Cristiana Crociani v Edoarda Crociani

Jurisdiction:	Jersey
Judge:	McNeill JA
Judgment Date:	03 October 2017
Neutral Citation:	[2017] JCA 162
Reported In:	[2017] (2) JLR Note 13
Court:	Court of Appeal
Date:	03 October 2017

Text

[2017] JCA 162

COURT OF APPEAL

Before:

James W. McNeill, Q.C., sitting as a Single Judge.

Between
Cristiana Crociani
First Plaintiff

and

A (by her Guardian ad Litem, Nicolas Delrieu)
Second Plaintiff

and

B (by her Guardian ad Litem, Nicolas Delrieu)

Third Plaintiff
and
Edoarda Crociani
First Defendant

and

Paul Foortse
Second Defendant

and

BNP Paribas Jersey Trust Corporation Limited
Third Defendant

and

Appleby Trust (Mauritius) Limited
Fourth Defendant

and

Camilla De Bourbon des Deux Siciles
Fifth Defendant

and

Camillo Crociani Foundation IBC (Bahamas) Limited
Sixth Defendant

and

BNP Paribas Jersey Nominee Company Limited
Seventh Defendant

and

GFIN Corporate Services Limited
Eighth Defendant

Advocate A. D. Robinson **for the Plaintiffs**.

Advocate W. A. F. Redgrave **for the Third and Seventh Defendants**.

Authorities

Crociani v Crociani [2017] JRC 146 .

Crociani v Crociani [2017] JRC 145A .

Winchester Cigarette Machinery Limited v Payne and Another [1993] WL 963008 .

Boru and others v Tepe [2016] JCA 067C .

C v Trilogy [2012] JCA 113 .

Veka A.G. v T.A. Picot [1999] JLR 306 .

Court of Appeal Consolidated Practice Direction No. 16 of September 1999 [CA 05/1].

Bhinji v Chatwani (29 January 1993).

Trust — applications for a stay of part of an Order of the Royal Court.

McNeill JA
Introduction

1 There is before me, sitting as a single judge, an application for stay of part of an Order pronounced recently by the Royal Court in this complex litigation. Two applications for stay have been made by the Third Defendant.

2 The Royal Court had sat on Friday 8 September 2017 to hear argument on the orders to be made on the handing down of the extensive final judgment on the matters raised in this litigation. Time did not permit that exercise to be completed and matters were adjourned until Monday 11 September. There are two judgments dated 11 September 2017. Judgment *Crociani v Crociani* [2017] JRC 146 (the “Final Judgment”) deals with the principal issues. Judgment *Crociani v Crociani* [2017] JRC 145A (the “Supplementary Judgment”) deals with the supplementary issues. At the hearing on 11 September the Third Defendant sought what, in effect, would have been a permanent stay of one part of the Third Defendant's liability under the Final Judgment, subject to liberty to apply. In the Supplementary Judgment the Royal Court (Clyde-Smith, Commissioner, with Jurats Blampied and Ronge) gave its reasons for refusing the application. By a further application the Third Defendant sought a shorter stay pending its appeal and made certain ancillary proposals.

3 The further application was heard by the Royal Court on the morning of Tuesday 26 September 2017 with arrangements already having been made for me to hear any application on appeal that afternoon, during the week of an ordinary sitting of the Court of Appeal. These arrangements appeared to be the best that could be made to assist parties given urgent timeframes and the availability of Appeal Judges but, inevitably, the time constraints, particularly for the Royal Court in issuing its judgment on the further application led to a requirement for a restriction on argument and reasoning. It is only right for me to commence by expressing my appreciation both to parties' representatives and to the learned Commissioner for the clarity and precision of their respective approaches in

enabling this matter to be heard on appeal.

4 I would add that on 26 September the Royal Court was well aware of the background to the applications and, indeed, to the nature of the application which was, to an extent, a renewed one. On the other hand, although I have had some previous involvement with discrete issues in this case, I did not enjoy that familiarity and, since the hearing, have taken more time to familiarise myself with the salient issues.

Background

5 The complex and lengthy proceedings in this matter relate to a family trust (always referred to as the “Grand Trust”) in respect of which some of the discretionary beneficiaries seek to enforce their rights, to set aside certain transfers away from the trust and to have the trust fund reconstituted in the hands of new trustees.

6 For the reasons set out in the Final Judgment, the Royal Court determined that certain transfers were to be set aside as void and also found that the Third Defendant and others, as former trustees, were acting in breach of trust in certain respects. As part of the remedies upon which the Royal Court determined, the Third Defendant was ordered to pay sufficient compensation to put the trust fund back to what it would have been had one of the transfers not been entered into. The Third Defendant was the only institutional trustee, the other former trustees being the settlor and another individual.

7 At some point the Grand Trust came to be held as two separate funds, one for each of the settlor's two children (Camilla and Cristiana) and their issue as discretionary beneficiaries. Those two funds have been referred to as “Camilla's Trust” and “Cristiana's Trust”, but they appear not be truly separate trusts and I prefer to refer to them “Camilla's Fund” and “Cristiana's Fund”. They came to be viewed separately in respect of present matters. As the Royal Court noted at paragraph 687 of the principal judgment, it was clear that Camilla had not only acquiesced in a breach of trust but had benefited at least to some extent from the funds improperly appointed out of the family trust. In their view it would be unjust for Camilla to enjoy the fruits of the breach and at the same time have the family trust reconstituted so that she could benefit from that as well.

8 It was in respect of that concern that, on the principal issues before the Royal Court, Advocate Redgrave for the Third Defendant had argued that the compensation payable by the former trustees should be limited to that reflecting Cristiana's Fund. The Royal Court, however, took the view that whereas it was the right of each beneficiary of the Grand Trust to have the whole trust fund reconstituted, it would impose a direction on the New Trustee to the effect that no power or discretion was to be exercised so as to confer directly or indirectly any benefit on Camilla: see paragraphs 689 to 693 of the Final Judgment.

9 In light of that approach by the Royal Court, the Third Defendant, in its first application,

sought to have the discharge of the liability to pay the sum of about US$50M into Camilla's Fund stayed, with liberty to apply. The Royal Court was not persuaded. As indicated at paragraphs 5 to 10 of the Supplementary Judgment they reiterated that, from the point of view of the trust estate, it was the Third Defendant as institutional trustee who had promoted and was party to the breach, and justice required that it should discharge its obligations to the Grand Trust in accordance with clearly established principles of law, seeking redress, if it could, from others.

10 By the time of the second application on 26 September, the Third Defendant, as of right, had indicated the commencement of an appeal against two parts of the final judgment, one of which being the finding that the Third Defendant should pay equitable compensation in respect of the whole of the assets as opposed to compensation limited to the one half due to Cristiana's Fund. The matter was undoubtedly urgent as the judgment required the full payment within twenty eight days of 11 September 2017: that is, by 9 October.

11 In the second application the Third Defendant sought stay of the liability to compensate Camilla's Fund pending its appeal but also sought to address any prejudice to Cristiana's Fund and to Camilla's Fund.

12 First, it would pay the full amount of what was referred to before me as the “Funder's Fee”. This fee represents the obligation of the First Plaintiff to a third party litigation funder which, at a later stage in the litigation below, had provided funds to the First Plaintiff to enable her costs in the proceedings below to be met. The Act of Court dated 11 September 2017 provides at paragraph 16 for the this fee to be paid by the New Trustee, once in receipt of funds from any defendant, as to 50% from Cristiana's Trust and 50% from Camilla's Trust. The obligation which the Third Defendant undertakes as regards this fee, amounting in total to something in the order of £10M, is not subject to the Third Defendant's appeal.

13 Second, the Third Defendant's parent company, BNP Paribas SA, has offered to guarantee all sums due by the Third Defendant under any order of the Royal Court.

14 Further, were there to be any extra administrative costs to Cristiana's Fund occasioned by the absence of funds within Camilla's Fund, the Third Defendant has undertaken to pay them.

15 Finally, the guarantee of the Third Defendant's parent company would guarantee all of its obligations under any order of the Royal Court in addition to the guarantee of the value of the assets together with such increased sum as the Royal Court might determine be added to reflect the value the funds would have had had they been paid to the new trustee within twenty eight days of the judgment.

16 In refusing the further application, the learned Commissioner commenced by noting that the fact of an appeal being made does not in itself act as a stay of execution. He also had

regard to the principles which he considered properly set out in the judgment of Ralph Gibson, L.J. in *Winchester Cigarette Machinery Limited v Payne and Another* [1993] WL 963008 where His Lordship (with whom McCowan and Hobhouse, LJJ agreed) said:

> ***"I respectfully agree with the approach of Balcombe LJ [in Bhinji Chatwani – 29 January 1993] to the question, namely that one starts with the assumption that a successful Plaintiff is not to be prevented from enforcing his judgment even though an appeal is pending.*** I also agree that the practice of the court has moved on, in that the increased work of the court has produced more examples of "other reasons" in addition to proved improbability of ***recovery which Lord Esher MR contemplated in*** *Atkins v Great Western Railway Company* . ***I do not disagree with the formulation "balancing of advantage", provided that, in holding that balance, full and proper weight is given to those starting principles, that there must be good reason to deprive a successful Plaintiff of the right to enforce his judgment and that the mere existence of an arguable ground of appeal is not by itself such a reason."***

17 Working from that basis the learned Commissioner noted that the ***"good reason"*** put forward on behalf of the Third Defendant related in part to the fact that half the compensation would have been paid into Cristiana's Fund and, more strongly, to financial prejudice to the Third Defendant in having to make the payment. The Royal Court, however, noted from the affidavit of Mr David Myatt, currently head of the ultimate parent of the Third Defendant, that the Group as a whole was well able to support the Third Defendant and meet the payment.

18 The learned Commissioner was therefore of the view that, in reality, the Third Defendant was merely seeking an indulgence. In his view, whilst it would be the case that the funds received into Camilla's Fund could not be paid out so that the Third Defendant could be repaid in the event of the appeal succeeding, that did not give sufficient weight to the starting principles which were that the Plaintiffs had succeeded in their claim that the whole trust fund should be reconstituted. The application was therefore refused.

Submissions on Appeal

19 As to the law, Advocate Redgrave and Advocate Robinson were agreed as to the relevant lines of authority. After discussion, however, I asked for certain further researches to be carried out and I am grateful for the additional authorities submitted.

20 As to the salient facts, the parties were again agreed.

21 Of greatest weight for the Third Defendant was that payment of the amount due to Camilla's Fund would not result in those funds or a part of them being available to her. Paragraph 18

of the Act of Court of 11 September 2011 states:

> *"No power or discretion shall be exercised by the New Trustee or any successor trustee so as to confer directly or indirectly any benefit on [Camilla] or her issue without the permission of the Court as to which there shall be liberty to apply."*

22 In Advocate Redgrave's submission it was inconceivable that a payment would be made by the New Trustee. Were an application to be made to the Royal Court by the New Trustee, the New Trustee would be faced with the views of the Royal Court in paragraph 687 of the Final Judgment finding that it would be unjust for Camilla to enjoy the fruits of the breach and at the same time benefit from the Grand Trust. Advocate Robinson effectively agreed with this position, referring to the funds for Camilla's Fund as being in a *"locked box"*.

23 As regards impact on the Third Defendant, the provision of a guarantee by the ultimate parent would be treated differently in accounting terms to the immediate payment out of funds which it was hoped to recoup after appeal. The provision of a guarantee would be a contingent liability rather than an outward cash flow. That said, given the overall financial position of the Group, the payment out for the time being of an additional US$50M would be of no significance.

24 Advocate Robinson, however, submitted that the provision of the guarantee would raise practical considerations, as any request for funds to be forthcoming would be being made to an adverse party. Already there were numerous enquiries being conducted in respect of aspects of the issues between the parties which would take a very long time to resolve.

25 In applying the law to the facts, Advocate Redgrave contended that where, as in his submission was the case here, there was no prejudice to the Plaintiffs as they were not being deprived of the fruits of their victory, the court had an unfettered discretion in dealing with an application for stay and the fundamental principle was to do justice as between the parties. As there was no benefit to the Plaintiffs, and as there was a cast iron parent company guarantee, the application should be granted.

26 For Advocate Robinson on behalf of the Plaintiffs however, the fact of the *"locked box"* did not provide a good reason for overcoming the basic principle and the uncertainties about access to the guarantee showed that any balance was in favour of the reconstitution of the whole trust fund. The Third Defendant, as the learned Commissioner had said, was merely seeking an indulgence.

Discussion: The Law

27 In *Boru and others v Tepe* [2016] JCA 067C and in *C v Trilogy* [2012] JCA 113 I have had occasion to consider certain aspects of the approach in this jurisdiction to a stay.

28 In *C v Trilogy Management* I indicated, at paragraph 26, that it could not fall to me, sitting as a single judge of the Court of Appeal, to declare of new the proper approach in this jurisdiction in respect of applications for stay of execution. Following the opinion of this court in *Veka A.G. v T.A. Picot* [1999] JLR 306, 309 I noted that, leaving aside cases where refusing the stay would make any realistic appeal nugatory, there would have to be exceptional circumstances to support the grant of a stay. That statement reflects the provisions of paragraph 4.8 of the Court of Appeal Consolidated Practice Direction No. 16 of September 1999 [CA 05/1].

29 Given the issues before me in this application, it is necessary to explore a little further what might be ***"exceptional circumstances"***.

30 It seems to me that a good starting point is that enunciated by Balcombe LJ (sitting as a single judge of the Court of Appeal in England and Wales) in *Bhinji v Chatwani* (29 January 1993) where he stated:

> ***"The principle to be applied in cases of this kind is laid down by a series of cases, largely in the late 19th/early 20th century, which can be summarised in the phrase that 'a person who has a judgment is not lightly to be deprived of the fruits of that judgment' and therefore in granting a stay one starts with the assumption that, where someone has a judgment …… this court should not stop the Plaintiffs from exercising the necessary court procedures in order to have the benefit of that judgment even though an appeal is pending.*** But as Lord Justice Staughton said, quite recently, the practice of the court has moved on, and I believe that he is right when saying that one approaches this really as a matter of common sense and balance of advantage…."

31 In *Winchester Cigarette Machinery Limited v Payne and Another* Ralph Gibson LJ fully quoted that statement and agreed with the approach which was, as he said:

> ***"… mainly that one starts with the assumption that a successful Plaintiff is not to be prevented from enforcing his judgment even though an appeal is pending.*** … I do not disagree with the formulation "balancing of advantage", provided that, in holding that balance, full and proper weight is given to those starting principles, that there must be good reason to deprive a successful Plaintiff of the right to enforce his judgment and that the mere existence of an arguable ground of appeal is not by itself such a reason."

32 It seems to me that each of these expressions reflects the position adopted in this jurisdiction and that, absent – as here – the rendering of an appeal nugatory or the mere reliance on an arguable ground of appeal, the obligant must show ***"good reason"*** (*Winchester*) ***"common sense and balance of advantage"*** (*Bhinji*) or ***"exceptional circumstances"*** (*Trilogy*).

Discussion: Application

33 In my judgment the Third Defendant is entitled to the grant of the present application. The circumstances here are quite exceptional and to make an order for stay pending appeal does not offend any of the principles enunciated in this jurisdiction or, as I read them, in England and Wales.

34 The starting point is that whilst the Grand Trust was settled as a single trust, it was clear to the Royal Court on the face of the trust deed that the intention of the settlor, Madame Crociani, was to create within it separate funds for each of her children, Camilla (then age 16) and Cristiana (then age 14): see paragraphs 5, 6, 62 and 63 of the Final Judgment. That said, as the Royal Court also found at paragraph 67 of the Final Judgment, within each of those two funds, the beneficiaries of the other fund (the other daughter and her issue) were to have an interest on the death of the daughter whose fund it was, in default of appointment by that daughter and upon failure of the issue of that daughter. With such a provision, the interest of the extraneous family is entirely contingent upon absolute failure of the principal family of the fund in question. In individual cases and if necessary (for example as regards variation of the trust), a precise actuarial calculation of the likelihood of benefit of the extraneous family could be carried out having regard to the age and health of the principal beneficiary and each of her issue. But that is not necessary. The principal point is that each family, in effect, has its own fund and the assets of that fund will pass to the other family only in default of appointment and upon complete failure of issue in the principal family.

35 It therefore follows that, whilst the present Plaintiffs, Cristiana and her children, through their guardian *ad litem*, had an interest in pursuing their case for reconstitution of the whole of the Grand Trust rather than merely that part which should have constituted Cristiana's Fund, for present purposes the reality is that they have obtained the fruits of their victory, namely the reconstitution of the Grand Trust and the payment of the amount due in respect of Cristiana's Fund. Their interest in Camilla's Fund is, in terms of the trust, both contingent and remote given the ages of Camilla and her children. Advocate Redgrave's submission that a grant of stay did not deprive the Plaintiffs of the fruits of their victory is, for all the practical purposes of this application, correct.

36 Indeed, given that Camilla and her children are not to benefit from their portion of the Grand Trust until Camilla has made good her benefit from the breaches of trust, the refusal of a stay, pending appeal, to the Third Defendant does not seem to do justice as between the parties. This case is far removed from that of an ordinary debtor or tortfeasor who has been found liable and where, subject to the usual caveats, the plaintiff should be entitled to the fruits pending the success of any appeal.

37 In my judgment these considerations are sufficient to enable the Third Defendant's

application to be granted. However it is proper to indicate that, in considering this whole matter it has also occurred to me that, were the whole fund to be reconstituted, serious issues would arise in respect of the administration of Camilla's Fund which might impact adversely on the Third Defendant. First, the New Trustee would have the duty to see that the fund was appropriately invested. But having regard to whose interests? Not, for the immediate period, those of Camilla and her issue (who, in any event, will have access to funds received as part of the breach) nor for Cristiana and her issue, whose interest is remote. In such intricate circumstances it is highly likely that complex and difficult issues would be required to be considered and determined by the New Trustee and by the asset manager or asset managers. That would come at a cost which, properly, would be paid from Camilla's Fund but might well be difficult for the Third Defendant to recover from Cristiana in the event of its success on appeal. Further, even if such intricacies were not perceived to exist by the New Trustee and the asset manager or asset managers, the appropriate investment strategies and operation of a trust fund of this size will, doubtless, come at no small expense.

38 The principal and ancillary reasons above seem to me to provide exceptional and good reasons to depart from the usual assumption. I do not go so far as to accede to Advocate Redgrave's submission that, where there was no prejudice to a plaintiff, the court had an unfettered discretion. But I do approach this matter upon the premise that where, to all intents and purposes, the Plaintiffs will be in receipt of the fruits of their victory, that constitutes an exceptional reason for granting a stay, pending appeal, in respect of the discharge of further orders which the court at first instance has imposed upon a defendant.

39 The appeal in respect of the application for a stay, pending appeal, in relation to that part of the equitable compensation claim by the Plaintiffs which relates to Camilla's Fund is therefore allowed.