

Cristiana Crociani v A (by her Guardian ad Litem Nicholas Delrieu)

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Crill, Blampied
Judgment Date:	02 February 2016
Neutral Citation:	[2016] JRC 30
Reported In:	[2016] JRC 30
Court:	Royal Court
Date:	02 February 2016

vLex Document Id: VLEX-792825625

Link: <https://justis.vlex.com/vid/cristiana-crociani-v-by-792825625>

Text

[2016] JRC 30

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner and** Jurats Crill **and** Blampied

Cristiana Crociani

First Plaintiff

and

A (by her Guardian ad Litem Nicholas Delrieu)

Second Plaintiff

B (by her Guardian ad Litem Nicholas Delrieu)

Third Plaintiff

Edoardo Crociani

First Defendant
Paul Foortse
Second Defendant
BNP Paribas Jersey Trust Corporation Limited
Third Defendant
Appleby Trust (Mauritius) Limited
Fourth Defendant
HRH Princess Camilla De Bourbon Des Deux Siciles
Fifth Defendant
Camillo Crociani Foundation IBC (Bahamas) Limited
Sixth Defendant
BNP Paribas Jersey Nominee Company Limited
Seventh Defendant

Advocate J. D. Kelleher, for the First Defendant.

Advocate W. A. F. Redgrave for the Third Defendant.

Authorities

Crociani -v- Crociani [\[2015\] JRC 227](#) .

Trust — appeal by the third defendant against the decision of the Master dated 11 November 2015.

THE COMMISSIONER:

- 1 This is an appeal by the third defendant against the decision of the Master to refuse it leave to bring a third party claim against the first defendant in respect of an indemnity clause.
- 2 The reasons for the Master's decision are set out in his judgment of 11th November, 2015, (*Crociani -v- Crociani* [\[2015\] JRC 227](#)). Rather than refer the reader to that judgment for the background, we will set out the background again using the Master's wording.
- 3 The plaintiffs' claims relate to the trust established in 1987 by deed referred to in the Order of Justice as the “Grand Trust”.
- 4 Between 2007 and 2012, the trustees of the Grand Trust were the first, second and third defendants.
- 5 On 9th February, 2010, the then trustees of the Grand Trust executed a deed (“the 2010

Deed”) appointing all the (substantial) assets of the Grand Trust (except a promissory note) to another trust, known as the Fortunate Trust. The first and third defendants were also trustees of the Fortunate Trust (it would seem that the second defendant became a trustee later), and the first defendant was a beneficiary (together with the first plaintiff and the fifth defendant).

- 6 On 30th June, 2011, by an “instrument of revocation and termination” (“the 2011 Revocation”), the Fortunate Trust was revoked by the first defendant and the whole of the property in the trust fund (“the Revoked Assets”) was vested in the first defendant.
- 7 On 6th February, 2012, the first, second and third defendants, as trustees of the Grand Trust, executed a deed under which they resigned as trustees and appointed the fourth defendant as sole trustee of the Grand Trust.
- 8 On 2nd August, 2012, the first, second, third and fourth defendants, as former and present trustees of the Grand Trust, executed a deed appointing the assets that were the subject of the 2010 Deed, together with any rights and interests in or over those assets, to the Agate Trust.
- 9 In 2013 the plaintiffs issued the present proceedings. While their Order of Justice has since been amended, the relief sought includes the following:-
 - (i) Certain payments out of the Grand Trust made by the first, second and third defendants said to be for the first plaintiff should be reimbursed to the Grand Trust.
 - (ii) The transfer of shares, relating to the ownership of two apartments in Miami, by the first plaintiff and the fifth defendant to the Fortunate Trust in 2010 should be set aside.
 - (iii) The 2010 Deed should be set aside; and
 - (iv) The deeds executed in 2012 should also be set aside.
 - (v) Such further orders, declarations, accounts and inquiries as may be necessary to reconstitute the trust fund of the Grand Trust and to place it under the control of new trustees.
- 10 There have been various procedural issues between the plaintiffs on the one hand and principally the first defendant on the other in respect of this dispute, which it is not necessary for the Court to recite. What is relevant is that by an Act of Court of 2nd July, 2015, the Master ordered the third and seventh defendants to provide a draft amended answer to all other parties for approval by 31st July, 2015, and that if the amendments sought were not agreed, he required an application to be made by the third and seventh defendants to amend their answer.

- 11 What led to that order was that until May 2015, the first, second, third, fourth and seventh defendants were all represented by Messrs Carey Olsen and a composite answer had been filed by Carey Olsen on behalf of the first to fourth defendants, followed later by an answer on behalf of the seventh defendant. The third and seventh defendants subsequently chose to be separately represented and wished to amend their answers, rather than rely on the answers filed previously.
- 12 It is as part of that application that the third defendant sought permission from the Master to issue a third party claim against the first defendant.

The law

- 13 There was no dispute as between the parties as to the applicable legal principles which were conveniently summarised in paragraphs 12 and 14 of the Master's judgment as follows:-

***“12 There was no real dispute on the applicable legal principles as to when a third party claim may be brought, which were considered in Cummins v Howland (Furniture) Limited [2014] JRC 242 . The power to convene an existing defendant as a third party is found in Rule 6/10(8) of the Royal Court Rules 2004, as amended (“the Rules”). It was also not in dispute that, as long as such a third party claim was properly pleaded, the first defendant could be joined as a third party by the third defendant on one or more of the grounds set out in Rule 6/10(8) of the Rules. The relief sought by the third defendant against the first defendant is for an indemnity and therefore falls within Rule 6/10(8)(a) of the Rules as long as the claim is one that can properly be brought.*”**

13 In Cummins v Howland (paragraph 13) I accepted that ordinarily when a prima facie case was shown on a pleading then leave to issue a third party claim should be granted. This followed on from consideration of Blenheim Trust v Morgan [1999/51] , and extracts from the 1999 Edition of the White Book set out at paragraphs 10 and 11 of Cummins v Howland, which I adopt for the purposes of this decision.”

- 14 It is not part of the function of the Court to decide whether on a proper construction of the 2011 Revocation, the third defendant is entitled to an indemnity from the first defendant. We are limited to a consideration of whether the third defendant can establish a *prima facie* (i.e. merely arguable) case in respect of the 2011 Revocation that it is so entitled. The position reached by the Master was that any claim under this indemnity was bound to fail even after full argument.

The proposed amendments

- 15 The third defendant sought to bring third party claims against the first defendant in respect of two indemnities. The first was the indemnity given by the first defendant under Clause 6 of the 2010 Deed and, following argument, leave was given for the reasons set out in paragraphs 21–32 of the Master's judgment, which we will not repeat here.
- 16 However, the Master refused to give leave in respect of the second indemnity given under Clause 3 of the 2011 Revocation ("the Fortunate Trust Indemnity"). The relevant terms of the 2011 Revocation are as follows:-

(i) In the 2011 Revocation the Fortunate Trust is described as the "Settlement".

(ii) Recitals (C) and (E) of the 2011 Revocation state:-

"(C) By article 2A of the Settlement the Grantor may by a written instrument delivered to the Trustees withdraw any or all property from the trust fund or revoke any trust created under the Settlement (the "Power of Revocation").

(E) The whole of the property of the trust fund is hereinafter referred to as the "Revoked Assets".

(iii) Clauses 2 and 3 of the 2011 Revocation state:-

"2. In exercise of the Power of Revocation conferred upon her by article 2A of the Settlement and of every other power enabling her to do so the Grantor with effect from the date hereof HEREBY WITHDRAWS all of the Revoked Assets, REVOKES the Settlement in respect of the Revoked Assets and HEREBY REVESTS in herself title to all of the Revoked Assets freed and discharged from all trusts powers and provisions in the Settlement and upon such withdrawal, revocation and revesting the Revoked Assets shall be held by the Trustees upon trust absolutely for and to the order of the Grantor ("the Revocation").

3. In pursuance of the Revocation and revesting the Grantor HEREBY ASSUMES liability for any and all liability arising directly or indirectly in respect of the Settlement arising from or in connection with the Revoked Assets and for herself and her heirs assigns personal representatives and estate hereby releases and covenants to indemnify keep indemnified and hold harmless the Trustees (other than herself) their respective successors and assigns and their respective officers and employees and their respective heirs assigns personal representatives and estates to the value of the Revoked Assets (as at the date hereof) against all actions claims costs demands loss or damage of any kind whatsoever and wheresoever arising directly or indirectly out of or in connection with the administration of the Settlement the Trust Fund and the Trustees' trusteeship thereof of the Revoked Assets or this instrument whether the same shall be enforceable in law or not and in particular (but without

prejudice to the generality of the foregoing) all taxes duties and fiscal impositions (including all interest costs charges and expenses or other sums incurred in connection therewith) by the revenue authorities of any government in any part of the world EXCEPTING ONLY such actions claims costs demands loss or damage arising from any fraud, wilful default, gross negligence or wilful misconduct on the part of the Trustees (other than by herself)."

(iv) Clause 4 is as follows:-

"4. In consideration for the indemnity provided by the Grantor the Trustees HEREBY ACKNOWLEDGE the said Revocation and declare and confirm that they are holding the Revoked Assets absolutely for and to the order of the Grantor freed and discharged from the trusts and provisions of the Settlement."

17 The Master's reasons for refusing leave in respect of this Fortunate Trust Indemnity are set out in paragraphs 35–38 of his judgment which it is easiest to set out in full as follows:-

"35 His [Advocate Redgrave's] argument was that the claim brought by the plaintiffs seeking to hold the third defendant liable for its actions were in relation to the "Revoked Assets". This was because, while these assets were assets that had been in the Grand Trust, because they were appointed by the Fortunate Trust, although the appointment was later revoked, clause 3 of the 2011 Revocation covered any liability in respect of these assets and was an assumption of such liability by the first defendant whenever arising. Advocate Redgrave further contended that the word "costs" entitled the third defendant to be indemnified in respect of its legal costs of defending the proceedings whether or not the third defendant was successful or not in its defence. He also contended that the relief sought by the plaintiffs necessarily involved impugning the actions of the trustees of the Fortunate Trust including the third defendant.

36 Advocate Kelleher objected to this claim on the ground that there was no claim for breach of trust brought against any of the first, second and third defendants as trustees of the Fortunate Trust. The 2011 Revocation was no more than a step in the story. What was complained about was the appointment of assets out of the Grand Trust, which was a claim for breach of trust against the trustees of the Grand Trust and events subsequent to the revocation, which were also complaints made against the trustees of the Grand Trust. There is no claim against any defendant as trustee of the Fortunate Trust and so clause 3 cannot be invoked.

37. In respect of this argument I agreed with Advocate Kelleher. The first three lines upon which Advocate Redgrave relied relate to any liability arising 'directly or indirectly in respect of the settlement.' i.e. the Fortunate Trust. There is no claim for breach of trust in respect of the Fortunate Trust or for the period of time assets were held by the trustees of the

Fortunate Trust. There is no claim against the first defendant or the third defendant for executing the 2011 Revocation. The relief sought by the plaintiffs relates to matters that either pre-date the appointment to the Fortunate Trust or post-date its revocation. I also do not accept the submission by Advocate Redgrave that the relief sought necessarily involves impugning the actions of the Fortunate Trustee. As I have indicated in the preceding paragraph, the actions of the trustees of the Fortunate Trust are not more than a step in the story. The claim for breach of trust is only against the third defendant in its capacity as former trustee of the Grand Trust.

38. I do not accept that the words “arising from or in connection with the Revoked Assets” can give rise to an indemnity or an assumption of liability by the first defendant when those assets were not held within the Fortunate Trust. That would mean the third defendant could be held liable for what had happened to assets which had been part of the Fortunate Trust in respect of liabilities relating to those assets when they were not part of the Fortunate Trust, i.e. earlier or later. I do not consider that it is possible to construe the 2011 Revocation in that way. Any liability has to arise directly in respect of the Settlement i.e. it has to arise in respect of the Fortunate Trust. To hold otherwise would ignore the basic principle that the duties and responsibilities of trustees of Trust A are separate and distinct from the duties and responsibilities owed by the trustees of Trust B even if those trustees are the same, and at different times the trustees held the same assets for the same beneficiaries. Accordingly, I refused to allow the third party claim in respect of the 2011 Revocation because I was not satisfied there was a prima facie case by reference to the terms of clause 3 of the 2011 Revocation itself.”

Submissions

18 The grounds for the third defendant's appeal can be summarised in this way:-

(i) The Master purported to decide on the true construction of the Fortunate Trust Indemnity rather than confine himself to the correct question of whether the third defendant had established a *prima facie* case in relation to the same.

(ii) The Master failed to take account or alternatively take sufficient account of the following:-

(a) The wide terms in which the Fortunate Trust Indemnity is drafted;

(b) The fact that the plaintiffs seek orders for the reconstitution of the assets which are the subject of the Fortunate Trust Indemnity into the Grand Trust; and

(c) That if the plaintiffs are successful all actions taken by the third defendant as

trustee of the Fortunate Trust (including the 2011 Revocation) would fall away.

(iii) The Master erred in concluding that it would only be possible for the Fortunate Trust Indemnity to be engaged if the plaintiffs sought relief arising from a breach of trust by the trustees of the Fortunate Trust.

19 The appeal was resisted by the first defendant on the following grounds, in summary: -

(i) The claim under the Fortunate Trust Indemnity is not properly pleaded, is not properly particularised and does not disclose any sustainable cause of action (still less any prospect of success) and

(ii) The Master's analysis was correct and there was no sustainable argument to the contrary.

Decision

20 We would extract the following passages from the judgment of the Master as being central to his analysis:-

“There is no claim against any defendant as trustee of the Fortunate Trust and so clause 3 cannot be invoked.”

“The relief sought by the plaintiffs relates to matters that either pre-date the appointment to the Fortunate Trust or post-date its revocation ... the actions of the trustees of the Fortunate Trust are no more than a step in the story. The claim for breach of trust is only against the third defendant in its capacity as former trustee of the Grand Trust.”

“Any liability has to arise directly in respect of the Settlement, i.e. it has to arise in respect of the Fortunate Trust.”

In essence the Master found that no claims were being brought against the Fortunate Trust, in respect of which no liabilities arose. Accordingly, the Fortunate Trust Indemnity could not be invoked.

21 It is correct that the Order of Justice contains no claims of breach of trust against the trustees of the Fortunate Trust or indeed any kind of misconduct on their part. The claims for breach of trust are made against the trustees of the Grand Trust. However, the relief sought by the plaintiffs arguably does affect the Fortunate Trust, as it seeks the setting aside of transfers and an appointment made in favour of the Fortunate Trust and by which the Fortunate Trust acquired very substantial assets.

22 Dealing with the Miami flats, the plaintiffs seek a declaration that the transfers of the relevant shares to the Fortunate Trust (“the Transfers”) are void and of no legal effect, or

alternatively, that they are voidable and should be set aside, together with *“all such further orders, declarations, accounts and inquiries as may be necessary to restore to the First Plaintiff the value of the shares transferred ...”*. In relation to the 2010 Deed, by which assets said to be worth at least US\$100M were appointed to the Fortunate Trust, the plaintiffs seek a declaration that the 2010 Deed is void and of no legal effect, or alternatively, that it is voidable and should be set aside, together with *“all such further orders, declarations, accounts and inquiries as may be necessary to reconstitute the trust fund of the Grand Trust ...”*.

- 23 The setting aside of the Transfers and the 2010 Deed arguably affects the interests of the Fortunate Trust, firstly because the trustees of the Fortunate Trust were a party to the same; secondly because by the Transfers and the 2010 Deed very substantial assets were acquired by the Fortunate Trust, and thirdly because if the Transfers and the 2010 Deed are set aside, the trustees of the Fortunate Trust may well come under an obligation to return those assets to the trustees of the Grand Trust (which may in turn involve the recovery of those assets from the first defendant).
- 24 The interests of the Fortunate Trust are so affected irrespective of the conduct of the trustees of the Fortunate Trust and so it is irrelevant that no breach of trust claim is being brought against them.
- 25 Advocate Kelleher argued that the first to third defendants have not been actioned in their capacity as trustees of the Fortunate Trust, but we think it is arguable that they have been. They have been named as defendants in the heading of the Order of Justice, but not in any specific capacity. The Order of Justice then recites at paragraph 5 that they were (and, the plaintiffs' claim still are) the trustees of the Grand Trust and in paragraph 34, it recites that, in the belief of the plaintiffs, the first to third defendants were the trustees of the Fortunate Trust by June 2011. In fact, the 2010 Deed shows that the first and third defendants were trustees of the Fortunate Trust at the time of that deed and the 2011 Revocation shows that the first to third defendants were the trustees of the Fortunate Trust at the time of that revocation. The Order of Justice then goes on to seek relief which in part involves setting aside transactions between the Grand Trust and the Fortunate Trust i.e. the Transfers and the 2010 Deed, relief which directly affects the trustees of both trusts.
- 26 If the first to third defendants are not before the Court in their capacity as trustees of the Fortunate Trust (and no-one else is), it may not be possible for the Court to set aside the Transfers and the 2010 Deed (if it is minded to do so) without formally convening them in that capacity and so that they can be given an opportunity of being heard in that capacity.
- 27 Thus by reference back to the passages in the Master's judgment which we have highlighted above, it is in our view arguable that:-

- (i) There is a claim against the first to third defendants as trustees of the Fortunate

Trust, namely the claim to have the Transfers and 2010 Deed set aside;

(ii) The relief sought does not pre-date the 2010 Deed—it seeks the setting aside of the deed itself, under which substantial assets were appointed to the Fortunate Trust; and

(iii) As a necessary consequence of the Transfers and the 2010 Deed being set aside, a liability may well arise directly in respect of the Fortunate Trust in relation to the assets received (or the right of the trustees of the Fortunate Trust to seek recovery of the same from the first defendant).

- 28 The parties went into some detail as to the proper construction of the Fortunate Trust Indemnity but it is not appropriate or necessary for us to go into that, as we are only concerned at this stage as to whether it is arguable that the third defendant is entitled to be indemnified under it and, in our view, it is arguable.
- 29 We do therefore, and with respect, differ from the conclusions reached by the Master.
- 30 In the circumstance it would not be just to shut the third defendant out from its claim to be able to rely upon the Fortunate Trust Indemnity. As Advocate Redgrave pointed out the sums involved here are very substantial and the issue is of considerable importance to the third defendant.
- 31 Accordingly, leave should be given and in the terms of the draft amended answer filed with the Court. In our view the pleading is clear, but any argument that further particulars are required should be pursued before the Master, who has the management of the pleadings in this case.
- 32 We therefore set aside paragraph 2 of the Act of Court of 15th October, 2015, by which the Master refused leave to the third defendant to issue a third party notice on the basis of clause 3 of the 2011 Revocation and grant that leave on the basis of the pleading filed with the Court.