Cristiana Crociani v Edoardo Crociani

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	28 January 2016
Neutral Citation:	[2016] JRC 26
Reported In:	[2016] JRC 26
Court:	Royal Court
Date:	28 January 2016

Text

[2016] JRC 26

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, **Master of the Royal Court**

Cristiana Crociani
First Plaintiff
A (by her Guardian ad Litem Nicholas Delrieu)
Second Plaintiff
B (by her Guardian ad Litem, Nicholas Delrieu)
Third Plaintiff
and
Edoardo Crociani
First Defendant
Paul Foortse

Second Defendant
BNP Paribas Jersey Trust Corporation Limited
Third Defendant
Appleby Trust (Mauritius) Limited
Fourth Defendant
Camilla de Bourbon des Deux Siciles
Fifth Defendant
Camillo Crociani Foundation IBC (Bahamas) Limited
Sixth Defendant
BNP Paribas Jersey Nominee Company Limited
Seventh Defendant

Advocates A. D. Robinson **and** P. O. J. Lewis **for the Plaintiffs**.

Advocates J. D. Kelleher **and** A Kistler **for the First, Second and Fourth Defendants**.

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

Advocate S. A. Franckel **for the Sixth Defendant**.

Authorities

Crociani v Crociani [2015] JRC 177 .

Campbell v Campbell [2015] JRC 249 .

Trust — reasons relating to application for further and better particulars of 1st, 2nd and 4th defendants.

CONTENTS OF THE JUDGMENT

THE MASTER:

Introduction

1 This judgment contains my reasons in respect of an application for further and better particulars of the first, second and fourth defendant's amended answer and counterclaim. The application was determined as part of a hearing where I gave directions more generally to enable this dispute to progress to trial. While it is not necessary for me to set out my detailed reasons in respect of the other directions ordered, before setting out my reasons in respect of the plaintiffs' application, I wish to record three other brief observations.

2 The first observation concerns granting a stay to enable the parties to explore settlement by mediation or such other method of alternative dispute resolution that they might agree. I specifically directed if that any party was not willing to take part in mediation that they should file an affidavit setting out their reasons why not, which affidavit could be considered by the trial judge on any costs application following trial or other determination of the present proceedings. I made this order because this dispute, involving significant disagreements between family members, is the kind of dispute that is entirely appropriate for mediation. If therefore any party does not want to take part in any mediation process they should justify why this is the case. I should make it clear that my order does not mean such a party cannot insist on a trial taking place but that party may be at risk of an adverse costs order if it refuses unreasonably to engage in a mediation process.

3 The second observation I made which I wish to record concerns attendance at mediation. Although I made no order to this effect, I indicated it was my strong view that the parties themselves in particular family members, should attend any mediation hearing that takes place rather than send a representative on their behalf. This is because mediation is about seeing whether parties can find their way not just to resolve their dispute and what has occurred, but also whether they can find a way forward for the future. This is particularly important in the context of relationships within families that have broken down.

4 Thirdly, in giving directions, I made an order that the obligation to exchange witness statements should be a final order; in other words if any party did not adhere to this deadline, which had already been extended twice, I was open to applications by any other party for sanctions. While I indicated that I would be unlikely to strike out a party's entire claim or answer for failure to file an individual witness statement on time, there were other possible orders I could make if the direction in respect of witness statements was not adhered to. As an illustration I indicated that a possible order, subject to argument, was debarring a particular witness from giving evidence if their evidence had not been produced within a timeframe ordered by the court.

The application for further and better particulars – request 1

5 The plaintiffs' first request for further and better particulars related to paragraphs 4b, 4c,

157–160 and paragraph 2 of the prayer where the first defendant had sought to set aside "each and every disposition by which she has settled assets on the Trusts and the Grand Trust agreement" on the basis of mistake. The dispositions were defined as *"the mistaken dispositions"*. The plaintiffs requested full details of each and every mistaken disposition, including the dates and amount of each disposition and copies of documents evidencing in the same.

6 On 15 th January, 2016, in response to this application, the first, second and fourth defendants offered to provide a schedule of each and every disposition said to be mistaken by 15 th February, 2016. This offer was accepted by the plaintiffs subject to requiring the date the schedule was to be provided to be confirmed by way of court order which request I accepted. Had the first, second and fourth defendants not made this concession I would have made such an order in any event because the other parties and the Royal Court at trial needed to know what dispositions the first defendant was asking to be set aside and therefore I confirmed that the first, second and fourth defendants should provide such a schedule by 15 th February, 2016. It is right to record that I expressly noted that the first, second and fourth defendants had liberty to apply if they could not produce the schedule ordered by 15 th February.

7 Finally, in respect of this issue, as the plaintiffs had asked for these particulars on a voluntary basis but had only received an offer to provide the same after issue of a summons, I ordered the first, second and fourth defendants to pay the plaintiffs' costs on the standard basis up to the date they made their offer on 15 th January, 2016, with such costs to be summarily assessed by me.

Application for further and better particulars —request 2

8 The main argument between the parties concerned the second request made by the plaintiffs. This request related to paragraphs 9, 9A, 10 and 11 of the amended answer and counterclaim which provide as follows:-

> *"9. Mme Crociani wished to structure this transaction in a tax-efficient manner whilst ensuring that she remained able to access and enjoy any assets settled into such a trust. This was particularly important to her because she intended (and, in fact, went on) to settle into the trust substantial assets representing the wealth, which she had generated.*
>
> *9A. Mme Crociani sought legal and tax advice as to how best to structure the transaction.*
>
> *9A.1 In the USA Mme Crociani continued to be advised generally by Mr Kumble and was also advised, regarding tax, by Mr Seth Zachary, also of Finley Kumble (and who is now the chairman and a partner of the leading US law firm, Paul Hastings).*

9A.2 In the Netherlands she was advised by the Second Defendant ("Mr Foortse"), a tax lawyer who was at that time a partner in the firm of Wisselink & Co, an independent tax consultancy firm. In 1989 Wisselink & Co merged with Meijburg & Co, changing its name to KPMG Meijburg & Co in 1992.

9A.3 In Italy she was advised by Professor Augusto Fantozzi, who later became the Italian Minister of Finance.

10. Mme Crociani was advised to the effect that:

10.1 there was a risk that the tax authorities in the Netherlands might characterise interest payable on the Promissory Note as dividend income;

10.2 in such circumstances that interest might be subject to a significant withholding tax; and

10.3 the risk that the interest payable on the Promissory Note might be subject to such withholding tax could be mitigated if the Promissory Note was settled into a family trust with a corporate vehicle interposed as a beneficiary, through which Mme Crociani would also be able to benefit.

11. In this way Mme Crociani would be able to ensure that the relevant tax requirements would be satisfied and that she would be able to benefit fully from the trust property during her lifetime (while at the same time the family wealth would be protected and held and managed for her daughters in the event of her death). It was with this intention and upon this basis that Finley, Kumble drafted the Grand Trust Agreement and that, thereafter, Mme Crociani created the Grand Trust and settled so much of her wealth, including both the Promissory Note and subsequent substantial amounts (referred to in more detail at paragraph 15 below), upon the trusts of the Grand Trust."

9 The requests were for:-

(i) Full details of the content of all tax advice the first defendant had received including full details of the relevant tax requirements sought to be satisfied and how they would be satisfied by taking the steps set out in paragraph 10.3 and 11.

(ii) Full details of when and how Madam Crociani was given such advice providing (or identifying in the first second and fourth defendants discovery) copies of all documents conveying or recording such advice.

10 The plaintiffs' response to paragraphs 9, 9A, 10 and 11 is found in the plaintiffs' amended reply to the amended answer and counterclaim dated 26 th November, 2015. Paragraph 4(b) provides as follows:-

"4. Without limiting the joinder of issue on the Amended Answer the Plaintiffs put the Defendants (1,2&4) to strict proof of:

……

b. the facts asserted in paragraphs 9 to 11 of the Amended Answer including the implicit assertion that the scheme outlined there (in insufficient detail for the Plaintiffs to be able to respond) and involving the apparent concealment of Mme Crociani's alleged interest in the Grand Trust (the existence of which is denied) and the alleged interposition (which is denied) of a charitable company as a corporate vehicle through which she would receive benefit was lawful and was not contrary to public policy."

The applicable legal principles and contentions

11 There was no disagreement between the parties on the applicable legal principles on a request for further and better particulars. I considered the approach in an earlier decision in the present dispute reported at *Crociani v Crociani* [2015] JRC 177 at paragraphs 8 to 10. The application of those principles to the first second and fourth defendants' answer was set out at paragraphs 10 to 23. I applied the same principles in a more recent decision, *Campbell v Campbell* [2015] JRC 249, at paragraphs 32 to 36.

12 Advocate Robinson on behalf of the plaintiffs in support of their request contended that the United States tax advice referred to in paragraph 9A.1 of the amended answer was highly material to whether or not it was intended that the first defendant was to benefit from the Grand Trust. At present his clients had no idea what that advice was, no discovery had been produced to-date because to-date the advice had not been found and no summary of the advice given was found in the amended answer and counterclaim. Yet by reference to an affidavit filed on behalf of the first, second and fourth defendants for the forum challenge sworn by Steven J Kumble, a former partner of a US law firm called Finley Kumble, Mr Kumble started advising the first defendant on a structure to hold her only income producing asset in a tax efficient way from early 1986 and worked for about a year and half on the Grand Trust. It was therefore clear that Finley Kumble were heavily involved in addressing the first defendant's desire to structure the transaction in a tax efficient manner. Paragraph 9A.1 of the amended answer and counterclaim also identified that tax advice in particular had been given by Mr Seth Zachary, also of Finley Kumble.

13 Advocate Robinson further complained that those assisting him on Dutch tax matters did not understand the explanation given at paragraph 10 of the amended answer which related to Dutch tax issues only. Nor did they understand the explanation of the Dutch tax advice set out in an affidavit sworn by the second defendant for the forum appeal, extracts of which were provided to me. What the first affidavit of the second defendant did show however was that the provision of tax advice in respect of creation of the Grand Trust was led by Finley Kumble.

14 Without the particulars sought, Advocate Robinson argued that the experts his clients had

retained simply could not give any guidance or advice on paragraphs 9 to 11 of the amended answer and counterclaim. This advice was important because, in the absence of documents recording the tax advice, the plaintiffs were going to have to rely on their own expert tax advisers to review the witness evidence provided by the first, second and fourth defendants to enable those witnesses to be cross-examined and tested on their evidence.

15 Expert evidence was also relevant to the fact that by paragraph 4b of the amended reply the first, second and fourth defendants were put to proof that the facts asserted at paragraphs 8 to 11 of the amended answer were lawful and were not contrary to public policy.

16 My attention was also drawn to specific criticisms of the discovery provided by the first, second and fourth defendants in respect of tax advice recorded at page 3 of a letter dated 23 rd December, 2015, from Messrs Bedell Cristin to Messrs Carey Olsen and Messrs Baker & Partners. This was to illustrate why the present application was necessary.

17 Advocate Kelleher contended in response that what was sought was evidence. Evidence was a matter that should await the provision of witness statements.

18 Insofar as what was sought was the equivalent of paragraph 10 of the amended answer for US tax advice that was a different point, but was not what the summons requested. The summons was seeking further and better particulars; a summary of US tax advice had not been asked for and was a further and better statement of case, not a request for particulars.

19 The defendants would deal with the matter by providing the best evidence that they were able to, based on parties and advisers' recollections, relying on what documents that they could find. His clients had already agreed to respond to Bedell Cristin's letter of 23 rd December, 2015, by 31 st January, 2016. To put this letter in context I was referred to his clients' affidavits of discovery and what attempts they had made to find documents containing relevant tax advice. I reviewed these before given my oral decision.

20 He also suggested that the tax advice was irrelevant and posed the question as to what it would prove.

Decision

21 The view I reached was that the request, as formulated, went too far in that in effect the level of detail sought amounted to evidence. It was therefore more than a request for particulars.

22 However, while the first, second and fourth defendants' amended answer did provide a

summary of the Dutch tax advice obtained, no equivalent summary was provided in respect of the US tax advice and Italian tax advice referred to at paragraph 9A of the amended answer. At present the plaintiffs therefore do not know what that advice was at all.

23 I further concluded that such advice was relevant to whether or not it was intended that the first defendant would benefit from the Grand Trust. It was also relevant to the matters raised by paragraph 4b of the amended reply, which put the first, second and fourth defendants to proof that the advice received was lawful and not contrary to a public policy. I also add that if the advice was not relevant, why did the first, second and fourth defendants go into to such detail to set out the attempts they had made to track down such advice in their affidavits of discovery. However, while I have concluded that the advice is relevant in respect of an issue between the parties, the extent of the relevance is a matter for the Royal Court to determine at trial.

24 In reaching my conclusion I also took into account that at present very limited documentation has been produced in respect of the tax advice given. Although the affidavits of discovery of the first, second and fourth defendants set out what enquires were made to recover documents from Finley Kumble and the second defendant's former firm and that it is likely that relevant documents have been destroyed due to the passage of time, no enquiries according to the affidavits appeared to have been made of the principal tax advisor, Mr Zachary, whom I was told was still practising. Mr Zachary therefore may be in a position both to assist with where any documents might to be found containing any tax advice as well as his recollection about what advice was given.

25 I also noted in reviewing the affidavits of discovery filed that in respect of advice on Italian tax issues, unlike in respect of the US and Dutch advice, where it is suggested that files had been destroyed, no similar suggestion is made in respect of the Italian tax advice. Rather it was simply noted that certain documents had been provided. The affidavit of discovery in respect of the Italian tax advice did not therefore contain any conclusive statement that there were no other relevant documents.

26 The view I reached in the absence of any significant discovery to-date is that it was appropriate firstly for the first, second and fourth defendants to provide a summary of the US and Italian tax advice received by the first defendant prior to establishing the Grand Trust, such summary to be provided by 29 th February, 2016. The summary I ordered to be provided should contain the same level of detail as that provided for the Dutch advice set out at paragraph 10 of the amended answer. While Advocate Robinson complained about this advice, he had not produced any evidence in support of his application from those advising him to indicate why the summary provided was not satisfactory. I was not therefore prepared to require the defendants to go further than provide a summary equivalent to that provided in paragraph 10. I made this order because I was not satisfied that the plaintiffs knew the case they had to meet in respect of the US and Italian tax advice and that they were putting the first second and fourth defendants to proof as set out in paragraph 4b of the amended reply. Requiring a party to explain the case the other party or parties had to meet

is the same approach I took for example at paragraph 17 of the earlier Crociani judgment referred to above and paragraph 31 of the *Campbell* decision. While a party is not entitled to require better detail of a pleading to obtain evidence, a party is entitled to have a summary of the key aspects of a case it has to meet. Although the plaintiffs' request was too widely drawn, their summons did, in the alternative seek a further and better statement of the first, second and fourth defendants' case. In the absence of any summary of the US and Italian tax advice received I concluded that the plaintiffs were entitled to such a summary and were therefore successful on their application to that extent.

27 I also ordered the first, second and fourth defendants at the same time as witness statements of fact are exchanged to also provide a schedule to be setting out the relevant tax requirements that had to be satisfied based on the US Dutch and Italian tax advice received including identifying the specific statutory provisions in each jurisdiction. I made this order by reference to paragraph 11 of the amended answer and counterclaim which stated “in this way Madam Crociani would be able to ensure that the relevant tax requirements would be satisfied…”. Nowhere in her pleading does the first defendant indicate what those tax requirements were. While I consider it would be onerous to require the defendants to provide such a schedule at this stage, the defendants in preparing their witness statements will have to address what tax advice was given. In the absence of contemporaneous documents and given that recollections may fade over time, the first, second and fourth defendants are therefore to take such steps as are necessary to identify in each of the jurisdictions concerned, what the tax requirements were including identifying the relevant provisions which were of concern. The schedule will allow the plaintiffs to review the witness statements filed by or on behalf of the first second and fourth defendants with their experts to enable those experts to advise the plaintiffs on possible cross-examination of such witnesses. In the absence of such a schedule, I was concerned that the Royal Court would be left with witness evidence only based on limited recollection and few or no contemporaneous documents which it might be difficult to evaluate. I also concluded that provision of a schedule would address the concerns of the plaintiffs that they did not understand the summary of the Dutch tax advice referred to in paragraph 10 of the amended answer and counterclaim.

28 In referring to experts I should make it clear the question of whether the plaintiffs and any other party should be entitled to call expert evidence was left over to a further directions hearing on 24 th February, 2016. This includes evidence on tax issues. The issue whether a party is able to adduce expert evidence however is different from a party's desire to obtain advice on another party's case to consider whether that party wishes to challenge witness evidence filed by that other party in cross-examination. I accept this might lead to expert evidence being adduced but at this stage it is not inevitable.

29 In relation to the costs of the second request for further and better particulars, as the plaintiffs had been partially successful, but had also failed in part as their request went too far, I ordered costs in the cause in respect of this part of the plaintiffs' application.