# Cristiana Crociani v Edoarda Crociani

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| **Jurisdiction:** | Jersey |
| **Judge:** | Matthew John Thompson |
| **Judgment Date:** | 23 August 2016 |
| **Neutral Citation:** | [2016] JRC 143 |
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| **Court:** | Royal Court |
| **Date:** | 23 August 2016 |

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**Text**

[2016] JRC 143

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, Master of the Royal Court

Between
Cristiana Crociani
First Plaintiff
A (by her Guardian ad Litem, Nicolas Delrieu)
Second Plaintiff
B (by her Guardian ad Litem, Nicolas Delrieu)
Third Plaintiff
and
Edoarda 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
GFIN Corporate Services Ltd
Eighth Defendant

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

**Advocate** N. M. Santos-Costa **for the First, Second, Fourth and Fifth Defendants**.

**Advocate** S. M. Baker **for the Third and Seventh Defendants**.

**The Sixth and Eighth Defendants not present**.

**Authorities**

*Crociani & Ors v Crociani & Ors* [2016] JRC 085 .

Lewin on Trusts 18th Edition.

*Trilogy Management Limited v YT Charitable Foundation (International) Limited* [2015] JRC 166 .

Dicey, Morris & Collins.

*Bourns Inc v Raychem Corporation* [1999] All ER (D) 355 .

*Crociani & Ors v Crociani & Ors* [2014] 2 JLR 508 .

*Café de Lecq Limited v Rossborough (Insurance Brokers) Limited* [2011] JLR 182 .

*Crociani v Crociani* [2016] JRC 111 .

*Re Vallar plc* [2012] 2 JLR 051 .

Trust — application by the plaintiffs requiring defendants to file affidavits and comply with orders.

**CONTENTS OF JUDGMENT**



**THE MASTER:**

**Introduction and background**

1 This judgment represents my decision in respect of an application by the plaintiffs requiring the first, second, fourth and eighth defendants to file affidavits and/or to comply with certain orders. It is easiest to explain the application by setting out the terms of the relief sought by the plaintiffs' summons which is as follows:-

> *"1. By no later than 5pm, 15 July 2016, the Fourth Defendant shall file a further affidavit to bring it into compliance with paragraph 13 of the Order of 24 February 2016 explaining all the circumstances leading to and its reasons for its retirement as trustee of the Grand Trust (the "2016 Retirement"). For the avoidance of doubt, for the purposes of the relevant affidavit, "all the circumstances leading to […] its retirement" shall be taken to include (but not be limited to): (1) the date or dates on which the retirement was first contemplated by D4; (2) the date of D4's first contact — either in writing or orally — with GFin regarding its willingness to take on the trusteeship of the Grand Trust; (3) why GFin was selected and on whose recommendation / suggestion / advice; (4) which other Defendants the 2016 Retirement was discussed with prior to it taking place and the dates on which these discussions took place; (5) full details of any discussions concerning the 2016 Retirement with D1 and D5 which took place either verbally or in writing; (6) full details of all and any discussions / communications with GFin regarding the retirement after first contact had been made. For the avoidance of doubt, if any kind of privilege is claimed, it shall be described sufficiently in the relevant affidavit so as to enable the Court and the parties to understand what type of privilege is being claimed and on what basis.*
>
> *2. By no later than 5pm, 15 July 2016, the First, Second, Fourth Defendants shall file further affidavits to bring them into compliance with paragraph 14 of the Order of 24 February 2016. For the avoidance of doubt, if any kind of privilege is claimed, it shall be described sufficiently in the relevant affidavit so as to enable the Court and the parties to understand what type of privilege is being claimed and on what basis.*
>
> *3. By no later than 5pm, 15 July 2016, the First, Second, Fourth Defendants*

*shall comply with paragraph 3 of the Order of 21 March 2016. For the avoidance of doubt, if any kind of privilege is claimed, it shall be described sufficiently in the relevant affidavit so as to enable the Court and the parties to understand what type of privilege is being claimed and on what basis."*

2 Advocate Robinson also in the course of argument sought to extend the relief sought at paragraphs 2 and 3 of its summons to the eighth defendant.

3 Paragraph 14 of the Act of Court of 24 th February, 2016, referred to in paragraph 2 of the summons states as follows:-

*"14. ….also by Wednesday, 9 th March, 2016, each of the Defendants shall produce to the Plaintiffs all documents other than those where privileged is claimed including electronic documents in the possession, custody or power of any such Defendant relating in any way to the retirement of the Fourth Defendant as trustee of the Grand Trust and the appointment of Gfin Corporate Services Limited as trustee of the Grand Trust such production to be verified by an affidavit confirming that all required documents have been produced."*

4 Paragraph 3 of the Act of Court of 21 st March, 2016, states:-

*"By close of business on 25 March 2016 each of the Defendants shall produce to the Plaintiffs all documents (including electronic documents), other than those where legal privilege is claimed (in which event the claim must be clearly made with a sufficient statement of the grounds of the privilege), in the possession, custody or power of each or any of them relating in any way to any change in ownership or change in the terms for repayment of the Secured Long Term Promissory Note dated 10 December 1987 for the payment of 75 billion lire on 10 December 2017 by Croci International BV with 8% annual interest ("the Promissory Note") such production to be verified by an affidavit in the case of each Defendant confirming that all required documents have been produced."*

5 In this judgment I shall refer to these obligations as the orders.

6 What led to the application in respect of the orders is summarised in the judgment of the Royal Court dated 18 th April, 2016, reported in *Crociani & Ors v Crociani & Ors* [2016] JRC 085 (the "April Judgment"). Paragraph 1 of the April Judgment stated as follows:-

***"1. This hard fought and well advanced litigation has taken a surprising turn in that on 29 th January, 2016, the fourth defendant purported to retire as trustee of the Grand Trust, the subject matter of the proceedings, and to appoint another Mauritius based company, GFin Corporate Services Limited ("GFin") as trustee in its place ("the 2016 appointment"). This was***

***done without prior notice to the other parties, apart from the first defendant (and possibly the fifth defendant), and without prior notice to the Court."***

7 The general background to the present dispute is set out at paragraphs 2 to 11 of the April Judgment which I adopt in full for the sake of brevity.

8 What has led to the present application is the 2016 appointment which was set out in the April Judgment at paragraph 12 as follows:-

***"2016 appointment***

***Moving on to the current developments, the 2016 appointment contained the following provisions:-***

***"2 In the exercise of the powers in the Twelfth Clause of the Grand Trust Deed and of every and any other power enabling them to do so under the Trust, the parties hereby expressly declare that:***

***(a) the proper law of the Trust shall be and continue to be the laws of Mauritius, which is the forum for the administration of the Trust, and the trusts of the Trust shall be read and take effect according to the laws of Mauritius;***

***(b) all disputes which may arise out of, or in connection with (whether, in each case, wholly or partially, directly or indirectly) this Instrument and/or the Grand Trust Deed or (whether, in each case, wholly or partially, directly or indirectly) the interpretation, application, implementation, validity, breach or termination of this Instrument and/or the Grand Trust Deed or any related instrument, agreement or document, or any other provision hereof or thereof, shall be subject to the exclusive jurisdiction of the Mauritius courts; and***

***…***

***7 This Instrument and the trusts of the Trust shall be governed by and construed in accordance with the laws of Mauritius*** .

***8 For the avoidance of doubt and notwithstanding any provision to the contrary, all disputes which may arise out of, or in connection with (whether, in each case, wholly or partially, directly or indirectly) this Instrument or (whether, in each case, wholly or partially, directly or indirectly) the interpretation, application, implementation, validity, breach or termination of this Instrument or any related instrument, agreement or document, or any other provision hereof, shall be submitted to the exclusive jurisdiction of the courts of Mauritius."***

9 While Commissioner Clyde-Smith made the eighth defendant a party to the Jersey proceedings, the eighth defendant has still refused to accept the jurisdiction of this Court. Instead it made to applications to the Courts in Mauritius as follows;-

> ***"(i) Seeking interlocutory injunctions restraining and prohibiting the plaintiffs from joining GFin as a party to the Jersey proceedings, from pursuing/continuing the Jersey proceedings and from enforcing any judgment of this Court against GFin; and***
>
> ***(ii) Seeking a number of declarations from the courts of Mauritius including declarations that the 2016 appointment is governed by the laws of Mauritius and is lawful valid and enforceable and that since the 2012 deed (by which the fourth defendant became sole trustee), and more so since the 2016 appointment, the Grand Trust has been governed by the laws of Mauritius and all disputes arising in relation to the Grand Trust are subject to the exclusive jurisdiction of the Mauritius courts."*** (Paragraph 13 of the April Judgment) .

10 It is right to record that firstly the eighth defendant is no longer seeking an injunction preventing the plaintiffs from pursuing and continuing the Jersey proceedings. On 5 th July, 2016, Judge A. F. Chui Yew Cheong issued a judgment refusing to require that the Jersey proceedings against the eighth defendant should be restrained ("the Mauritius judgment"). I refer to her reasoning later in this decision.

11 Returning to the April Judgment, Commissioner Clyde-Smith summarised the actions of the eighth defendant as follows:-

> ***"14. The combined effect of GFin asserting that all disputes concerning the Grand Trust since 2012 (i.e. before the Jersey proceedings commenced) are subject to the exclusive jurisdiction of the courts of Mauritius and seeking an interlocutory injunction against the plaintiffs continuing with the Jersey proceedings, is to attempt to argue (once again) that Mauritius is the appropriate forum for the subject matter of the Jersey proceedings, an argument that has been settled finally and conclusively by the Privy Council in its judgement of the 26th November 2014."***

12 Paragraph 30 of the April Judgment summarises the reasons for the appointment of the eighth defendant and why the fourth defendant wished to resign. In summary the reasons were as follows:-

> (i) The fourth defendant had been placed in a very embarrassing situation;
>
> (ii) The resignation followed a realignment of Appleby's business model;

(iii) The fourth defendant was sick of the litigation;

(iv) The fact that considerable costs and fees had been incurred to date;

(v) That the plaintiffs wanted new trustees appointed;

(vi) The potential damage to the fourth defendant's international reputation as an independent service provider;

(vii) The fact that the fourth defendant's integrity and independence had been placed into question by the plaintiffs;

(viii) The fourth defendant was entitled to relief as trustee and appointing a new trustee;

(ix) The recent changes of the ultimate shareholding of the fourth defendant had led to the new board wishing to impose stricter compliance obligations on the management of the fourth defendant;

(x) The unnecessary reputational risk to the fourth defendant in light of the allegations made by the plaintiffs;

(xi) That the litigation had run out of all proportion;

(xii) That the fourth defendant is a trust company based and regulated in Mauritius; and

(xiii) It was not conducive to the interests of all the stakeholders of the Grand Trust to continue to litigate a family dispute which ran the risk of consuming the family wealth and resources of the beneficiaries before the Royal Court.

13 These reasons led to Commissioner Clyde-Smith in the April Judgment making the following observations:-

***"31. It would seem fair to observe from this that in retiring as trustee and appointing GFin in its place, the fourth defendant was primarily concerned with its own interests, as opposed to those of the beneficiaries, but leaving that aside it appears to have taken the decision that it was not in the interests of the beneficiaries (the stakeholders) as a whole to continue with the Jersey proceedings and this apparently without any consultation with those beneficiaries. It then went on to make declarations in the 2016 appointment (set out above) which created the platform upon which GFin has launched the new Mauritius proceedings. The fourth defendant will have to explain how these actions could be said to be in the interests of all the beneficiaries. We can see that it might be that some of the defendants would regard these actions on the part of the fourth defendant to be in their interests, but there can surely be little doubt that if the plaintiffs had been consulted as beneficiaries, they would have raised the most serious objection*** .

***32. In making the declarations contained in the 2016 appointment that the courts of Mauritius will have exclusive jurisdiction over all disputes in relation to the Grand Trust, the fourth defendant was purporting to exercise its powers under the Twelfth clause of the trust deed, but on examining that clause we note that it applies only where a new trustee is appointed "outside the jurisdiction at that time applicable to the trusts"- our emphasis. On its appointment GFin was within the jurisdiction at that time (on the face of it) applicable to the Grand Trust. In any event the Privy Council had held definitively that this clause does not confer exclusive jurisdiction upon the courts of Mauritius and the fourth defendant, which is directly bound by the decision of the Privy Council and which as the retiring trustee exercised the power, will need to explain how it could take it upon itself to declare otherwise*** .

***34. GFin will need to explain the basis upon which it purported to make it a condition of becoming trustee that, notwithstanding the decision of the Privy Council, the courts of Mauritius should, after all and in defiance of that decision, have exclusive jurisdiction over the subject matter of the Jersey proceedings and this apparently without any consultation with the beneficiaries as to whether it was in their interests for such a condition to be accepted. The fourth defendant will need to explain how, directly bound as it is by the Privy Council decision and in the exercise of its fiduciary powers, it could accept such a condition, again apparently without consultation with the beneficiaries*** .

***36. The first defendant is the settlor of the Grand Trust and, on her case, an intended (rather than just a default) beneficiary. The trust fund comprises the benefit of a promissory note under which some €23M is due to be paid by a company she controls. It might be thought, therefore, that a change of trustee would be of considerable importance to her and a matter over which she would have been consulted and very much involved. According to her letter, however, her involvement was minimal, implying that the fourth defendant and GFin took these actions upon themselves, unprompted by anyone connected to the beneficial class. The first defendant was not, apparently, consulted over (i) the fourth defendant's wish to retire (ii) the identity and suitability of the proposed new trustee and (iii) the condition upon which GFin was prepared to act as trustee, a condition which would potentially have a direct impact on the Jersey proceedings in which she was involved*** .

***37. As can be seen, a number of issues arise out of these documents and explanations which will need to be addressed:-***

***(i) Our understanding of the evidence given as to Mauritius trust law in the forum challenge is that the fundamental principles of English trust law would apply and under English trust law (as under Jersey trust law), it is well established that the power to appoint new trustees is a fiduciary***

***power which must be exercised in good faith in the interests of the beneficiaries as a whole (see*** *In re Skeats' Settlement* [1889] 4 2 Ch D 522 ***and*** *In re Bird Charitable Trust* [2008] JLR 1 ). ***We do not think that a trustee can be criticised for expressing a desire to retire as trustee.*** Indeed, we are sure many a trustee, finding itself embroiled in trust litigation, would wish to do so. The problem***relates to the exercise of the retiring trustee's power to appoint a new trustee, a fiduciary power which we suggest can only be exercised in the interests of the beneficiaries as a whole.*** As we have already observed, the explanations put forward make no reference to any consultation with the beneficiaries as to whether it was in the interests of all of them for GFin to be appointed. We do not know whether the fifth defendant was consulted but it seems clear that the plaintiffs were not. According to the first defendant's letter she does not appear to have been consulted over whether it was in the interests of the beneficiaries of the Grand Trust for GFin to be appointed. She appears to have been consulted only over where, in 1987, she intended disputes to be heard and over giving GFin an indemnity.

***(ii) In addition to exercising its fiduciary power to appoint GFin as trustee, the fourth defendant has selected a new trustee which (according to GFin's e-mail of 11th March, 2016,) would only act as trustee on the basis that, notwithstanding the decision of the Privy Council, all disputes concerning the Grand Trust should be subject to the exclusive jurisdiction of the Mauritius courts, hence the declarations made in the 2016 appointment set out above, a document, according to the written resolution of the fourth defendant, prepared on its behalf.*** Again, as we have already said, there is no reference to any consultation with the beneficiaries whether the appointment of a new trustee on this basis was in their interests. It was a matter of very considerable importance as it potentially had a direct bearing on the Jersey proceedings in which they were all heavily involved .

***(iii) One of the issues in the Jersey proceedings is the validity of the 2012 appointment by which the fourth defendant was appointed as sole trustee of the Grand Trust and the proper law changed to Mauritius.*** Pending resolution of that issue, there is uncertainty therefore as to whether the fourth defendant is the duly appointed sole trustee of the Grand Trust and, indeed, whether the Grand Trust is subject to the proper law of Mauritius. The fourth defendant will need to explain why it has purported to exercise its power to appoint a new trustee in the face of that uncertainty as to its status, its powers and the applicable proper law .

***(iv) The Grand Trust is illiquid.*** Its sole material asset is the benefit of the promissory note under which interest is not currently being collected. Shortly before retiring as trustee, the fourth defendant agreed to extend the repayment date from the 31st December, 2017, to 12th December, 2022, because of an apparent lack of liquidity within the payor, Croci International BV, a company controlled by the first defendant. GFin has therefore accepted trusteeship of a

trust embroiled in hostile litigation which in the short to ***medium term would seem to have no ability to pay for GFin's professional services.*** Furthermore, GFin has now launched proceedings in Mauritius through lawyers in that jurisdiction. On the assumption that GFin would not be providing its professional services gratuitously or using its personal funds to pay for the new Mauritius proceedings, GFin must presumably be receiving funding from another source. Attached to the first defendant's letter to the Court is a copy of a "Fee Agreement and Indemnity" dated the 29th January, 2016, under which the first defendant gives GFin a wide indemnity for acting as trustee, as she says she has done with previous trustees. The preamble to that indemnity also anticipates litigation for which it says she has agreed to pay. The clear implication is that the first defendant is the source of GFin's funding. Indeed, it is our understanding, and not we believe in dispute, that the first defendant has been paying or procuring the payment of the fees and outgoings of the fourth defendant to date .

***38. This Court is very concerned at the picture that is emerging from the documents and explanations so far provided. The fourth defendant and GFin, possibly funded by the first defendant, appear to have procured:-***

***(i) The removal of the remaining but still substantial trust assets beyond the reach of this Court, and***

***(ii) The creation of a platform, the declarations in the 2016 appointment, from which GFin has launched the new Mauritius proceedings in defiance of the Privy Council decision, proceedings which may have been contemplated when it was appointed trustee by the fourth defendant*** .

***39. We raise these concerns because they arise on the documents and explanations provided to us but we acknowledge that the first defendant, the fourth defendant and GFin, have not had an opportunity to respond to those concerns. These actions must have given rise to a substantial body of documentation over which the fourth defendant is claiming privilege but which may well throw greater light upon what has transpired. Whether it is entitled to do so will need to be determined by the Master as part of the discovery process initiated by him pursuant to his orders of the 24th February, 2016."***

14 It is a result as of the second sentence at paragraph 39 that the present application has been brought by the plaintiffs.

**The parties' contentions**

15 Advocate Robinson for the plaintiffs contended as follows:-

(i) The statement made by the first defendant in her letter dated 29 th March, 2016, to the Judicial Greffier that she "had no involvement whatsoever save in except as specified below in the appointment of the new trustee of the Grand Trust GFin corporate Services Limited", was untrue. This was clear from the witness statement dated 30 th June, 2016, of Lee Mo Lin Chee Kiong Noel Patrick Lee (whom I will refer to as "Mr Patrick Noel"). Mr Patrick Noel stated at paragraph 35 that, following the fourth defendant expressing its wish to retire, counsel at Benoit Chambers *"took the lead"* in relation to the preparation of the deed of appointment and retirement and liaised with GFin. Benoit Chambers, in particular Mr Clarel Benoit, was and remains the legal adviser of the first defendant at all material times. This was confirmed by the opinion from Bridges Lawyers provided by Advocate Santos-Costa.

(ii) Given that the first defendant has been funding the litigation and entered into a fee agreement and indemnity in favour of the eighth defendant it is clear that the first defendant knew how the eight defendant was going to act in terms of commencing proceedings in Mauritius and those were the fees she was agreeing to underwrite.

(iii) In addition to the Royal Court taking a dim view of the appointment of the eighth defendant as set out at paragraphs 38 and 39 of the April Judgment, the Mauritian Court in refusing to grant the eighth defendant's application not only ruled that the eighth defendant was a proper party and a necessary party to the proceedings in Jersey but also stated the following:-

> ***"Fourthly and above all, an injunction including an anti-suit injunction is an equitable remedy and "He who comes to equity must come with clean hands".*** No justifiable and convincing reason has been advanced for the retirement of Appleby as Trustee and for the appointment of GFIN in the middle of the Jersey Proceedings. And there is more, it is not unreasonable to conclude by the manner in which they are drafted that clauses 2(a) and (b), 7 and 8 have been inserted in the 2016 Deed in response to the reasons given by the Judicial Committee of the Privy Council as to why Clause 12 only determines the proper law for the administration of the Trust, is not a jurisdiction clause and does not confer exclusive jurisdiction on the Courts of Mauritius. It is also not unreasonable to conclude that the purpose of the exclusive jurisdiction clause is to circumvent and defeat the effect of the ***judgment of the Privy Council.*** In these circumstances, an injunction and the more so an anti-suit injunction cannot and will not lie."

(iv) What had therefore occurred, led by the first defendant's lawyer, was a clear attempt to circumvent the Privy Council decision. What was done was tactical and was in defiance of the Privy Council decision.

(v) The plaintiffs have not had any proper explanation from the fourth defendant for its conduct and they have not had discovery. This material is relevant to the cross-examination of the fourth defendant and the documents should be provided.

(vi) The material is also relevant to cross-examination of the first defendant and of the

eighth defendant, if it appears at trial.

(vii) There is no difference between direct communications between the fourth defendant (as the retiring trustee), the first defendant as settlor (and on her case as a beneficiary) and the eighth defendant (as the proposed successor trustee) and communications sent between their respective advisers. Such communications are all communications between a trustee and a third party and cannot be privileged. The fact that the third party was acting through a lawyer does not matter.

(viii) In this case the actions of the fourth defendant were an administrative act namely looking to retire as trustee and appoint a replacement trustee.

(ix) As a matter of trust law privilege cannot be asserted against a beneficiary (see paragraph 23–048 of Lewin on Trusts (18th edn) on Trusts approved in *Trilogy Management Limited v YT Charitable Foundation (International) Limited* [2015] JRC 166.

(x) The fact that the fees of the fourth defendant were met by the first defendant did not make any advice that the fourth defendant had taken privileged. This was not a case of advice being taken by fourth defendant at its own expense in respect of its personal position. Rather this was advice being taken by the fourth defendant as trustee in respect of steps it wished to take as trustee in order to retire.

(xi) The law of Mauritius was also irrelevant because the question of whether or not documents were privileged from production was a matter for the Jersey Court as the Court hearing the dispute – see Rule 19 of Dicey, Morris & Collins which states “All matters of procedure are governed by the domestic law of the country to which the court where in any legal proceedings are taken belongs”.

(xii) The fact that under a foreign law a document may or may not be privileged does not matter. *Bourns Inc v Raychem Corporation* [1999] All ER (D) 355 was cited in support of this proposition.

(xiii) The purpose of section 300 of the Mauritian Criminal Code refer to in the opinion from Mr Vodiren Ramsamy of Bridges & Co was to preserve and protect client confidence. The lawyers were protected if an order was made by the Jersey Court.

16 Advocate Robinson accepted that he was not entitled to see communications between the first defendant and her lawyer alone, but was entitled to see all other communications between the first, fourth and eighth defendants including communications between their legal advisers. What was key was for the fourth defendant to file an affidavit setting out the circumstances to the level of detail set out in paragraph 1 of his summons and for the first, second, fourth and eighth defendants to provide all relevant documents as required by paragraphs 2 and 3 of the summons.

17 Advocate Santos-Costa in response contended as follows:-

(i) He made it clear that he did not act for the eighth defendant.

(ii) The present position of the eighth defendant was that it had failed to appear but no steps had been taken.

(iii) An extension of time had been sought in which to appeal the judgment of the Mauritian Court.

(iv) The evidence from the Mauritian expert was the only evidence before the Court. It was independent and not contradicted and therefore represented the Mauritian Law position.

(v) If I was minded to order discovery any documents should also be reviewed by Advocate Santos-Costa or a member of his team to see whether or not claims for privilege could be made. To date he had not reviewed any documents. It was therefore premature to order discovery before he had done so.

(vi) Apart from section 300 of the Mauritian Criminal Code, the law of privilege in Mauritius was essentially the same as that in Jersey.

(vii) The issue that had to be decided is whether or not the Mauritian position was accepted.

(viii) Under Mauritian law communications between each of the defendants concerned namely the first, second, fourth and eighth defendants and their advisers were privileged.

(ix) The communications between them were also privileged because there was a common interest in defending the litigation brought by the plaintiffs.

(x) The communications between the legal advisers could only be disclosed if the advisers were compelled to do so by law. Advocate Santos-Costa argued that meant Mauritian Law.

(xi) In relation to the confidentiality of communications with lawyers Advocate Santos-Costa referred me to a passage in Lewin on Trust at 23–052 as follows:-

> ***" Legal advice and communications with lawyers in breach of trust actions***
>
> ***"Trustees who are sued for breach of trust or other relief in contentious trust proceedings are not liable to disclose legal advice obtained and paid for by them for the purpose of their defence.*** They may assert privilege for such advice in the normal way and beneficiaries' rights to disclosure under trust law make no difference. Similar considerations apply to communications with their lawyers for the purpose of their defence after commencement of proceedings, and in our view communications with their lawyers (paid for by themselves) before the commencement of proceedings in relation to their liability for breach of

trust, though not to communications before commencement of proceedings in relation to the trust property."

(xii) The fact that legal costs of the fourth defendant may have been paid for by the first defendant did not matter. Such costs had not been paid for out of the trust fund. It did not matter whether the fourth defendant bore the costs of advice itself or whether it was paid for by the first defendant.

(xiii) There was a view in Mauritius that the exclusive jurisdiction clause in the Grand Trust was not drafted correctly and that this is what led to the Privy Council decision. The intention of the parties to the 2016 appointment was therefore to correct the 'mistakes' in the original drafting. Advocate Santos-Costa made no comment on whether that view was justified or not and accepted it could be tested in cross-examination. However he wished to make it clear what his understanding of the rationale was for the 2016 appointment and its terms.

(xiv) The best summary of the reasons for the appointment is that set out at paragraphs 2 to 6 of the affidavit of Mr Patrick Noel dated 29 th March, 2016.

(xv) The material relating to the handover had been disclosed — see paragraph 9 of the affidavit of Mr Patrick Noel dated 29 th March, 2016.

(xvi) The privilege in Mauritius is one that is absolute as a matter of public policy (see paragraph 25 of the opinion of Mr Ramsamy).

(xvii) If Jersey was to order disclosure the lawyers in Mauritius would be committing a criminal offence, because they would then be in breach of Section 300 of the Mauritian Criminal Code.

(xviii) What the court was being asked to do was therefore to order a party to waive privilege which was a tall order.

18 Advocate Robinson in reply contended:-

(i) A client must always be in a position of being able to compel its lawyer to produce documents if ordered to do so.

(ii) No question of privilege arises in this case because the appointment of the eighth defendant is not connected to the litigation. It was an administrative decision of the fourth defendant. The plaintiffs are entitled to disclosure of the information and the circumstances which led to that decision.

(iii) No question of common interest privilege arises. This is not the parties defending the litigation but a separate step.

(iv) It is far too late for the Jersey lawyers to review material to see whether the claims for privilege can be asserted given the first order for discovery was made on 24 th

February, 2016.

(v) The question of privilege is one for the Jersey Court as directed by Commissioner Clyde-Smith at paragraph 39 of the April Judgment.

(vi) A trustee cannot assert privilege against its beneficiaries.

**Decision**

19 The starting point for my decision is to firstly consider whether the present question is a Jersey law or a Mauritian law question. The answer to this issue is to be found in the forum decision of the Privy Council in this matter (reported at *Crociani & Ors v Crociani & Ors* [2014] 2 JLR 508). At paragraph 23, the Board stated as follows:-

> ***"23 It is appropriate now to turn to the appellants' contention that the words "shall be subject to the exclusive jurisdiction" ("the exclusive stipulation") in cl.*** 12(6) confer exclusive jurisdiction. As already stated, there is obvious force in the point that, at least when read on its own, the direction that certain issues should be "subject to the exclusive jurisdiction … of the said country" has the effect of conferring exclusive jurisdiction on the courts of that country. However, the respondents contend that, properly construed in its context, the exclusive stipulation has a very different purpose, namely to ensure that all issues concerning the Grand Trust are to be governed by the same law, thereby avoiding the risk of dépeçage, i.e. that different aspects of the Grand Trust were subject to different proper law. In the Board's view, the respondents' argument is to be preferred."

20 The current issues in the proceedings are therefore to be determined by the Royal Court. Furthermore, the Royal Court has extended the plaintiffs' claims by granting leave to amend to challenge the appointment of the eighth defendant. The Mauritian judgment has also accepted that the eighth defendant is a necessary party to the Jersey proceedings and that it is also a proper party. I construe proper in that sense to mean appropriate.

21 Accordingly both the view of the Royal Court and the Mauritian Court (subject to any successful appeal against the decision of the Mauritian Court) is that the matters currently pleaded by the plaintiffs including challenging the 2016 appointment are to be determined by the Royal Court. In other words the Royal Court is the trial court.

22 Furthermore, I agree with Advocate Robinson that the question of whether or not documents should be produced is a matter for the Royal Court as the trial court to determine by reference Rule 19 of Dicey, Morris & Collins which provides that "all matters of procedure are governed by the domestic law of the country to which the Court where any legal proceedings are taken belongs". In this case the decision to be made on discovery has been delegated to me by Commissioner Clyde-Smith. This delegation does not however affect the principle that it is the Royal Court applying Jersey law that decides what

documents are to be disclosed.

23 What is meant by privilege under Jersey law is clear and was set out by Sir Michael Birt, Bailiff (as he then was) in *Café de Lecq Limited v Rossborough (Insurance Brokers) Limited* [2011] JLR 182 at paragraphs 24 to 26 as follows:-

> ***"24 This court has previously applied English principles in relation to questions of privilege, e.g.*** *Bene Ltd. v. VAR Hanson & Partners (3)* ; *T v. H (12)*; *In re Continental Trust Co. Ltd. (5)*; ***and****Matthews v. Voisin & Co. (9).* ***In our judgment, that is entirely appropriate as the general principles underlying civil litigation and the position of lawyers in that process are similar in England and Jersey***.
>
> ***25 There are two principal forms of legal professional privilege, namely legal advice privilege and litigation privilege.*** Litigation privilege provides protection for a wider range of documents but only applies where litigation is in reasonable prospect. Legal advice privilege applies even if litigation is not in reasonable prospect but the range of documents to which it applies is narrower. We are concerned in this case with litigation privilege and we consider that the general nature of that privilege is accurately summarized in Phipson on Evidence, 17th ed., para. 23–89, at 688 (2010):
>
> ***"The second category of legal professional privilege is wider than the first, but arises only when litigation is in prospect or pending.*** From that moment on, any communications between the client and his solicitor or agent, or between one of them and a third party, will be privileged if they come into existence for the sole or dominant purpose of either giving or getting legal advice with regard to the litigation or collecting evidence for use in the litigation. This is the basis for claiming privilege for correspondence with witnesses of fact or experts, and proofs, reports or documents generated by ***them.*** The principle is that a party or potential party should be free to seek evidence without being obliged to disclose the result of his researches to the other side. In *Anderson v. Bank of British Colombia* ***James, L.J. said:***
>
> ***'… as you may have no right to see your adversary's brief, you have no right to see that which comes into existence merely as materials for the brief.'***
>
> ***In order for litigation privilege to apply, there must be a confidential communication between client and lawyer or lawyer and agent, or between one of these and a third party made for the dominant purpose of use in litigation; that is, to seek or provide information or evidence to be used in, or in connection with, litigation in which the client is or may become a party, and when litigation is either in process or reasonably in prospect."***
>
> ***26 An authoritative description of litigation privilege, approved by the House of Lords in*** *Waugh v. British Rys.* Bd. ***(15), is to be found in the***

***statement of Barwick, C.J. in the Australian case of*** ( *Grant v. Downs (6)* 135 C.L.R. at 677):

> ***"Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the Court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection."***
>
> ***That summary of litigation privilege is equally applicable under the law of Jersey."***

24 In view of the arguments raised by Advocate Santos-Costa I also referred to paragraph 27 to 29 of the same judgment which are material to the claims of privilege raised by Advocate Santos-Costa.

25 In this case, it is clear that the fourth defendant wished to retire as trustee. As summarised at paragraph 12 above it has also set out a number of different reasons why it wished to retire. For the purpose of this judgment neither the strength of those reasons nor whether they are consistent with each other matters. Those are issues to be explored at trial.

26 What does matter is that reasons have been given. In *Trilogy Management Limited v YT Charitable Foundation International & Ors* [2015] JRC 166 where a trustee had given reasons, Commissioner Herbert stated:-

> ***"32 I have two main comments about YT's position.*** First, YT has in fact given its reasons for making its decision, at least in part, and to my mind this entitles, and perhaps even obliges, the court to consider whether those reasons justify the decision. The question for the court will remain the same, namely whether the decision which YT has made is one which a reasonable trustee could make. But now that the reasons for the decision have been disclosed, the analysis of that question becomes easier for the court to perform. And if the court is entitled to judge the soundness of the trustee's reasons in that way that process will be impeded unless there is disclosure of documents recording and explaining the trustee's deliberations and other documents on which its decision may have been made."

27 In my judgment there is no difference between the position of the trustee in the *Trilogy* decision and that of the fourth defendant. The fourth defendant has also given its reasons for making its decision. That decision has been challenged and is an issue for trial. Just as in *Trilogy*, the process of deciding whether or not the appointment of the eighth defendant is

valid will be ***"impeded"*** unless there is disclosure of documents recording and explaining the fourth defendant's deliberations. I do not consider it makes any difference that in *Trilogy* the court was reviewing the reasonableness of the trustee's selection of a replacement trustee, whereas in the present proceedings the issue is whether the appointment of the eighth defendant should be set aside as being invalid. The trustee has given its reasons and therefore the plaintiffs and the court should be put in the same position as the trustees to test these reasons and should have the material considered by the fourth defendant i.e. ***"the documents recording and explaining the trustee's deliberations and other documents on which its decision may have been made"***.

28 The present position is also not a case where the fourth defendant has paid for advice to explore its own potential personal liability as a defendant. Rather the advice was taken by the fourth defendant to exercise its powers as trustee to appoint the eighth defendant. The fact that it had the benefit of an indemnity from the first defendant and, assuming that the first defendant paid the fourth defendant's legal fees, which seems likely, does not make the advice private. It was still advice given to the fourth defendant as trustee in the exercise of its powers as trustee.

29 As is noted at paragraph 21 of the *Trilogy* decision citing paragraph 23–048 of Lewin, "the privilege is held for the benefit of the beneficiaries, not for the personal benefit of the***trustees, and so privilege is no answer to the beneficiary's demands for disclosure"***. The same reasoning applies to the present case.

30 I also do not consider that questions of litigation privilege arise. The communications between the first, fourth and eighth defendants' advisers did not take place to defend existing claims in the litigation as formulated by the plaintiffs. I accept that in exploring whether or not to appoint a new trustee the advisers may have explored whether or not the appointment would be challenged. However that is not discussing how to defend an existing claim. I also accept (as was conceded by Advocate Robinson) that discussions between the first defendant and her legal advisers alone are privileged. Likewise the same analysis must apply to discussions between the eighth defendant and its advisers only as putative trustee (i.e. before the eighth defendant was purportedly appointed as trustee). However, the position is not the same for the current trustee. To hold otherwise would be inconsistent with the passage in paragraph 32 of *Trilogy* to which I have referred. It would also allow a current trustee to hide behind questions of privilege to say that beneficiaries are not entitled to see the material upon which the trustee relied in making its decision because the beneficiaries might then use that information to challenge the acts of the trustee. Such reasoning is in effect a trustee using privilege to cloak its actions and would mean that it could not be held accountable, when challenged by a beneficiary at least where reasons had been given.

31 I am also of the view that the dominant purpose of the communications was how to effect the 2016 appointment and what terms should form part of that appointment. The dominant purpose was not therefore to defend the existing litigation. The 2016 appointment was a new step which the fourth defendant did not have to take but chose to take as trustee as it

wished to retire. The risk of being pursued for making the appointment or the appointment being challenged are consequences of the appointment rather than the main purpose for which legal advice was sought, namely the fourth defendant's wish to retire. In addition, the risk of being pursued and the appointment being challenged may also have been something that the fourth defendant took into account in deciding whether or not to make the 2016 appointment.

32 The legal advice was therefore material relied upon by the trustee in making its decision. In my decision in this matter reported at *Crociani v Crociani* [2016] JRC 111 I ordered disclosure of certain legal advice received by the first to fourth defendants on the basis that it was at least arguable such advice was in the minds of the first to fourth defendants when they made the Agate appointment (see paragraphs 74 to 76). In my judgment the position is no different in relation to the 2016 appointment. What the fourth defendant or her advisors had in mind based on communications either with the first defendant or its advisors or the eighth defendant or its advisers, is material that should be disclosed. It was material in the mind of the fourth defendant when it made its decision. Such material is particularly important where it is alleged that the 2016 appointment was a fraud on a power (see paragraph 110 of the re-re-amended order of justice).

33 Likewise the criticisms of Commissioner Clyde-Smith at paragraphs 38 to 39 of the April Judgment and the conclusion of the Mauritian Court at paragraph 14 (c) above also justify ordering disclosure. The discussions between the legal advisers of the first, fourth and eighth defendants from the evidence advanced by the fourth defendant were part of the factual matrix that led to the appointment. The dominant purpose of these communications was to appoint a new trustee and, as noted by the Mauritian judgment, “to circumvent and defeat the effect of the judgment of the Privy Council”.

34 In light of this conclusion, the question that then arises that I have to determine is whether the above conclusion is affected by the opinion on Mauritian law. In my judgment it is not for the following reasons.

35 Firstly, the question of privilege is a matter of Jersey law and not Mauritian law and Mauritian law is therefore irrelevant as set out above.

36 Secondly, the fact that privilege under the law of Mauritius is absolute does not matter. The privilege that attaches to legal advice is absolute in Jersey just as it is in Mauritius (see *Re Vallar plc* [2012] 2 JLR 051 at paragraph 27). According to the opinion on Mauritian law, the only difference between Jersey and Mauritius appears to be that a criminal sanction applies to Mauritian lawyers who make disclosure unless compelled by law. While Advocate Santos-Costa argued that compelled by law meant Mauritian law, the opinion of Mr Ramsamy does not make this clear. The opinion does not also address the effect of Rule 19 of Dicey, Morris and Collins which states that “procedural questions are matters for the trial court hearing of the dispute”.

37 Furthermore, it is difficult to see why a criminal offence would be committed where a party was required to produce documents held by that party and its adviser. Given there appears to be no difference between the law of privilege in Jersey procedure and the law of privilege in Mauritius, other than section 300, the privilege, on the application of Jersey law or Mauritian law, is that of the client. Where a client is ordered to produce documents including legal advice obtained, because under Jersey law — as the trial court dealing with matters of procedure — no question of privilege arises, I do not follow on what basis a criminal complaint could be laid against a Mauritian legal adviser for revealing communications his client was required to disclose. The opinion does not address why a complaint would arise in such circumstances.

38 In addition, as I have already noted the Mauritian Court has agreed that the eighth defendant is a necessary party and a proper party to the Jersey proceedings. In making that statement the Mauritian Court must be taken to understand that the eighth defendant is subject to the procedural rules of the Royal Court. It would be illogical on the one hand to say that the eighth defendant is a necessary or proper party to a dispute before the Royal Court and on the other hand to conclude that a criminal offence had been committed because legal advice had been disclosed relating to that same dispute by compliance with an order of the Royal Court against the adviser's client.

39 Finally, in relation to the suggestion by Advocate Santos-Costa that his client should have time to review whether or not other claims for privilege can be made, I consider this submission is made far too late. The orders requiring discovery were made in February and March of this year. This application has also been postponed to allow other issues between the parties to be determined. Advocate Santos-Costa has therefore had sufficient time to formulate any other arguments he wished to advance as to why documents should not be disclosed. I am not therefore prepared to refuse to order discovery of documents which, based on the material before me are not privileged, on the basis that some other claim to privilege might be raised. I wish to add that, in light of the conclusions I have reached in this judgment, it is difficult in any event to see what other claim for privilege arising under Jersey law could be advanced. I should make it clear however that I am not saying that such grounds may not exist; rather my conclusion at this stage is that the possibility of such grounds should not delay provision of discovery or determination of the plaintiffs' summons or in reaching a conclusion that discovery should be provided.

40 In conclusion for the reasons set out in this judgment I grant the plaintiffs' application save that the first defendant shall not be required to disclose communications between her and her legal adviser alone in relation to the 2016 appointment and the eighth defendant shall not be required to disclose communications between it and its legal adviser alone.

41 I also do not consider it necessary for the fourth defendant to file any further affidavit evidence setting out its reasons for its retirement. These have been set out extensively as summarised at paragraph 12 above. However, the fourth defendant must file an affidavit explaining all the circumstances leading to its retirement including the matters set out in

paragraph 1 of the plaintiffs' summons.

42 Finally, if Advocate Santos-Costa does seek to claim any kind of privilege above and beyond the matters considered by this judgment, that claim for privilege must be described sufficiently clearly in the relevant affidavit to enable the court and all other parties to understand what type of privilege is being claimed and on what basis.