Cristiana Crociani; A (by her Guardian ad Litem, Nicholas Delrieu); B (by her Guardian ad Litem, Nicholas Delrieu) v Edoarda Crociani; Paul Foortse; BNP Paribas Jersey Trust Corporation Ltd; Appleby Trust (Mauritius) Ltd; HRH Princess Camilla De Bourbon Des Deux Siciles; Camillo Crociani Foundation IBC (Bahamas) Ltd; BNP Paribas Jersey Nominee Company Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith
Judgment Date:	01 September 2015
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Text

[2015] JRC 178

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, sitting alone**

Between
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
Edoarda 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 A. D. Robinson **for the Plaintiffs**.

Advocate J. D. Kelleher **for the First, Second and Fourth Defendants**.

Advocate N. M. Santos-Costa **for the Fifth Defendant**.

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

Authorities

Re X (Trust) [2012] JRC 171 .

McDonald v Horn [1995] 1 All ER 961 .

Watkins v Egglishaw [2002] JLR 1 .

SGI v Wijsmuller [2008] JRC 078

Cotrel v Christmas [2013] JRC 101 .

Dick v Dick [1990] JLR Notes 2C .

Trilogy Management v YT and others [2012] JCA 204 .

C -V- P-S [2010] JLR 645 .

Leeds United Football Club v Weston and Levi [2012] JCA 088 .

Dalemont Limited v Senatorov and Ors [2013] JRC 209 .

Underhill and Hayton Law of Trusts and Trustees 18th edition.

Public Trustee v Cooper [2001] WTLR 901 .

Trust — costs judgment

THE COMMISSIONER:

1 On 7 th July, 2015, I heard argument as to the costs incurred by the parties in relation to the application brought by the plaintiffs for a pre-emptive costs order out of the assets of the Grand Trust, which the plaintiffs had withdrawn with effect from 8 th June, 2015. Substantial evidence had been filed and the application was due to be heard over the three days commencing 7 th July, 2015. The background to this litigation is set out in a number of previous judgments and I will not repeat that here.

2 The application for a pre-emptive costs order was made by summons dated 16 th March, 2015, at the stage in proceedings when the pleadings had been filed and discovery was due to begin, a process which it is accepted involved the first to fourth defendants, who are the current and past trustees, in a very considerable logistical exercise.

3 It followed the unsuccessful application by the first to fourth defendants to have the proceedings stayed on the basis that Jersey was not the proper forum. That application was appealed by those defendants all the way to the Privy Council and costs were awarded at each stage to the plaintiffs on the standard basis. I was informed that their bill of costs, as yet untaxed, amounts to £1.2M which gives some indication of the actual costs that must have been incurred by all of the parties involved in the forum challenge.

4 The plaintiffs' application was for a pre-emptive costs order and an indemnity out of “Cristiana's Fund” within the Grand Trust in respect of their costs and any costs that may be ordered against them in the substantive proceedings, together with a payment on account of $5M.

5 This is not a standard discretionary settlement of the kind the Court is used to seeing. The preamble to the trust deed provides as follows:–

> *“The Settlor wishes to record that she intends by this Agreement to have set aside a separate trust for each of her children Camilla (aged Sixteen (16) years as of the date of this Agreement) and Cristiana (aged Fourteen (14) years as of*

the date of this Agreement). The Trustees shall receive as the initial Trust Fund the Secured Term Note (the "Note") described in the annexed Schedule A. The Trustees shall retain the Note until its maturity or until its prior redemption, without regard to rules concerning diversification of investments or theories or principles of investment for fiduciaries. The Trustees shall collect the income from and proceeds of the Note when due, but shall not be required to institute litigation to enforce payment or to enforce any right which the Trustees may have as owner of the Note. The Trustees shall divide the property described in the annexed Schedule A into two (2) substantially equal (as to value) separate trusts, one of which shall be identified by the name of CAMILLA and one of which shall be identified by *the name of CRISTIANA.* Each such separate trust shall be disposed of as hereafter directed in this Agreement."

6 Under the principal trust provisions of the Grand Trust, the trustees have the power in respect of each fund that bears the name of Camilla (the sixth defendant) and Cristiana (the first plaintiff) to pay income to each of them respectively during their lifetimes, together with a company beneficially owned by their mother Madame Crociani, who is the first defendant, and known as the Camillo Crociani Foundation Limited, the sixth defendant ("the Foundation"), and to pay capital to each daughter respectively during their lifetimes with the remaining capital passing as they may appoint, or failing appointment, to their children on their respective deaths. In the event of both daughters dying without leaving issue surviving, Madame Crociani is the default beneficiary and failing her, the Foundation.

7 The plaintiffs, comprising Cristiana and her two children, sought these pre-emptive orders out of Cristiana's Fund, so that on the face of the application, it would not affect Camilla's Fund. It was known to the plaintiffs at the time that the application was made that the Grand Trust held no liquid assets. Its sole asset was the benefit of a Promissory Note in the sum of 75 billion lira, payable in 2017 and bearing interest, issued by Croci International BV, a company controlled by Madame Crociani.

8 Cristiana filed an affidavit in support of the application on 14 th April, 2015. She referred to the costs she had incurred in these proceedings (and in other jurisdictions) and asserted, as set out in the Order of Justice, that she had been cut off financially by Madame Crociani. A request for a distribution of $5m had barely been acknowledged and she was sceptical whether any financial assistance would be given. The fourth defendant, Appleby Trust (Mauritius) Limited ("Appleby"), whose status as the current trustee is challenged by the plaintiffs, the second defendant Mr Paul Foortse and the third defendant BNP Paribas Jersey Trust Corporation Limited ("BNP"), both former professional trustees, had sided with Madame Crociani, also a former trustee, against her. She stated that if she did not obtain the relief sought, she "may" not be able to continue with the substantive claim, which she said has been brought to re-constitute the Grand Trust for the benefit of all of its beneficiaries.

9 At a directions hearing on 20 th April, 2015, it became clear that the plaintiffs' application

would be strenuously resisted and that the one day originally fixed for its hearing was inadequate. Three days were therefore fixed instead namely the three days commencing 7th July, 2015. The issues which the Court would have to deal with were summarised by Advocate Kelleher for the first to fourth defendants as follows:–

> *"28.1 Whether the Court had jurisdiction to make the orders sought by the Plaintiffs under Article 5 of the Trusts (Jersey) Law 1984 in circumstances where the governing law of the Grand Trust is not Jersey law; the trustee is incorporated outside of Jersey, the trust assets are located outside Jersey and the trust is administered outside Jersey;*
>
> *28.2 The impact of Mauritius law, as the governing law of the Grand Trust, on the relief sought by the Plaintiffs;*
>
> *28.3 The nature and extent of the Court's jurisdiction to give the orders sought by the Plaintiffs, and any constraints on that jurisdiction;*
>
> *28.4 The nature of the claims advanced by Cristiana in these proceedings;*
>
> *28.5 The merits of the claim advanced by Cristiana in these proceedings, including Cristiana's conduct in consenting to, and acquiescing in, certain decisions and actions of the trustees of the Grand Trust, disentitling her from bringing the claims that she now seeks to advance;*
>
> *28.6 Cristiana's conduct prior to the commencement of proceedings, and conduct since then in proceedings in other jurisdictions (including attacking the validity of the Grand Trust), and Cristiana's conduct generally;*
>
> *28.7 whether it was inevitable that Cristiana would be awarded her costs of litigating on the trustee indemnity basis at the conclusion of these proceedings, regardless of whether or not some or all of her claims are dismissed;*
>
> *28.8 Delia and Livia's [the second and third plaintiffs] status as beneficiaries of the Grand Trust; and*
>
> *28.9 the absence of any funds held by the trustee of the Grand Trust comprising capital of Cristiana's Fund of the trust fund…."*

10 At that directions hearing the Court expressed these concerns in relation to the application:–

> (i) Cristiana had not descended into any detail in her affidavit as to her ability and that of her husband to finance the litigation, the Court appreciating the difficulties that such a process would involve in hostile litigation of this kind by which Cristiana using Advocate Robinson's words 'would have to disclose how much petrol was left in the tank'.
>
> (ii) The apparent illiquidity of the Grand Trust. The Court expressed the view that

Appleby, as the current trustee, should give a full explanation of the financial position of the Grand Trust and its ability to meet any order that the Court might make. That explanation must extend to what it knew about Croci International BV and its ability to pay the interest under the Promissory Note. The Court expressed the belief that it would be its expectation that Appleby should take all the steps it properly could to put itself in a position where it can meet any pre-emptive costs order it might make at the hearing.

11 On 30 th April, 2015, the first to fourth defendants provided a draft amended answer and counter-claim by which (as I understand it) Madame Crociani seeks, in the alternative, to have the Grand Trust set aside on the grounds of mistake. Shortly before the costs hearing before me on the 7 th July, 2015, leave had been granted by the Master for those amendments to be made, although at the time of the costs hearing, his judgment setting out his reasons had not been published. I was informed that the plaintiffs argued before the Master that such an amendment was an abuse of process, which is of course denied by Advocate Kelleher's clients. It would not be appropriate for me to comment, as the matter has been the subject of argument before the Master.

12 On 19 th May, 2015, the first second and fourth defendants filed and served three substantial affidavits from a director of Appleby, Madame Crociani and Mr Foortse together with supporting exhibits, setting out in detail and with extensive supporting documentary evidence:–

(i) The current financial position of the Grand Trust (exhibiting current and historical trust accounts);

(ii) The history of payments of interest and capital under the Promissory Note (which is the only substantial asset in the Grand Trust);

(iii) Explanations of why interest and capital has been paid by Croci International BV (the debtor under the Promissory Note) to the Grand Trust when it has been paid.

(iv) Explanations of why there is currently a balance of accrued but unpaid interest due to the Grand Trust from Croci International BV;

(v) Explanations of why Appleby, as trustee of the Grand Trust, does not presently intend to pursue legal proceedings for payment of the accrued but unpaid interest from Croci International BV, but does intend to continue to monitor the position in a careful and appropriate way; and

(vi) The current financial position of Croci International BV and of the numerous underlying companies that form part of the group of companies of which it stands at the head.

13 It is fair to say that a very great deal of work must have gone into providing this evidence,

and indeed, such was its volume that Advocate Robinson referred to it as throwing "the kitchen sink at the application to increase its scale and complexity."

14 On 26 th May, 2015, Advocate Kelleher ceased to act for BNP which is now represented by Advocate Redgrave.

15 At a further directions hearing heard on 29 th May, 2015, the plaintiffs sought translations of many of the documents which had been provided in Italian and sought to set aside the hearing dates fixed for 7 th — 9 th July, 2015, in order to understand the asserted liquidity issues with the assistance of forensic accountants. Bearing in mind the urgency with which the plaintiffs had pursued the application to that point, Advocate Kelleher described this as a *"complete volte face"*. He prophesied, correctly, that within a short period, the application would be withdrawn.

16 In her affidavit, Madame Crociani described the very substantial assets held within the extensive group of companies beneath Croci International BV and therefore under her ultimate control. The principal business is conducted by an Italian company called Vitrociset S.p.A. Between 2002 and 2014 Vitrociset paid dividends of some €120M. Some €159M has been deployed within the group, including investments of some €89M in an apartment in Rome, a villa in Cortina, a villa in Rome, an apartment in Monaco, a villa in Circeo, a 24 metre luxury yacht and land and a hotel in Sardinia. She explained that Vitrociset has had financial difficulties between 2008 and 2013 but is now restored to long-term profitability.

17 Notwithstanding this, she deposed that the Croci Group had limited cash, all of which was required either to service its assets or to provide support to its substantial operations. She said at paragraph 59:–

> *"As matters stand, therefore, Croci International BV simply cannot pay the interest due under the Promissory Note [some €17M as at 31st December 2014] to the Grand Trust.* The only way it might become able to pay interest is if it risked leaving Vitrociset in the lurch or procured its subsidiaries to sell off some of their assets."

Application

18 All of the defendants (other than the seventh defendant, who had not been convened to the application), sought their costs from the plaintiffs on the indemnity basis, save for BNP, which had little involvement in it. It had run up costs of £3,000 and was prepared to accept £2,000 by way of costs on the standard basis.

19 The plaintiffs sought their costs on the standard basis from the first, second and fourth

defendants, or failing that, an order that costs should be reserved.

20 The first, second and fourth defendants had undertaken the bulk of the work in resisting the application and in substance, this was a contest between them and the plaintiffs. The first, second and fourth defendants had incurred costs (on a charge out basis) of £318,437.89p, of which £69,000 related to the fees of two London counsel. The plaintiffs had incurred costs (again on a charge out basis) of £105,000 of which £25,000 related to London counsel. Advocate Robinson was very critical of the quantum of costs claimed by these defendants, but I will not go into those criticisms because the quantum of any order that I might make would be for the Greffier to assess.

21 Advocate Kelleher's skeleton argument ran to 99 paragraphs and he addressed me at some length going into the history in detail. It would not be proportionate for me to seek to cover all of the points he made and I will therefore only summarise the principal submissions. In reaching my decision I have taken into account the whole of his submissions, as I have the submissions of Advocate Robinson.

22 The application, he said, was doomed to fail and should never have been brought. An order of the kind sought was exceptional and its consequences would have been draconian, in that it would have allowed the plaintiffs to pursue these proceedings, which the defendants regard as meritless and being pursued for illegitimate purposes, at no risk as to costs. In hostile proceedings of this kind, such an order simply could not be justified.

23 The key points, he said, were these:–

> (i) Before the application was made, the plaintiffs knew that the Grand Trust was illiquid. They had received the accounts in September 2013 and were aware that no interest had been paid by Croci International BV since 2003. Furthermore, Cristiana had been a director of Croci International BV between 2004 and 2010 and therefore was aware of the approach of that company to the payment of interest.
>
> (ii) The plaintiffs relied on the decision of the Court in *Re X (Trust)* [2012] JRC 171, in which the Court had made a protective costs order in favour of beneficiaries out of the trust fund in respect of proceedings they were bringing against the trustee for breach of trust. That decision, he said, had departed from the decision of the English Court of Appeal in *McDonald v Horn* [1995] 1 All ER 961, which had laid down various preconditions for the exercise of such a discretion none of which, he said, applied here. The plaintiffs knew, therefore, that any reliance upon the decision in *Re X (Trust)* was susceptible to challenge.
>
> (iii) They knew that the defendants were engaged in the exercise of discovery and that the defendants' resources were stretched. It was a tactic, therefore, firstly to try to prevent the defendants from mounting the best possible opposition to the application and secondly, to disrupt the discovery exercise.

(iv) No information as to Cristiana's actual financial position or that of her husband had been provided. Within two days of receiving Cristiana's affidavit of 15 th April, 2015, Advocate Kelleher had replied making it clear that the application would be defended and the broad terms of that defence so they knew what was coming.

(v) The application was used as a fishing expedition in order to try to secure evidence and information to which the plaintiffs ought not to have been entitled, which could be helpful for Cristiana's long running and ongoing "legal onslaught" against Madame Crociani around the world. Not only had they secured evidence but had deployed it in that as a consequence of receiving information in relation to the non-payment of interest by Croci International BV, they had now amended the Order of Justice to include a claim for breach of trust in relation to the alleged failure to call in the interest.

(vi) I should be wary about explanations now given on the plaintiffs' behalves by Advocate Robinson in a skeleton argument which Advocate Kelleher described as *"tendentious".* There had been no evidence from Cristiana as to the reasons for the withdrawal of the application.

24 Advocate Kelleher referred to the principles in the seminal case of *Watkins v Egglishaw* [2002] JLR 1. There was no question that the defendants were the winners. The plaintiffs had abandoned their application. Furthermore, there was authority for the proposition that where applications were withdrawn before adjudication, indemnity costs were justified (*SGI v Wijsmuller* [2008] JRC 078 and *Cotrel v Christmas* [2013] JRC 101 and *Dick v Dick* [1990] JLR Notes 2C.

25 Advocate Robinson resisted any order for costs against the plaintiffs and sought their costs from the 1st, 2nd and 4th defendants for the following reasons:–

(i) These defendants had not been open about the position of the Appleby in relation to the payment of interest. The plaintiffs knew that the Grand Trust had no liquidity and that no interest had been paid on the Promissory Note since 2003 but there was no explanation as to why. By not claiming these (substantial) sums, the Grand Trust was in effect making an interest free loan to Croci International BV. The approach of Appleby to the issue of the outstanding interest was therefore critical to the application.

(ii) Two letters had been written by Advocate Robinson to Advocate Kelleher on 18 th February, 2015, one asking for a distribution to Cristiana of US$5M for her to use towards her legal costs and the other seeking an explanation for the non-payment of interest by Croci International BV and laying the groundwork for a breach of trust claim in relation to it. There was no substantive response until these defendants filed their detailed case on 19 th May, 2015.

(iii) These defendants' conduct in this respect was, he said, against the modern principle of open justice referred to at paragraph 8 of *Watkins v Egglishaw* where

Page, Commissioner said this:–

> ***"8 Among the factors to which a court may have regard, two in particular should be mentioned at this point.*** The first is conveniently expressed in the passage of the judgment of judge, LJ in *Ford v G.K.R. Construction Ltd* ***(7) with which Lord Woolf, M.R. and Pill, L.J. agreed) in which he said*** [2000] 1 WLR 1400): **–**
>
> > ***'Civil litigation is now developing into a system designed to enable the parties involved to know where they stand in reality at the earliest possible stage, and at the lowest practicable cost, so that they may make informed decisions about their prospects and the sensible conduct of their cases.*** Among other factors the judge exercising his discretion about costs should consider is whether one side or the other has, or has not, conducted litigation with those principles in mind.'
>
> ***After referring to the trial judge's reasons for making the order, he continued (ibid., at 1402):–***
>
> > ***'Indeed his judgment has served to underline the importance, rightly and increasingly, to be attached to civil litigation being conducted openly between the parties with the real issues between them efficiently and quickly identified and investigated."***

(iv) In addition to these defendants' conduct as litigants, the plaintiffs were beneficiaries and the request for a distribution had been made in relation to Cristiana's fund.

(v) By her proposed amendment seeking to set aside the Grand Trust on the grounds of mistake, Madame Crociani was now able to resist any plaintiffs' costs order on the grounds that the trust fund may ultimately be found to be hers. Until notice of that amendment had been given, the plaintiffs had assumed that they were dealing with a valid trust and now Madame Crociani was casting some doubt upon that, making it difficult for the Court to accede to a pre-emptive costs order.

(vi) Madame Crociani, who controlled Croci International BV and therefore the purse strings, made it clear in her affidavit as set out above that she would resist the payment of any interest.

(vii) Furthermore the mistake claim should have been brought earlier in the proceedings as it is plainly relevant to the application. In the plaintiffs' view, it was deliberately delayed so as not to prejudice the forum challenge and this in breach of the direction of the Court that a full answer should be filed.

26 In summary, the plaintiffs had decided to abandon the application because even if they

succeeded Madame Crociani had made it clear that as far as she was concerned there was little prospect of any funds being paid into the Grand Trust, these defendants would appeal any decision to the Privy Council incurring yet more *"massive"* costs as they did in the forum challenge and the mistake claim now cast doubt on whether these were trust funds.

27 Advocate Robinson informed me that Cristiana's husband had been funding the litigation but following the forum claim had signalled that enough was enough. His firm was therefore now exploring the possibility of litigation funding.

28 In the alternative Advocate Robinson submitted that costs should be reserved because if the plaintiffs were successful at trial, then this application should never have been opposed.

Decision

29 My assessment of the conduct of this part of the litigation is that this application was not a *"tactical, cynical ploy"* as alleged by Advocate Kelleher, brought to stretch the reserves of the defendants preventing them from mounting the best possible opposition to it and to disrupt the discovery process.

30 BNP is a large financial institution, Appleby is an international firm and Madame Crociani is clearly a person of very considerable wealth. In addition to the substantial assets she controls through Croci International BV, it is not in dispute that she benefited from the distribution of $100M out of the Grand Trust in 2010, a distribution which the plaintiffs seek to impugn. I do not regard it as plausible to suggest that these defendants could have their resources stretched. Furthermore, it is counter-intuitive to suggest that the plaintiffs wished to disrupt the process of discovery. Any plaintiff would have the greatest interest in examining the fruits of that process.

31 Nor do I regard it as plausible to suggest that this application was a fishing exercise for evidence to bolster a new breach of trust claim. The evidence in relation to the non-payment of interest is there in the accounts and the groundwork for a claim had been laid. It was the explanation for not collecting it that was missing, whatever Cristiana may have known before 2010. That explanation has now been forthcoming but in my view Appleby was always under a duty to provide it as part of its duty to account to its beneficiaries.

32 I am not sure it is fair to say that the orders, if granted, would have allowed the plaintiffs to pursue this litigation without risk as to costs. The orders were sought against Cristina's Fund, a fund which she regards as having been established for the benefit of her and her children.

33 I have not heard argument on the merits of the application both in terms of the applicable

law and the facts but it is going too far to say that it was doomed to fail. There is local authority in *The X Trust* (and *Trilogy Management v YT and others* [2012] JCA 204) for such an order and it is necessary to bear in mind the particular terms of the Grand Trust which may have assisted the plaintiffs' arguments.

34 As against that, by making the application, Cristiana was putting her means and that of her family at issue, and a greater level of disclosure as to those means may have been necessary for the application ultimately to succeed.

35 It is helpful to be reminded of the principles to be applied when awarding costs as set out in *Watkins v Egglishaw* which I take from its headnote:–

> ***"Held, awarding costs to the defendants in part:***
>
> ***(1) …***
>
> ***(a) The overriding objective in considering costs was to do justice between the parties;***
>
> ***(b) That objective was fulfilled by making an award of costs in favour of the winning party, where a winner was readily apparent;***
>
> ***(c) It was, however, a mistake to try to label one party as the winner when the complexity or other circumstances of the litigation did not lend themselves to such an analysis;***
>
> ***(d) The wide discretion laid down in art. 2 was not fettered by any particular practice, other than that the discretion should be exercised judicially and broadly in accordance with the accepted guiding principles;***
>
> ***(e) It was, accordingly, open to the court to have regard to any and all considerations that had a bearing on the overriding objective of doing justice, including (i) whether a defendant brought the action on his own head and (ii) whether litigation had been conducted in a manner which enabled the parties involved to know where they stood at the earliest possible stage and at the lowest practicable cost.***
>
> ***(f) It was implicit in this that (i) costs should not always automatically follow the event, (ii) it was no longer necessary for a party to have acted unreasonably to be deprived of his costs on a particular issue on which he failed, and (iii) the court should be ready to make separate orders reflecting the outcome of different issues (paras. 7–8)."***

36 There is precedent (as stated above) for costs on such an abandonment being awarded on the indemnity basis. The general principles in considering an award on the indemnity basis are set out in *C -V- P-S* [2010] JLR 645 and *Leeds United Football Club v Weston and Levi* [2012] JCA 088 more recently summarised by Bailhache, then Deputy Bailiff, in *Dalemont Limited v Senatorov and Ors* [2013] JRC 209. As Beloff JA said in *C v P-S*:–

> ***"The question will always be — is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising that there will usually be some degree of unreasonableness?"***

37 Although I have rejected many of the submissions made by Advocate Kelleher, he has mounted a strong case and I accept that ordinarily a costs order would be made against the plaintiffs, who brought and then abandoned an application, but there are two considerations which bear on the overriding objective of doing justice.

38 The first consideration is that raised by Advocate Robinson, and not addressed by Advocate Kelleher, namely that Cristiana and her children are beneficiaries of Cristiana's Fund, albeit that the status of her children is, I believe, being challenged.

39 Although I have not had the opportunity of reviewing the expert evidence filed in the forum proceedings in relation to Mauritius trust law, my memory is that it is based upon English trust law and therefore the fundamental principles underlying English trust law would apply.

40 Trustees have a duty of undivided loyalty to their beneficiaries. Underhill and Hayton Law of Trusts and Trustees 18th edition puts it this way at paragraph 57.29:–

> ***"Duty of undivided loyalty***
>
> ***57.29 More fundamental than the prescriptive duties laid down by trust law and the trust instrument is the proscriptive fiduciary obligation of undivided loyalty owed to the beneficiaries.*** This fiduciary obligation is the obligation to put the interests of the particular beneficiaries above all other interests (unless otherwise authorised). Thus for example no profit can be made from the trust property or the office of trustee (unless authorised), and (unless authorised) the trustee must not place himself in a position where his own interest conflicts with the interests of his beneficiaries or his duty in one capacity conflicts with his duty in another capacity or in a position where there ***is a sensible possibility of such conflict arising.*** If however there is a conflict or possibility of conflict the trustee must prefer his duty to his interest, except as permitted by the trust instrument, the beneficiaries or the court to consider his interest."

41 Cristiana, as a beneficiary, sought a distribution from Cristiana's Fund in circumstances

that, on her case, were both urgent and difficult. She was entitled to have that request for a distribution considered. Appleby was not in a positon to consider that request because, as a defendant in the substantive proceedings brought by the plaintiffs, it is in a position of conflict as between its personal interests as a defendant and its duties as trustee. In these circumstances it is clear that Cristiana's interests are to be preferred.

42 Guidance as to how a trustee should act in these circumstances was provided in the case of *Public Trustee v Cooper* [2001] WTLR 901 where Hart J said this at 922–924:–

> ***"The beneficiary is entitled to the decision of all his trustees, but, at the same time, he is entitled to require that the decision is made independently of any private interest or competing duty of any of the trustees.*** Where a trustee has such a private interest or competing duty there are three possible ways in which the conflict can successfully be managed. One is for the trustee concerned to resign. This will not always provide a practical or sensible solution. The trustee concerned may represent an important source of information or advice to his co-trustees or have a significant relationship to some or all of the beneficiaries such that his departure as a trustee will be potentially harmful to the interests of the trust estate or its beneficiaries.
>
> ***Secondly, the nature of the conflict may be so pervasive throughout the trustee body that they, as a body, have no alternative but to surrender their discretion to the court*** .
>
> ***Thirdly, the trustees may honestly and reasonably believe that, notwithstanding a conflict affecting one or more of their number, they are nevertheless able fairly and reasonably to take the decision.*** In this third case, it will usually be prudent, if time allows, for the trustees to allow their proposed exercise of discretion to be scrutinised in advance by the court in proceedings in which any opposing beneficial interests are properly represented, and for them not to proceed unless and until the court has authorised them to do so. If they do not do so, they run the risk of having to justify the exercise of their discretion in subsequent hostile litigation and then satisfy the court that their ***decision was not only one which any reasonable body of trustees might have taken but was also one that had not in fact been influenced by the conflict."***

43 A further impediment to Appleby giving consideration to Cristiana's request is that its status as trustee was being challenged. For this reason and because of the conflict Appleby, in my view, had no alternative but to surrender its discretion to the court (presumably the Mauritius court) so that Cristiana's request for a distribution could receive independent consideration.

44 I have not heard argument as to the true construction of the Grand Trust deed (other than in relation to the forum issue) but Cristiana is not one of a wide class of discretionary beneficiaries all of whom the trustees have to consider. If the preamble is to be taken at

face value, Cristiana's Fund was established for her. It is a fund that bears her name and she has a power of appointment over the capital on her death, failing which her children will take absolutely. I accept that during her lifetime she is a discretionary beneficiary, both as to capital and income, and that the Foundation can also benefit. Whatever construction the Court, following full argument, may place upon the trust deed, there can surely be no disputing that Cristiana, at least, is a beneficiary (within a very narrow class) and she is surely entitled to have her request for a distribution considered independently and, in the circumstances which were well known to Appleby, as a matter of urgency. That would not appear to have happened.

45 The formal letter seeking a distribution of $5M was sent on 18 th February, 2015, with a request that there should be a response by 25 th February, 2015. As far as I can see, there has been no substantive response from Appleby to this request, other than the filing of the affidavit of Mr M G Gilbert Noel, a director of Appleby, on 19 th May, 2015. In that affidavit he says that Cristina's request was still being considered when, on the 9 th March, 2015, Appleby received notice of the application for a pre-emptive costs order. He says at paragraph 12:–

> *"Given the plaintiffs' rush to this honourable Court, Appleby Mauritius takes the view that the prudent and appropriate course is to consider and address Cristiana's distribution request in light of this honourable Court's decision on the pre-emptive costs application."*

46 It is difficult to see how that approach to Cristiana's request for a distribution is consistent with Appleby's duty of loyalty as trustee to her as a beneficiary to ensure that her request received independent consideration without delay.

47 If Appleby had responded to that request in a manner which I feel was consistent with its duty of loyalty to Cristiana, then I take the view that the application for a pre-emptive costs order may have been rendered wholly unnecessary.

48 It must also be open to question the basis upon which Appleby, as trustee, opposed the application for a pre-emptive costs order, which it did in strong terms, bearing in mind its position of conflict. Should it not have sought directions as to the stance it should take and surrender its discretion?

49 There is also a question in my mind as to the stance of the former trustees Madame Crociani, BNP and Mr Foortse in aligning themselves with Appleby in opposing this application. Of course their personal interests are very much against the plaintiffs being able to continue funding the claims against them, but what interest did they have in the Grand Trust being used for that purpose, other than as potential trustees (if their appointment of Appleby as trustee in their place is set aside) and as potential trustees they were in a clear position of conflict? I accept that Madame Crociani, in addition to being a potential trustee is also the ultimate default beneficiary of the Grand Trust, but there is again

a conflict between the two roles in so far as this application is concerned.

50 I am not purporting to make a finding against Appleby that it was in breach of its duties to Cristiana as a beneficiary, as it has not responded to the point and, in any event, I have made assumptions as to these fundamental principles applying under Mauritius law, which may not be correct. However, I am concerned at the way Cristiana's request for a distribution has been dealt with and the potential injustice in these circumstances of making an order for costs against the plaintiffs, certainly at this stage.

51 The second consideration relates to all of the defendants to the application and that is that at the heart of their opposition is the assertion that the claims brought by the plaintiffs in the substantive proceedings are technically flawed, meritless, bad and misconceived and are being pursued, not for the benefit of the trust fund, but as part of a wider campaign by Cristiana to obtain a share of her mother's wealth. If that is the case then one can understand why the fifth defendant Camilla, the Foundation (as beneficiaries) and the other defendants as trustee and former trustees opposed the use of any part of the trust fund to assist the plaintiffs. On the other hand, if the claims are ultimately found to be of merit and result in the trust fund being re-instated with funds which are found by the Court to have been wrongly appointed out by the former trustees, then that opposition would not have been justified.

52 For all these reasons I have concluded that the costs arising out of this application should be reserved to the trial judge and I order accordingly.