Cristiana Crociani v A (by Her Guardian Ad Litem, Nicholas Delrieu) and B (by Her Guardian Ad Litem, Nicholas Delrieu and Edoarda Crociani and Paul Foortse and BNP Paribas Jersey Trust Corporation Ltd and Appleby Trust (Mauritius) Ltd and Camilla De Bourbon Des Deux-Siciles and Camillo Crociani Foundation IBC (Bahamas) Ltd and BNP Paribas Jersey Nominee Company Ltd and GFin Corporate Services Ltd and Ocorian Trustees (Jersey) Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Blampied, Ronge
Judgment Date:	18 May 2018
Neutral Citation:	[2018] JRC 91A
Reported In:	2018 (1) JLR 468
Court:	Royal Court
Date:	18 May 2018

vLex Document Id: VLEX-793230593

Link: https://justis.vlex.com/vid/cristiana-crociani-v-by-793230593

Text

[2018] JRC 091A

ROYAL COURT

(Samedi)

Before:

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

Between
F (the father)
First Plaintiff

and

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

and

B (by her Guardian ad Litem, Nicholas Delrieu
Third Plaintiff
and
Edoarda Crociani
First Defendant

and

Paul Foortse
Second Defendant

and

BNP Paribas Jersey Trust Corporation Limited
Third Defendant

and

Appleby Trust (Mauritius) Limited
Fourth Defendant

and

Camilla De Bourbon des Deux-Siciles
Fifth Defendant

and

Camillo Crociani Foundation IBC (Bahamas) Limited
Sixth Defendant

and

BNP Paribas Jersey Nominee Company Limited
Seventh Defendant

and

GFin Corporate Services Limited

Eighth Defendant

and

Ocorian Trustees (Jersey) Limited
Party Cited

Advocate E. B. Drummond **for the Plaintiffs**.

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

Authorities

Crociani v Crociani [2017] JRC 146 .

Equity: Doctrines and Remedies by Meagher, Gummow and Lehane.

Trusts (Jersey) Law 1984.

Speight v Gaunt [1883] 9 App. Cas. 1.HL

Bartlett v Barclays Bank Trust Co. Limited [1980] Ch. 515 at 531

Midland Bank Trust Company (Jersey) Limited v FPS [1995] JLR 352

Browning v Brachers [2005] EWCA Civ 763

Wallersteiner v Moir (No 2) QB 373

Guerin v R [1984] 2R.C.S

Nestle v National Westminster Bank Plc [1993] 1 WLR 1260

Libertarian Investments Limited v Hall 17 ITELR :

Trusts — concerned with two of the inquiries ordered by Court on 11th September, 2017.

JUDGMENT ON PORTFOLIO AND LOAN INQUIRIES

COMMISSIONER:

1 This judgment is concerned with two of the inquiries ordered by the Court on 11 th September, 2017, following the handing down of the substantive judgment in this matter *Crociani v Crociani* [2017] JRC 146 ("the substantive judgment"). The party cited, as the new trustee of the Grand Trust, has delegated the conduct of these inquiries on its part to the plaintiffs.

2 Under the substantive judgment, the Court set aside the 2010 Appointment, as defined in paragraph 2 of that judgment, by which substantial assets had been appointed out of the Grand Trust to the Fortunate Trust, including a portfolio held with BNP Paribas (Suisse) SA ("BNP Suisse") and a number of loans receivable, ordering inquiries into both. We take first the portfolio inquiry.

The Portfolio Inquiry

3 The Court ordered the first and third defendants jointly and severally to pay to the party cited the value of the portfolio as at the 16 th May, 2011, the date it was transferred away, namely the sum of US$100,347,046. The third defendant has paid half that amount, which has been received by the party cited into Cristiana's Trust (within the Grand Trust), with its obligation to pay the balance being stayed pending appeal.

4 The Court then ordered an inquiry into what the value of the portfolio would have been at the date of the handing down of the substantive judgment, namely 11 th September, 2017, if the sum of US$100,347,046 had not been transferred out of the Grand Trust on 16 th May, 2011.

5 The first and third defendants were ordered jointly and severally to pay the difference, if any, between the sum of US$100,347,046, being the value of the portfolio on the 16 th May, 2011, and the hypothetical valuation of the portfolio as at 11 th September, 2017, as determined by the inquiry, together with interest from 11 th September, 2017.

6 The purpose of the inquiry is to put the Grand Trust back to what it would have been at the date of judgment had the portfolio not been transferred. This is a hypothetical exercise, and whilst there is agreement that the valuation must be on the basis of how prudent trustees acting in accordance with all of their duties would have invested the portfolio, there is a clear difference between the plaintiffs and the third defendant as to how that exercise should be conducted. In essence:–

> (i) The plaintiffs say that the hypothetical performance of the portfolio should be measured against the performance of the relevant peer group within the investment industry.
>
> (ii) The third defendant says that the hypothetical performance of the portfolio should be measured on the basis of it being managed in a manner consistent with its management prior to 16 th May, 2011.

7 Because of their different approaches, their experts come from different disciplines, the plaintiffs' expert being versed in trustee investment management and the third defendant's expert being a forensic accountant.

8 The Court has to determine which of these different approaches is the most appropriate for ascertaining how, hypothetically, the portfolio would have performed in the six years four months between 16 th May, 2011, and 11 th September, 2017.

9 Prior to summarising the evidence of the two experts, it is helpful to be reminded of the following:–

(i) The terms of the Grand Trust as construed in the substantive judgment and in particular the status of the first defendant as a default beneficiary (paragraph 206) and the first plaintiff and fifth defendant as principal beneficiaries (paragraph 218).

(ii) Throughout most of its history the Grand Trust has had a professional trustee. Until 10 th February, 2012, the professional trustee had acted with two lay trustees. A summary of the trusteeships can be found at paragraphs 5 to 25 of the substantive judgment, but the first defendant was a lay trustee from inception until the 10 th February, 2012, and the second defendant was a lay trustee from 9 th April, 1999, again until the 10 th February, 2012.

(iii) The portfolio had always been reported in US dollars and it was agreed that it would have continued to be so reported after 16 th May, 2011.

(iv) From 1999 to 16 th May, 2011, the portfolio was held by BNP Suisse, but it had no discretion over investments. Investment decisions were taken by the first defendant because on 8 th October, 1993, Chase Bank, a predecessor trustee, had appointed her as “investment counsellor” to the Grand Trust and on 23 rd July, 1994, had delegated to her the full exercise of the trustee's investment powers under the Grand Trust. We will refer, as the parties have done, to the portfolio being managed by the first defendant in the sense that she controlled the investment decisions.

(v) The second defendant played no part in the investment or monitoring of the portfolio at any stage of his trusteeship.

(vi) On 30 th January, 2008, BNP Suisse completed an investor profile (in French) for the Grand Trust which we will refer to as “the BNP Questionnaire”. The form was designed for an individual, and it has been completed on the basis that the first defendant was the only beneficiary. For example, one of the first questions is *“How old are you?”* to which the box *“Over 65”* has been crossed. For the question *“What is your investment horizon?”* the box *“1–5 years”* has been crossed. For the question *“What is your investment objective?”* the box *“Regular Yield”* had been crossed. The responses were scored, and resulted in a BNP investor profile of *“Cautious investor”*, namely *“You are ready to take very low risks in the short term in exchange for yields that are slightly higher than those of bank deposits”*. The *“Cautious investor”* profile indicated a portfolio mix of 20% equities, 45% bonds, 20% money market and 15% alternative investments. The form is not signed by the first defendant and there is no evidence of which we are aware that she ever saw it, but for these purposes we assume that it had been completed by the officers of BNP Suisse who signed it in consultation with the first defendant.

(vii) There are a number of trustee resolutions signed by the third defendant "as Trustee of the Grand Trust" showing that it did review the performance of the portfolio held with BNP Suisse. The resolutions are not counter-signed by either co-trustee, and we are not aware of any evidence that these resolutions and the attached investment performance reports were ever seen by either co-trustee.

(viii) By the 16 th May, 2011, there had been a breakdown in the relationship between the first plaintiff and the first and fifth defendants (paragraphs 415 to 417 of the substantive judgment). The first letter sent by the first plaintiff's Italian lawyer to the first defendant was dated the 11 th May, 2011, (paragraph 422 of the substantive judgment).

Evidence of Mr James Day

10 Mr Day was called by the plaintiffs. He is managing director of Peritus Investment Consultancy, a specialist private company located in Zurich guiding trustees and high net worth clients in all aspects of profiling, asset modelling and the selection and monitoring of investment managers.

11 His instructions were as follows:–

"As regards Madame Crociani's past performance managing the portfolio between 2003 and May 2011:

(1) How would you describe her investment strategy? It may assist if you can plot the mix of main asset classes over the relevant period and the average across that period.

(2) Is this strategy consistent with the mandate completed by Madame Crociani on 30 January 2008?

(3) Over the period in question, how did her actual performance compare to industry benchmarks for strategy (1) and (2)?

What would be the value of the portfolio as at 11 September 2017 if the sum of US$100,347,046 had not been transferred out of it on 16 May 2011?

(4) Assuming Madame Crociani had continued to manage the portfolio in line with her previous investment strategy;

(5) Assuming Madame Crociani had managed the portfolio in line with the mandate completed by Madame Crociani on 30 January 2008; and

(6) Assuming a professional investment manager had been appointed. In this scenario please explain what investment strategy you would expect an investment manager to adopt acting for a prudent trustee?"

12 In terms of his methodology, rather than select a benchmark to measure a return equivalent to cautious, moderate or aggressive risk profiles, he advised that it was normal to focus on peer groups, because it is rare for investment managers to match or exceed a benchmark return.

13 A peer group comprises a weighted calculation of the returns of the investment industry following a similar investment risk profile, and he had used the publicly available source, namely Morningstar, which is independent of the investment industry. Depending on the risk profile selected, the peer group would comprise between 50 and 500 institutions, which he said was meaningful and statistically useful.

14 He used the Morningstar GIFS OE USD Cautious, Morningstar GIFS OE USD Moderate and Morningstar GIFS OE USD Aggressive risk profiles to represent the returns that were secured on average by the investment industry for each risk level. The measure is for total returns, meaning that it includes income and dividends reinvested after any withholding tax is deducted, net of each investment manager's management fees.

15 Looking at the performance of the portfolio prior to May 2011 under the management of the first defendant it showed, he said, that there was always a significant cash balance, ranging from 28% to 66%, with an average of 48%. Cash before the credit crisis in 2008 offered a relatively attractive yield, but such a large concentration in one asset class would often be perceived to be a risk, as the opportunity cost of not securing other returns would have been substantial. After the credit crisis, cash was, he advised, a very poor asset class as interest rates were almost zero.

16 The equity exposure ranged between 3% — 34%, with an average of 13%, and was always at the lower end of the theoretical boundary under the BNP *"cautious investor"* profile, likewise with bonds. In essence, none of the weightings came close to the neutral allocations set out in the BNP " *cautious investor"* profile.

17 However, *"by accident rather than by design"*, the results of the first defendant's management during the period 2003 to 2011 and the results if the portfolio had been invested in the same period in accordance with the BNP *"cautious investor"* profile ended up being very similar.

18 Turning to the period from May 2011 to September 2017, he was unable to speculate how Madame Crociani would have managed the portfolio over that period, but he assumed that the returns secured by her using her self-determined investment approach would have continued to be very similar to that of the Morningstar cautious peer group representing the

average for the industry. This showed that the benchmark return was 22.9% and the peer group average return was 15.9%, and taking the latter, this would value the portfolio on 11 th September, 2017, at US$116,302,227, an increase of US$15,955,180.

19 He was of the strong opinion, however, that if a professional investment manager had been appointed to manage the portfolio, it would not have adopted a cautious strategy. A prudent trustee, he said, would have completed the questionnaire in consultation with the true principal beneficiaries (i.e. the first plaintiff and the fifth defendant, not the first defendant) and would have recognised the interests of their children, the lack of need for distributions and the long term horizon. Such a trustee would easily have concluded that a moderate risk profile would have been appropriate or possibly even a more aggressive profile.

20 Mr Day had completed the BNP questionnaire again with this in mind, which when re-scored raised the BNP risk profile from *"cautious"* to *"dynamic"*, which, according to the BNP questionnaire would result in an asset allocation of 5% money market, 20% bonds, 15% alternatives and 60% equities. This, in his view, would justify a moderate peer group or even higher risk, but on balance, he felt that a prudent trustee would have selected a moderate risk profile.

21 The appropriate peer group would be the Morningstar GIFS OE USD moderate peer group, which showed a benchmark return of 35.1% over the period from 16th May 2011 to 11th September 2017, with a peer group average return of 23.4%. The latter would have given a valuation of the portfolio as at 11th September 2017 of US$123,828,256, an increase in value of US$23,481,209.

22 However, Mr Day went on to make the point that this is a very substantial portfolio, and in his view, it would be quite unusual for a prudent trustee not to engage professional parties to support the investment process, asset allocation and the identification of investment managers. A prudent trustee would, at the very least, have instituted a beauty parade which would invite the most suitable and best performing investment managers of the time to present to the trustees and to deploy the assets across between three to five investment managers or more. In other words, the significant assets within the portfolio would have allowed the trustees access to some of the best professional advisers and investment managers with very affordable terms and conditions, which would have delivered results better than average.

23 Rather than the mean average for the moderate peer group, a result in the first quartile of that peer group should have been possible in his view, but in fairness, he suggested a result on the border of the first and second quartiles was reasonable. His calculations of the first/second quartile percentage returns took in the period from 1st June, 2011 to 31 st August, 2017, rather than the strict dates in issue here, but he advised that the monthly data comprises the fullest peer group, including firms who provide data not only daily but weekly and monthly. This allowed for the most reliable analysis for looking at the peer group boundaries, rather than the average and in any event because of market movements at that

time it gave figures marginally beneficial to the first and third defendants.

24 Taking those figures the portfolio would have increased over the period of 1 st June, 2011, to 31 st August, 2017, by at least 31% (still below the benchmark), giving a portfolio valuation as at 31st August, 2017 of US$131,454,630, an increase of US$31,107,584.

Evidence of Mr Luke Steadman

25 Mr Steadman was called by the third defendant. He is a forensic accountant and partner of Alvarez & Marsal Disputes and Investigations, LLP. His instructions were as follows:–

> *"1. Assuming that there would have been no active management of the portfolio between 16 May 2011 and 11 September 2017. This approach eliminates the need for speculation as to how the portfolio would have been managed after May 2011 as it is limited to the assets which were in the portfolio at that time. This is how [the third defendant] manages portfolios when it does not have an investment mandate and where it cannot obtain instructions from the portfolio manager (e.g. because of illness or death).*
>
> *2. An alternative approach which assumes that the portfolio would have been actively managed in the period between 16 May 2011 and 11 September 2017, in a manner consistent with the management of the portfolio by [the first defendant] prior to May 2011.*
>
> *3. You will note from …. [the first plaintiff's] affidavit referred to above, that she argues she could have appointed a professional investment manager in 2011 to ensure optimal growth of the portfolio. Leaving aside whether this contention is realistic, can you consider what impact such a strategy would have had on the value of the portfolio."*

26 Mr Steadman described the approach in the first question as *"the objective approach",* where you take the investments in the portfolio as they were on 16 th May, 2011, and there is no active management thereafter at all. As investments matured, their proceeds would be retained in cash, taking the cash element of the portfolio from 43.4% as at 16 th May, 2011, to 60.2% as at 11 th September, 2017. Using this methodology, he calculated that the portfolio would have been worth US$102.4 million as at 11 th September, 2017, an increase of only 2% over its valuation some six years earlier.

27 Mr Steadman described the approach in the second question as the " *subjective approach"*, in other words, what would have been the value of the portfolio if it had been managed in a manner consistent with the management of the portfolio by the first defendant prior to May 2011.

28 This instruction necessitated Mr Steadman in analysing in some detail the performance of the portfolio under the management of the first defendant. This showed, he said, that on a number of occasions, she would take the advice of BNP Suisse, but equally on a number of other occasions she would suggest investments of her own. There were many instances where it was difficult, he said, to ascertain a particular strategy underlying her investment suggestions "often ignoring BNP's advice, or making decisions based on emotional factors."

29 He advised that the asset composition of the portfolio had changed significantly in the period 2003–2011, with a directional shift from lower-risk cash and bonds to a more balanced portfolio. However, this shift was not linear and the composition of the portfolio in the final two years prior to the transfer to the Fortunate Trust fluctuated significantly, and it was therefore difficult for him to discern a particular investment strategy, with the result that there was considerable uncertainty as to the likely composition of the Grand Trust portfolio after May 2011.

30 He addressed this problem by taking *"the individual asset-currency packages"* held in the Grand Trust Portfolio as at May 2011 (i.e. USD equities, Euro equities, USD bonds, Euro bonds etc), and applying relevant market index returns to those packages going forward, but not allowing any re-allocation as between them. Dividends received would be deemed to have been re-invested in the same asset. The proceeds of investments (such as bonds) that matured would be deemed to be held in cash of the same currency.

31 Applying appropriate returns to those packages, he calculated a total return between May 2011 and September 2017 of 7.1%, which would generate a value of the portfolio as at 11th September, 2017, of US$107.5 million, an increase of US$7,152,953 over the six year period.

32 Mr Steadman was unable to address the third question posed in his instructions because of the lack of clarity, he said, over the investment strategy that the plaintiffs claim would have been pursued after May 2011, although he did prepare illustrative valuations of the portfolio based on varying levels of equity in the portfolio; the greater the levels of equity, the higher the valuation that was achieved.

Joint Report

33 The experts met and prepared a joint report for the Court, but there was a limit to the extent to which they could narrow the differences between them, partly because of their different instructions and partly because of their different professional disciplines, but they agreed the following:–

(i) The first defendant's management of the portfolio was materially different to the approach that a professional investment fund manager following a cautious investment mandate would have adopted.

(ii) Her management style followed no consistent pattern of behaviour.

(iii) Although the portfolio achieved a return over the period January 2003 to May 2011 similar to the average performance of a peer group of cautious funds that was by accident rather than design.

Mr Steadman's Supplemental Report

34 Mr Steadman filed a supplementary report in which he examined the effect of currency fluctuations on the US valuation of the portfolio. Over the period May 2011 to September 2017, the Euro weakened against the Dollar by 15.6% and he said that under Mr Day's valuation methodology the impact of this downward pressure on the portfolio value from currency depreciation was unclear, since the US Dollar mandate was assumed. If one applied the increase in the portfolio value assumed by Mr Day (the average cautious peer group return of 15.9%) but " *then considers a relevant exchange rate of deterioration to the 44.9% of the portfolio that was held in currencies other than US Dollars as at 16 th May, 2011, Mr Day's valuation under this first approach would reduce to US$108.1 million"*. This came close to his subjective valuation of US$107.5 million, based on the assumption that this currency allocation would remain constant from May 2011 to September 2017. There would be commensurate reductions in the other valuations prepared by Mr Day.

The Law

35 It seems to us fundamental, and it was not in dispute, that in carrying out this hypothetical exercise as to how the portfolio would have performed between May 2011 and September 2017, we must assume that the trustees of the Grand Trust over the relevant period, whoever they may have been, would have performed all of their duties in relation to the Grand Trust. The plaintiffs, as beneficiaries, are entitled to no less than that. The point is made in *Equity: Doctrines and Remedies* by Meagher, Gummow and Lehane at paragraph 23–425:–

> ***"It seems to be inherent in the compensatory principle at the heart of equitable compensation that a court's hypothesis of what would have happened had the defendant not committed the particular breach of which complaint is made should extend further to assume that the defendant would have performed all the defendant's duties in relation to the relevant trust or fiduciary relationship.*** …
>
> ***Nevertheless, it would seem contrary to principle to proceed on the basis that the defendant would have properly performed fewer than all the defendant's duties.*** These duties are not merely a narrowly defined set of fiduciary duties, nor duties which are imposed by equity rather than duties assumed by the fiduciary or imposed by legislation. In the case of a trustee, it is

submitted, a court ought to suppose that the trustee:

> ***(a) would have complied with (i) the terms of the trust, and (ii) with any applicable legislation; and***
>
> ***(b) would have (i) performed the trustee's obligations and (ii) exercised the trustee's discretions within the bounds set by fiduciary doctrine and to the level of care and diligence required by equity (or, where there are statutory duties of care owed by trustees, by statute) and (iii) complied with any other equitable obligations, such as obligations of good faith and to exercise powers only for proper purposes.”***

36 Under Jersey law, those duties are set out in Article 21 of the Trusts (Jersey) Law 1984 as follows:–

> ***“21 Duties of trustee***
>
> ***(1) A trustee shall in the execution of his or her duties and in the exercise of his or her powers and discretions –***
>
> ***(a) act***
>
> ***(i) with due diligence*** ,
>
> ***(ii) as would a prudent person*** ,
>
> ***(iii) to the best of the trustee's ability and skill; and***
>
> ***(b) observe the utmost good faith.”***

This is consistent with the general principle under English law expressed in the well-known case of *Speight v Gaunt* [1883] 9 App. Cas. 1.HL:–

> ***“…[As] a general rule a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own.”***

37 We will refer therefore to “a prudent trustee” as a trustee who is fulfilling all of the duties of a trustee. We note however that a higher standard of care applies to a trustee such as a trust corporation carrying on a specialised business of trust management — see *Bartlett v Barclays Bank Trust Co. Limited* [1980] Ch. 515 at 531, cited with approval by the Jersey Court of Appealin *Midland Bank Trust Company (Jersey) Limited v FPS* [1995] JLR 352 at page 381.

38 As Meagher, Gummow and Lehane say at paragraph 23–395, the decision as to what would have happened if there had been no breach of trust is not a simple question of fact

and must be reached by means of a structured exercise. They go on to say at paragraph 23–400:–

> ***"In considering the structure of the hypothetical inquiry, it is well to remember that the purpose of the inquiry is to permit a comparison between the facts as they ought to have been and the facts as they are, in order to identify any loss suffered by the trust fund or a fiduciary's principal by reason of the relevant breach of duty, and if so in what amount.*** That purpose is frustrated if too much weight is placed on the hypothesis of what would have happened without the particular breach."

39 There are a number of presumptions to assist the Court in this hypothetical exercise. The first is encapsulated in this extract from the judgment of Parker LJ in the English Court of Appeal decision of *Browning v Brachers* [2005] EWCA Civ 763 at paragraphs 204 and 205:–

> ***"[204] In the well-known case of*** *Armory v Delamirie* (1772) 1 Stra 505 ***the claimant, a chimney-sweeper's boy, found a jewel, and took it to the shop of the defendant (a goldsmith) to find out what it was worth.*** The defendant handed it to an apprentice, who, under the pretence of weighing it, told the defendant that it was worth three halfpence. The defendant offered the claimant that sum, but the claimant refused to take it and demanded the return of the jewel; whereupon the apprentice returned only the empty socket. The claimant sued the defendant in trover. The trial of the action took place before Pratt CJ and a jury. The Chief Justice ruled that the claimant was entitled to ***maintain an action against the defendant in trover.*** The significance of the case, however, lies in the direction which the Chief Justice gave to the jury as to the measure of damages. In the course of the trial, the jury had heard evidence from witnesses in the trade as to the value of a jewel of the finest quality of the right size to fit the socket. The brief report of the case concludes as follows:
>
> ***'…. The Chief justice directed the jury that unless the defendant produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did'*** .
>
> ***[205] It has been recognised in subsequent authorities that in so directing the jury the Chief Justice was applying a general principle to the effect that, in a case where the defendant has wrongfully deprived the claimant of property of value (be it an item of physical property or a chose in action), the court will, save to the extent that it is persuaded otherwise by the defendant, assess the value of the missing property on a basis which is generous to the Claimant."***

40 As Advocate Redgrave submitted, this assumption is of limited assistance in this case, because we know what was removed from the Grand Trust, namely the portfolio, and its precise value on the date of its removal. The issue is how that portfolio would have performed if it had not been removed.

41 The second assumption is that where there are a number of realistic possibilities as to what might have been done with an asset, the presumption is made that it would have been used in the most beneficial way. In the English Court of Appeal case of *Wallersteiner v Moir* (No 2) QB 373, Lord Denning MR said this in the context of determining whether to award compound interest for breach of fiduciary duty:–

> ***"In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business.*** It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money — years later — is by no means adequate compensation, especially in days of inflation. The company should be compensated by the award of interest. That was done by Sir William Page Wood V.-C. (afterwards Lord Hatherley) in one of the leading cases on the subject, *Atwool v Merryweather* [1867] L.R. 5 Eq. 464n., 468–469 . ***But the question arises: should it be simple interest or compound interest?*** On ***general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it: cf.*** *Armory v Delamirie* (1723) 1 Stra. 505. ***"***

42 In *Guerin v R* [1984] 2R.C.S. the Supreme Court of Canada used the principle in the calculation of loss by presuming that the best possible (but realistic) use of the land in question would have been made. The land in question belonged to an Indian Band (a unit of government for those people subject to the Indian Act in Canada) which had been surrendered to the Crown for lease to a golf club. The terms of the lease obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. The trial judge found the Crown in breach of trust in entering into the lease and awarded damages on the basis of the loss of income which might reasonably have been anticipated from other possible uses of the land. Quoting from the judgment at page 362:–

> ***"Since the lease that was authorised by the Band was impossible to obtain, the Crown's breach of duty in this case was not in failing to lease the land, but in leasing it when it could not lease it on the terms approved by the Band.*** The Band was thereby deprived of its land and any use to which it might have wanted to put it. Just as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period they were wrongfully withheld from him by the trustee (see *McNeil v Fultz* (1906), 38 S.C.R. 198 ,) ***so also it should be presumed that the Band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease.*** In this respect also the principles applicable to determine damages for breach of trust are to be contrasted with the principles applicable to determine damages for breach of

contract. In contract it would have been necessary for the Band to prove that it would have developed the land: in equity a presumption is made to that effect: see Waters, Law of Trusts in Canada, at p. 845."

43 *Guerin* was cited with approval by the English Court of Appeal in *Nestle v National Westminster Bank Plc* [1993] 1 WLR 1260, in which the bank had been actioned for breach of trust in the way it had invested the trust fund. The claim failed, because despite breaches of trust being found, the plaintiff was unable to prove loss. Quoting from the judgment of Leggatt LJ at page 1283:–

> ***"In*** *Guerin v The Queen* [1984] 13 D.L.R. (4TH) 321 ***the Crown leased to a golf club land belonging to an Indian band to which the Crown owned a fiduciary duty.*** Since the terms of the lease were unsatisfactory and the lease for 85 years was irrevocable, the court had to evaluate the loss to the band, and did so by presuming against the Crown that the band would have made the ***most profitable use of the land by letting it for residential development.*** That loss had been suffered by the letting to the golf club was obvious: the presumption applied in proving the extent of the loss by relieving the band from the need to prove that they would have let the land for development .
>
> ***In my judgment either there was a loss in the present case or there was not.*** Unless there was a loss, there was no cause of action. It was for the plaintiff to prove on balance of probabilities that there was, or must have been, a loss. If proved, the court would then have had to assess the amount of it, and for the purpose of doing so might have had recourse to presumptions against the bank. In short, if it were shown that a loss was caused by breach of trust, such a presumption might avail the plaintiff in quantifying the loss. The plaintiff's difficulty is in reaching that stage."

44 In the same case, Dillon LJ said this on the subject of quantification at page 1268:–

> ***"If what had happened in the present case had been that the bank, through failure to inform itself as to the true scope of its investment powers, had invested the whole of the annuity fund in fixed interest securities, and no part in equities, for the whole period from 1922 to 1960, then, as on the evidence loss would clearly have been proved to have been suffered, the appropriate course would have been to require the bank to make good to the trust fair compensation — and not just the minimum that might have got by without challenge — for failure to follow a proper investment policy.*** On this I find the Canadian decision in *Guerin v The Queen* [1984] 13 D.L.R. (4TH) 321 ***helpful."***

45 The case before us is to be distinguished, of course, from *Nestle* in that in this case, the loss to the Grand Trust has been proved, and we are concerned therefore with the issue of compensation for that loss.

46 Even so, where there are evidential difficulties facing the Court flowing from the defendant's original wrongdoing as a defaulting fiduciary, the Court should adopt a robust approach, as made clear in the decision of the Final Court of Appeal in Hong Kong in the case of *Libertarian Investments Limited v Hall* 17 ITELR:–

> ***“[138] The evidential difficulties now faced by the court form part of the consequences flowing from the defendant's original wrongdoing as a defaulting fiduciary.*** In such circumstances, the court adopts a robust ***approach.*** This was explained by Handley JA in the New South Wales Court of Appeal in *Houghton v Immer (No 155) Pty Ltd* , ***where equitable compensation was awarded in a case involving equitable fraud (but not a breach of fiduciary duty), as follows:***
>
>> ***‘The defendants are entitled to a set-off for the actual cost of the improvements, but there was no evidence of this cost.*** The accounting issue would normally be referred to a Master but the trial was not conducted on this basis. The defendants would have great difficulty in such an enquiry, since no attempt appears to have been made to keep separate records of the cost of constructing the improvements on the common property …
>>
>> ***At this stage the Court should only remit the matter to a Master as a last resort, if no other course if fairly open.*** The defendants, having improved common property without lawful authority, and attempted to effect a fraud on the minority, are wrongdoers, and their failure to keep and produce proper accounts of their actual expenditure on the common property has made it difficult to assess the compensation due to the plaintiff. Compare *Armory v Delamirie* [(1972) 1 Stra 505, (1722) 93 ER 664] ***… <u>In my judgment the Court should assess the compensation in a robust manner, relying on the presumption against wrongdoers, the onus of proof, and resolving doubtful questions against the party ‘whose actions have made an accurate determination so problematic’</u>.*** See*LPJ Investments Pty Ltd v Howard Chia Investments Pty Ltd (No 2)* (1989) 24 NSWLR 490***AT 508.***’” (Our emphasis)

47 We would also highlight this extract from the judgment at paragraph 123:–

> ***“[123] The exercise of quantifying loss on a wilful default basis is necessarily hypothetical.*** In undertaking that exercise, the court is assisted by techniques developed by the courts of equity, reflecting the stern view taken of defaulting fiduciaries. Thus, as Lord Millett writing extra-judicially points out, a fiduciary is precluded from setting up a case inconsistent with the obligations of his fiduciary position.”

Decision

48 In this case, we are presented with entirely different approaches to the hypothetical exercise before us and we start with those put forward by Mr Steadman on behalf of the third defendant.

49 His first, the objective approach, assumes no active management at all of the portfolio from May 2011 to September 2017. It seems to us that this approach can be discounted without further debate, as it would be completely inconsistent with the duties of a prudent trustee to leave the portfolio effectively unmanaged for over six years. This is not akin to a situation where a bank has no mandate and cannot get instructions. The prudent trustee is under a duty to give instructions.

50 His second, the subjective approach, seeks to replicate what would have happened to the portfolio from May 2011 if it had been managed in the same way as it was prior to May 2011.

51 In our view, there are insurmountable difficulties with this approach, attributable to the fact that the management of the portfolio prior to May 2011 had been in the hands of the first defendant. Mr Steadman's evidence was that she sometimes took the advice of BNP Suisse but at other times did not. She made decisions based on emotional factors and it was difficult for him to discern any particular strategy underlying her investment decisions. Both experts agreed that her management style showed no consistent pattern of behaviour and the returns she achieved between 2003 and 2011, similar to the average performance of a peer group of cautious funds, was by accident rather than design.

52 Mr Steadman, constrained as he was by his instructions, sought to address this difficulty by the artificial process of freezing the asset-currency allocation as it happened, by accident, to be in May 2011 and not permitting any further re-allocation of those assets-currencies over the ensuing six years, on the basis, presumably, that no one could predict how the first defendant might have re-allocated those assets-currencies. There was, for example, in 2005 a 40% re-allocation by the first defendant of Dollar to Euro assets, for which there was no discernible explanation.

53 In our view, no prudent trustee would manage a portfolio of this, or indeed of any size, on the basis that there would be no re-allocation of assets-currencies in this way. In any event, it is inconsistent with the way the portfolio was actually managed previously, when the first defendant did re-allocate assets-currencies, on at least one occasion dramatically.

54 Under Mr Steadman's subjective approach the allocation of assets-currencies in May 2011 was frozen at what it happened to be at that time; for example 43.35% was in cash of which 15.9% was US Dollars and 19.58% Euros. There is no advice as to whether that allocation was appropriate, let alone that it should be continued unchanged. A prudent trustee in May 2011 would have taken advice on the asset-currency allocation of the portfolio and would

have required active management thereafter.

55 In essence the proposition being put forward by the third defendant is that under this hypothetical exercise, we should assume that this large portfolio would be managed between May 2011 and September 2017 by a lay trustee (with no known relevant qualifications other than experience), who sometimes takes professional advice but other times does not, who sometimes makes decisions on an emotional basis and who has no discernible strategy. No-one can predict how the portfolio managed by such a person in such a way would have performed; it might have done well but equally might not. It would be an exercise in pure speculation.

56 Advocate Redgrave argued that a finding that the subjective approach put forward by Mr Steadman would be inconsistent with the duties of a prudent trustee, would necessarily involve a finding that the third defendant and its co-trustees were in breach of trust, prior to May 2011, in permitting the first defendant to manage the portfolio, a wholly new assertion, he said, not pleaded at trial.

57 However, we think that submission is misplaced. We are certainly not concerned with allegations of breaches of trust in the period prior to May 2011. The difficulty arises because it is the third defendant which has put forward a hypothetical exercise based upon the way the portfolio was managed prior to May 2011, which necessitates at least looking at that management.

58 The objective approach, no active management, bears no relation to how the portfolio was managed prior to May 2011, and we have discounted it. The subjective approach also bears no relation to how the portfolio was managed prior to May 2011, in that it assumes no re-allocation of assets-currencies over the six year period which ensued, when the first defendant would almost certainly have re-allocated those assets-currencies. Accordingly, neither approach properly reflects the management of the portfolio by the first defendant prior to May 2011. The fact is that the first defendant was unpredictable in her management of the portfolio and you cannot predict the unpredictable. This does not constitute a finding of breach of trust in the period prior to May 2011.

59 It is not fair to the plaintiffs as beneficiaries to restrict them to a portfolio which is, hypothetically, either not managed at all or managed under artificial restraints as to asset-currency re-allocation or managed on a basis that simply cannot be predicted for the reasons set out above. For all these reasons, we reject the objective and subjective approaches put forward by the third defendant, which leaves us with the approach put forward by Mr Day, on behalf of the plaintiffs.

60 The Court was impressed by the evidence of Mr Day. This is not in any way to criticise the quality of the evidence of Mr Steadman, who did his professional best on the instructions given to him, but Mr Day, unlike Mr Steadman, is in the business of advising and guiding

trustees on the investment process. That is what he does, and he appeared to the Court to be both confident as to how the portfolio would have been managed and very knowledgeable in this area.

61 He eschewed pressing for benchmark returns, because he acknowledged that in practice it is rare for managers to match or exceed the same. Measuring the performance of the portfolio against the peer group within the investment industry from data collected independently by Morningstar, seemed to us to be both fair and powerful. There are 180 fund managers in the Morningstar cautious profile peer group and 270 in the moderate profile peer group; a very broad cross section.

62 We accepted his strong view that a prudent trustee of the Grand Trust would not adopt a cautious strategy, given the very significant funds involved. As he said, younger beneficiaries usually subscribe to a much higher risk and longer term investment profile, due to their age, particularly when distributions are expected to be relatively low. He based his advice on the ages of the principal beneficiaries, namely, the fifth defendant, who was 40 in 2011 and the first plaintiff, who was 38, both of whom had minor children and on the first plaintiff's affidavit, that she would not have required distributions during this period.

63 Advocate Redgrave said there was an air of unreality about the first plaintiff's suggestion that she had no need of distributions between May 2011 and September 2017 as he said she still had legal battles to fight with the first plaintiff and if the Grand Trust had been a source of cash, he says she would have sought a distribution rather than place the burden upon her husband, even if he was a man of independent means.

64 The transfer of the portfolio in May 2011 was part of a strategy being pursued by the first defendant to benefit the fifth defendant (see paragraph 846 of the substantive judgment). If that strategy of unequal benefit between her daughters had not been pursued by the first defendant, it is difficult to know what litigation, if any, might have ensued within the family and the need for distributions to finance it. We bear in mind here the caution expressed by Meagher, Gummow and Lehanne not to place too much weight on hypothesising what might have happened if there had been no breach.

65 We accept the first plaintiff's evidence as to her likely need for distributions, but acknowledge that there was no input from the fifth defendant as to her needs because she had not participated on the substantive proceedings. Mr Day made the point in evidence that the issue of investment policy adopted by a prudent trustee is quite separate from the issue of possible requests for distributions (and the currency of such distributions) upon which it is difficult to speculate.

66 We have to get on with the hypothetical exercise and in our view, given the very large amounts in the portfolio and the other sources of finance available to the family, the issue of possible distributions was not such as to undermine the advice of Mr Day as to the likely

investment strategy that a prudent trustee would have adopted for this portfolio.

67 Mr Day also accepted in evidence that he had looked at the portfolio in isolation, and did not take into account the other assets within the Grand Trust, namely the artwork which currently has a value of between just under US$22,000,000 on the advice of the third defendant's art expert or US$60,000,000 on the advice of the plaintiffs' art expert, and the Promissory Note (with a face value of Euros 52,607,480), or indeed the very substantial assets held outside the Grand Trust through Croci NV (see paragraph 398 of the substantive judgment). He maintained his advice as to the investment strategy notwithstanding, and we agree that the existence of these other assets would not have altered the investment strategy of a prudent trustee.

68 We also agree with Mr Day that the very substantial sums here would have opened the door to the best of financial advice and that a prudent trustee would have expected a better return than the mean average of the performance of the moderate peer group. Mr Day did not press for a return in the first quartile, but on the border of the first and second quartile, resulting in a total return (i.e. with the income re-invested) of at least 31% over the six year period, which is about 4.5% per annum compounding — as Advocate Drummond said, hardly meteoric.

69 Advocate Redgrave submitted that, failing the approaches of Mr Steadman, we should adopt the Morningstar cautious as opposed to moderate peer group because the portfolio had in the past been managed on a cautious basis. It is true that the BNP questionnaire adopted a cautious strategy, but both experts agreed that it was not a strategy that the first defendant followed. The fact that the same results happen to have been achieved was by accident rather than design. Furthermore, the BNP questionnaire had been completed on the erroneous basis that the sole beneficiary was the first defendant, then aged over 65, with a short-term investment horizon, whereas the two principal beneficiaries were her much younger daughters, who would have had a much longer term investment horizon. If it had been completed properly then as Mr Day said, the risk profile would have been raised from the BNP *"cautious"* to the BNP *"dynamic"*.

70 In her fifth affidavit, the first plaintiff said that if the 2010 Appointment had not been made, then given the fall-out in the family, she would have insisted on a professional investment manager being appointed who would have ensured optimal growth. Advocate Redgrave argued that this was implausible, but in our view, this is again hypothetical speculation that does not assist. Even if the first defendant had stayed on as investment manager, it is impossible to predict, for the reasons given, how she would have managed the portfolio between May 2011 and September 2017 hence the resort, properly, to the advice of Mr Day, as to how the portfolio would have been managed by reference to the appropriate peer group within the investment industry.

71 Advocate Redgrave asks us to be cautious about the figures taken by Mr Day from Morningstar for the following reasons:–

(i) He said they assumed in May 2011 a prudent trustee would have realised the portfolio and invested it in one of the US Dollar funds listed by Morningstar. In our view, that is not the assumption. The purpose of referring to the US Dollar funds monitored by Morningstar is to achieve a fair method of measuring how this US Dollar denominated portfolio would have been likely to perform as against the US Dollar denominated funds within the peer group.

(ii) Morningstar had its limitations when considering historic performance, because it only features the funds that are still in existence now, with the poorer performing funds having been closed down and therefore excluded, which Advocate Redgrave said inflates the figures — what is known as survivorship bias. They do not take funds that were in existence in 2011 and work forwards, to see how they perform. Mr Day says it is not correct to say that the figures would have been inflated in this way. Changes in funds were not always due to poor performance and the performance of such funds was included in the data used to calculate the averages for the actual period in question. It remained, he said, the fairest measure of the performance of a fund of this size, and we accept his evidence.

(iii) Morningstar is not a forensic tool; it is used by investment professionals to look at the past performance of existing funds, not by forensic accountants to reconstruct portfolios. It is a blunt instrument for that purpose. We disagree. It seems to us to be a very good and fair way of assessing how, hypothetically, this portfolio is likely to have performed.

72 Advocate Redgrave said we should ignore the above average percentile performers. It would not have been a breach of trust to continue managing the portfolio as before, and it was not necessary to see what a different investment manager might have been expected to achieve had they employed someone like Mr Day and aimed for above average results. We disagree.

73 The plaintiffs, as beneficiaries, are entitled to have this hypothetical exercise carried out in the most beneficial way and as Dillon LJ said in *Nestle*, it is not a question of the minimum that a trustee could have got away with without being actioned for breach of trust. A trustee might have got away with adopting a cautious investment policy, but if there is any doubt as to how the questions *"cautious"* or *"moderate"*, "mean average" or *"first/second quartile"* should be resolved, the presumption is that they should be resolved in favour of the beneficiaries and against the first and third defendants as the defaulting trustees. It happens that resolving them this way accords with the expert evidence of Mr Day, the only expert evidence we have as to what a prudent trustee would have done. Mr Day's advice comes from his experience in the trustee investment field and we found it persuasive.

74 Mr Redgrave's final point, on which he placed great stress, related to the currency effect upon Mr Day's figures. As at May 2011, he said the trust fund comprised some 43.2% of Euro denominated assets, the Euro being the home currency of the Crociani family (apart from the first plaintiff) and he says such substantial Euro holdings would have been

maintained. In reality, he said there was a Euro portfolio and a Dollar portfolio, and during the period May 2011 to September 2017, the value of the Euro fell against the Dollar by 15.6%, depressing the value of the Euro assets when converted to Dollars. Mr Day's figures should, therefore, be adjusted, he said, downwards to reflect this.

75 In our view, this argument is flawed for the following reasons:–

(i) The portfolio has been reported (and it follows monitored) from inception in US Dollars and it was agreed by the parties that it would have continued to be so reported between May 2011 and September 2017. It would comprise from time to time a mixture of assets-currencies depending on the investment decisions of the investment manager, but on each valuation date the non-US assets-currencies would be notionally converted to US Dollars at the then prevailing exchange rate to give a US Dollar value for the whole portfolio.

(ii) The loss to the trust fund of the Grand Trust was a portfolio valued in US Dollars and the compensation is payable (and has in part been paid) in US Dollars. It was not, and in our view, could not have been suggested that the loss to the trust fund comprised two portfolios, one in US Dollars and one in Euros, with compensation being paid separately in the relevant currency for each.

(iii) The asset-currency allocation of the portfolio as at 16 th May, 2011, was a matter of pure chance. There was no rationale for that allocation and no basis, other than speculation, for saying that it would have been maintained under active management. Euros may have been the home currency for the first and fifth defendants, but the Grand Trust had a large euro asset in the Promissory Note and there were substantial euro assets outside the Grand Trust held in Croci NV, including the jewel in the crown Ciset.

(iv) Mr Day was clear that the peer group managers of their respective US Dollar funds would all have invested in assets and currencies world-wide, although it was impossible to say how each would have been positioned. There would have been winners and losers, but they could all have been exposed to Euro assets, and the currency risk is therefore built in to all of their performance figures.

76 There was no evidence before us as to how this portfolio would have performed if reported in Euros, but the fact is that it was reported in US Dollars and the hypothetical exercise we are embarked upon is to find its value as at 11 th September, 2017, in US Dollars.

77 We do not know what proportion of Euro denominated assets or cash would have been in the hypothetical portfolio over the six year period and how any currency risk would have been managed, but that is why the measurement against the peer group is so powerful, as they are all US Dollar denominated funds exposed to the same currency risks.

78 We therefore conclude that the value of the portfolio as at 11 th September, 2017, would

have been US$131,454,630 and pursuant to paragraph 21b of the Act of 11 th September, 2017, the first and third defendants are jointly and severally liable to pay to the party cited the difference between that sum and the sum of US$100,347,046, being the value of the portfolio on 16 th May, 2011, namely the sum of US$31,107,584 together with interest on that amount at the judgment rate calculated in accordance with practice direction RC 05/06 from 11 th September, 2017, until payment.

The loan inquiry

79 The final issue for us to determine is the loan inquiry. Amongst the assets appointed out under the 2010 Appointment were the benefit of interest-free loans due by Croc Investments SA, Good Luck Limited, Happiness Limited, the Foundation and the Fortunate Trust, all entities associated with the first defendant. These loans have been built up over the years because the Grand Trust had been used to pay the administrative costs and expenses of these entities.

80 On 11 th September, 2017, the Court ordered an inquiry as to the extent to which these interest-free loans were recoverable, as at 9 th February, 2010, the date of the 2010 Appointment. The Court heard evidence from Mr Steve Caine, an accountant and associate partner in the London office of Ernst & Young LLP called by the plaintiffs. His advice, in essence, was that Happiness Limited, Good Luck Limited and the Foundation were not sufficiently solvent for the loans due by them to be recoverable, but that the Fortunate Trust (or the trustee thereof) and its wholly owned company Croc Investments SA were sufficiently solvent (manifestly so) for the loans payable by them to be recoverable.

81 The third defendant filed an affidavit from Mrs Kim Deveney, the general manager and a director of the third defendant, who said that it was never intended for these loans to be called in, and they would in due course have been written off. The Fortunate Trust and Croc Investments SA were illiquid and Madame Crociani would never have agreed to the sale of any of the valuable artwork owned by Croc Investments SA for this purpose.

82 As Advocate Drummond said this is opinion as opposed to factual evidence on her part, but leaving aside the propriety of writing off sums due to the Grand Trust in this way, how these loans would have been treated in the future is a matter of speculation. The fact of the matter is that the Fortunate Trust and its company Croc Investments SA were sufficiently solvent for the loans due by them to be recoverable, and we find that they were recoverable in full. Pursuant to paragraph 21d of the Act of Court of 11 th September, 2017, the first and third defendants will now be jointly and severally liable to pay the full amount of those two loans, together with interest at the judgment rate calculated in accordance with practice direction RC 05/06 from 11 th September, 2017, to payment.