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BNP Paribas Jersey Trust Corporation Ltd v Cristiana Crociani

Jurisdiction:	Jersey
Judge:	Sir William Bailhache, James McNeill, John Martin
Judgment Date:	25 July 2018
Neutral Citation:	[2018] JCA 136A
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Text

[2018] JCA 136A

COURT OF APPEAL

Before:

Sir William Bailhache, **Kt., President**

James McNeill, **QC; and**

John Martin, **QC**.

Between
BNP Paribas Jersey Trust Corporation Limited
First Appellant

and

Appleby Trust (Mauritius) Limited
Second Appellant

and

Camilla de Bourbon des Deux Siciles
Third Appellant
and
Cristiana Crociani
First Respondent

and

A (by her Guardian ad Litem)
Second Respondent

and

B (by her Guardian ad Litem)
Third Respondent

Advocate W. A. F. Redgrave **for the First Appellant**.

Advocate E Moran **for the Second Appellant**

Advocate A D Hoy **for the Third Appellant**.

Advocate A D Robinson **for the Respondents**

Authorities

Crociani v Crociani [2017] JRC 146.

Trusts (Jersey) Law 1984

Target Holdings Limited v Redferns [1996] AC 421

AIB Group (UK) plc v Mark Redler & Co Solicitors [2015] AC 1503

Canson Enterprises Limited v Boughton & Co (1991) 85 DLR (4th) 129

Re Pauling's Settlement Trusts [1962] 1 WLR 86, 108, 115

Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484

Walton Dégrèvement [2015] JRC 003

Twinsectra Ltd v Yardley (HL) [2002] 2 AC 164

Barlow Clowes v Eurotrust Ltd (PC) [2006] 1 WLR 1476

Trusts (Amendment No. 6) (Jersey) Law 2013

Investec Trust (Guernsey) Limited and another v Glenalla Properties Limited and others [2018] UKPC 7

States of Jersey Law 2005

Futter v Futter and *Pitt v Holt* [2013] 2 AC 108.

In re A Trust [2009] JLR 447 [2009] JLR 447

In the matter of the Lochmore Trust [2010] JRC 068

In re S Trust [2011] JLR 375

In the matter of Seaton Trustees Limited [2009] JRC 050

In the matter of the B Life Interest Settlement [2012] JRC 229

In re Z Trust 2016(1) JLR 132

Link Trustee Services (Jersey) Limited re the B Trust [2018] JRC 043.

Wilson v First County Trust Ltd (No. 2) [2004] 1 AC 816

Westdeutsche Landesbank v Islington LBC [1996] AC 669

Bristol & West Building Society v Mothew [1998] Ch 1

Guardian Trust and Executors Company of New Zealand Ltd v Public Trustee of New Zealand [1942] AC 115

Armitage v Nurse [1998] Ch 241, 252C-D

Re Barney [1892] 2 Ch 265

Kells v Cashback Limited [2012] JCA 140

Cloutte v Storey [1911] 1 Ch 18

Nestlé v NatWest Bank plc [1993] 1 WLR 1260

Crociani v Crociani [2017] JRC 145A

Trust — appeal against the judgment of the Royal Court [2017] JRC 146

PRESIDENT:

Introduction

1 This is the judgment of the court which concerns the appeals of three of the parties to proceedings before the Royal Court which resulted in a lengthy trial in 2017. The judgment in the Royal Court (Clyde-Smith, Commissioner, with Jurats Blampied and Ronge) *Crociani v Crociani* [2017] JRC 146 is compendious and a model of clarity and precision. For the most part the appeals are presented in relation to discrete points concerning issues of law and we therefore restrict our opening narration of the factual background to matters which enable a general understanding of the context within which the issues appealed arise. Our responses in this judgment to these appeal issues will be found in the following sections:

(a) Salient factual background: paragraphs 2 – 13

(b) Equitable Compensation: paragraphs 14 – 50

(c) Remedies upon setting aside transfers because of mistake: paragraphs 51 – 116

(d) Exoneration: paragraph 117

(e) Breach of trust: paragraphs 118 – 171

(f) Camilla's Appeal: paragraphs 172 – 202

Background

2 A family trust, known in these proceedings as the “Grand Trust” was settled on 24 December 1987 by the first defendant, referred to in these proceedings as Madame Crociani. The trust deed was drafted by legal advisers to Madame Crociani, based in the United States. The trust was governed by Bahamian Law and the first trustees were Madame Crociani, one Mr. Girolamo Cartia and Bankamerica Trust and Banking Corporation (Bahamas) Limited (“Bankamerica”), a trust company carrying on business in the Bahamas. In the trust deed Madame Crociani stipulated that the property held on trust was to be held on two separate trusts, in identical terms, for each of her two children and issue: one for her daughter Camilla, the fifth defendant in these proceedings (then aged 16 years) and the other for her daughter Cristiana, the first plaintiff in these proceedings (then aged 14 years).

3 The property initially settled in the hands of the trustees was the benefit of a promissory note (“the Promissory Note”). The Promissory Note had been issued to Madame Crociani by a family company, Croci International BV (“Croci BV”), a company incorporated in the Netherlands, in the sum of 75 billion Italian lira, bearing interest, and payable on 10 December 2017. Madame Crociani assigned the Promissory Note to the trustees of the Grand Trust.

4 By 2010, when acts relevant to these proceedings began to occur, Croci BV was owned by

Croci International NV (“Croci NV”), a company incorporated in the Netherlands Antilles and beneficially owned by Madame Crociani. The corporate structure had been arranged for tax purposes relating, to a great extent, to a successful Italian company, Vitrociset SPA (“Vitrociset”), whose profits were in the control of its sole shareholder, another Italian company Ciset SRL (“Ciset”), which was itself wholly owned by Croci BV, which received relevant dividends. Over time the Grand Trust built up a substantial portfolio of artwork, investments and cash as a result of the receipt of payments of interest made by Croci BV under the Promissory Note.

5 As far as proper governance of the Grand Trust is concerned, on 27 January 1992 the proper law of the Grand Trust was changed from that of the Bahamas to that of Jersey. By April 1999 the trustees were Madame Crociani, the second defendant (“Mr. Foortse”) and Banque Paribas International Trustee (Guernsey) Limited (“Banque Paribas”) and the proper law had been changed from that of Jersey to that of Guernsey. By October 2007 the trustees were Madame Crociani, Mr. Foortse and the third defendant, BNP Paribas Jersey Trust Corporation Limited (“BNP Jersey”) and the proper law had been changed back to that of Jersey.

6 Quite separately from the arrangements for the Grand Trust, but of particular importance to part of these appeals, in 2004 and 2008 Cristiana purchased two apartments in Miami. They were held by her through a company incorporated in the British Virgin Islands, Crica Investments Limited (“Crica”). Cristiana and her family lived in one apartment for three months of the year and the other was held as an investment. Until 2010 Cristiana held almost the entire shareholding of Crica, with the remaining 0.02% being held by Camilla as a requirement of the structure of ownership.

7 Parallel to the Grand Trust, in September 1989 Madame Crociani settled property in what is known in these proceedings as the Fortunate Trust. The property held on trust in the Fortunate Trust comprised valuable works of art which had been acquired by Madame Crociani and her husband predominantly in the 1970s, separate from artworks acquired by the trustees of the Grand Trust. Madame Crociani's husband, Camillo Crociani, died of cancer in 1980. By 2010 Madame Crociani was the sole beneficiary of income and capital during her lifetime, and she had power to revoke the trust and withdraw all of the capital from it. Camilla and Cristiana and their respective issue were reversionary discretionary beneficiaries.

8 In 2010 an appointment was made by Madame Crociani, Mr. Foortse and BNP Jersey, as the trustees of the Grand Trust, to Madame Crociani and BNP Jersey as trustees of the Fortunate Trust (the “2010 Appointment”) of the whole assets of the Grand Trust apart from the Promissory Note. The 2010 Appointment was made under and by reference to Clause Eleventh of the Grand Trust deed, which gave the trustees power to appoint the trust fund to other trusts for the benefit of *“all or any one or more exclusively of the others or other of the beneficiaries (other than the Settlor) …”*. The settlor of the Grand Trust, of course, was Madame Crociani and, as we have just noted, by 2010 Madame Crociani was the sole immediate beneficiary of the Fortunate Trust, holding a power of revocation.

9 Separately, in 2010 Cristiana transferred one half of her shareholding in Crica to Camilla and the whole shareholdings were transferred to the Fortunate Trust (the “Crica transfers”). The circumstances surrounding the Crica transfers are the subject of one of the appeals. The Royal Court found that the Crica transfers had been carried out under a serious mistake on the part of Cristiana and should be set aside. That finding is not the subject of challenge: the essence of the appeal is as to the appropriate remedies.

10 By late 2010 – 2011 what had been a close relationship between Madame Crociani and her two daughters had broken down, with Cristiana and her family being estranged from Madame Crociani and Camilla. In about late November 2010 Cristiana had been removed as a director of Croci BV without her knowledge and Camilla had become the owner of Croci BV. At about the same time, and in questionable circumstances, Cristiana had transferred her shares in Croci NV back to Madame Crociani. In June 2011 Madame Crociani revoked the Fortunate Trust and withdrew all of the assets which, by then, included all of the assets appointed under the 2010 Appointment from the Grand Trust and the Crica shares which held Cristiana's Miami apartments. It appears that those assets have been dispersed by Madame Crociani around the globe and, whilst the Royal Court has made an order for disclosure at the instance of BNP Jersey, Madame Crociani has refused to disclose where and how they are held.

11 In February 2012 Madame Crociani, Mr. Foortse and BNP Jersey purported to retire as trustees of the Grand Trust and to appoint Appleby Trust (Mauritius) Limited (“Appleby Mauritius”), the fourth defendant, in their place. As its name suggests, Appleby Mauritius carries on a financial services business in Mauritius. The Deed of Retirement and Appointment (the “2012 Appointment”) also purported to change the proper law of the Grand Trust to that of Mauritius and to assign to Appleby Mauritius the Promissory Note. The Royal Court found that, at least latterly, Madame Crociani and Camilla were acting together in trying to defeat the plaintiffs' claims. In August 2012, shortly after receiving a letter before action on behalf of the plaintiffs and sent to those acting for the former trustees of the Grand Trust and Appleby Mauritius, and prior to responding substantively to that letter, Madame Crociani and the former trustees together with Appleby Mauritius as present trustee of the Grand Trust entered into a deed of appointment known in these proceedings as the “Agate Appointment”. By that appointment it was purported to appoint Appleby Mauritius and one other as trustees of the Agate Trust, investing them with the right of the Grand Trust trustees to recover the assets appointed by the 2010 Appointment, should that appointment be found to be invalid. The Agate Trust was constituted for this purpose. The beneficiary of the trust fund was the Camillo Crociani Foundation IBC (Bahamas) Limited, formerly Camillo Crociani Foundation Limited (“the Foundation”), a corporation beneficially owned by Madame Crociani. The plaintiffs duly challenged the Agate Appointment as being an excessive execution and fraud on the power.

12 The principal issues which arise for determination in the appeals before us are the following. The 2010 Appointment having been in breach of trust, does the liability of BNP

Jersey as a trustee extend to reconstituting the whole of the Grand Trust or only that part held in the trust for Cristiana and her children, the plaintiffs? The Royal Court having determined that the Crica share transfer should be set aside under Article 47E of the Trusts (Jersey) Law 1984, as amended (the "Trusts Law") by reason of mistake on Cristiana's part as to the nature of the entitlement of herself and her children in the Fortunate Trust, to what extent are BNP Jersey liable personally as respects that, having transferred the trust estate of the Fortunate Trust to Madame Crociani on revocation, they no longer have those assets? Third, in the circumstances which came about, were Appleby Mauritius at fault in not seeking to collect interest on the Promissory Note as and when it should have been available? Fourth, Camilla not having participated in the trial below, is she now able to raise on appeal issues regarding the determination of the Royal Court; and, if so, how should those issues be resolved?

13 For completeness we add that there are a number of other proceedings between the parties in this jurisdiction and ancillary to these proceedings, but the issues there do not affect the issues before us. We now deal with each appeal in turn.

The appeal of BNP Jersey: Equitable Compensation

14 BNP Jersey does not appeal the finding by the Royal Court that it is jointly and severally liable with Madame Crociani for breach of trust in respect of the 2010 Appointment from the Grand Trust to the Fortunate Trust. BNP Jersey, however, contends that the Royal Court fell into error in finding that the appropriate remedy for that breach of trust was equitable compensation calculated by reference to the value required to fully reconstitute the trusts of both daughters. They submit that the fair, appropriate and just remedy is to limit the obligation to the reconstitution of Cristiana's Trust only. In the alternative, if this court is not minded to allow that appeal, BNP Jersey seeks a stay of the obligation to reconstitute Camilla's Trust until further order, with liberty to apply to beneficiaries of the Grand Trust.

15 The Royal Court dealt with the issue as to appropriate remedy at paragraphs 673 to 693. It noted that, as reflected in Article 21(2) of the Trusts Law, the basic right of a beneficiary was to have the trust administered in accordance with the provisions of the trust instrument. It then observed that Article 30 of the Trusts Law provided that a trustee, liable for a breach of trust, should be liable for the loss or depreciation in value of the trust property resulting from the breach and that this provision reflected the position under English law.

16 By reference to *Target Holdings Limited v Redferns* [1996] AC 421 and the speech of Lord Browne-Wilkinson at 434, together with the decision of the Supreme Court in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503, the Royal Court characterised the Grand Trust as a traditional trust rather than a commercial trust, found that it had not been administered in accordance with its terms, and that the liability of the trustees was to restore to the trust fund what had been lost by reason of the breach or to make compensation for such loss applying a common sense "but for" test of causation.

17 As regards the 2010 Appointment, the Royal Court found that the loss of assets would not have occurred but for that appointment but noted the argument for BNP Jersey that the compensation payable by the former trustees should be limited to Cristiana's trust. BNP Jersey contended that Camilla had clearly acquiesced in the breach of trust and could not now complain to the Court. The Court should simply treat Camilla's trust as if it had been distributed out to Camilla.

18 The Royal Court, in paragraph 687, expressed some sympathy with that submission as it appeared clear that Camilla had not only acquiesced in the breach of trust but had benefited at least to some extent from the funds improperly appointed out. In the view of the Royal Court it would be unjust for Camilla to enjoy the fruits of the breach and at the same time have the Grand Trust reconstituted so that she could benefit from that as well.

19 In the view of the Royal Court, however, the difficulty with the proposal for BNP Jersey was that Camilla was not the only person interested in her trust: her children had an interest as did Cristiana and her children in default. Each of those potential beneficiaries had a right to have the whole trust fund reconstituted so as to be available to satisfy their equitable interests. Reference was made to the speech of Lord Browne-Wilkinson in *Target v Redferns* at page 436.

20 The Royal Court noted that, because Camilla was only a discretionary object, she did not have an interest that could be impounded by way of indemnity pursuant to Article 46(1) of the Trusts Law. It considered, however, that it could make an appropriate direction to the trustee of the Grand Trust. It therefore determined that it should give a direction in respect of Camilla – and potentially extend it to her children – that the trustee should not exercise any power or discretion so as to confer, directly or indirectly, any benefit on Camilla, with liberty to apply. The Royal Court duly made such a direction.

21 Before us, BNP Jersey repeated the submissions made to the Royal Court and sought to stress that the determination of the Royal Court gave insufficient weight to the following factors. First, equitable compensation is a flexible remedy, able to be fashioned according to circumstances in order to provide a practically just solution. Second, the Royal Court had failed to adopt a proper appreciation and understanding of the division of the Grand Trust into two distinct trusts, each with its own separate hierarchical entitlement. Third, the case was essentially about Cristiana's trust, not Camilla's trust: Camilla and her issue were not plaintiffs. Fourth, looking at Camilla's trust, the Royal Court had found that Camilla had benefited at least to some extent from the breach and it was clear that Cristiana and her issue had only a remote interest in Camilla's trust. Camilla's trust fund should therefore be treated as if it had been paid out.

22 For the plaintiffs, Advocate Robinson contended that the wording of Article 30 was clear and that the determinations in *Target Holdings v Redferns* and in AIB showed that, in effect, there was strict liability. He also sought to emphasise that there was only one Trust Fund of the Grand Trust. Whilst Cristiana's trust and Camilla's trust were represented by separate

funds within the Grand Trust, they were not two separate trusts in the sense of being two distinct and separately constituted settlements. The Grand Trust was constituted by the transfer of one indivisible asset (the Promissory Note) to one set of trustees to hold on trusts declared by one deed. The definitions in Clause 1 of the Grand Trust showed that there was only one trust fund. That trust fund was held by the trustees as to half for Cristiana's trust and as to half for Camilla's trust but subject to overriding powers to appoint a new trust: see Clause 11. No divisible or distinct property was transferred to trustees of Cristiana and Camilla's trusts so as to constitute them as separate trusts rather than sub funds of the Grand Trust.

23 Advocate Robinson accepted, however, that equitable compensation was a discretionary remedy and that a court could take remoteness of interest into account in determining whether there should be reconstitution. Of necessity, he accepted that the assessment of the degree of remoteness was a matter for the court. He accepted that a single beneficiary out of a number, with only a very remote interest, would not be able to insist on reconstitution. In his submission the degree of remoteness sufficient to justify exclusion was not reached merely by reference to defeasibility; it had to be at the level such as that of a remote discretionary beneficiary where a Court would authorise a distribution notwithstanding the interest. He accepted that, in respect of Camilla's trust, the interests of Cristiana and her daughters were remote but submitted that they were not so remote as to be able to be disregarded: apart from a potentially remote interest on the failure of Camilla and her issue, they had an expectation that an application could be made for an overriding appointment in their favour. Camilla's children also had an interest which was far from remote.

24 For the Fifth Defendant, Camilla, it was contended, by reference to the decision in *Target Holdings v Redferns* and certain passages from Lewin on Trusts, that the trustee in breach was obliged to restore the lost trust property or make compensation. The only case in which that might not be the position, and where liability to reconstitute might be limited to Cristiana's trust, would be if all those persons interested under Camilla's trust had acquiesced in or waived the relevant breaches of trust. Notwithstanding the views expressed by the Royal Court, there had been no acquiescence by Camilla, still less acquiescence by her children. Nor was there any direct finding by the Royal Court that Camilla, far less her children, had benefited from the 2010 Appointment.

25 Appleby Mauritius made similar submissions to those made by BNP Jersey regarding the separation of the two trusts and the remoteness of the interests of Cristiana and her children as that issue was at large for their own appeal. Although initially suggesting that Camilla's interest was of such importance that it could be impounded, Advocate Moran was forced to accept that her expectation of benefit was not guaranteed. Her argument as regards Camilla's position therefore reverted to the entitlement of a trustee who had acted in breach at the instigation of a beneficiary to stand in the shoes of that beneficiary and thereby obtain indemnification. As regards Camilla's trust, Camilla had made no complaint as regards any of the breaches of trust and it could be assumed either that she had benefited or that she had waived any entitlement to obtain redress.

Discussion

26 We consider that it was correct for the plaintiffs to accept that remoteness of the interest of the beneficiary seeking equitable compensation is a relevant factor in exercising the discretion to award compensation. The speech of Lord Reed JSC in *AIB Group* at paragraphs 122 and 123 explains the importance of having regard to issues of remoteness (albeit in the context of causation) and contributory negligence in the search for the just result. As the issue of remoteness was not addressed before the Royal Court, it is open to this court to consider it. In our judgment, consideration of this issue does not require a remit to the Royal Court in order to engage its understanding as the court of first instance as to the wealth of material before it. The issue relates primarily to a consideration of trust documentation and, otherwise, can be dealt with upon the facts already found by the Royal Court.

27 The Trusts Law provides, among other matters:

> ***"21 Duties of trustee***
>
> ***…***
>
> ***(2) Subject to this Law, a trustee shall carry out and administer the trust in accordance with its terms*** .
>
> ***…***
>
> ***…***
>
> ***30 Liability for breach of trust***
>
> ***…***
>
> ***(2) A trustee who is liable for a breach of trust shall be liable for –***
>
> ***(a) The loss or depreciation in value of the trust property resulting from such breach;***
>
> ***…"***

28 These are the broad principles also applied in jurisdictions such as England and Wales and Scotland. As explained in *AIB*, by reference both to *Target v Redferns* and to *Canson Enterprises Limited v Boughton & Co* (1991) 85 DLR (4th) 129, it is clear that whilst the law in respect of equitable compensation for breach of trust is in a state of development – especially as regards issues of causation – the basic rule is that, where property has been misapplied and cannot be restored in its original form, the trustee must restore the trust fund to the position in which it would have been but for the breach. That compensation, appropriately calculated, then forms part of the trust fund and is held on the same terms as

the remainder of the fund unless the trust is at an end and payment of compensation can be made directly to the beneficiary or beneficiaries absolutely entitled to the trust fund. Particular reference can be made to the judgment of Lord Reed JSC in *AIB* at paragraphs 90, 91, 94, 105 and 116.

29 In the case of a misapplication of trust property by misuse, the application of the principle will often be straightforward. Subject to calculation of the appropriate amount of compensation to place the trust fund in the position in which it would have been had it not been for the breach, the trust estate must be fully reconstituted in order to continue to provide benefit – whether by way of discretionary payment or vested entitlement – to those entitled to participate in the income arising and those eventually entitled to participate in the distribution of the capital.

30 More complex issues arise where the recipient of the misapplication is a member of one of the classes of beneficiaries, and especially where the misapplication has involved part only of the trust estate. The improperly enriched beneficiary cannot benefit twice and the trustee who has committed the breach of trust may have done so at the instigation of, or upon request by, or with the consent of a beneficiary. There will also be cases where the breach consists of a misapplication to someone other than the requesting or consenting beneficiary. In such circumstances there are equitable considerations as between the trustee and the beneficiary in question. Assuming that there was a continuing trust with other beneficiaries entitled immediately or prospectively to participate in the benefit of the trust estate, the trust estate must be reconstituted, but the trustee is entitled to be indemnified; and this is done by allowing the trustee to impound all or any part of the interest of the beneficiary in the trust estate. Article 46 of the Trusts Law provides:

> ***"46 Power to make beneficiary indemnify for breach of trust***
>
> ***(1) Where a trustee commits a breach of trust at the instigation or at the request or with the consent of a beneficiary, the court may by order impound all or part of the interest of the beneficiary by way of indemnity to the trustee or any person claiming through the trustee*** .
>
> ***(2) Paragraph (1) applies whether or not such beneficiary is a minor or an interdict."***

31 More fundamentally, where a beneficiary of full age and capacity participates in the breach, consents to it, releases his claim or later acquiesces in the breach, such acting provides the trustee with a defence to the claim of that beneficiary: see *Re Pauling's Settlement Trusts* [1962] 1 WLR 86, 108, 115 (Wilberforce J., as he then was).

32 However, the decisions in *Target Holdings* and in *AIB*, and their underlying issues of mortgage fraud, do not provide full guidance directly applicable to the issues before us. They establish relevant factors and appropriate propositions in law relating to traditional (that is, family style) trusts and to non-traditional (that is, commercial) trusts. The Grand

Trust and the Fortunate Trust are traditional trusts in the sense of being family trusts making provision, at certain stages, for interests in income (whether vested or discretionary) and for subsequent interests in capital (whether by survival, appointment or overriding power of appointment). But, as far as the Grand Trust is concerned, a factor which appears potentially to be relevant to the issue of equitable compensation is that it embraces two sub-trusts or sub-funds, each of which has the characteristics of a traditional trust and under each of which a separate family has the immediate interest whilst having a contingent interest in the other in the event of a failure of the other family. As Lord Reed JSC indicated in *AIB* at paragraph 125, under reference to the decision of the High Court of Australia in *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, the nature of the appropriate remedy for a breach of trust may well vary to reflect the terms of the trust in question and the breach in respect of which the complaint is made.

33 Separately, neither of the decisions in *Target Holdings* or *AIB*, or their underlying circumstances, assist where a beneficiary has been involved to some extent in the breach of trust which has taken place, whether as instigator, associate or recipient. For example, as Lord Browne-Wilkinson expressed matters in *Target Holdings* (at 436 C-D):

> ***"But the basic equitable principle applicable to breach of trust is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach."***

Without hesitation we agree; but how that principle is applied where one or more beneficiaries are found to be instigator, associate or recipient in the breach is a question which requires to be resolved, on equitable principles, having regard to the individual facts of the particular case.

34 Central to the issue in this appeal, it seems to us, is the proper characterisation of the two trusts or funds, the one referred to as Camilla's and the other as Cristiana's. The Royal Court treated them as two separate trusts, in our view correctly: see paragraph 688 read together with paragraphs 62 to 67. Such a characterisation is not unusual: many single trust instruments provide that the trustees are to divide the trust estate into individual portions, each to be held on trusts specific to that portion whether or not in similar terms to those for other portions and whether or not in some way interlinked at the level of default beneficiaries.

35 On this point the terms of the Grand Trust are meticulously expressed. The starting point is the opening recital where Madame Crociani recorded her intentions in establishing the trust:

> *"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 at the date of this Agreement) and CRISTIANA (aged Fourteen (14) years as of the date of this Agreement).* ….. 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."

36 Clause SECOND then directed the trustees to hold the property identified by reference to the name of a child of the Settlor "separately IN TRUST" with discretionary provision for disposal of the income or capital during the life of the child in question. The trust purposes include the following terms:

> *"(C) Upon the death of the Settlor's child whose name identifies the trust, the remaining principal of such child's trust shall pass as such child may appoint by her Last Will and Testament in favor of her issue, or the other issue of the Settlor (but not the Settlor).* Any principal which is not effectively appointed pursuant to such child's testamentary power of appointment shall pass on such child's death to the then living issue of such child, in equal shares per stirpes, or in default thereof, to the Settlor's other then living issue, in equal shares per stirpes, or if there be none, to the Settlor if she is then living, and if the Settlor is not then living, to the CAMILLO CROCIANI FOUNDATION LTD."

37 Accordingly, and as the Royal Court indicated at paragraph 67 of its judgment, except insofar as having been paid out to the child during her lifetime, the capital passes (a) as she may appoint to or among her own issue or her sister's issue, (b) in default of appointment to her own issue and (c) in default of those issue to the remainder of the settlor's issue (with final longstop provisions).

38 For the avoidance of doubt Clause FIFTH (P) also provided that the estate of each trust could be retained in one fund for the purposes of investment and reinvestment but with the specific proviso that any such administration of the trust estates "shall not be deemed to destroy the individual character of each trust or prevent the release of principal upon determination of any such trust or the making of discretionary payments from principal of such trust in different amounts."

39 It is well known that an individual or corporation may hold the position of trustee in respect of different trusts. Nor is there any objection in principle for one document at the hand of one individual or legal person to contain within its juristic acts the setting up of separate trust provisions (so long as not inconsistent) which the accepting trustee becomes bound to carry out. As we have indicated, the terms of the Grand Trust could not be clearer in identifying that the property being transferred to the trustees was to be held on two separate sets of trusts, albeit with a potential coincidence of beneficiaries.

40 Nor is there an objection in principle to there being two separate trusts constituted in respect of one piece of trust property. As with other jurisdictions, the law of Jersey recognises the concept of undivided property being held in common by one or more persons whether in equal or unequal shares and even to the extent that each share can be

hypothecated: see in the matter of *Walton Dégrèvement* 2015 JRC 003, especially at paragraph [35] (Birt Kt, Bailiff). That which can be held by two separate persons for their personal benefit can be held by two separate persons as trustees of trust patrimony.

41 It is clear, therefore, that the trustees for the time being of the Grand Trust were to hold the trust patrimony on two separate sets of trust provisions known, respectively, as Camilla's trust and Cristiana's trust.

42 Turning, therefore, to Camilla's trust, the primary beneficiaries are Camilla and her issue. We have quoted clause SECOND (B) and (C) above. Clause ELEVENTH, as we have already noted also gave the trustees power to appoint the trust fund to other trusts, so long as for the benefit of "all or any one or more exclusively of the others or other of the beneficiaries (other than the Settlor) …" Such a provision is well known in ordinary family trusts. It allows trustees, among other matters, to expatriate a trust to a more favourable jurisdiction, to extend or restrict the class to benefit and (especially in very high value trusts) to exclude or control the interest of members of the discretionary class who are considered inappropriate recipients of absolute control over the trust estate. To use such a power either to reduce or completely exclude one branch of a family would require the trustees to be quite clear that the circumstances almost ineluctably led to that conclusion.

43 So long, therefore, as Camilla is alive, the principal interest of Cristiana and her issue in that trust property is a future interest under Clause SECOND, as there can be no interest until some trust property devolves upon Camilla's death. The interest is also contingent, firstly as the expectation is dependent firstly upon Camilla not having received the property (or part of it) as a Clause SECOND (B) distribution. Secondly it is contingent upon her not having appointed the trust estate to one or other of her own issue or, in default of appointment, there being no surviving issue of Camilla. Thirdly, it is contingent upon there not having been a resettlement within her family under clause ELEVENTH. The emergence of the interest is also dependent upon there being one or more of Cristiana and her issue alive on the death of Camilla. Therefore, the principal interest of Cristiana and her issue in the estate held for Camilla's trust purposes is, for all practical purposes, remote in the extreme. Whilst events might come to pass in which Cristiana or her issue would succeed to the whole of the capital held for Camilla's trust purposes, the power given to Camilla to appoint to or among her own issue means that the prospect of Cristiana or her issue succeeding under clause SECOND to the estate are very remote; albeit with some expectation in the event of a common calamity for Camilla and her issue.

44 Further, as regards Cristiana and her issue, any secondary interest is uncertain as well as remote. The potential in the mind of Advocate Robinson for the further interest of the plaintiffs was in respect of their entitlement to be considered under clause ELEVENTH which, as we have noted gives the trustees an overriding power to appoint the trust fund to other trusts, so long as for the benefit of "all or any one or more exclusively of the others or other of the beneficiaries (other than the Settlor) …" Accordingly, so Advocate Robinson argued, it was perfectly open to Cristiana and her children to seek such an appointment on trust out of Camilla's trust, having particular regard to the court's present order that there be

no distribution to Camilla or her children without court sanction. But, there can be no certainty that Cristiana or her children would ever benefit under this provision. The trustees might refuse all applications until Camilla died and then consider the interests of Camilla's remoter issue.

45 Given that the remedy is equitable, and as Lord Reed was at pains to point out in *AIB* that analogies with other remedies are inapt, we reach the view, for our own part, that the court has a discretion to refuse relief. That seems consistent with the equitable remedy of impounding and the availability of the defences of consent, and acquiescence. Looking at the issue from an equitable stance, the reconstitution of Cristiana's fund will give her and her issue everything which, if matters had turned out more happily and both families flourished, they could have expected to enjoy. To reconstitute Camilla's fund just to allow a windfall to Cristiana and her family would be to punish BNP Jersey. Accordingly, not only is it our view that the interest of Cristiana and her issue under Clause ELEVENTH is of a degree of remoteness that it need not be catered for, we consider that it would not be consistent with the equitable interests as between BNP Jersey and Cristiana and her family for the exercise of our discretion to order that the reconstitution extend beyond Cristiana's trust.

46 We turn, finally to the interest of Camilla and her children in Camilla's trust. No claim was made by Camilla, not only as one presently entitled to be considered as an object of either of the discretionary exercises but also in our view as the primary beneficiary of her trust, that there had been a breach of trust. Nor was any claim for breach of trust presented by Camilla and her husband as guardians of their infant children, as the discretionary beneficiaries currently in life and with an expectation of succeeding to the capital upon Camilla's death. Given the length and complexity of the current proceedings, the numerous applications which have been made, and even leaving aside for the moment the considerations underlying the plaintiffs' claims, it can be assumed, more than seven years after the events, that no such claims will be made. In such circumstances one need not enter into discussion as to the juristic characteristics of acquiescence, concurrence, waiver or release or confirmation of the transaction in breach of trust. The simple fact is that, as regards, for present purposes, the appeal of BNP Jersey in respect of the equitable compensation issue, Camilla as the primary beneficiary does not and cannot now contend in favour of liability for breach of trust. Her children's parents have not sought to join them to the proceedings as persons interested in the outcome and the court is entitled to presume that those interested in Camilla's trust are content that their interests in the trust have not been prejudiced by the events that have come to pass. Upon that basis we agree with Advocate Redgrave that (subject to what we say in paragraphs 179 and 180 below) it is appropriate to treat Camilla's trust as having been paid out. This also has consequences for large parts of Camilla's appeal to which we will turn later.

47 There is a further reason for reaching the view that, in the exercise of the discretion, it is appropriate to proceed upon the basis that there should no longer be a trust fund held for Camilla's trust. In the judgment below there is a particularly cogent rehearsal of findings which led the Royal Court to find not only that by the summer of 2011 there was open

warfare within the family, but also that Camilla was playing a leading role in the fight entirely to cut off Cristiana from the family wealth and that Camilla had little faith in the propriety of some of the actions: see paragraphs 431 to 441.

48 Camilla was not a trustee, but Madame Crociani and Camilla were acting together dishonestly in setting up breaches of trust. As matter of law Camilla's actions might be characterised as knowing assistance in breach of trust. In *Twinsectra Ltd v Yardley* (HL) [2002] 2 AC 164, Lord Millett dissented on the question as to the test for dishonesty. However, in a passage which was apparently approved in *Barlow Clowes v Eurotrust Ltd* (PC) [2006] 1 WLR 1476, his Lordship said:

> ***"135. The question here is whether it is sufficient that the accessory should have actual knowledge of the facts which created the trust, or must he also have appreciated that they did so? It is obviously not necessary that he should know the details of the trust or the identity of the beneficiary. It is sufficient that he knows that the money is not at the free disposal of the principal. In some circumstances it may not even be necessary that his knowledge should extend this far. It may be sufficient that he knows that he is assisting in a dishonest scheme."***

49 Lord Millett's approach would seem to cover the nature of Camilla's actions and, in consequence, the trustees could have treated Madame Crociani and Camilla as liable jointly and severally for the whole loss caused to the Grand Trust by the appointment to the Fortunate Trust in breach of trust; but, in the alternative, they could have taken the view that had Camilla instead asked for a disbursement under Clause SECOND (B) they would have acceded to it, so that she would be liable only for half the loss. Furthermore, on any view, the findings which the Royal Court has made on the facts support the conclusion that on the balance of probabilities Camilla can anticipate receiving, if she has not already received, the preponderance of the assets obtained from the Grand Trust by Madame Crociani. In those circumstances, it would be inequitable as between BNP Jersey and Camilla for Camilla to receive 150% of the assets which she might legitimately have expected – all those appointed out to Madame Crociani in breach of trust (including Cristiana's half share as well as her own) and those in her fund as reconstituted by BNP Jersey, if the court were to make such an order. In our judgment these considerations are further support for treating Camilla's trust as having been paid out – again, subject to what we say in paragraphs 179 and 180 below.

50 Accordingly, the appeals of BNP Jersey and Appleby Mauritius against this part of the Royal Court's decision in respect of the reconstitution of Camilla's trust are allowed.

The appeal by BNP Jersey: appropriate remedies regarding the Crica shares transfers

51 This part of the appeal concerns BNP Jersey and Cristiana only, and it relates to two

apartments in Miami which were bought by Cristiana in 2004 and 2008, the first to live in for three months of the year and the second as an investment which was let out so as to provide Cristiana with an income. As described by the Royal Court, the apartments were acquired through a structure which for tax reasons comprised a “tick the box” partnership for which two beneficial owners were required. Cristiana therefore arranged for her sister Camilla to hold 0.2% of the shares in Crica. Although the structure was wholly outside the Grand Trust, the apartments were purchased through distributions requested by Cristiana and paid to her. The Royal Court made a finding of fact that the two apartments were beneficially owned in March 2010 through the Crica structure as to 99.8% by Cristiana.

52 50,000 shares in Crica had been issued, 49,900 held by Cristiana and 100 held by Camilla. Cristiana transferred to Camilla 24,900 shares on 7 April 2010, so that they held 25,000 shares each, and they both transferred their 25,000 shares to BNP Nominees Limited as nominee for the trustees of the Fortunate Trust on 30 April 2010 by the Crica transfers. Although the share transfer forms were executed by Cristiana and her sister on that date, the transfer of shares was not finally completed until 16 December 2010 for reasons which are not relevant to the current proceedings. It is the circumstances surrounding the Crica transfers which give rise to the part of this case with which this part of the appeals is concerned.

53 Although Madame Crociani and Camilla made witness statements which were before the Royal Court, neither of them appeared to give evidence *viva voce* and be cross-examined on those statements. Cristiana however did give evidence in person and was cross-examined; and the Royal Court expressly found her evidence, and on this point the evidence of Mr Le Cornu of BNP Jersey, to be preferred to the evidence of Madame Crociani and Camilla.

54 Cristiana's evidence of how the Crica transfers came about was that, at the beginning of April 2010, her mother advised her to transfer the Miami apartments to the Fortunate Trust so that Madame Crociani could better look after the interests of Cristiana's children if anything should happen to Cristiana. Cristiana was told that it would be necessary to equalise the shares in Crica with Camilla as part of the process for settling the shares in Crica on the Fortunate Trust. Cristiana understood that this was purely for the purpose of settling the shares and that, once settled, the full proportion of her interest would be restored. Mr Le Cornu of BNP Jersey was first informed of this proposed transfer at a meeting on 7 April 2010. According to his file note, he was told that Crica owned two apartments in Miami and that the family wanted to add the shares in that company to the Fortunate Trust. He was told that the shares were currently held 50/50 by the two daughters.

55 As noted above, the Fortunate Trust had been created by Madame Crociani in 1989 to hold valuable works of art. At the time of the Crica transfers Madame Crociani was the sole beneficiary of the Fortunate Trust as to income and capital during her lifetime, with a power to revoke the trust and withdraw the whole of the capital from it. Camilla and Cristiana, with their respective children were reversionary discretionary beneficiaries. By the 2010

Appointment the whole of the trust fund of the Grand Trust, with the exception of the Promissory Note, had been appointed by the trustees of the Grand Trust to Madame Crociani and BNP Jersey as trustees of the Fortunate Trust.

56 The Royal Court found as a fact that, at a meeting which took place on 7 April 2010, attended by Madame Crociani, Camilla, Cristiana and Mr Le Cornu, an asset exchange agreement had been completed in relation to paintings within the Fortunate Trust. It included the division of family paintings with the result that Camilla or her fund received paintings to the value of US$122 million and Cristiana or her fund received paintings to the value of US$21 million. The Royal Court accepted Cristiana's evidence that the division was dictated by Madame Crociani and that Cristiana felt she had no option other than to accept it.

57 Mr Le Cornu informed the Royal Court that at that meeting he had told Cristiana and Camilla about the Fortunate Trust, and, although he did not provide a copy of the conformed deed, he showed them both a chart which contained a box naming the beneficiaries of the Fortunate Trust as Madame Crociani, Camilla and Cristiana, and as well as a document entitled *"Features of the revised Fortunate Trust"* which was in these terms:-

> *"Features of the revised Fortunate Trust*
>
> *1. Continue to be revocable by grantor (MDM) [Madame Crociani]*
>
> *2. Mr PF to be appointed as co-trustee with BNP PJTC [the First Appellant]*
>
> *3. Assets to continue to be held in two funds – Fund A and Fund B*
>
> *4. Beneficiaries to be MDM's daughters and their lineal descendants*
>
> *5. Grantor (MDM) to continue to be able to direct the payment of income to herself during her lifetime*
>
> *6. All fixed entitlements to be removed such that there are no compulsory distribution dates."*

58 The document then set out protector powers with Madame Crociani identified as the first protector, consistent with her requests.

59 Accordingly, by showing Cristiana the Features document and the chart, Mr Le Cornu, plainly, was informing her that although the trust was revocable by Madame Crociani, she, her sister and her mother would be the immediate beneficiaries of the trust. Indeed, when he emailed Cristiana on 8 April 2010 over the Crica transfers, he said:-

> *"Please note that we shall also be preparing a document for each of you to record your transfer of your shares into the F Trust and your respective funds"*.

In doing so he was indicating that their respective A and B Funds existed at that time.

60 Relations between Cristiana on the one hand and her sister and mother on the other deteriorated from about November 2010; although perhaps Cristiana did not appreciate this until three or four months later. Certainly, it had come to a head on 25 April 2011, when Cristiana came across documents including the "Mozart Trust proposals" showing that the Grand Trust portfolio would be transferred into the Fortunate Trust, which would then be revoked and the bulk of the family wealth put into new structures primarily for the benefit of Camilla and her children.

61 On 5 May 2011, BNP Jersey instructed Ogier to draft a deed of revocation of the Fortunate Trust. Cristiana was removed as a manager of the structure beneath Crica on 10 May 2011 without her knowledge, and on 13 May 2011, at a meeting in Monaco between Mr Le Cornu, Mr Paul Foortse (the Second Defendant in the proceedings below and by this time a co-trustee), Madame Crociani, Camilla and their adviser Mr Kosman, the Mozart Trust proposals were discussed. The same day Madame Crociani signed a letter directing the trustees of the Grand Trust to transfer its portfolio of some US$100 million to the Fortunate Trust. At about the same time, Madame Crociani asked Mr Le Cornu to appoint the Promissory Note to the Fortunate Trust, although he said that could not be done; and on 23 May, he was instructed that Madame Crociani insisted the Fortunate Trust should be revoked as soon as possible. This happened by an instrument dated 30 June 2011, by which all the assets of the Fortunate Trust, including the Crica shares, were transferred to Madame Crociani.

62 It was against that background of facts that the Royal Court considered the claims of Cristiana that the Crica transfers should be set aside on the ground of mistake.

The decision below

63 We now turn to consider how the Royal Court determined this particular claim. In summary, the Royal Court was prepared to set aside the Crica transfers because the conditions of Article 47E of the Trusts (Jersey) Law 1984 ("the Trusts Law") permitting such a remedy were met; and it found that the effect was to make BNP Jersey bare trustees of the Crica shares for Cristiana as from the date of execution of the share transfer forms. It determined that, notwithstanding the involvement of Madame Crociani, for BNP Jersey to transfer the shares to Madame Crociani was a breach of that bare trust and declined to relieve BNP Jersey from its personal liability for that breach.

64 The relevant passages from the judgment of the Royal Court are the following:

> ***"645. The mistake relied on by Cristiana relates to what she understood to be her interests in the Fortunate Trust. She thought she was transferring the Crica shares to a trust of which she was a current beneficiary, and Mr***

Le Cornu has confirmed that she would have had that impression, an impression supported by the Features document and the chart, which were referred to at the meeting on 7th April, 2010. Indeed, in his e-mail to Cristiana of 8th April, 2010, (which we set out earlier) he had confirmed that her half of the shares would be transferred into "your fund", and on 16th December, 2010, BNP Nominees had certified that it was holding her half of the shares for her fund. In fact, the funds of both daughters only came into effect on their mother's death .

646. There was a further mistake, in that at that time her children were not, in fact, beneficiaries of the Fortunate Trust. She and Nicolas did not marry until 2012, and the children were, therefore, illegitimate; as such, they did not come within the definition of "issue" under Jersey law .

647. At the time of the transfers, Cristiana beneficially owned, as to 99.8%, and controlled, the Miami apartments. One was used as her home for three months of the year, and the other let out as an investment. We accept that she would not have transferred these assets to a trust of which she was not a beneficiary until her mother's death, and over which her mother would have had total control, without any fiduciary obligation, during her lifetime. Furthermore, she would not have transferred these assets to a trust of which her children were not beneficiaries at all. The whole rationale of the transfer, as propounded by Madame Crociani, was to enable Madame Crociani to look after the interests of the children, should anything happen to Cristiana .

648. We conclude that Cristiana would not have made the first and third transfers but for these mistakes, which are of so serious a character as to render it just for the Court to declare them voidable and of no effect from the date of each transfer. It follows that the second transfer was of no effect, and we will declare that the trustees of the Fortunate Trust held 49,900 shares in Crica on bare trust for Cristiana with effect from the 30th April, 2010."

65 As to remedies, the Court said:

"726. The Court has set aside the transfer of 49,900 shares in Crica by Cristiana (in part via Camilla) to the trustees of the Fortunate Trust, who were Madame Crociani and BNP Jersey when the decision was made on 7th April, 2010. Mr Foortse was appointed a trustee on 14th May, 2010, and so was not a party to that decision, but he was a trustee on 30th June, 2011, when the Fortunate Trust was revoked by Madame Crociani, and all of the assets, including the Crica shares, transferred to her .

727. The effect of our decision is to render the trustees of the Fortunate Trust bare trustees of these Crica shares for Cristiana with effect from 30th April, 2010. Ordinarily, the trustees would be ordered to return the shares

to her, but they are unable to do so, because they have been transferred to Madame Crociani, or to her benefit, when she revoked the Fortunate Trust. The Miami apartments were subsequently sold and the proceeds received by Madame Crociani and dispersed by her away from BNP Jersey .

728. Clearly, we will order Madame Crociani to account to Cristiana for the value of the Crica shares as she received them, for which purpose we will need to order an inquiry as to the value of those shares on terms to be determined after further input from counsel. Madame Crociani will be ordered to pay interest on the amount of that valuation from a date and at a rate to be determined by the Court .

729. However, Cristiana also seeks an order that BNP Jersey and Mr Foortse be jointly and severally liable with Madame Crociani for this loss. It was not immediately obvious to the Court what breach of trust could be levelled at BNP Jersey and Mr Foortse to render them liable to compensate Cristiana. It was Madame Crociani, after all, who had revoked the Fortunate Trust, as she was entitled to do, and it was through that revocation that the shares have been lost .

730. In both *Target v Redfern* ***and*** *AIB v Redler*, ***the solicitors had paid away money transferred to them by a finance company in breach of the terms of a bare trust. In a similar case***,
Lloyds TSB Bank plc v Markandan & Uddin (a firm) [2012] 2 All ER 884, ***the solicitors themselves, in paying away monies transferred to them by a finance company on bare trust to be applied "on completion" of the purchase, had been the victim of a fraud. The fraudulent completion was held not to be a genuine completion and therefore the monies had been paid away in breach of trust. The following comment was made per curiam:-***

"Per curiam. In circumstances such as those in the instant case, the careful, conscientious and thorough solicitor, who conducts the transaction by the book and acts honestly and reasonably in relation to it in all respects but does not discover the fraud, may still be held to have been in breach of trust for innocently parting with the loan money to a fraudster, but is likely to be treated mercifully by the court on his s61 application."

731. Advocate Redgrave submitted that there had been no breach of trust on the part of BNP Jersey, but we are persuaded that Advocate Robinson's analysis is correct, namely that at the time of the revocation of the Fortunate Trust and following our finding in mistake, the shares were held on bare trust for Cristiana, and to transfer those shares away to Madame Crociani was a breach of that bare trust. There has, therefore, been a breach of trust by Madame Crociani, BNP Jersey and Mr Foortse as bare trustees at the time of the revocation, albeit BNP Jersey and Mr Foortse would argue that the transfer to Madame Crociani was innocent

on their part. The issue will be whether BNP Jersey and Mr Foortse should be exonerated under Article 45(1) of the Trusts Law. To the extent that they are not exonerated, they are entitled to be indemnified by Madame Crociani, who received the Crica shares and has benefited from them .

732. Before making any orders against the defendants, we must now consider the issue of exoneration."

66 As to exoneration, the Court indicated:

"774. Finally, in relation to BNP Jersey, we need to consider whether it should be relieved from personal liability for the transfer out of the Fortunate Trust to Madame Crociani of the Crica shares in breach of the bare trust of those shares in favour of Cristiana. Again, we accept that BNP Jersey acted honestly in that transfer .

775. Advocate Robinson argued that had BNP Jersey not treated Madame Crociani as the client, had they not ignored their true beneficiaries, Cristiana and Camilla, and had they explained to them their true entitlement in the Grand and Fortunate Trusts, none of this could have happened. He points to the subsequent actions of BNP Jersey in the removal of Cristiana as a director of Crica, her exclusion from the Miami properties, (one of which was or had been her home) and securing the sale of the apartments, which militates, he said, against any discretion which the Court had to exonerate BNP Jersey .

776. Advocate Robinson pointed to the advice given by Ogier on 18th May, 2011, which correctly summarised the main provisions of the Fortunate Trust, and on receipt of which, Mr Le Cornu should, he said, have realised Cristiana's mistake in adding the Crica shares to the Fortunate Trust and drawn the same to her attention. Mr Le Cornu accepted in evidence that on receipt of this advice, he appreciated for the first time the true position of the daughters' interests in the Fortunate Trust .

777. As against that, Advocate Redgrave argued that:

(i) BNP Jersey's involvement in accepting the Crica shares was entirely passive. The Crica shares had never formed part of the trust fund of the Grand Trust, and BNP Jersey had no prior administrative involvement. Their addition to the Fortunate Trust was presented by the family at the meeting on 7th April, 2010, without prior notice and on the basis of a decision ***taken by the family that they wanted these assets held within the Fortunate Trust.*** Mr Le Cornu was not aware until these proceedings of the prior transfer by Cristiana to Camilla, and that in substance, this was a gift by Cristiana alone;

(ii) Even though there was a mistake on the part of Cristiana as to her interests under the Fortunate Trust, a mistake shared by Mr Le Cornu, she

did know that the Fortunate Trust was revocable by her mother, and it was the exercise of that power of revocation that led to the loss of those shares from the Fortunate Trust; and

(iii) Once added to the Fortunate Trust, the Crica shares ostensibly became an asset of that trust, of which Madame Crociani was both settlor and principal beneficiary, and it is unreasonable to criticise the actions of BNP Jersey in not securing that asset, given the information that it had been given by Madame Crociani as to the conduct of Cristiana. Indeed, in May 2011, Madame Crociani was wanting BNP Jersey to exclude Cristiana as a beneficiary of the Fortunate Trust and that was the subject matter upon which Ogier were advising on 18th May, 2011. The sale of the apartments, of course, took place after the Fortunate Trust had been revoked, when Madame Crociani had taken the shares into her personal ownership .

778. Advocate Redgrave submitted that it is wrong to judge the actions of BNP Jersey with hindsight, with which we agree, but we conclude that BNP Jersey did not act reasonably for the following reasons:-

(i) It was a paid professional trustee;

(ii) On receipt of the advice from Ogier on 18th May, 2011, Mr Le Cornu became aware of the true position in respect of the daughters' interests in the Fortunate Trust and should, therefore, have appreciated that there had been a serious mistake on his part and on the part of the daughters at the time that the Crica shares were added to the Fortunate Trust, as to the true nature of their interest under it;

(iii) When Madame Crociani sought to revoke the Fortunate Trust, in circumstances of a complete family breakdown, Mr Le Cornu should have made further inquiry and sought advice in relation to these assets that had been settled by the daughters, and not by Madame Crociani, under a serious mistake as to the nature of their interests in the Fortunate Trust. At the very least he should have given them notice of the revocation before transferring ***what had been their assets away.*** Instead, the Crica shares, were simply transferred away to Madame Crociani without further thought .

779. For these reasons, BNP Jersey does not pass the first part of the test, namely that it has acted "reasonably" and we need not go on to consider the second part of the test. However, in our view, it would not be fair to relieve it of liability. The key factor here is the effect of BNP Jersey being relieved upon the beneficiary of the bare trust, Cristiana. If it is relieved, Cristiana will be required to action her mother directly for compensation, presumably in Monaco. If she obtains a judgment there, then she will have the task of searching round the world for assets against which to enforce that judgment. Looking at the way Madame Crociani has conducted these proceedings, in some material part in tandem with BNP Jersey, it is unfair, in our view, that this burden should be placed on Cristiana and fair for it to

be placed upon BNP Jersey, which will in all probability be pursuing Madame Crociani in any event in order to recover the sums that, we anticipate, it will have paid to the new trustee of the Grand Trust by way of compensation for the 2010 appointment .

780. We decline therefore to relieve BNP Jersey from its personal liability for the transfer of the Crica shares."

The contentions on Appeal

67 As BNP Jersey was not relieved of its personal liability for the transfer of the Crica shares it has appealed against the consequent Order on the following grounds:

(i) The Royal Court was wrong in law in finding that a bare trust arose: because the transaction was voidable and not void and, being voidable, full legal and beneficial ownership of the assets passed to the recipient at the date of the gift into the Fortunate Trust subject to the right of the transferor to have the transaction set aside.

(ii) The Royal Court was wrong to take the view that a mistaken payment, without more, gave rise to the monies being held on bare trust absent any characterisation of the conduct of the bare trustee as wrongful.

(iii) The Royal Court was wrong in law not to accept that, until avoided, the recipient of assets under a voidable transfer was entitled to proceed on the basis that the transfer was valid and effective.

(iv) Accordingly, no bare trust of the Crica shares existed as at the date of transfer and it followed that BNP Jersey could not be in breach of trust.

68 In the alternative it was asserted that BNP Jersey should have been exonerated under Article 45 of the Trusts Law.

69 Advocate Robinson, for Cristiana, submitted that liability was very straightforward – a transfer into trust had been made, it was voidable for mistake which the Court had found established, and the Court accordingly had declared that the trust was "of no effect from the date of each transfer". If the transfer had "no effect" from that date, the consequence was that the transferee of the shares received them as bare trustee for the transferor. By paying the money away when the Fortunate Trust was revoked, BNP Jersey had breached the bare trust upon which the Crica shares were held, and it followed inexorably that liability was established.

The statutory framework

70 The disposal of this appeal by BNP Jersey requires interpretation of Article 47E of the Trusts Law, this being the first truly adversarial litigation to engage with the application of that Article The fundamental issue is as to the consequence in law of a transfer being declared to be of no effect from the time of its exercise and what principles must the court apply in fashioning its remedies.

71 Article 47E provides:

> ***"Power to set aside a transfer or disposition of property to a trust due to mistake***
>
> > ***(1) In this paragraph, "person exercising a power" means a person who exercises a power to transfer or make other disposition of property to a trust on behalf of a settlor*** .
> >
> > ***(2) The court may on the application of any person specified in Article 47I (1), and in the circumstances set out in paragraph (3), declare that a transfer or other disposition of property to a trust –***
> >
> > ***(a) by a settlor acting in person (whether alone or with any other settlor); or***
> >
> > ***(b) through a person exercising a power*** ,
> >
> > ***is voidable and –***
> >
> > > ***(i) has such effect as the court may determine, or***
> > >
> > > ***(ii) is of no effect from the time of its exercise*** .
> >
> > ***(3) The circumstances are where the settlor or person exercising a power –***
> >
> > ***(a) made a mistake in relation to the transfer or other disposition of property to a trust; and***
> >
> > ***(b) would not have made that transfer or other disposition but for that mistake, and***
> >
> > ***the mistake is of so serious a character as to render it just for the court to make a declaration under this Article."***

72 Articles 47B to 47J of the Trusts Law were introduced by the Trusts (Amendment No. 6) (Jersey) Law 2013 (the "Amendment Law"). Articles 47B and 47C provide that the concept of error in this fasciculus of articles is to be interpreted with the greatest possible width; but is not to include the doctrine of *erreur* as understood in Jersey customary law. Articles 47F to 47H make provisions similar to those of Article 47E in respect of the exercise of powers

or fiduciary powers. Article 47I provides, among other matters, that an Article 47E application may only be made by the settlor, the settlor's personal representatives or successors in title. It also empowers the court to make such consequential order as it thinks fit; save that the interests of a bona fide purchaser for value and without notice are not to be prejudiced. Article 47D provides that the fasciculus applies in relation to transfers or exercises of powers whether occurring before or after the coming into force of the Amendment Law.

73 For completeness we also refer to Article 47J which provides:-

> ***"Savings in respect of applications made under Articles 47E to 47H***
>
> ***Nothing in Articles 47E to 47H shall prejudice –***
>
> ***(a) any application for a declaration that a transfer or other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property, is void or voidable on grounds other than those specified in Articles 47E to 47H; or***
>
> ***(b) any personal remedy which may be available against a trustee or any other person."***

74 It is appropriate to note, therefore, that Article 11 of the Trusts Law, to the extent material, provides:-

> ***"…***
>
> ***(2) Subject to Article 12, a trust shall be invalid –***
>
> (a)
>
> (b) to the extent that the court declares that –
>
> ***(i) the trust was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty*** ,
>
> ***…***
>
> ***(6) Property as to which a trust is wholly or partially invalid shall, subject to paragraph (5) and subject to any order of the court, be held by the trustee in trust for the settlor absolutely or if the settlor is dead for his or her personal representative*** .
>
> ***(7) In paragraph (6) "settlor" means the particular person who provided the property as to which the trust is wholly or partially invalid."***

75 Article 11(5), which deals with the title to immovable property, and Article 12 which

prevents the avoidance of non-charitable purpose trusts in defined circumstances, are not relevant for present purposes.

76 It follows that there are alternative ways in which mistake can operate to avoid a transfer of assets into trust: striking down the entire trust under Article 11, or striking down a particular disposition under Article 47E. Whether the consequences of doing so under Article 11 differ from the consequences which arise under Article 47E may depend on whether one construes Article 11(6) as being materially different from what is set out in Article 47E(2). Article 11(6) suggests that there is a presumption that the transfer into trust is void because the whole trust is void, unless the Court makes a different order, whereas under Article 47E(2) the Court has a choice as to what order it is to make in relation to a transfer or disposition of property to a trust which is voidable. We do not think the existence of the mistake provisions in article 11 affect the proper construction of Article 47E, added later, but rather that if an application to strike down a trust were made under Article 11, that Article would fall to be construed in the light of and consistently with Article 47E.

77 Before we turn to an analysis of the relevant provisions of the Trusts Law, we refer briefly to the decision of the Judicial Committee of the Privy Council in *Investec Trust (Guernsey) Limited and another v Glenalla Properties Limited and others* [2018] UKPC 7. Although this was an appeal from the Island of Guernsey, the Judicial Committee was considering, in the course of its judgment, a construction of different articles in the Trusts Law. At paragraphs 57 and 58, Lord Hodge said:

> ***"57. Before addressing Article 32, some preliminary observations need to be made. The TDT is a discretionary trust established under the law of Jersey. In their modern form, trusts are a creation of equity judges in England. There are of course concepts in other legal systems, notably in Roman law and in the civil law of France, which have some features in common with an English Law Trust. But they do not have the elaboration and detailed prescription which the existence of a large and coherent body of case law has given to the English Trust Law. The law of trusts in Jersey is a comparatively recent import from England. Its widespread use in the custody and management of wealth dates from the rise of a significant financial services industry in the 1960s. The international appeal of Jersey trusts is to a significant extent dependent on the certainty which it derives from the English case law. Naturally, English trust law must be modified where it conflicts with established principles of Jersey customary law, and it has also been modified by Jersey statutes. These general remarks apply equally to the trust law of Guernsey*** .
>
> ***58. The TJL [the Trust Law] is the principal indigenous source of Jersey Trust Law. It is not a complete code of the law of trusts. But it gives statutory effect to some principles already well established in England and significantly modifies other principles. English trust law therefore serves as the background against which the provisions of the TJL fall to be construed."***

78 At paragraph 59 Lord Hodge then goes on to set out some well-established principles of English trust law before concluding:

> ***"It appears to the Board that all of these principles must be regarded as having been part of the law of Jersey before the enactment of the TJL or its statutory predecessors."***

79 Lord Hodge then turned to Article 32(1) of the Trusts Law and expressed the view of the Board that its effect was to abrogate the rule of English law that the law looks no further than the legal entity which assumed the liability in question. In other words, although English law provided a base for the law of trusts in Jersey before the enactment of the Trusts Law, it was open to the States of Jersey to abrogate any particular English rules by its own legislation.

80 In his judgment, Lord Briggs expressed himself in a similar way. At paragraphs 244 and 245, Lord Briggs stated:-

> ***"244. Lord Mance's disagreement with the third strand seems to me to be based essentially upon his perception that the common law treats the extent of the liability of the trustee who contracts with a third party as dependent upon the terms of the contract. In the common law of England I agree that this is so. But statute has intervened in Guernsey so that, in a wholly domestic situation where the trustee is a trustee of a Guernsey trust, this is not so. His liability is limited by trust law, regardless whether he has limited or not limited his liability under the contract*** .
>
> ***245. Finally I agree with Lord Mance that there may be pragmatic reasons, in this context, for not giving priority to the law of the trust over the law governing the contractual relationship. English common law recognises that this should not be done. But those reasons have not dissuaded the legislature in Guernsey from doing just that, in a domestic context. …"***

81 If we may respectfully say so, the decision of the Board in the *Investec* case rightly in these respects gives primacy to the Island legislatures in so far as enactments concerning the law of trusts have been passed. This is consistent indeed with the preamble to the States of Jersey Law 2005, which states:-

> ***"WHEREAS it is recognised that Jersey has autonomous capacity in domestic affairs;***
>
> ***AND WHEREAS it is further recognised that there is an increasing need for Jersey to participate in matters of international affairs;***
>
> ***AND WHEREAS Jersey wishes to enhance and promote democratic, accountable and responsive governance in the island and implement fair,***

effective and efficient policies, in accordance with the international principles of human rights …"

82 This law, having been adopted by the States and having received assent from Her Majesty in Council firmly recognises therefore the autonomous capacity of the States of Jersey in their domestic affairs.

83 The Amendment Law was lodged by the Chief Minister on 31 May 2013, and it was debated and approved on 16 July 2013. It obtained Royal approval on 9 October and was registered in the Royal Court on 18 October 2013. The power to provide remedies for mistaken transfers into trust and for the mistaken exercises of trust powers was not, in general, an innovation on the powers of the Royal Court. The report accompanying the draft Amendment Law records that the concept of the proposed amendment was first considered by leading members of the financial services industry in 2011, and the amendment was subject to significant consultation with those specialist practitioners in industry most concerned in this area of the law in this jurisdiction. Numerous instances of the exercise of the power by the Royal Court are the subject of decisions of the Royal Court between at least 2009 and 2013, and it is clear from them and from the report accompanying the draft Amendment Law that there was some concern in this jurisdiction as to a growing divergence between domestic jurisprudence and that from England and Wales as to the ambit of the powers of the court on these matters. Indeed, the work preparatory to the presentation of the draft Amendment Law to the States was undertaken at the same time as the litigations in *Futter v Futter* and *Pitt v Holt* were proceeding in the English courts towards the Supreme Court, whose decision was handed down on 9 May 2013: [2013] 2 AC 108.

84 In our judgment, were there to be any doubt about the matter – which is not our view – the report accompanying the draft Amendment Law makes it plain that, regardless of the developing position in England, the States of Jersey intended by the Amendment Law to affirm the Island's separate framework for the law of mistake and what are known as 'Hastings Bass' applications.

85 The starting point in construing Article 47E is that one must take the ordinary and natural meaning of the words. In our view the natural meaning of Article 47E(2) is that where a settlor has made a mistake having the characteristics set out in paragraph 3 of that Article the Court may follow one of three courses:

(i) It may declare the transfer to be avoided and of no effect from the time of its having taken place;

(ii) It may declare the transfer to be avoided from the time of its having taken place but nonetheless be deemed to have had such effect as the Court may determine; or

(iii) It may declare the transfer to be avoided from a date subsequent to the time of its

having taken place.

86 The second and third of those options flow from the language of sub paragraph (i), namely that the transfer may have such effect as the court may determine. It may deal appropriately with the justice of the case with an order that the transfer is avoided at the date it is made; but that nonetheless a trustee which has exercised its powers of investment pursuant to the trust deed in good faith in the interim should not find itself faced with criticism for having done so. Or that a trustee which has charged fees ought fairly to retain them, or, the trust having profited from permitted investments under the terms of the deed, the trustee might retain associated fees or permitted profits. By contrast, it may sometimes be the case that some events have taken place between the date of the transfer and the date on which it is set aside which make it just to declare that the transfer be of no effect from a later date than the date it was made.

87 In our judgment this construction of Article 47E (2) is consistent with the general approach of the Trusts Law in establishing overall principles and allowing them to be developed flexibly by the Royal Court. In essence, the legislature has conferred upon the court a discretion to determine which of the three courses it would follow if satisfied that the mistake was of so serious a character as to render it just for the court to make any declaration at all under that Article.

88 What, then, are the principles by which the court should guide itself in exercising these powers? What is the nature of the jurisdiction? Is the provision that the court may declare a transfer voidable a restriction on the power of the court? The answer to these questions, in our judgment, lies in an examination of the relevant case-law in this jurisdiction prior to the Amendment Law coming into force.

89 The line of authority dealing with mistaken transfers includes *In re A Trust* [2009] JLR 447 (Clyde-Smith, Commissioner, with Jurats Le Breton and Le Cornu), *in the matter of the Lochmore Trust* [2010] JRC 068 (Birt, Bailiff, with Jurats Liddiard and Fisher) and *in the matter of the S Trust* [2011] JLR 375 (Sir Philip Bailhache Kt., Commissioner, with Jurats Clapham and Liddiard). For the sake of completeness, we note that the line of authority as regards the mistaken exercise of a power includes *in the matter of Seaton Trustees Limited* [2009] JRC 050 and *in the matter of the B Life Interest Settlement* [2012] JRC 229.

90 In the judgment in the A Trust, the learned Commissioner considered the nature and effects of the remedy for a mistaken transfer and stated:

> ***"75 This case is not concerned with the Hastings-Bass principle but with a voluntary disposition by Mrs. B of her own property.*** … .
>
> ***76 The issue is whether, in the light of the donor's serious mistake, it is just for the donee to retain the property given to him.*** That exercise by its very language presupposes that the original disposition had some legal effect.

The voluntary disposition stands unless and until it is set aside for mistake; it is voidable, not void .

77 Mr. Wilson submitted that a declaration that the dispositions and trust were void is consistent with the statutory wording of art. 11(2) of the Trusts Law…. The words “shall be invalid” suggested a mandatory requirement following a declaration by the court. The need for the court to consider that the trust was “established” by reason of one of the vitiating factors suggested, he argued, that the trust is rendered void because it never existed at all .

78 In our view, it simply does not follow that because the court is considering whether the trust was established by (in this case) mistake it never existed at all, as opposed to it existing until the court decides otherwise. The statutory provision does not, we think, inform the void/voidable debate .

79 Mr. Wilson placed some reliance on the case of *In re R Remuneration Trust*, ***a case where, applying English law, gifts into a trust were set aside by the court on the ground of mistake.*** There the court concluded that a mistake had been made before going on to consider whether to exercise its discretion. In doing so, it took into account the effect on the beneficiaries and third parties and observed ([2009] JRC 164A, ***at para. 37) that if the gifts were set aside, the donor would have a theoretical claim against the trustee for moneys distributed to the beneficiaries and the trustee may in turn have a claim against the beneficiaries, subject to a change of position defence.*** The court took a similar approach in *In re DSL Remuneration Trust*, ***also involving English law.*** The fact that the court considered the position of third parties in this way lent support to the view, Mr. Wilson argues, that the transactions in question are rendered void as opposed to voidable.

80 We do not think these cases lend any particular support to that argument. This is a discretionary remedy and in exercising that discretion the court must consider the effect on the donee and third parties, irrespective of whether the transaction is void or voidable. In our view, the potential for claims against beneficiaries exists whether the dispositions and trust are void or voidable .

81 The court asked to be addressed on the Jersey customary law and, in particular, on “erreur” in the Jersey law of obligations. However, we accept Mr. Wilson's submissions that this would be of limited assistance. He drew our attention to the warning given by Birt, Deputy Bailiff in (*JP v. Atlas Trust Co. (Jersey) Ltd. (14)* [2008] JRC 159, ***at para. 22):***

“Erreur' may be relevant when considering a contract governed by Jersey law but it cannot possibly, in our judgment, have any relevance in a case governed by equitable principles. The concept should be confined to matters governed by the law of contract. It would be quite wrong in principle and highly undesirable to muddy the waters by importing into cases concerning equitable

principles a concept derived from a jurisdiction which does not recognise or apply such principles."

82 We conclude therefore that the dispositions made by Mrs. B which we are setting aside for mistake and (as a consequence) the trust are voidable as opposed to void."

91 In the judgment *in the matter of Lochmore Trust* the learned Bailiff considered the required characteristics for a mistake to vitiate a transfer and stated:

"10 The law regarding the setting aside of a trust on the ground of mistake has been considered in depth and clarified in the recent decision of the Royal Court in *In re A Trust* [2009 JLR 447]. ***In that judgment, Clyde-Smith, Commr.*** reviewed the different tests as set out in *Gibbon v. Mitchell*, [1991] 1 W.L.R. 1304 ***on the one hand and*** *Ogilvie v. Allen* (1889), 15 TLR 294 ***on the other and adopted the test set out in the latter case, namely whether the donor or settlor was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him.*** In applying that test, the court must be satisfied that the donor or settlor would not have entered into the transaction 'but for' the mistake. The court rejected the distinction between a mistake as to the 'effect' of a transaction and a mistake as to the 'consequences' of a transaction as formulated in *Gibbon v. Mitchell*.

11 It follows that the court has to ask itself the following questions:

(i) Was there a mistake on the part of the settlor?

(ii) Would the settlor not have entered into the transaction 'but for' the mistake?

(iii) Was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?"

92 In the judgment in the *S Trust* the learned Commissioner further discussed the issue as to whether transfers of property into trust vitiated by mistake were void or voidable and stated:

"52 The form of the order is unusual and merits, perhaps, a word by way of further explanation because the court was not asked to set aside the transactions in question. No detailed submissions were made on the point but we understand that it was important for fiscal reasons that the representor, rather than the court, should set them aside. We were satisfied that the orders sought were correct and in accordance with principle. This court found, in *In re A Trust*, ***after a comprehensive consideration of the authorities, that the dispositions made by the settlor in that case were voidable as opposed to void.*** For essentially the same reasons, we were persuaded that in this case the dispositions were voidable.

53 The result of that conclusion was that the transfers of property were voidable at the instance of the representor on the ground of her mistake. She was accordingly entitled, at her election, to affirm the voidable transfers if she thought fit, or to avoid them and to exercise her right to have them set aside. As it happens, the representor did, pursuant to the order made on April 19th, 2011, exercise her right to have the transfer to the trustee set aside by executing a deed of avoidance on May 6th, 2011. Analogous results have been achieved in relation to the new trusts. Had she not done so, she might have ***been treated as having affirmed her gift into trust.*** She was not entitled to sit on the fence in perpetuity .

54 Although not previously the subject of consideration by this court, this principle emerges clearly from a decision of the English Court of Appeal in *In re Glubb*. ***In that case, gifts to charity were induced by innocent misrepresentations.*** When these misrepresentations were discovered, the donees asked the donors whether they would be prepared to apply their money to a different charitable gift (which they were). The situation was analysed by Lindley, M.R. as follows ([1900] 1 Ch. at 362):

"… I think the subscribers could, when the mistake was discovered, have got their money back, if they had chosen to demand it, and, having the right to do that, they elected to have their money applied to meet the deferred legacy. In other words, if the gifts were voidable in equity (I do not say they were voidable at law), the subscribers have elected not to avoid them, but they consented to appropriate their former subscriptions to meet the deferred legacy."

55 The action which avoids the gift is thus in equity the action of the donor and not the court, although the court may of course be asked to declare that the donor has that right and even, at the request of the donor, that the gift has been set aside .

56 The same analysis appears from the speech of Lord Atkinson in *Abram SS.* Co. Ltd. v. Westville Shipping Co. Ltd. ***The case concerned a contract, but the explanation appears to us to be equally relevant to this equitable jurisdiction.*** His Lordship stated ([1923] A.C. at 781):

"Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in statu quo ante and restores things, as between them, to the position in which they stood before the contract was entered into. It may be that the facts impose upon the party desiring to rescind the duty of making restitutio in integrum. If so, he must discharge that duty before the rescission is, in effect, accomplished; but if the other party to the contract questions the right of the first to rescind, thus obliging the latter to bring an action at law to enforce the right he has secured for himself

by his election, and the latter gets a verdict, it is an entire mistake ***to suppose that it is this verdict which by itself terminates the contract and restores the antecedent status.*** The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective, and put an end to the contract."

57 We were satisfied that these dicta may equally be taken to express the law of Jersey in relation to this equitable jurisdiction."

93 From this examination it can be seen that Article 47E, in almost every salient operational aspect, follows the settled approach of the Royal Court. The nature of a relevant mistake may be of almost any character (save that the doctrine of *erreur* is not to be used): see Articles 47B and 47C. The result of the mistake is that the transfer is voidable at the instance of the settlor: see Article 47E read with Article 47I. It is voidable not void and therefore has legal effect until declared avoided. The effect of avoiding the transfer may bear upon donees and third parties: compare the power to identify that a transfer may have had some effect. We therefore find that, upon a proper interpretation, Article 47E is the statutory embodiment of an existing equitable jurisdiction, the purpose of which is to enable a mistaken transferor to recover his or her property, with the appropriate remedial declaration and consequential orders being at the discretion of the court. The innovation of the Article lies in confirming that the court has alternate powers (a) to allow some effect to the transfer or (b) to declare that it has been of no effect. That provision, however, may be little more than a reflection of a need to give consideration to the interests of donees and third parties and of the possible availability of change of position defences (as compared with the position of the bona fide purchaser for value and without notice whose protection is maintained under Article 47I(4)).

94 Turning to guiding principles in the exercise of this jurisdiction, the court must first identify, as the Royal Court did below, that the application has been made by an appropriate person and that there has been a mistake bearing the characteristics required by the statute. The court then has a discretion as to whether to declare the transfer voidable and, the jurisdiction being equitable, it may be that, even with the required characteristics, the whole circumstances militate against a declaration. Having determined to make such a declaration the court will bear in mind for its consequent orders that the transfer or disposition will have had legal effect until the point of the declaration. It is only upon the making of the declaration that the trustee will become a bare trustee of the transferred funds or property: declaring the transfer to be of no effect will not result in the relationship of trust never having existed. In considering the effect of the declaration upon donees and third parties (and in this respect the trustee is entitled to be considered as a potentially affected third party) the court may require to adjudicate upon change of position defences. Accordingly, in exercising its discretion as to the appropriate remedies and consequential orders to authorise, the court will have to take into account all factors relevant to those issues.

95 It follows, therefore, that as regards the consequences of an exercise of the now statutory

jurisdiction the court may determine that, albeit the transfer has had some effects, none of those are to be a bar to the transferor potentially achieving full recovery. Thus, an appropriate order could have the effect of allowing the settlor to make a claim against the trustee for moneys distributed to beneficiaries, as a result of which the trustee would make a claim against the beneficiaries; both claims being subject, in principle, to the response of a change of position defence. In practice, however, a declaration of no effect from the date of the transfer will often require the making of sometimes numerous consequential orders: see *Z Trust* 2016(1) JLR 132 and *Link Trustee Services* [2018] JRC 043.

96 Upon this analysis, neither the proper operation of the statutory framework nor the orders of the court would run counter to the presumption against the retroactive operation of legislation: see, for example, *Wilson v First County Trust Ltd (No. 2)* [2004] 1 AC 816, especially at paragraphs 186 to 196 (Lord Rodger of Earlsferry). There is no change to the effect in law of juristic acts carried out before the date upon which the court makes the declaration: rather the statute gives the court power to use a consequential order to create a right to obtain the reconveyance of property or payment of a monetary equivalent when, prior to that date, the settlor had no such right. The remedy is restitutionary: see the *S Trust* at paragraphs 56 and 57.

97 Given that we construe Article 47E to be providing a flexible framework, we do not think that it is appropriate to attempt an exclusive list of factors which will be relevant from case to case; but in our judgment potentially many factors could be relevant considerations in the process of identifying the appropriate declaration. In some instances the parties may be indifferent as to the date as at which the transfer is avoided: an example is the simple mistake, with no taxation consequences and no distributions in the intervening period. On the other hand, a mistaken transfer may well have unattractive taxation consequences and the court must be persuaded that a declaration that the transfer has had no effect is a proper declaration to make. Equally, there may be competing factors to be taken into consideration in identifying which, if any, of the effects of a transfer are to be declared to be retained. Where, as here, the transferee is no longer in possession of the assets transferred, the exercise will be more complex.

98 In each case it will be important for the court to be clear that the factors identified are indeed relevant to the question as to which orders may be appropriate ones to make.

99 Certain authorities from England and Wales were put before us regarding the general approach of the courts to principles to be applied on occasions when a court's discretion has to be exercised following a mistaken transfer. In our judgment, however, whilst these are potentially helpful illustrations of possible approaches to the exercise of discretion as to an appropriate remedy, they cannot be treated as establishing binding principles to which the courts in this jurisdiction must adhere. This is because the decisions were not given against a background such as the statutory options available to the courts in Jersey under Article 47E. Accordingly, although we were referred to important authorities such as *Westdeutsche Landesbank v Islington LBC* [1996] AC 669, *Bristol & West Building Society v Mothew* [1998] Ch 1 and *Target Holdings Limited v*

Redferns, we did not find in them any assistance as regards the proper approach in this jurisdiction to the exercise of the equitable jurisdiction to fashion an appropriate restitutionary remedy.

Discussion

100 It seems to us apparent from paragraphs 648 and 727 of the Royal Court's judgment that the Royal Court did not approach its powers under Article 47E by identifying the full range of options as to what order might be made once it had been satisfied that a mistake had been made which was sufficiently serious to justify the Court making a declaration under that Article. Indeed, it appears that the Court assumed that once it had declared the transfer to be avoided, it followed that it was void from the outset and, therefore, that the transferred assets were held on trust for Cristiana. In doing so, the Royal Court appears to have been persuaded to fall into error in failing to follow the principled approach which it had established prior to the coming into effect of the Amendment Law. It follows that, as an appellate court, we either should consider the issues ourselves or remit the matter back to the Royal Court for further argument. We do not think that the latter course is appropriate for two reasons. First, we have the information which is necessary so as to be able to determine how we think the discretion might best be exercised. Second, the way in which the Royal Court has approached the problem does indicate with some clarity what the Royal Court's view was on the conduct of BNP Jersey and indeed on the other features we conceive to be relevant to the necessary exercise.

101 We should record at the outset that many of the submissions by Advocate Redgrave for BNP Jersey were premised upon the suggestion that the Royal Court had in fact substituted a remedial constructive trust in respect of the holding of the Crica shares by BNP Jersey. Whilst the point is no longer of importance, we do not accept the submission that a remedial constructive trust was imposed. As we have already indicated, the Royal Court concluded that the transfer was void from the outset, and that it followed as a matter of law that BNP Jersey held the Crica shares on bare trust for Cristiana.

102 We turn, therefore, to apply the principles which we have identified to the circumstances of this part of these appeals and, in particular, to identify the factors relevant to the questions as to which if any of the juristic acts which have been carried out should be permitted to remain valid and effective, and as to the appropriate restitutionary remedies.

103 We recognise that Madame Crociani has been found by the Royal Court to be the principal architect of the problems which have arisen, in relation to the Crica transfers at least, and, indeed, is liable to account for them. Furthermore, the Royal Court has found, understandably on the evidence which it heard, that there is a probability that she will take steps to ensure that her assets are held in a variety of entities and placed in different parts of the world beyond the reach of those who have legitimate claims against her. In all likelihood, there will be a difficulty in recovering those assets to satisfy judgments of the court. BNP Jersey have the unenviable task, as a result of other parts of the judgment of the

Court below, of trying to enforce against Madame Crociani the right of indemnity which has been found to exist. The same problem is likely to arise in connection with any judgment for the recovery of the value of the Crica shares: and we have formed the view that we should proceed on the basis that recovery from Madame Crociani is less likely than not. Even so, we wish to make it clear that, in our judgment, there are no equitable considerations in favour of allowing Mme Crociani to retain the gratuitous donation: she directed the transfer to herself in full knowledge that she was depriving Cristiana of property which, having been Cristiana's own property, Mme Crociani made her (Cristiana) transfer to Camilla and to the Fortunate Trust for her (Madame Crociani's) own purposes.

104 As for BNP Jersey, in its favour it can be said that it acted within its power as trustee in terms of a valid trust and, indeed, would appear at first sight to have been obliged to denude when called upon to do so by Mme Crociani. If the transfer is declared of no effect as from its exercise, the result is to make it from that point a bare trustee of the shares with an obligation to account, and, for the reasons which we have given, in practical terms unlikely to be able to recover from Madame Crociani.

105 On the other hand, there is much that can be said about the participation of BNP Jersey with the family, and its state of knowledge, which places it in a singular position for a trustee at the time when it denuded in favour of Madame Crociani. We start by considering the position of BNP Jersey in June 2011 as trustee of the Fortunate Trust, as against the provisions of Article 21 of the Trusts Law which requires that a trustee shall, in the execution of his duties and in the exercise of his powers and discretions, act with due diligence, as would a prudent person and to the best of his ability and skill, observing the utmost good faith. By Article 21 (2), a trustee is charged, subject to the Trusts Law, to carry out and administer the trust in accordance with its terms.

106 At first sight, it may be thought that the combination of these provisions means that, when Madame Crociani revoked the Fortunate Trust, BNP Jersey was obliged, as trustee, to carry out the administrative actions necessary to place the assets of the trust in her ownership. In our judgment, the position is more complex. For example, the obligation on the trustee to carry out and administer the trust in accordance with its terms is subject to the whole of the Trusts Law, one provision of which relates to the setting aside of gifts into trust for mistake. In our view, therefore, Article 21 of the Trusts Law does not provide any conclusive assistance. All are taken to know the law: and a Jersey trustee must acquaint himself or herself with the Trusts Law. In doing so, the possibility of a gift into trust being vitiated by mistake will become obvious. Even leaving that matter aside, any trustee – especially, one might think, a professional trustee – ought to consider whether assets held in its charge are indeed patrimony of the trust it is dealing with before it pays them away in accordance with the terms of that trust. When a person is a trustee of more than one trust, it is his or her obligation to keep the assets of the two trusts separate and distinct; just as he must keep his own patrimony distinct from trust patrimony. In the circumstances, as set out in paragraph 99 above, we are exercising our own discretion, and therefore proceed carefully to appraise from the findings of the Royal Court what was the apparent state of knowledge of BNP Jersey at relevant times.

107 What did BNP Jersey know at the material times between in April 2010 and June 2011? It knew that in April 2008 it had distributed from the Grand Trust considerable sums of money to Cristiana. It knew that it had distributed, in particular, US$5.3 million from the Grand Trust to Cristiana to buy one of the Miami apartments; and it knew that further substantial sums had been distributed both to Cristiana and to Camilla during 2008. It knew that, in December 2009, Cristiana's absolute interest in the Fortunate Trust had been replaced with discretionary provisions and it also knew that, in April 2010, Cristiana had issued a Letter of Wishes indicating her state of mind, namely that in relation to her fund in the Fortunate Trust, if her mother ceased to be protector, and she, Cristiana, died, then Camilla was to be appointed protector until Cristiana's eldest son reached the age of eighteen. It accordingly understood that Cristiana considered that provisions in the Fortunate Trust were for her benefit and for the benefit of her children; and – although it may not have appreciated it – by reason of its conduct in providing the Features document and the chart to Cristiana as set out in paragraph 57 above and its email of 8 April 2010, it had encouraged her in that belief.

108 In April 2010 BNP Jersey also knew of the unequal division of artworks – Camilla or her fund received paintings to the value of US$122 million, and Cristiana, or her fund, paintings to the value of US$21 million – because, at the request of Madame Crociani, it had drawn up the relevant deed recording the position. By November 2010, it knew that Cristiana had been replaced by Camilla as a director of Croci BV, and, on 28 March 2011, it was advised of the breakdown in relations between Cristiana and her mother. It knew that on 11 April 2011 Cristiana had been removed as sole director of Crica and replaced with Mr Paul Foortse, as BNP Jersey, through BNP Nominees had done this: see paragraph 412 of the principal judgment below. By May 2011, it knew that Madame Crociani was considering a revocation of the Fortunate Trust, because preliminary instructions had been given to Messrs Ogier to prepare a draft deed of revocation; and it knew that on 13 May 2011, it had instructed that all cash and securities be transferred from the Grand Trust to the Fortunate Trust.

109 When, therefore, at the end of June 2011 the Fortunate Trust was revoked by Madame Crociani as grantor of the trust – although she was not the provider of the Crica assets – and despite having had time, especially since May 2011, to consider its position in relation to Crica and Cristiana with care, BNP Jersey accepted the instructions of Madame Crociani to transfer all the assets in the Fortunate Trust to her, including the Crica shares which had been provided by Cristiana, and possibly in BNP's mind by Camilla. Knowing all those things, BNP Jersey did nothing but perform Madame Crociani's instructions. It did not contact Cristiana or Camilla. It did not consider, let alone take, the step which many trustees might have taken and approach the Royal Court for directions in circumstances where there was doubt as to an administrative matter. As the Royal Court recorded, Mr Le Cornu accepted in evidence that, at the time of the meeting on 13 May 2011, he should have sought advice as to whether he could and should have stopped the transfer, pursuant to the delegated authority under the 2010 Appointment: see paragraph 426 of the principal judgment. Further to that general statement, and as the Royal Court also noted, Mr Le Cornu had also conceded that, at the point of that meeting, he would not have been willing to make the 2010 Appointment, as it was no longer in Cristiana's interests.

110 Whilst the Royal Court considered these matters only in terms of exoneration, they are, in our judgment, material factors to be taken into account in connection with the exercise of the equitable jurisdiction.

111 That a particularly high degree of caution may be expected from trustees derives from what the Privy Council have referred to as one of the well-established principles of equity. In *Guardian Trust and Executors Company of New Zealand Ltd v Public Trustee of New Zealand* [1942] AC 115, the Board had to consider the case of a bank executor who paid legacies under a will after it had received notice from the next of kin that they intended to challenge the will. He was made personally liable to account for the value of the legacies paid out when the challenge to the will by the next of kin proved successful and the grant to the executor was revoked.

112 Lord Romer, delivering the advice of the Board, stated (at 127–129):

> ***"… [I]f a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded*** .
>
> ***…*** ..
>
> ***…after a review of the facts of the case, Myers C.J. said that he could come to no other conclusion than that the payments to the legatees were made with knowledge and notice on the part of the respondents of facts and circumstances which should have made it plain to any ordinary, reasonable and prudent man of business that the payments should not have been made.*** With this conclusion of the learned Chief Justice their Lordships find themselves in complete agreement."

113 Here, by the time of the transfer to Madame Crociani, the totality of the state of knowledge of Mr Le Cornu of relevant matters was such that BNP Jersey was on notice that to deal with the fund within the terms of the Fortunate Trust without other considerations would be to do so in disregard of its notice that there could be a competing claim that could prove to be well founded.

114 In such circumstances, it was open to BNP Jersey to take the course well known to almost any trustee and apply to the court for directions.

115 It did not. Such considerations weigh greatly against BNP Jersey and have the outcome that, even considering the significant effect on it, the balance of equities is firmly in favour of Cristiana. Following *Guardian Trust*, as between Cristiana and BNP Jersey the latter are not in a position to argue a change of position defence based upon their payment to

Madame Crociani consequent on her apparently valid revocation of the Fortunate Trust.

116 In summary, in concluding which of the remedies was most appropriate, it seems to us, albeit for different reasons, that the Royal Court was entitled to conclude that the transfer into trust of the Crica shares ought to be set aside and declared to be of no effect as of the date it was made, namely 30 April 2010; and that liability on the part of BNP Jersey would follow. For the avoidance of doubt, this conclusion does not detract from the right of BNP Jersey to recover such sums from Madame Crociani, if it is able to do so.

Exoneration

117 The conclusion which we have reached and the reasoning which supports it means that the question of exoneration for breach of trust does not arise. It follows that BNP Jersey's appeal against this part of the decision of the Royal Court in respect of the Crica shares fails and is dismissed.

The appeal by Appleby Mauritius: breach of Trust

118 The Royal Court held that Appleby Mauritius acted in breach of trust as *de facto* trustee/trustee *de son tort* in four respects: by agreeing to amendments to the Promissory Note extending by five years the date for repayment of principal, with an increased rate of interest in the interim; by assigning it to GFin Corporate Services Limited ("GFin"), another company carrying on a financial services business in Mauritius; by amending the provisions of the Grand Trust and so giving GFin a platform to commence rival proceedings in Mauritius; and by not collecting the accrued and accruing interest under the Promissory Note.

119 Appleby Mauritius does not appeal the first three of these conclusions. It does challenge the Royal Court's decision that it was in breach of trust by not collecting the interest; and it also contends that the Royal Court was wrong to hold that Camilla did not have an interest capable of being impounded, and wrong to order reconstitution of Camilla's fund. The issues raised by the points concerning impounding and reconstitution are identical to the issues raised by BNP Jersey in its appeal. In dealing with the latter appeal we have made reference to the arguments advanced on behalf of Appleby Mauritius by Advocate Moran; and for the reasons given in relation to BNP Jersey's appeal we allow Appleby Mauritius's appeal on the impounding/reconstitution issue to the same extent. We deal below with a related point about the divisibility of the debt due under the Promissory Note.

120 This section of the judgment accordingly deals primarily with the appeal of Appleby Mauritius against the Royal Court's conclusion that it was in breach of trust in failing to collect the interest under the Promissory Note.

121 The factual background to this aspect of the matter may be shortly stated. No interest had been paid under the Promissory Note since 2003. By 30 September 2013, eighteen months after the purported appointment of Appleby Mauritius, the outstanding capital was US$32 million and the outstanding interest was US$21.4 million. Interest of about US$2.5 million a year continued to accrue on the capital, but not on the arrears of interest. The Royal Court took the view that the failure to collect interest up until the purported appointment of Appleby Mauritius on 10 February 2012 was not a breach of trust. Its reasoning was as follows:

> ***"We accept that the trustees should at least have put their minds to the payment of interest every year, and be recorded as having done so, but we feel we must look at the reality of the position.*** The reality was that Madame Crociani, the settlor of the Grand Trust and matriarch of the family, would decide where the money should be retained within the Croci Group, for example to support the jewel in the crown, Ciset, or to acquire property for the use of the family, or to be used to pay interest to the Grand Trust. For so long as she remained in control of the Croci Group, and the family were living together in apparent harmony, benefiting from both the Grand Trust and the Croci Group, it is not reasonable to expect Mr Foortse and BNP Jersey to seek to engage the enforcement powers under the Promissory Note against the family owned company, in what would be a hostile act in the face of the wishes of the family. As Mr Le Cornu said, the value of the Promissory Note was accruing and in any event, was payable in full in December 2017."

122 The Royal Court went on to say that the position changed fundamentally in April 2011 when there was a breakdown in the family relations, and in particular in December 2011 when Camilla became the owner of Croci BV. From that time, there was no longer a community of interest: Camilla, as the owner of Croci BV, had no interest in that company paying interest, half of which would go to Cristiana's trust for the benefit of Cristiana, from whom she was estranged, and her children; and Cristiana and her children had no interest in leaving the accrued interest outstanding.

123 Accordingly, the Royal Court held that following this fundamental change in circumstances there could be no conceivable justification for the trustees of the Grand Trust making an interest free loan to Croci BV by failing to collect the accrued interest due under the Promissory Note. Within a reasonable time from its purported appointment as trustee, Appleby Mauritius should have given 30 days' notice to Croci BV to pay all of the accrued interest due under the Promissory Note, and its failure to do so constituted a breach of trust.

124 The Royal Court noted that the Promissory Note represented one indivisible debt due to the trustees of the Grand Trust. Although the issue had not been discussed and so remained open, the Court doubted whether it would have been possible for Appleby Mauritius to call in half the accrued interest for the benefit of Cristiana's trust alone, since any payment received would have accrued for the benefit of both trusts.

125 The Royal Court felt itself unable to assess fairly the compensation that Appleby Mauritius should pay for its breaches of trust, and so gave judgment against it on liability, leaving the amount of the compensation to be assessed by inquiry. Pending the outcome of the inquiry, however, and as security for its obligation to pay compensation, Appleby Mauritius was ordered to pay into court pending further order €52,607,480, being the amount of the capital and accrued interest due under the Promissory Note at its original maturity date of 10 December 2017.

126 Appleby Mauritius took four main points on this aspect of its appeal:

(i) The terms of the Grand Trust absolved the trustees from any duty to enforce the terms of the Promissory Note;

(ii) the Promissory Note had not been properly assigned to Appleby Mauritius, so that Appleby Mauritius had never had custody or control of the Promissory Note and so could not be liable as trustee *de son tort* for failing to collect the interest;

(iii) there were good reasons for not collecting the interest; and

(iv) any attempt to collect the interest would have failed.

127 These points were designed to support an overall challenge to the Royal Court's finding that Appleby Mauritius was liable to account on the basis of wilful default. It was said, by reference to *Armitage v Nurse* [1998] Ch 241, 252C-D, that the test for liability on the basis of wilful default is whether the interest could with reasonable diligence have been recovered; and these points demonstrated that it could not. We take the points in turn.

Terms of the Grand Trust

128 The relevant part of the recital to the deed establishing the Grand Trust was in the following terms:

> ***"The Trustees shall receive as the initial Trust Fund the Secured Term Note (the "Note") described in the annex to 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 Trustees may have as owner of the Note" (emphasis added)*** .

129 Appleby Mauritius made a general point and a specific point by reference to this provision and the circumstances in which the Grand Trust was established. The general point was that it was to be inferred from the terms of the Promissory Note, the wording of the recital

and the control exerted by Madame Crociani over the company structure that the ability of Croci BV to secure an interest-free loan by non-payment of interest was integral to the basis on which the Grand Trust had been established and the Promissory Note transferred to its trustees. The specific point was that the wording of the recital, in particular that part of it that we have emphasised above, absolved the trustees from time to time of any duty to take steps to procure payment of the interest. If it were volunteered, they were obliged to receive it; but if it were not volunteered, there was no obligation on the trustees to require its payment.

130 It appears to us that this argument stands or falls on the wording of the recital itself. The general point does no more than supply a possible context to explain why the recital took the form it did: it cannot on its own remove a duty which the Grand Trust otherwise imposes. But when the wording of the recital is examined in that context, it is in our judgment clear that it does not have the effect contended for by Appleby Mauritius. The first part of the emphasised passage, so far from absolving the trustees from liability, obliges them to collect the interest and principal when due. The word *"collect"* imports a requirement of positive action to obtain the principal and interest, not mere passive receipt of them if they are offered. The second part of the recital does no more than provide a limited derogation from the general duty to collect; it does not abrogate it altogether. There are two possible interpretations of that derogation, depending on the extent to which the words *"shall not be required to institute litigation"* govern the residue of the recital. The first interpretation is that the trustees are not required to commence litigation either (a) to enforce payment or (b) to enforce any right they have as owner of the Promissory Note. The second interpretation is that they do not have to litigate to enforce payment, and do not have to enforce by any means any of their rights as owners. We have no hesitation in preferring the first interpretation, for two reasons: first, that the second interpretation – by removing any requirement on the trustees to enforce the Promissory Note – directly conflicts with the primary duty to collect the principal and interest; secondly, that treating the recital as removing any requirement to enforce the trustees' rights as owners of the Promissory Note makes redundant the removal of the requirement to enforce payment – which is, of course, one of the owners' rights under the Promissory Note – by litigation. But on that basis, although the recital states that the trustees need not litigate to enforce the terms of the Promissory Note, it does not state that they *cannot*. It is not a prohibition on enforcement even by litigation. Had Appleby Mauritius pursued enforcement steps falling short of litigation, it is at least possible that any litigation would have been initiated by Croci BV, or by Camilla as beneficiary of the Grand Trust; and, since the terms of the recital state only that the trustees shall not be required to institute litigation, they would on the face of it have been under an obligation to defend the proceedings.

131 Nor does it seem to us that the recital is a limitation on the trustees' duties such as to exempt them from liability in all circumstances for a failure to litigate. They cannot be made to litigate, but, since there is nothing to stop them doing so if circumstances require, so there is nothing to exempt them from liability if they fail to litigate in circumstances where litigation is the only effective means of performing the primary obligation to collect the debt. The most that can be said is that they are immune from liability if they have properly considered whether or not to litigate, and have concluded that it is not in the interests of the

beneficiaries that they should do so. There was, however, no suggestion that Appleby Mauritius had given any consideration as to whether it should collect the interest, and in consequence it cannot bring itself within the limited immunity afforded by the terms of the recital.

132 By the time Appleby Mauritius was purportedly appointed trustee of the Grand Trust, the Promissory Note represented the trust's sole asset. Relationships within the Crociani family had deteriorated dramatically, and the circumstances were no longer remotely the same as had prevailed when the Grand Trust was set up. The circumstances called for steps to be taken by the trustees, in the interests of Cristiana and her children, to enforce Croci BV's obligations under the Promissory Note. Nothing in the terms of the Grand Trust prevented Appleby Mauritius from taking those steps, by litigation if necessary, but none was taken. Nothing in the recital exempts Appleby Mauritius from liability for failing to take those steps.

133 This point accordingly fails.

Liability as trustee de son tort

134 In its supplemental submissions, Appleby Mauritius developed its original complaint that the Promissory Note had not been assigned to it into a wider point on its position as trustee *de son tort*. It drew a distinction between custody and control of the Promissory Note as a physical document and custody and control of the chose in action represented by the Promissory Note — namely the right to receive the principal and interest. Appleby Mauritius accepted that it had custody and control of the document itself, but asserted that the Promissory Note had not been assigned to it and that therefore it did not have any right to or control over the chose in action. Since liability as trustee *de son tort* depended on custody and control of the relevant trust asset, there could be no liability for failure to collect the interest.

135 The Plaintiffs objected to the introduction of this point. They said that supplemental submissions were not contemplated either by the rules or by the directions for the appeal given by the Court; but, more fundamental than that, Appleby Mauritius's wider point amounted to an essential objection not only to the finding of breach of trust in failing to call in arrears of interest but also to the findings that Appleby Mauritius had acted in breach of trust in assigning the Promissory Note to GFin and in renegotiating its terms. Appleby Mauritius could not be allowed to run an argument which was capable of undercutting parts of the Royal Court's order that had not been formally appealed. That was particularly so, because if there had from the outset been an appeal against all aspects of the finding that Appleby Mauritius was liable as trustee *de son tort* the Plaintiffs would have sought to appeal the finding that BNP Jersey was not liable for what had happened to the Promissory Note.

136 We allowed Appleby Mauritius to make its argument on this point, but on strict terms. We

took the view that the Amended Notice of Appeal makes plain that the appeal is against the judgment in relation to the collection of interest and accrued interest, and it followed that the contentions and the supplementary contentions that were filed must relate to that ground of appeal. We expect that the Royal Court, in pursuing the inquiry which it is to pursue in due course, will do so consistently with the judgment which it has given and with this judgment, and therefore Appleby Mauritius will not be able to use any conclusions in this judgment in order to contend before the Royal Court on the inquiry that it is not responsible for any inability to recover the capital.

137 To put this point in context, it is necessary to consider what conditions are necessary to the imposition of liability on a person as trustee *de son tort*. As Lewin on Trusts, 19th ed, states at paragraph 42–101: "If a person by mistake or otherwise assumes the character of trustee when it does not really belong to him, he becomes a trustee de son tort and he may be called to account by the beneficiaries for the money he has received under the colour of the trust". Advocate Moran emphasised the reference to money received, and referred to the leading English authority of *Re Barney* [1892] 2 Ch 265, in which Kekewich J said the following (at pp 272–3), speaking initially of a duly appointed trustee:

> ***"But there must be that which is either vested in him in law, or for which he is entitled to call, about which there is no question; so that his duty plainly is to require that it should be vested in him.*** And if that is true of a trustee properly appointed, why is it not also true of a trustee de son tort? Why should I extend the phrase when I find a person irregularly acting in a certain way, and make him a trustee irregularly, although he would not be a trustee if he had been regularly appointed to act in the same way? I hold that it is essential to the character of a trustee that he should have trust property either actually vested in him, or so far under his control that he has nothing to do but ***require that, perhaps by one process, perhaps by another, it should be vested in him."***

138 The position is stated as follows in Lewin at paragraph 42–103:

> *"The accountability of a trustee de son tort is limited to property which he has received.* In general receipt means acquisition of legal ownership or the right to obtain legal ownership, and lesser forms of control are insufficient.
>
> *But it is not clear whether a trustee de son tort will escape liability in a case where a loss, for which he would have been liable if he had been properly appointed, is incurred in respect of trust property which has not, due to a defect in his appointment, been vested in him under section 40 of the Trustee Act 1925, but is nonetheless administered and controlled by him in the mistaken belief that he has been properly appointed.* It is thought that a trustee de son tort would be liable for such a loss, at any rate if his conduct was the cause of the loss or if his effective control over the trust property would have enabled him to prevent the loss."

139 The Royal Court cited this passage. Advocate Moran referred us to a short passage

appearing in the supplement to Lewin at Note 356, adding at the end of paragraph 42 – 103, to which the Royal Court's attention had not been drawn: “The property must be vested in him as though a trustee. And so a party to a contract does not become a trustee de son tort because he receives, controls and deals with a fund out of which money should have been, but has not been, set aside by him under the terms of a contract to create a trust, which in consequence remains unconstituted”. We do not think this adds anything: it is plainly concerned with the capacity in which a person holds property, and says no more than that a person who holds property as a contracting party does not become a trustee of it. The first sentence of the passage cannot be read in isolation.

140 The Royal Court did not decide if the Promissory Note became vested in Appleby Mauritius, stating that whether or not there was a defect in the assignment to it of the Promissory Note Appleby Mauritius nevertheless administered and controlled the Promissory Note as if it had been appointed trustee. Its reasons for holding Appleby Mauritius liable as trustee *de son tort* are encapsulated in the following passage from paragraph 702 of the judgment:

> ***“having assumed the role of trustee since February 2012, Appleby Mauritius purported to act in all respects as if it was the trustee, defending these proceedings and the pre-emptive costs application as trustee and dealing with the sole remaining asset of the Grand Trust by renegotiating its terms and assigning it to GFin.*** Having done so, Appleby Mauritius ought not to be in a better position as regards its liability for the losses caused by the breaches of trust we have found against it, than if had been validly appointed” .

141 Advocate Moran's argument was that the right to recover the debt evidenced by the Promissory Note was never received by Appleby Mauritius, which had neither legal ownership of the chose in action represented by the Promissory Note nor the right to call for legal ownership. That was because the chose in action had not been validly assigned to Appleby Mauritius. It was necessary to draw a distinction between the Promissory Note as physical document and as representing the right to recover the sums due under it. Title to the document was capable of passing by delivery, and it did so; but title to the right to recover sums due under the Promissory Note and to sue for them depended on an assignment that never occurred.

142 It was common ground that the question whether or not there had been an assignment was to be determined in accordance with the law governing the purported assignment itself: see Dicey, Morris and Collins, The Conflict of Laws, 15th edition, Rule 135. The only document capable of constituting an assignment was the 2012 appointment, and that document expressly stated in clause 12 that it was governed by the law of Jersey.

143 Unlike in England, the appointment of a new trustee under Jersey law does not automatically vest the trust estate in the new trustee. Instead, Article 17(4) of the Trusts Law provides that:-

"On the appointment of a new or additional trustee anything requisite for vesting the trust property in the trustees for the time being of the trust shall be done."

144 However, again unlike in England, no particular formality is required by Jersey law for an effective assignment. In *Kells v Cashback Limited* [2012] JCA 140 this Court, whilst stating that the lack of any principled submissions on the Jersey law of assignment and the absence of any analysis of the law below meant that the case was not one in which it would be appropriate for the Court of Appeal to provide general guidance on the substantive and procedural law governing the process of assignment in Jersey, stated the position as follows:

> ***"Thus according to Pothier, although historically the legal nature of a debt as a personal right of a creditor meant that it could be neither assigned nor sold, the law developed to permit debts to be effectively assigned by recognising the assignee of any debt as the mandataire of the creditor, whereupon the debtor would be bound to tender the debt to the mandataire instead of the creditor.*** More significantly, given the basis of the appellant's appeal, this procedure of "transport-cession" may be carried out without the consent or intervention of the debtor and whether or not the debt has been sold. No particular form is required to appoint a third party or mandataire to collect the debt: see further Traité du Contrat de Mandat Partie VI, Chapitre IV."

145 It is accordingly necessary to consider the terms of the 2012 appointment. So far as material, they are as follows.

(i) Recital (B):

"Pursuant to the Twelfth Clause of the Trust the Trustees have power at any time or times and from time to time before the Distribution Date and without infringing the rule against perpetuities at the absolute discretion of the Trustees by any irrevocable deed or deeds to resign as Trustees and to appoint a New Trustee or New Trustees outside the jurisdiction at that time applicable to the Trusts thereunder as Trustees thereof and to declare that the Trusts thereof shall be read and have effect according to the laws of the country of the residence or incorporation of such New Trustee or Trustees and upon such appointment being made the then Trustees shall immediately stand possessed of the Trust Fund upon trust for the New Trustee or Trustees as soon as possible …".

(ii) Recital (G):

"It is intended that the assets subject to the trusts of the Trust (the "Trust Fund") shall forthwith be transferred into the name of, or under the control of, the New Trustee …".

(iii) Clause 4:

"The parties hereby declare that the property comprised in the Trust Fund shall upon execution hereof vest in the New Trustee and the Outgoing Trustees hereby covenant and undertake to execute all documents and take all such other action as is necessary for the vesting of the Trust Fund in the New Trustee, following which the New Trustee shall hold the Trust Fund upon the trusts and with and subject to the powers and provisions of the Trust so far as the same are now subsisting and capable of taking effect" (all emphasis added).

146 In our judgment, as a matter of construction the 2012 appointment constitutes an immediate assignment of such trust property as is capable of assignment. This is the effect of clause 4, which in terms speaks of the trust property vesting in Appleby Mauritius on execution of the 2012 appointment. That is consistent with recital (G), which expresses an intention that the trust property shall be forthwith transferred to Appleby Mauritius – as, so far as it is capable of assignment, it is by the effect of clause 4. The reference in the latter part of clause 4 to the execution of documents and the taking of action necessary to vest the trust fund in Appleby Mauritius applies only to assets that require some further action before title is transferred: for example, the registration of shares and the delivery of chattels. Thus title to the Promissory Note as a physical document would pass only upon delivery to Appleby Mauritius, and until then would be held on trust by BNP Jersey for Appleby Mauritius as contemplated by Recital (B); but title to the chose in action represented by the Promissory Note, which could be assigned by appointment of Appleby Mauritius as mandataire, passed on execution of the 2012 appointment by virtue of clause 4. In consequence, title to the right to recover the sums due under the Promissory Note passed to Appleby Mauritius forthwith on execution of the 2012 appointment; and, subject to notice being given to Croci BV, thereafter the only person entitled to receive those sums was Appleby Mauritius.

147 Advocate Moran submitted that, whether or not that would have been the position had the 2012 appointment been valid, the Royal Court had declared it to be void. In consequence, so it was said, nothing could have passed under that document.

148 We reject that submission. What the Royal Court declared to be void were the appointment of Appleby Mauritius and the attempt to change the proper law: "the appointment of Appleby Mauritius and the change in the proper law must fail and we will set it aside as being void and of no effect" (paragraph 484). That was because the then trustees had exercised their trust powers for an improper purpose: "of the three former trustees who exercised the power to appoint Appleby Mauritius and to change the proper law, Madame Crociani was acting for an ulterior and improper purpose, but at the very least all three former trustees were not acting in the interests of the beneficiaries as a whole" (paragraph 483). It is important to appreciate that the reasons why the appointment and change of law were void had no effect on the 2012 appointment as a document. It was not, for example, void as a forgery. It was accordingly effective according to its terms to transfer title to the chose in action, even though the recipient was not properly appointed and accordingly came under an immediate obligation to retransfer it. If Appleby Mauritius had transferred the chose in action, as it ultimately did to GFin, the acquirer would have

acquired title – although, subject to any defences it might have, it would be obliged to transfer to the persons truly entitled to it. The point may best be illustrated by considering the position in relation to the Promissory Note as a physical document. There is no dispute that that document was delivered to Appleby Mauritius, and the effect of delivery was to pass title to the document. The fact that the recipient had no right to receive it is immaterial to the passing of title; all it means is that Appleby Mauritius came under an obligation to restore title to the proper trustees by giving it back.

149 *Cloutte v Storey* [1911] 1 Ch 18 is a decision of the Court of Appeal of England and Wales that establishes that an appointment resulting from a fraud on the power is void in equity, not voidable – a conclusion that, although not universally accepted, we are content for the purposes of this judgment to accept. The case concerned a claim by a purchaser of a reversionary interest to have acquired title to the interest as a bona fide purchaser for value of it without notice of the fact that the interest had been appointed to the vendor in breach of trust. The claim failed because the interest acquired by the purchaser was an equitable interest, not a legal estate. The terminology of the leading judgment, delivered by Farwell LJ, is founded on the distinction between legal and equitable interests that is a product of the development of English law and has no direct parallel in Jersey law, and for present purposes is further complicated by the fact that the judgment relates to the law as it stood before the 1925 property legislation, including the Trustee Act 1925. It nevertheless appears to us that the following passage from the judgment of Farwell LJ at pages 30–31 draws precisely the distinction between an appointment that involves the passage of title to a trust asset and one that does not that is relevant in the present case:

> ***"Now the power in this case is equitable only; i.e., it has no direct operation on the legal interest and could not have been enforced or challenged in any common law Court; the trustees in whom the legal title is vested must have transferred the property in order to give legal effect to the appointments.*** In such a case the difference between void and voidable is of little, if any, importance. Equity administers the trusts of the settlement and has regard only to equitable interests and equities: the appointments operate only in equity and are mandates to the trustees as to the mode of dealing with the legal title: there is nothing to be set aside or delivered up to be destroyed before effect can be given to the rights of the parties, because the Court has all the materials in its own hands and deals with the parties according to their rights in equity only. It would be otherwise if the power enabled dealings directly affecting the legal estate — e.g., if (as in *M'Queen v. Farquhar* 11 Ves. 467) ***the settled property was real estate conveyed to the use of such of the children as the parents should by deed appoint: the common law would inquire only whether the appointee was a child and whether the deed was duly executed in accordance with the power, and if these questions were answered in the affirmative would hold the execution valid.*** Any questions of a fraud on the power would be for equity only: Sugden on Powers, 8th ed., pp. 602 and 606. In such a case the appointee would have the legal estate, and it would be necessary to set aside the appointment in order to get rid of the legal estate which had passed thereunder; and in an action for that purpose the plea of purchase for value without notice passing the legal estate would be a good

> ***defence:*** *M'Queen v. Farquhar*. ***But in equity the appointment is void, not voidable…***.
>
> ***The law may be stated thus: an appointment under a common law power, or a power operating under the Statute of Uses by which the legal estate has passed, is voidable only, and a purchaser for value with the legal estate and without notice is not affected by the fraudulent execution of the power; but an appointment in fraud of an equitable power, i.e., not operating so as to pass the legal estate or interest, is void, and a purchaser for value without notice but without the legal title can only rely on such equitable defences as are open to purchasers without the legal title who are subsequent in time against prior equitable titles"*** .

150 Although it was not cited to us, we note that Goff & Jones, The Law of Unjust Enrichment, 8th ed, paragraphs 8–170 to 8–173, takes the same view.

151 Accordingly, in our judgment title to the chose in action represented by the Promissory Note passed to Appleby Mauritius on execution of the 2012 appointment, and title to the Promissory Note as a physical document passed as soon as the document was delivered to Appleby Mauritius. In each case, title was unaffected by the setting aside of the appointment of Appleby Mauritius. The right to the debt was therefore "actually vested" in Appleby Mauritius, and the test set out in *Re Barney* for liability as trustee de son tort was satisfied.

152 We add that, even if we had taken the view that the right to recover the debt was for whatever reason not formally vested in Appleby Mauritius, the outcome would have been the same. In every practical sense, Appleby Mauritius had control over the Promissory Note and the debt it represented. It had physical custody of the Promissory Note itself, and it had a document in the form of the 2012 appointment that appeared either to be an assignment of the debt or to be a declaration of trust of it for Appleby Mauritius (see the concluding words of recital (B)). None of the parties concerned either in the 2012 appointment or in the debt – that is to say, the former trustees (including in particular Madame Crociani), Appleby Mauritius, Camilla and Croci BV – had the ability to challenge the 2012 appointment; only Cristiana or her children could do that. Madame Crociani, to the extent that she retained influence over Camilla and Croci BV, would have been the last person to suppose that the appointment of Appleby Mauritius was invalid: as the Royal Court found in paragraph 482, "obsessed as Madame Crociani was with Cristiana's claims over assets she was determined to keep, the move of the Grand Trust to Mauritius was tactical, the purpose being to place impediments in Cristiana's way". An attempt by Appleby Mauritius to claim accruing interest might have been resisted; but it is wholly artificial to suggest that it would at any point have been contested on the ground that the cause of action on the debt was not vested in Appleby Mauritius. Advocate Moran's argument is no more than a device to turn Cristiana's success in setting aside the appointment of Appleby Mauritius back on her and use it as a defence to her claim based on Appleby Mauritius's failure to act in accordance with the duties it intended to assume. In our judgment, Appleby Mauritius had

more than enough control over the chose in action to justify the Royal Court's finding that it was liable as trustee *de son tort*.

153 We quote again the final words of paragraph 42–103 of Lewin:

> ***"But it is not clear whether a trustee de son tort will escape liability in a case where a loss, for which he would have been liable if he had been properly appointed, is incurred in respect of trust property which has not, due to a defect in his appointment, been vested in him under section 40 of the Trustee Act 1925, but is nonetheless administered and controlled by him in the mistaken belief that he has been properly appointed.*** It is thought that a trustee de son tort would be liable for such a loss, at any rate if his conduct was the cause of the loss or if his effective control over the trust property would have enabled him to prevent the loss."

154 The case described there is on all fours with the present case. If Appleby Mauritius had been properly appointed, there is no doubt that it would have been liable for the loss resulting from its failure to collect the interest. If the right to recover the debt and interest was not in fact vested in Appleby Mauritius, the loss will have been incurred in respect of trust property that was nonetheless administered and controlled by Appleby Mauritius in the mistaken belief that it had been properly appointed. It seems to us beyond doubt that Appleby Mauritius is liable for positive dealings with the debt represented by the Promissory Note, as by renegotiating the terms of the Promissory Note and assigning it to GFin, even if it was not formally vested in Appleby Mauritius; and indeed there is no appeal against the Royal Court's findings to that effect. We cannot see that the position is different in respect of Appleby Mauritius's failure to pursue the rights it understood itself to have; and we agree with the tentative conclusion expressed in Lewin, that in such circumstances a trustee *de son tort* is liable notwithstanding that the relevant trust property was not vested in it.

155 For these reasons, this point also fails.

Good reasons not to collect interest

156 The Royal Court held that, following the fundamental change in circumstances in 2011, "there could be no conceivable justification for the trustees of the Grand Trust making an interest free *loan to Croci BV out of the trust fund as a whole (as distinct from the trust fund of Camilla's trust) by failing to collect the accrued interest due under the Promissory Note (some US$163 million at that stage)"* (paragraph 664).

157 Advocate Moran attacks this conclusion, contending that the circumstances at the time justified the decision not to call for the interest. It was immaterial that no thought had been given by Appleby Mauritius to the desirability of collecting the interest: the matter was to be

tested objectively. She relied on a further decision of the Court of Appeal of England and Wales, *Nestlé v NatWest Bank plc* [1993] 1 WLR 1260, in which Dillon LJ said the following (at 1270 A-C):

> ***"The investment decision was therefore prima facie made for an untenable reason, but that is not the end of the matter since, as Sir Robert Megarry V.C. pointed out in*** *Cowan v. Scargill* [1985] Ch, 270, 294:
>
> ***"If trustees make a decision upon wholly wrong grounds, and yet it subsequently appears, from matters which they did not express or refer to, that there are in fact good and sufficient reasons for supporting their decision, then I do not think that they would incur any liability for having decided the matter upon erroneous grounds; for the decision itself was right*** .
>
> ***The court has to look objectively at the circumstances, to see if there are in fact good and sufficient reasons for supporting the decision"*** .

158 Advocate Moran contended that the relevant circumstances were that the Interest on the debt would not be lost if not collected but would continue to accrue at the favourable annual rate of 8%; that triggering an event of default would have been devastating to Croci BV, and hence to Camilla, whose interests as beneficiary were to be taken into account and who had recently paid about $45 million for Croci BV; that Vitrociset, the only source of funds, was in severe financial difficulty; and that the settlor's wishes as expressed in Grand Trust were legitimate to be taken into account. The Royal Court had failed to consider these factors, and had instead highlighted only one issue – the family breakdown. The failure to apply the *Nestle v Nat West* decision was an error of principle; had the Royal Court considered all the circumstances it should have concluded that viewed objectively there were good reasons for the non-collection of interest and that accordingly Appleby Mauritius was not in breach of trust by failing to do so.

159 In our judgment, there is again nothing in this point. Although we accept that the question is whether the failure to collect the outstanding interest was objectively justified, we do not accept Advocate Moran's analysis of the circumstances. On the Royal Court's findings, the crucial and determinative factor was the breakdown in the family relations and the threat to Cristiana's interests that it entailed. By the time Appleby Mauritius came on the scene, the attempt by Madame Crociani and Camilla to exclude Cristiana from all benefit under the Grand Trust was well advanced, something of which Appleby Mauritius became aware at the latest on receipt of Cristiana's letter before action dated 3 July 2012. All the other factors suggested by Advocate Moran are to be viewed in that light. Thus, although in principle the interest would not be lost if not collected, any delay in collection would give more opportunity to Madame Crociani and Camilla to devise a means of ensuring that it never accrued to Cristiana. Triggering an event of default would no doubt have adverse effects on Croci BV; but, as Advocate Moran conceded before the Royal Court, the Croci Group as a whole was able to meet its obligations under the Promissory Note (see paragraph 667), so that declining to pay the interest was a matter of self-interested choice. As to the settlor's

wishes, the settlor was Madame Crociani, and on any basis her wishes had become wholly antithetical to Cristiana and the interests she and her children had under the Grand Trust; so that it would have been wholly improper for Appleby Mauritius to have regard to her wishes when considering whether or not to collect interest. In reality, the only relevant consideration was the need to protect Cristiana's position against the threat posed by the persons in control of Croci BV and the rest of the Croci Group. The financial effects on Camilla and Croci BV were capable of being mitigated, as the Royal Court pointed out in paragraph 666, by loans or distributions to Camilla or for her benefit; but on any objective view it was imperative to call in what was then due to Cristiana's fund.

160 It is convenient here to mention a point made in Appleby Mauritius's written submissions, but not elaborated in oral argument, that as trustee *de son tort* Appleby Mauritius had none of the powers conferred on a properly appointed trustee of the Grand Trust. It was said that as trustee *de son tort* Appleby Mauritius was restricted to the performance of ministerial acts only, so that it could not take positive steps to collect the interest, or make loans or distributions to Camilla to mitigate the financial consequences to Croci BV, or distribute any interest that it might receive to Cristiana, or invest it for her benefit. Authority for the proposition that the powers of a trustee *de son tort* were limited to ministerial acts only was said to be supplied by paragraphs 42–104 to 42–106 of Lewin. The tenor of those paragraphs is sufficiently identified by the following selection from them:

> ***"If a trust is administered by a trustee de son tort, questions may arise as to how far, if at all, the acts done by the trustee are valid.*** The most common circumstance in which these questions arise is where a trust is administered by a trustee over a long period, and it then turns out that, due to a defect in his appointment, the appointment was void and so he was a trustee de son tort. … If, however, the appointment was void, then it becomes necessary to ***distinguish between ministerial acts and acts involving the exercise of discretions or powers conferred on the "trustees"*** .
>
> ***As regards merely ministerial acts in accordance with the trust, for example the distribution of trust income to a life tenant, there should be no practical problem*** .
>
> ***Where, however, the acts in question, whether of an administrative or dispositive character, involve the exercise of powers or discretions, then serious problems arise.*** … It is doubtful too whether any express powers conferred by the trust instrument on "the trustees" can be validly exercised by a trustee de son tort, even if merely administrative, since it is virtually unknown for a trust instrument to define the "trustees" so as to include a constructive trustee. Clearly, in the absence of some special provision in the trust instrument, an exercise by a trustee de son tort of a power of appointment or similar dispositive power is invalid."

161 These paragraphs are concerned with matters internal to a trust. They assume that a trustee *de son tort* has purported to exercise trust powers that, because he was not formally

a trustee, he was not as a matter of law entitled to exercise, and are directed to the consequences of the exercise as between the beneficiaries. They say nothing about the position in relation to third parties. As we have already concluded, Appleby Mauritius had sufficient control over the cause of action represented by the Promissory Note to be able to pursue the interest, and it was rightly held liable for its failure to do so. It is artificial to suppose that, had the interest been collected, there would have been any difficulty in distributing it; but in any event the burden of the complaint against Appleby Mauritius is about its failure to protect the asset, not about its failure to deal properly with it once collected.

162 In our view, the Royal Court's resolution of these points is unassailable.

Attempts would have failed

163 . Advocate Moran contended that, on the Royal Court's findings at paragraphs 711 and 717, any attempt to collect the interest would have met with well-funded and determined opposition, so that litigation would have been inevitable; and that since the Grand Trust had no liquid assets by the time of Appleby Mauritius's appointment, there was no obligation on it to litigate to enforce payment of interest. She relied on paragraph 34–022 of Lewin, which states: “Where there are no funds available, however, trustees are not bound to institute proceedings at their own expense, unless the lack of funds was brought about by the trustees' own breach of duty”.

164 Implicit in this contention are two propositions: first, that collection would not have been possible without litigation; second, that there were no funds available. Although it seems to us that the correctness of these propositions is a matter for the inquiry, not for us, we do not think they are to be taken at face value.

165 As to the first, there was nothing to stop Appleby Mauritius pressing for payment and declaring an event of default if payment were not made. There was nothing to stop it publicising the event of default as a means of imposing economic pressure. There was nothing to prevent it from serving the Dutch equivalent of a statutory demand. There may well have been other steps falling short of litigation available under Dutch law to enforce payment. As to the second, we do not think that the question of availability of funds is concluded by the absence of liquid assets in the Grand Trust. On the face of it, liability to pay the interest was clearly established by the terms of the Promissory Note, and it is far from impossible that litigation funding would have been available had Appleby Mauritius sought it. It is also possible that Cristiana would have been able and willing to provide funds, if necessary herself obtaining funding for that purpose – as she did for these proceedings. As we have said, though, these are matters for the inquiry, which will be concerned to establish what loss flowed from Appleby Mauritius's failure to collect the interest; and that will involve consideration of what Appleby Mauritius could realistically have achieved if it had performed its duty properly. As matters stand before us, we see no reason to interfere with the Royal Court's conclusions on this ground.

Divisible debt

166 As we indicated at the beginning of this section, Appleby Mauritius raised a separate point contesting the Royal Court's conclusion that the debt the subject of the Promissory Note was indivisible so that it would not have been possible to call in half the interest for the benefit of Cristiana's fund alone: see paragraph 666. If Appleby Mauritius were right about this, the result would be that it would be liable only for failing to collect the interest due in respect of Cristiana's fund; and the same effect is achieved by our finding that Appleby Mauritius's obligation is only to reconstitute Cristiana's fund. We can accordingly deal with the point shortly.

167 The basis of the Royal Court's conclusion was that any payment received would have had to accrue for the benefit of both trusts – although, as we have mentioned, the Court suggested that the financial burden on Camilla and Croci BV could have been reduced by loans or distributions to Camilla from her fund. As Advocate Moran said, the issue is accordingly whether anything that was received had to be split between the two trusts or whether it could have only been put in Cristiana's trust.

168 As we have said, it is clear that the effect of the terms of the Grand Trust was to establish separate trusts for each of Camilla and Cristiana, and that “the property described in the annexed Schedule A” – which was the Promissory Note – was to be divided into two substantially equal as to value separate trusts: see the preamble to the Grand Trust agreement. However, clause FIFTH (P) provided that “whenever more than one trust is in existence hereunder, the Trustees may retain the several trusts in one fund for the purpose of investment and reinvestment, crediting each trust with its proportionate share of income, profits and appreciation in value and charging each trust with its proportionate share of expenses, losses and diminution in value. This provision is solely for the purpose of convenience in administration and shall not be deemed to destroy the individual character of each trust or prevent the release of principal upon the termination of any such trust or the making of discretionary payments from principal of such trust in different amounts. It is clearly understood that after the initial division of the trust assets into two equal funds, one each for CAMILLA and CRISTIANA, the separate trusts and the separate trust funds may be invested in different manner and may (and probably shall) cease to be equal in value and amount”.

169 The Promissory Note represented one obligation. Of necessity, it was retained in one fund for the purpose of investment; and accordingly, by virtue of clause FIFTH (P), income arising from it in the form of interest was to be credited proportionately to each of the two funds. In our view, it follows that anything received by way of interest would, as the Royal Court thought, have to be split equally between Cristiana's fund and Camilla's fund.

170 However, we agree with Advocate Moran that it would have been possible for the trustees to appoint out to Camilla or at her direction the half of any interest payment that was to be

allocated to her fund. In reality, that could have been done by Appleby Mauritius, which all parties assumed to have been validly appointed as trustee. It could have been done prospectively, so that either there would have been no actual transfer of the notional payment due to her fund or it would have been paid and repaid almost simultaneously. This was in effect what the Royal Court itself contemplated in its reference to mitigating the financial impact on Croci BV by loans or distributions to Camilla.

171 Accordingly, although the Royal Court was in our judgment correct to hold that Appleby Mauritius was liable for breach of trust in failing to claim the whole of the interest, the financial consequences of that failure are in effect limited to half the value of the uncollected interest and the appeal of Appleby Mauritius against the judgment of the Royal Court in respect of the matters covered between paragraphs 118 and 170 of this judgment is allowed to this extent.

Camilla's Appeal

172 The Royal Court found the 2010 Appointment to be void and of no legal effect; likewise the 2012 appointment and retirement, the Agate Appointment and the 2016 Appointment and retirement. It found Appleby Mauritius to have acted in breach of trust in relation to the 2016 appointment and retirement, by not collecting the accrued and accruing interest on the promissory note, agreeing to the amendments to the promissory note, assigning the promissory note to GFin and amending the provisions of the Grand Trust thus giving GFin a platform to commence rival proceedings in Mauritius. In particular, as recorded in its Act dated 11 September 2017, it ordered that:

> (i) Upon receiving sufficient sums from any defendant, the new trustee should discharge in full all sums due by Cristiana to her litigation funder Xantippe Limited forthwith, as to one half from Cristiana's trust and other half from Camilla's trust: Order 16.
>
> (ii) No power or discretion should be exercised by the new trustee or any successor trustee so as to confer directly or indirectly any benefit on Camilla or her issue without the permission of the Court as to which there shall be liberty to apply: Order 18.
>
> (iii) The new trustees should keep any sums received by Camilla's trust from or on behalf of Croci International BV under the Promissory Note in a segregated fund within Camilla's trust: Order 19. and
>
> (iv) Cristiana's costs should be calculated on the trustee indemnity basis and such costs as were not actually recovered pursuant to the orders for costs made by the Court should be borne by the Trust Fund (equally as between Cristiana's fund and Camilla's fund): Order 34.

173 By her Respondent's notice, Camilla appeals against these particular orders, that notice

being entered on 6 October 2017 and amended on 20 December 2017. She has not appealed against any findings of fact made by the Royal Court, including in particular the finding at paragraph 678 of the judgment under appeal that she had benefited at least in part from the breaches of trust.

174 The appeals of all appellants were listed to be heard together during the week of 26 February 2018. On 20 February 2018, the Court was informed that Advocate Hoy, who acts for Camilla, had been taken into hospital. His office expressed concern that he would not make a sufficient recovery to present his client's appeal the following week, and it was said that no replacement advocate could be found on short notice to deal with an appeal of this complexity. On 21 February, it was confirmed that it was unlikely Advocate Hoy would be able to appear, and in fact he was not able to do so. It was apparent that if we were to adjourn Camilla's appeal, we would also have to adjourn substantial parts of the appeals of BNP Jersey and Appleby Mauritius. At short notice, this would cause not only difficulty in relation to the ongoing proceedings before the Royal Court, where various accounts had been ordered, but also a significant delay in the hearing of the appeals and a waste of both court time and litigants' costs in preparing for the appeals. We recognised that Camilla was not in any sense culpable for Advocate Hoy's indisposition, but we were faced with a position where either there would be a serious disadvantage for BNP Jersey and/or Appleby Mauritius, or a disadvantage for Camilla. In the circumstances that Camilla, unlike BNP Jersey and Appleby Mauritius, had not appeared in the Royal Court to give evidence or to argue the case, we considered that the fairest outcome was to proceed with the appeals and allow Camilla's advisers to make written submissions by 12 noon on Tuesday 6 March. In making that order, we recognised that Camilla would have the advantage of transcripts of the proceedings during the week of 26 February. We also ordered that the other parties might file short written responses to Camilla's written case by 12 noon on Friday 9 March. In the light of detailed written contentions filed by Camilla on 29 January 2018, it appeared to us that these, coupled with the additional written submissions made in answer to the oral submissions of other counsel during the week of 26 February, would ensure that the Court was entirely familiar with Camilla's detailed appeal. We consider that the documents filed have enabled us to address it fully.

175 BNP Jersey has asserted in its contentions on this appeal that Camilla is not entitled to appeal any orders made by the Royal Court because she did not participate in the trial at first instance. We do not accept that to be the position. She is a party to the proceedings and is affected by them. For as long as she remains a party, she is entitled to appeal an order which is not to her advantage. That is not to say however that her lack of participation at the trial is completely disregarded – it has already had an effect on our exercise of discretion in relation to her counsel's illness as set out above. Undoubtedly her lack of participation at the trial also had an impact on the extent to which the Royal Court was prepared to accept her witness statement which was before that court, and the Royal Court's findings of fact are not disturbed on this appeal.

The Royal Court's Conclusions

176 Having heard argument on 8 September 2017 in relation to the matters covered by the present appeal, the Court delivered judgment on 11 September under reference *Crociani v Crociani* [2017] JRC 145A. In this judgment, the Court noted there were two substantive issues to be addressed before looking at the more procedural orders. The first of these concerned the equitable compensation to Camilla's fund, BNP Jersey asking the Court to reconsider its decision that the whole of the trust fund be reconstituted as reflected in paragraphs 686 – 689 of the judgment. The basis for this was that the Royal Court had expressed some sympathy with BNP Jersey's wish to limit compensation to Camilla's fund because Camilla had acquiesced in the 2010 Appointment and, at least to some extent, benefited from it. BNP Jersey pointed out that it would have to pay a very substantial sum – at least US$50M into Camilla's trust, which as she is the only discretionary beneficiary of income and the only discretionary beneficiary of capital, would simply sit there for the rest of her life, potentially some thirty to forty years. Accordingly Advocate Redgrave submitted for BNP Jersey that Camilla's trust fund need not be reconstituted.

177 As regards Order 16 of the order of the Court of 11 September 2017, litigation funding, the Court concluded that the draft order could be simplified to say that BNP Jersey should discharge in full all sums due by Cristiana to her litigation funder forthwith, split between the two trusts i.e. Cristiana's trust and Camilla's trust. The context of that order was the submission that the plaintiffs had brought the case on behalf of all the beneficiaries of the Grand Trust seeking its reconstitution. That claim could, and it was said should, have been brought by the trustee of the Grand Trust, and had the claim been brought by the trustee, its costs would have been borne by the trust fund. Accordingly Advocate Robinson contended that Cristiana's costs, to the extent not recovered by the defendants, should be borne by the trust fund. Cristiana's position was that, in relation to the funder's fee, it was essential that the new trustee paid that sum from the funds recovered from the defendants, and that in that context it was important that Camilla's fund be reconstituted in order that Cristiana's fund did not bear the whole of the expenses of the funder's fee. It was put to the Royal Court that these proposals were not contentious. They were internal to the Grand Trust, and once the money had been paid by the defendants into the trust, it was no longer of any concern if some of it was paid to the discharge of the funder's fee. It is to be noted that Camilla, as a matter of her choice, was not represented at this hearing.

178 The orders in relation to the payment of the funder's fee out of the Grand Trust were not to affect the claims which Cristiana brought against the defendants for repayment of the funder's fee as part of her costs. That was not because Cristiana sought a double recovery, but rather because it was essential a structure was put in place early to enable the funder's fee to be repaid.

179 Although Camilla has entered an appeal against this paragraph of the Royal Court's order of 11 September 2017, she has not advanced any contentions either in the reply contentions filed on 29 January 2018 or in the submissions filed on 6 March 2018, to support this ground of appeal. For that reason alone, it appears to us that this part of Camilla's appeal on this point should be dismissed, but we also add that we accept that the Royal Court was entitled to put a structure in place early on to enable the funder's fee to be

repaid. Accordingly, given that restitution is discretionary and notwithstanding our conclusion that Camilla's trust should be treated as fully paid out, as set out at paragraphs 45–49 above, we direct that BNP Jersey should reconstitute Camilla's trust to the extent necessary to enable Order 16 of the Act of the Royal Court to take effect.

180 We can similarly deal briefly with the appeal in relation to Cristiana's costs, the order for which is found at paragraph 34 of the Act of the Court of 11 September 2017. Although this is a matter which is raised in Camilla's Respondent's Notice, no contentions were advanced by Camilla either in January or in March to support this ground of appeal. As with our approach taken in relation to Order 16, we direct that BNP Jersey should reconstitute Camilla's trust to the extent necessary to enable Order 34 of the Act of the Royal Court to take effect.

181 We turn next to the appeal against the order that no power or discretion should be exercised by the new trustee or any successor trustee so as to confer directly or indirectly any benefit on Camilla or her issue without the permission of the Court, as to which there should be liberty to apply; which issue can be taken together with that in respect of the segregation of the Promissory Note funds.

182 Advocate Robinson submitted to the Royal Court that if Camilla's trust were to be reconstituted and Camilla to die, then of course the trust fund would vest immediately in her children. His submission was that Camilla's children, aged 12 and 14, were innocent parties who could not be taken to have acquiesced in the breaches of trust, but that it should not be possible for them to be used as stalking horses, as it were, for payments to be made to Camilla. It was submitted that Ocorian, the new trustee, should take steps to prevent that happening.

183 Given the conclusions we have reached at paragraphs 45–49 above that BNP Jersey have no obligation to reconstitute Camilla's trust, save to the extent necessary to meet Orders 16 and 34 of the Act of the Royal Court dated 11 September 2011, Advocate Robinson's concerns fall away. There will be nothing in Camilla's trust to enable payments to be made to Camilla.

184 In her appeal contentions, Camilla makes points both on her own account and on behalf of her minor children. She has not formally been appointed as guardian *ad litem* of those children for the purposes of these proceedings, and they are not parties to them. Nonetheless, we have proceeded upon the basis that, had she applied to be appointed as guardian *ad litem* and for their interests to be recognised by joining them as parties to the proceedings, the Court would have agreed to such an application. Accordingly we deal with the whole of Camilla's appeal, including those points raised on behalf of her children, as though they were made by her both in her own right and as guardian *ad litem* for them. The short answer to these points is the same as that which addressed Advocate Robinson's concerns. The conclusion reached that BNP Jersey has no equitable obligation to reinstate Camilla's trust as it is to be treated as having been fully paid out to her means

that it is unnecessary to consider acquiescence as a possible defence that could be run in relation to Camilla or her children.

185 In her contentions, Camilla asserts that she is neutral as to whether the Royal Court was correct in its conclusion on what was referred to below as the “Key Underlying Issue”, namely whether or not it had always been intended that Madame Crociani would be able to benefit from the Grand Trust through the Foundation; but she goes on to assert that even if the Royal Court were to be correct on that issue, there is no allegation, nor any evidence, that she, Camilla, understood that her mother was not, through the Foundation, a beneficiary of the Grand Trust. Thus she contends that there was no evidence that she had full knowledge of the breach of trust, and thus the doctrine of acquiescence cannot be held against her.

186 While it is strictly unnecessary to deal with the question of acquiescence by Camilla, we will make some brief comments given the extensive written submissions she has made on this subject. Camilla's appeal contentions in relation to acquiescence raises in summary these points:-

(i) Her understanding of the key underlying issue, namely whether Madame Crociani was intended to be, an indirect beneficiary of the Grand Trust through ownership of the Foundation, was wrong. Accordingly it is said she did not have the requisite degree of knowledge for the defence of acquiescence to be raised against her by BNP Jersey.

(ii) The Royal Court was wrong to conclude that there was financial benefit which she received indirectly from the Grand Trust, as set out at paragraph 687 of its judgment.

(iii) She did not in fact acquiesce in the 2010 Appointment, and there was no pleading that she had. If the matter had been pleaded, she would have been able to participate in the trial.

(iv) Her agreement to the Agate appointment was based on her mistaken belief, as it turned out, that Madame Crociani was indirectly a beneficiary of the Grand Trust, and therefore again it could not be said that she had the requisite degree of knowledge.

(v) The ownership of the Croci Group was irrelevant.

187 We take now those questions.

“Key Underlying Issue” and Croci Group

188 It is convenient to take these two issues together because although the principles which fall to be applied in assessing whether the defence of acquiescence has been established are well settled, the assessment itself is made by having regard to all the facts and

circumstances of the case. One can contemplate there may well be occasions when a beneficiary is unaware of the technical legal niceties which make the action of the trustee a breach of trust, but that lack of knowledge in relation to the technical legal position will not avail the acquiescing beneficiary who nonetheless knows that what has been done is wrong. The Royal Court found that the Grand Trust was not created with the purpose or intention of providing any benefit, directly or indirectly, to Madame Crociani and it also found that the Foundation was not included as a beneficiary as a means by which she could benefit (see paragraph 206 of the judgment). The Royal Court also found that Cristiana, although not defined as the principal beneficiary of her trust, was appropriately so described (see paragraph 219). Although it was not an express finding, by implication, the Court must also have concluded – as have we — that Camilla would be regarded as the principal beneficiary of her trust.

189 The Royal Court also found that the 2010 Appointment was an excessive execution, as well as an appointment to be impugned on the grounds of mistake under Article 47(H) of the Trusts Law (see paragraph 346 of the judgment).

190 The principal judgment shows that the Royal Court concluded that Camilla was well aware of the overall arrangements from a date prior to the 2010 Appointment. Those findings of fact are not challenged, nor is it easy to see how they might be challenged by Camilla, given that she did not attend in the Royal Court to give evidence. The Royal Court had the benefit of her witness statement, untested as it was on cross-examination, and reached findings of fact which it was entitled to reach on the evidence. Whether she was or was not aware that her mother was not a beneficiary of the Grand Trust, the findings of the Royal Court referred to at paragraphs 431 and 444 of its judgment show that she had the requisite degree of knowledge in relation to the breaches of trust by BNP Jersey to justify a defence of acquiescence as against her, whether or not she thought that Madame Crociani was through the Foundation a beneficiary of the Grand Trust.

191 Camilla has contended on appeal that the ownership of the Croci Group is irrelevant. In a direct sense, namely as to whether the ownership of the Croci Group goes to the three grounds upon which the Royal Court found the 2010 Appointment to be void, that is correct. Nonetheless, it appears to us that in considering the defence of acquiescence, the Royal Court was entitled to have regard to all the circumstances established by the evidence which it heard. Those circumstances included the division of paintings referred to at paragraph 394 of the judgment below, and also the arrangements for the transfer of the beneficial ownership of the Croci Group. In this connection, it is noted that in November 2010 BNP Jersey recorded that Madame Crociani wanted to arrange her affairs in such a way that Croci NV would be placed in a new trust for Camilla and her family – Croci NV being the owner of all of the numerous prestigious family properties, the yacht and the company Ciset SRL and its subsidiary Vitrociset SPA, described by the Royal Court as *“the jewel in the crown”*. At paragraph 398 of its judgment, the Royal Court noted that BNP Jersey and Mr Foortse did not seem to appreciate how devastating to Cristiana the proposal to transfer the Croci Group to Camilla would have been, and that Cristiana knew nothing about it, as Camilla herself confirmed. In order to overcome any impediments to

implementation of this proposal, Cristiana was removed as a director of Croci BV, and, as the Royal Court found, she was tricked into signing a share transfer agreement by which she and Camilla transferred their shares in Croci NV back to Madame Crociani, and thence to Camilla.

Benefit

192 In her contentions, Camilla also asserts that where BNP Jersey submit that she and her children have benefited from the relevant breaches of trust, there is no evidence to provide support for that submission. However, there was the express finding of fact by the Royal Court that she had, at least to some extent benefited from the breaches of trust and Camilla has not in this court disputed the findings in fact either generally or in any remotely systematic fashion.

193 On these facts alone, it appears to us that the Royal Court was absolutely entitled to reach the conclusion that Camilla had acquiesced in the breach of trust in connection with the 2010 Appointment. This conclusion however is reinforced by consideration of Camilla's other contentions on appeal.

No pleading that she had acquiesced

194 Camilla contends on this appeal that there was no allegation that she understood that Madame Crociani was not, through the Foundation, a beneficiary of the Grand Trust. At paragraph 4 of her contentions filed in January 2018, Camilla says that she made the decision not to participate in the trial in circumstances where there were no pleaded claims for relief made against her. At various points in her contentions, she asserts that there was no allegation, and no evidence, that she understood that Madame Crociani was not, through the Foundation, a beneficiary of the Grand Trust.

195 In our judgment, these contentions simply do not hold water. On 14 June 2013, the original defendants (Madame Crociani, Mr Foortse, BNP Jersey and Appleby Mauritius) filed an answer to the Order of Justice which averred that the former trustees, as trustees of the Grand Trust, consulted with both Cristiana and Camilla to decide the most appropriate way to give effect to the various proposals which ultimately led to the 2010 Appointment. At paragraph 25.5 the answer filed averred that:-

> ***"Each of Camilla and Cristiana indicated to Madame Crociani and BNP Jersey (both before and, in particular, at a meeting in Monaco on 7 April 2010) that they agreed with the proposed new structure and were aware that the new structure would involve the Fortunate Trust (to be amended as proposed) and an appointment from the Grand Trust to the Fortunate Trust."***

196 At paragraph 29 of the same answer, it was averred that each of Camilla and Cristiana was fully aware of and agreed with the proposed flexible structure which was being considered and that the original defendants had discussed the proposed structure in detail with each of them. It was asserted that in January 2009, BNP Jersey had provided a draft of the proposed deed of amendment to the Fortunate Trust, in both English and Italian, to Madame Crociani, Camilla and Cristiana. It was then contended at paragraph 33:-

> ***"For the avoidance of doubt, each of Cristiana and Camilla were well aware of – and consented to and/or acquiesced in – the transfer of the appointed assets into the Fortunate Trust …"***

197 Camilla was subsequently joined to the proceedings and filed her answer on 27 March 2015. *Inter alia*, her answer contains these averments:-

> ***"16.4 As pleaded at paragraphs 25.5 and 33 of the original defendants' answer, the terms of the Fortunate Trust and the effect of the 2010 appointment had been explained to both Princess Camilla and Cristiana.*** Princess Camilla understood the effect of the transaction and acquiesced in it. To the best of Princess Camilla's knowledge, Cristiana also understood the effect of the transaction and acquiesced in it .
>
> ***16.5 It is further averred that, as pleaded in the second and third sentences of paragraph 25.2 and paragraphs 25.4, 29 and 33 of the original defendant's answer, the part which the 2010 appointment was intended to play in a wider restructuring of the family's assets, and the nature of that restructuring itself, had also been explained to Princess Camilla and Cristiana.*** Princess Camilla understood the nature and effect of the planned restructuring and acquiesced in it. To the best of Princess Camilla's knowledge, Cristiana also understood the nature and effect of the planned restructuring and acquiesced in it."

198 The question of acquiescence was therefore fully raised on the pleadings by Camilla herself. She accepted that she had acquiesced in the arrangements which were made. It is unsurprising in those circumstances that no party contended otherwise before the Royal Court, and there was no evidence that her pleaded case was wrong. In those circumstances the contention which she now makes that BNP Jersey cannot rely on her pleading that she acquiesced in the arrangements has no traction.

The Agate appointment

199 The Royal Court rightly described the whole Agate exercise as disheartening, given the standing of the lawyers concerned (see paragraph 570 of the judgment), and held the Agate appointment would be set aside on five principal grounds, of which only one narrated the false premise for the appointment namely the belief that the Foundation had been established for the sole benefit of Madame Crociani. However we note that the other

grounds were that the appointment was a fraud on a power, that the former trustees had a conflict of interest such as to vitiate the purported exercise by them of the powers under clause 11 of the Grand Trust, that the decision was not one which was open to a reasonable body of trustees and finally that it was not in any event a genuine exercise of their dispositive powers. At paragraph 538 of the Royal Court's judgment, the Court said this:-

> ***"The decision to enter into the Agate appointment was made against a background of serious disputes within the family and a threat of imminent litigation.*** Stripped to its essentials one can analyse the reasons given for the Agate appointment in this way:-
>
> ***'(i) If the 2010 appointment was found to be a breach of trust, that was accidental or unintended;***
>
> ***(ii) There were concerns about Cristiana's situation and that if the appointed assets were returned to the Grand Trust, she would regard that as a source of funding for claims against Madame Crociani and Camilla;***
>
> ***…"***

200 The Royal Court described at paragraphs 512 and 513 of its judgment the meeting of the former and current trustees of the Grand Trust held on 1 August 2012 at the offices of Messrs Macfarlanes in London. Madame Crociani was present, and Camilla attended by video conference. The Royal Court set out an extract from those minutes as follows:-

> *"44. It is Camilla's view that it would very much be in her own personal interest of the assets previously held in the Grand Trust, and which were subject to the 2010 appointment remained in her mother's ownership as this would enable her mother to make appropriate provision for Cristiana and her children (to all of whom she was and remains deeply attached) as appropriate for the current unhappy circumstances. She fears that if the Appointed Assets are returned to the Grand Trust, Cristiana will attempt to access funding that was not intended for her, including as a means of funding yet more unmeritorious litigation, which will not be in the long-term interests of Cristiana or of her children."*

201 As the Royal Court recognised, the difference between what is attributed in those minutes to Madame Crociani and Camilla and what was said in the Monaco apartment on 14 June 2011 is stark. It is unsurprising that the Royal Court found that Cristiana's witness testimony was credible, and that it preferred that evidence to the evidence contained in witness statements made by Madame Crociani and Camilla.

202 For all these reasons, the grounds of appeal advanced by Camilla in her Respondent's notice are rejected. In the circumstances, Camilla's appeal is dismissed.