

# BNP Paribas Jersey Trust Corporation Ltd v Cristiana Crociani

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Sir William Bailhache, Bailiff of Jersey, James McNeill, Lord Anderson of Ipswich, K.B.E.
<b>Judgment Date:</b>	07 August 2018
<b>Neutral Citation:</b>	[2018] JCA 141
<b>Reported In:</b>	[2018] JCA 141
<b>Court:</b>	Court of Appeal
<b>Date:</b>	07 August 2018

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## Text

[2018] JCA 141

COURT OF APPEAL

Before:

Sir William Bailhache, **Esq.**, Bailiff of Jersey, **President**;

James McNeill, **QC**; and

Lord Anderson of Ipswich, K.B.E. **Q.C.**

Between  
BNP Paribas Jersey Trust Corporation Limited  
First Appellant

Appleby Trust (Mauritius) Limited  
Second Appellant  
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 E. B. Drummond for the Respondents.**

### **Authorities**

*BNP Paribas Ors v Crociani Ors* [\[2018\] JCA 136A](#).

*In Parish of St Helier v Minister for Infrastructure* [\[2017\] JCA 076](#).

*Botas v Tepe* [\[2016\] JCA 199D](#)

*Uprichard v Scottish Ministers* [\[2013\] UKSC 21](#)

*R v Secretary of State of Trade and Industry ex p Eastaway* [\[2000\] 1 WLR 2222](#)

Trusts (Jersey) Law 1984

Judicial Committee of the Privy Council's Rules 2009

Appeal — decision of the Court in relation to the matter left over on 25th July 2018.

**PRESIDENT:**

- 1 On 25th July, 2018, *BNP Paribas Ors v Crociani Ors* [\[2018\] JCA 136A](#) the judgment of this Court on the substantive issues in the appeals before it ("the Substantive Judgment) was handed down in relation to the appeals of the Appellants. The Court had indicated previously that there may be issues arising out of the Act of the Royal Court of 11<sup>th</sup> September, 2017 which might need attention in the light that judgment. Furthermore, the Court indicated to counsel that it would hear any other applications that might be made. Due to professional commitments, only two of the members of the Court which heard the appeal and issued the Substantive Judgment were able to sit to hear the ancillary applications. Martin JA has been apprised of the issues discussed and is in agreement with the determinations made in this judgment.

## Costs

- 2 By agreement between all the parties save Camilla, the costs incurred in the Court below should be left undisturbed, and furthermore:-
  - (i) Each party should bear its own costs in relation to each of the appeals save that of Camilla.
  - (ii) Camilla would pay each party's costs in relation to her appeal on the standard basis.
  - (iii) The costs of and incidental to the provision of electronic material to the Court of Appeal for the hearing of the appeals would be shared by the parties equally.
- 3 In addition, Advocate Moran sought an order that Camilla pay £4,998 to Appleby Mauritius on account being 50% of that firm's costs in relation to her appeal.
- 4 Camilla, through Advocate Hoy did not enter any dissent to these orders but he did not formally consent to them.
- 5 The Court considered these orders to be appropriate in the light of the parties' expressed positions, and the orders were accordingly made.

## Leave to appeal

- 6 Advocate Redgrave, on behalf of BNP Jersey applied for leave to appeal the Crica decision to the Judicial Committee of the Privy Council and for a stay pending appeal. Advocate Drummond, on behalf of the Respondents and Ocorian, sought leave to appeal the Court of Appeal's decision in relation to the reconstitution of Camilla's fund. Advocate Hoy, on behalf of Camilla, sought leave to appeal generally in relation to Camilla's appeal. In relation to the stay which Advocate Redgrave had sought, Advocate Drummond

submitted that there was no uncertainty as to where the Plaintiff lived. There was a procedural requirement for an affidavit, and there was no such affidavit produced. He also made submissions in relation to guarantees which were in place.

- 7 *In Parish of St Helier v Minister for Infrastructure* [2017] JCA 076, this Court gave judgment refusing leave to appeal to the Judicial Committee of the Privy Council. In doing so, it considered it was acting consistently with the earlier Court of Appeal decision of *Botas v Tepe* [2016] JCA 199D, where the Court applied *Uprichard v Scottish Ministers* [2013] UKSC 21. In that case some importance was attributed to the opinion of Lord Bingham of Cornhill in *R v Secretary of State of Trade and Industry ex p Eastaway* [2000] 1 WLR 2222, at page 2228 when he said:-

***“In its role as a Supreme Court the House must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance.*** It cannot seek to correct errors in the application of settled law, even where such are shown to exist.”

- 8 We accept that the way in which the Court should approach the exercise of discretion under Article 47E of the Trusts (Jersey) Law 1984 does raise arguable points of law. We are also prepared to accept that there may be an arguable point of law in relation to our conclusion that in the exercise of discretion we should treat Camilla's fund as entirely paid out when considering the reconstitution of her trust and indeed her appeal generally. However, the facts which are engaged in the present case are very specific and whether these arguable points of law should be treated as points of general public importance is a question which we think we should leave to the Judicial Committee to determine. Accordingly, following the *Uprichard* practice, leave to appeal to the Judicial Committee was refused.
- 9 As to the stay which Advocate Redgrave had sought, we recognise that he may well be instructed to seek leave from the Judicial Committee. In relation to the appeal to this Court, Commissioner Clyde-Smith said this:-

***“In relation to the Crica shares, I am going to grant a stay pending the appeal.*** Advocate Robinson informs me that the First Plaintiff [Cristiana] has now moved from the Dominican Republic to Miami but there is uncertainty as to where she resides and, in my view, there is a risk that the Defendant [BNP Jersey] will have some difficulty in recovering any sums that were paid over to her as an individual should it succeed in its appeal. The funds paid into Cristiana's trust should ensure for her financial needs and those of her family pending the appeal.”

- 10 We are informed that Cristiana may now have moved and be living in Monaco, although BNP Jersey do not seem entirely clear as to whether that is or is not the case. However, in our view the broad assessment of the position made by Commissioner Clyde-Smith on 26th September remains applicable today, and if therefore leave to appeal to the Judicial Committee is given, it would be appropriate for there to be a stay on our order and on the

order of the Court below pending the determination of that appeal. On the other hand, Cristiana is entitled to know that the application for leave to appeal will be taken forward expeditiously. We accordingly indicated on 25<sup>th</sup> July that a stay would be imposed provided that BNP Jersey entered its application for leave to appeal within two months of that date and the stay would last until the application for leave had been determined, when no doubt it could be renewed before the Judicial Committee. After the Court had risen, our attention was drawn to the Judicial Committee of the Privy Council's Rules 2009 and Practice Direction 7. Rule 39 provides that a stay must be sought from the Court below and that only in exceptional circumstances will the Privy Council grant a stay. The relevant Practice Direction provides that the filing of a notice of appeal or an application for permission to appeal does not in itself place a stay of execution on any order appealed from. A party seeking such a stay must apply to the court appealed from, not to the Judicial Committee.

- 11 Given that we have accepted the principle that a stay should be granted until such time as the Judicial Committee has either dealt with the question of leave or the substantive appeal and that any applications to the Judicial Committee itself for a stay are discouraged, we directed the Greffier that the stay is granted until 30<sup>th</sup> September, 2018, or, if an application for permission to appeal has been made to the Privy Council on or before 30<sup>th</sup> September, 2018, until the final determination by the Privy Council of that application, and if permission is granted of the subsequent appeal.
- 12 In doing so, we acknowledge that whilst in normal circumstances an affidavit in support of the stay will be required on the application being made, as the salient circumstances regarding the Crica shares issue appear little different in principle to those obtaining when the Royal Court granted a stay, we do not require that the rule be strictly applied.

### **The Act of the Royal Court of 11th September 2017**

- 13 Advocate Drummond, on behalf of both the Respondents and Ocorian, the new trustee for whom he also had authority to appear in these proceedings, contended that some amendments should be made to the Act of 11<sup>th</sup> September, 2017, in the light of the findings which this Court has made in relation to equitable compensation. He proposed some additional paragraphs numbered 20A and 20B which he said were designed to protect Ocorian. Those paragraphs were as follows:-

***“20A. The new trustee shall not be required to institute enforcement proceedings against the First Defendant in respect of her liability to reconstitute Camilla's Trust (as set out at paragraph 21A, below) and shall not be liable for any failure to do so .***

***20B. The new trustee shall not be required to pursue any appeal of the Jersey Court of Appeal's judgment dated 25 July 2018 in respect of the reconstitution of Camilla's Trust and is authorised to leave any such***

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***proceedings to the beneficiaries of the Grand Trust, including the Plaintiffs and the Fifth Defendant, and shall not be liable for any failure to do so.”***

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- 14 Advocate Drummond's submissions were essentially that, as Madame Crociani had not appealed, she could not be relieved of her liabilities on appeal. Accordingly, Camilla's Trust could not lose its rights against Madame Crociani, and it followed that that Trust must continue. Furthermore, it would have to continue to some extent anyway because it remained responsible, for example, for making various payments, in particular, in relation to its share of the costs of the litigation funder and the Plaintiff's costs in relation to the litigation below, and also in relation to the assignment of the rights of the Grand Trust to claim the ownership of assets appointed out of the Grand Trust by appointments which have been set aside. In his submission, there was a difference between treating Camilla's Trust as if it had been distributed, and indicating that it had been fully distributed. Furthermore, Madame Crociani should not be relieved of her liability for an egregious breach of trust. For that reason, he also proposed a new paragraph 21A to go into the Act of the Royal Court which would require Madame Crociani to pay to Ocorian the relevant sums to reconstitute Camilla's Trust.
- 15 . As to these proposed amendments to the Act of the Royal Court of 11<sup>th</sup> September, 2017, we consider that they do not reflect this Court's decision. At paragraph 46 of the judgment, the Court confirmed its view that Camilla was to be treated as the primary beneficiary of her Trust and we noted that she made no claim that there had been any breach of trust, whether such a claim be brought by her or by her and/or her husband as guardians of their infant children. The Court agreed with Advocate Redgrave's submission that Camilla's Trust should be treated as having been paid out. At paragraph 47 it noted that Camilla had played a leading role in the fight to cut off Cristiana entirely from the family wealth, and gave that as a reason for concluding that it was appropriate to proceed “upon the basis that there should no longer be a trust fund held for Camilla's Trust”.
- 16 In other words, the basis upon which the Court decided that the equitable compensation issue should be determined as it has was that Camilla's Trust has been treated as fully paid out and, subject to paragraphs 179 and 180 of the judgment, should come to an end.
- 17 Similar reasoning led to the dismissal of Camilla's appeal. Furthermore, in dealing with that appeal, the Court noted that Camilla herself had agreed that she had acquiesced in all the arrangements which were made for the appointment of assets out of the Grand Trust. That was her pleading.
- 18 The finding which the Court has made that BNP Jersey ought not to pay equitable compensation to Camilla's Trust because that is to be treated as having been fully paid out accords with Camilla's pleading and her own position as the primary beneficiary of that Trust. In our judgment, there is no difference between saying that Camilla's Trust is to be treated as having been fully paid out and saying that on the facts of this case it has been fully paid out. It may remain in place artificially for the purposes of acting as a conduit for the

recovery of the Promissory Note, which is indivisible, or for the receipt of monies in and payment of monies out in relation to costs and/or the funders fee and/or enquiries, but that is not to give the Trust any substantive assets to be dealt with by the trustees pursuant to the Trust at some future date. To reach that conclusion would be to adopt a rationale which is inconsistent with the rationale adopted for dismissing Camilla's appeal and for making the findings on equitable compensation payable by BNP Jersey as the Court has. Accordingly, we do not order the introduction of paragraphs 20A and 20B as requested – indeed as far as 20B is concerned, any such question is a matter for a Beddoe application by the new trustee if so advised.

- 19 For the same reasons, we do not direct the introduction of new paragraph 21A. Camilla's Trust has come to an end and there is no one with any interest in enforcing against Madame Crociani any obligations to reconstitute that Trust.
- 20 We were faced with a number of small amendments to Order 21 of the 11<sup>th</sup> September, 2017, Order which we agree. The effect is to limit the obligation of Madame Crociani and BNP Jersey to reconstitute Cristiana's Trust.
- 21 Order 22 of the Act of 11<sup>th</sup> September, 2017, required Ocorian to execute such documents as might be necessary to assign to BNP Jersey any interest, title or rights which it had against any person other than BNP Jersey in respect of the property transferred pursuant to the 2010 Appointment. There was further provision that BNP Jersey should account to Ocorian for any property it might recover in excess of the sum which BNP Jersey had paid to Ocorian in reconstituting the Grand Trust. That possibility of BNP Jersey recovering more than it had paid to reconstitute the Grand Trust as a whole was probably reasonably remote, but it comes into sharper focus once the obligation is only to reconstitute 50% of the Grand Trust, namely Cristiana's fund. The immediate context is that a number of paintings have been identified in Miami which appear to have emanated from the Grand Trust and it is clear that the value of those paintings not only depends to some degree on the personal appraisal of the valuer but also the time at which the valuation takes place. Accordingly there remains the possibility that realisation of the paintings may be deferred until such time as, given the then changes in the market, there is a real possibility of BNP Jersey recovering more than its outlay. Thus it is that Advocate Drummond submits that the duty to account is a one way ticket. As a defaulting trustee, BNP Jersey is entitled to get itself back to zero, but it should not have any ability to profit from the arrangement. In further submissions he accepted that it was not the assignment which potentially caused the problem, but the handling of the proceeds of any recovery from that assignment.
- 22 In theory, the striking down of the 2010 Appointment means that the new trustees, Ocorian, have the right to bring a proprietary claim to recover trust property, the only defence to such a claim being that of the bona fide purchaser for value without notice. That defence would not appear to arise if the paintings are held to the order of Madame Crociani as BNP Jersey is likely to contend to be the case. On the other hand, Cristiana's Trust has been fully reconstituted by BNP Jersey pursuant to its obligations as a result of the Royal Court's



order, and as a result of this Court's decision, Camilla's Trust has been fully paid out. Accordingly, as far as Ocorian is concerned, there is nothing for it to recover. In our judgment, it follows that the assignment of any interest which Ocorian has in respect of the property that was transferred pursuant to the 2010 Appointment is not an interest which is of value to Cristiana's Trust.

- 23 If one assumes that BNP Jersey is successful in establishing in Miami that these paintings are held to the order of Madame Crociani, it is relevant that she should not be able to put up a defence that they are in fact assets held to the order of Camilla's Trust. The way round that difficulty is to ensure that Ocorian does indeed assign whatever rights it has in the property in question. To the extent that property is recoverable, BNP Jersey is entitled to be repaid the monies it has paid into Cristiana's Trust to reconstitute the fund. The assignment seems to us therefore to have the dual advantage first of all of preventing a wholly technical and artificial defence being mounted against BNP Jersey and secondly in ensuring a sensible mechanism for ensuring that BNP Jersey is able to recover under its indemnity from Madame Crociani. In our judgment therefore, it would be wrong to interfere with the Order for the assignment of the asset, but it would be appropriate to introduce language to ensure that BNP Jersey cannot profit by receiving, by its enforcement of these rights, a sum in excess of that which it has had to pay out to reconstitute Cristiana's fund.
- 24 Having regard to these factors, and in particular recognising that any sum actually received by BNP Jersey may be greater or less than the valuation figures found by the Royal Court on its enquiry, we think the most appropriate course is to direct that BNP Jersey produce a report to the Royal Court as to the progress of its recovery of property, whether by the assignment to it of title in the property transferred pursuant to the 2010 Appointment or otherwise. That report should be made promptly in the event that BNP Jersey makes a recovery in excess of that which it has dispersed in the reconstitution of Cristiana's fund, but in any event should do so no later than 31<sup>st</sup> July, 2023. The Report will set out the assets which have been recovered, the price obtained on disposal and the costs if any connected therewith. The report should furthermore set out what proposals BNP Jersey has for any further applications in respect of any such excess held, and Cristiana, Camilla and Ocorian should all have liberty to apply both as to the accuracy of the report and as to the appropriate recipient or recipients of any excess in value over and above the amount which BNP Jersey is entitled to retain in order to cover the reconstitution of Cristiana's fund.
- 25 We therefore order that paragraph 22 of the Order of the Royal Court of 11<sup>th</sup> September, 2017, be revised to read as follows:-

***“22. Ordered that upon payment by the Third Defendant of each of the sums specified in paragraphs 21(a), (b), (c) and (d) above, and upon the Third Defendant indemnifying the new trustee in respect of its reasonable costs incurred in doing so, the new trustee shall execute such documents as may be necessary to assign to the Third Defendant any interest, title or rights, proprietary or personal (against any person other than the Third Defendant), that the new trustee has in respect of the property that was***



***transferred pursuant to the 2010 Appointment. Promptly in the event that the Third Defendant shall make a recovery in excess of that which it has dispersed in the reconstitution of Cristiana's fund, but in any event no later than 31 July 2023, the Third Defendant shall produce a report to the Royal Court as to the progress of its recovery of property, specifying the assets which have been recovered (whether by way of the assignment to it of title or rights to the property transferred pursuant to the 2010 Appointment or otherwise), the price on disposal or otherwise the value to be attributed to such assets, whether its process of recovery has been completed and, if not, what proposals it has for any further procedures; with leave to the First Plaintiff, the Fifth Defendant and Ocorian to apply as to the accuracy of the report and as to the appropriate recipient or recipients of any excess of value over the amount which the Third Defendant is entitled to retain in order to cover the whole amount paid by the Third Defendant in respect of the matters set out in paragraph 21(a), (b), (c) and (d) above."***

- 26 Advocate Drummond proposed the addition of paragraph 22A, by which the new trustee was to be indemnified against any administrative and legal costs incurred by it attributable to the reconstitution of Camilla's Trust. We do not see the need for this paragraph, because Camilla's Trust is not being reconstituted other than for the technical purposes which we have set out above. For the same reasons, we do not consider it appropriate to add the proposed new paragraph 25A which contemplates that Ocorian will incur administrative and legal costs attributable to the reconstitution of Camilla's Trust in so far as the promissory note is concerned.
- 27 However, in summary we think that it would be helpful to adopt the amendments to paragraph 21 and 34 of the draft order as proposed, and indeed to approve the addition of a new paragraph 34A which makes it plain that the reconstitution of Camilla's Trust by the Third Defendant takes place only to the extent necessary for the purposes of paragraphs 12, 16 and 34 of the Royal Court Order to have effect.