Cristiana Crociani v Edoardo Crociani

Jurisdiction:	Jersey
Judge:	Matthew John Thompson, Royal Court
Judgment Date:	30 June 2016
Neutral Citation:	[2016] JRC 111
Reported In:	[2016] JRC 111
Court:	Royal Court
Date:	30 June 2016

Text

[2016] JRC 111

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, Master of the Royal Court.

Between
Cristiana Crociani
First Plaintiff
A (by her Guardian ad Litem, Nicholas Delrieu)
Second Plaintiff
B (by her Guardian ad Llitem, Nicholas Delrieu)
Third Plaintiff
and
Edoardo Crociani
First Defendant

Paul Foortse
Second Defendant
BNP Paribas Jersey Trust Corporation Limited
Third Defendant
Appleby Trust (Mauritius) Limited
Fourth Defendant
Camilla de Bourbon des Deux Siciles
Fifth Defendant
Camillo Crociani Foundation IBC (Bahamas) Limited
Sixth Defendant
BNP Paribas Jersey Nominee Company Limited
Seventh Defendant

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

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

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

Advocate P.A. Clarke **for the Fifth Defendant**.

The Sixth Defendant did not appear.

Authorities

Crociani v Crociani [2016] JRC 085 .

Crociani v Crociani [2016] JRC 089C .

Pearce v Treasurer of the States [2016] JRC 101 .

Trusts (Jersey) Law 1984.

Vilsmeier v AI Airports International Limited and PI Power International Limited [2014] JRC 101 .

Crociani v Crociani [2015] JRC 145 .

Phipson on Evidence.

Victor Hanby Associates Limited v Oliver [1990] JLR 337 .

Trust — decision in relation to specific discovery applications.

CONTENTS OF THE JUDGMENT

Paras

THE MASTER:

INTRODUCTION

1 This judgment represents my decision in respect of the specific discovery applications brought by the plaintiffs against the first to fifth defendants and the first, second and fourth defendants against the plaintiffs. By the time the applications came to be heard, as set out later in this judgment, the principal argument related to the application by the plaintiffs against the first, second, third and fourth defendants in these terms:-

> *"Full disclosure of the files of Ogier, Carey Olsen, Mourant Ozannes, MacFarlanes and Lawrence Graham up to, and immediately surrounding, the Agate Appointment including all documents relating in any way to the question of the validity of the 2010 Appointment and the 2012 Retirement and relating in any way to the steps that D1–4 or any of them should or could take in relation to the same or in relation to assets representing those purportedly appointed by the 2010 Appointment."*

2 I set out below what is meant by the 2010 Appointment, the 2012 Retirement and the Agate Appointment. In respect of this part of the application I reserved my judgment.

3 This judgment also represents my brief reasons in respect of other specific discovery applications which had not been resolved by agreement and which I determined on 18th May.

Background

4 There are a number of judgments in relation to this matter where the background to the present proceedings and the relief sought by the plaintiffs has been summarised.

Nevertheless in relation to the applications before me it is necessary to briefly set out once again the background to put the current applications in context. The background was most recently described in the judgment of Commissioner Clyde-Smith reported at *Crociani v Crociani* [2016] JRC 085 at paragraphs 3 to 9 as follows:-

> ***"3 The Grand Trust was created by the first defendant on 24th December, 1987, under Bahamian law, the initial trust fund comprising a secured long-term promissory note issued by Croci International BV in favour of the first defendant.*** The intended beneficiaries included the first defendant's two daughters, namely the first plaintiff and the fifth defendant, for whose benefit the promissory note was to be held in two equal shares. Thereafter various other assets accrued to the Grand Trust .
>
> ***4 The trust deed conferred various powers over the trustees, including the right to pay income from their respective shares to the daughters, or, in each case, the sixth defendant, as well as the right to pay capital to the daughters from their respective shares.*** There were also provisions for each daughter's share to pass to their respective issue on their respective deaths. In the event of both daughters dying without leaving living issue the first defendant is the default beneficiary and failing her the sixth defendant .
>
> ***5 There were various changes of trustees and proper law but from October 2007, the trustees were the first, second and third defendants ("the Jersey trustees") and the proper law was that of Jersey*** .
>
> ***6 Between 2007 and 2011, various distributions were made by the Jersey trustees from the Grand Trust.*** On 9th February, 2010, the Jersey trustees executed a deed ("the 2010 deed") appointing all of the assets of the Grand Trust, except the promissory note, to another trust called the Fortunate Trust, of which the first defendant was both a trustee (together with the third defendant) and a beneficiary .
>
> ***7 Relations between the first defendant and the first plaintiff deteriorated in early 2011 and the first plaintiff moved out of her mother's home.*** In June 2011, the first defendant revoked the Fortunate Trust and withdrew all of its assets for her benefit. Before the end of 2011, the first plaintiff raised allegations that the Jersey trustees had acted wrongly and threatened to take steps against them. On 10th February, 2012, the Jersey trustees executed a deed ("the 2012 deed") under which they resigned as trustees, appointed the fourth defendant, a company incorporated and registered in Mauritius, as sole trustee and changed the proper law to that of Mauritius .
>
> ***8 The first plaintiff's lawyers complained about the appointment of the fourth defendant following which, on 2nd August, 2012, the Jersey trustees and the fourth defendant executed a deed ("the Agate appointment") appointing the assets the subject of the 2010 deed into the Agate Trust, a Jersey trust whose terms had been declared the same day by the second and fourth defendants*** .

9 The Jersey proceedings were brought by the plaintiffs on 18th January, 2013, against the first to fourth defendants. In the original proceedings, the plaintiffs allege that:-

(i) certain payments amounting in total to around €6.6M and $1.2M were wrongly made by the Jersey trustees to the first plaintiff but re-directed to the first defendant and that these monies should be reimbursed to the Grand Trust;

(ii) the 2010 deed was executed in breach of trust and that its effect should be reversed;

(iii) the execution of the 2012 deed was a fraud on the trustees' powers and that its effects should be reversed; and

(iv) the Agate appointment ought to be reversed .

The plaintiffs also seek various heads of consequential relief including the appointment by the Court of new trustees in place of the fourth defendant .

The Order of Justice has now been amended to include a claim for breach of trust over the alleged failure of the Jersey trustees and the fourth defendant to collect the interest payable under the promissory note."

5 In respect of this summary the 2010 Deed is the 2010 Appointment referred to the plaintiffs' application for disclosure of legal advice; the 2012 Deed is the 2012 Retirement referred to in the plaintiffs' application.

Procedural History

6 Following the Privy Council determining the forum application at the end of 2014, reported at [2014] UKPC 40, there have been a number of applications relating to pleadings and discovery. Firstly, I observe that this is the twelfth judgment issued since the Privy Council hearing in relation to this matter and the seventh judgment I have produced. This number of judgments alone makes it clear that this litigation is extremely bitter and hard fought. Secondly, it is clear from these judgments at times that approaches have been taken which are not proportionate and where, in cases involving less rancour and less amounts at stake, the points raised would not have been pursued or would have been resolved by agreement.

7 The starting point which led to the hearing on 18th May is the Act of Court dated 20th January, 2016. By that Act, at paragraph 2, I directed that any specific discovery application any party wished to make was to be issued by close of business on 5th February and was to be accompanied by an affidavit with any such application being heard on 24th February, 2016. I also gave consequential directions for the filing of affidavits in reply.

8 However, as is referred to in paragraph 1 of Commissioner Clyde-Smith's judgment reported at [2016] JRC 085, matters took a surprising turn of events because in January of this year the fourth defendant purported to retire as trustee of the Grand Trust and to appoint another Mauritius-based company, GFIN Corporate Services Limited ("GFIN") as trustee in its place. This was done without prior notice to the other parties, apart from the first defendant (and possibly the fifth defendant), and without prior notice to the Court. At the time of this appointment Carey Olsen were acting for the first, second and fourth defendants. On 2nd February, 2016, Carey Olsen gave notice that it had ceased acting for the fourth defendant who was now represented by Collas Crill. This was a decision taken by Carey Olsen.

9 On 5th February, 2016, the plaintiffs issued their application for specific discovery.

10 On 8th February, 2016, Messrs Carey Olsen issued an application for specific discovery on behalf of the first and second defendants.

11 On 10th February, 2016, I directed that the first and second defendants' specific discovery application against the plaintiffs should be heard on 16th and 17th March, 2016. Certain consequential directions relating to the filing of evidence were also given by me.

12 On 17th February, 2016, I was informed by Carey Olsen that their instructions in relation to this matter to represent the first and second defendants had been terminated with immediate effect. The termination of the first and second defendants retainer of Carey Olsen led to an issue as to whether Collas Crill could act for the first and second defendants in place of Carey Olsen, as set out in Commissioner Clyde-Smith's judgment reported at *Crociani v Crociani* [2016] JRC 089C.

13 The change of legal representation of the first, second and fourth defendants also led to the specific discovery applications of the plaintiffs and the first and second defendants being adjourned to 11th and 12th April, 2016, by paragraph 10 of the Act of Court of 24th February, 2016; other orders were made on this date which are not relevant to the present application.

14 By the time of the hearing on 24th February, I had received the plaintiffs' application for specific discovery supported in the second affidavit of Ben Thorp, the first and second defendants' application for specific discovery supported by the affidavit of Julie Katherine Keir sworn on 8th February, 2016, (with three lever arch file of exhibits) and a further affidavit from Ms Keir dated 17th February, 2016, filed in opposition to the plaintiffs' application for specific discovery. I had also received an affidavit from Dilly Jessica Frances Wright dated 17th February, 2016, filed on behalf of the third and seventh defendants in opposition to the plaintiffs' applications for specific discovery in so far as it concerned the third and seventh defendants.

15 Accordingly, by the time of the hearing on 24th February, 2016, I had been able to review these materials and the specific discovery applications brought by the plaintiffs and the first and second defendants. I therefore set out for the parties an indication of my thinking at that time in relation to the applications I had received. While on 24th February the only application listed for hearing was the plaintiffs' application, as I had received the materials from the first and second defendants in support of their application, I had reviewed these as well both to ensure I was taking a consistent approach in respect of the plaintiffs' application and so that all parties knew where they stood. In giving this indication, I had not received any affidavit in response to the first and second defendants' applications for specific discovery or any oral submissions. My observations were therefore qualified in this respect and were only an indication without having heard from the parties.

16 Advocate Santos-Costa, while at that stage not on the record for the first and second defendants, indicated that he wished to sit down and explore with the plaintiffs both applications to see to what extent agreement could be reached. Advocate Robinson was amenable to such a meeting, which I also encouraged. Notwithstanding the bitterness of any litigation, I consider it to be the duty of counsel to explore whether disputes, procedural or substantive, can be resolved by agreement or limited to real areas of disagreement. Such an approach is both proportionate (see *Pearce v Treasurer of the States* [2016] JRC 101) and leads to disputes including procedural agreements being resolved more promptly and more efficiently.

17 Following determination of the question of representation of the first and second defendants, the parties were able to meet and significantly narrow down the issues between them which required determination.

18 In respect of the fourteen requests issued by the plaintiffs, three requests were dealt with as part of various general discovery orders I made on 11th April and 10th May, 2016, and two applications were acceded to by the first, second and fourth defendants. The principal issue left to be determined therefore concerned waiver of privilege. The other issues were whether evidence should be provided as well as the judgments in two sets of proceedings defined in Mr Thorp's second affidavit as the Ciset proceedings and the Rome proceedings, and to three discrete applications concerning the fifth defendant only. The plaintiffs did not pursue two applications.

19 In relation to the first and second defendants, two of the first and second defendants' requests were resolved by agreement, nine requests were no longer pursued and two further requests were not pursued by agreement. This left only one discreet issue to decide relating to documents held by other professional advisors retained by the first plaintiff.

The Waiver Argument

20 I now turn to deal with the most significant argument which took place on 18th May which concerned the application by the plaintiffs for disclosure of legal advice given to the first, second, third and fourth defendants as set out in paragraph 1 of this judgment.

21 What led to the plaintiffs' application arose out of certain paragraphs of the pleadings of the first to fourth defendants concerning the Agate Appointment.

22 In relation to the first, second and fourth defendants, the key part of the pleadings in relation to the Agate Appointment are set out at paragraphs 54 to 58 of the amended answer of the first, second and fourth defendants as follows:-

> *"54 Between the revocation of the Fortunate Trust on 30 June 2011 and 3 July 2012 the First to Fourth Defendants considered that the Appointed Property which, by the 2010 Appointment, had been transferred to the Fortunate Trust was vested in Mme Crociani.*
>
> *55 By letter dated 3 July 2012, however, Bedell Cristin, on behalf of Cristiana asserted various claims to the Appointed Assets for the first time.*
>
> *56 The First to Fourth defendants were advised by Mourants Ozannes (Jersey counsel), Macfarlanes LLP ("Macfarlanes") (an English firm of solicitors) and Mr Brian Green Q.C. (English leading counsel):*
>
> *56.1 that Cristiana's claims to these assets were misconceived, technically flawed and lacking in merit; but that*
>
> *56.2 if, contrary to this advice, Cristiana's claims were nevertheless successful or if, for some formalistic or technical reason, the disposition of the Appointed Assets could otherwise be impugned, the Appointed Assets would still be vested in the Grand Trust.*
>
> *57 This would have been an unintended and accidental result and would be best addressed by ensuring that any claims to or in respect of the Appointed Assets were in the hands of those who could best be expected to protect the family's interests.*
>
> *57.1 It was common ground amongst the First to Fourth Defendants that (a) Cristiana was not such a person and (b) it would not be in the interests of the beneficiaries of the Grand Trust for the Appointed Assets to be returned to the Grand Trust (for the reasons which led to the 2010 Appointment and otherwise).*
>
> *57.2 The Foundation was considered to be the obvious recipient for any such claims in order to ensure that persons whom the First to Fourth Defendants were confident would consider their existence and/or prosecution whilst taking into account the family's interests.*
>
> *58 Accordingly:*

58.1 Meetings took place between the First to Fourth Defendants and their legal advisers on 25 July 2012 and 27 July 2012 (first with former trustees, then with present trustees) to discuss the issue.

58.2 A further meeting took place over 4 hours on 1 August 2012, at the offices of Macfarlanes in London, at which the First to Fourth Defendants were advised that:

58.2.1 It would not be legitimate to enter into confirmatory documentation simply to defeat Cristiana's claims and accompanying risk of litigation; but

58.2.2 they were entitled and obliged to take account of such claims and such risk in deciding how, if at all, to proceed and that the elimination of unintended or accidental consequences, the avoidance of uncertainty and considerations as to whether the Appointed Assets were or would be in safe and responsible hands were material considerations in all the circumstances.

58.3 During the meeting at the offices of Macfarlanes on 1 August 2012 there was extensive discussion of the reasons for the revocation of the Fortunate Trust, Cristiana's subsequent conduct, the nature of the Foundation as a beneficiary of the Grand Trust, Cristiana's alleged claims and steps available to the First to Fourth Defendants.

58.4 The First to Fourth Defendants were advised that if they were still the trustees of the Grand Trust and, if the assets of the Grand Trust included any rights or choses in action that might enable them to seek to recover value passing under the 2010 Appointment or the assets now representing that property ("the Specified Property"), they could pass the Specified Property to one or more beneficiaries of the Grand Trust if they believed it was in the interests of one or more of the beneficiaries of the Grand Trust so to do.

58.5 Draft documentation to appoint the Specified Property in this way was considered at the meeting on 1 August 2012. At the conclusion of that meeting, Macfarlanes was instructed to produce execution copies of that documentation for consideration at a further meeting to be held the next day.

58.6 At the further meeting on 2 August 2012 legal advice was again provided as to the vires and propriety of the First to Fourth Defendants entering into the documentation which had been produced. In particular the First to Fourth Defendants were again advised specifically that, if the purpose of appointing the Specified Property was simply to defeat any claim which Cristiana and/or the Plaintiffs might have, this would not be a good reason for acting – but that the existence of Cristiana's claim was a fact which they were obliged to take into account in deciding whether or not to make the appointments

58.7 Accordingly, and in reliance on that advice, on 2 August 2012 Appleby Mauritius and Mr Foortse executed a trust declaration constituting the Agate Trust.

58.8 Subsequently the First to Fourth Defendants executed a deed of appointment in favour of Appleby Mauritius and Mr Foortse (as trustees of the Agate Trust) appointing the Specified Property onto the trusts of the Agate Trust absolutely freed and discharged from the trusts, powers and provisions of the Grand Trust ("the Agate Appointment).

58.9 The First to Fourth Defendants' reasons for making the Agate Appointment were recorded in detailed minutes of the hours of discussion and deliberation which took place. The Plaintiffs have, despite being informed of the Agate Appointment and the existence of the minutes by letter from Mourant Ozannes dated 17 August 2012, never requested a copy of those minutes and commenced these proceedings without having requested a copy.

58.10 For the avoidance of doubt Jersey counsel (Mourant Ozannes), Macfarlanes and English leading counsel (Mr Green QC) each confirmed that it was perfectly proper for the First to Fourth Defendants to make the Agate Appointment."

23 The first, second and fourth defendants at paragraph 153 of their amended answer also pleaded that "they have also sought, taken and acted in accordance with appropriate legal advice from leading legal advisers," in asking to be excused under, inter alia, Article 45 of the Trusts (Jersey) Law 1984.

24 In respect of the third defendant, at paragraph 76 of the re-amended answer of the third and seventh defendants pleaded "in executing the Agate Appointment BNP Jersey acted on the advice of Jersey counsel, Mourant Ozannes, English Solicitors, Macfarlanes and English leading counsel, Brian Green QC." This pleading is repeated at paragraph 85.4. The third defendant also asks to be excused under Article 45 of the Trusts (Jersey) Law 1984 (see paragraph 100).

25 In respect of the third defendant, the third defendant further pleaded in respect of the 2010 Appointment at paragraph 55 that it was drafted by and in accordance with the advice of Jersey counsel, Ogier; again at paragraph 59 the third defendant seeks to be excused under Article 45.

26 The same averment is made in respect of the 2012 Retirement at paragraph 71 and again Article 45 is invoked at paragraph 80.

27 I record in passing that at the outset of the hearing I disclosed that I was a partner in Ogier at the time advice was given to BNP Jersey, but that as far as I was aware I was not involved in the giving of any such advice. I therefore considered that the fact that Ogier had given advice which was now relied on by the third defendant did not prevent me from sitting on this application. No party argued otherwise.

28 As a result of the above pleadings, certain legal advice was disclosed by the first to fourth defendants to the plaintiff. At the conclusion of the hearing I asked to be provided with a copy of the bundle of the legal advice disclosed. I was therefore provided with a bundle of 48 documents between 13th July, 2012 and 2nd August, 2012, containing notes of calls, notes of meetings, instructions to Nicholas Le Poidevin Q.C., a note of advice of Nicholas Le Poidevin Q.C., instructions to Brian Green Q.C. and notes of meetings with Brian Green Q.C. on 25th July and 27th July, 2012. I was also provided with minutes of the meeting of the trustees of the Grand Trust dated 1st August and 2nd August, 2012.

29 The notes of the meeting of 1st August, 2012, were lengthy and discussed extensively the issues and advice that led to the Agate Appointment the following day. The minutes are some nine pages in length. Present were the first to fifth defendants, Brian Green Q.C., Advocate Jonathan Speck of Mourant Ozannes, then advisers to the former and present trustees, and Macfarlanes LLP. On 2nd August, 2012, the Agate Appointment was entered into. Paragraph 10 of the notes of the minute of the meeting dated 2nd August, 2012, states “The Grand Trustees were reminded that it would not be legitimate to enter into the Agate Appointment simply to defeat Cristiana's claims and the accompanying risk of litigation. The Grand trustees were very clear that this would not be the basis upon which they were entering into the Agate Appointment which was for the reasons discussed at the meeting the previous day and at this meeting.”

30 Handwritten notes of Advocate Speck and from Macfarlanes in respect of both these meeting were also disclosed.

31 The trustees' meetings on 1st and 2nd August followed on from consultations with Brian Green Q.C. on 20th July and 27th July, 2012; manuscript notes of those advisers who attended the meeting have been disclosed together with a typed attendance note produced by Mourant Ozannes of the consultation on 25th July, 2012.

32 The consultation with Brian Green Q.C. referred to advice previously given by Mr Nicholas Le Poidevin Q.C. at a consultation on 19th July, 2012. That consultation came about because up to 27th July, 2012, Carey Olsen were initially acting for the first, second and third defendants as the ‘former’ trustees of the Grand Trust and the Fortunate Trust. (I have put ‘former’ in quotes because the validity of the 2010 Appointment is itself in issue.) Initially Mourant Ozannes acted for the first defendant in her capacity as settlor and beneficiary of the Grand Trust and the Fortunate Trust but not as trustee. From 27th July, 2012, Mourant Ozannes also acted for all of the trustees. This state of affairs continued until April 2013 when Messrs Carey Olsen then acted for all of the first to fourth defendants until May 2015 when the third defendant (and the seventh defendant) sought separate representation. Carey Olsen's retainer came to an end in early February 2016 as set out above.

The Parties' Contentions

33 Advocate Robinson for the plaintiffs contended that the right way to approach loss of privilege was on the basis of fairness which means that a party waiving privilege over legal advice cannot "cherry pick" i.e. disclose only documents, part of a document, or a series of documents without allowing the other party to be satisfied that what has been disclosed represents the whole of the material relevant to the issue in question. The same approach has been taken in Jersey (see *Vilsmeier v AI Airports International Limited and PI Power International Limited* [2014] JRC 101 applied in earlier decision in this matter reported at *Crociani v Crociani* [2015] JRC 145).

34 Loss of privilege is decided objectively; in other words what a party intended to disclose or not disclose was irrelevant. At paragraph 26.0.3 of Phipson on Evidence it is stated that "the fact that a statement is made that a reference is not to be taken as a waiver does not prevent the court holding that as a matter of law the statement does constitute a waiver. What matters is an objective analysis of what the party has done. There are exceptional circumstances, of which fraud and obvious mistake are the most important. But unless those exceptions apply, the extent of any waiver must be judged objectively."

35 The approach to take to this was considered further in Phipson in paragraph 26.11 at page 821:-

> *"**In** Fulham Leisure Holdings v Nicholson Graham and Jones **it was argued that by waiving privilege over certain legal advice, the claimant had waived privilege over other legal advice.*** Mann J. emphasised that there was no rule to the effect that a party who waives privilege in relation to one communication is taken to waive privilege I relation to all and considered how the "transaction" or "issue" in respect of which privilege was being waived was to be identified in any case. The first step was to identify a transaction or act in respect of which disclosure was being made, such as the giving of advice on a particular occasion. The court must ensure that proper disclosure was given in relation to that act. It was then necessary to determine whether that transaction or act was part of a bigger picture, in which case consideration had to be given as to whether fairness required a wider disclosure. The purpose for which the disclosure was made was material to the conclusions which the court would reach. This approach draws a distinction between the act or transaction over which privilege is waived, which depends on precise identification of what privileged material has been disclosed voluntarily and ***may be very narrow, and the material which fairness requires to be disclosed in consequence of that voluntary disclosure.*** The judge rightly rejected an argument that the purpose of the disclosure was irrelevant: it is crucial to understand for what purpose the privileged material is relied upon in order to decide what fairness requires to be disclosed .
>
> ***The case law shows that without exception the courts have not extended the ambit of the waiver beyond what is necessary and if in doubt have taken a relatively restrictive view of the "issue in question".*** The other point of significance is that it is for the court and not the party to determine objectively

what is the extent of the waiver. Care must be taken as the court may take a different view of the extent of the waiver."

36 Advocate Robinson also, quite correctly, reminded me that if there was doubt a restrictive approach should be taken to the issue in question.

37 Advocate Robinson further argued that, in addition to referring to the legal advice in parts of the pleadings set out above, advice had been deployed in opposition to the plaintiffs' pre-emptive costs application. At paragraph 5.5 of the first defendant's third affidavit she referred to the advice of Brian Green Q.C. that the plaintiffs' claims were "bad" and "misconceived".

38 The third defendant had also relied on legal advice of Brian Green Q.C. to justify its position in respect of the 2010 Appointment and the 2012 Retirement.

39 The reference to advice of Brian Green Q.C. in the first defendant's third affidavit was repeated in the first defendant's fourth affidavit at paragraphs 16 to 19.

40 This legal advice was also referred to in submissions in relation to the pre-emptive costs application as well as being referred to in written submissions to the Privy Council on the Forum Challenge.

41 What had not been given disclosed was legal advice given following the sending of the plaintiffs' letter before action on 3rd July, 2012, to Ogier. Ogier had acted prior to the letter before action being sent. Given the advice that had already been waived the plaintiffs were entitled to know what advice Ogier had also given in relation to the letter before action.

42 It was also clear that Carey Olsen had given advice by reference to the instructions to Mr Le Poidevin. At paragraph 29 the instructions stated:-

"In addition instructing advocates have given preliminary advice that an application should be made to the Royal Court in private for a declaration as to:-

29.1 the correct construction or interpretation of clause 11 of the Grand Trust;

29.2 the validity of the Appointment;

29.3 the validity of the 2012 deed including the appointment of Appleby Mauritius and the change of proper law."

43 Mr Le Poidevin Q.C. agreed that an application for directions should be made (see paragraph 64 of his note) although he appeared to prefer the construction of clause 11 of the Grant Trust contended for by Bedell Cristin rather than the construction Carey Olsen

wished to advance.

44 I was also referred to a fee note of Carey Olsen which referred to calls between Carey Olsen and Lawrence Graham in early July 2012 and a meeting between Advocate Kistler and the first to fourth defendants and Lawrence Graham on 16th July, 2012. It is clear from the entry of 18th July, 2012, of Victoria Connelly (an experienced English solicitor with whom I worked at Ogier for a number of years) that notes were taken at the meeting on 16th July by reference to her time entry of 18th July, 2012.

45 What the plaintiffs argued should be disclosed by the defendants were the whole files of all the lawyers involved between the period of the letter before action on 3rd July, 2012, and the Agate Appointment on 2nd August, 2012. This was because the legal advice disclosed went far beyond the reasons for the Agate Appointment but also expressed views on the merits of the plaintiffs' claim as set out in the letter before action. For the defendants only to select what they wished to disclose in relation to the Agate Appointment amounted to cherry picking. Given what had been deployed in the pleadings and in evidence, the defendants had waived their right to advice given up to and including the Agate Appointment. The issue in question in July 2012 was not just why the parties made the Agate Appointment, but why the 2010 Appointment was not valid.

46 Advocate Redgrave in response firstly contended that the issue in respect of Ogier advice prior to the Agate Appointment was separate. In a brief adjournment the parties agreed that this issue should be put to one side for the parties to reflect on. I agreed to this approach but do wish to observe that, as matters stand, it does appear that Ogier advice in respect of the 2010 Appointment and the 2012 Retirement has been deployed by the third defendant to justify being excused if a breach of trust is established. This would point towards such advice being disclosed because there appears to be no difference in principle between the approach taken in respect of the Agate Appointment where disclosure has taken place and in respect of the 2010 Appointment and the 2012 Retirement. However these are observations only and the issue is for another day if adjudication is required. In handing down an earlier draft of this judgment for comments I was informed by Advocate Redgrave for the third defendant that all material relied on has been disclosed.

47 In respect of the disclosure sought from the date of the plaintiff's letter before action of 3rd July until the date of the Agate Appointment on 2nd August, 2012, it was contended that what is sought is in effect everything. This is therefore clearly a fishing expedition. The material relevant to the Agate Appointment has been disclosed; the flaw in the plaintiffs' approach is why would you stop at 2nd August? If the plaintiffs were right in their contentions, then where would the line be drawn? Yet the plaintiffs themselves do not contend they are entitled to legal advice after the Agate Appointment. The fact they did not do so indicates why their application is flawed.

48 The correct approach has already been taken in disclosing the advice of Nicholas le Poidevin Q.C. and the instructions to him. The Defendants contended that the only reason

for disclosing this advice was that it was referred to in the advice of Brian Green Q.C. otherwise there was a good argument that it would not have had to have been disclosed.

49 The fact that Mr Le Poidevin Q.C's advice has been disclosed means that the plaintiffs are aware of the alternative course of action and the possibility of applying for directions.

50 The Agate Appointment only dealt with two technical points namely whether or not the 2010 Appointment was void for perpetuity and to ensure that any appointment was within the terms of clause 11 of the Grand Trust.

51 The Agate Appointment could not address arguments that the Agate Appointment or indeed the 2010 Appointment and the 2012 Retirement were both a fraud on a power or made in bad faith.

52 Ultimately whether or not the plaintiffs' claims will succeed is a matter for trial. What advisers may have said prior to the Agate Appointment in respect of the plaintiffs' claims is ultimately irrelevant because the Royal Court will make its own decision on the validity of the actions challenged by the plaintiffs.

53 The plaintiffs have more than sufficient information in order to cross-examine the defendants about the validity of the Agate Appointment and the considerations that the first to fourth defendants either took or did not take into account in making the Agate Appointment.

54 The fact that a reply to the letter before action was drafted by Carey Olsen but was never sent does not have to be disclosed to understand what the first to fourth defendants had in mind when they made the Agate Appointment. The interests of justice do not require such disclosure.

55 Likewise the draft representation that Carey Olsen drafted does not need to be disclosed. The draft representation did not go to Mr Le Poidevin Q.C.; it was not considered by Brian Green, Q.C. Macfarlanes or Mourant Ozannes because the strategy had changed. There was not going to be an application for directions.

56 The plaintiffs have seen the advices from both QC's and can explore in cross-examination why one option was preferred over another.

57 Advocate Santos-Costa supported Advocate Redgrave and emphasised that the context of the disclosure was the Agate Appointment where the plaintiffs had received full disclosure. He also urged me not to open the floodgates to disclosure of all legal advice; a restrictive approach should be taken.

Decision

58 Ultimately this application did not turn on the applicable legal principles as set out by Advocate Robinson at paragraphs 33 to 35 above which were agreed and which I consider reflect the approach I should take. Rather the issue concerned the application of those principles.

59 The fundamental question I have to determine concerns the sufficiency of the disclosure made by the defendants in support of their reliance upon legal advice referred to in the relevant parts of the amended answer of the first, second and fourth defendants set out at paragraph 22 above and in the third and seventh defendants' re-amended answer set out at paragraph 24 above.

60 In respect of this discovery I was provided with a lever arch file as I have described at paragraphs 28–32 above. A significant amount of material has therefore been provided. The question I have to consider is whether proper disclosure has been made in respect of the transaction which is the Agate Appointment. As noted in Phipson that requires me to determine whether the Agate Appointment was part of a bigger picture in which case consideration has to be given as to whether fairness requires wider disclosure.

61 I am in no doubt that the obligation of fairness led to the instructions to Mr Le Poidevin Q.C. and the note of his advice being disclosed even though the advice relied upon when making the Agate Appointment was that of Brian Green Q.C., Mourant Ozannes and Macfarlanes. This is because the advice of Mr Le Poidevin Q.C. was considered in the consultation with Mr Green Q.C. which consultation led to the idea of the Agate Appointment instead of an application for directions. It would clearly have been cherry-picking if the advice of Mr Le Poidevin Q.C. and the instructions to him had not been disclosed.

62 The material disclosed furthermore reveals that Carey Olsen were preparing a draft letter before action and a draft representation. However those materials were not provided to Brian Green Q.C. and were not pertinent to the discussions that took place with Brian Green Q.C. on 25th and 27th July and at the trustee meetings on 1st and 2nd August, 2012. Instructions to Mr Le Poidevin Q.C. also summarised at paragraph 29 the preliminary advice given by Carey Olsen about making an application to the Royal Court and their views on a possible interpretation of clause 11 of the Grand Trust. The plaintiffs, in relation to the advice from Mr Le Poidevin Q.C., clearly can explore whether the Agate Appointment was invalid (see paragraph 97 of the order of justice), was a fraud on a power (see paragraph 98), was vitiated by a conflict of interest (see paragraph 99) and whether or not the appointment was based on false assertions or false facts (see paragraphs 100 and 101) leading to the assertion at paragraph 102 that the decision to make the Agate Appointment was not *bona fides*.

63 Based on Mr Le Poidevin Q.C.'s advice, the plaintiffs can also test whether the trustees failed to take into account all relevant matters or took into account irrelevant or incorrect matters as set out in detail at paragraph 103 of the amended order of justice.

64 Having reviewed all the materials provided to me, I do not consider that the interests of justice requires disclosure of initial conversations or discussions between Carey Olsen and the first defendant, any draft reply to the letter before action sent on behalf of the plaintiffs or any draft representation, in order to assist the plaintiffs to be able to cross-examine the defendants on the assertions set out in the order of justice. The lack of this material will not hamper cross examination. In my judgment the key material leading to the advice of Mr Le Poidevin Q.C. which in turn was reviewed by Mr Green Q.C. has been disclosed and can be used by Advocate Robinson to question relevant witnesses to explore why they followed the approach advocated by Mr Green rather than Mr Le Poidevin, if Mr Robinson chooses to do so.

65 The same analysis applies to requests for files of Ogier or Lawrence Graham. In relation to Ogier in addition, the plaintiffs have not shown me that Ogier in fact advised at all in relation to the Agate Appointment. Their application, in respect of access to Ogier's files, if there are any, fails to overcome this hurdle also.

66 However matters do not end there. This is because it is clear that advice was given by Brian Green Q.C. and Mourant Ozannes in response to the letter before action. Advice was also given on defences to claims advanced in the letter before action. This can be seen from two documents.

67 Firstly, in Carey Olsen's file note dated 26th July 2012, prepared by Advocate Kistler of the consultation with Brian Green Q.C. on 25th July 2012, in the final paragraph it states “when Princess Camilla returned to the room Jonathan indicated he wished to discuss the production of the First and Second Responses to Cristiana's letter and Princess Camilla insisted that she wished to speak with Jonathan Speck separately and at 4pm I was asked to leave the conference.”

68 In other words the conference with Brian Green Q.C. was in two parts. The first part related to the Agate Appointment and I am satisfied that material in respect of the Agate Appointment has been disclosed. However, the second part appears to relate to a response to the letter before action. This material has not been disclosed. The issue for me is whether it should be disclosed.

69 By 27th July, 2012, Mourant Ozannes and Macfarlanes were acting for all the trustees. Up to this point in time and at the time of the first consultation with Brian Green Q.C. they were only acting for the first defendant as settlor and beneficiary. From 27th July, 2012, onwards however, they were advising the first to fourth defendants in all their capacities.

70 Secondly, in the minutes of the meeting of the trustees on 1st August the minutes contain the following references to legal advice received by the first to fourth defendants in response to Bedell Cristin's letter before action. Paragraph 8 of the typed minutes state:-

> *"In the light of the legal advice which had been received by the Grand Trustees, they had been clear that the claims intimated by BC were technically flawed and lacking merit and should be defended."*

At paragraph 32 the minutes say:-

> *"The Grand Trustees were advised as to the defences available in respect of the claims advanced in the BC letter.* BG, MO and Macfarlanes were instructed to draft a full response to BC's letter, firmly rebutting the claims made."

Paragraph 32 appeared in a section of the minutes headed "Cristiana's Claims".

71 In the first of the two meetings leading to the Agate Appointment, the first to fourth defendants therefore also received advice in respect of defences available to the plaintiffs' claims.

72 Quite properly the first to fourth defendants were warned that it would not be legitimate to enter into the Agate Appointment "simply to defeat Cristiana's claims and the accompanying risk of litigation…" (see paragraph 33 of the minutes). However paragraph 33 also continued "…but that the Grand Trustees were entitled and obliged to take account of such claims and risk in deciding how if at all to proceed, and that the elimination of unintended or accidental consequences, the avoidance of uncertainty, and considerations as to whether the Appointed Assets were or would be in safe and responsible hands were material considerations in all the circumstances."

73 In reaching my decision I have also had the benefit of reading the handwritten (but clear) manuscript notes of the meeting of 1st August, 2012, taken by Advocate Speck. These notes appear to me to be a verbatim record of what was said whereas the typed minutes of the meeting is a summary, albeit a detailed summary, of the discussions that took place.

74 The view I have reached in relation to these discussions is that the first to fourth defendants were exploring the rationale for the 2010 Appointment, how to respond to the letter before action and whether or not to make the Agate Appointment all in the same meeting. In making the Agate Appointment, and I express no criticism of this, the first to fourth defendants in part appear to have relied on the rationale which led to the 2010 Appointment. In the same meeting they had also had advice on how to defend the challenges to the 2010 Appointment. While they had been properly warned about not simply making the Agate Appointment in order to defeat the attack on the 2010 Appointment, that warning and the advice given on how to defend the claim, meant that when making the Agate Appointment there was a link back both to the rationale for making the 2010 Appointment and consideration of whether that rationale was still justified. The

first to fourth defendants had also received advice on how to defend attacks on the rationale for the 2010 Appointment. It is at least arguable that all these matters were in the minds of the first to fourth defendants when they made the Agate Appointment because from the notes and minutes disclosed these matters were being discussed in the same meetings on 1st and 2nd August, 2012. This is so even though the meetings on 1st and 2nd August were held to decide whether or not to make the Agate Appointment.

75 In my judgment, when the Agate Appointment was made, what was being considered was more than resolving the technical issue of whether or not the 2010 Appointment was void for perpetuity. Certainly that was one of the justifications for it but from the material disclosed it was not the only justification. Returning to the words in Phipson, the discussions on 1st and 2nd August were more than just dealing with a technical defect; they extended to and covered the rationale for and the challenge to the 2010 Appointment. At the time of making the Agate Appointment, the first to fourth defendants had therefore revisited their rationale for the 2010 Appointment and had received advice on how to defend that appointment. The rationale for the 2010 Appointment appears to have still been relied on in making the Agate Appointment.

76 In my judgment the conclusion I have reached therefore is that the plaintiffs, as a matter of fairness, should be placed in the same position as the first to fourth defendants to permit them to test the approach taken by the first to fourth defendants in making the Agate Appointment. Accordingly, I have concluded that fairness requires that disclosure of legal advice concerning how to defend or respond to the allegations contained in the letter before action dated 3rd July given by any of Brian Green Q.C., Mourant Ozannes and/or Macfarlanes between 25th July 2012 when Brian Green Q.C. first gave such advice and 2nd August, 2012 when the Agate Appointment was made, should occur.

77 This conclusion does not mean that the making of the Agate Appointment was in breach of trust. That is for the Royal Court to decide at trial and this decision should not be taken as containing any finding or criticism of the actions of the first to fourth defendants in making the Agate Appointment.

78 The disclosure should cover any notes of any advice made by any of Brian Green Q.C., Macfarlanes and/or Mourant Ozannes, including any notes of any telephone calls, any written advice given and any notes taken by any of the first to fifth defendants. I have included the fifth defendant as she was present at the consultations of 25th and 27th July and the meetings of the trustees on 1st and 2nd August and discovery is a continuing obligation which also applies to her as much as to the first to fourth defendants.

79 With this material the plaintiffs will have the same information that had been received by the first to fourth defendants and will be able to cross-examine the first to fourth defendants on the Agate Appointment and all the issues the first to fourth defendants were exploring and reviewing in making the Agate Appointment. Without it they (and the Court) will not be placed in the same position as those who made the appointment.

80 I therefore grant the plaintiffs' application to this extent.

81 I should also make it clear that this decision does not justify any requests for discovery in respect of advice given after 2nd August. The only discovery to be provided is to enable the Court and the plaintiffs to understand what the first to fourth defendants had been told by the time they made the Agate Appointment. What they were told after that date remains confidential and privileged.

82 Insofar as the application was made on the basis of matters referred to in the third and fourth affidavits of the first defendant and in skeleton arguments deployed in particular for the pre-emptive costs application I would have refused such requests on the basis of this material alone. While the references appear to be referring to the content as distinct from the gist of the advice, ultimately the reference to such advice in respect of those applications was irrelevant. It was always a matter for the court concerned to form its own view of the relative strengths of the plaintiffs' claims and the defendants' responses in order to decide whether or not to make a pre-emptive costs order or in respect of the forum challenge. The interests of justice and a fair trial of the substantive issues raised by the pleadings in this case do not require disclosure of the advice that has been referred to in resisting earlier interlocutory disputes that have been resolved or withdrawn.

The Other Applications

83 In this part of my judgment I shall deal with the other issues which were determined briefly by me on 18th May.

84 The first request related to the Ciset proceedings and the Rome proceedings where the plaintiffs sought the judgments and any witness statements or affidavits filed. Advocate Costa at present did not have any such witness statements or evidence and only had one judgment. The order I made was that I was satisfied that disclosure of the judgments should be made. Once the plaintiffs had received this disclosure and had considered the judgments, they could then consider whether they wished to renew an application for evidence filed in relation to the proceedings. On any such application I would have to be satisfied that any such request met the usual tests on a specific discovery application, in particular that it was not oppressive and also that it did not solely go to credit. Requests for material simply to attack the credit of a party is not a basis to order a specific disclosure (see *Vilsmeier* above).

85 In relation to the plaintiffs' request that there should be disclosure of any letter written to Pleming JA on or around 20th May, 2013, and any response, I ordered that any such communications should be listed by the fifth defendant. The question of whether or not the plaintiffs could inspect any such communications was however a matter for the trial judge. The fifth defendant was given 28 days to provide such a list.

86 In relation to the application for disclosure of the files of Christopher Kosman by reference to the matter set out at paragraph 31 of the second affidavit of Mr Thorp I was satisfied that the relevant tests on a specific discovery application had been made out. I therefore ordered that the fifth defendant had 28 days to make enquiries of both Mr Kosman and his former firm Sarrau and Associés, to obtain any documents from Mr Kosman and/or Sarrau and Associés and to disclose any such documents (assuming they were relevant) by way of a supplemental list of documents verified by affidavit.

87 In respect of the plaintiffs' application for full disclosure of all relevant documents sent or received by the defendants using unsearched electronic repositories including mobile devices, on 24th February I indicated that I expected the fifth defendant to search the email account cdbds@tiscali.it between 2010 and 2012 and to disclose any relevant documents. I reach this view because I was satisfied from paragraph 33 of Mr Thorp's second affidavit that the fifth defendant had used the account cdbds@tiscali.it. The relevant period to be searched was limited to the time around the making of the 2010 Appointment, the 2012 Appointment and the Agate Appointment. To search beyond these dates in my view was oppressive.

88 I was not prepared to order a search of any other electronic repositories used by the first defendant for the reasons set out in paragraphs 50–53 of the affidavit of Julie Keir sworn in opposition to the second affidavit of Mr Thorp.

89 In respect of the application for specific discovery issues by the first, second and fourth defendants, the only issue I had to determine related to the request for documents held by other professional advisers. By the time of the hearing on 18th May, the application was limited to those advisers other than lawyers who had given advice to the plaintiffs.

90 In respect of this application, by their letter of 1st December, 2015, Bedell Cristin stated:-

> *“Cristiana has been content to contact certain third parties whose discovery we would not otherwise be obliged to procure (e.g. Baker and McKenzie) but she is not prepared to enter wide-ranging speculative requests for information from unnamed, unspecified third parties.”*

91 The decision I reached was that I was not satisfied that this statement was sufficient to discharge the first plaintiff's discovery obligations including the duties of a party's advocate (see *Hanby v Oliver* [1990] JLR 337 at pages 347 line 32 to page 348 line 2). I therefore required Bedell Cristin, as the advocates for the first plaintiff, to ascertain from the first plaintiff whether or not there were such advisers to whom the first plaintiff had spoken between 2010 and 2012 in relation to the Grand Trust, the Fortunate Trust, the 2012 Retirement and the Agate Appointment; if any such conversations had taken place, it was their duty to explore whether there were any relevant documents setting out what was discussed (in whole or in part) or whether any relevant documents were created arising out

of such conversations. The plaintiffs were also given 28 days to confirm the position.