Cristiana Crociani v Edoarda Crociani

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Blampied, Ronge
Judgment Date:	19 February 2019
Neutral Citation:	[2019] JRC 28B
Date:	19 February 2019
Court:	Royal Court

Text

[2019] JRC 28B

Royal Court

(Samedi)

Before:

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

Between
Cristiana Crociani
First Plaintiff

and

A (by her guardian *ad litem*, Nicolas Delrieu)
Second Plaintiff

and

B (by her guardian *ad litem*, Nicolas Delrieu)

Third Plaintiff
and
Edoarda Crociani
First Defendant

and

Paul Foortse
Second Defendant

and

BNP Paribas Jersey Trust Corporation Limited
Third Defendant

and

Appleby Trust (Mauritius) Limited
Fourth Defendant

and

Camilla de Bourbon des Deux Siciles
Fifth Defendant

and

Camillo Crociani Foundation IBC (Bahamas) Limited
Sixth Defendant

and

BNP Paribas Jersey Nominee Company
Seventh Defendant

and

GFin Trustees (Jersey) Limited
Eight Defendant

and

Ocorian Trustees (Jersey) Limited
Party Cited

Advocate D. S. Steenson **for the Fifth Defendant**.

Advocate S. J. Williams **for the Fourth Defendant**.

Authorities

Crociani v Crociani [2017] JRC 146.

BNP Paribas Ors v Crociani and Ors [2018] JCA 136A.

English Commercial Court Guide.

Crociani v Crociani [2016](2) JLR 543.

The Niedersachsen (1983) COM OR 234 (1983) 1 WLR 1412).

Nolan v Minerva Trust Company Ltd [2014] (2) JLR 117.

Royal Court Rules.

Service of Process (Jersey) Rules.

Aerostar Maintenance International Limited v Wilson [2010] EWHC 2032.

CMC Holdings Limited v Foster [2017] JRC 190.

Lewin on Trusts.

The Law of Contribution and Reimbursement.

Patel v Mirza [2017] AC 467.

Maçon v Quérée [2001] JLR 106.

Kazakhstan Kagazy plc and others v Zhunus and others [2017] 1 WLR 1360.

Numbers 12 and 13 Britannia Place Limited v J and G (Property) Limited & Ors [1989] JLR 34.

Crociani v BNP Paribas Jersey Trust Corporation Limited [2016] (2) JLR 543.

Holyoake v Candy [2018] Ch. 297.

Ras al Khaimah Investment Authority and others v Bestfort Development Lip and others [2017] EWCA Civ 1014.

Crociani v Crociani [2018] JRC 230C.

Trusts — world-wide freezing and disclosure orders.

THE COMMISSIONER:

1 The fifth defendant (“Camilla”) applies for the world-wide freezing and disclosure orders

granted on 18 th January, 2019, to be discharged or time for compliance with the disclosure orders extended.

2 The orders were made *ex parte* pursuant to the representation of the fourth defendant ("Appleby Mauritius") signed by the Commissioner on 18 th January, 2019, in which it seeks from Camilla an indemnity against or contribution towards the substantial sums it has paid to the party cited, Ocorian Trustees (Jersey) Limited ("Ocorian") as the new trustee of the Grand Trust, by way of the reconstitution of Cristiana's Trust, its liability for costs, its ongoing liability in respect of the costs and expenses of the receivers appointed over the Promissory Note and its contingent liability in respect of the reconstitution of Camilla's Trust, should Camilla's appeal to be Privy Council succeed. We will refer to it as "the contribution claim".

3 In its substantive judgment *Crociani v Crociani* [2017] JRC 146, the Court found and declared that the appointment of Appleby Mauritius as trustee of the Grand Trust on 10 th February, 2012, was void and of no legal effect. Accordingly, Appleby Mauritius was held to be a mere trustee *de son tort* in relation to the trust property under its control, namely the Promissory Note. The Court found that Appleby Mauritius was liable for the following breaches of trust, as summarised at paragraph 6 of the representation:-

We will refer to the final four breaches identified above as "the 2016 breaches".

> ***"6.1 not collecting the accrued and accruing interest on the Promissory Note within a reasonable time of its appointment;***
>
> ***6.2 agreeing to the amendments to the Promissory Note;***
>
> ***6.3 assigning the Promissory Note to the Eighth Defendant ("GFin")***
>
> ***6.4 the 2016 Appointment and Retirement; and***
>
> ***6.5 amending the provisions of the Grand Trust, thus giving GFin a platform to commence rival proceedings in Mauritius."***

4 The representation recites that the Court made the following findings, amongst others, about the role of Camilla in the 2016 breaches, which occurred in January 2016:-

> ***"In our judgment, the whole of this correspondence [relating to the amendment to the terms of the Promissory Note] was manufactured under the auspices of Mr Noel, and its purpose was to avoid the maturity date of 10th December, 2017, on a debt owed by a company now owned by Camilla.*** It was not a genuine negotiation."[582]
>
> ***"We conclude that the agreement to amend the Promissory Note was not made bona fide in the interests of the beneficiaries of the Grand Trust as a***

whole and constitutes a breach of trust."[586]

"Whilst the agreement purported to extend the maturity date of the Promissory Note, it would not have prevented the holder from calling in all of the accrued interest, a very substantial sum, and a failure to pay that interest within 30 days would constitute an event of default, entitling the holder to call in the entirety of the debt. It was important, therefore, from Madame Crociani and Camilla's point of view, to have the Promissory Note in friendly hands, which explains what then happened three days later."[587]

"…We can only conclude from this that Appleby Mauritius did not give any or any proper consideration of its own to the powers it was purporting to exercise, acting on the prompting and direction of Mr Noel. Allowing itself to be used in this way has had serious consequences for which it has to be responsible:-

> ***(i) It purported to place the trusteeship of the Grand Trust with an entity that was not a party to the proceedings and not within the jurisdiction of this Court;***
>
> ***(ii) it placed the only asset of the Grand Trust, the Promissory Note, beyond the reach of this Court; and***
>
> ***(iii) it has given GFin the platform to launch rival proceedings in Mauritius, with the burden of further costs that imposes upon the plaintiffs and the other parties."***[606]

"These are consequences from which only Madame Crociani and Camilla could benefit, and it is significant that Madame Crociani's counsel, Mr Benoit, played a central role. Mr Lee agreed in evidence that the appointment of GFin as trustee should never have happened and we regard it as nothing ***less than a direct interference with the administration of justice in this jurisdiction."*** [607]

"We do not accept that Mr Noel or Mr Benoit took these steps on their own initiative. Lawyers act on instructions. They were not instructed to do so by Appleby Mauritius, and certainly not by Cristiana. They could only, therefore, have acted on the instructions of Madame Crociani and/or Camilla, being the parties who benefited."[611]

"We conclude that the amendment to the Promissory Note, the appointment of GFin, the assignment to it of the Promissory Note, and the purported amendment to the Grand Trust deed all formed part of a concerted plan by Madame Crociani and/or Camilla, executed through Appleby Mauritius misusing its purported powers as trustee, to place further impediments in the way of the plaintiffs' claims in these proceedings …"[612]

"We have found that the amendment to the Promissory Note and its

assignment to GFin was undertaken at the instigation of Madame Crociani and Camilla, and from it we deduce that their intention is to delay, if not avoid altogether, Croci BV's liability under the Promissory Note, and that GFin by its conduct, has shown that it is likely to work to their agenda." [711]

"Having lost the forum challenge, Madame Crociani and Camilla were then instrumental in procuring, through Mr Noel and Appleby Mauritius, the amendment of the Promissory Note postponing the repayment date, the appointment of GFin as trustee and the assignment of the Promissory Note to it, away from the jurisdiction of this Court, and the amendment of the Grand Trust deed giving GFin a platform to issue rival proceedings in Mauritius which are still on foot." [853]

5 Camilla brought an appeal against certain orders of the Court, but did not appeal any findings of fact made by the Court, including those referred to above. The representation goes on to set out certain extracts from the decision of the Court of Appeal *BNP Paribas Ors v Crociani and Ors* [2018] JCA 136A:-

"11. 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 plaintiff's claims."

In the context of the 2010 Appointment, it held as follows:-

***"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 – 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 [sic] Camilla's actions might be characterised as knowing assistance in breach of trust [….]

49. Lord Millett's approach in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 ***at [135] 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***

...”

6 The representation states that it can be inferred that in allowing the appeal of Appleby Mauritius on this point, it was applying the same reasoning identified in paragraphs 47–49 in respect of the 2010 Appointment *a fortiori* to the 2016 breaches. In the premises, it is averred that the Court of Appeal found that Camilla dishonestly assisted in the 2016 breaches and is therefore liable jointly and severally with Appleby Mauritius for the losses flowing therefrom. The representation contends that these findings of the Royal Court and the Court of Appeal are *res judicata*.

7 The representation gives particulars of further evidence that has come to light since the main hearing, which it is averred shows that Camilla instigated and procured or in the alternative assisted with each of the 2016 breaches.

8 The world-wide freezing order is in the sum of £21 million, and Camilla was given five working days from service of the representation to disclose in writing all of her assets in the Island of Jersey or elsewhere exceeding £10,000 in value. The representation contains the usual undertakings and substantially follows the form of the freezing order contained in Practice Direction RC 15/04, amended using the template for freezing order from the English Commercial Court Guide.

9 The *ex parte* application was supported by two affidavits sworn by Ms Harriet Bovingdon, an associate and Scottish solicitor employed by Collas Crill, and a detailed skeleton argument dated 17 th January, 2019, from Advocate Williams with authorities.

10 At the outset of this discharge hearing and in the absence of the Jurats, Advocate Steenson sought leave to cross-examine Ms Bovingdon on her affidavits, covering, he said, the efforts (or lack of) made to serve the representation, the conclusions she had drawn from the evidence, the observations she had made, whether she truly believed what she said and what she had suggested to the Court should be done. He thought he would need half an hour for this purpose, but it was clear that his proposed cross-examination was intended to be wide ranging.

11 Advocate Williams resisted the application on the basis that it would turn the hearing into a mini trial. Ms Bovingdon's beliefs and conclusions were what they were, and could be dealt with in submissions. He referred me to this passage from Steven Gee QC on Commercial Injunctions 6th edition:-

> *“The application to discharge the injunction takes the form of a complete rehearing of the matter, with each party being at liberty to put in evidence.* Thus, e.g. the defendant may seek to persuade the court that on all the evidence there is insufficient risk of a judgment being unsatisfied to justify the granting of Mareva relief. The court decides the application on all the evidence before the

court. This includes evidence of matters which have occurred since the without notice application, so for example it would include evidence resulting from execution of a search order or how the defendant had acted in relation to an order for disclosure of information and the information obtained. The court has power under CPR r.32.7 to order that there be cross-examination of a person giving evidence in writing, with the possibility of excluding the evidence if the person does not attend. In practice the court is most reluctant to allow cross-examination on a discharge application because this may turn it into a lengthy, costly and unnecessary mini-trial." (our emphasis)

12 The Commissioner refused the application. The Court had one day allotted to hearing the discharge application and in the Commissioner's view there was a serious possibility that in allowing cross-examination (and it follows re-examination), the matter would go part heard. As it was, the Court struggled to complete the application on submissions alone by the end of the day. In his view the Court was perfectly capable of distinguishing what constitutes submissions or beliefs and what constitutes evidence of fact, and no particular evidential issue was identified by Advocate Steenson which the Court would require to be dealt with by way of cross-examination of Ms Bovingdon in order to dispose of the application fairly.

Grounds for setting aside world-wide freezing and disclosure orders

13 It was not in dispute that the test for the granting of world-wide freezing and disclosure orders were set out in *Crociani v Crociani* [2016](2) JLR 543 at paragraphs 28 and 29, namely:-

> ***(i) Whether Appleby Mauritius has a good arguable case in respect of the underlying cause of action, namely the contribution claim*** .
>
> ***(ii) if so, whether there is a real risk that Camilla will dissipate her assets, so as to frustrate any judgment in favour of Appleby Mauritius*** .
>
> ***(iii) Whether to grant an injunction of this kind is always a matter of discretion, having regard to the balance of convenience and the justice of the case***

14 A good arguable case is one which is more than barely capable of serious argument, but need not have a greater than 50% chance of success (*The Niedersachsen* (1983) COM OR 234 per Mustill J, confirmed on appeal (1983) 1 WLR 1412).

15 Advocate Steenson submitted on behalf of Camilla that none of these three tests was met.

Good arguable case

Prescription

16 The 2016 breaches occurred on 26 th and 29 th January, 2016, and as under Jersey law an action for dishonest assistance must be brought within three years of the material breach (see *Nolan v Minerva Trust Company Ltd* [2014] (2) JLR 117), Advocate Steenson submitted that the cause of action was now prescribed. Time had not been suspended by service of these proceedings pursuant to Rule 6/4 of the Royal Court Rules, because the proceedings had not been validly brought.

Validity of proceedings

17 In the substantive proceedings, Appleby Mauritius, Mr Foortse and the first defendant Madame Crociani had filed a joint answer, in which no contribution claim was made as between them; in particular, Appleby Mauritius had not filed a contribution claim against Camilla. When the substantive judgment was handed down on 11 th September, 2017, the Court made this order at paragraph 28:-

> ***"Contribution***
>
> ***28 Ordered that any further claims for contribution as between the first, third, fourth, fifth, sixth and eighth defendants are adjourned generally, with liberty to apply.*** For the avoidance of doubt, such contribution claims to include the order in respect of costs made hereunder or in due course."

18 The transcript of the hearing shows that the inclusion of Camilla as the fifth defendant in this order was made at the request of Advocate Moran, acting for Appleby Mauritius. When commenting on her amendment to the draft order she said this:-

> *"I would just like to leave open the possibility that there might be contribution claims against the fifth, sixth and eighth defendants, including contributions in relation to any costs that may be paid."*

Those amendments were accepted by the Court and the order made without further consideration.

19 The current proceedings were commenced by way of representation, rather than *inter partes* summons or order of justice, and the use of a representation was explained in Advocate Williams' skeleton argument of 17 th January, 2019, in this way which we set out in full:-

> *"Procedural issues*
>
> *25 Before turning to the application for a freezing order, it is important to address the Court on certain preliminary procedural issues.*

26 As mentioned above, paragraph 28 of the Act of Court of 11 September 2017 provided that all contribution claims between the Defendants, including in relation to costs, be adjourned with liberty to apply. The liberty to apply provision suggests that any claims could be brought in due course within the same proceedings. In the ordinary course, and absent any requirement for an interim freeing order, any such application would be brought by inter partes summons. While it is acknowledged that the current application has the character of a third party *claim, the liberty to apply provision has been taken to supersede the usual rules of Court pursuant to Rule 6/10 of the Royal Court Rules 2004 (as amended) (the "Royal Court Rules") in respect of third party claims for contribution or indemnity, where such claims are brought forth by means of inclusion in a defendant's answer or by amendment to such answer, subject to leave being granted to convene the third party after hearing the parties to the action*.

27 In the current case, the application of Rule 6/10 would give rise to a cumbersome and unsuitable procedure because: (i) the Representor had filed a composite Answer together with the First and Second Defendants; (ii) the matter is post-trial and post-Judgment on liability; (iii) an interim freezing order is required to be signed by a judge of the Royal Court; (iv) it would frustrate the purpose of the freezing order, which is being sought ex parte, if the Contribution Claim could only be brought after an inter partes hearing.

28 Equally, Practice Direction RC 15/04 provides a standard form of freezing order which is envisaged to be brought by Order of Justice. However, the use of an Order of Justice in this case, which would tend to imply a wholly separate action, would be inconsistent with the liberty to apply provision which envisages that contribution claims could be brought within the framework of the existing proceedings. It is submitted that it would be disproportionate if the Contribution Claim instead had to be brought as a separate, standalone action.

29 The Court's attention is drawn to Rule 3/8(1) of the Royal Court Rules, which provides as follows:

"A representation containing an interim injunction may be presented to the Bailiff in chambers, and, in respect therefore, the Bailiff shall have the same powers as the Inferior Number would have in relation to the service of the proceedings, the convening of parties and the making of the interim injunction and any order incidental thereto."

Accordingly, it is permissible to bring an ex parte Representation seeking an interim injunction as has been done in the current case. It is submitted that this is the appropriate procedure to follow in the circumstances of the case in the interests of simplicity and proportionality.

30 Two objections might be raised against the use of this procedure from Camilla's perspective: (i) the procedural safeguards in respect of service of process out of the jurisdiction, which would otherwise be required were an

Order of Justice to be used, may be thought to be bypassed, and (ii) the procedural safeguards built into Rule 6/10 of the Royal Court Rules are also apparently sidestepped. In order to mitigate the effects of the use of a Representation, the current application has been treated as if it were a new originating process where leave to serve out of the jurisdiction is required. The requirements for service out are addressed later in this Skeleton Argument and, it is submitted, are clearly satisfied in any event: as such no prejudice to Camilla arises.

31 In relation to safeguards built into Rule 6/10, and in particular Rules 6/10(8) and 6/10(2), these essentially boil down to providing an opportunity for the affected party, namely Camilla, to raise objections to being convened as a third party, and to putting the Court in control of both the granting of leave and the procedural directions that follow. The Representation specifically addresses this concern by providing Camilla with an opportunity to be heard at the inter partes hearing: see paragraph (3)(b) of the prayer for procedural relief. The same paragraph also explicitly provides that the Court grants leave to continue the Contribution Claim at the inter partes hearing stage, and at the following paragraph (3)(c) express provision is made for the Representation to be set down for a substantive hearing and for requisite procedural directions to be made. This mirrors the spirit and the effect of Rule 6/10 without slavishly adhering to its letter for the reasons set out above: accordingly, paragraph (2) provides that there is no requirement to comply with Rule 6/10(8) or Rule 6/10(2) and that the Representation shall stand as the relevant pleading."

20 Advocate Steenson argued that Appleby Mauritius had sought to adopt a novel and hybrid procedure with no basis in established rules or practice, which he said amounted to an abuse of process. It had cloaked this novelty by describing the procedural issues as set out above in a misleading or at least supine way. It is clear, he said, from the wording of paragraph 28 of the order of the 11 th September, 2017, that it could only refer to claims that had been formulated and made as at the date of that order, as the Court had no jurisdiction to adjourn claims that had not already been brought. It could not apply, therefore, to the contribution claim, since it had not been formulated and made as at the date of the order. There was nothing within paragraph 28 that allowed Appleby Mauritius to pursue its contribution claim outside the ambit of established procedure. These proceedings could not properly be construed as being third party proceedings that formed part of the main action and can only be properly construed as a new originating process. Quoting from paragraph 16 of his skeleton argument:-

"16.2 The use of the term "action" in this rule [Rule 6/2(1)] is salient. If a Plaintiff wishes to assert a cause of action against a defendant (such a claim for a contribution) that claim, it is submitted, must be brought by way of either Summons or Order of Justice (the action being directed to the defendant).

16.3 Conversely, whilst it is accepted that a Representation is a method of originating process, it should not be construed as an action but as a means of bringing to the attention of the court a situation which exists and on the basis of

which [Appleby Mauritius] seeks the court's intervention or order. That is not the case here: [Appleby Mauritius] seeks to bring a substantive action.

16.4 It follows that [Appleby Mauritius] has again failed to follow the correct procedures of this Court, by attempting to start a cause of action in a new originating process by a Representation; as opposed to by an Order of Justice."

21 The wording of paragraph 28 of the order of the 11 th September, 2017, must, he said, be interpreted in light of the presumption that the Court did not seek to ride a coach and horses through its own established rules, and would not seek to depart from established rules without compelling reasons for doing so. No good reasons had been put forward. Quoting again from paragraph 14 of his skeleton argument:-

"14.2 No good reason is given for why existing procedure should be disregarded; (fatal) inconvenience to [Appleby Mauritius] is not a good reason.

14.2.1 Rule 6/10 is stated to 'give rise to a cumbersome and unsuitable procedure'. Instead of amounting to a 'good reason' for disregarding a Rule, inconvenience and unsuitability to [Appleby Mauritius] merely reflects that Rules establish a fair balance of interests between parties, and the logical corollary to this fair balance of interests is occasional inconvenience to one party; from the perspective of any one party, the Rules will often seem 'cumbersome'.

14.2.2 It is stated that 'it would be disproportionate' for [Appleby Mauritius'] claim against [Camilla] to be brought as a separate, standalone action. This also reflects that the logical corollary to the fair balance of interests established by the Rules is additional costs; from an individual party's perspective such costs may seem frustrating or inefficient.

14.2.3 In fact, it is submitted that the real reason the established procedures were set aside was for expedience, and to facilitate the bringing of a cause of action despite it being prescribed. It is self-evident that a cause of action cannot be introduced improperly to sidestep the fact it is now prescribed. It was always open to the Representor to avail itself of the proper mechanisms for bringing third party claims (as BNP did) and [Appleby Mauritius] must face the consequences for having failed to do so."

22 Whilst accepting that Rule 10/6 of the Royal Court Rules gave the Court a general discretion as to the approach it should take to non-compliance with the Rules of Court, he submitted that the Court should be slow to grant leave to amend defects in procedure where doing so would deny Camilla a prescription defence. The Court, he said, "should be especially slow in doing so when the defects in procedure appear to be part of a cynical tactical ploy by [Appleby Mauritius] to side-step prescription". The Court, he said, should

also have regard to Appleby Mauritius' culpability in that:-

(i) It had been a substantive party to the main action since 2014.

(ii) It elected not to avail itself of its right to bring the contribution claim, notwithstanding the fact that it must have known that the third defendant, BNP Paribas Jersey Trust Corporation Limited ("BNP"), had done so.

(iii) It had provided no proper explanation as to why it declined to bring these proceedings in the proper way, either by way of third party proceedings or by way of order of justice, other than that to do so would be cumbersome and unsuitable – in other words inconvenient.

(iv) It had provided no proper explanation as to why it only thought to bring these proceedings at the eleventh hour. The use of a representation in this way was tantamount, he said, to non-disclosure.

23 We make the following points:-

(i) The use of a representation was clearly flagged by Advocate Williams in the skeleton argument of 17 th January, 2019, as set out above. Whatever the true ambit of paragraph 28 of the order of 17 th September, 2017, it did on the face of it purport to state that any " *further claims"* to contribution (i.e. claims that had not yet been made) would be dealt with as part of the main proceedings. How that would be done was not considered by the Court.

(ii) Advocate Steenson was unable to support his contention that the use of a representation was in breach of the established Royal Court Rules. Rule 6/2 makes it clear that proceedings can be instituted by way of representation:-

"6/2 Forms of proceedings

(1) Unless otherwise directed by the Court and save as provided by any enactment or by these Rules, proceedings in the Court must be instituted –

(a) (i) by an action –

(ii) by an order of justice; or

(b) by a representation."

(iii) Furthermore, Rule 3/8(1) of the Royal Court Rules (set out above) specifically provides that a representation may contain interim injunctions. Even if there was a Rule requiring this claim to be commenced by way of summons or order of justice, Rule 10/7 provides:-

"10/7 Non-compliance as to mode of beginning proceedings

> ***(1) No proceedings shall be void, or be rendered void or wholly set aside under Rule 10/6 or otherwise, by reason only of the fact that the proceedings were begun by a means other than that required in the case of the proceedings in question*** .
>
> ***(2) If proceedings are begun as mentioned in paragraph (1) then, subject to that paragraph, the Court may make any order which it has power to make under Rule 10/6, and paragraph (1) shall not be taken as prejudicing the power of the Court to make any order it thinks fit with respect to the costs of those proceedings*** .

(iv) Rule 10/6 provides as follows:-

"10/6 Non-compliance with Rules of Court or rule of practice

> ***Subject to Rule 10/7, non-compliance with Rules of Court, or with any rule of practice for the time being in force, shall not render any proceeding void unless the Court so directs, but the proceeding may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with, in such manner and on such terms as the Court thinks fit."***

Whilst we accept it can be said that ordinarily, an action or legal demand is commenced by summons or order of justice, there is nothing in the Royal Court Rules that stipulate that it cannot be commenced by way of representation. Advocate Steenson produced no authority to that effect.

(v) It would be of concern to the Court if Appleby Mauritius had brought its claim by way of representation in order to obtain some advantage over Camilla, which would not otherwise have been available to it if the proceedings had been commenced by way of summons or order of justice. In his skeleton argument of 17 th January, 2019, Advocate Williams sought to address the objections that might be raised by Camilla by the use of a representation, firstly, by treating it as an application for service out of the jurisdiction, it being open to Camilla to assert that the jurisdictional gateways set out in Rule 7 of the Service of Process (Jersey) Rules were not met, and secondly, by building in to prayer (3)(b) a requirement for Appleby Mauritius to be given leave to continue its claim, thus allowing Camilla to raise any objections that she may have been able to raise if convened under Rule 6/10 of the Royal Court Rules. The issue of the convenient forum for the hearing of the contribution claim was addressed by Ms Bovingdon in her first affidavit at paragraphs 57 and 58 and again it remains open to Camilla to challenge Jersey as the convenient forum.

(vi) As it was, we could not see that Appleby Mauritius had gained any advantage over Camilla by the use of a representation. In terms of prescription, it would have

taken Appleby Mauritius no longer to obtain and serve, by way of substituted service, an order of justice as opposed to a representation, Rule 6/4 of the Royal Court Rules providing that prescription is suspended where an order for substituted service is made.

(vii) It is the case that Appleby Mauritius has delayed bringing the contribution claim, which could have been brought during the trial or after the handing down of the substantive judgment on 11 th September, 2017. Ms Bovingdon addresses this at paragraph 49 of her first affidavit and in summary:-

> (a) The extent of the losses for which Appleby Mauritius was liable as a result of the 2016 breaches has only become apparent and/or crystallised recently. It had appealed the extent of its equitable compensation, and aspects of its liability, with judgment only being handed down by the Court of Appeal on 25 th July, 2018. The inquiry into the Appleby losses ordered by the Court had been protracted, due to the complexities of valuing the Promissory Note, and the quantum of compensation payable to Cristiana's fund only crystallised with the settlement in November 2018.
>
> (b) In relation to the receivership, it was unclear as to when the challenge to the jurisdiction of the District Court of Amsterdam brought by the Croci entities might be determined.
>
> (c) A key number of documents had only come to light in mid 2018, when they were made available by the law firm of Appleby.
>
> (d) In all, it was reasonable, she said, for Appleby Mauritius to await the resolution of these matters, in order to understand the extent of its liabilities before seeking a contribution from Camilla and causing costs to be incurred.

(viii) In terms of prescription, the claim that the contribution claim would become prescribed by 26 th and 29 th January, 2019 was again addressed by Advocate Williams in his skeleton argument of 17 th January, 2019. Whilst he contended that the prescription period was ten years, as opposed to three years, and would begin to run from the date of payment by Appleby Mauritius, there was an understandable concern to serve the proceedings before 26 th January 2019 in order to stop time running and to prevent a prescription argument being raised. As Ms Bovingdon said in paragraph 61 of her affidavit of 17 th January, 2019, in the context of substituted service, “It is possible to argue that the claim will prescribe in the next few weeks, meaning that time is of the essence, and the precise whereabouts of Camilla are unknown.” The order for substituted service was made on 18 th January, 2019, and accordingly, pursuant to Rule 6/4 of the Royal Court Rules, prescription was suspended at that date. It would only be if the representation was struck out in its entirety, and Appleby Mauritius required to bring entirely new proceedings, that the three year prescription defence would become available. There is no application before us for the representation to be struck out.

24 For all these reasons we do not accept that the contribution claim was prescribed because it had not been validly brought.

Dishonest assistance

25 It is not in dispute that the test for dishonest assistance in the case of a trust is that (i) a trustee acts in breach of trust, (ii) the defendant induces or assists in that breach of trust and (iii) the defendant does so dishonestly (see *Aerostar Maintenance International Limited v Wilson* [2010] EWHC 2032 at paragraph 178). Advocate Steenson accepted the first limb of the test, in that Appleby Mauritius had acted in breach of trust, but denied the second and third limbs, namely that Camilla had induced or assisted in that breach of trust dishonestly.

26 Advocate Steenson submitted that the findings made by both the Royal Court and the Court of Appeal did not "inexorably point to, at the very least, a good arguable case that Camilla induced and assisted in the 2016 breaches." The finding of the Royal Court that the 2016 breaches occurred out of instructions ***"of Madame Crociani and/or Camilla" and as*** "part of a concerted plan by Madame Crociani and/or Camilla." ***"And/or"*** findings are, he said, purposely uncertain, and it would be mistaken to attribute inducement/assistance on the basis of these. The fact that Camilla could eventually benefit from these steps does not necessarily show assistance or inducement on her part.

27 An analysis of the subsequent documentation produced by the Appleby law firm did not, in his view, in fact corroborate assistance/inducement to breach of trust. Furthermore, Camilla was involved through lawyers throughout the run up to and in the course of the 2016 breaches, which would indicate to the ordinary reasonable person that the 2016 breaches were lawful. Consequently, there was no objective dishonesty on Camilla's part and this element of dishonest assistance was not made out.

28 We agree with Advocate Williams that there is, at the very least, a good arguable case that at equity, a trustee may seek contribution from a dishonest assister (see *CMC Holdings Limited v Foster* [2017] JRC 190, Lewin on Trusts at paragraph 39–090 and Charles Mitchell in The Law of Contribution and Reimbursement (2003) at paragraph 8.23) and, in our view, it cannot seriously be contended that Appleby Mauritius does not have a good arguable claim for contribution against Camilla on the basis of dishonest assistance, in the light of the findings of the Royal Court and the Court of Appeal, as set out above. In addition the further evidence provided did seem to us, on the face of it, to implicate Camilla as the person who was instructing the lawyers who carried out the 2016 breaches.

29 That is not to say that there are no arguments which Camilla can deploy in defence of the contribution claim, for example:-

(i) Arguments which may arise from any evidence she may give as to her involvement.

(ii) Her use of lawyers, which, it might be argued, would indicate to the ordinary person that the 2016 breaches were lawful and that consequently, there was no objective dishonesty on her part.

(iii) The application of the maxims that ***"Those who claim equity must come with clean hands" and "those who seek equity must do equity"***. We need to address the former maxim as Advocate Steenson submitted that it barred the contribution claim completely. That is not supported by the authorities cited to us. The common law illegality defence was recently considered by the Supreme Court in *Patel v Mirza* [2017] AC 467 which held that in deciding whether illegality bars a claim, a Court must consider:-

> (a) the effect that barring the claim would have on the policies behind the defence (including preventing claimants from profiting from their own wrongs, and deterring illegal conduct), and
>
> (b) whether barring the claim would be a proportionate response to the illegality. Relevant factors include the seriousness of the conduct, its centrality to the claim, whether it was intentional, and whether there was a marked disparity in the parties' respective culpability.

The Royal Court applied a similar clean hands test in *Maçon v Quérée* [2001] JLR 106 at paragraph 65:-

> ***"It becomes a question of degree whether the misconduct is sufficiently serious to preclude the plaintiff from invoking the Court's equitable jurisdiction."***

Advocate Williams also referred us to the case of *Kazakhstan Kagazy plc and others v Zhunus and others* [2017] 1 WLR 1360, where it was held by the English Court of Appeal that the "clean hands" principle in equity did not prevent the grant of an injunction as there could be orders for equitable contribution between fraudsters, especially if one of them had benefited more than the other, and there could be no blanket denial of any recovery.

(iv) That it is not just and equitable for Camilla to make a contribution in respect of the loss incurred by Appleby Mauritius.

> It is for the trial court to evaluate the evidence and to decide how to exercise its discretion and not for this Court to pre-judge the outcome. What this Court can and does say is that Appleby Mauritius has a good arguable case to go before the trial Court.

Risk of dissipation

30 It is a requirement for the grant ex parte of a freezing order that the applicant show evidence of a real risk that assets will be dissipated so as to frustrate any judgment in

favour of the applicant: see, for example, *Numbers 12 and 13 Britannia Place Limited v J and G (Property) Limited & Ors* [1989] JLR 34 and (*Crociani v BNP Paribas Jersey Trust Corporation Limited* [2016] (2) JLR 543. The applicant must adduce ***"solid evidence"*** to support the assertion that there is a real risk that the judgment will go unsatisfied, which risk is judged objectively: *Holyoake v Candy* [2018] Ch. 297 per Gloster LJ at paragraph 34.

31 Advocate Williams summarised the risk factors as follows:-

> *"75.1 The findings of dishonesty on the part of the Court of Appeal and the nature of the scheme in which she is alleged to have participated, namely to put assets out of the reach of the Jersey courts in order to frustrate a judgment.* In this case, the dishonesty alleged is **"at the heart of the claim"** against Camilla and it is submitted, justifies the inference of a real risk of dissipation;
>
> *75.2 The suggestion on the part of BNP that Camilla assisted in the transfer of artworks from Singapore to Zurich in breach of the freezing orders against her mother in November 2016*.
>
> *75.3 Failure to meet the interim costs orders in favour of Appleby Mauritius*.
>
> *75.4 Her attempt to influence a judge of the Court of Appeal*.
>
> *75.5 Her fee dispute with Voisin Law*.
>
> *75.6 Inadequate disclosure pursuant to court orders in the context of the ancillary disclosure order in favour of BNP and the disclosure order in the context of the Appleby Inquiry."*

32 Advocate Steenson argued that the Court could be satisfied from the case history that Camilla neither could nor would dissipate her assets. The world-wide freezing order overlaps with pre-judgment attachments and pre-judgment seizure orders that already exist in favour of Appleby Mauritius and the receivers in relation to the Croci entities, and is therefore oppressive and so unnecessary that it ought to be discharged. Alternatively, it was excessive, in that the value of the assets frozen does not take into account the assets already incapable of dissipation and the freezing order should therefore be varied.

33 Advocate Williams addressed these arguments in his skeleton argument of the 17 th January, 2019, in that he acknowledged that some of the companies within the Croci group structure named as assets of Camilla in the freezing order were already subject to the pre-judgment attachments and seizure orders in favour of Appleby Mauritius and the receivers. He conceded that *prima facie* it would therefore seem unlikely that those shares could be disposed of lawfully, and it could be argued that there is an overlap with the world-wide freezing order in this regard, such as that it is unnecessary. Furthermore, although this is not the case, he said it might be argued that the request for a freezing order was not made in good faith in support of the contribution claimed against Camilla, but is an attempt to strengthen the position of the receivers and Appleby Mauritius in respect of the Promissory

Note litigation.

34 In response to these contentions, he submitted that there were nonetheless good reasons to name these companies as subject to the freezing orders. Quoting from in his skeleton argument of the 17 th January, 2019 -

> *"77.1 the overall asset position of Camilla is not known pending disclosure by her;*
>
> *77.2 these are assets of potentially significant value;*
>
> *77.3 there is a distinction between restraining Camilla in personam from dealing with or disposing of these assets and putting in place an in rem attachment in the local jurisdiction;*
>
> *77.4 unless she is restrained, Camilla's control of the boards and management of these entities, and of their parent entities, may mean that she could direct or procure a transfer of shares or assets contrary to the attachment orders*.
>
> *77.5 as part of the Dutch jurisdiction motion brought by Croci, it has requested that the existing attachments be lifted if the Dutch court declines jurisdiction.* Equally, even if the Dutch court accepts jurisdiction, there may then be an opportunity for the Croci companies to challenge the pre-judgment attachments on the merits;
>
> *77.6 finally, there are likely to be intercompany loans and receivables as between companies in the group, and there is a risk of leakage of value, particularly in respect of the sale proceeds in respect of Vitrociset, which is not the subject of an attachment in Italy because it is not directly owned by the Dutch Croci companies"*.

35 Advocate Steenson agreed that the assets subject to the prejudgment attachments and seizure orders were of significant value, hence, he said, the oppressiveness of the world-wide freezing order. Camilla would not use her control of the boards and management of these entities to transfer assets contrary to the attachment orders or the world-wide freezing orders. To do so would put her in contempt of court. In his submissions, the world-wide freezing order had no additional effect beyond the attachment and seizure orders. If the existing attachments and seizures orders are lifted, it would then be open to Appleby Mauritius to approach the Court to seek an extension of the world-wide freezing order, but to effectively freeze assets beyond the value of the world-wide freezing order by not taking into account assets already incapable of dissipation, on the contingent basis that those assets incapable of dissipation may become so capable, is mistaken. It is trite law, he said, that freezing orders are oppressive in any event, and this presumption against Camilla was additionally oppressive.

36 He went on to say that Camilla had had ample opportunity to dissipate her assets from at

least 11 th September, 2017, when she was put on notice that Appleby Mauritius may seek to bring a contribution claim against her. There was no evidence that she had actually taken any steps to put her personal assets beyond the reach of her potential creditors. The fact that she would have had ample opportunity to do so and had not done so and had expressed no intention of doing so, is a material consideration that Appleby Mauritius should have brought to the attention of the Court, and failed to. He submitted that the world-wide freezing orders had been sought:-

The oppressiveness and excessiveness of the world-wide freezing orders are, he said, grounds to discharge them completely, or alternatively, to vary the orders.

(i) cynically, as an attempt to strengthen Appleby Mauritius' position against Camilla in respect of the Promissory Note litigation, and

(ii) most crucially, as a means to strengthen Appleby Mauritius' position in respect of ongoing settlement negotiations corollary to this litigation.

37 Since the imposition of the world-wide freezing and disclosure orders, there have been two recent developments in relation to the Croci entities disclosed to us by Ms Bovingdon in her fifth affidavit of the 6 th February, 2019:-

(i) On 31 st January, 2019, the District Court of Amsterdam dismissed the jurisdiction and challenges brought by Croci and GFin.

(ii) A decision of the Court of Rome on whether to make protective orders in favour of the receivers and Appleby Mauritius, including the appointment of a custodian in the context of the sale of Vitrociset SpA and associated Italian registered assets, was adjourned by consent for a period of 45 days, with certain undertakings given by Ciset SRL and the real estate companies as to the preservation of the sale proceeds during that period, which has enabled the sale to proceed, so far as the receivers and Appleby Mauritius are aware. The net Vitrociset sale proceeds of €10.7 million are to be paid into an escrow account for the duration of the seizure order, which remains in effect, and the real estate sale proceeds in the amount of €16.2 million will be placed in an account with Intesa Sanpaolo Bank and will not be disposed of for a period of 45 days.

38 Having taken this into account, we accept the risk factors put forward by Advocate Williams and his arguments for justifying the imposition of the world-wide freezing order over shares in the Croci entities thought to be owned by Camilla, in addition to the attachment and seizure orders obtained by receivers and Appleby Mauritius over the assets of those companies. Insufficient is known about Camilla's assets and the working of the Croci group of companies to ground a contention that the orders are oppressive and excessive and we can see no justification for the assertion that these orders were obtained as part of a cynical plot to strengthen the hand of Appleby Mauritius.

39 We acknowledge that there was no evidence that Camilla has already dissipated her assets, a somewhat unattractive proposition, as Longmore LJ said in *Ras al Khaimah Investment Authority and others v Bestfort Development Lip and others* [2017] EWCA Civ 1014 at paragraph 55:-

> ***"55 Delay on the part of a party applying for a freezing injunction gives rise to rather more elusive considerations.*** It can be said that any serious delay means that an applicant does not genuinely believe there is any risk of dissipation or conversely (and more cynically) that, if a defendant is prone to dissipate his assets, such dissipation will have already occurred by the time a court is asked to intervene. This latter argument assumes that a defendant is already of dubious probity and it is a curious principle that would allow such a defendant to rely on his own dubious probity to avoid an order being made against him. The former argument is also open to the objection that it is the fact of the risk rather than a claimant's apprehension of it that should govern the court's decision."

40 The issue is not whether Camilla has, in the past, dissipated her assets in order to frustrate a possible claim for contribution by Appleby Mauritius, but whether there was a real risk that she would do so, if given prior notice of this substantial claim.

41 The key to this is our finding that there is a good arguable case that Camilla dishonestly assisted in the 2016 breaches, which involved the assignment of the Promissory Note away from the jurisdiction of the Court. Quoting again from paragraph 612 of the substantive judgment:-

> ***"We conclude that the amendment to the Promissory Note, the appointment of GFin, the assignment to it of the Promissory Note and the purported amendment to the Grand Trust deed all formed part of a concerted plan by Madame Crociani and/or Camilla, executed through Appleby Mauritius misusing its purported powers as trustee, to place further impediments in the way of the plaintiffs' claims in these proceedings.*** These steps were undertaken secretly when Appleby Mauritius knew the validity of its appointment as trustee was being challenged and that it might not therefore have the ability to exercise any of the powers given to the trustees of the Grand Trust."

42 The Promissory Note was secretly removed from the jurisdiction of the Court, something that the Court regarded as an interference in the administration of justice in the Island (paragraph 808(vii)(2) of the substantive judgment). The final judgment of the Court in favour of the plaintiffs was indeed frustrated, in that the Court was unable to procure the assignment of the Promissory Note to Ocorian, with all the consequences that have flowed from that. This is solid evidence of a real risk that any judgement that Appleby Mauritius may obtain against Camilla in respect of its contribution claim will also be frustrated.

43 Advocate Williams' skeleton argument, at paragraph 75.2 states that there was a *"suggestion"* on the part of BNP that Camilla assisted in the transfer of artworks from Singapore to Zurich, in breach of the freezing orders against Madame Crociani in November 2016. In our view, this understates the position, in that, in its judgment of 14 th December, 2018 *Crociani v Crociani* [2018] JRC 230C, the Court referred at paragraph 4 to ***"prima facie evidence that [Camilla] was actively involved in their movement and possible part ownership since October, 2015."***

44 In all, we are satisfied that there was a real risk that if Camilla was given prior notice of this substantial claim for contribution, her assets would be dissipated so as to frustrate any judgment in favour of Appleby Mauritius.

Overstatement of losses

45 In his skeleton argument, Advocate Steenson submitted that Appleby Mauritius had overstated the losses for which it is liable, namely the receivership costs up until end of December 2018, which was beyond the date of the settlement in November 2018, a figure we understand of some £50,000 out of receivership costs of some £1.2 million. Bearing in mind this, and the £19.4 million paid to Ocorian, the overstatement, if there is one, is not material, and the issue was not pressed by Advocate Steenson.

Balance of convenience

46 We accept Advocate Williams' submission that the balance of convenience favours the granting of world-wide freezing orders, because there is a real risk that a judgment in favour of Appleby Mauritius will go unsatisfied if they are not granted. Consideration had been given by Advocate Williams to whether a notification injunction would instead be sufficient. A notification injunction was described in *Hollyoake v Candy* as an order requiring the respondents to give advance written notice to the claimants of dealings with their assets. Such an injunction was not considered sufficient by Appleby Mauritius, because, it was said, Camilla had shown herself to be perfectly willing to flout orders of the Jersey courts, and had shown herself willing to employ court proceedings for tactical advantage, reasons which Advocate Steenson argued were bad in law.

47 In our view, having been satisfied that there was a real risk of dissipation, a world-wide freezing order was justified, and it was not possible to give consideration to any kind of less stringent order without first having full disclosure of Camilla's assets.

Conclusion

48 In his oral submissions, Advocate Steenson concentrated on the issues of prescription, procedure and risk of dissipation. In his view, the use by Appleby Mauritius of a

representation was fatal to its case, as was the lack of any risk of dissipation. The claim, he said, should have been made in September 2017 and it was now too late.

49 Whilst criticisms can be made of paragraph 28 of the order of the Court of 17 th September 2017, and the use of a representation as opposed to an order of justice:-

(i) Appleby Mauritius has a good arguable case for a contribution and the sums involved are very substantial.

(ii) We accept the explanations given for the delay in bringing the contribution claim, and the need for proceedings to be issued before 26 th January, 2019, to avoid the claim arguably becoming prescribed.

(iii) The Royal Court Rules do not prohibit the use of a representation; on the contrary, they expressly permit it. Proper safeguards have been built into the process, to ensure that Camilla was not prejudiced by the use of a representation and we can see no advantage to Appleby Mauritius by the use of a representation.

(iv) We agree that if Camilla were to be given prior notice of the contribution claim, there was a real risk of the dissipation of her assets, and the balance of convenience and justice of the case militated in favour of world-wide freezing and disclosure orders being made *ex parte*.

(v) All of the objections raised by Advocate Steenson in the discharge application were drawn to the attention of the Court by Advocate Williams in his skeleton argument of 17 th January, 2019, in a manner that in our view was both adequate and fair. Appleby Mauritius has therefore discharged its obligation of full and frank disclosure.

50 We decline, therefore, to discharge the world-wide freezing and disclosure orders. Advocate Steenson did not pursue the alternative relief sought of an extension of time for compliance by Camilla of the disclosure orders. It has already been extended once, and no evidence has been filed by Camilla explaining why a further extension is required. Because it was not addressed however, we will stand that part of the summons over.

51 Finally, we delegate the ongoing case management of these proceedings to the Master.