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UPDATE

Crociani and others v Crociani and others

Update prepared by Ben Thorp (Associate, Jersey)

The recently-published judgment in *Crociani and others v Crociani and others* [2017] JRC 146 marks the end (subject to appeal) of the beneficiary plaintiffs' long-running claim against the trustee defendants. The claim, first issued in 2012, endured bitter interlocutory skirmishes (the judgments in relation to many of which have periodically been published during the course of the last five years) and an appearance before the Privy Council, but has now been resolved categorically in favour of the plaintiffs.

Introduction

The case is, at its heart, a breach of trust claim (or rather, a series of breach of trust claims) brought by Cristiana Crociani (Cristiana) and her minor daughters against the trustees and former trustees of two related structures; the Grand Trust and the Fortunate Trust.

The law applied by the court in deciding the claim does not break new ground or traverse issues that are particularly novel or unusual in the context of offshore trust disputes. Ultimately, the court decided that the breaches claimed by Cristiana were clear, and Commissioner Clyde-Smith, who presided over the 12-week trial, was critical of some of the conduct of the trustees of the Grand Trust, particularly its more recent Mauritian trustees, in finding for the plaintiffs.

The facts of the case and the characters involved make the case an interesting read, and the judgment provides useful illustration of how the court might approach remedying breaches of trust by trustees.

The case

The case arises out of a bitter family dispute principally between a plaintiff beneficiary daughter (Cristiana) and her defendant trustee mother (Edoarda Crociani (Edoarda)) in relation to family wealth emanating from Cristiana's father and Edoarda's husband, Camillo Crociani (Camillo). Camillo was a wealthy and prominent Italian industrialist who died in Mexico in 1980 after fleeing his native Italy in order to avoid imprisonment for his role in the Lockheed scandal. Camillo's considerable interest in a successful and prosperous Italian engineering company allowed the family to enjoy a lavish and privileged lifestyle.

Ownership and control of the Italian engineering company was ultimately acquired by Edoarda after Camillo's passing (following deals done by Edoarda with Camillo's children from a previous marriage). That interest has generated very significant wealth for the family. In 1987, by which time she and her two daughters were living in New York, Edoarda settled the Grand Trust, principally from the wealth she had inherited from Camillo. The Grand Trust lies at the heart of the recently-concluded Jersey proceedings.

The Grand Trust was settled as a Bahamian law trust and further to advice from Edoarda's US advisors, Finley, Kumble, Wagner, Underberg, Manley, Myerson & Casey (which famously (and coincidentally) suffered a precipitous decline and ultimately liquidation shortly after its involvement with the Grand Trust). On its face, the Grand Trust records Edoarda's intention to devolve some of the family's wealth by creating separate funds for each of her daughters, Cristiana and Camilla (who were both minors at the time). Together with Edoarda's daughters, Camillo Crociani Foundation Limited (the Foundation) was also named as a beneficiary of the Grand Trust.

The Grand Trust initially comprised the benefit of a promissory note issued by a Dutch holding company, Croci International BV, to Edoarda, and assigned by Edoarda to the Grand Trust. The promissory note was issued in the sum of ITL75billion, bearing interest at eight per cent per annum, and was payable in December 2017.

In the years following its establishment, further assets were settled on the Grand Trust (notably including a very valuable collection of artwork), and a substantial portfolio of cash and investments was accumulated from payments of interest made by Croci International BV under the promissory note. The trustees of the trust also changed a number of times. By 2009, Edoarda, Paul Foortse (Mr Foortse, one of Edoarda's close advisors) and BNP Paribas Jersey Trust Corporation Limited (BNP) held office as trustees of the Grand Trust.

Separate to the Grand Trust, Edoarda also settled a further trust called the Fortunate Trust in the late 1980s, which was initially established to hold a valuable collection of art (separate from the artwork subsequently settled on the Grand Trust). Edoarda retained close control over the Fortunate Trust via, amongst other things, direction over its management and investment, powers to direct distributions of income to herself, and powers of revocation and amendment. The terms of the Fortunate Trust were amended in December 2009 with the effect that Edoarda tightened her control of the direction of the trust, became the sole discretionary beneficiary of income, and retained the right to withdraw any or all of the property from the trust fund and to revoke or amend the trust deed.

At the centre of the Jersey proceedings is the decision taken in 2010 by the then trustees of the Grand Trust to appoint out all of the assets of the Grand Trust, except the promissory note, to the (by then amended) Fortunate Trust (referred to in the judgment as the '2010 appointment'). That appointment was made under clause Eleventh of the Grand Trust deed, which gave the trustees an overriding power to appoint the trust fund to other trusts 'in favour or for the benefit of all or any one or more exclusively of the others or other of the beneficiaries (other than the Settlor)'.

The validity of the 2010 appointment was a central issue for the Jersey court in considering the case. The plaintiffs claimed that the appointment removed assets from the Grand Trust (from which, they claimed, Edoarda was not able to benefit) to the Fortunate Trust (of which Edoarda was a direct beneficiary and over which she exercised significant control) contrary to the terms of the Grand Trust, and therefore in breach of that trust.

The defendants maintained that Edoarda always intended, and was always intended, to be able to benefit from the Grand Trust. They argued that the vehicle for her benefit was the Foundation, her indirect interest in which allowed her to benefit from the Grand Trust. The Foundation had, however, been set up before the Grand Trust was settled as a not-for-profit company with charitable purposes (namely, to receive distributions from trusts and to donate those distributions to charities in the Bahamas and, later, anywhere in the world). Tellingly, the Foundation never received any such distributions, either for the benefit of charity, Edoarda or anyone else.

While the court conceded that it was technically possible for Edoarda to receive benefit from the Grand Trust via the Foundation, ultimately it found that the Grand Trust was not created with the purpose or intention of providing any benefit, directly or indirectly, to Edoarda (other than as a default beneficiary), and that the Foundation was not included as a beneficiary of the Grand Trust for the purposes of allowing Edoarda to benefit (but rather as the make-weight in an arrangement designed for US tax efficiency).

In the course of defending her daughter's claim, Edoarda had, in anticipation of the difficulties posed by arguing that the Foundation was intended to be a vehicle for her benefit, amended her case to argue in the alternative that if the court found, as it ultimately did, that she was not able to benefit from the Grand Trust, then the settlement of the trust was based on a mistake (since she had always intended to have been able to benefit) and should be set aside.

This was a notable amendment to Edoarda's case. The first two years of the proceedings had essentially been taken up by a forum challenge led by Edoarda, which she had pursued all the way to the Privy Council. That challenge relied on the terms of the Grand Trust being valid, so her subsequent amendment (made only once that forum challenge had been exhausted) was seemingly contradictory.

In an extraordinary turn of events, however, on the eve of trial Edoarda wrote to the court to indicate that due to poor health she would not be attending and would not be legally represented. Edoarda's explanation for this eleventh-hour withdrawal was dismissed by the court, which concluded that she

(and Camilla, a defendant in her own right, who had written in similar terms and whose position had been aligned with her mother's throughout the proceedings) had deliberately stayed away. As a consequence, Edoarda's mistake claim was not prosecuted and was accordingly discounted by the court.

Having concluded that the Grand Trust was not created with the intention to provide benefit to Edoarda, the court went on to consider the construction of the power used by the trustees of the Grand Trust to make the 2010 appointment. Accepting expert evidence on the negative US tax implications for Edoarda (and the Grand Trust's status as a non-grantor trust) of allowing any distribution from the Grand Trust to a trust in favour or for the benefit of Edoarda, the court concluded that clause Eleventh of the Grand Trust prohibited any transfer to a trust of which Edoarda was a beneficiary.

The court having reached the decision it did in relation to both the intentions behind the Grand Trust and the effect of clause Eleventh, it is unsurprising that the court went on to also conclude that the 2010 appointment was void and of no legal effect. In reaching this conclusion, the court found for the plaintiffs on all three of the grounds by which they had sought to impugn the 2010 appointment; namely that it was (1) an excessive execution and outside the scope of the trustees' powers; (2) a fraud on the power; and (3) a mistake under Article 47(H) of the Trusts (Jersey) Law 1984.

The ultimately void 2010 appointment was a long time in the making. As early as 2001, discussions had been held as to how the Grand Trust might be restructured to better reflect how Edoarda had intended the trust to operate. At that time, BNP sought advice from Mourant du Feu & Jeune (a predecessor firm of Mourant Ozannes) as to the possibility of re-settling both the Grand Trust and the Fortunate Trust into two new trusts. Mourant du Feu & Jeune's advice pointed out the difficulties posed by the distribution restrictions imposed by clause Eleventh of the Grand Trust, however, and queried how the proposed re-settlement of the Grand Trust could be construed as being in the interests of its beneficiaries. The court noted that had that advice been followed, the later litigation would not have taken place.

Ultimately, however, the 2010 appointment did take place, and substantial assets of the Grand Trust were transferred to the Fortunate Trust. The appointment documentation was prepared by Ogier for the Grand Trust trustees, though the court concluded that their instructions excluded enquiry as to the efficacy of clause Eleventh to accommodate the transfer (on which basis the court also subsequently refused to exonerate BNP for reason of having sought legal advice).

The 2010 appointment marked the start of the precipitous breakdown in the relationship between Cristiana and Edoarda, which ultimately culminated in the issue of the Jersey proceedings. The court's judgment provides some interesting commentary on the dynamic of a mother-daughter relationship that the court clearly felt was dominated and controlled by Edoarda. The 2010 appointment itself and the various steps taken by or on behalf of Edoarda seem indicative of her desire to control both the family's assets and her daughters. Indeed, the court considered Cristiana to be a 'woman of some considerable courage' in pursuing her (and her daughters') interests in the family wealth, despite the obstructions put in her way at every opportunity by her mother.

Some of those obstructions, which formed part of the plaintiffs' claim and were therefore ruled on by the court, included the following:-

The revocation in 2011 by Edoarda of the Fortunate Trust, which resulted in those assets transferred out of the Grand Trust by the 2010 appointment falling directly and solely into the hands of Edoarda.

The decision in 2012 to appoint Appleby Trust (Mauritius) Limited (Appleby Mauritius) as sole trustee of the Grand Trust and to change the proper law of the trust to Mauritian law. The court found that that move was tactical on Edoarda's part, designed to place impediments in Cristiana's way in respect of her by then articulated claims in relation to the Grand Trust. The court concluded that in making the appointment and changing the proper law, Edoarda had been acting for an ulterior purpose, and all three of the appointing trustees were not acting in the interests of the beneficiaries as a whole. The 2012 appointment was therefore set aside by the court as being void and of no effect.

Further to receipt of Cristiana's letter before action in the Jersey proceedings, the steps taken in relation to the so-called 'Agate appointment', by which Appleby Mauritius and the former trustees sought to insulate the 2010 appointment from challenge by Cristiana by appointing, as an asset in itself, the right of the Grand Trust to recover the assets transferred by the 2010 appointment. The Agate appointment appointed those rights first to the Agate Trust (of which Camilla and the Foundation were beneficiaries), but, when the

Agate Trust lapsed 7 days' later, ultimately to the Foundation (of which Edoarda was by then the sole beneficial owner). The court also set that appointment aside as being void and of no effect.

The decision in 2016 by Appleby Mauritius to appoint GFin Corporate Services Limited (GFin) as sole trustee of the Grand Trust. The court reserved particular criticism for Appleby Mauritius in its handling of the 2016 appointment of GFin (another Mauritian corporate trustee), and the events leading up to it. The appointment followed quickly on the heels of Appleby Mauritius' decision to agree to an extension of the promissory note from December 2017 to 2022 (which the court found was itself a breach of trust). Once that extension had been agreed (and the court found that 'agreement' to have been manufactured), GFin was immediately appointed (over the course, it seems, of just a few days). GFin misguidedly then opened again the issue of forum and issued proceedings in Mauritius seeking to restrain the Jersey proceedings (which by then had been on foot for four years). Since its appointment in 2012 had been invalid, Appleby Mauritius was a trustee *de son tort* of the Grand Trust and the court found that it had acted in breach of trust in (1) agreeing to the amendment of the promissory note; (2) appointing GFin as trustee; (3) assigning the promissory note to GFin; and (4) purporting to amend the provisions of the Grand Trust so as to give GFin a platform to commence rival proceedings in Mauritius.

Orders

All the participating defendants (BNP, Mr Foortse and Appleby Mauritius) sought exoneration from liability in the event that breaches of trust were found. In the event, the court agreed to exonerate only Mr Foortse, who it found had effectively served as a lay trustee for no reward.

Having found against and refused to exonerate most of the defendants, the court made orders including the following:-

The 2010 appointment, the 2012 appointment of Appleby Mauritius, the Agate appointment and the 2016 appointment of GFin would be set aside as void and of no legal effect.

Edoarda, BNP and Mr Foortse would be removed as trustees of the Grand Trust and a new trustee appointed in their place.

Edoarda and BNP must within 28 days of appointment of the new trustee jointly and severally pay to the new trustee a sum of just over USD100m to reconstitute the Grand Trust.

BNP was to be indemnified by Edoarda pursuant to both contractual indemnities agreed between them, and the inherent jurisdiction of the court.

Appleby Mauritius was liable for the breaches of trust arising from the 2016 appointment of GFin and the transfer of the promissory note, the compensation for such breaches to be assessed.

An interesting consequence of the court's decision to order the reconstitution of the Grand Trust was the prospect that Camilla might stand to benefit from that reconstitution (as a named beneficiary of the Grand Trust) notwithstanding her acquiescence to the 2010 appointment, her complicity in much of what Edoarda did to frustrate Cristiana's claims, and the significant benefit she ultimately acquired as a direct result of the various breaches of trust.

The court acknowledged its sympathy for the defendants' submission that in view of the circumstances, Camilla's fund should simply be treated as having been distributed to Camilla, with the effect that only Cristiana's fund need be reconstituted. The court was, however, mindful of the fact that Camilla was not the only beneficiary of her fund (her daughters, and Cristiana and her daughters (as default beneficiaries) also potentially stood to benefit). Rather than deny the other beneficiaries their potential benefit in Camilla's fund, the court indicated its intention to direct that Camilla's fund also be reconstituted, but that Camilla (and possibly her daughters) be precluded from benefit until such time as Edoarda made full restitution of the assets received by her, via the revoked Fortunate Trust, from the Grand Trust.

Comment

The court's judgment and the orders that followed represent a finding overwhelmingly in the plaintiffs' favour (whose task was undoubtedly made easier by the unexpected and last minute non-appearance of the principal defendant). In several respects, this case is one of extremes; the value of the trust and the opulent lifestyle of the family concerned, the deterioration of the relationships within that family (which, at one stage, involved accusations of harassment and attempted kidnapping), the duration of the

proceedings and the hostile and attritional manner in which they were fought, the decisions taken, particularly by Edoarda and the overseas institutional trustees, are all exceptional by any normal standards.

While the law applied by the court in deciding the case broke no new ground, the case is an interesting (if lengthy) read from a human interest perspective, and serves as a useful reminder to trustees of the risks involved in losing sight of the impartiality of office, and the need to prioritise the interests of beneficiaries above almost all else. Though such principles will be well known to all trustees, the consequences for the trustees in the *Crociani* case of not following those principles should be a sobering reminder of what can go wrong.

Contacts

Bruce Lincoln
Partner, Jersey
+44 1534 676 461
bruce.lincoln@mourant.com

Ben Thorp
Associate, Jersey
+44 1534 676 096
ben.thorp@mourant.com