Trust – breach of trust and associated issues.

[2017]JRC146

ROYAL COURT
(Samedi)

11 September 2017

Before : J. A. Clyde-Smith, Esq., Commissioner, and Jurats Blampied and Ronge.

Between	**Cristiana Crociani**	**First Plaintiff**
And	**A (by her Guardian ad Litem, Nicolaas 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 Limited**	**Seventh Defendant**
And	**GFIN Corporate Services Limited**	**Eighth Defendant**

Advocate A. D. Robinson, Advocate E. B. Drummond and Advocate P. O. J. Lewis for the Plaintiffs.

The Second Defendant appeared on his own behalf.

Advocate W. A. F. Redgrave and Advocate S. M. Baker for the Third and Seventh Defendants.

Advocate E. Moran and Advocate S. Williams for the Fourth Defendant.

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JUDGMENT

THE COMMISSIONER:

1. After some four years of fiercely contested interlocutory hearings, the final hearing of this matter has taken place between 16TH January, and 3RD April, 2017, and this is the judgment of the Court.

2. At its heart lies the validity of an appointment of very substantial assets (with an estimated value of some US$132M comprising a portfolio of investments, receivables and works of art), made out of the Grand Trust on 9TH February, 2010, ("the 2010 appointment"), into a trust known as the Fortunate Trust and ultimately transferred to the settlor and one of the trustees of the Grand Trust, namely the first defendant ("Madame Crociani").

3. The first plaintiff (who we will refer to as "Cristiana" as that is how she is described in the Grand Trust) and her two children (together "the plaintiffs") seek to enforce their rights as beneficiaries of

the Grand Trust to have the trust fund reconstituted in the hands of new trustees. There are other claims to which we will come shortly.

4. We start by giving a brief overview of the formal history of the Grand Trust, the facts of which are not in contention. Underlying this litigation is the story of the breakdown of the relationship between Cristiana on the one part and her mother, Madame Crociani, and her sister, the fifth defendant (who we will refer to as "Camilla" as that is how she is described in the Grand Trust) on the other part, who in happier times were a close-knit family. The history of that breakdown will emerge in due course.

OVERVIEW OF THE HISTORY OF THE GRAND TRUST

5. The Grand Trust was settled by Madame Crociani on 24TH December, 1987. Although Italian, she was at that time residing in New York, and the trust agreement (which we will refer to as the "Grand Trust deed") was drafted by her US legal advisers. It was governed by Bahamian Law and the first trustees were herself, a Mr Girolamo Cartia and Bankamerica Trust and Banking Corporation (Bahamas) Limited, ("Bankamerica") a trust company carrying on business in the Bahamas.

6. We will consider the Grand Trust deed in detail later, but it records in clear terms on the face of the trust deed the intention of Madame Crociani to create within it separate trusts for each of her children, Camilla (then aged 16) and Cristiana (then aged 14).

7. The initial trust fund of the Grand Trust comprised the benefit of a promissory note ("the Promissory Note"), issued by Croci International BV ("Croci BV"), a company incorporated in the Netherlands, to Madame Crociani and assigned by her to the Grand Trust, in the sum of 75 billion lira, bearing interest at the rate of 8% per annum, and payable on 10TH December, 2017. Under the provisions of the Grand Trust deed, the trustees were not obliged to enforce their rights under the Promissory Note.

8. At the time of the 2010 appointment, Croci BV was owned by Croci International NV ("Croci NV"), a company incorporated in the Netherlands Antilles beneficially owned by Madame Crociani. Croci NV and Croci BV formed part of what is described as "a Dutch sandwich", the purpose of which was to reduce withholding tax on dividends paid to Croci BV by its wholly owned Italian subsidiary, Ciset SRL, ("Ciset"), which through its Italian subsidiary Vitrociset SPA ("Vitrociset") operates a successful engineering, technical and logistics services business in Italy. There are

numerous other companies within the Croci Group, holding prestigious real estate and a luxury yacht.

9. The Grand Trust acquired art work held through a company Twenty-three Investments Limited and over time built up a substantial portfolio of cash and investments from payments of interest made by Croci BV under the Promissory Note.

10. On 27TH January, 1992, Bankamerica retired as a trustee and Chase Bank & Trust Company CI Limited ("Chase Bank") was appointed as a co-trustee along with Madame Crociani and Mr Cartia. The proper law was changed from that of the Bahamas to that of Jersey.

11. On 1ST December, 1997, Mr Cartia resigned as a trustee and on 20TH March, 1998, a François Canonica and Dante Canonica, who had been nominated under clause Fourth of the Grand Trust deed to succeed him, disclaimed their rights to be appointed.

12. On 15TH May, 1998, by letter addressed to Madame Crociani, Chase Bank retired as a trustee leaving her as the sole trustee.

13. On 9TH April, 1999, the second defendant, Mr Paul Foortse, and Banque Paribas International Trustee (Guernsey) Limited ("Banque Paribas") were appointed as co-trustees along with Madame Crociani and the proper law was changed from that of Jersey to that of Guernsey.

14. On 2ND October, 2007, Banque Paribas (then known as BNP Paribas International Trustee (Guernsey) Limited – "BNP Guernsey") retired as a trustee and the third defendant, BNP Paribas Jersey Trust Corporation Limited ("BNP Jersey"), was appointed as a co-trustee along with Madame Crociani and Mr Foortse and the proper law changed back to that of Jersey.

15. In 2004 and 2008, with funds distributed to her from the Grand Trust, Cristiana purchased two apartments in Miami, held through a British Virgin Islands incorporated company known as Crica Investments Limited ("Crica"). She lived in the first apartment for three months of the year, and the second apartment was purchased as an investment. In March 2010, Cristiana transferred the shares in Crica to the Fortunate Trust. She seeks to set aside that transfer on the grounds of mistake.

16. Between 2007 and 2011, substantial distributions were made out of the Grand Trust to Camilla and Cristiana. Much of it was transferred on by them to Madame Crociani (with whom they were

living in an apartment in Monaco). It is alleged by the plaintiffs that these distributions to Cristiana (no complaint is made by Camilla), to the extent that they were transferred on by Cristiana to Madame Crociani, were a fraud on the power.

17. By the 2010 appointment, the whole of the trust fund of the Grand Trust, bar the Promissory Note, was appointed by Madame Crociani, Mr Foortse and BNP Jersey, as the trustees of the Grand Trust, to Madame Crociani and BNP Jersey as trustees of the Fortunate Trust. 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 plaintiffs challenge the 2010 appointment as being an excessive execution, a fraud on the power and a mistake.

18. The Fortunate Trust had been created by Madame Crociani on 8TH September, 1989, to hold valuable works of art acquired predominantly in the 1970s (quite separate from the art acquired by the Grand Trust). Its terms were amended so that upon the 2010 appointment, Madame Crociani was the sole beneficiary of income and capital during her lifetime, with a power to revoke the trust and withdraw all of the capital from it. Camilla and Cristiana and their respective children were reversionary discretionary beneficiaries.

19. By 25TH April, 2011, and we discuss the timing in more detail below, the relationship between Cristiana on the one hand and Madame Crociani and Camilla on the other hand had broken down and lawyers were consulted.

20. On the 30TH June, 2011, Madame Crociani revoked the Fortunate Trust and withdrew all of its assets, comprising inter alia, the assets appointed to it under the 2010 appointment. Those assets appear to have been dispersed by Madame Crociani to various parts of the world and she has refused to comply with an order of the Court made at the instance of BNP Jersey, to disclose where and how they are held.

21. On 10TH February, 2012, Madame Crociani, Mr Foortse and BNP Jersey purported to retire as trustees of the Grand Trust and to appoint the fourth defendant, Appleby Trust (Mauritius) Limited ("Appleby Mauritius"), which carries on a financial services business in Mauritius, in their place, changing the proper law to that of Mauritius and assigning the Promissory Note. The plaintiffs challenge that appointment as being a fraud on the power.

22. On 3RD July, 2012, a letter before action was sent by Bedell Cristin, acting for the plaintiffs, to Ogier, acting for BNP Jersey and to Madame Crociani, Mr Foortse and Appleby Mauritius. On 2ND August, 2012, and prior to responding substantively to that letter, Madame Crociani, Mr Foortse, BNP Jersey and Appleby Mauritius, as former and present trustees of the Grand Trust, entered into a deed of appointment known as the "Agate appointment" by which they purported to appoint to Appleby Mauritius and Mr Foortse, as trustees of the Agate Trust dated 2ND August, 2012, the right of the Grand Trust trustees to recover the assets appointed by the 2010 appointment, should that appointment be found to be invalid. Under the terms of the Agate Trust deed, the trust fund vested in the sixth defendant, Camillo Crociani Foundation IBC (Bahamas) Limited, formerly Camillo Crociani Foundation Limited ("the Foundation"), should Madame Crociani survive by seven days, which she did. The Foundation, which changed its objects in 1991, is a discretionary income beneficiary under the Grand Trust, and is beneficially owned by Madame Crociani. The plaintiffs challenge the Agate appointment as being an excessive execution and fraud on the power.

23. On 29th January, 2016, without notice to the Court or to the parties, other than Madame Crociani and potentially Camilla, Appleby Mauritius purported to resign as trustee of the Grand Trust and to appoint the eighth defendant, GFin Corporate Services Limited ("GFin"), another company carrying on a financial services business in Mauritius, in its place and assigned to it the Promissory Note. Under the terms of the instrument of retirement and appointment, Appleby Mauritius and GFin purported to amend the terms of the Grand Trust (which by its terms are unamendable) by conferring on the Mauritius courts jurisdiction over all disputes relating to the Grand Trust. The plaintiffs challenge the appointment of GFin and the amendments as being a fraud on the power.

24. A matter of days before retiring as trustee, Appleby Mauritius and Croci BV purported to amend the terms of the Promissory Note by extending the repayment date to 12th December, 2022, at an increased interest rate of 11% per annum. The plaintiffs challenge that amendment as being a breach of trust.

25. We now set out a brief summary of the procedural history in so far as it is relevant to this judgment.

Procedural history

26. The Order of Justice was issued initially against Madame Crociani, Mr Foortse, BNP Jersey and Appleby Mauritius on 18th January, 2013. Jurisdiction was accepted by these defendants, but following a change in legal representation, they then challenged Jersey as the appropriate forum,

unsuccessfully, in the Royal Court (Crociani-v-Crociani [2013] (2) JLR 369), the Court of Appeal (Crociani-v-Crociani [2014] JCA 089) and the Privy Council (Crociani-v-Crociani [2014] UKPC 40), the final judgment of the Privy Council being handed down on 26th November, 2014. These defendants were represented by the same legal firm, and their defence, including the forum challenge, was funded by Madame Crociani.

27. Subsequently, Camilla, the Foundation and the seventh defendant, BNP Paribas Jersey Nominee Company Limited ("BNP Nominees") were added as defendants.

28. A composite answer resisting the claims of the plaintiffs was filed on behalf of Madame Crociani, Mr Foortse, BNP Jersey and Appleby Mauritius. By its answer the Foundation aligned itself with Madame Crociani in resisting the plaintiffs' claims but has not otherwise participated in these proceedings. By her answer, Camilla also aligned herself with Madame Crociani in resisting the plaintiffs' claims.

29. In May 2015, BNP Jersey and BNP Nominees chose to be separately represented and they subsequently filed separate answers.

30. On 7th July, 2015, the plaintiffs amended their Order of Justice to include a claim for breach of trust against Madame Crociani, Mr Foortse and BNP Jersey as the former trustees of the Grand Trust (we will refer to them in that capacity as "the former trustees") and Appleby Mauritius as the current trustee, for failing to collect the interest on the Promissory Note from 2003.

31. On 14th August, 2015, Madame Crociani amended her answer to include a counter-claim against the plaintiffs for the Grand Trust to be set aside on the grounds of mistake, should the Court hold that she was not entitled to benefit from the Grand Trust either directly or indirectly through the Foundation.

32. On 22nd October, 2015, BNP Jersey and BNP Nominees filed an amended answer, which included a third party claim by BNP Jersey against Madame Crociani under the indemnities given to it by her in relation to the 2010 appointment and the revocation of the Fortunate Trust.

33. On 24th February, 2016, shortly after its purported appointment as trustee of the Grand Trust, GFin instituted rival proceedings in Mauritius relating to the matters in dispute in these proceedings, and on 10th March, 2016, it applied for an anti-suit injunction against the plaintiffs.

34. On 21st March, 2016, GFin was joined as a party to these proceedings, but has refused to submit to the jurisdiction of the Court.

35. On 22nd March, 2016, the Court granted the plaintiffs an injunction against Appleby Mauritius and GFin, restraining them from dealing with the Promissory Note, such that it be held to the order of this Court.

36. On 24th March, 2016, Madame Crociani and Mr Foortse filed a counter-claim against BNP Jersey, seeking a contribution, indemnity or damages from BNP Jersey should they be found liable under the plaintiffs' claims, and this on the ground of alleged breaches of duties said to be owed to them by BNP Jersey as the professional trustee.

37. On 5th July, 2016, the Supreme Court of Mauritius dismissed GFin's application for an anti-suit injunction. GFin's appeal against that judgment has been abandoned.

38. On 4th August, 2016, BNP Jersey obtained a freezing injunction and disclosure order against Madame Crociani, pursuant to its third party claim against her, and this for the reasons set out in the Bailiff's judgment of 25th November, 2016 (Crociani-v-Crociani [2016] JRC 220B). Leave to appeal that judgment was granted on 12th December, 2016, but an application for the stay of the disclosure order was refused. Madame Crociani refused to comply with the disclosure order. That appeal came before the Court of Appeal on 26th January, 2017, when it ordered that her entitlement to pursue her appeal was conditional upon her lodging with the Judicial Greffe by 3rd February, 2017, a sealed confidential envelope containing an affidavit giving proper disclosure of her worldwide assets. She failed to comply with that condition and her appeal was dismissed on 21st February, 2017. She remains in breach of the disclosure order.

39. In November 2016, Madame Crociani ceased funding the defence of Appleby Mauritius.

40. By e-mail to the Court of 22nd December, 2016, Camilla, who had filed a witness statement dated 29th June, 2016, gave notice that she would not be represented at the hearing and would not be giving evidence. Her witness statement is therefore untested.

41. On 9th January, 2017, Collas Crill gave the Court notice that it would no longer be representing Mr Foortse, because Madame Crociani had ceased funding his defence. At such short notice, he had no option other than to represent himself at the hearing.

42. On 10th January, 2017, the Court granted Appleby Mauritius an injunction against GFin on the same terms as that granted to the plaintiffs, namely restraining GFin from dealing with the Promissory Note, such that it be held to the order of this Court, and this for the purpose of that injunction being rendered executory in Mauritius.

43. On 13th January, 2017, the Court received a letter from Madame Crociani saying that she would not physically take part in the hearing, due to her age and state of health, which discouraged her from making the trip and staying over in Jersey. No evidence has been provided to substantiate her inability to attend on health grounds and indeed, Advocate Robinson, for the plaintiffs, produced an extract from Facebook showing Madame Crociani at a New Year's Eve celebration on 1st January, 2017, apparently in rude health.

44. Also on 13th January, 2017, the Court received an e-mail from Advocate Santos Costa, which included the following: -

> *"I have for some considerable time been asking Madame Crociani to instruct me formally as to what her position will be in relation to the forthcoming trial. During this period I have been told on a regular basis that Madame had not decided whether she was going to give evidence at trial or call her witnesses. More recently I was told that Madame was going to write a letter to the Court setting out her intentions. I have since had conversations with other lawyers representing Madame Crociani and whilst I was told yesterday evening that a letter was to be sent to the Court I did not see the final version until this morning.*
>
> *As things stand at present, I am no longer instructed to make any representations on behalf of Madame Crociani at trial and I will not be appearing at the trial on Monday on her behalf. I will, of course, attend Court to answer any questions the Court may have if required."*

45. The Court is in no doubt that Madame Crociani has made a deliberate decision, as has Camilla, not to be represented at the hearing and not to give evidence, placing the burden of defending these proceedings upon BNP Jersey, Mr Foortse and Appleby Mauritius.

46. The Court and the parties have therefore been left with Madame Crociani's detailed skeleton argument, filed on her behalf by Collas Crill, the untested affidavits filed by her in relation to earlier applications and her untested witness statement filed for the main hearing.

47. As a consequence of her not appearing, Madame Crociani's counter-claims against the plaintiffs in mistake and BNP Jersey for breach of duty were dismissed.

48. On 6th March, 2017, Appleby Mauritius applied to the courts of Mauritius for the injunction it had obtained against GFin from this Court to be rendered executory in that jurisdiction, namely an injunction restricting GFin from dealing with the Promissory Note, such that it be held to the order of this Court. GFin is resisting that application which has yet to be determined.

THE ISSUES

49. The claims of the plaintiffs raise the following issues for the Court to determine, namely: -

(i) Whether the 2010 appointment is valid. If found to be invalid, a further issue arises as to whether Cristiana has acquiesced in that appointment;

(ii) Whether the January 2012 appointment of Appleby Mauritius as trustee of the Grand Trust and the change of proper law to Mauritius are valid;

(iii) Whether the Agate appointment in August 2012 is valid;

(iv) Whether the amendment to the Promissory Note in January 2016 is a breach of trust;

(v) Whether the appointment of GFin as trustee of the Grand Trust in January 2016 is valid;

(vi) Whether the distributions to Cristiana from the Grand Trust between 2007 and 2011, to the extent that they were transferred on to Madame Crociani, should be set aside as being frauds on the power;

(vii) Whether the addition of the Crica shares to the Fortunate Trust in March 2010 should be set aside on the grounds of mistake; and

(viii) Whether Madame Crociani, Paul Foortse, BNP Jersey and Appleby Mauritius are in breach of trust for failing to claim the interest on the Promissory Note from 2003 during their periods of trusteeship of the Grand Trust.

50. All of the claims of the plaintiffs are resisted by the defendants still participating in these proceedings, namely Mr Foortse, BNP Jersey and Appleby Mauritius, save that BNP Jersey and Appleby Mauritius concede that the appointment of GFin as trustee was invalid – Mr Foortse took no position on the point.

51. To the extent that the plaintiffs succeed in these claims, further issues fall to be determined by the Court, namely:

(i) Whether and the extent to which the defendant trustees should be exonerated under the provisions of the Grand Trust and under Article 45 of the Trusts (Jersey) Law 1984 (as amended) ("the Trusts Law");

(ii) Whether Madame Crociani should indemnify BNP Jersey under the terms of the two indemnities she signed in its favour;

(iii) Whether BNP Jersey is liable to Paul Foortse for alleged breaches of duties said to be owed by BNP Jersey, as professional trustee, to him;

(iv) What, if any, orders for contribution should be made as between defendant trustees found liable for any breach of trust; and

(v) Whether the Court should appoint a new trustee of the Grand Trust.

Key Underlying Issue

52. The plaintiffs' case is that the Grand Trust was not created for the purpose or intention of providing any benefit to Madame Crociani. Under its terms, Madame Crociani is not able to benefit otherwise than as a default beneficiary, if all of her live descendants are extinguished.

53. The defendants' case is that Madame Crociani was always intended to benefit from the Grand Trust and the Foundation was named as a beneficiary as the legal vehicle through which she would benefit. Their case is that Madame Crociani generated a fortune of her own after her husband Camillo Crociani died insolvent. For US tax reasons she was advised to create a discretionary trust for the benefit of herself and her daughters and for Dutch tax reasons, the Foundation was made a beneficiary of the Grand Trust as a vehicle for her to benefit from it.

54. A key underlying issue, therefore, is whether Madame Crociani was, and was intended to be, an indirect beneficiary of the Grand Trust through ownership of the Foundation, or whether the Foundation was included as a beneficiary purely to permit charitable donations.

PRINCIPLES OF CONSTRUCTION

55. It was not an issue between the parties that the general approach of the Court in construing documents was set out in the judgment of Page, Commissioner, in the case of In re Internine Trust [2005] JLR 236, as approved by the Jersey Court of Appeal in Trilogy Management Limited v YT Charitable Foundation (International) Limited & Others [2012] JCA 152. Quoting from paragraph 62 of the judgment of Page, Commissioner:

> ***"62 The correct approach to the task before the court is to a large extent the same as it is for any instrument the meaning of which is in contention:***
>
> ***(i) the aim is to establish the presumed intention of the maker(s) of the document from the words used: in the present case, there being no settlor-signatory, the maker must be taken in each case to be the trustee – or possibly the trustee and Sheikh Abdullah as the parties to the letters of instruction which conferred authority on the trustees to execute the declarations of trust (it makes little difference which in the present case);***
>
> ***(ii) words must, however, be construed against the background of the surrounding circumstances or "matrix" of facts existing at the time when the document was executed - a principle that has been a bedrock of English law since the judgment of Lord Wilberforce in Prenn v Simmonds (3) and appears now to have been accepted as also properly reflecting the approach that this court should adopt in relation to such matters;***
>
> ***(iii) the circumstances relevant and admissible for this purpose are those that must be taken to have been known to the maker at the time or, where there are more than one, known to the makers of or the parties to the document, and include (to use the language of Lord Hoffmann in Investors Compensation Scheme Ltd v West Bromwich Bldg. Socy. (2) [1998] WLR at 913, from whose speech only Lord Lloyd of Berwick dissented) "…absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man";***

(iv) evidence of subjective intention, drafts and negotiations and other matters extrinsic to the document in question is inadmissible, as is evidence of events subsequent to the making of the instrument (evidence of this kind being relevant where an estoppel is said to arise but not in this jurisdiction, unlike some others, as an aid to construing the original meaning of the document);

(v) the critical provisions, c11. 2(b), 6(c) and 6(f), as with all words and phrases, have to be read in the context of the document as a whole;

(vi) words should as far as possible be given their ordinary meaning: "Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation", per Lord Steyn in Lloyd's v Robinson (5) [1999] 1 WLR at 763; and

(vii) this last precept may, however, have to give way if consideration of the document as a whole, having regard to the principles set out above or common sense, points to a different conclusion: "common sense" in this context being best reflected by the passage from the speech of Lord Reid in Schuler (L) AG v Wickman Machine Tool Sales Ltd (4)[1974] AC at 251 in which he observed:

'The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.'

(See also Lord Steyn, again in Society of Lloyd's v Robinson [1999] 1 WLR at 763, and Lord Hoffmann's observations in the Investors Compensation Scheme case (2) concerning the need, on occasion, for a court to accept that the parties must have used the wrong words or syntax).

56. Relevant to the task before us, Page, Commissioner went on to say at paragraph 63:-

"It is also elementary, first, that when attempting to discern the true meaning of a power conferred in a trust deed or other instrument the court must have regard to the nature of the deed and the purpose for which the power appears to have been granted - though this will depend to a large extent on the terms of the instrument itself; and secondly, that a power of amendment reserved in a trust must be exercised for the purpose for which it

was granted and not for one beyond the contemplation of the makers of the original instrument (Lord Steyn (ibid), citing <u>Hole v Garnsey (1).</u>"

57. It is to the wording, therefore, of the Grand Trust to which the Court must have regard, not to evidence of the subjective intention of the parties to the Grand Trust deed or to subsequent events, but that wording needs to be set against the surrounding circumstances or matrix of facts existing when it was executed.

58. We are going to start with the Grand Trust deed itself, taken in isolation, and then set the words used against the matrix of facts.

GRAND TRUST DEED IN ISOLATION

59. We start by setting out clause Eleventh of the Grand Trust deed, which is the power utilised by the former trustees in making the 2010 appointment. It is in these terms:-

> *"ELEVENTH:*
>
> *(A) Notwithstanding any of the trusts, powers and provisions herein contained the Trustees shall have power at any time or time before the Distribution Date at the absolute discretion of the Trustees to raise and pay or transfer the whole or any part of the Trust Fund freed and discharged from the trusts and powers and provisions of this instrument to the Trustees of any other trust not infringing the rule against perpetuities applicable to these trusts and approved by the Trustees and in favour or for the benefit of all or any one or more exclusively of the others or other of the beneficiaries (<u>other than the Settlor</u>) and whether or not the Trustee or trustees of such other trust is or are resident within the jurisdiction applicable at the time to that trust and thereupon the property so paid or transferred shall be subject to the trusts, powers and provisions of the other trust and be governed by the proper law of that other trust whether or not such proper law is the proper law of this Agreement.*
>
> *(B) […] and a person shall be deemed to be interested under a trust if any capital or income comprised in the trust is or may become liable to be transferred, paid, applied or appointed to him or for his benefit either pursuant to the terms of the trust or in consequence of any exercise of any power or discretion thereby conferred on any person." (our emphasis)*

60. The issue arises over our emphasised words *"other than the Settlor"* for which on the face of the document there appear to be two possible constructions:

(i) The first, adopted by the plaintiffs, is that they refer ultimately to benefit. That is, the power is to provide a benefit for any beneficiary other than the Settlor.

(ii) The opposing construction, adopted by the defendants, is that the words *"other than the Settlor"* refer ultimately to *"exclusively".* The power is to pick and choose between the beneficiaries and so disregard any of them except the Settlor; that is, the Settlor must benefit from any exercise of the power.

61. In our view, the first construction is the more natural but the second is grammatically possible and it is necessary, therefore, to look at the deed as a whole, which we do with a particular emphasis on the potential for Madame Crociani to benefit.

62. As mentioned earlier, Madame Crociani chose to record her intentions in establishing the Grand Trust in the recital to the deed in this way: -

> *"The Settlor wishes to record that she intends by this Agreement to have set aside a separate trust for each of her children CAMILLA (aged Sixteen (16) years as of the date of this Agreement) and CRISTIANA (aged Fourteen (14) years as of the date of this Agreement). The Trustees shall receive as the initial Trust Fund the Secured Term note (the "Note") described in the annexed Schedule A. The Trustees shall retain the Note until its maturity or until its prior redemption, without regard to rules concerning diversification of investments or theories or principles of investment for fiduciaries. The Trustees shall collect the income from and proceeds of the Note when due, but shall not be required to institute litigation to enforce payment or to enforce any right which the trustees may have as owner of the Note. The Trustees shall divide the property described in the annexed Schedule A into two (2) substantially equal (as to value) separate trusts, one of which shall be identified by the name of CAMILLA and one of which shall be identified by the name of CRISTIANA. Each such separate trust shall be disposed of as hereafter directed in this Agreement."*

63. Two separate trusts were therefore to be created for each of Camilla and Cristiana. Clause Fifth (P) provides that the trusts could be retained in one fund for the purpose of investment and re-investment but: -

"…. This provision is solely for the purpose of convenience in administration and shall not be deemed to destroy the individual character of each trust or prevent the release of principal upon the termination of any such trust or the making of discretionary payments from principal of such trust in different amounts. It is clearly understood that after the initial division of the trust assets into two equal funds, one each for CAMILLA and CRISTIANA, the separate trusts and the separate trust funds may be invested in different manner and may (and probably shall) cease to be equal in value and amount."

64. The only definition of beneficiaries is contained within clause First: -

"income beneficiary" and "income beneficiaries" shall include:

(a) CAMILLA

(b) CRISTIANA

(c) the CAMILLO CROCIANI FOUNDATION, LTD."

65. The Foundation is described in the trust deed in this way, but its constitutional documents show that its correct name was *"Camillo Crociani Foundation Limited".*

66. The trusts are set out in clause Second in this way: -

"SECOND The property identified by the name of a child of the Settlor shall be held by the Trustees separately IN TRUST:

(A) During the life of the Settlor's child whose name identifies the trust, the Trustees shall pay to or for the benefit of any one or both of such child and the CAMILLO CROCIANI FOUNDATION, LTD., so much of the income of such trust as the Trustees may deem advisable from time to time. All income which the Trustees do not direct to be paid for any year shall be accumulated by adding it to the principal of such child's trust.

(B) At any time and from time to time the Trustees may, in the Trustees' sole and absolute discretion, pay to or for the benefit of such child so much (even all) of the principal of such child's trust as the Trustees may from time to time in their sole and absolute discretion determine to be necessary or desirable.

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

67. Thus, taking Cristiana's trust, during her lifetime, the trustees have power to pay the income to her or to the Foundation and the capital to her alone. On her death, the capital passes to such of her issue or the other issue of the Settlor as Cristiana may by will appoint, or in default of appointment, to her children in equal shares, or failing them, the Settlor's other issue. The Settlor only benefits if all of her descendants pre-decease her, and in ultimate default, the capital passes to the Foundation. The highlighted words *"but not the Settlor"* emphasise the fact that the Settlor cannot benefit from Cristiana's fund whilst any of the Settlor's issue are alive. Camilla's trust is held upon the same terms.

68. Clause Third (D) removes Madame Crociani as a trustee from any involvement in paying income or capital to her children during their minority: -

"(D) Notwithstanding any other provision of this Agreement: So long as the Settlor shall be serving as a Trustee hereunder, she may not participate in the exercise of any discretionary power to pay income or principal from a child's trust until the Settlor's child whose name identifies such trust attains the age of twenty-one (21) years."

69. Clause Third (D) then goes on to remove any individual trustees (not just Madame Crociani) from participating in income payments to the Foundation.

"The individual Trustees may not participate in the exercise of any discretionary power to pay income to the CAMILLO CROCIANI FOUNDATION, LTD. from a child's trust; provided, however, that the exercise by the individual Trustees of the discretionary power to pay income for any year to the child whose name identifies such trust shall prevail in the event of an inconsistent exercise of the discretionary power by the corporate Trustee to pay income to the CAMILLO CROCIANI FOUNDATION, LTD."

The interest of the Foundation in the income is therefore subordinate to that of Camilla and Cristiana.

70. Having limited the interests of the Settlor to that of a default beneficiary after the death of all of her descendants, clause Sixth goes on to further limit her ability to benefit: -

> *"SIXTH Notwithstanding any other provision of this Agreement: The Trustees shall, in no event, have power to do any of the following: -*
>
> *(A) …*
>
> *(B) To enable the Settlor to borrow the principal or income of the trusts, directly or indirectly;*
>
> *(C) To lend money to the Settlor from principal or income.*
>
> *(D) To use any income or principal to satisfy the Settlor's obligation to support the Settlor's child for whom each trust exists."*

71. Under clause Eighth, the Settlor appears to be excluded from an ability to seek an accounting from the trustees: -

> *"EIGHTH: The Trustees may, at any time and from time to time, render an accounting to the income beneficiary of a trust if such beneficiary has attained majority, or if not, to the guardian of such beneficiary (but not the Settlor)."* (our emphasis)

72. Finally, clause Fourteenth provides as follows: -

> *"FOURTEENTH: The Settlor declares that this Agreement is irrevocable and neither this Agreement or any trust hereby created may be amended."*

73. Thus, looking at the Grand Trust deed as a whole, the Settlor is unable to benefit whilst any of her descendants are alive, both directly as a beneficiary or indirectly through loans, or even to assist her in caring for Camilla and Cristiana. It would be consistent therefore for her to be unable to

benefit from the exercise of the overriding power in clause Eleventh. The plaintiffs' interpretation of clause Eleventh is therefore consistent with the deed as a whole.

74. The defendants' interpretation is inconsistent, in that having been at pains to prevent the Settlor from benefiting during the lives of her descendants, clause Eleventh, incongruously, would require that any exercise of this overriding power of appointment had to be exercised in her favour. This is not just incongruous but a real fetter upon the circumstances in which the power could be exercised.

75. From the narrow perspective of the Grand Trust deed on its own, we accept the plaintiffs' construction and construe clause Eleventh as a power to provide a benefit for any beneficiary other than the Settlor.

76. That leaves the position of the Foundation, as the Settlor does not record in the recital to the Grand Trust deed her intention in including the Foundation as an income beneficiary and as an ultimate default beneficiary. Three observations can be made from the face of the Grand Trust deed (the constitution of the Foundation being unseen for the purposes of this exercise):

    (i) It is not a beneficiary of capital save in ultimate default;

    (ii) It bears the name of someone other than the Settlor; and

    (iii) The word "Foundation" connotes an institution with philanthropic purposes. It is defined in the *Shorter Oxford Dictionary* as an endowed institution, in the *Business Directory* as an organisation established from donated funds for the purpose of donating funds (grants) to others and in the *Macmillan Dictionary* as an organisation that provides money for things such as medical research or for charity.

77. Therefore, on the basis of the Grand Trust deed alone, we would presume it was the intention of the makers of the Grand Trust that the Foundation could receive income to further its philanthropic objectives, but only to the extent not required for the daughters (clause Third (D)). It was also the ultimate default beneficiary on the demise of the whole family (clause Second (C)) for the same purpose. It is very common in our experience for settlors to name a charitable institution as an ultimate default beneficiary. There would seem to be little point in naming it as an ultimate default beneficiary, if the assets it received would simply devolve through it to Madame Crociani's estate and not to charity.

GRAND TRUST SET AGAINST MATRIX OF FACTS

78. The Grand Trust deed must, however, be construed in the context of its surrounding circumstances or matrix of facts. The case of the defendants is that the Promissory Note constituted a major proportion of Madame Crociani's wealth in 1987, and it would be inconceivable that, as a widow then aged 40, with two teenage children, she would place that wealth into a trust from which she could not benefit. They say the Foundation was inserted on Dutch tax advice as a means by which she could do so. We will take this under a number of headings.

Origin of the family wealth

79. In her untested first affidavit, Madame Crociani explained how her husband, Camillo Crociani (who we will refer to as "Camillo") described by her as a hard-working industrialist, died in 1980 in Mexico, leaving an Italian estate that was heavily insolvent, with assets of about 4 billion Italian liras (which she converted to around €2M) and liabilities of some 32 billion Italian liras (which she converted to around €16M) mainly due to the Italian tax authorities. In doing this conversion, Madame Crociani has taken off three noughts from the number of Italian liras and divided it by two. It is not an accurate method of conversion, but we think it suffices to give a general indication. She spent over a decade after his death working to pay off most of these debts and through her own hard work developed successful business interests and made fruitful investments. She said that she acquired Ciset in 1982 (the Italian engineering company) and successfully developed that business over the years. The clear implication was that the wealth she had acquired derived not from any inheritance from her late husband, but from her own hard work.

80. In her untested witness statement, Madame Crociani says she has never been dependent upon her late husband Camillo as a source of wealth. Through her own hard work and as an entrepreneur and businesswoman, she built up the wealth which was settled upon the Grand Trust. Summarising her witness statement:

    (i) She was born on 23RD October, 1940. She started work as a model, but from 1959 at the age of 19 years, she was a film actress, appearing mostly as the leading lady and this for some four years. She estimates that she earned the equivalent of between €1M to €1.5M per year. She was then living with Camillo, who was 20 years her senior and who she married in 1970, when she was aged 30, giving birth to Camilla in 1971 and Cristiana in 1973. She says she invested her earnings in the stock market, land and works of art.

(ii) In terms of the works of art, Advocate Moran, for Appleby Mauritius, referred us to documentation said to evidence her purchase of art between 1973 and 1975. It is, as Advocate Moran commented, an astonishing collection comprising two Chagalls, a Chirico, a Utrillo, a Picasso, a Dufy, a Rousseau, a Cezanne, another Rousseau, a Matisse, a Modigliani, a Renoir and a Gauguin. The documents do not show who the actual purchasers of these works of art were and perhaps more importantly, who paid for them. They comprise in the main certificates of authenticity addressed to Madame Crociani. One gallery owner, David Nash, deposes in an affidavit to having seen the paintings purchased at auction by dealers and then to having seen them in Madame Crociani's residence, from which he *"believed"* that they belonged to her. In particular, he recalls seeing a dealer purchasing the Gauguin at Sotheby's in New York in May 1975 and that it was his *"understanding"* that the dealer was acting on behalf of Madame Crociani. He later saw the painting at her residence and *"believed"* it to belong to her.

(iii) She says her investments in the stock market were frowned upon by Camillo as being too risky a form of investment, but she was *"very successful"* and was able to use the proceeds to acquire this art and land, namely an impressive property called Via Conca in Rome comprising some 5 apartments. We were shown a document in Italian as indicating her purchase of this property in 1972, but, from our limited understanding, the purchase was in the name of a company Conca SRL and does not evidence Madame Crociani either as the purchaser or indeed as the provider of the purchase consideration.

(iv) She acknowledges that Camillo started Ciset in 1956 and that quite separately from that, he was, from 1972, president of two Italian state-owned companies. He then became embroiled in the Lockheed scandal being accused of assisting in the payment of bribes and was forced to leave Italy, taking refuge with his family in Mexico.

(v) By contract dated 16TH February, 1977, Camillo sold his shares in Ciset to Mr Cartia, who was chairman of the company and who later became a first trustee of the Grand Trust.

(vi) Camillo died of cancer in 1980 and his estate in Italy was heavily insolvent. The inventory of assets did not include the shares in Ciset, because they belonged to Mr Cartia as a result of the agreement of 1977. As a consequence of the criminal proceedings, in which Camillo had been convicted in his absence in 1979 and sentenced to 28 months' imprisonment, a legal charge had been created over the assets of the estate in Italy, which Madame Crociani discharged, making no claim for reimbursement from her co-heirs, namely Camilla and Cristiana, and Camillo's children from his first marriage, Claudio Crociani and Daniela Crociani (who we will refer to as "Claudio" and "Daniela").

(vii) On 2nd April, 1982, she purchased Ciset back from Mr Cartia after persistent pressure from her. The company was then in a disastrous state financially and she therefore agreed to pay the same price as he had paid for the shares from Camillo.

(viii) Over the years, Daniela and Claudio have tried to extort money from her through numerous court proceedings, with the Italian court ruling definitively that the shares in Ciset did not form part of Camillo's estate.

(ix) She moved from Mexico to New York in 1982 because her daughters wanted to study there and she sold two apartments in the Via Conca building to finance the purchase of an apartment in New York. There she engaged in stock market trading and under her control, the business of Ciset improved quickly. She negotiated with influential people in the Italian state to get valuable contracts for the company and over time, it became the primary source of her wealth, and in turn, her family's financial well-being.

81. Thus, Madame Crociani attributes little, if any, of the family wealth which she used to settle the Grand Trust to her late husband Camillo.

82. Cristiana was too young to remember the family life in Italy and was only seven when her father died in Mexico. Claudio, however, who was born on 18th March, 1950, was able to give direct testimony as to this period, as he lived with his father, Madame Crociani and her daughters from 1976 to a year or so before his father's death.

83. He described his father as a very, very wealthy man and referred to the property in Via Conca as his father's home. He remembered accompanying his father to galleries where he purchased art, and although he was unable at this distance of time to provide us with a list, he could remember those paintings he liked (such as the Renoir and the Picasso) but was in no doubt that it was his father who purchased the art.

84. When the Lockheed scandal broke, the art was moved out of Italy and the family left to live firstly in Switzerland, then in France and finally, in Mexico. Claudio had been put by his father in charge of an account with Chase Manhattan Bank in Geneva, which his father was unable to operate and which had some $10M - $15M in it and into which millions regularly flowed up from Ciset. He said there were other accounts, probably in the USA and Mexico, but he had no involvement in these. The account of which he had control was used for short-term investments, and he gave the impression that his father treated it very much like a current account.

85. It was Claudio who purchased the house in Mexico for his father for $1M using money from this account. It was a large house, some 2,000 square metres, with an indoor and outdoor swimming pool and which was fully staffed. In 1980, Camillo was seriously ill with cancer and took steps to put his affairs in order, executing a will on 12th October, 1980, and entering into an agreement with Mr Cartia, Madame Crociani, Claudio and Daniela over the Ciset shares. We will come to both in a moment.

86. He remembers a meeting in October 1980 where, in the presence of Madame Crociani and Mr Cartia, his father told him and his sister not to be upset by the fact that he had decided to leave all the paintings to Camilla and Cristiana, in view of their young age, so as to be certain that the two girls would not have any material problems. Claudio informed us that the account at Chase Manhattan Bank and everything outside Italy, including the paintings, devolved upon Madame Crociani.

87. Madame Crociani's assertions as to how she generated the family wealth were not supported by any credible evidence. Her online biography shows the films in which she appeared and it would seem that she played a leading role in only one. It was a short career and we are dealing with the Italian film industry, not Hollywood; we simply do not believe the claim that she was earning some €1.5M a year. If she was earning that kind of money, the decision at the age of 23 to stop acting seems inexplicable. There is no evidence corroborating earnings of this kind from this short career, nor is there any evidence corroborating her supposed success on the stock market. Her online biography makes no mention of her prowess in the stock market or indeed of her acquiring such an outstanding collection of art in her early thirties. On the contrary, she says that at this time she focused on her young children *"with tireless passion".*

88. It has to be borne in mind just how outstanding the paintings acquired in the 1970s were and in our view, only the most wealthy would have been able to have funded such a collection. We ask ourselves the question whether the collection was acquired by a very, very wealthy industrialist, Camillo, or by his young wife, a former actress. We prefer the evidence of Claudio to the untested, and in our view, implausible version of events put forward in Madame Crociani's witness statement.

89. However, when dealing with events so long ago, documents provide the surest guide and here there is a clear paper trail showing that the wealth settled into the Grand Trust derived from Camillo: –

    (i) By an agreement dated 16th February, 1977, no doubt as a consequence of the Lockheed scandal, Camillo transferred all of his shares in Ciset to Mr Cartia for 3 billion liras, payable

in instalments over 5 years from future profits. Mr Cartia was described by Claudio as Camillo's friend and right-hand man. Mr Cartia already held 8% of the shares. By letter of the same date, Mr Cartia agreed to hold the shares transferred to him for Camillo. On 2nd March, 1977, Camillo and Mr Cartia agreed that Mr Cartia would hold only 80% of the total number of shares in Ciset for Camillo.

(ii) By his will dated 12th October, 1980, Camillo left half his Italian estate to Madame Crociani and divided the remainder of his Italian estate equally between his four children, appointing Mr Cartia as his executor and the guardian of Camilla and Cristiana. In our view, Mr Cartia's role as guardian may have informed his appointment as one of the first trustees of the Grand Trust. It is Cristiana's belief that her father would have wanted him to be a trustee to look after her interests and those of Camilla, as their guardian would have. There appears to have been no will for his estate outside Italy.

(iii) By an agreement made in Mexico on 13th October, 1980, made with Camillo's consent, Mr Cartia agreed with Madame Crociani (expressly acting on behalf of herself, Camilla and Cristiana), and with Claudio and Daniela, that before 1983 he would procure the issue of further shares in Ciset so that he held those shares as to: -

(a) 60% for Madame Crociani, which she in turn would hold as to 40% for herself and as to 10% for Camilla and as to 10% for Cristiana;

(b) 10% for each of Daniela and Claudio; and

(c) 20% for himself.

(iv) On 15th December, 1980, Camillo died.

(v) By agreement dated 22nd March, 1982, Claudio and Daniela transferred to their co-heirs all of their interest in Camillo's Italian estate in exchange for a payment of 200M Italian lira and a release from any liability. Before they signed this agreement, Mr Cartia offered to sell Claudio and Daniela 20% of the shares in Ciset in accordance with the provisions of the 13th October, 1980, agreement. They refused, considering it not in their interest to do so, given what they were told of the financial circumstances of Ciset at the time.

(vi) By agreement dated 2nd April, 1982, Mr Cartia sold 80% of the entire share capital of Ciset to Madame Crociani for 2.4 billion lira, payable in instalments from the future profits of the company over 5 years. It would seem that Madame Crociani thereafter acquired the remaining shares held by Mr Cartia, so that she owned 99.5%, although we do not know on what terms.

(vii) By agreement dated 10th December, 1987, Madame Crociani sold her shares in Ciset to Croci BV (which we remind ourselves was beneficially owned by her through Croci NV) for 105 billion liras, payable in three tranches, (a) a promissory note for 14 billion liras payable in six months interest free, (b) a promissory note for 16 billion liras payable in six months carrying 8% interest; and (c) the Promissory Note, as defined by us.

(viii) On 24th December, 1987, Madame Crociani settled the Promissory Note upon the trusts of the Grand Trust. She retained ownership of Ciset through the Croci NV and Croci BV structure. Ciset was the only income producing asset within that structure.

90. Despite the agreement reached on 22nd March, 1982, Claudio and Daniela clearly felt cheated in relation to their inheritance in Ciset, and years of litigation followed with a final settlement being reached in 2005. It is not necessary to detail that litigation, but it is noteworthy that the arrangements between Camillo and Mr Cartia were reviewed in two sets of proceedings before the Italian courts, which held that the original sale by Camillo to Mr Cartia was a legitimate *"pactum fiduciae"* – a fiduciary agreement - which obligated Mr Cartia to safeguard the shareholding in Ciset and re-transfer it to Camillo *"once the spotlight was off".* It was also held that the sale of the shares in Ciset by Mr Cartia to Madame Crociani was in fulfilment of that fiduciary obligation and that the purchase price paid to Mr Cartia was paid by Ciset using part of its dividend distributions, i.e. not from wealth Madame Crociani had previously generated.

91. Mr Miles Le Cornu of BNP Jersey, who first became involved in the Grand Trust in 2001, had always understood that the assets settled into the Grand Trust were derived from the wealth generated by Camillo and there are internal records within BNP Guernsey to that effect and within the records of BNP Suisse, one of which states: -

"Origine de la fortune et provenance des fonds à recevoir"

(Origin of wealth and provenance of the funds to be received).

"Héritage de son 1er mari: Camillo Crociani. Riche Industriel Italien. Elle a hérité d'une grosse fortune en biens immobiliers, Œuvre d'art, avoirs en cash et la société dont elle est actionnaire. Total estimé à environ US$600 millions".

(Inheritance from her first husband Camillo Crociani. Rich Italian industrialist. She inherited an enormous fortune of immovable goods, works of art, cash holdings and the business of which she is a shareholder. Total estimated at about US$600 million.)

92. Mr Foortse also shared the view that the source of the family wealth was the inheritance from Camillo, as confirmed by him in an e-mail dated 21st July, 2005, in which he gives some background to Croci NV and Croci BV and says: -

"Mrs Crociani has acquired the funds through inheriting"

93. In her untested witness statement and earlier affidavits, Madame Crociani places great emphasis on the insolvency of Camillo's Italian estate, which was insolvent in part no doubt because Ciset had been removed from it under the fiduciary arrangement with Mr Cartia, an arrangement upheld, perhaps surprisingly, by the Italian courts. She volunteers nothing about Camillo's assets outside Italy apart from the property in Mexico, all of which, according to Claudio, devolved upon her, including the bank account with Chase Manhattan of some US$10 million - US$15 million and accounts elsewhere.

94. Madame Crociani may have been an effective custodian of the wealth she inherited from Camillo, but we find that the source of the funds settled into the Grand Trust was the wealth generated by Camillo, a share of which he intended should be passed to his children.

Madame Crociani's circumstances in 1987

95. It is not in dispute that Madame Crociani moved from Mexico to New York with her daughters in or around 1982, where she purchased an apartment in New York. According to Cristiana, it was an apartment in a very prestigious location, namely 834 Fifth Avenue, which Madame Crociani purchased from Rupert Murdoch. It would seem that around the same time she may have sold two of the apartments at Via Conca in Rome, but she did not sell the Mexico property until 1989. A few years after moving to New York she purchased an adjacent apartment making what Cristiana described as an enormous duplex apartment in which they lived in some style and where the art collection was displayed.

96. The US lawyers she consulted over the creation of a trust, namely Finley Kumble, went into liquidation shortly after the Grand Trust was created, and only one document from their files is in existence, namely, a memorandum from Mr Douglas Allen of 4th March, 1987, and it says this: -

> *"To: The Files*
>
> *From: Douglas F Allen*
>
> *Date: March 4, 1987*
>
> *Re: "Grantor Trust" File No. 12782.00:*
>
> *Our client is a non-resident alien individual currently possessing a short-term non-immigrant visa. Our client is considering becoming a permanent resident of the United States and thus a U.S. person for income tax purposes. She has substantial income producing assets overseas. She also has minor children who may or may not become permanent residents of the United States."*

97. Madame Crociani does not state what kind of visa she was on, but we know from Cristiana that she was attending an art academy, and so it would seem likely that it would be a student visa, which, according to the U.S. experts from whom we heard evidence, would have meant that there was a danger of her becoming a U.S. person for income tax purposes in 1989.

98. The reference to her having substantial income producing assets overseas is reflected in the minutes of the meetings of shareholders of Ciset, which show that in May 1985, it declared a dividend of 11.45 billion lira and in April 1986, a dividend of 14 billion lira. By 1987, she would have easily paid off the purchase price due to Mr Cartia, (2.5 billion lira) from these dividends. We also note from these minutes that Mr Cartia continued to be the chairman and chief executive officer of Ciset during this period and that Madame Crociani was not a board member, undermining her assertion that the business of Ciset had improved *"under her control".*

99. Mr Allen's memorandum continues: -

> *"Creation of a foreign trust has been recommended to the client as a means of retaining certain income tax advantages on non-resident status after she becomes a permanent resident of the United States. It is proposed that income from the trust,*

which will be non U.S. source income, be accumulated for the children of the client, until they reach the age of 23 years."

100. We can draw the following from this evidence and indeed it is not in dispute that in 1987:

(i) Madame Crociani was living in some style in New York with her daughters;

(ii) She was considering or was in danger of becoming a U.S. person for income tax purposes;

(iii) She had very substantial income from Ciset, a prestigious duplex apartment in New York, apartments in Rome, a very valuable art collection and other assets; and

(iv) She was recommended to create a foreign trust to retain certain income tax advantages after she has become US resident for income tax purposes.

101. Whilst we do not know what advice was actually given to Madame Crociani, we can have regard to expert evidence as to the relevant U.S. tax law and practice in 1987 and its application to the terms of the Grand Trust.

US tax law and practice in 1987

102. The plaintiffs called Mr Henry Christensen III, a partner in McDermott Will & Emery LLP, and Appleby Mauritius called Mr Michael G Pfeifer, a partner in Caplin & Drysdale, Chartered. There was very little difference in the expert evidence they gave.

103. As explained by Mr Pfeifer at paragraph 28 of his report, under U.S. tax law (then and now) a trust can be classified either as a "grantor trust" or as a "non-grantor trust". A grantor trust is one in which a trust settlor (referred to as a "grantor") retains *"substantial powers vis-à-vis the disposition of the trust principal and income that are tantamount to ownership of the trust principal and income".* As a consequence, the grantor is treated as the "owner" of the trust, and the trust itself is disregarded as a separate taxable entity. The trust's income, deductions and credits flow through the trust and are attributed to the grantor, who takes those amounts directly into the calculation of her net income tax liability on an arising basis. The grantor is also treated as indirectly owning interests in the trust's underlying corporations and partnerships.

104. By comparison, a non-grantor trust is treated as a separate tax payer that may be taxed on its net income on an arising basis. Someone in Madame Crociani's position in 1987 could create a foreign non-grantor trust, known as a "drop-off" trust, before becoming a U.S. person for income tax purposes. It was described by Mr Christensen as classic pre-immigration planning applicable in 1987. Once Madame Crociani had become a U.S. person for income tax purposes, she would have been subject to U.S. income tax on her world-wide income, but she would not have been subject to tax on income earned by the foreign non-grantor trust if she created it while she was still a non U.S. person for income tax purposes. The advice provided in Mr Allen's memorandum of 4th March, 1987, (which we have not set out) describes such a drop-off trust and the Grand Trust deed is consistent with it being such a "drop-off" non-grantor trust. For the Grant Trust to qualify as a non-grantor trust in 1987:

(i) It had to be irrevocable.

(ii) Madame Crociani could not directly or indirectly benefit from the trust in any way, other than retaining not more than a 5% reversionary interest in the assets of the trust. Her default interest in the Grand Trust did not exceed that limit.

(iii) Madame Crociani could not in any way determine or affect the beneficial interest in the trusts, which under the provisions of the Grand Trust she could not.

(iv) Madame Crociani could not retain any "tainted powers" over the trust, which she did not. In that respect clause sixth of the Grand Trust deed closely followed the language of the relevant statutory provision (Internal Revenue Code section 675) to explicitly prohibit Madame Crociani from holding any of the administrative powers that would have caused the Grand Trust to have grantor trust status.

105. If the Grand Trust failed to meet any of the relevant factors, it would instead be a grantor trust which would have made all of its income taxable to her once she became a U.S. person for income tax purposes, whether or not it was distributed and regardless of to whom it was distributed. Had the Grand Trust been a grantor trust, there would have been no sense in creating it at all, as it would not have provided any U.S. income tax benefit.

106. Both experts agreed that the more likely interpretation of clause eleventh from a US standpoint was that the trust assets could be resettled into a new trust but only if Madame Crociani was excluded from that trust, an interpretation that would be consistent with the intended non-grantor status of the Grand Trust. The alternative interpretation, that the trust assets could be resettled

into another trust with Madame Crociani as a beneficiary so long as another current beneficiary of the Grand Trust was a beneficiary, would have caused the Grand Trust to be a grantor trust from inception.

107. We will see later that under the Foundation's original constitution, its objects were exclusively charitable, but in terms of the Foundation, both experts agreed that if Madame Crociani could receive any direct or indirect benefit from it, the Grand Trust would have been a grantor trust from its inception.

108. Mr Christensen expressed a further opinion, not initially addressed by Mr Pfeifer but which after discussion he ultimately agreed with, that a power to amend the Foundation in the future in a manner which would allow Madame Crociani to benefit from the Grand Trust via the Foundation would have caused the Grand Trust to be a grantor trust from inception.

109. Whilst neither practised Bahamian law, they both believed the clear reading of the Foundation's organizing documents made the Foundation solely for the benefit of charity and if that is right, then the members would not have the power to convert the Foundation, as they did in 1991, to a Bahamian International Business Company ("IBC") with broadly commercial objects, of which Madame Crociani was the beneficial owner.

110. The U.S. experts found the late discovery of the Finley Kumble fee notes very helpful in understanding the overall nature of the tax planning, because they showed that Finley Kumble (principally through Mr Seth Zachary) had given detailed consideration to the U.S. treatment of the foreign corporations Madame Crociani owned. As they explained in their joint written response: -

> *"In addition, had Mrs Crociani become a US tax resident, certain foreign companies she owned would have become "controlled foreign corporations" as defined in Section 957 of the US Internal Revenue Code (the "Code"). Under the CFC rules, if a US person directly or indirectly owns 10% or more of the voting power of a CFC, which is defined as a foreign corporation in which more than 50% of the total voting power or total value of the stock of the corporation is owned directly or indirectly by "United States shareholders," the US shareholder is subject to US income tax on his or her pro rata share of the CFC's passive income, regardless of whether or not such income is actually distributed to the US shareholder in that taxable year. See ss 951, 954, 957 and 958 of the Code. Based on the facts we have been given, it appears likely that Croci BV, Croci NV, and the Ciset companies would have become CFCs had Mrs Crociani become a US tax resident, which would*

have provided an even more compelling reason for Mrs Crociani to create a foreign non-grantor trust (i.e. the Grand Trust) and to fund it with the promissory note before she became a US tax resident. The invoices from Finley Kumble that were recently produced by the Defendants indicate that in February, March, April, May and October of 1987, Seth Zachary, Dan Grossman and Patricia McCarroll of Finley Kumble were in fact researching "CFC issues" relating to Mrs Crociani's residency and the trust project."

They went on to say: -

"The existence of the promissory note due by Croci BV to the Grand Trust would have had two important effects if Mrs Crociani had become a US tax resident: (1) Mrs Crociani would not have been subject to US income tax on the interest paid by Croci BV on the promissory note to the Grand Trust; and (2) the taxable income of Croci BV (and Croci NV, which owns 100% of Croci BV) could potentially be reduced by Croci BV taking a business expense deduction for the interest it paid on the promissory note, thereby reducing the taxable income of Croci BV and in turn Croci NV. In effect, the promissory note could have converted what would have been passive income of a CFC, otherwise taxable to Mrs Crociani if she had become a US person, into a deductible business expense of the CFC, with a foreign non-grantor trust receiving the income, which would not be subject to US income tax."

111. Thus, the income in the Italian operating companies, Ciset and Vitrociset, would not have been subject to US tax, but once it was brought up to Croci BV and NV, then it becomes taxable. Madame Crociani could control how much income came up from Ciset, but if it was brought up to Croci BV, the interest on the Promissory Note was a deductible expense reducing her taxable income. The Promissory Note, in effect, converted what would have been passive income of a CFC, otherwise taxable to Madame Crociani, if she had become a US person for income tax purposes, into a deductible business expense of the CFC, with a foreign non-grantor trust receiving the income, which would not be subject to US income tax. In the words of Mr Christensen, this presented a coherent plan and in the words of Mr Pfeifer, represented good estate planning.

112. As Mr Christensen further explained, there were also a number of US tax advantages to having a charity, such as the Foundation, as a discretionary beneficiary. Had Camilla and Cristiana become US tax residents, and distributions were to be made to them, the trustees of the Grand Trust could have controlled the amount of taxable income they received, by making charitable distributions to the Foundation out of that US income. The amount of income earned by a non-grantor trust in the current tax year and available for distributions to the beneficiaries is called the trust's distributable net income for that year. If income is accumulated, rather than distributed, in

a year, undistributed net income will arise in the trust. In subsequent years, if a distribution is made to a US beneficiary that exceeds the distributable net income for that year, the excess amount is treated as an "accumulation distribution" for US income tax purposes, carrying undistributed net income out of the trust.

113. The US imposes a *"significant throwback tax"* and interest charge on accumulation distributions made to US beneficiaries of a foreign non-grantor trust, described by Mr Christensen as confiscatory – up to 90%. By adding the Foundation as a foreign income beneficiary of the Grand Trust, the trustees had a way of preventing large accumulations of income and undistributed net income in the Grand Trust. Mr Allen's memorandum indicated that he was considering the tax consequences of possible accumulation distributions to the daughters. He explained that if income were accumulated in the trust and then distributed to the girls after they have left the US, the US tax on accumulated distribution rules would not apply to such distributions. Mr Christensen explained that he had often created drop-off trusts for clients with charities included in this way.

114. Advocate Redgrave, for BNP Jersey, questioned what benefit it would be to Madame Crociani, or to her daughters, for the Foundation to be included as a beneficiary for this purpose. If the objective is to retain as much of your money as possible, then giving the money away to charity to avoid paying tax didn't make any sense to him. Mr Pfeifer, in response, said that many wealthy clients would much rather give money away to charity than give it away to the government and Mr Christensen explained that the benefit to Madame Crociani and to her daughters was that rather than making a distribution directly from the Grand Trust to a given charity, they could keep control of it through the Foundation and decide from time to time what charitable donations would be made from the Foundation.

115. The US tax experts differed in their advice in one respect and that, in our view, arose out of the way in which they were instructed. Mr Pfeifer was instructed that Madame Crociani had been advised to create a vehicle through which she could benefit from the Grand Trust and to give his opinion on the assumption that she was able to benefit from the Grand Trust through the Foundation.

116. Working on that assumption, and on the basis that this is what her advisers would have been seeking to achieve for her, Mr Pfeifer could see that Finley Kumble might have constructed something which would have allowed her to benefit at a later point in time, if the Bahamian legal advice had been that the objects of the Foundation could be so changed, an issue which we will come to.

117. There is no record of the advice given by the Bahamian lawyers who formed the Foundation, but he said there was sufficient uncertainty for it to be reasonable for Finley Kumble to take the position that this might have worked, even if both he and Mr Christensen agreed that if challenged by the I.R.S. it would be unlikely to succeed. Mr Pfeifer regarded that as aggressive tax planning, but not in any way fraudulent. Mr Christensen took a more stringent view.

118. It is the case of the defendants that the Foundation was included as a beneficiary as a potential means of providing a benefit indirectly to Madame Crociani and this was on the advice of Mr Foortse, a Dutch tax adviser, with whom Mr Zachary had worked previously, and so we now turn to the Dutch tax advice.

Dutch tax law and practice in 1987

119. In 1987, Mr Foortse was working as a tax lawyer in the Amsterdam office of Wissellink & Co and ran a practice advising mainly international clients.

120. No records survive from his involvement in this matter, other than his diaries. The fee notes of Finley Kumble, however, show that there were extensive written communications between Mr Foortse and Finley Kumble, none of which are now available to us.

121. He remembers receiving a phone call from Mr Zachary asking if he could assist in advising a client, who he later discovered was Madame Crociani, over the creation of a Dutch sandwich, something he had done before for other clients of Mr Zachary.

122. He was told that Madame Crociani was at that time tax resident in Mexico, although living in New York, and she would have suffered a 25% withholding tax in Italy on any dividends paid to her by Ciset. Describing a classic “Dutch sandwich”, he explained that Madame Crociani would sell her shares in Ciset to Croci BV (a Dutch company) which is in turn owned by Croci NV (a Netherlands Antilles company) which is in turn owned by Madame Crociani. The Dutch authorities required the purchase price to be financed with at least 15% equity or capital. On the payment of dividends by Ciset to Croci BV, there would be no withholding tax in Italy. Dividends paid by Croci BV to Croci NV would suffer a 7.5% withholding tax and there would be no withholding tax on dividends paid by Croci NV to Madame Crociani. Thus, a 25% tax rate had been reduced down to 7.5%. As there was no tax on interest payments, it was beneficial to re-designate the dividends paid by Croci BV as interest payments, hence the creation of the Promissory Note.

123. Mr Foortse says that Mr Zachary informed him that there would be a trust to receive the interest payments and that Camilla, Cristiana and Madame Crociani were each to have an equal share in the trust. Madame Crociani wanted the trust, as with the whole structure, to be as tax efficient as possible, while ensuring that she could access and enjoy her wealth.

124. Quoting from paragraph 17 of his witness statement:

> *"In essence, the proposed structure re-characterised dividends as interest payments. It was unusual and unnecessary from a Dutch tax point of view to use a trust to receive the interest payments. I was not privy to why it was necessary to have a trust, but worked with the structure proposed by Mr Zachary. Given that Madame Crociani was to be the beneficial owner of the shares in Croci International N.V., I advised Mr Zachary that a corporate vehicle should be interposed as a beneficiary of the trust through which she would benefit and receive funds. If this were not to be done, then there might be two potential adverse tax consequences. First, the Dutch tax authorities could view the interest arising on the Promissory Note (financed by dividends from Italy and payable to the trust) as an unacceptable device to avoid a taxable dividend paid to Croci International N.V. by Croci International B.V. They might argue that designing a payment as interest was to avoid withholding tax payable on dividends (there being no domestic tax levied on interest paid in the Netherlands). Second, the Dutch tax authorities might decide to look through the trust and treat Madame Crociani as the actual recipient of the interest payments. In addition, as Madame Crociani was at that time tax resident in Mexico, she enjoyed no tax treaty protection as the Netherlands did not have a tax treaty with Mexico (the Netherlands only entered into a tax treaty with Mexico in 1993). The risk in both scenarios was that interest paid on the Promissory Note would become subject to a full withholding tax of 25%. The risk could be alleviated if a corporate entity was interposed in the way I suggested. I should say that it was not necessary from the Dutch tax point of view for the entity to be established for any form of charitable purpose or to have charitable objects and I did not suggest that the corporate vehicle should be established in this way."*

125. He told us that this advice was given at the meetings he held with Mr Zachary in Amsterdam in late October 1987 and subsequently in Rome. He said he had no further involvement in the structure and had no real knowledge of the US tax considerations driving the use of a trust. When he was asked by Madame Crociani to become a trustee of the Grand Trust many years later in 1999, and saw the trust deed for the first time, he assumed that the Foundation was there as an income beneficiary through which Madame Crociani could benefit, as a consequence of the advice he had given to Mr Zachary.

126. It can be seen that Mr Foortse, working on the basis that Madame Crociani was to be a beneficiary of the trust, identified two risks; firstly, that the Dutch tax authorities might regard the interest payable under the Promissory Note as a device to avoid a taxable dividend, and secondly that they might look through the trust and treat Madame Crociani as the recipient of the interest payable under the Promissory Note. The risk in both cases was, he said, that the interest would become subject to a full withholding tax of 25%, a risk which he advised could be eliminated entirely by the interposition of a company within the trust from which she could in turn benefit.

127. This explanation for the inclusion of the Foundation is the pleaded case of the defendants, and indeed was the explanation which had been provided by Mr Foortse to the advisers and parties to the Agate appointment, which we will come to later. However, when the Dutch tax experts were instructed in this matter, it became clear that there was a much greater potential liability on the part of Madame Crociani as the indirect owner of more than 7% of Croci BV, namely to Dutch income tax at the rate of up to 72%, which would have been the major concern of anyone advising at the time.

128. The plaintiffs had instructed Mr Matthijs Van Kranenburg, a Dutch tax lawyer and partner in Prudence Tax & Consulting BV, and Mr Foortse and Appleby Mauritius had instructed Mr Marten Mees, a Dutch tax lawyer and partner in Loyens & Goellf.

129. There was a large amount of agreement between them, of which we would highlight the following:

(i) As a result of the Promissory Note being issued initially as it was to Madame Crociani and of her being an indirect owner of more than 7% of the shares in Croci BV, she was liable to income tax on the interest pursuant to the Dutch Income Tax Act 1964 of up to 72%.

(ii) If the interest on the Promissory Note were to be regarded by the Dutch tax authorities as a dividend, withholding tax was still payable. The parties to the structure would have been subject to withholding tax as follows: -

(a) Croci NV as a recipient of the dividends up to 7.5%;

(b) Madame Crociani, as a resident of Mexico, 25%;

(c) The daughters, as residents of Mexico, 25%;

(d) The Grand Trust (as a non-transparent special purpose fund in the Bahamas), 25%; and

(e) The Foundation, 25%.

Thus, the interposition of any company wherever incorporated, as advised by Mr Foortse, would not have avoided the payment of withholding tax, the problem he had identified. Furthermore, the location of the company was of great importance, because if it had been incorporated in, say, the Netherland Antilles rather than the Bahamas, the withholding tax would have been limited to no more than 7.5%.

(iii) The much greater risk of Madame Crociani having to pay income tax on the interest of up to 72% could have been avoided altogether by the simple expedient of the Promissory Note being issued by Croci NV and not Croci BV.

130. Mr Foortse accepted in evidence that he had been wrong in suggesting that the risk involved here was as to withholding tax, but he said that at the time, he had been alert to the income tax issue. He maintained that the trust structure had been a given with which he had to work. Madame Crociani was to be a beneficiary, and the interposition of a company in her place, would have resolved that liability.

131. In this, he was supported by Mr Mees, on the basis that the company, not Madame Crociani, would have been the recipient of the interest payments, and on his understanding of the case law at that time, the Dutch authorities would not have looked through such a company as an abuse or frustration of the law.

132. Mr Kranenburg supported the interposition of a company in that way, but only as a last resort. Why, he asked, create the problem in the first place by issuing the Promissory Note to Madame Crociani, which immediately gave rise to a Dutch income tax issue which did not otherwise exist, and then try and find a solution to the problem you had created, when it could have been avoided completely by the Promissory Note being issued by Croci NV.

133. Both experts were in agreement that in 1977 the Dutch tax authorities could have regarded a trust as transparent for tax purposes but it seems curious that they would not do so in the case of a company, and we sympathise therefore with the view of Mr Kranenburg that simply interposing a company from which Madame Crociani could benefit was a risky solution to a potential tax liability of 72%.

134. The only reason why Mr Foortse says he gave this advice was because he said he had been informed by Mr Zachary that Madame Crociani was going to be a beneficiary of the trust, and that is why for Dutch tax purposes he advised the interposition of a company.

135. We do not think it is possible that Mr Zachary could have made such a statement to Mr Foortse. The advice we have received from the US tax experts is that the only kind of trust that could have been contemplated by Finley Kumble was a non-grantor trust and indeed, the Grand Trust, which they drafted, purports to be such a trust. The central feature of such a trust is that the grantor, Madame Crociani, cannot be a beneficiary, save in respect of a reversionary interest not exceeding 5% in value. For Madame Crociani to have been a beneficiary, apparently an equal beneficiary with her daughters, directly or indirectly through a company, would have destroyed the US tax planning in its entirety.

136. Mr Allen's memorandum, the only document we have from the files of Finley Kumble, makes it clear that the trust Madame Crociani was being recommended to create was for the benefit of her daughters, not for her, and both US tax experts agree that what he was discussing in that memorandum, correctly, was a non-grantor trust. In our view, Mr Zachary can only have given Mr Foortse information that was consistent with that.

137. The likely sequence of events does not support Mr Foortse. The fee notes of Finley Kumble do appear to show them working in two stages, firstly in drafting the Grand Trust and secondly, in establishing the Dutch sandwich. The Foundation was incorporated on 6th August 1987, well before Mr Zachary's visit to Mr Foortse in late October, 1987. There is a reference to the proofing of the final draft of the Grand Trust on 16th October, 1987. Croci NV, on the other hand, was incorporated on 26th October, 1987, and Croci BV on 10th December, 1987, with the trust deed being executed on 24th December, 1987. Whilst we need to be cautious about the sequence of events so long ago and in the absence of supporting documentation, it would seem that the Foundation was incorporated well before Mr Foortse says he advised for its need; and it was also incorporated with charitable objects, a feature that has no relevance to Dutch tax considerations at all.

138. We agree with Advocate Robinson that a Dutch income tax risk of 72% would have been a major concern to Finley Kumble, and to Madame Crociani, and it is not credible that if they were relying on Mr Foortse's advice for the need of a company, they would not have required him to look at the Grand Trust deed, the Foundation documents and sought advice as to where the Foundation should be incorporated, none of which Mr Foortse says they did. As Advocate Robinson says, had Madame Crociani intended to be a beneficiary (impossible from a US tax standpoint), both Finley Kumble and Mr Foortse would have been all over this issue.

139. Furthermore, if a company was to be interposed so that Madame Crociani could benefit from the trust through it equally with her daughters, then why did the draftsman make it an income beneficiary only, and this during the daughters' lifetimes, so that the company's interest in the income of the trust would terminate on the death of the daughters? Its limited role and objects are all consistent with it coming about as a result of US tax advice, not Dutch.

140. The inescapable conclusion is that Madame Crociani was never intended to be a beneficiary of the Grand Trust and Mr Foortse was not told that she was going to be. To be fair to Mr Foortse, he is being asked to remember events that took place 30 years ago and in the absence of supporting documentation. We think that Madame Crociani would indeed have said that she wanted to benefit from her wealth, whilst minimising her US tax exposure, and that is what she achieved by retaining ownership of Croci NV (and thus indirectly of Ciset), creating a Promissory Note payable by Croci BV and settling that on trust for the benefit of her daughters, from which she could not benefit, that being the price that the US tax advantages brought with it. Because she was not to be a beneficiary of the Grand Trust, no Dutch income tax issue ever arose and there was no prejudice in the Promissory Note being issued to her by Croci BV and then settled into the Grand Trust.

141. We do not accept that the trust was a given, in the sense that Mr Zachary had dictated that the Promissory Note should be issued by Croci BV. The Grand Trust was going to have a Promissory Note settled upon it, but that had no bearing on which part of the Dutch sandwich that note came from. There would be little point in seeking Dutch tax advice on a Dutch structure but to dictate the composition of that structure. If Madame Crociani was to be a beneficiary (again impossible from a US tax standpoint), then it must have been perfectly open to a Dutch tax adviser to highlight the problem and propose the simple solution that the Promissory Note issue from Croci NV.

142. Mr Foortse referred us to two letters which he said supported his evidence:

    (i) On 25th April, 1990, he wrote to Bankamerica and to Mr James Hughes of Jones Day Reavis & Pogue, who had taken over from Finley Kumble, advising that all bank transfers dealing with interest payments on the Promissory note should mention that the beneficiary of the payment is the Grand Trust. In that letter, he said he had advised ever since the spring of 1987 to Mr Zachary that interest payments to Madame Crociani were fully taxed in the Netherlands. As a resident of Mexico she cannot claim the protection of a tax treaty and being a substantial shareholder indirectly in Croci BV, interest payments to her personally would be fully taxed in Holland:

"Interest payments to the Trust (which Trust is not controlled by Mrs Crociani) can be paid without any Dutch tax."

(ii) In an undated e-mail in 2004, he appears to be providing information in relation to Dutch tax assessments, in which he explains that the daughters are the beneficiaries of the Grand Trust and that Madame Crociani does not control the assets.

143. Advocate Robinson was prepared to accept, as do we, that contrary to his witness statement, Mr Foortse would have been aware in 1987 of the potential liability of Madame Crociani to Dutch income tax on a promissory note issued by Croci BV in her favour, hence the importance of making it clear that the recipient of the interest payments on the Promissory Note was the Grand Trust, of which she was not a beneficiary and not her. However, the beneficiaries are identified by him as the daughters (there is no reference to any company interposed for her benefit) and both communications relate to the issue of control, which is consistent with Mr Zachary telling Mr Foortse that Madame Crociani was to be a trustee of the Grand Trust (and one of three), which indeed she was. We do not find these two communications support the notion that he was told by Mr Zachary that Madame Crociani was to be a beneficiary of the Grand Trust and that he advised the interposition of a company through which she could benefit.

144. We therefore conclude that Dutch tax advice had no part to play in the Foundation being a beneficiary of the Grand Trust.

The Foundation

145. The Foundation was incorporated in the Bahamas, as we have said, on 5th August, 1987, in advance of the establishment of the Grand Trust on 24th December, 1987. The memorandum is headed *"Company Limited by Guarantee"* and having set out its name and registered office in clauses 1 and 2, clause 3 sets out the objects:

"3 The objects for which the Company is established are as follows:

(1) To receive distributions from trusts, estates and similar entities and to donate same to charities established or to be established within the Commonwealth of the Bahamas.

(2) To receive moneys by way of donations or loan for the payment of the Company's administration and similar expenses.

(3) To open and operate bank accounts and draw, accept and negotiate cheques, bills of exchange, promissory notes, and other negotiable instruments.

(4) To invest the moneys of the Company not immediately required for its purposes in or upon such investments, securities or property as may be thought fit.

(5) To undertake and execute any trusts or any agency business which may seem directly or indirectly conducive to any of the objects of the Company.

(6) To purchase or otherwise acquire and undertake all or any part of the property, assets, liabilities and engagements of any one or more of the companies, institutions, societies or association having objects similar to those of the Company.

(7) To do any and all things which may be advisable, proper authorised or permitted to be done by the Company under and by virtue of any law or regulation.

(8) To do all such other lawful things as are incidental or conducive to the attainment of the above objects or any of them."

146. Clause 4 provides that it is a non profit-making body:-

"The Company is a non-profit making body and the liability of the members is limited."

147. Clause 5 provides that nothing in the memorandum shall prevent the payment of remuneration to any officer or member of the Foundation in return for services actually rendered nor prevent the payment of interest on money lent to the Foundation.

148. Clause 6 provides the guarantee provision by which the members undertake to contribute to the assets of the Foundation, on a winding up, in an amount not exceeding 10 dollars, subject to adjustment of the rights of the contributories amongst themselves.

149. It is then signed by the 5 subscribers, all members of the Bahamian law firm of Graham Thomson & Co, whose liability as members was limited to 10 dollars each.

150. The articles of association have no provision for distributions or for the payment of dividends and there is no provision in either the memorandum or the articles of association for the winding up of the Foundation.

151. Companies limited by guarantee are widely used for charities, community projects, clubs, societies and other similar bodies. Quoting from Equity & Trusts, 9th edition, by Alistair Hudson at page 969:-

> ***"Whereas companies are ordinarily organised so that they have shareholders who own shares in the company, it is more usual for charitable companies to be organised as "companies limited by guarantee", which do not have shareholders nor a share capital. This form of company limited by guarantee is thus closer to the American notion of a "not-for-profit" company in relation to which the company limited by guarantee does not have to make profits so as to be able to pay dividends to its shareholders. Instead, its purposes are limited to the pursuit of its charitable goals."***

152. As the US experts observed, on its face the Foundation (a name which in the US connotes a charity) presents as a not-for-profit company formed for charitable purposes, namely to receive distributions from trusts and to donate the same to charities in the Bahamas (later extended to charities anywhere in the world).

153. However, the defendants argue that despite the appearance, the Foundation was, in fact, a vehicle by which Madame Crociani was intended to benefit from donations made by the Grand Trust and we heard extensive evidence on whether the constitution could be used for that purpose.

154. Mr Brian Simms QC, a partner in Lennox Paton in the Bahamas, instructed by the plaintiffs, explained that the Bahamian Companies Act, initially passed in 1866, largely mirrored the English Companies Act of 1862 and has since been heavily amended, generally mirroring developments in England, the most significant of these introducing many of the provisions of the English Companies Act of 1948. As such, the Bahamian courts have generally drawn on English common law in interpreting the provisions of the Bahamian Companies Act and would follow English law where the relevant provisions are sufficiently similar to their English counterparts.

Accordingly, the plaintiffs instructed Mr Michael Todd QC of Erskine Chambers, whose opinion Mr Simms endorsed.

155. BNP Jersey had instructed Mr John Fitzgerald Wilson, a partner in McKinney, Bancroft & Hughes in the Bahamas and Mr David Chivers QC of Erskine Chambers. Mr Foortse, Appleby Mauritius & Madame Crociani instructed Mr Brian M Moree QC, a partner in the same firm as Mr Wilson. Mr Moree had been instructed to advise on the validity of the continuation of the Foundation into an IBC in 1991, but inevitably when giving evidence his views on other issues were sought. Both Mr Wilson and Mr Moree took the same approach in relation to the relevance of English law. Mr Wilson and Mr Moree essentially endorsed Mr Chivers' opinion. In Mr Todd's opinion, clause 3(1) contains the main objects of the Foundation and sub-paragraphs (2) to (8) are powers ancillary to those main objects. The Foundation could not make distributions to Madame Crociani. Quoting from his written opinion:

> *"In my opinion, in 1987, the Foundation could not make distributions to the First Defendant.*
>
> *(1) The Foundation could only apply distributions from trusts, estates and similar entities in making donations to charities established or to be established within the Commonwealth of the Bahamas.*
>
> *(2) As a matter of company law a guarantee company can make distributions.*
>
> *(3) However, any distribution may only be made out of profits.*
>
> *(4) Clause 4 of the Foundation's Original Memorandum provides that it is a non-profit making body, and, therefore, there would be no profits out of which distributions could be made.*
>
> *(5) Distributions may only be made to or for the benefit of members.*
>
> *(6) The First Defendant was not a member of the Foundation in 1987."*

156. He explained in evidence that the purpose of dividends is to encourage people to put capital into the company, so that it can better carry on its business and for the promotion of its business. In the case of the Foundation, it did not have to pay dividends to its members in order to receive distributions from the Grand or other trusts.

157. There were, however, a number of anomalies in the memorandum and articles of association of the Foundation:

(i) Section 5 of the Bahamian Companies Act provides that a memorandum for a company limited by shares must contain the following inter alia: -

"(d) A declaration that the liability of the members is limited;

(e) The amount of capital by which the company proposes to be registered, divided into shares of a certain fixed amount, to be also therein specified."

Clause 4 of the memorandum contains a declaration that the liability of members is limited, superfluous (but not incorrect) for a company limited by guarantee, but a requirement for a company with a share capital.

(ii) Where the subscribers signed the memorandum, they put opposite each of their names in handwriting "1 share", suggesting that the Foundation had shares. The annual return made up to 20th August 1988 referred to the company having a share capital of $5,000 divided into 5,000 shares of $1 each.

(iii) The articles of association do not specify the number of members proposed to be registered as required by section 15 of the Bahamian Companies Act for companies limited by guarantee.

158. A question arose, therefore, as to whether the Foundation was intended to be a hybrid company, namely one both limited by guarantee and with a share capital. However, the failure of the memorandum to stipulate the share capital, as required by section 5, must be fatal to its being a share capital company. Mr Todd and Mr Chivers shared that view, as did Mr Simms and Mr Moree. Mr Wilson alone maintained that it was a hybrid company, but he accepted that it was not possible from the constitution of the Foundation on the day it was incorporated to ascertain what its share capital was and that a company could not acquire a share capital other than through a formal process. The majority opinion of the experts was that this was a company limited by guarantee only, and we accept that advice.

159. Mr Chivers agreed with Mr Todd that clause 3(1) contains the main objects of the Foundation and, after careful consideration of sub-paragraph (7), agreed on balance that the remaining sub-paragraphs (2) – (8) were powers ancillary to the main objects. Mr Chivers was not prepared to

agree that clause 3(1) was exclusively charitable. That, he said, was a matter of charity law, but he agreed that the Foundation could only carry on the business of using distributions from trusts and in making donations to charities. Mr Wilson thought that clause 3(8) did permit objects beyond the charitable objects set out in clause 3(1), but we accept the advice of Mr Todd that clause 3(1) was exclusively charitable and that the remaining sub paragraphs (2) – (8) were powers ancillary to the main objects.

160. Mr Chivers supported by Mr Wilson and Mr Moree, and Mr Todd supported by Mr Simms, differed fundamentally on the question of whether distributions could be made to the members and, if they were nominees, to a third party, in particular Madame Crociani.

161. The difficulty with the memorandum and articles of association is that, notwithstanding its exclusively charitable objects under clause 3(1), there were no provisions to prevent leakage to the members, namely by expressly prohibiting the making of distributions to members, and providing that on a winding up, the surplus assets of the Foundation would go to charities and not to the members.

162. The directors of the Foundation had not applied under section 78 of the Bahamian Companies Act for a licence not to have the word "limited" in its name, for which it seems likely that such restrictions in its memorandum and articles of association would have been a prerequisite. If a licence had been granted, a condition might well have been imposed placing an external restriction upon the members from changing the Foundation's charitable objects.

163. Mr Todd was clear that a prohibition upon payments to the members was unnecessary, because the whole purpose of the Foundation was to receive donations and apply them in making charitable donations. He was taken aback and found quite extraordinary the suggestion that the directors could receive a donation from the Grand Trust, decide not to make any charitable donations out of it and instead, pay it to its members. The payment of any dividend to the members was, he said, quite inconsistent with the provisions of clause 3(1).

164. However, Mr Todd accepted Mr Chivers' proposition that despite it being a not-for-profit company, that did not prevent the company from making a profit, as whether or not a company made a profit was a matter of fact. It did not follow, said Mr Chivers, that a company which does not set out to make a profit will never, in fact, make a profit. The question was how the Foundation's income was, or ought to have been, or would have been accounted for. That, he said, was a mixed question of Bahamian law as regards the status of the assets received by the Foundation on the one hand and accountancy practice on the other. The existence of an objects clause in the form of paragraph 3(1) does not create any person a creditor of the company. In that respect, any

monies received by it beneficially might be regarded from an accounting standpoint as "profits" once all expenses of the Foundation had been paid for and, as a matter of company law, a company can make distributions out of profits.

165. There were three ways, he said, in which Madame Crociani could benefit from the Foundation:

(i) By the members changing the objects from charitable to non-charitable – by way of extreme example, to provide as an object the payment of money to Madame Crociani.

(ii) By the members directing the directors to make distributions out of profits to them, which they could then pass on to Madame Crociani.

(iii) By winding up the Foundation, which, in the absence of any provision to the contrary, would entitle them to any surplus after discharge of the company's debts.

166. Two cases were cited in support of the latter proposition. In re Merchant Navy Supply Association Limited [1947] 1 All ER 894 the memorandum of a private company provided that its income and property should be applied solely towards the promotion of its objects and that no portion thereof should be transferred, directly or indirectly, by way of dividend, benefit or otherwise, to members of the company, but there was no provision, in either the memorandum or the articles, as to how the surplus assets should be applied on a winding up. It was held that these provisions did not exclude the express terms of the Companies Act 1929 section 247, which provided that the property of the company on its winding up after satisfaction of its liabilities, shall, unless the articles otherwise provide, be distributed amongst the members according to their rights and interests in the company.

167. There is an equivalent provision in section 136(1) of the Bahamian Companies Act, the implication being that the not-for-profit provisions within the memorandum of the Foundation did not override the express words of section 136, and there was nothing in the memorandum and articles of association providing that, on a winding up, the property of the Foundation should be distributed other than to the members.

168. Liverpool and District Hospital for Diseases of the Heart v Attorney General [1981] Ch193 concerned a company limited by guarantee, the main object of which was the provision, maintenance and managing of hospitals. Its memorandum did provide that on a winding up its assets would not be distributed amongst its members, but should be transferred to an institution or institutions having similar objects to those of the association. There was, however, no

corresponding provision in its articles of association. There were three issues. Firstly, were the surplus assets in question the property of the association which fell to be dealt with by the liquidator in accordance with section 265 of the Companies Act 1948? Secondly, if the answer to the question was yes, were members entitled to such surplus assets by virtue of section 265 and thirdly, if the members were not entitled to such surplus assets, has the court jurisdiction to order a *cy-près* scheme and, in the exercise of its discretion, should it do so?

169. In relation to the first issue, it was held that a company formed for charitable purposes, although in an analogous position to that of a trustee, was not in the strict sense a trustee and therefore it was both the legal and beneficial owner of its assets. Accordingly, on the winding up of the association, its surplus assets were to be disposed of in accordance with section 265 of the Companies Act 1948. Section 265, when read in conjunction with section 302, provides that the net assets of the association must ***"unless the articles otherwise provide"*** be distributed among ***"the members according to their rights and interests in the company."*** Although there was nothing in the company's articles of association which provided otherwise, the members had contracted in accordance with the terms of the memorandum, to which the articles were subordinate, and the relevant provision of the memorandum must be deemed to be included in the articles for the purposes of section 265. The members were therefore excluded from any rights or interests in the assets.

170. In terms of the third question, the Court's jurisdiction to order a *cy-près* scheme arose not only where there was a strict trust, but, in the case of a corporate body, where under the terms of its constitution, there was a strict obligation to apply its assets for exclusively charitable purposes. Since the Association's constitution imposed the obligation to hold its assets for strictly charitable purposes and the provisions of the constitution did not oust the jurisdiction of the Court, a scheme would be directed on the footing of the property and funds of the Association were to be applied *cy-près.*

171. In his judgment, Slade J found startling the suggestion that the members were capable of having ***"rights and interests"*** in the company and of being ***"persons entitled thereto"*** for the purposes of section 265, when the memorandum contained provisions expressly prohibiting the distribution of the company's assets to the members, both during its existence and on a winding up, and further there were provisions in the memorandum expressly directing the transfer of the company's assets to similar charitable institutions on a winding up. There are no such express provisions within the constitution of the Foundation, implying that the members of the Foundation did have rights or interests in it, pursuant to section 136 of the Bahamian Companies Act, although one might still question what interest the members could have, bearing in mind its charitable objects and that it was a not-for-profit company. Their rights do, of course, constitute

personal property, (section 24 of the Bahamian Companies Act) and as Mr Chivers says, clear words are required to take away a person's rights.

172. Mr Todd argued that there may well be constraints placed upon the way members of a charitable company exercise their powers. Reference was made to Charity Governance, 2nd edition, by Con Alexander, which says this under the heading *"Members' duties"* at paragraph 5.22 onwards: -

> ***"5.22 With one important exception, the legal duties of the members of a charity are not clear. This is due to the lack of any clear case-law in this area. While there are many cases dealing with the duties of shareholders in commercial companies, they do not clearly establish that a shareholder's powers must be exercised for the benefit of a company as a whole, and there are in addition no clear precedents in the context of charitable companies. The position in relation to charitable unincorporated associations is just as unclear.***
>
> ***5.23 The exception is the CIO,*** [Charitable Incorporated Organisation] ***as under the Charities Act 2011, the members of a CIO are obliged to exercise their powers in the way that they decide, in good faith, would be most likely to further the purposes of the CIO. The legislation does not specify what will happen as a result of any failure to comply with this duty, but a breach is likely to allow a claim to be made to the courts for an appropriate order.***
>
> ***5.24 While the position in relation to the members of other forms of charity is unclear, the courts are likely to impose a duty on members. This is consistent with the approach taken by the courts in relation to charities generally (often as part of its equitable jurisdiction) and also with the statutory duty imposed in relation to CIOs by the 2011 Act (which the courts may well refer to in making a decision). It would also be consistent with the approach taken by the Charity Commission, who regard members as acting in a fiduciary capacity. It is perhaps easier to see this in the case of the many charities who have corporate members (including companies, local authorities, other public bodies and other charities) appointed because they are stakeholders of the charity. However the Commission takes the view that members have a fiduciary duty, regardless of whether they are an individual or a corporate member."***

173. Whilst this is not expressed quite in the way that Mr Todd would have expressed it, it is consistent with the approach that he adopts, that is to say, that when you have a company with charitable

objects and it has been acting as a charitable company, are the members free or is there some constraint upon the way in which members of that company should exercise their powers? He thinks, supported by Mr Simms, that there is at least a good argument that members should seek to give effect to the charitable objects, certainly with the assets which are in the possession of the company at the time, although he accepted that there was nothing in Bahamian statutory framework to prevent the charitable objects of the Foundation being changed.

174. It would seem clear that at English common law, which would be followed in the Bahamas, a body with charitable objects can change its objects to non-charitable ones. In Inland Revenue Commissioners v Yorkshire Agricultural Society [1927] 1 KB611 at 633, Atkin LJ, in the context of a charitable unincorporated association, said as follows:

> ***"As it may dissolve itself, so I think it is fairly plain that it may, if it chooses, re-associate itself for other purposes, either by dissolving itself and forming itself into a society for another purpose, or it may be by adding to its objects, objects which are non-charitable, or by substituting for its objects an object which is non-charitable, instead of a charitable object".***

175. That position applied equally to companies with charitable objects and was only changed in England with the enactment of the Charities Act 1960, section 30(2) which provided that a company could not change its objects in order to apply sums it had received when it had solely charitable objects to non-charitable purposes. However, the company's ability to change its objects from charitable to non-charitable remained unaffected until 4th February, 1991, when section 30(A)(2) of the Charities Act 1960 was introduced by the Companies Act 1989. That provided that a company which was a registered charity could not change its objects without the consent of the Charity Commissioners. The Bahamas has no such statutory provisions.

176. Considerable time was spent on these and related issues, but we think we can avoid setting out the arguments in further detail, implying no disrespect to the very careful advice we were given by all of the experts in this area, because we think that the weight of authority favours the defendants, and that, using Mr Chivers' words, whilst the Foundation could be described as a conduit for the receiving and making of charitable donations, it was not a sealed pipe and that it would have been possible, although not without difficulty, for monies donated by the Grand Trust to the Foundation to have found their way to Madame Crociani, should the members of the Foundation and its directors have cooperated in that process and the trustees of the Grand Trust so intended.

177. What is not suggested by the defendants is that the trustees of the Grand Trust would make a donation to the Foundation in the expectation that it would be used for the purposes of making charitable donations pursuant to clause 3(1) of its memorandum and that Madame Crociani, through the members, would seek to ambush those monies in any of the ways suggested by Mr Chivers.

178. What is being suggested by the defendants is that the Foundation was inserted as a beneficiary as a vehicle through which Madame Crociani could benefit, and it was therefore the intention of the makers of the Grand Trust that it be so used. Under this scenario, the trustees would make a donation to the Foundation, not for the purposes of it being used to make charitable donations pursuant to clause 3(1), but for the benefit of Madame Crociani and in the expectation that the directors, under the authority of the members, would procure that outcome.

179. However contorted the process that would be used by the members and the directors to achieve this end, it is difficult to see who at the Foundation level would complain, in that the funds would not have been received for charitable purposes (arguably therefore of no interest to the Attorney General of the Bahamas representing the interests of charities) and the members and directors would have approved the payment to Madame Crociani.

180. Although we accept it would have been possible for the Foundation, as originally constituted, to have been used to benefit Madame Crociani in this way, it would have been a somewhat tortuous process and on any view, it was an entirely unsuitable vehicle for that purpose. The defendants put forward the alternative scenario that it was the intention of the makers of the Grand Trust to change the objects of the Foundation to non-charitable objects, should Madame Crociani decide not to become US resident or having done so, then ceased to be US resident. Indeed, she did leave the US before becoming US resident, and the objects were changed in 1991, when the Foundation was continued as an IBC with a share capital.

181. The persons who could have complained under either scenario would be the beneficiaries of the Grand Trust, on the basis that benefiting Madame Crociani through the Foundation was a breach of trust. That brings us back to the question whether this was the intention of the makers of the Grand Trust, a question we are required to determine from the provisions of the Grand Trust, set against the matrix of facts at the time it was executed. Before we do so, we feel we should record what Madame Crociani says about the role of the Foundation in her witness statement.

Madame Crociani's subjective intentions

182. The defendants have put forward these arguments as to how Madame Crociani might have been able to benefit from the Foundation, because of what she has said about her intentions, which were that she was assured that she could benefit, directly and indirectly, from the entirety of the assets of the Grand Trust, either through the Foundation, a mechanism by which she could get the trust assets back if she needed them, or through clause Eleventh. Reliant on this assurance, she gave instructions for the formation of the Foundation, described by her as her alter ego from the outset, although she has no recollection of being party to any discussions regarding it having charitable objects. Her witness statement is unclear as to whether the mechanism of the Foundation arose as a result of Mr Foortse's advice or those of her US tax advisers.

183. Madame Crociani places considerable reliance on Mr Stephen Kumble, a partner in Finley Kumble in 1987, to whom she had been introduced and with whom, according to Cristiana, she had a relationship.

184. Mr Kumble was not prepared to give evidence by video link from New York without an indemnity from Madame Crociani, which she was not prepared to give, and we were therefore left with his untested witness statement. He would appear to have had extensive involvement in the setting up of the Grand Trust, as evidenced by Finley Kumble's fee notes, but he makes it clear in his statement that he was neither a tax or trust lawyer at the time. It was Mr Zachary who advised on and drafted the trust deed. Mr Kumble said this at paragraphs 18 and 19 of his statement: -

> *"18 I can state with certainty that it was not Mme Crociani's intention to exclude herself from benefiting in any way from the assets placed into the Grand Trust. This would have made no sense at all, given that she intended to place her main, if not her only, income-producing asset into the Grand Trust.*
>
> *19 Indeed, to the contrary, Mme Crociani wished to have, and to continue throughout her life to have, a significant role in relation to the Grand Trust and to benefit from it. This was why she was named as one of the first trustees (which was unusual when setting up discretionary trusts like this). It was also why she gave clear instructions to Finley Kumble that, during her lifetime, she should remain able to benefit from the assets in the Grand Trust whether by way of principal or by way of income distribution. In return, Mme Crociani was told, before she executed it, that the Grand Trust allowed this."*

185. As to the Foundation, he says this at paragraph 22 and 23:

"22 … I recall that I travelled to the Bahamas with Madame Crociani and her daughters upon the incorporation of the Foundation, in order to meet people from Bank of America.

23 I am told that the Foundation's original objects were predominantly charitable but could be changed. I believe that this was on the recommendation of the representatives from Bank of America. I am not clear why they recommended this. It was not part of Finley Kumble's advice or estate plan that the entity should be charitable but as it seemed to do no harm we were happy to go along with this recommendation. I am absolutely certain that it was the intention of Mme Crociani that she would be able to benefit from the Foundation, particularly since at that time she was a young widow with two young daughters and had to plan an entire new life for her and her family."

186. He goes on to say that the Foundation had greater scope to benefit from the Grand Trust than either Camilla or Cristiana, although quite how he reaches that conclusion is unclear, bearing in mind it derives no support at all from the provisions of the Grand Trust deed itself. Money, he said, would be transferred into a bank account in the name of the Foundation, which would then transfer it to Madame Crociani. He was categorical that from the outset the Foundation was simply a conduit to transfer money from the Grand Trust to Madame Crociani.

187. We can place no weight upon Mr Kumble's statement, as it is so at odds with the tax planning that we find must have led to the Grand Trust. His account of the formation of the Foundation with charitable objects i.e. that it was a recommendation of Bankamerica representatives, and not of Finley Kumble, which he and Madame Crociani went along with as it did no harm, is risible, set against the important role that company was felt by both of them to have in providing benefits to Madame Crociani. It is, of course, untrue for him to state that the Promissory Note was her main, if not her only, income producing asset; she retained Ciset, which at that time was producing substantial dividends.

188. More fundamentally, the statements of both Madame Crociani and Mr Kumble are evidence of her subjective intentions in establishing the Grand Trust, which we cannot take into account in construing the Grand Trust deed.

FINDING ON THE KEY UNDERLYING ISSUE

189. The defendants contend that Madame Crociani was always intended to benefit from the Grand Trust, and that the Foundation was named as a beneficiary as the legal vehicle through which she could derive that benefit. They have to make that contention, from an examination of the Grand

Trust deed set against the matrix of facts without regard to any evidence of Madame Crociani's subjective intentions and of subsequent events.

190. Advocate Redgrave said it was highly improbable that someone as keen as Madame Crociani on controlling the family wealth would willingly have ceded control of the family's major income producing asset to a trust from which she could not benefit. Of course, she did not cede control of the family's major income producing asset to the Grand Trust as she retained Ciset.

191. He relied in part upon the character of Madame Crociani, and we have heard evidence that certainly in more recent times, she was someone who liked to control her family and the family wealth. We accept that control was very important for Madame Crociani but there is, of course, a difference between control of an asset and having a beneficial interest in it.

192. He rejected Advocate Robinson's suggestion that the settlement of the Promissory Note represented Madame Crociani's fulfilling her obligations to her daughters under the Mexico agreement to give them 20% of the shares in Ciset following an increase in capital, pointing out correctly, we think, that there is no evidence that the Mexico Agreement was ever put into effect.

193. He suggested that Madame Crociani had chosen the Bahamas for the location of the Foundation rather than nominating a US charity because it was not intended for charitable use. He said that to make the non-grantor trust work, she did not want it to be obvious. We accept that there is no evidence as to the choice of the Bahamas for the location of the Foundation, but the Grand Trust was to be a foreign trust (from the US standpoint) to be governed by Bahamian law, and a Bahamian corporate trustee, Bankamerica, was to administer the Grand Trust and the Foundation. It seems logical to us that the Foundation should therefore have been incorporated in the same jurisdiction, namely the Bahamas.

194. Advocate Moran said it was implausible to suggest that Madame Crociani in her mid-forties would settle into the Grand Trust a promissory note which she said was worth $61 million without being able to benefit.

195. We do not think it is improbable or implausible at all. The Grand Trust represented good tax planning in 1987, as both US experts agreed, but for that planning to work, Madame Crociani could not benefit directly or indirectly other than as a default beneficiary. Thus, as envisaged by Mr Allen in his memorandum, and as set out in the recital to the Grand Trust deed, the trust was established for her daughters, not for her, but she retained a great deal of control in that:

(i) As we have said, Madame Crociani retained ownership and control of Ciset, the income producing asset and the benefit of any capital appreciation of that asset. In particular, she controlled what dividends were paid up to Croci BV and whether Croci BV was able to and did pay any interest under the Promissory Note.

(ii) The Grand Trust deed recital relieved the trustees from any obligation to enforce their rights under the Promissory Note and she and Mr Cartia, the chairman and chief executive of Ciset, were two of the three original trustees.

196. It is not possible to speculate on what proportion of her wealth was represented by the value of the Promissory Note, because we have no evidence as to the value of Ciset, other than it generated very substantial dividends in the two years prior to the creation of the Grand Trust, the value of the art, the value of the properties and any other assets she owned and the amounts held in any bank accounts. The annual interest of 8% payable on the Promissory Note of 75 billion liras amounts to 6 billion liras, set against an annual dividend from Ciset for 1985 of 11.4 billion liras and for 1986 of 14 billion liras.

197. We find that in the Promissory Note, Madame Crociani had created a fixed interest paying asset for the benefit of her daughters, to which she would not need to have recourse to meet her own needs. The dividends she was receiving from Ciset way exceeded the amount of the interest payable and she retained ownership of the income producing asset, Ciset, as well as the other assets she had inherited from Camillo, so that she could control what dividends were paid up to Croci BV and the amount of interest that it would pay. The principal due under the Promissory Note was not payable for 30 years and there was no obligation on the trustees to enforce it in the meantime. In effect, she could turn the payment of interest under the Promissory Note on and off like a tap.

198. We do think that the sum settled into the Grand Trust did represent in part the discharge of her moral obligation, at least, to her daughters in respect of their inheritance from their father. The fact that her obligation was discharged through the creation of a Promissory Note rather than shares in Ciset itself seems to us to be of no consequence.

199. We accept that the constitution of the Foundation was not leak-proof so that the company itself, rather than its objects, could not be described as exclusively charitable, but it was a not-for-profit company limited by a guarantee, whose objects were exclusively charitable. Technically, it may have been possible for the Foundation to have been used to benefit Madame Crociani, but looked at objectively, the Foundation was a vehicle for charitable giving, and not for providing benefits to

its members and through them to Madame Crociani. As Mr Simms put it *"Was it fit for purpose*? *It would do the job. Is it the best drafting available? No."*

200. We accept the advice of the US tax experts that the fact that the Foundation's objects could be amended, as we have found they could, might have undermined the non-grantor status of the Grand Trust, but as Mr Christensen said, it would have been very difficult for the IRS to have worked this out. Both Mr Christensen and Mr Pfeifer, very experienced practitioners, (indeed, Mr Pfeifer had worked for the IRS for some years) and approaching the matter from a US tax perspective, had no reason to doubt its efficacy.

201. However, the fact that the constitution was not leak-proof does not mean that this was by way of deliberate design on the part of those making the Grand Trust deed, so that, contrary to the clear provisions of the Grand Trust deed, Madame Crociani could in fact benefit. We reject that suggestion. It would mean us finding that, contrary to the express terms of the Grand Trust deed, and the objects of the Foundation, Madame Crociani was in fact intended to benefit, and this just because, technically, it may have been possible for her to do so. Because something is technically possible, does not mean that is what the makers of the Grand Trust actually intended.

202. Mr Pfeifer advised that there was sufficient uncertainty surrounding the position of the Foundation for it to be reasonable for Finley Kumble, if they were so instructed, to create a structure from which Madame Crociani could benefit in the future – he said it would be aggressive tax planning but did not cross the line into fraud. As we said earlier, Mr Christensen advised that it would have crossed the line, but whether across the line or not, it seems to us that if you create documents which on their face show to the IRS or anyone else reading them that Madame Crociani is not a beneficiary other than in default, then that is what you have created. Madame Crociani is not a beneficiary of the Grand Trust other than in default and that is really an end to the matter.

203. Advocate Redgrave placed some emphasis upon the fact that Madame Crociani was not an excluded person in the way that we often see in standard discretionary trusts, which contain very wide powers to add beneficiaries, but we see no force in this in that:

    (i) In a more narrowly drawn unamendable trust such as the Grand Trust where there is no power to add beneficiaries, you are either a beneficiary or you are not. There is no need or requirement to exclude someone who is not named as a beneficiary.

    (ii) Madame Crociani was, in any event, to benefit from the Grand Trust in default in the event of all of her descendants pre-deceasing her.

204. When you set Madame Crociani's subjective intentions aside, and look at the terms of the Grand Trust deed set against the matrix of facts, there is nothing that would even hint at the possibility of the Foundation being used as a vehicle to benefit Madame Crociani, even if, technically, that could have been done in the ways envisaged by Mr Chivers.

205. The Grand Trust deed itself, the governing document, is clear that it was created for the benefit of Madame Crociani's daughters, and she is not a beneficiary of income or capital and cannot benefit other than in default of all of her descendants. The role of the Foundation, as per its constitutional documents, was to act as a conduit for charitable donations out of distributions made to it as an income beneficiary, or out of assets it might receive as the ultimate default beneficiary.

206. Accordingly, we find that the Grand Trust was not created with the purpose or intention of providing any benefit, directly or indirectly, to Madame Crociani, other than as a default beneficiary if all of her descendants were extinguished, and in particular we find that the Foundation was not included as a beneficiary as a means by which she could benefit.

207. We would observe, incidentally, that the defendants have worked on the assumption that the members of the Foundation were from the outset nominees of Madame Crociani, and therefore under her control. Advocate Redgrave said this must overwhelmingly be the case. There is evidence of the shareholders of the Foundation after its continuation as an IBC in 1991 being nominees of Madame Crociani, but there is no evidence that the members at the time of the execution of the Grand Trust were her nominees. For our part, and in the light of the US tax advice, we very much doubt that they would have been her nominees.

208. We make the additional point that if it had been the intention of the makers of the Grand Trust deed to allow Madame Crociani to benefit, contrary to the express terms of the Grand Trust deed, then why was the Foundation's role as an income beneficiary tied to the life of her daughters, and not the life of Madame Crociani? The death of Cristiana would have terminated her trust, and the interest of the Foundation. The same applies to Camilla's trust.

209. We ought, for completeness, make reference to a somewhat strange document put in evidence by Advocate Redgrave to Claudio, namely a Fiduciary Agreement made on 24th December, 1987, between Madame Crociani and Mr Cartia, apparently representing the trustees of the Grand Trust (defined as "the Fiduciary") and Madame Crociani (defined as "the Principal"). It was drawn up in English and is subject to Dutch law, although Mr Foortse had no part in it. It purports to provide that the Promissory Note will be held by the Fiduciary for the Principal. Bankamerica is not a party to it. Claudio had never seen it before and neither Madame Crociani nor Mr Kumble make

any reference to it in their witness statements. None of the parties relied on or referred to it in their submissions and we did not take it into account.

210. Although subsequent events are not an aid to construction, having reached this conclusion we take comfort from the following:

(i) At an extraordinary general meeting of the Foundation held on 11th January, 1988, clause 3(1) of the memorandum was amended so that donations could be made to any charity in the world, rather than just in the Bahamas, showing that those involved were giving consideration to the Foundation's charitable role. It is difficult to see why they would have bothered with such an amendment if the purpose of the Foundation was to benefit Madame Crociani.

(ii) No distribution has ever been made to the Foundation, whether for charitable purposes or for Madame Crociani, and so it has never been used for the purpose she now maintains it was included as a beneficiary.

(iii) When Madame Crociani created the Fortunate Trust in 1989 (we discuss its provisions in more detail shortly), the Foundation was included as the ultimate default beneficiary, and this of a trust of which she was a named and indeed (as we shall see) principal beneficiary. That indicates that at that time, when it was a not-for-profit company limited by guarantee with exclusively charitable objects, its charitable role extended beyond the Grand Trust. This would be consistent with an intention on Madame Crociani's part, one shared, we suggest, by many settlors, that in the event of the demise of the whole of her family, these assets would be used for charitable purposes.

(iv) No distributions from the Grand Trust at all were made until 1993, and then to the daughters, who were aged 22 and 20, in relatively small amounts. The only evidence we have of Madame Crociani benefiting from distributions made to her daughters arises many years later in 2008, i.e. the distributions which Cristiana seeks to impugn, demonstrating that Madame Crociani had no need to have recourse to the assets of the Grand Trust.

(v) Payments of interest on the Promissory Note have instead been used to build up what became a substantial portfolio of investments, and in the early years, the Grand Trust invested some $8.4 million in acquiring art through its wholly owned company, Twenty-Three Investments Limited, art no doubt selected by Madame Crociani.

(vi) Notes prepared by Chase Bank in 1992 refer to the beneficiaries of the Grand Trust as "issue". There is no reference to either the Foundation or Madame Crociani as a beneficiary.

(vii) On 24th January, 1992, Madame Crociani wrote a letter of wishes to Chase Bank on its appointment as corporate trustee in place of Bankamerica, in which she makes no reference to her benefiting from the Grand Trust through the Foundation. She wrote another letter of wishes to Banque Paribas on 2nd March, 1999, upon its appointment as corporate trustee, expressed to be confidential, to be shown to no one other than the beneficiaries. Such a letter, the purpose of which is to tell the trustees confidentially of her intentions in creating the Grand Trust and how she would wish them to exercise their powers, is the ideal opportunity for Madame Crociani to explain her intention that she should benefit through the Foundation, bearing in mind how important she and Mr Kumble say that was to her. This is what she actually says:

"The Grand Trust

I write this letter to you in the knowledge that you will treat the contents herein as confidential. By confidential I mean that you should not show this letter to any other person except the beneficiaries of the Trust.

Although I realise that the trustees have full discretion over the affairs and assets on the Grand trust, I should be grateful if you would consider the following as being my wishes regarding the application of the Trust Fund.

It has always been my intention that the Trust Fund of the Grand Trust should be for the benefit of my daughters in equal shares and it would be my wish that in the event of my death, if either of my daughters should approach you requesting funds, you should make available immediately up to 15% of the Trust Fund to each of them, should they so request, this request to be made in writing. The balance of the Trust Fund should be held equally for their benefit and I would wish you to discuss with each of them the management, administration and investment of the Trust bearing their name and also discuss with them how and when funds should be made available to them. While I would hope that there would also be funds available for my grandchildren, it is my principal concern that these funds should be for the use and benefit of my daughters.

It would also be my wish that you discuss with my daughters and, as far as you feel able, take account of their thoughts and wishes in general regarding each

Trust and, for example, in such matters as who will advise on investment of the Fund, where the Trusts' assets will be located, who will act as bankers to the Trust and who might act as Trustee, whether as an additional individual or in the case of retirement of Paribas as the Corporate Trustee."

This confidential letter written years before the family breakdown is in our view a surer guide to Madame Crociani's true intentions and it is, of course, consistent with the provisions of the Grand Trust deed itself.

(viii) The dividends paid by Ciset were large, and greater than the interest due under the Promissory Note, such that in 2002 there was a pre-payment of capital of some €15 million.

FINDINGS ON THE CONSTRUCTION OF CLAUSE ELEVENTH

211. Having set out the matrix of facts and our finding on the key issue, we now turn to our findings on the construction of clause Eleventh, the power used to make the 2010 appointment.

212. We have the benefit of an opinion from Mr Nicholas Le Poidevin QC of New Square Chambers, obtained by the former trustees in July 2012 following receipt of Bedell Cristin's letter before action of 3rd July, 2012. He was instructed on the following, incorrect as we have found, basis:

(i) The Foundation was established for the sole benefit of Madame Crociani and its inclusion as a beneficiary was to allow her to continue to benefit from the assets settled into the Grand Trust.

(ii) It was important that she should be able to benefit indirectly since all her money was to go into the Grand Trust – she was a young single mother, a widow, with two young daughters to support.

(iii) It was intended that clause Eleventh would allow transfers to a trust of which Madame Crociani was a beneficiary.

213. Working on that incorrect basis and having identified the same two possible constructions to clause Eleventh that we had identified earlier, he made the point that the plaintiffs' construction did not prohibit Madame Crociani from having any interest under the recipient trust at all. Quoting from paragraph 18 of his opinion:

"18 What is prohibited on their construction is a transfer in favour of or for the benefit of the settlor. That is, the trustee must be actuated by benefiting one of the other beneficiaries. It does not automatically follow that the settlor is prohibited from any interest under the recipient trust. She is not in the position of the familiar 'Excluded Person'. It is, indeed, orthodox to say that a power exercisable for the benefit of X may be exercised by paying money to Y, a non-object, if that is beneficial to X – e.g. if X wishes to help Y – and the trustee is motivated by the benefit to X. So even if Bedell Cristin are right in their construction, it is a non sequitur to say that it precludes the settlor from being a beneficiary of the recipient trust. What it precludes is an exercise of the power with a view to benefiting her."

214. We will come to his opinion on the 2010 appointment shortly, but the evidence of the US tax experts gives rise to a further, more restricted, construction of clause Eleventh, namely that the recipient trust must not be *"in favour or for the benefit of"* the settlor in any way and thus prohibits a distribution to a trust of which Madame Crociani is a beneficiary. Mr Le Poidevin did not have the benefit of the US tax advice which we have received, and in that context, the US tax experts agreed that excluding Madame Crociani from benefit under the recipient trust would be consistent with the intended non-grantor trust status of the Grand Trust.

215. There are therefore three possible constructions of clause Eleventh:

(i) The first is that the recipient trust must not be *"in favour or for the benefit of"* Madame Crociani in any way and thus prohibits a distribution to a trust of which Madame Crociani is a beneficiary (the "US construction").

(ii) The second is that the recipient trust must be *"in favour or for the benefit of"* Cristiana, Camilla or (if it is a beneficiary for this purpose), the Foundation – i.e. permitting a distribution to a trust for the benefit of one or more of them, notwithstanding that Madame Crociani may receive some ancillary benefit ("the wider construction").

(iii) The third is that the recipient trust must be a trust *"in favour or for the benefit of"* Madame Crociani alone, or *"in favour or for the benefit of"* Madame Crociani and one or more other beneficiaries (the "defendants' construction").

216. Advocate Redgrave submitted that set against the factual matrix as put forward by the defendants, the defendants' construction makes most sense. However, based on the factual matrix as we have found it to be, the defendants' construction makes no sense at all. Only the US construction or the wider construction are consistent with the Grand Trust deed as a whole set

against the matrix of facts, and as we said earlier, the defendants' construction would be entirely inconsistent.

217. Accordingly, we agree with Advocate Robinson that set against the factual matrix as we have found it to be, clause Eleventh prohibits any transfer to a trust of which Madame Crociani is a beneficiary. In other words, the US construction is the more consistent with the intentions of the makers of the Grand Trust in 1987 as we have found them to be. If that is too cautious an approach, then the wider construction applies, but we reject the defendants' construction.

CRISTIANA AS PRINCIPAL BENEFICIARY

218. During the course of the hearing, the Court had referred to Cristiana as the principal beneficiary of her trust, and Advocate Redgrave was concerned that the Court should bear in mind that she was no more than an object of the power to pay income or capital, that interest being liable to be overridden by an exercise of the power in clause Eleventh, which exercise may not have been in her favour.

219. We accept that Cristiana is not defined as the principal beneficiary of her trust, but in our view, it is an apt description of her interest under her trust, which we will continue to use. We say this because:

(i) In the recital Madame Crociani records that she intended to set aside a separate trust for Cristiana.

(ii) She was one of only two objects of the power to pay income. As we shall see later, in our view, she became, in practice, the only object of that power.

(iii) She was the only object of the power to pay capital.

(iv) On her death, she had the power to appoint the capital by will.

(v) Under clause Third (A), the trustees had the power to pay capital to her for any reason or purpose without regard to her other resources or needs. The interests of Cristiana's children were to be subordinate to her interests.

(vi) Under clause Third (B), the trustees had the power to pay income to Cristiana without considering her other resources.

(vii) There is no power to add or remove beneficiaries and the trust could not be amended.

220. We accept that clause Eleventh is expressed as overriding, and could therefore be exercised to override the earlier trust provisions, but it would not have been within the reasonable expectations of the settlor, as we have found them to be, for that power to be used in a way that was not beneficial to Cristiana and her children as regards her trust, unless there were unusual circumstances.

221. We think any trustee of the Grand Trust would inevitably and, indeed, should regard Cristiana as the principal beneficiary of her trust.

THE CONTINUATION OF THE FOUNDATION

222. At the first annual general meeting of the Foundation, held on 6th August, 1987, Madame Crociani was appointed an officer (president) and a director, alongwith members of the staff of Bankamerica. In late January 1988, the original members were replaced by members of staff of Bankamerica and Mr Cartia was appointed as an officer (vice-president) and a director, together with Mr Kumble. Thus, immediately after the creation of the Grand Trust, the trustees were fully represented within the Foundation.

223. At some point between 1989 and 1991, the precise date is not known, Madame Crociani decided to leave New York and return to Europe. Cristiana says it was in early 1991. Madame Crociani says it was in 1990, but before the creation of the Fortunate Trust to hold her art collection – that was drafted by her US legal advisors and created on 8th September, 1989, with Banque Bruxelles Lambert Trust Company (Jersey) Limited ("Banque Bruxelles") as the first trustee. Madame Crociani and Mr Cartia ceased acting as officers and directors of the Foundation on 8th August, 1989, just before the creation of the Fortunate Trust.

224. On 26th June, 1991, the Foundation was continued as an IBC pursuant to the International Business Company Act (No 2) of 1990 ("the IBC Act"), adopting non-charitable objects in place of its previously charitable objects and creating a share capital. There is no contemporaneous evidence explaining why this was done and neither Madame Crociani nor Mr Kumble make any reference to it in their witness statements.

225. Mr Simms advised that in his view, the continuation had not been validly carried out under the provisions of the IBC Act, his principal objection being that the directors did not have the power to alter the memorandum without a special resolution of the members, and indeed, that there may not have been a quorum of validly appointed directors when the resolution was passed on 25th June, 1991.

226. Mr Moree had been instructed to respond to these points, but we do not think it is necessary for this Court to go into these issues for the following reasons:

(i) It would seem that the records from that time are not complete and we should therefore be cautious about making findings of fact about events so long ago. There may well be other documents we have not seen. It is unlikely, in our view, that any of those involved in this continuation in 1991, even if available to give evidence, would have any memory of it.

(ii) Whatever conclusions we may come to, we cannot make any orders affecting the status of a Bahamian company. There is a certificate of continuance in existence issued by the acting Registrar General of the Bahamas, which is *prima facie* evidence of compliance with all of the requirements of the IBC Act. In our view, any challenge to that certificate can only take place before the courts of the Bahamas.

(iii) The continuation has remained unchallenged by a court for over 25 years and in those circumstances, and in the light of the incomplete documentation, we agree with Advocate Redgrave that the presumption of regularity or *omnia praesumuntur rite esse acta* is engaged. In Re Harper [2009] EWHC 1369 (Ch) at 47, the English High Court relied on the presumption in circumstances where there was no evidence that members of a social club had challenged certain actions taken by the club over a number of years. More recently, the presumption has been explained by Lord Drummond Young in Alexander v Patterson & Sim [2015] CSIH 96 at 19 – 21.

> ***"[19] In considering transactions that have taken place a significant time in the past, there is a general presumption that all necessary procedures have been properly followed, the result being that the burden of proving otherwise rests on any party who challenges the transaction. The presumption is generally referred to by the Latin maxim omnia praesumuntur rite esse acta, or in the full version found in Trayner's Latin Maxims and Phrases, omnia praesumuntur rite et solemniter acta esse: all things are presumed to have been done duly and in the usual manner. The principle is of wide application, and has been applied to commercial transactions … The presumption is of***

great practical importance. In Morris v Kanssen [1946] AC 459, Lord Simonds referred to the maxim, which he described as one of the fundamental maxims of the law, and its many applications, and continued "The wheels of business will not go smoothly round unless it may be assumed that that is in order which appears to be in order." That appears to us to be very clear.

[20] In our opinion four main reasons may be said to justify the application of the maxim. First, in practice those who carry out transactions generally ensure that at least the substance of the transaction is properly decided and recorded. Consequently, any defect in procedure tends to be a matter of form rather than substance. The maxim thus reflects the underlying principle that substance is more important than form. Secondly, if there is a substantial objection to the transaction, it is likely that there will be an immediate challenge, at least on an informal basis. The result is that any defects in procedure that are serious and material, in the sense that they affect the end result, are likely to be addressed at the time. Thirdly, when a considerable time is allowed to pass after a transaction has been carried out evidence will frequently be lost. …

[21] Fourthly, and perhaps most importantly, transactions do not stand alone. The parties to them, and third parties affected by them, rely on the existence and validity of a transaction in their future dealings. If a transaction were open to challenge, possibly long after it was carried out, on the ground that it was impossible to prove that proper procedures had been used, all subsequent dealing that proceeded on the faith of that transaction would also be potentially open to challenge. That would be an intolerable situation, both in the commercial world and elsewhere."

(iv) Everyone involved in the Grand Trust since 1991 has proceeded on the basis that the necessary steps to convert the Foundation to an IBC have been taken and have acted accordingly. As Advocate Redgrave said, the consequences of now seeking to *"unscramble the eggs",* a term employed by Mr Moree, would be wide ranging.

227. We accept, therefore, that the Foundation has been continued as an IBC, but what are the consequences of the Foundation ceasing to be a not-for-profit company limited by guarantee with an exclusively charitable objects clause? The defendants say that as from 1991, distributions can be made by the trustees to the Foundation from which Madame Crociani can benefit. We do not take that view.

228. The effect of the continuation is to remove from the trustees of the Grand Trust their ability to make distributions of income to the Foundation for charitable purposes as originally intended and it means that in the case of the Foundation receiving the trust fund as the ultimate default beneficiary, those assets will not now be used for charitable purposes, but will revert back to the benefit of Madame Crociani's estate, if she is still the owner of the shares, or to the benefit of whoever might own the shares at the time. In other words, the Foundation has lost the role intended for it within the Grand Trust and cannot now seek to benefit from it, as the exercise of any power in its favour would simply be for the benefit of its shareholders, whoever they may be from time to time, and it was never intended that the shareholders from time to time of the Foundation should benefit from the Grand Trust. In particular, distributions cannot be made to the Foundation or powers exercised in its favour whilst it is beneficially owned by Madame Crociani, as she is not a beneficiary of the Grand Trust whilst any of her children and their descendants are in existence. That is why we think that since 1991 Cristiana has in practice been the sole income beneficiary of her trust.

APPOINTMENT OF MR FOORTSE AS CO-TRUSTEE

229. Mr Foortse first met Madame Crociani in New York in December 1988, when she asked him to become a director of Croci BV, alongside the corporate director which administered the company. He described it as an undemanding role. It was a holding company which received dividends from Ciset and made payments of interest under the Promissory Note and dividends to Croci NV. He made it clear in evidence that it was Madame Crociani who made these decisions. From 1990, Mr Foortse spoke to Madame Crociani more frequently, as she had moved back to Europe, and was living in an apartment in Monaco.

230. On 8th October, 1993, Madame Crociani was appointed by Chase Bank as "investment counsellor" to the Grand Trust and on 23rd July, 1994, the full exercise of the trustees' investment powers under the Grand Trust was delegated to her and to the best of our knowledge never revoked.

231. In 1996, Madame Crociani asked Mr Foortse for assistance in protecting her shares in Croci NV prior to her second marriage. He drafted an agreement by which she transferred her title to the shares to her daughters, retaining the usufruct. This was executed on 23rd January, 1996, by Madame Crociani and her daughters.

232. Mr Foortse said he was telephoned by Madame Crociani in March or April 1999 and told that she had decided to change the proper law and trustee of the Grand Trust, and asked whether he would be willing to serve as her co-trustee. She explained to him that she wanted a third trustee

in addition to herself and the corporate trustee, in case the corporate trustee proved to be hostile, and she did not want there to be any risk that she would lose control of the trust. He said he was prepared to help as a favour to her. She gave him a copy of the trust deed and explained that she and her daughters were beneficiaries, and as we said earlier, when he saw the Foundation named as a beneficiary, he assumed it had been interposed for her benefit on the advice he had given Mr Zachary in 1987. However, he said there was no discussion about the role of the Foundation.

233. He told us that he did not go through the trust deed with her but he read it himself and found some parts difficult to understand. He did not get any advice on it either then or thereafter.

234. Mr Foortse's evidence as to Madame Crociani's wishes in respect of the Grand Trust, and to her being a beneficiary, is at odds with the letter of wishes she wrote to Banque Paribas, his prospective co-trustee, on 4th March, 1999, extracts of which we have set out earlier and which make no reference to her being a beneficiary or indeed to the Foundation. He had never seen that or the earlier letter of wishes written to Chase Bank.

235. A meeting took place between Madame Crociani, Mr Foortse and representatives of Banque Paribas at her apartment in Monaco on 7th April, 1999, and the file note made by Banque Paribas records this: -

> *"a) Deed of Appointment*
>
> *Once again the client has made a last minute change to the final document. As she is a co-trustee with PB Trustee [Banque Paribas], "in actual fact" her decisions are shared with us. As she is not in a majority position due to the very nature of the trust (two co-trustees), the client did not feel comfortable about possibly taking a decision which would have led to a change in trustee. A letter of comfort from PB Trustee stating that we would have resigned upon the first request from the client was not sufficient for her.*
>
> *SHE HAS THUS HAD MR. FOORTSE INCLUDED AS AN "ADDITIONAL CO-TRUSTEE", justifying her decision by explaining that he was a man, according to her, who was exceedingly trustworthy and would always make decisions in line with her own. Hence, she has a majority in terms of any decision made about the trust."* (Banque Paribas' emphasis)

236. Mr Foortse did not deny that this may have been said, and in his presence, but he told us it did not mean that he would always say yes to Madame Crociani. He saw himself as a man who took his own decisions.

237. Mr Foortse and Banque Paribas (later to become BNP Guernsey) were appointed co-trustees along with Madame Crociani on 9th April, 1999. From that time, neither Banque Paribas (and then BNP Guernsey), nor its successor, BNP Jersey, sought a meeting with Mr Foortse and indeed he only met Mr Le Cornu of BNP Jersey after the 2010 appointment. He had little or no communication with BNP Guernsey or BNP Jersey, save when his signature was required to written resolutions. It would seem that his communications were predominantly with Madame Crociani.

238. Mr Foortse had no previous experience of acting as a trustee and he comes from a civil law jurisdiction. He said he understood that a trustee's duties were to preserve and enhance the trust fund and to act in the best interests of the beneficiaries. That, of course, presumes a proper understanding of who the beneficiaries are. He told us that he had a business contact in Guernsey who was a trustee of several trusts, and from him he gained a general knowledge about trusts.

THE 2010 APPOINTMENT

239. As we said at the outset, this appointment lies at the heart of this case and in order to set it in its proper context, we need to start in 2001, when Mr Le Cornu of BNP Jersey first became involved.

240. Mr Le Cornu has extensive experience working in bank owned trust companies. In 1999, he became deputy general manager of BNP Jersey, becoming general manager in 2003 and finally, chairman in 2011. He left BNP Jersey in 2014.

241. The involvement of BNP Jersey with the Grand Trust arose as a result of the acquisition of the Paribas Group by the BNP Group in 1999 and the subsequent merger of the two groups in 2000. At the time of the merger, Banque Paribas operated a licensed trust company in Guernsey, which was managed by the Ansbacher Group. This trust company subsequently became known as BNP Paribas International Trustee (Guernsey) Limited, which we have defined as BNP Guernsey.

242. Following the merger, it was decided within the BNP Group that there should be only one BNP Paribas trust operation in the Channel Islands, namely BNP Jersey. The intention was that following consultation, as appropriate, BNP Guernsey would retire from those trusts of which it

was then trustee in favour of BNP Jersey, provided that those trust structures complied with BNP Jersey's due diligence requirements. Mr Le Cornu took the lead in determining which of the trust structures managed by BNP Guernsey could be transferred to BNP Jersey.

243. The Grand Trust and Fortunate Trust structures were the largest trust structures managed by BNP Guernsey at that time and the transfer was very difficult, taking some six years to complete.

The Fortunate Trust

244. At this stage, it is necessary to say a little about the Fortunate Trust, which Madame Crociani had established on 8th September, 1989, to hold her valuable art collection. She was the settlor and its principal provisions were as follows:

(i) The trust fund was to be managed and invested as she directed in writing. She could also designate any company as a "special company" and if so designated, the trustees could only act on her directions in relation to that company and its assets;

(ii) She could direct distributions of income to her and she could withdraw any or all of the capital and revoke, alter, amend or modify the trust deed;

(iii) On her death, the trust fund, (comprising a Fund A and a Fund B) devolved upon her daughters in stages, one half at 25 years of age and the balance at 30 years of age; and

(iv) The ultimate default beneficiary was the Foundation.

245. We can appreciate that a valuable art collection such as this is a risky sole asset for a trustee to hold within a standard trust, because of the duty to diversify and the lack of liquidity to meet the costs of insurance and storage, let alone fees. Under the terms of the Fortunate Trust, the trustee was effectively reduced to that of a bare custodian of the art during Madame Crociani's lifetime, with little or no fiduciary risk. We note that in practice the costs of its administration were paid over the years by loans from the Grand Trust.

Initial review

246. Mr Le Cornu went to Guernsey in June 2001 to review the files of the Grand Trust and the Fortunate Trust. BNP Guernsey, managed by Ansbacher, had no direct relationship with

Madame Crociani. Her dealings were predominantly with the relationship manager at BNP Suisse, which held the Grand Trust's very substantial portfolio, and as previously noted, the trustees' investment powers had been fully delegated to her. BNP Suisse regarded her as an important client. That pattern of dealing continued after BNP Jersey's appointment as trustee.

247. Mr Le Cornu had a number of concerns about BNP Jersey becoming a trustee, as reflected in internal e-mail exchanges:

(i) The fact that, if appointed, BNP Jersey would be a co-trustee with Madame Crociani and Mr Foortse and therefore in a minority. It was not the policy of BNP in Jersey to act as co-trustee and he could envisage issues arising which would place BNP Jersey in a difficult position. His impression at an early stage was that Mr Foortse was content to agree any steps in relation to the Grand Trust of which Madame Crociani approved. He confirmed in evidence that Madame Crociani had told him as much when he first met her in 2002, and asked her about majority decisions; she replied *"And that's why I have Paul".*

(ii) The fact that Madame Crociani had been delegated the trustees' investment powers over what was now a very substantial portfolio. He doubted whether such an appointment would be regarded as prudent and it would require a majority decision to revoke those powers.

(iii) The Grand Trust was not a suitable vehicle for holding the art it had acquired through Twenty-Three Investments Limited (quite separate from the art held within the Fortunate Trust).

248. He also had concerns over the suitability of the Grand Trust, some of the terms of which he felt were obscure, and in particular, their inflexible nature, which he did not feel met the family's current needs. He said such provisions were most unusual in his experience – he had never seen anything like it. He thought it had been set up in this way on Dutch tax advice. He was also concerned about the possible tax, and in particular Italian tax implications for the beneficiaries, particularly in the event of the death of Madame Crociani.

249. Whilst his understanding was that the source of the wealth was Camillo, rather than Madame Crociani, he was aware that she wanted as much control as possible. He was led to believe from the outset that she could benefit from the Grand Trust through the Foundation, interposed for tax purposes which no longer had any relevance, and so he approached the Grand Trust on that basis.

250. We think this misunderstanding as to the role of the Foundation arose because of the long time that had elapsed since the Grand Trust was created, the absence of any documents or file notes handed down by Bankamerica explaining the original rationale, and the fact that by this time, the Foundation was an ordinary share capital company, beneficially owned by Madame Crociani – the inference being that it must have been there for her to benefit from.

251. Mr Le Cornu's assumption that Madame Crociani was able to benefit from the Grand Trust can be seen in his internal e-mail of 8th June, 2001, where he says at point 3:-

> *"3 I don't think the use of the Bahamian company serves any useful purpose in these times (in fact if anything it only complicates matters.) Either Mdm wants to be a beneficiary or she does not. She does not appear to have any difficulty being a beneficiary of the F trust [Fortunate Trust] and also does not appear to have received any distributions."*

And at point 5

> *"5 The F trust reserves in Mdm the power to direct the Trustees with regard to income and on investments. It also allows her to nominate companies as Special Companies in which the Trustees are not to become involved. This would appear to me to be a far better solution to Mdm's requirements than that which exists at present for the G Trust. I would therefore suggest that consideration be given to the appointment of the assets held in the G Trust onto a new trust drafted along similar lines to the F Trust. Any company holding paintings should be designated a special company. This should have the effect of reducing the fiduciary risk, reducing the potential for a successful attack on the trust whilst also providing Mdm with the powers she wishes to retain."*

252. However, he clearly appreciated early on the difficulties in the use of clause Eleventh, as in an internal document he produced on 21st September, 2001, he says this:

> *"I do not believe that the Grand Trust is the most appropriate structure for holding pieces of art, the Fortunate Trust being more suitable. Unfortunately the only method for removing assets from the Grand Trust and transferring these to the Fortunate Trust is via a distribution to Mdm's daughters. Direct transfers to the Fortunate Trust not being possible due to the fact that Mdm is a beneficiary thereof."*

253. He also expressed surprise that Madame Crociani was not named as a beneficiary of the Grand Trust *"why is Madam not named as a beneficiary of the Grand Trust?"* He went on to say:

> *"I note that the terms of the Fortunate Trust are quite different. This being a revocable trust where Mdm is not a Trustee but has retained a number of powers and is also a beneficiary. It would appear that The Fortunate Trust is a better representation of Mdm's wishes and my proposal would be to restructure the Grand Trust upon similar lines."*

254. It was significant to Mr Le Cornu that Madame Crociani had not been excluded as a beneficiary of the Grand Trust and he felt it had been drafted to give the impression that she was not a beneficiary and this for now obsolete tax purposes.

255. In a telephone conference with Madame Crociani and representatives from BNP Suisse on 26th September, 2001, Mr Le Cornu pointed out to her that if either daughter passed away, the relevant trust would vest in the grandchildren. Madame Crociani, he said, expressed gratitude to him for pointing this out. He recalls her saying to him *"Nobody has said this to me before. It's not what I intended and not what I want."*

256. What is clear from these documents is the predominance given by him to fulfilling the wishes of Madame Crociani, as opposed to the wishes of her daughters, who by then were aged 28 and 30 and who were the principal beneficiaries of their respective trusts within the Grand Trust.

257. On 26th September, 2001, he sent through a further note proposing the transfer of all of the Grand and Fortunate assets into two new trusts. He explained his view that Madame Crociani would be the beneficiary of the Fortunate 2 Trust and should not be a beneficiary of the Grand 2 Trust, although an option was to leave her off as a beneficiary at the beginning, but allow the trustee, with the permission of a protector, to add her as a beneficiary at a later date.

Advice of Mourant du Feu & Jeune

258. Mr Le Cornu then took advice from Advocate Cyman Davies of Mourant du Feu & Jeune and e-mailed Madame Crociani on 3rd October, 2001;

> *"Dear Mdm,*

Following on from our telephone conversations of yesterday I have given below some further suggestions as to how we may proceed. I have discussed the position of the G.2 Trust with Jersey counsel and he has confirmed that if the transfer of assets were made direct then it would not normally be possible for the G.2 Trust to be revocable. This is due to the restriction in Clause 11 of the G Trust which states that whilst the trustees are able to transfer assets to another trust, they cannot transfer them to one in which the settlor of the G Trust is a beneficiary."

It is clear from this that Advocate Davies had recognised the restriction in clause Eleventh and indeed, had adopted the narrower US construction.

259. Two options were put forward: -

(i) A distribution to the daughters for them to re-settle; or

(ii) A transfer to a new trust, which would have the disadvantage that it could not be revocable, Madame Crociani would not be able to be named as a beneficiary (at least in the beginning) and it would not be able to last any longer than the Grand Trust.

260. Madame Crociani indicated that she wanted to take the second option and Advocate Davies was formally instructed to prepare the necessary documentation. The new trust was to have the following characteristics: -

(i) BNP Jersey to be a sole trustee;

(ii) Madame Crociani to be the protector with extensive powers; and

(iii) To be discretionary with the beneficiaries being the two daughters and their issue.

Advocate Davies was asked to confirm that the trust could not be revocable and that Madame Crociani could not be named as a beneficiary, although he was asked whether it was possible for her to be added at a later stage.

261. Following a meeting with Advocate Davies, Mr Le Cornu e-mailed Madame Crociani on 10th October, 2001. Advocate Davies had favoured a distribution to the daughters and three options were put forward in order of Advocate Davies' preference:

"1. Distribution of assets to your daughters jointly. Your daughters would then be able to resettle these assets as described above. You would be able to be a named beneficiary of the G2 Trust.

2. Distributions of the portfolio directly onto the new trust. The new Trust would be settled by you, irrevocable and you would not be able to be a named beneficiary. (Counsel has also advised that it would not be possible to add you at a later stage). The CC Foundation, however, would be able to be a beneficiary.

3. Distribution of the assets to your daughters. Your daughters could choose to transfer these to yourself. You would then be able to settle these upon a new trust which could be revocable." (our emphasis)

262. It would seem that Advocate Davies had not been asked to advise on the role of the Foundation as a beneficiary of the new trust, and whether it could be used to benefit Madame Crociani, even if she was not a beneficiary.

263. On 19th November, 2001, Advocate Davies provided a first draft of a new Grand Trust and he gave this advice: -

"Grand Trust

…

I understand that the intention is for a substantial part of the trust fund of the existing Grand Trust to be transferred across, by the existing trustees, to BNP Jersey as trustee of this new trust.

As discussed with you, the terms of the existing Grand Trust do provide for re-settlement but only for the benefit of the beneficiaries of the existing trust. It is not obvious why the settlement, which has the effect of taking away substantially the interests and powers of the daughters, and moreover confers extensive protector powers on Mrs Crociani (including power to direct investments), is in the interests of the beneficiaries. This is a matter for the trustees who make the transfer to consider and take responsibility for, but if I were advising those trustees I would urge them to obtain formal confirmation from the daughters in this respect, and also to consider perhaps seeking indemnities.

The existing Grand Trust has a number of unusual restrictions and features which have not been carried over into the draft of the new trust, see for example clause six. A more cautious approach would be for those restrictions to be carried over into the new trust. Moreover you will be aware that the power of resettlement under the existing trust is not exercisable to another trust under which the Settlor is a beneficiary. The present draft of the new trust does not include the Settlor as a beneficiary, but there is a power to add further beneficiaries in the future, and the Settlor is not excluded from this. It would seem to me to be more within the spirit of the existing trust and the power of resettlement for the Settlor to be excluded from benefit under the new trust.

These are strictly matters of Guernsey law, and for the Guernsey trustees to consider." (our emphasis)

264. This advice was given in the context of a proposed discretionary trust, of which Camilla and Cristiana and their children were to be the beneficiaries; Madame Crociani was not to be a beneficiary. It follows that Advocate Davies would not have permitted the use of clause Eleventh to make an appointment to the Fortunate Trust over which she had such extensive powers and interests.

265. On 20th November, 2001, Advocate Davies provided an amended version of the new Grand Trust, introducing further restrictions on the trustee's powers to reflect clause Sixth of the existing trust and to provide that Madame Crociani could not be added as a beneficiary, thus ensuring that the proposed appointment was well within the scope of the power in clause Eleventh.

266. Mr Le Cornu e-mailed Madame Crociani on 22nd November, 2001, with the draft trust documentation, and said this in his covering e-mail, we suggest as a consequence of advice given to him by Advocate Davies:

"Whilst these changes are being made in order to increase the flexibility of the family's arrangements it could be argued that by removing some of the fixed entitlements of your daughters and any grandchildren they are being disadvantaged. It is vital that your daughters understand the rationale behind these changes and that their understanding and acknowledgement is documented. If it is at all possible I would suggest that your daughters also attend some or all of our meetings in order that they can appreciate the changes being made." (Our emphasis)

267. Mr Le Cornu suggested in evidence that he expected Madame Crociani to explain these aspects to her daughters, and not BNP Jersey, but he accepted that she would not have been in a

position to give them legal advice or to explain the difference in their entitlements under the old and new Grand Trusts.

268. It is worth pausing at this stage to take stock. Whilst Mr Le Cornu had worked on the misunderstanding that Madame Crociani could benefit from the Grand Trust through the Foundation, he had identified the problem with clause Eleventh and sought and received clear legal advice as to the restrictions it imposed and as to the need to involve the daughters. Advocate Davies was able to give that advice without the detailed knowledge we now have about the matrix of facts in 1987, and he did so by simply having regard to the terms of the trust deed itself, the wording of which in our view is clear.

269. Mr Le Cornu, therefore, was firmly on the right track and if he had remained on that track and followed that advice, this litigation would not be taking place today.

270. For reasons which Mr Le Cornu was unable to explain to himself, let alone the Court, he came to hold a different view as to the scope of clause Eleventh.

First meeting with Madame Crociani

271. Mr Le Cornu first met with Madame Crociani in her Monaco apartment in May 2002. There are no notes of the meeting, but it was a marathon starting at 10.00 in the morning and lasting until 2am the next day. It was also attended by the relationship manager from BNP Suisse. Mr Le Cornu described it as a long and clearly not very productive meeting. The daughters attended for about an hour in the evening, but the discussions were all very general and the specific proposals were not canvassed with them. The draft prepared by Advocate Davies was not produced or discussed.

272. He described Madame Crociani as being obsessed with control and as the Grand Trust being the only mechanism by which she could control the family affairs. She had a concern over attacks upon the trust bordering on paranoia.

273. In the short time that he saw the daughters, they expressed themselves as being very sceptical about trusts, and as having great confidence and trust in their mother to look after the family assets. They would not trust anybody else. They made it clear that they were very happy for their mother to represent them and Mr Le Cornu expected everything he did with Madame Crociani to be shared with them. At one stage, he said there was a discussion in Italian over the

prospect of the daughters' interests being subject to protector control after their mother's death, which he said gave rise to a lot of screaming and shouting in Italian.

274. He did not meet Madame Crociani again until 2007, when the decision in principle to appoint assets out of the Grand Trust was made, and he did not meet the daughters again until 7th April, 2010, after the 2010 appointment.

275. Madame Crociani proved reluctant to make any changes to the Grand Trust and discussions petered out. The Grand and Fortunate Trusts remained with BNP Guernsey, which as we understand it was being kept in operation to deal with just these two trusts, and perhaps one other unrelated trust.

276. Under pressure from BNP Suisse, Mr Le Cornu picked the matter up again, writing to Madame Crociani on 16th February, 2004, stating that BNP Jersey would agree to becoming a co-trustee with Madame Crociani and Mr Foortse, but only on the basis of the financial assets being appointed into a new Grand Trust and the art work into the Fortunate Trust. BNP Jersey, therefore, was only willing to be co-trustee in relation to the Promissory Note. Madame Crociani did not reply to this letter and Mr Le Cornu wrote again in November 2004, suggesting that the family instruct Jersey lawyers, but that led to nothing.

277. Pressure mounted upon BNP Jersey, with the BNP Group keen to close down BNP Guernsey and with BNP Suisse keen to retain the valuable portfolio, but with Mr Le Cornu reluctant for BNP Jersey to take on trusteeships that he described as *"thankless".* Without tracking through all of the internal group correspondence, the following extract from an e-mail sent by BNP Suisse to Mr Le Cornu on 11th July, 2006, written in response to a somewhat curious demand by Madame Crociani that the deed of appointment and retirement between BNP Guernsey and BNP Jersey should be governed by Swiss law, illustrates the difficulty: -

> *"We know we are dealing with a difficult and sometimes unreasonable client but we have to deal with this matter in an exceptional way because she is an UHNW client with over USD 140 mio in our books. Plus the Group is paying too much with the maintenance of the trust co in Guernsey for Mme's almost exclusive use and with the subsidising of her own structures. This situation must end ASAP."*

278. Towards the end of 2006, Madame Crociani did engage Italian lawyers, namely Mr Antonio Saffioti and Professor Maurizio Lupoi. In response to an inquiry from Professor Lupoi, Mr Le Cornu e-mailed him on 16th October, 2006, with reference to a possible *"re-settlement",* drawing

his attention to clause Eleventh and quoting from it, including the words *"other than the Settlor"* and saying this:

> *"We have explored previously with Jersey lawyers the possibility of a restructuring of the existing trust to provide our mutual client with an arrangement more aligned with her needs but it was not considered possible under the terms of the trust. I am very happy to revisit this possibility if you feel that the existing trust provides for this."*

This shows that the problems with clause Eleventh were firmly in Mr Le Cornu's mind at that time.

279. Professor Lupoi raised a further question in relation to clause Eleventh upon which advice was sought from Mourant Ozannes, which Mr Le Cornu felt might have been the catalyst for the change in his view about its scope. The question raised by Professor Lupoi was whether clause Eleventh could be used to vary the Grand Trust, but without forming a new trust: -

> *"In other words, a resettlement can occur either by settling into a different trust or by changing the trusts upon which certain assets are held. Now, if the trustees can pour the trust assets into Trust "A" for certain beneficiaries they ought to be able to achieve the same end by altering the provisions of the trust of which they are the trustees. The net effect is the same."*

280. Mourant Ozannes were not referred to the advice given in 2001 by Advocate Davies and their advice of 20th October, 2006, limited to the narrow point raised and this on perusal only of the Grand Trust deed, was as follows:

> *"Summary*
>
> *We are of the opinion that the power contained within clause "Eleventh" does not confer on the trustees' power to amend and restate or appoint the Trust Fund on to new trusts. The clause contemplates the Trust Fund being transferred to the trustees of another trust for the benefit of all or any one or more of the beneficiaries. In other words there must be a stand-alone trust in existence to which the transfer is made."*

281. Under pressure from the BNP Group, Mr Le Cornu reluctantly agreed for BNP Jersey to be appointed as co-trustee of the Grand Trust as a temporary measure on the basis that it would

receive indemnities from Madame Crociani and the two daughters. Mr Saffioti objected to the two daughters giving an indemnity, giving rise to this response from Mr Le Cornu of 18th December, 2006:

> *"Mr Lupoi is correct they have no vested entitlements at this point but as previously stated it is to them that the trustees owe their fiduciary duties. The directors of BNPPJTC have made it clear that we do not wish to assume the responsibility of acting as co-trustee but will do so as a temporary measure whilst the family further consider their wealth management requirements and options. This can only be on the condition that they are indemnified by the persons to whom they owe their obligations (i.e. the beneficiaries)."*

282. The deed of appointment and retirement of trustees between BNP Guernsey and BNP Jersey and the change of the proper law to Jersey was eventually executed on 2nd October, 2007, with indemnities given by Madame Crociani and her daughters to BNP Jersey for any claims arising out of any past, present or future conduct of BNP Jersey in the management and administration of the Grand Trust and its investments, unless caused by its fraud, wilful neglect or gross negligence.

2007 Meeting in Rome

283. On 5th December, 2007, shortly after BNP Jersey's appointment as co-trustee in place of BNP Guernsey, Mr Le Cornu met with Madame Crociani in Rome with Miss Serene El Masri, the relationship manager at BNP Suisse. The daughters were not present.

284. In advance of that meeting, Madame Crociani's lawyer had produced a summary of her requests as compared against the terms of the Grand Trust. Her request was to be appointed protector, with power to choose meeting locations, to change the proper law, to consent to the addition and exclusion of beneficiaries, to consent to the division of the trust fund, to consent to any distributions, to control investments and to remove and appoint new trustees. There were to be no mandatory distributions and no restriction on variations. In terms of benefit, 15% of each child's share was to be made available on the death of the settlor, making it clear by necessary implication that Madame Crociani was to be the principal beneficiary during her lifetime.

285. There are no notes of the meeting, but the next day, Mr Le Cornu sent this e-mail to Miss El Masri:

"For my part I have set out below my understanding of various next actions: -

..

3. Review F [Fortunate] trust and obtain legal advice re amendment of trust instrument to be in line with Mdm wishes

4. Mdm to appt. PF [Mr Foortse] as co-trustee of the F trust

5. Appt assets of G [Grand] trust on to F trust (will need current position of loan note from PF – Mdm mentioned that it had been repaid but the accounting from previous trustees does not reflect that)

6. Split liquid assets into two funds and place each fund under a company using the existing dormant companies in F trust. Art will continue to be held in Croc and 23 and Mdm will decide in time on a split between the two

7. Agree with Mdm protector powers to be passed on to daughters …"

286. Two abbreviations need explaining here. *"Croc"* stands for *"Croc Investments SA",* a company held within the Fortunate Trust and which owned the valuable art collection Madame Crociani had inherited from Camillo. *"23"* stands for *"Twenty-Three Investments Limited",* a company held within the Grand Trust, and which owned the more limited art collection acquired by the Grand Trust.

287. At the meeting in Rome, therefore, a decision had been made in principle that the assets of the Grand Trust would be transferred to the Fortunate Trust, over which Madame Crociani already had extensive powers and interests, and which was to be further amended in line with her wishes.

288. Such an appointment using clause Eleventh, the only power available within the Grand Trust, was well outside the scope of that power as advised by Advocate Davies.

289. On 9th January, 2008, Mr Le Cornu instructed Advocate Philip Le Cornu of Ogier to draft the necessary documentation. There was no real explanation as to why a different firm of lawyers was now being used to advise on the Grand Trust. In his letter, Mr Le Cornu enclosed copies of the formal trust documentation for both trusts and a document headed *"Required features of the revised Fortunate Trust",* which is in these terms:

"Features of the revised Fortunate Trust

1 Continue to be revocable by Grantor (Mdm)

2 Mr PF to be appointed as co-trustee with BNPPJTC

3 Assets to continue to be held in two funds – Fund A and Fund B

4 Beneficiaries to be Mdm's daughters and their lineal descendants

5 Grantor (Mdm) to continue to be able to direct the payment of income to herself during her lifetime.

6 All fixed entitlements to be removed such that there are no compulsory distribution dates."

The document then sets out the protector powers, with Madame Crociani to be first protector, consistent with her requests.

290. The instructions to Advocate Le Cornu were as follows:

"As discussed I should be grateful if you would draft an instrument varying the trust in the manner outlined. In addition we will also require a draft inst. of appointment of additional trustee appointing Mr Paul Foortse ……. . The grantor would like to pass on her protector powers to her daughters in the manner outlined …… and for this we will need an instrument of appointment of successor protector.

The final step will be to appoint all of the assets currently held in the Grand trust onto the varied Fortunate Trust which will require an instrument of appointment."

No confirmation is sought as to whether this appointment comes within the scope of clause Eleventh – indeed, there is no reference to clause Eleventh at all or to the earlier advice of Advocate Davies.

291. There is no note of their discussion. Mr Le Cornu said he probably did not ask Advocate Le Cornu if the trustees had the power to make the appointment, saying that Advocate Le Cornu

would not have been able to prepare a draft if he had felt they did not have the power. If it had not been possible, he would have expected Advocate Le Cornu to tell him.

292. Advocate Le Cornu responded by e-mail on 21st January, 2008, enclosing drafts. He referred to there having been a meeting between them earlier in the week, but there is no note of that meeting. The major part of Advocate Le Cornu's e-mail related to the changes to the Fortunate Trust, but he said this in relation to the Grand Trust:

> *"Turning to the Deed of Appointment and indemnity from The Grand Trust, in accordance with your instructions, I have drafted this such that the Grand Trustees appoint the whole of The Grand Trust to The Fortunate Trustee to be held on the terms of The Fortunate Trust. Both Camilla and Cristiana as beneficiaries have been added as parties, as has the Grantor. The beneficiaries and Grantor are indemnifying the trustee in the same terms as the previous Deed of Retirement and Appointment and this appears as Clause 6."*

293. The written instructions did not refer to the daughters being a party, or to the giving of indemnities, and so this aspect must have arisen in discussion. Certainly, at this stage, the daughters were to be parties to the appointment.

294. BNP Suisse e-mailed Mr Foortse on 1st February, 2008, giving him a copy of the *"Features of the revised Fortunate Trust"* document and by letter of 4th February, 2008, they sent him the drafts prepared by Advocate Le Cornu. There was no explanation or commentary and it is emblematic of the way this trust was administered by BNP Jersey that this communication came from BNP Suisse and not BNP Jersey, Mr Foortse's co-trustee. Mr Foortse said in evidence that he would only have glanced at these documents as he was not yet a trustee of the Fortunate Trust. There was no discussion of any kind between Mr Foortse and BNP Jersey over these important developments.

295. In his e-mail to Miss El Masri of 4th January, 2008, Mr Le Cornu informed her that he had instructed Jersey lawyers and was intending to meet with them next week. He said this: -

> *"Please note that given the nature of the entitlements under Grand Trust it will be necessary for daughters to be party to the instrument of appointment of assets from the Grand Trust to the Fortunate Trust."*

296. Mr Le Cornu said that this did not arise out of any advice given by Advocate Le Cornu, or because of any requirement that the daughters be parties, but simply because he considered it prudent. He said it was usual, whenever possible, to ask beneficiaries to sign appointments of the sort being contemplated. He did not request it in contemplation of any specific challenge by either daughter. On the contrary, he considered the changes would be for their benefit, and would provide them with the sort of flexible structure which would give them greater powers over their own funds and greater powers over the trustees in their capacity as protectors, while mitigating potential tax risks and third party claims.

Daughters removed from the draft deed

297. In August 2008, Madame Crociani indicated through Miss El Masri that she did not want the daughters to be a party to the deed appointing assets from the Grand Trust to the Fortunate Trust. Mr Le Cornu's response indicated that advice had been received from Ogier, as to the need for the two daughters to be parties:

> *"Trf frm G tst to F tst – Advice received is that as G trust is for 2 daughters on fairly certain terms docs to trf to F trust should also be signed by them (Deed of Appointment and Indemnity). The current drafts reflect this."*

298. An e-mail dated 27th August, 2008, from Miss El Masri to Mr Le Cornu headed *"My wonderful w-end with Mdme and co."* confirmed that Madame Crociani would be happy to indemnify BNP Jersey for not *"collecting the daughters' signatures"* and went further:

> *" … we are going to avoid collecting the daughters' signatures on the F revised docs so the daughters will not be clear on the facts:*
>
> *1) The F trust has been revised (Miles and I think the daughters do not even know of this trust's existence).*
>
> *2) 70% of the G trust funds have been wired into Goodluck and Happiness*
>
> *3) Goodluck and Happiness are in turn owned by the F trust.*
>
> *Letters sent to the daughters requesting distributions to them should – after the transfer – addressed SOLELY to "The Directors of Goodluck" or to "The Directors*

of Happiness" WITHOUT MENTIONING THE F TRUST OR BNP JERSEY TRUST CORP.

..

Please make sure …that no mention of the F Trust is ever made to the daughters during their mother's lifetime." (her emphasis)

The reference to 70% of the trust fund being paid to Goodluck and Happiness, companies held within the Fortunate Trust, had not of course yet happened, but was presumably what Madame Crociani then intended should happen.

299. Mr Le Cornu was firmly of the view that it was in the daughters' interests for the proposed restructuring to take place and he did not wish to allow what was the general practice of requesting indemnities to impede the restructuring. As a result, he was willing to proceed without the daughters signing the documentation, provided Madame Crociani was willing to indemnify BNP. He said he discussed it with Mr Brian Kenyon, a director of BNP Jersey, and although not happy about giving this up, they both believed it was in everybody's best interests that BNP Jersey accede to this request. It was not just about reducing fiduciary risk, he said, but about getting the assets into the correct structures. They did not consider taking legal advice on the point, bearing in mind that Ogier had apparently advised earlier that the daughters should be parties to the documentation.

300. Mr Le Cornu thought that most of what Miss El Masri had said in her e-mail was nonsense, particularly in relation to him thinking that the daughters did not know of the existence of the Fortunate Trust, but he accepted that he went along with this secrecy for about a year.

301. On 8th September, 2008, Mr Le Cornu instructed Advocate Le Cornu to remove the daughters from the draft deed:

"You will recall that amongst the documents you drafted for the above was an instrument of appointment from the Grand trust to the Fortunate trust. Originally both daughters were to sign on this appointment. The two individual trustees do not wish for the daughters to sign principally because they do not wish for them to be aware of the Fortunate trust existence at this time. Can you redraft this appointment accordingly but to include an indemnity to BNPPJTC as the third trustee.

I will give you a call to discuss further."

302. Mr Foortse denied ever expressing such a wish but that is clearly what Mr Le Cornu had been informed. Again, there was no note of his telephone conversation with Advocate Le Cornu, if one took place, but there was no request for Ogier to advise on the implications of the daughters' removal and Ogier simply returned the drafts duly amended and as instructed. BNP Jersey had therefore moved from a position where it was *"vital"* for the daughters to be involved, to one in which not only would they not be a party to the appointment, but knowledge of the existence of the Fortunate Trust would be kept from them.

303. On 30th January, 2009, Mr Le Cornu provided Miss El Masri with engrossed documents for Madame Crociani to execute, in relation to both the Grand Trust and the Fortunate Trust, including a consolidated trust deed for the Fortunate Trust as amended. There was no evidence that the consolidated trust deed for the Fortunate Trust was ever sent to Mr Foortse.

304. Two deeds of appointment out of the Grand Trust to the Fortunate Trust were prepared, one transferring all of the assets to the Fortunate Trust and the other, some of the assets. Mr Le Cornu commented: -

> *"Mdm will need to decide whether to trf all or only some of G trust and execute … accordingly."*

305. The recital to the draft deed incorrectly sets out the terms of clause Eleventh of the Grand Trust deed. This is how it is recited: -

> *"By the Eleventh clause of the Grand Trust, the Grand Trustee has power at any time or time before the Distribution Date at its absolute discretion to raise and pay or transfer the whole or any part of the Trust Fund of the Grand Trust to the trustee for the time being of any other trust wheresoever established or existing under which any one or more of the beneficiaries of the Grand Trust are interested …."*

We have set out the correct wording of clause Eleventh earlier in this judgment, but it can be seen that this wording is different, and omits the important words *"(other than the Settlor)".*

306. Mr Le Cornu responded to Advocate Le Cornu on 24th January, 2008, saying he had reviewed the draft instruments and making a number of comments, but he did not pick up the error in the recital, which error was carried through to the executed deed.

Amendments to the Fortunate Trust

307. BNP Jersey had been appointed trustee of the Fortunate Trust, along with Madame Crociani, on 2nd October, 2007, at the same time that it was appointed co-trustee of the Grand Trust. The amendments to the Fortunate Trust were made by a deed between Madame Crociani, as grantor, and BNP Jersey and herself, as trustees, dated 23rd December, 2009, and which therefore came into effect before the 2010 appointment. We now summarise the main provisions of the Fortunate Trust as amended. During Madame Crociani's lifetime:

(i) She was given *"prescribed direction"* powers over the trust fund and any company held within it, which the trustees were bound to obey and in respect of which she had no fiduciary obligations;

(ii) Rather than being able to call income as before, she became the sole discretionary beneficiary of income;

(iii) She retained the right to withdraw any or all of the property from the trust fund and to revoke, alter, amend or modify the trust deed; and

(iv) Upon her death, the trust fund was split into two funds (Fund "A" and Fund "B") and held on wide discretionary trusts for Camilla and her issue and Cristiana and her issue respectively.

308. The trustees were given wide overriding powers of appointment and the power to add and exclude beneficiaries.

309. Madame Crociani was appointed the first protector, with provision for the appointment of separate protectors for each of her daughter's funds after her death. Protector consent was required for the addition or removal of beneficiaries, and the distribution of any income or capital. The protector had the power to appoint and remove trustees.

310. In effect, Madame Crociani was the only beneficiary of the Fortunate Trust in her lifetime, with complete power over the investment of the trust fund without fiduciary obligation, and the right to access the whole or any part of the trust fund. Whatever might be left on her death would be split into Funds A and B, which would become separate sub funds at that point, and passed to her daughters and their issue on wide discretionary trusts.

311. Mr Foortse was appointed an additional trustee of the Fortunate Trust on 14th May, 2010, after the 2010 appointment.

Execution of the 2010 appointment

312. On 9th December, 2009, Mr Le Cornu was told by Miss Stéphanie de Mestral of BNP Suisse ("Miss de Mestral"), who had taken over from Miss El Masri as the client relationship manager, that Madame Crociani wanted to finalise the documentation as soon as possible. He travelled to Rome and met her on 17th December, 2009, with Miss de Mestral. The daughters were not present. At this time, Camilla would have been 39 and had two children of her own and Cristiana would have been 37 and also had two children of her own.

313. Mr Le Cornu took two deeds of appointment from the Grand Trust to the Fortunate Trust with him, one appointing all of the assets and the other listing all of the assets, other than the Promissory Note. It was the latter document that was executed by Madame Crociani, but the schedule setting out the assets has manuscript alterations reflecting her changes of mind in the course of the meeting. Initially, the reference to the portfolio was crossed out and *"the sum of US$10 million"* inserted. This was then crossed out, and the following inserted in manuscript: -

"A sum to be determined by Mdm Crociani and on her instructions only."

This wording was arrived at because, in Mr Le Cornu's words, Madame Crociani could not make up her mind how much she wanted appointed out to the Fortunate Trust. It was not his preferred outcome, as he wanted all of the assets to be appointed out, but he regarded it as progress towards the restructuring of all of the assets, using his words, *"to better meet the needs of the Crociani family".*

314. Mr Foortse was sent the deed by BNP Jersey and simply asked to sign and return it, which he did. There was no explanation or commentary. He said he had discussed the matter with Madame Crociani. She told him that *"We go ahead"* because the Grand Trust was not up to date any more, was not flexible and the deed could not be amended. There could be possible trouble with divorce and tax. She also explained to him that the Fortunate Trust was revocable, and the Grand Trust was not, and did not meet up any more with the family requirements, having moved back to Europe and with the daughters now having grown up. That, he said, was the basic story. He was convinced that it would not change anything with the family, with Madame Crociani continuing to look after the daughters, as she had done before *"and financially as well".* He understood Madame Crociani had more control over the Fortunate Trust, but he could not see any improper motive. It did not cross his mind for a moment that anything could go wrong in the

family. He did not need to be an expert on trust law to make a common sense decision and this decision, to him, made sense.

315. Mr Foortse did not read the Grand Trust deed before signing, and in particular clause Eleventh, and he made no contact with Cristiana or Camilla. He had been told by Madame Crociani that Ogier had advised, and he believed therefore that the draft was based upon legal advice. In his view, the appointment was for the benefit of both Madame Crociani and her daughters – all three of them.

316. BNP Jersey signed the deed of appointment last, hence it being dated 9th February, 2010. In accordance with BNP Jersey's practice, the resolution made no reference to the reasons for the deed being executed.

317. Article Eleventh requires the trustees to approve the recipient trust, but Mr Foortse had only glanced at the original Fortunate Trust deed and the draft deed of amendment given to him some two years before. In fact, it is a difficult task to work out from those documents what the final form of the Fortunate Trust as amended would be, as the number of amendments were considerable, and he had not been given a conformed copy.

318. Mr Le Cornu was asked why his view as to the scope of clause Eleventh had changed from 2001, when he accepted that an appointment could not be made to a trust in which Madame Crociani was a beneficiary. Now, in 2010, he was doing just that. What had changed? Had he forgotten the advice given by Advocate Davies in 2001? He was unclear on this latter point, moving from saying that he hadn't forgotten to saying that he had. He had certainly remembered that advice in 2006, in his exchange with Professor Lupoi. He said he had struggled to try and work out what was the precise catalyst for the change, but thought it was the taking of advice from Mourant Ozannes in 2006 at the instance of Professor Lupoi.

319. Whatever the catalyst, he had come to the belief that an appointment in favour of the Fortunate Trust was possible. Provided it was in the interests of the daughters, he thought it did not prevent Madame Crociani from being a beneficiary, although *"she could not be the sole object of the thought process".* The words *"other than the Settlor"* meant to him that Madame Crociani could not be the stated object of the exercise of discretion – that had to be the daughters. He came to hold this belief so firmly that he saw no need to have it confirmed by lawyers.

320. In Mr Le Cornu's view, the appointment was for the benefit of the daughters, because it would provide them with the sort of flexible structure which would give them greater powers over their

own funds and greater powers over the trustees in their capacity as protectors, while mitigating potential tax risks and third party claims, but of course that flexibility would only arise after Madame Crociani's death.

321. However, it came out in cross-examination that Mr Le Cornu himself fundamentally misunderstood the terms of the Fortunate Trust. The Court had expressed a concern that the document *"Features of the revised Fortunate Trust"* and a chart shown to Camilla and Cristiana at a meeting on 7th April, 2010, after the 2010 appointment, were misleading. The *"Features"* document, which we have set out earlier, whilst stating that the Fortunate Trust continued to be revocable by Madame Crociani, said *"Beneficiaries to be Mdm's daughters and their lineal descendants"* giving the impression that they were the beneficiaries of the Fortunate Trust under its revised terms. In fact, as we have set out above, Madame Crociani was the only beneficiary during her lifetime. In the chart, the box containing the Fortunate Trust named the beneficiaries as Madame Crociani, Camilla and Cristiana, again giving the impression that all three were beneficiaries at that time.

322. Mr Le Cornu said that Camilla and Cristiana were supposed to be immediate beneficiaries of the Fortunate Trust, so that they could benefit directly during Madame Crociani's lifetime (subject to the agreement of Madame Crociani, presumably as protector) and he did not appreciate until later in May 2011, that this was not the case. His instructions to Ogier had been that they were to be immediate beneficiaries.

Findings on the 2010 appointment

323. The plaintiffs' primary case is that this was an excessive execution, i.e. outside the scope of the trustees' powers under clause Eleventh.

324. Clause Eleventh authorises the trustees to transfer the trust fund to another trust *"approved by the Trustees and in favour of or for the benefit of any one or more exclusively of the others or other of the beneficiaries (other than the Settlor) ….."*. The trustees therefore have power to transfer the trust fund to a trust approved by them and that, viewed objectively, can fairly be regarded as being in favour or for the benefit of the object of the power, and subjectively, they believe it to be so – see Hampden's Settlement Trusts [1977] DR 177 and In re Esteem Settlement [2001] JLR 7 at paragraph 48. If objectively the terms of the receiving trust are not ***"in favour or for the benefit"*** of the object of the power, then it is an excessive execution – see the judgment of Lord Walker in Pitt v Holt [2013] 2AC 108 at paragraph 60.

325. Turning to the 2010 appointment itself, it recites that Camilla and Cristiana are beneficiaries of both the Grand Trust and the Fortunate Trust, and they are defined as *"the Beneficiaries"* for the purposes of the appointment. Having set out clause Eleventh, incorrectly, the recital then continues:

> *"The Grand Trustee is desirous of exercising its power in favour of the Beneficiaries in such a manner as herein appears …."*

Accordingly, Camilla and Cristiana are the stated objects of the exercise of this power.

326. Applying the US construction (as we have defined it earlier) the 2010 appointment fails as an excessive execution, because Madame Crociani is, impermissibly, a beneficiary of the Fortunate Trust. No further discussion is required.

327. However, even on the wider construction, the 2010 appointment fails as an excessive execution because, viewed objectively, it is not for the benefit of Camilla and Cristiana.

328. Under the Grand Trust, Camilla and Cristiana were the principal beneficiaries of their respective trusts, with a power of appointment by will over the capital in favour of their issue, or the issue of the other of them, failing which it would vest in their children absolutely in equal shares. The Grand Trust could not be amended and there was no power to add or exclude beneficiaries. Their trusts could be overridden under clause Eleventh, but it would be in the reasonable expectation of Madame Crociani as settlor, and as we have found her intentions to be, that ordinarily any such power would be exercised for their benefit and that of their children. Madame Crociani was a beneficiary only if all of her descendants had died before her - a remote possibility. She had no power under the Grand Trust deed over the investment of the trust fund (the fact that the investment powers had been delegated to her is a separate issue), either by way of prescribed directions or by designating special companies. She was a trustee, but one of three.

329. Under the terms of the Fortunate Trust, the position of Camilla and Cristiana and that of Madame Crociani were not only reversed, but the rights of Madame Crociani were greatly enhanced. She was the only beneficiary during her lifetime. Whilst a discretionary beneficiary of income, she could withdraw all or any of the trust fund or revoke the trust at her whim; it was akin to a bank account from which she could draw at any time for whatever reason. To the extent that she did not do so, she had complete control over the trust fund without any fiduciary obligation. Camilla and Cristiana only became beneficiaries on their mother's death, but then as discretionary

beneficiaries in respect of their respective funds. There were wide overriding powers of appointment and powers to add and exclude beneficiaries, together with extensive protector provisions.

330. Camilla and Cristiana had gone from being principal beneficiaries of their respective trusts to being no beneficiary at all during their mother's lifetime. It is not an exaggeration to say that the trustees had effectively given the trust fund to Madame Crociani to dispose of as she wished during her lifetime.

331. Mr Le Cornu was open in his approach that Madame Crociani should benefit from these assets during her lifetime, with the Fortunate Trust being the mechanism by which the daughters would receive what he regarded as their inheritance. He talked in terms of giving Camilla and Cristiana a more flexible structure, but that would only be over what, if anything, was left of the trust fund on the death of Madame Crociani. In our view, the change in their interests was so extreme that, objectively, the only conclusion that we can reach is that the 2010 appointment was, impermissibly, for the benefit of Madame Crociani (and BNP Jersey, to the extent that its fiduciary risk was reduced). It was not for the benefit of Camilla and Cristiana; indeed, it was to their detriment.

332. Advocate Redgrave conceded that the 2010 appointment *"was clearly for Madame Crociani's benefit",* but he argued (quoting from paragraph 246 of his written closing submission):

> *"She was the ultimate beneficial owner of the Foundation, the appointment benefiting her was obviously for the benefit of the Foundation, whose sole raison d'être was to be a vehicle for Mme Crociani to benefit. It is well established that the exercise of a power can be for the benefit of a beneficiary, even if the benefit is an indirect one. So, for example, a power of advancement could be exercised to benefit a charitable foundation, because it discharged the moral obligations of a wealthy beneficiary. In this case, rather than the appointment going to a trust under which the Foundation was a beneficiary and the Foundation then passing benefit to Mme Crociani, the appointment was to a trust under which she benefited, and that was a benefit to the Foundation."*

333. We have found that the Foundation was not a vehicle for Madame Crociani to benefit, and in any event, the terms of the 2010 appointment make it expressly clear that the objects of the exercise were Camilla and Cristiana, and not the Foundation. Mr Le Cornu confirmed in evidence that the Foundation never came into his thinking, and neither Madame Crociani nor Mr Foortse made any reference to it. This was not an appointment made for the benefit of the Foundation.

334. Advocate Redgrave submitted that it was extremely important not to look at the 2010 appointment with hindsight, because at the time, the family was close-knit and concerned about attacks from outside – which the flexibility of the Fortunate Trust meant were less likely. You could not measure the issue of benefit simply in terms of comparing one trust with another – it must be looked at in the context of this family. It was reasonable for the trustees to assume that benefit could be considered as it affected the family as a whole, and the Fortunate Trust provided Madame Crociani with the power to control the family assets during her lifetime and ensure they were protected from outside attack.

335. It seemed to us that the Grand Trust had the flexibility to protect the interests of the daughters and their children from outside attack. Their interests were discretionary. They had powers of appointment by will to prevent their children receiving absolutely on their death and there was the overriding power to appoint to other trusts under clause Eleventh. Giving Madame Crociani the power to withdraw the trust assets would have rendered those assets more vulnerable to attack by, say, a future husband of hers or her creditors. It would also expose the daughters to the risk that she could withdraw those trust assets at her whim.

336. We can accept that the matrix of facts surrounding the 2010 appointments included the fact that the family lived together in an apartment in Monaco and therefore appeared, to the outside world, as a close-knit family with the daughters expressing trust in their mother's custodianship of the family wealth, but however close they may all have appeared to be, this cannot justify an appointment that, on an objective analysis of the Grand Trust and the Fortunate Trust, was so clearly to their detriment.

337. The conclusion we have reached is supported by Mr Le Poidevin, who says this in his opinion:

> *"19(2) It is anyway difficult to see how the transfer was for the benefit of either of the daughters. I fully understand that with the settlor sharing a house with the daughters and pooling their resources they did not then consider that it mattered whose money was whose; and the trustees were entitled to take account of that circumstance. But it is still necessary to show how the transfer can reasonably have been regarded as beneficial to one or both of the daughters. From a trust under which the settlor could receive (via the Foundation) only income, the assets had been transferred into a trust under which she could also receive capital at the trustees' discretion and under which she could of her own volition possess herself of the entire capital by revoking the trust. Those features of the transfer are clearly disadvantageous to the daughters and I am not presently aware of any countervailing consideration.*

20. It is unhelpful, of course, that the Fortunate Trust was indeed revoked though only some sixteen months after the transfer, since the very possibility which made it disadvantageous to the daughters has occurred.

21 On the present evidence, if the court accepts Bedell Cristin's construction, the exercise of the power conferred by Article Eleventh and hence the transfer itself will in my view be held ineffective."

That advice was given on the incorrect basis that Madame Crociani could benefit via the Foundation.

338. A further argument arises in that clause Eleventh requires the trustees to approve the terms of the Fortunate Trust. The evidence shows that Mr Le Cornu fundamentally misunderstood the terms of the Fortunate Trust in so far as the interests of Camilla and Cristiana were concerned, and that Mr Foortse had not read it – he relied on the *"Features"* document he had been sent some two years before, which in itself gives the misleading impression that Camilla and Cristiana were beneficiaries. The transfer had not, therefore, been made to a trust approved by the trustees and on that ground alone is therefore out with their powers under clause Eleventh.

339. The 2010 appointment can also be impugned as a fraud on the power, namely, as per Lord Walker in Pitt v Holt at paragraph 61, an appointment made ostensibly within the scope of the power but for improper purposes. The classic statement of principle is that of Lord Westbury in Duke of Portland v Lady Topham [1864] 11 H.L.C. 32 at 54:

"….[T]he donee, the appointer under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power."

340. As Lewin says, at paragraph 29-290: -

"The term "fraud" in this context merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power."

341. Mr Le Cornu said in his witness statement and in evidence that it was the interests of Camilla and Cristiana and their families that drove his decision to restructure the Grand Trust and the Fortunate Trust. Although that may have been part of his thinking, on the evidence we find that what drove the 2010 appointment was: -

(i) A desire to make Madame Crociani a named beneficiary so that she could benefit directly from the trust assets during her life rather than indirectly through the Foundation (which they mistakenly thought possible) or indirectly through her daughters. Madame Crociani, in her witness statements, said it was vital that she was able to continue to benefit. Mr Le Cornu said in evidence that he equated the Foundation with her, and he wanted her to be a beneficiary in her own right. Paragraphs 43-47 of the response sent by Mourant Ozannes on 17th August, 2012, to Bedell Cristin's letter before action makes that intention clear.

(ii) A desire on the part of Madame Crociani to control the trust fund and consequently a desire on the part of BNP Jersey to reduce its fiduciary risk. It had taken on this trusteeship under pressure from the BNP Group in which, in effect, it felt it was in a position of a built-in minority, in that the perception was that Madame Crociani and Mr Foortse would act together, clause Fourth (M) of the Grand Trust deed providing that where there are more than two trustees in office, they shall act by a majority decision. There was little prospect, for example, of revoking the investment powers given to Madame Crociani by Chase Bank in 1994, powers which, in her desire to control, she would be very reluctant to give up. The 2010 appointment enabled Madame Crociani to retain those powers, and indeed to be given even greater powers over the trust fund, but reduced, if not eliminated altogether, BNP's fiduciary risk.

These are purposes which are foreign to the power in clause Eleventh, which has to be exercised for the benefit of one or more of the beneficiaries, in this case, for the benefit of Camilla and Cristiana.

342. The instructions to Mr Le Poidevin said it was considered undesirable that should either Cristiana or Camilla die, the assets contained in their separate trusts would vest in their children, notwithstanding that Madame Crociani might still be alive and require to be supported from those assets. He said this at paragraph 19(1) of his opinion:

> *"(1) The initiative for change seems to have come from BNP Paribas Jersey Trust Corporation Ltd ("BNP Jersey"). The stated reason was that the Grand Trust was too inflexible because an early death of either daughter would vest the assets of her trust in her children even though the settlor still needed support. That*

points clearly to benefiting the settlor as the motive for the transfer, an inadmissible consideration …… if that was the motive the transfer will fail."

343. The 2010 appointment can also be impugned on the grounds of mistake under Article 47(H) of the Trusts Law, which empowers the Court to set aside the exercise of a power by a trustee, in circumstances where the trustee has failed to take into account any relevant considerations or taken into account any irrelevant considerations. It does not matter whether or not the circumstances occurred as a result of any lack of care or other fault on the part of the trustee.

344. The irrelevant consideration taken into account was that Madame Crociani could benefit from the trust fund of the Grand Trust via the Foundation, a consideration that underlay the trustees' approach and the relevant consideration not taken into account was that Camilla and Cristiana could only benefit under the Fortunate Trust on the death of Madame Crociani.

345. An excessive execution, being outside the scope of the trustees' powers, is void (Lewin 29-240) and as the English authorities now stand, a power which is vitiated as a fraud on the power is void in equity. That authority is Cloutte v Storey [1911] Ch 18, which Lord Walker at paragraph 93 of Pitt v Holt described as a difficult case without overruling it, but none of the parties before us sought to argue that we should not follow it. Article 47(H) of the Trusts Law allows the Court to declare the exercise of the power as voidable and having such effect as the Court may determine, or as having no effect from the date of its exercise.

346. We find for the plaintiffs under all three grounds by which the 2010 appointment is sought to be impugned and we will, therefore, set it aside as being void and of no legal effect.

Delegation

347. A further issue with the 2010 appointment arises in relation to the way Madame Crociani was given the power to determine what amount from the portfolio should be appointed to the Fortunate Trust, an amendment which was made in manuscript by Mr Le Cornu, without the benefit of any legal advice as to its effectiveness. Having decided to set the whole appointment aside, it is not necessary for us to consider this point further, but we do so because it was raised in argument before us.

348. The trustees have the power under clause Fourth (E) to grant a revocable power of attorney to a co-trustee, but it was not suggested that this power had been utilised, as no power of attorney

had been executed. We agree with the defendants that this power is permissive and does not exclude article 25(1) of the Trusts Law which is in these terms:

> ***"(1) Subject to the terms of the trust, a trustee may delegate the execution or exercise of any of his or her trusts or powers (both administrative and dispositive) and any delegate may further so delegate any such trusts or powers".***

349. We have serious doubts as to whether what occurred on this occasion was a considered and reasoned delegation by Mr Foortse and BNP Jersey to Madame Crociani of this important decision (involving a portfolio of around US$100 million). The evidence of Mr Le Cornu is that he simply left it entirely up to Madame Crociani as to how much would be transferred to the Fortunate Trust and she was unable to make up her mind. Mr Foortse was sent the deed without any comment or discussion with BNP Jersey – he just signed and returned it. It seems to us that the decision was effectively abandoned to Madame Crociani, rather than being properly delegated to her.

350. It was a decision that potentially created very considerable difficulties for the ongoing administration of the Grand Trust, as it was a power that she could exercise at any time over an indefinite period. Two distributions were in fact made from that portfolio before she eventually transferred the balance to the Fortunate Trust, showing that it must have been revocable in nature; an important point, as the plaintiffs criticise the failure of BNP Jersey and Mr Foortse to attempt to revoke it, when the family relationship broke down and the landscape changed.

351. Whatever the validity of this purported delegation, what it did do was place Madame Crociani in a position of serious conflict, as she was a beneficiary, with extensive powers, of the Fortunate Trust. The defendants correctly say that the conflict rule does not apply where the trustee is placed in a position of conflict by the terms of the trust, but Madame Crociani could not benefit from clause Eleventh, other than incidentally, adopting the wider construction, and therefore the Grand Trust deed did not place her in a position of conflict. By this purported delegation, she was placed into a position in which she had to decide, as trustee, how much to appoint from a trust from which she could not benefit to a trust from which she was the only beneficiary during her lifetime, with power to withdraw all of the capital, i.e. by how much to benefit herself.

352. The need for impartiality is expressly required under the terms of the Grand Trust deed, under which the term *"discretionary power"* is defined as meaning *"that power of decision or action vested in a Trustee which requires the exercise by that Trustee of the high burden of impartial judgement imposed upon the Trustee as a fiduciary."*

353. We deal with the issue of conflict in more detail when we consider the Agate appointment, but this conflict between Madame Crociani's private interests as a beneficiary of the Fortunate Trust and her duties as a trustee of the Grand Trust (to say nothing of her conflict and that of BNP Jersey as trustees of both trusts) are such as to vitiate the purported delegation to her.

354. Therefore, if we were not to strike down the 2010 appointment as a whole, we would have found the exercise of the power purportedly delegated to Madame Crociani and the actual exercise of that power to constitute a breach of trust.

ACQUIESCENCE

355. It is the pleaded case of the defendants that Cristiana acquiesced in the 2010 appointment, in particular at the meeting held on 7th April, 2010, some months after it had been executed. Even if she had acquiesced, that would not affect the outcome, as no such claim can be made in relation to the second and third plaintiffs, *"A",* who was born on 25th March, 2005, and "B", who was born on 28th November, 2007, who are minors. However, as it has been raised, we are going to deal with it and in order to do so, we will summarise the circumstances of the family at that time.

356. After leaving New York, the family lived for a period of time in Paris, and in or around 1992, they moved to an apartment in Monaco, where they lived together until the family breakdown in 2011. Madame Crociani, Camilla and her husband and children still reside there.

357. Cristiana described her mother as a scary person, who had a psychological hold over her, manipulating and controlling her life. She lived in fear of her. That assessment of her mother's character was supported by other witnesses who knew her. Mr Le Cornu described her as unpredictable and an exceptionally difficult person to work with, to say the least, who would often lose her temper at meetings, leading to her getting extremely angry and hostile towards him.

358. Mr Foortse said she was a dominating person who liked to control, with mood swings from one end of the spectrum to the other. Although he was able to handle her, she could be intimidating to others, and would use foul language.

359. Miss de Mestral described her as *"a very high tempered woman".* Mr Marc Walmsley, a deputy trust manager at BNP Jersey in 2011, when he first became involved in the Grand and Fortunate Trusts, said she was quite a scary person to talk to, even on the telephone. She was just very rude, calling him *"boy"* and swearing down the phone; something he was not used to.

360. Cristiana told us that her mother had an obsession that she and Camilla should marry princes, which Cristiana did in June 1997, under pressure from her mother, a marriage that was very unhappy and lasted only four months. Camilla married Prince Charles de Bourbon des Deux Siciles a year later. He had a title, but no independent means.

361. As they grew up, Cristiana felt that her mother favoured Camilla and in adulthood, the relationship between Madame Crociani and Camilla became very close. They shared the same social ambitions and interests and their social diaries were inextricably linked.

362. Madame Crociani did not approve of Nicolas Delrieu (a man of independent means who we shall refer to as "Nicolas") as a potential husband for Cristiana, and *"refused to allow"* Cristiana to marry him when she became pregnant with A in 2003, but in a pact, described by Nicolas as "blackmail", it was agreed that although Cristiana had to remain living in the apartment (with Nicolas, who moved into the apartment in or around October 2003), they could be free for three months of the year. As a consequence, in 2004 Cristiana and Nicolas found and Cristiana purchased the first flat in Miami with a distribution from the Grand Trust and would live there with Nicolas and their children for three months of the year, starting a couple of days after Madame Crociani's birthday (23rd October), returning for Christmas, leaving again after her birthday on 12th February, and returning for Camilla's birthday on 5th April. This was a regular pattern up until 2010/11.

363. To the outside world, they no doubt presented as a close-knit family. Mr Foortse said whilst there may have been tensions from time to time, that did not detract from the appearance of a happy and united family, with the perception being that Madame Crociani treated Camilla and Cristiana as though they were twins, entirely equally both financially and otherwise. They trusted each other completely and found it very difficult to trust anyone outside their close family unit.

364. However, to Cristiana and Nicolas the atmosphere in the apartment was suffocating. It was a five-bedroomed apartment and by 2010, it was occupied by Madame Crociani, Camilla, her husband and their two children and Cristiana, Nicolas and their two children. This was the way Madame Crociani wanted it. Madame Crociani had a fear of being alone, and she controlled the purse strings. Cristiana acknowledged that they led extremely glamorous and luxurious lifestyles, but they had no independence or private life of their own. She described it as *"a golden hell".*

365. However, despite all this, Cristiana trusted her mother completely on financial matters. She would sign whatever documents her mother put in front of her. Sometimes, she and Camilla were asked to sign documents in blank in case Madame Crociani needed their signature, and she never thought for a moment that her mother would *"steal from her".*

366. She was aware that there were two trusts, but with everything she has since learned, it is now difficult for her to say precisely what her state of knowledge was at that time. She described it as *"living in a fog".* She could remember signing requests for distributions, and was aware, therefore, that she was a beneficiary. She was aware of the large portfolio managed by BNP Suisse. As she said, the money was coming in and it was a very nice lifestyle financially. She did not probe, but at the same time, no one ever explained the trusts to her and there is no evidence that any of the trustees ever did so. There is no evidence that she ever had a copy of the Grand Trust deed, or ever saw any trust accounts. Indeed, no trust accounts were produced by BNP Jersey for approval by Cristiana as a principal beneficiary, let alone for approval by its co-trustees.

367. Cristiana's lack of knowledge of the trusts is supported by the evidence of Mr Le Cornu. He had the impression by 2008 that whilst she was broadly aware of the nature of the assets held within the trusts, which she was happy for Madame Crociani to look after, he would be surprised if she knew the exact nature of her entitlements under the Grand Trust prior to the 2010 appointment.

368. On 30th March, 2004, Cristiana was made a director of Croci BV along with Mr Foortse and the corporate trustee, on the instructions of her mother, Cristiana said, as a *"yes woman to sign, just so that others would not steal*". That role did at least involve her in signing the annual accounts of Croci BV, but despite this, she says she was not aware of how the family structure was set up and indeed, of the Promissory Note. It is hard to believe, she said, but that's how it was. Mr Foortse confirmed that she showed very little interest in Croci BV.

369. By way of an aside, we note in this respect that the accounts of Croci BV, whilst mentioning the liability under the Promissory Note, make no reference to the identity of the creditor, namely the Grand Trust.

370. There is no evidence, other than the witness statements of Madame Crociani and Camilla, that Cristiana had any prior knowledge of the 2010 appointment. Indeed, the evidence is to the contrary, in that in August 2008, Madame Crociani gave instructions that the daughters were not to be parties to the 2010 appointment, and they were subsequently removed from the draft deed. Cristiana did not attend the meeting on 5th December, 2007, when the in principle decision was made, or the only subsequent meeting on 17th December, 2009, when the 2010 appointment was executed by Madame Crociani, and there is no evidence that she ever had sight of the 2010 appointment in draft or as executed.

371. Miss de Mestral, whose main contact was with Madame Crociani, who she regarded as the client, did have contact with Camilla and Cristiana over the signing of distribution requests, and with

Cristiana, who within the family had the role of filing the statements of accounts sent by BNP Suisse in connection with the companies held within the two trust structures and for monitoring the fees levied by the BNP group. She said she would refer in conversations with Cristiana to the revocable and irrevocable trusts in order to distinguish between them, and in her view, Cristiana was aware that the distributions came out of the irrevocable trust.

372. However, Miss de Mestral was essentially on the banking side of the relationship, and she confirmed that she never had any discussions with Cristiana about the terms of the Grand Trust, or of the Fortunate Trust, or by necessary implication, the terms of the 2010 appointment.

373. Madame Crociani says the 2010 appointment was the culmination of a lengthy and detailed process, very carefully considered by Camilla and Cristiana, and which it was agreed by them was in the interests of the family as a whole. Indeed, she says they insisted on it, as they wanted the old structure transformed into a simple, more effective and efficient one. There were, she said, long discussions with their Italian lawyer, a Mr Cecilia, in the summer of 2006 or 2007, over the re-structuring, when they both made comments and suggestions of their own. Indeed, that Camilla and Cristiana were pushing for the changes, is evidenced, she said, by the way they signed the asset exchange agreement under the Fortunate Trust on 7th April, 2010, (which divided artwork between their respective funds A and B in the Fortunate Trust), and documents relating to the protectorships of their respective funds A and B in the Fortunate Trust.

374. This begs the question of why, if Cristiana was so involved and so keen on the 2010 appointment, Madame Crociani instructed her removal as a party to it. We note that Madame Crociani makes no reference at all in her witness statement to her instruction in 2008 that the daughters were not to be a party; indeed, the daughters were not even to know about the existence of the Fortunate Trust.

375. Camilla's witness statement says very much the same thing. She goes further and says that in 2009, she and Cristiana attended meetings in the Monaco apartment with Mr Le Cornu, Miss de Mestral and her predecessor as relationship manager, Miss El Masri, in which the re-structuring was explained. Mr Le Cornu had apparently confirmed that Ogier were working on the deeds to be signed. The evidence shows, however, that the only meeting in 2009 was that held on 17th December, at which neither daughter was present.

376. Camilla then says that in the summer of 2008, Miss El Masri spent some two or three days with them, going through the drafts prepared by Ogier, but this is the same Miss El Masri who, on 27th August, 2008, e-mailed Mr Le Cornu under the heading *"My wonderful weekend with Madame and co."* passing on the instruction of Madame Crociani that the daughters were not to be parties

to the deed or to even know about the Fortunate Trust; it follows that there can have been no such discussions with the daughters.

377. It may be that Camilla was more aware of what was happening because of her closer relationship with Madame Crociani, but it is Madame Crociani and Camilla who ultimately benefited from the 2010 appointment and it is in their interests to defend it. They have not come forward to allow their evidence to be tested in cross-examination. We prefer the evidence of Cristiana.

378. Before turning to the meeting on 7th April, 2010, we deal firstly with the law on acquiescence.

Law on acquiescence

379. Jersey law on acquiescence is the same as English law (Nolan v Minerva Trust and others [2014] (2) JLR 117). Lewin, at paragraphs 39-122 and 39-123 sets out the conditions to be satisfied where trustees seek to rely on such a defence, namely: -

(i) The beneficiary must be of full age and capacity;

(ii) The beneficiary must have the requisite degree of knowledge; and

(iii) The release must not be wrung from the beneficiary by distress or terror.

380. The second, and relevant condition for our purposes, is that the beneficiary must have the requisite degree of knowledge. Wilberforce J, after reviewing the authorities, summarised the position as follows in Re Pauling's Settlement [1962] 1 WLR 86 at 108: -

> ***"The Court has to consider all the circumstances in which the concurrence of the [beneficiary] was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn round and sue the trustees; that, subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefited by the breach of trust."***

Meeting of 7th April 2010

381. Following the execution of the 2010 appointment (it was dated 9th February, 2010), Mr Le Cornu attended a meeting at the Monaco apartment on the 7th April, 2010, with Madame Crociani, Cristiana, Camilla and Miss de Mestral. The purpose of the meeting, as far as he was aware, was to discuss the re-structuring and in particular, to execute the asset exchange agreement in relation to the artwork, and by which it was divided between the A and B funds held for Camilla and Cristiana under the Fortunate Trust.

382. At the meeting, he said he spoke to Camilla and Cristiana about the changes that had come about as a result of the 2010 appointment, showing them the chart and the Features document, and he said neither Camilla nor Cristiana expressed any surprise or discomfort when he did this. There are a number of versions of these documents and so Mr Le Cornu could not be certain which were used at the meeting, but all of the versions are the same for the purposes for which we rely upon them.

383. He did not give them a copy of the Grand Trust deed, the conformed Fortunate Trust deed or the 2010 appointment. He did not conduct a comparison of the terms of the Grand Trust and the amended Fortunate Trust, or of their respective interests under the two trusts, his focus being on the key advantages of the new arrangement, one of which was the removal of the fixed vesting of capital interests upon their respective deaths. He explained that this had changed to discretionary interests and that they would have extensive control as protectors following their mother's death. He explained this also provided better protection against external attack for them and their children. He said he would have run through each of the Features and explained that the Fortunate Trust was still revocable, but *"there wasn't a huge amount of importance attached to that, frankly."*

384. Cristiana can only remember that part of the meeting relating to the asset exchange agreement and the addition of the Crica shares which we describe later. There was a difference in the recollection of Mr Le Cornu and Miss de Mestral over what he told Camilla and Cristiana about their interests in the Fortunate Trust. He said he would have told them that they were beneficiaries, with their own separate funds. Miss de Mestral, who is still friendly with Madame Crociani and Camilla, recalled that he made it clear to them that they were not beneficiaries until after Madame Crociani's death, although this is something she raised for the first time in her fourth written account of this meeting.

385. Advocate Redgrave did his best in re-examination to get Mr Le Cornu to recant on his evidence as to his misunderstanding of the interests of Camilla and Cristiana in the Fortunate Trust. As

Advocate Redgrave pointed out, this evidence was inconsistent with his evidence in chief and his witness statement, and also inconsistent with the evidence of Miss de Mestral as to what he said at this meeting.

386. However, Mr Le Cornu's recollection is consistent with the contemporaneous documentation and is to be preferred:

(i) The Features document and the chart used at the meeting show Camilla and Cristiana as beneficiaries of the Fortunate Trust – nowhere does it state that they only become beneficiaries after their mother's death;

(ii) The asset exchange agreement itself recites that Camilla and Cristiana are beneficiaries of their respective A and B funds in the Fortunate Trust, as if those funds existed as separate funds at that time, whereas under Article 3 of the Fortunate Trust as amended, separate funds only came into existence on Madame Crociani's death;

(iii) When Mr Le Cornu e-mailed Cristiana on 8th April, 2010, over the transfer of the Crica shares into the Fortunate Trust, he said this:

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

again, indicating that he thought their respective A and B funds existed at that time; and

(iv) Although there are documents signed by Camilla and Cristiana about that time in relation to them becoming protectors of their respective funds, neither says anything about their status as beneficiaries.

387. It is clear that Mr Le Cornu regarded Camilla and Cristiana as being beneficiaries of separate funds that existed at that time. As we find later, we do not think it would be possible that Cristiana would have transferred the Crica shares into a trust of which she, and her children, were not current beneficiaries.

388. The evidence goes nowhere near supporting a case in acquiescence in the 2010 appointment on the part of Cristiana. There are two aspects of acquiescence, firstly a concurrence or agreement, and secondly, an understanding of what you are concurring in or agreeing to.

389. The focus of the 7th April, 2010, meeting was the new structure and its merits, as Mr Le Cornu perceived them. Cristiana was told what had happened, but at no stage was she asked whether or not she concurred in or agreed to it. If she had been asked, she would have to have understood what her respective interests under the Grand Trust and the Fortunate Trust were, and how they differed; Mr Le Cornu was clear that no such comparison was carried out. Furthermore, she would have to have understood the limitations on the power used to make the transfer, namely clause Eleventh.

390. The evidence shows that no one at any stage had ever advised Cristiana as to her interests under the Grand Trust, and we conclude that she had no idea as to how her interests had in fact been diluted comprehensively by the 2010 appointment. The plea of acquiescence, as against Cristiana, therefore fails.

THE 2012 APPOINTMENT OF APPLEBY MAURITIUS

391. We now move on to the next appointment which the plaintiffs seek to impugn, namely the appointment of Appleby Mauritius as trustee of the Grand Trust on 10th February, 2012. In order to set this appointment in its context, it is necessary to summarise the events leading up to it. Much took place during this period and was explored in some detail during the hearing but of necessity, we must limit ourselves to the key events. We start by going back slightly to an event in late 2009, in relation to the art, when there was the first outward sign that Madame Crociani wanted to favour Camilla.

392. Cristiana had seen Camilla spending more and more time with Madame Crociani, pushing, she now assumes, for a greater share of the family wealth. Nicolas described Camilla as being obsessed with her status as a princess and becoming very greedy.

393. This is how Cristiana described the process by which Madame Crociani divided the art between her and Camilla:

> *"What happened was that one day my mother called me into her room, and my sister was already there, and she said "Sit down, we are talking about the artwork", okay? She said – It was terrible, this episode is terrible as well – Here I*

have the list of the artwork in front of me. So I am going to divide it up just in terms of convenience of which artwork fits better with whom of the two of you". So then she started saying, "The Chagall, your father bought one for each. So this Chagall to you, this Chagall to you. Camilla write. Camilla write what I am saying." So then Camilla made a handwritten note of the paintings. -- ..

My mother was laying on the bed, as I said, in a very casual manner, and then she was like, "Okay, Camilla, Giacomo Balla, Leger, Cristiana, Van Gogh, Camilla". She had the list of the paintings in her hand. So she was going back and forth …

Giving a little explanation like in a laughable way, after she would say each painting, which was very unusual for her because she was such a strict and dominating woman. …

So it was done in a very casual manner. And then she said "Sign, do you agree?" So I looked at the list, as if you would now please try to come into my skin, look at the list that your mother has chosen to share and she said "Sign". I signed, my sister signed, and that was it.

Then I went back to my bedroom where Nicolas was and said "You can't imagine what just happened. There was some sort of division of paintings". He said, "Like what?" Because Nicolas likes art very much and we do go to art exhibitions and museums together, we like art. Of course I grew up with these paintings on my walls. So I was telling him a little bit the names, and he is like "Cristie, it doesn't sound like it was very even if your sister got Gauguin and Cezanne and Rousseau and Renoir. Are you sure about that? And I said "Yes, but I think I got .." Anyway, my bad memory always plays tricks on me, I couldn't really remember the names. And that was it, that was the end of the story."

394. The spread sheet showing this division prepared by BNP Jersey, and which formed the subject matter of the asset exchange agreement under the Fortunate Trust signed by Camilla and Cristiana on 7th April, 2010, showed that Camilla or her Fund A received paintings to the value of US$122 million and Cristiana or her fund B US$ 21 million.

395. Madame Crociani says that Camilla and Cristiana divided these paintings between themselves. Camilla says the division respected their own wishes and inclinations. Neither comments on the gross disparity in the value each received. We accept Cristiana's evidence that this division was dictated by Madame Crociani and that she felt she had no option other than to accept it.

396. On the afternoon of 25th October, 2010, a meeting took place in the Monaco apartment between Madame Crociani, Camilla, Paul Foortse and Miss de Mestral. It would seem that Cristiana was aware that Mr Le Cornu was attending that meeting, but not what the meeting was about. She had already arranged to leave on that day for Miami, as she always did two days after Madame Crociani's birthday. Mr Le Cornu did not know what the purpose of the meeting was. Mr Foortse was expecting Cristiana to be there in the morning, for a meeting of the directors of Croci BV. There is no evidence that she had been given notice of that meeting.

397. Mr Foortse was told by Madame Crociani and Camilla that they had asked Cristiana to stay for the meeting and they were angry that she had refused. In our view, the meeting was purposely fixed by Madame Crociani and Camilla for a time when they knew Cristiana would not be there, and this because of what was proposed. Once again, Mr Le Cornu appears to have kept no note of the meeting, but his e-mail of 1st November, 2010, records that Cristiana had shown little interest in the business or properties and preferred to lead a simpler life and Madame Crociani wanted to arrange her affairs in such a way that responsibility for these assets passed to Camilla. It was proposed that Croci NV would be placed in a new trust for Camilla and her family. This became known, aptly, as the Princess Trust.

398. Croci NV owned all of the numerous prestigious family properties, the yacht, and the jewel in the crown, Ciset. The cash generating potential of Ciset and its subsidiary Vitrociset is illustrated by the fact that between 2004 and 2007, Vitrociset generated dividends of some €108 million, which were used *inter alia* to acquire an additional apartment in Rome, a villa in Cortina, a villa in Rome, a villa in Circeo, land and a hotel in Sardinia and an additional apartment in Monaco. Cristiana doubted that Camilla was really interested in the management of these assets, but management is one thing, ownership another. Mr Le Cornu, Miss de Mestral and Mr Foortse did not seem to appreciate how devastating such a proposal would have been to Cristiana, and the implications of it to her and her children. She knew nothing about it as Camilla later confirmed.

399. There were two impediments to this proposal; firstly, Cristiana was a director of Croci BV and would become aware of any transfer of the shares in Croci NV, and secondly, she and Camilla were the bare owners of the shares in Croci NV which would need to be transferred to the new trust for Camilla.

400. By way of notice to Cristiana of her removal as a director, Mr Foortse left the following note on the mantelpiece of the apartment:

> *"Oct 25, 2010*

Dear Cristie,

It was a pity to miss you today.

Please be advised that a shareholder meeting of Croci International BV is planned on 16 November.

Best regards

Paul Foortse"

401. Apart from the fact that Cristiana had gone off to Miami, and Mr Foortse had no idea when she would be returning, this note gives no indication of the business that was to be conducted at the meeting, namely, her removal as a director. Mr Foortse accepted that this was, using his words, *"Sloppy",* and that he could have contacted her directly if he had wanted to.

402. Mr Foortse then drafted a share transfer agreement, by which Camilla and Cristiana transferred their shares in Croci NV back to Madame Crociani, which he sent to Madame Crociani. Cristiana said she was tricked into signing this document by Madame Crociani sending to her in Miami by fax in early November 2010 the signature page only, and asking her to sign and return it. This was at a time when she fully trusted her mother and was signing documents in relation to the transfer of the Crica shares.

403. In her witness statement, Madame Crociani says that Cristiana happily transferred the shares back to her, as she had signed a document agreeing that she would do so. Madame Crociani does not explain how she procured Cristiana's signature, and does not pretend that Cristiana was told why they were being transferred back. We are given to understand that Madame Crociani has failed to discover her telephone records which would show whether she faxed Cristiana one page or the full three page document. Cristiana's telephone records show that she only faxed back one page. We will come to further evidence on this but it is inconceivable to us that Cristiana would have signed this transfer, if she had known the purpose behind it.

404. Madame Crociani's case has always been that following Cristiana's departure to Miami on 25th October, 2010, she disappeared and Madame Crociani and Camilla became concerned over her safety and well-being, and feared that she may have got involved in drugs or with a sect or was under the influence of the Mafia. For the first month of her departure, things were normal, but they changed in December 2010 when she said Cristiana called saying she didn't want to come

home for Christmas. She did not return home for her birthday on 12th February, 2011, or for Camilla's birthday on 6th April, 2011, although she did call on Camilla's birthday; that was the last time Madame Crociani and Camilla spoke to her. Camilla gives a very similar account.

405. Cristiana and Nicolas gave a quite different account. Cristiana said she had every intention of returning for Christmas, as they always did, and indeed she had left her clothes and possessions and those of her children in the Monaco apartment. It was Madame Crociani and Camilla who made a strange phone call to her in December, suggesting that she didn't return with the family. They said it was too cold, and they were very busy with working on *"Charles's dynastic order".* So she didn't go back for Christmas which she said was very unusual. Cristiana wanted to go back for her birthday and Camilla's birthday, but was again dissuaded in phone calls, some of which Nicolas overheard.

406. We can place little weight on the untested evidence of Madame Crociani and Camilla, but in any event, we prefer the evidence of Cristiana and Nicolas. Madame Crociani and Camilla had good reasons for wanting them out of the Monaco apartment, because they were busily and secretly engaged in transferring Croci NV to or for the benefit of Camilla and her children.

407. Following the 25th October, 2010, meeting, BNP Jersey instructed Mourant Ozannes to prepare a draft of the Princess Trust, which was signed on 21st March, 2011, with BNP Jersey and Mr Foortse being the first trustees, although the transfer of Croci NV into the Princess Trust never proceeded. Under the terms of the Princess Trust, Cristiana was only to benefit if Madame Crociani and Camilla and all of her issue were no longer living.

408. On 16th November, 2010, Cristiana was removed as a director of Croci BV and replaced by Camilla. This took place without her knowledge.

409. On 2nd March, 2011, a distribution of €280,000 was made from the Grand Trust to Cristiana (one of the impugned distributions), which she transferred on to her mother, for which purposes she was in contact with BNP Suisse.

410. On 23rd March, 2011, Camilla engaged the services of Mr Christophe Kosman of Sarrau & Associé, a Swiss lawyer, who, it would seem, became the legal adviser to both Camilla and Madame Crociani. He advised against proceeding with the Princess Trust because he thought it was vulnerable to attack (we presume by Cristiana) and formulated his own proposals.

411. Mr Le Cornu met Camilla in Paris on 28th March, 2011, and was told by her that relations between Madame Crociani and Cristiana were strained and Madame Crociani wanted Cristiana temporarily excluded as a beneficiary of the Fortunate Trust, although it would seem from BNP Jersey's time records that it was already researching the possible exclusion of beneficiaries earlier on 25th March, 2011.

412. On 11th April, 2011, BNP Jersey, through BNP Nominees, removed Cristiana as a director of Crica and appointed Mr Foortse as a director in her place, and this again without her knowledge.

413. Cristiana felt something was strange and wondered why Madame Crociani and Camilla did not wish to see her. She e-mailed Mr Le Cornu on 14th April, 2011, requesting copies of all documents signed by herself starting in March that year, concerning the Grand Trust, the Fortunate Trust and the various underlying companies. Mr Le Cornu accepted that ordinarily communications from beneficiaries would be kept confidential, but on this occasion he did not answer that e-mail, but forwarded it instead to Mr Kosman. He felt it was in some way related to the hostility then manifesting itself in the family and that Cristiana might have *"fallen into criminal hands".* He said it was an unusual request and responding might have made matters worse; if he had provided the information, it might potentially have fallen into criminal hands. There is no file note or internal or external communication about these serious concerns about Cristiana so that we can understand on what evidence they were based, concerns serious enough to override the duty of confidentiality owed to her as a beneficiary.

414. Advocate Robinson submits, with some justification, that BNP now regarded Madame Crociani and Camilla as *"the clients",* and were working with them over the proposed new structure, which was to the benefit of Camilla and her children, and to the detriment of Cristiana and her children.

415. Cristiana decided to visit Madame Crociani and Camilla on her own, so that if there was a problem, they could resolve it face to face. When she arrived at the Monaco apartment on 25th April, 2011, Madame Crociani and Camilla were not there, but on the dining room table she found documents, including something called *"the Mozart Trust proposals"* prepared by Mr Kosman for the restructuring of the family trusts and the Princess Trust, which came as a profound shock to her. Under the Mozart Trust proposals, the Grand Trust portfolio was to be transferred to the Fortunate Trust which would then be revoked and the bulk of the family wealth then put into new structures, primarily for the benefit of Camilla and her children. Cristiana also learned about the transfer of her shares in Croci NV and her removal as a director of Croci BV.

416. She left the apartment for her father-in-law's house in France, and called Nicolas, who said she was crying and sounded devastated. She had found documents which showed that her sister

and mother were plotting against her. We find this was a defining moment, in which Cristiana's trust in her mother was shattered, it would seem irreparably.

417. It was Mr Kosman who noticed the error in the wording of clause Eleventh, as set out in the recital to the 2010 appointment, and he raised this with BNP Jersey. BNP Jersey took advice from Ogier on 21st April, 2011, giving them a copy of the Grand Trust deed and the 2010 appointment, but not the Fortunate Trust, and giving this incorrect information:

> *"The Grand Trust is irrevocable whereby the Fortunate Trust is revocable. The Settlor is not a beneficiary of either the Grand Trust and Fortunate Trust. However, she would be able to benefit from the Fortunate Trust as she has the power to revoke it."*

418. It would seem that the advice was required that day, and Ogier responded as follows: -

> *"We are unable to give definitive advice on such short notice as our file is in storage. However, our initial response would be that we do not anticipate a problem provided that the trustee of the Grand Trust exercised its powers under clause 11 at the time of the Appointment for the benefit of Camilla and Cristiana Vesel and this should be a proper exercise of its power and whether or not the settlor of the Fortunate Trust has a power to subsequently revoke that trust has no bearing on the Appointment and the exercise of the trustees' powers under the Grand Trust for the benefit of Camilla and Cristiana.*
>
> *If you would like us to give considered advice on this point, then we would need to retrieve our file and would be unable to provide such advice until next week. Please let me know how you would like to proceed."*

419. This exercise had been conducted in the absence of Mr Le Cornu by Mrs Kim Deveney, who was then the director of client administration at BNP Jersey, who responded to Ogier saying this was *"exactly what we wanted confirmation on"* and asking Ogier to hold off retrieving the files until they had discussed the matter further with Mr Kosman. Mr Le Cornu was sent this exchange, and said it did not set alarm bells ringing with him, and he did not regard it as appropriate to get further advice from Ogier. He accepted in evidence that perhaps further advice should have been obtained. Mrs Deveney passed on this advice to Mr Kosman, and confirmed that the appointment had been effected in the manner outlined in that advice. It was left to Mr Kosman to decide whether or not more comprehensive advice was required and, unsurprisingly, in the light of Mrs Deveney's confirmation, none was.

420. On 5th May, 2011, pursuant to the Kosman proposals, BNP Jersey instructed Ogier to draft a deed of revocation of the Fortunate Trust. On 9th May, 2011, Mr Le Cornu informed BNP Suisse that Madame Crociani was going to transfer the entire portfolio from the Grand Trust to the Fortunate Trust, pursuant to the authority delegated to her under the 2010 appointment.

421. On 10th May, 2011, Cristiana was removed as manager of the structure beneath Crica, again without her knowledge.

422. Cristiana consulted an Italian lawyer, Professor Mario Cera, who wrote to Madame Crociani on 11th May, 2011. It was couched in diplomatic terms and was concerned with Cristiana's interests in the family assets. It sought a preliminary meeting. Madame Crociani responded promptly on 15th May, 2011, saying that she was willing to provide Cristiana with any clarification she sought, but if it was necessary to involve lawyers, then he could contact her lawyer, then a Professor Nicolo Lipari. Professor Cera also wrote to BNP Jersey on 16th May, 2011, noting that it had carried out a number of trustee duties on behalf of the Crociani family. He said he was taking certain measures on Cristiana's behalf to protect her interests and that it would be appropriate to have a meeting to obtain clarification and information. BNP Jersey decided not to get involved at this stage in this correspondence and did not provide him with any information.

423. On 18th May, 2011, BNP Jersey e-mailed Ogier with the following instruction in relation to the Grand Trust:

> *"It has recently been brought to our attention that one of the beneficiaries of the above Trust has been renting out property ultimately held by our structure and has been pocketing the rental income. The family have lost touch with this individual and there are significant disputes within the family. The property that has been rented is in the US and we are not sure if the individual is residing in the US.*
>
> *Bearing in mind the above, we should be grateful if Ogier would kindly advise the Trustees whether or not it would be advisable for the Trustees to consider exercising their discretionary powers (in accordance with Article 2C of the Deed of Amendment dated 23/12/2009) to remove this beneficiary by way of a revocable instrument."*

424. Ogier were concerned that these allegations against Cristiana emanating from Madame Crociani and Camilla were unsubstantiated and gave this considered preliminary advice:

"Our preliminary advice

…

However, a trustee when exercising any of its powers and discretions has a duty to take into account all relevant circumstances and ignore any irrelevant circumstances. Our concern at the moment is whether the Trustees at present have sufficient reliable information and factual understanding of the background to make an informed decision whether or not to exercise their power of removal. When we spoke on the phone, it sounded as though a number of the allegations against the Relevant Daughter were as yet unsubstantiated.

It also appears to us that the taking of this step is a form of punishment for the Relevant Daughter misappropriating the funds, which, assuming the allegations against her are correct, has resulted in a deprivation of the other beneficiaries of the Trust (namely the Grantor, and in due course (ie after the Grantor's death) her sister and sister's lineal descendants), from the benefit of the misappropriated income that the LLCs, and in turn the BVI Co and the Trustees, were entitled to."

425. This exchange makes an interesting comparison to the instructions given to Ogier in 2008, over what became the 2010 appointment. On this occasion, unlike 2008, Ogier were asked to advise on the merits of Cristiana being excluded, and did so.

426. On 13th May, 2011, there was a meeting at the Monaco apartment, between Mr Le Cornu, Mr Foortse, Madame Crociani, Camilla and Mr Kosman, at which Mr Kosman's restructuring proposals were discussed. On the same day, Madame Crociani signed the letter directing the trustees of the Grand Trust to transfer the portfolio to the Fortunate Trust, comprising some US$100 million. The situation within the family had now completely changed, and Mr Le Cornu accepted in evidence that he should have sought advice as to whether he could and should have stopped the transfer, pursuant to the delegated authority under the 2010 appointment. He conceded that he would not at this point have been willing to make the 2010 appointment, as it was no longer in Cristiana's interests.

427. In or around May 2011, Madame Crociani asked Mr Le Cornu whether the Promissory Note could be appointed from the Grand Trust to the Fortunate Trust and he told her that this would not be proper, given that the relationship between Cristiana and Madame Crociani had deteriorated and the factual background had thus changed considerably.

428. On 23rd May, 2011, Mr Le Cornu received an e-mail from Miss de Mestral informing him that Madame Crociani insisted that the Fortunate Trust should be revoked as soon as possible. Relations between Madame Crociani and Cristiana deteriorated further in June 2011, when there was personal correspondence between them.

429. Cristiana consulted lawyers in the Dutch Antilles, who, on 6th June, 2011, wrote to Madame Crociani and Camilla, alleging that Cristiana's shares in Croci NV had been transferred fraudulently. She also instructed a Dutch firm of lawyers, who wrote to the directors of Croci BV (including Mr Foortse) alleging that they had assisted Madame Crociani in depriving Cristiana of her shares in Croci NV. On 24th June, 2011, Cristiana obtained a pre-judgment attachment in the Dutch Antilles to the shares in Croci NV. She obtained a similar order from the Dutch courts and challenged her removal as a director of Croci BV.

430. It seems logical to us that Cristiana would have sought redress in this way, as these were the two matters of which she was aware, following her surprise visit on 25th April, 2011, namely her removal as a director of Croci BV and the transfer of her shares in Croci NV. She and her advisers were seeking information as to what had happened within the trusts, which is supportive of Cristiana not understanding the implications of the 2010 appointment.

431. A meeting took place at the Monaco apartment on 14th June, 2011, between Madame Crociani, Camilla, Mr Foortse, an Italian banker and a number of other advisers. Mr Foortse explained that Madame Crociani was concerned to ensure that the transfer of the shares in Croci NV had been undertaken correctly, and at her request, he had arranged for a Dutch Antilles lawyer, Mr Leo Spigt, to attend. That meeting was secretly taped, and a USB stick containing the recording left in an envelope in the office of Nicolas in Monaco. It had to have been recorded by someone with access to the Monaco apartment, and he and Cristiana could only speculate as to who might have done this, but it was clearly to help them and damaging to Madame Crociani and Camilla. A number of points emerged from this recording: -

    (i) Camilla plays a leading role.

    (ii) Camilla and Madame Crociani were still unaware of the 25th April visit and were convinced that a former employee of Madame Crociani, Mr Marco Cecilia, was responsible for giving Cristiana the documents and information she had obviously obtained.

(iii) Madame Crociani had been trying, she said, to divide her assets as to one third to Cristiana, and two thirds to Camilla, and this in compliance with Italian forced heirship rules, but having received the recent letters from Cristiana's lawyers, her opinion had changed.

(iv) Contrary to their witness statements, they said it was after the 5th April, 2011, telephone conversation that Cristiana had disappeared and started attacking them with lawyers' letters. Up to 5th April, 2011, they were all on speaking terms, which is consistent with Cristiana's evidence.

(v) But for the documents Madame Crociani and Camilla thought Mr Cecilia had given Cristiana, they confirmed that she had no idea of what was happening, and would never have known what they were doing. *"She would never have known what we were doing, she didn't know what anything was about, what we did."* This confirms Cristiana's evidence that she had no knowledge of the Princess Trust or Kosman's proposals.

(vi) On the issue of the transfer of the shares in Croci NV, Mr Spigt pressed Madame Crociani as to whether she had sent Cristiana the whole 3 page transfer document prepared by Mr Foortse, or just the signature page – a simple question to which she gives an equivocal answer.

(vii) Camilla says that she wants to make the shares in Croci NV disappear *"because that's the only thing we are interested in. And to get out before it's too late. For the rest we are not interested in who loses, who wins the case …. because we know the attack will get here. We are just saying it will come."*

This demonstrates little faith on Camilla's part in the propriety of the transfer of the shares in Croci NV.

(viii) The objectives of Madame Crociani and Camilla, were that Cristiana should receive nothing; she should be cut off totally. Camilla stated that Cristiana had *"no money to fight".*

(ix) Mr Foortse advised that any transfer of Croci NV must be for a fair value, so that Cristiana's rights under Italian forced heirship rules were not prejudiced. As he said in evidence, he was advising Madame Crociani and Camilla, that whatever they wanted to do, they had to respect the law, namely Cristiana's heirship rights. Mr Foortse was keen to present this as his standing up for Cristiana's interests, but as Advocate Robinson said, here he was with all of Madame Crociani's advisers, clearly well aligned with their strategy; he was merely

pointing out the limitations as to what they were trying to do. That alignment included his agreement to act as a director of Crica in place of Cristiana and as a co-trustee of the Princess Trust.

432. On 30th June, 2011, Madame Crociani revoked the Fortunate Trust and withdrew all the assets (which included those appointed out of the Grand Trust under the 2010 appointment) to herself.

433. On 14th July, 2011, Mr Le Cornu wrote a letter to assist Madame Crociani and Camilla in defending the proceedings brought by Cristiana in the Dutch Antilles. In that letter, he confirmed that the shares in Croci NV had not been transferred to the Princess Trust. In fact, the day before, his office had received a document signed by Madame Crociani, as transferor, and Camilla, for the trustees of the Princess Trust, transferring the shares in Croci NV to the Princess Trust. It had not been signed by the trustees, namely Mr Foortse and BNP Jersey, and the transfer was not proceeded with. It is not clear how this transfer tied in with the advice of Mr Kosman, who had apparently advised against the use of the Princess Trust, but in any event Mr Le Cornu accepted that in the circumstances, his letter had been misleading, but not intentionally so.

434. On 11th August, 2011, the Dutch Antilles court lifted the pre-judgment attachment over the shares in Croci NV. Madame Crociani had produced a handwritten letter signed by Camilla and Cristiana in 1996 agreeing to transfer the shares back to her at her request. Mr Foortse said he had no part in the drafting of that letter. The judge found that whether or not Cristiana had been tricked into the transfer in 2010 was immaterial, as she was obliged to transfer the shares back to her mother under the terms of that letter. The Dutch Antilles court found Cristiana's case inherently implausible.

435. Cristiana maintains that this letter is a forgery. In 2014, she made a criminal complaint in Monaco and produced to us a copy of an expert's report, commissioned by the investigating authority, which finds that it has the marks of a possible forgery, but the opinion is heavily caveated, in particular because the expert was working from a copy, and not the original, which has now apparently disappeared in the hands of Madame Crociani.

436. By the late summer of 2011, in the words of Advocate Redgrave, the feud had descended into open warfare. The Grand Trust portfolio, now beneficially controlled by Madame Crociani, was systematically emptied on her instructions. Mrs Deveney described her as *"paranoid"* at this time and wanting everything back. Mr Le Cornu accepted that bit by bit assets disappeared from the view of BNP Jersey and that Madame Crociani was taking these steps, certainly in part, to frustrate Cristiana.

437. We were taken through the many transactions involved, including trusts which were established and then revoked, but suffice it to say that by the time of the appointment of Appleby Mauritius in January 2012, only some US$16 million - US$17 million remained under BNP's management, and most of that was paid away over the ensuing six months. The rest had gone to various destinations in the world, including, we note, a payment of €15 million to Madame Crociani's account at AfroAsia in Mauritius.

438. Mr Le Cornu accepted that the Promissory Note in the Grand Trust would also have gone if Madame Crociani had had her way. Amongst the documents discovered is a draft letter from Mr Foortse to Madame Crociani and Camilla dated 6th September, 2011, which may or may not have been sent to them, but which Mr Foortse confirmed he drafted, and it is in these terms:

> *"Mrs Edoarda Crociani*
>
> *Mrs Camilla Crociani – de Bourbon*
>
> *Rome*
>
> *Italy*
>
> *6th September 2011*
>
> *Dear Ladies,*
>
> *With respect to the Note I have the following idea.*
>
> *The Note between the Trust and Croci International BV (BV) is a reality and a fact of life which makes it impossible to let the Note disappear.*
>
> *The only thing that can be done is to change the conditions of the Note. This can only be done by negotiating this by BV with the Trust. It should be based upon an external factor, so that the beneficiaries of the Trust cannot say that their rights have been damaged. For instance, if a bank lending money to the Group demands that the bank will be repaid first and no payments can go to the Trust. The effect of this is that the Note will only be paid if the money is really there because the Note will be qualified as subordinated.*

I have discussed this with Miles Le Cornu and Aldo Mariani and they agree with my view.

Best regards,

Paul Foortse."

439. Mr Le Cornu denied discussing ways of diminishing the value of the Promissory Note, and of course, any such proposal would have been a clear breach of the duties of the trustees of the Grand Trust.

440. Mr Foortse gave a wholly unconvincing explanation for this letter. It is clear that in discussion at the time, was Madame Crociani and Camilla's wish for the Promissory Note *"to disappear"* and whilst that could not be done, Mr Foortse came forward with a proposal to diminish its value.

441. Mr Le Cornu met with Madame Crociani and Camilla on 14th September, 2011, and described her in his witness statement as *"exasperated".* In evidence, he said that this probably understates the situation, as she was *"absolutely furious with Cristiana …. She was mad."* He made reference to a possible sale programme of the artwork, which she confirmed was to make it harder for Cristiana to get at it. Mr Le Cornu said he didn't think Madame Crociani was necessarily hiding her assets, but she was *"frantic and she did what I consider to be nonsense things in terms of putting assets in different companies' names and all the rest of it".* Despite the success of the Dutch Antilles proceedings, Madame Crociani was, he said, planning for the next potential confrontation, the Dutch proceedings continuing until a final hearing and unsuccessful outcome for Cristiana on 10th January, 2012.

442. In her affidavit of 2nd August, 2016, sworn in support of BNP Jersey's application for a Mareva injunction against Madame Crociani, and in reviewing her conduct following the revocation of the Fortunate Trust, Mrs Deveney said this:

> *"41.5.2 Madame Crociani is very familiar with the use of trust and company structures to hold assets. Following the revocation of the Fortunate Trust in June 2011, BNP Jersey was involved in/aware of the creation of at least six such structures. It is my belief that Mme Crociani intended to use these structures to protect her assets from third parties, and <u>more specifically the plaintiffs.</u>"* (Our emphasis)

443. That statement was made after a review conducted in 2016, but looking at Madame Crociani's conduct in the period leading up to the appointment of Appleby Mauritius in January 2012, it must have been clear to BNP Jersey that Madame Crociani was seeking to protect the assets derived from the revocation of the Fortunate Trust from claims by Cristiana; no other parties were threatening claims.

444. In December 2011, Camilla (possibly with another investor), acquired Croci BV from Croci NV for €44.9 M, through her company Allimac Limited (her name backwards). We have no further information in relation to this transaction. Mr Foortse confirmed that as a director of Croci BV he was aware of this purchase. The proceeds came into BNP Jersey on 20th December, 2011, (soon to be disbursed away), as shown in its Inwards Payments Checklist signed by Mr Le Cornu, who confirmed that it represented the proceeds of Camilla's purchase of Croci BV. Such a purchase was consistent with the earlier planning.

445. In December 2011, Cristiana opened up a new front, instructing a French lawyer, Mr Silvio Rossi-Arnaud, who wrote to Madame Crociani and Camilla for the first time on 1st December, 2011. Correspondence continued between him and Madame Crociani's lawyer, Professor Lipari. In that correspondence, Mr Rossi-Arnaud raised questions about the Grand Trust and the Fortunate Trust, requested information about the trusts, threatened to contact the trustees, and, if necessary, bring proceedings against the trustees directly. His last communication that month was dated 23rd December, 2011, in which he threatened to bring Cristiana's case to court without further notice unless a settlement meeting was held in early January 2012.

446. It was in January 2012, when Madame Crociani and Camilla were on holiday in Mauritius, that Madame Crociani telephoned Mr Le Cornu asking for Appleby Mauritius to be appointed as sole trustee of the Grand Trust, a suggestion that had not even been hinted at before. It is worth taking stock of the position at that time:

    (i) there had been a complete breakdown in the relationship between Cristiana and her mother and her sister which had descended into open warfare.

    (ii) the portfolio of the Grand Trust had been transferred to the Fortunate Trust and the Fortunate Trust then revoked, with Madame Crociani withdrawing all of the assets, which were then in large part moved away from BNP and dispersed to various destinations around the world.

(iii) legal proceedings had been issued in the Dutch and Dutch Antilles courts. Legal proceedings were threatened by Cristiana's lawyer, Mr Rossi-Arnaud, in correspondence with Madame Crociani's lawyer, Professor Lipari. Although Mr Le Cornu said he was not aware of the correspondence between Mr Rossi-Arnaud and Professor Lipari, BNP Jersey had received the letter from Professor Cera of 16th May 2011, and was, of course, aware of the legal proceedings before the Dutch and Dutch Antilles courts. Mr Foortse, on the other hand, was aware of the correspondence between Mr Rossi-Arnaud and Professor Lipari, as made clear in Camilla's e-mail to him of 3rd January, 2012, in which she seeks his assistance in responding to it.

(iv) despite Madame Crociani's success in the Dutch Antilles courts, Mr Le Cornu knew from his meeting with Madame Crociani on 14th September, 2011, that she was *"frantic"* and was preparing for *"the next confrontation".*

(v) there had been discussions between Madame Crociani, Camilla, Mr Le Cornu and Mr Foortse over the Promissory Note, the only asset of the Grand Trust, which the former two wanted *"to disappear".*

(vi) Croci BV, the debtor under the Promissory Note, was now owned by Camilla. The financial statements of the Grand Trust for the period ending 30th September, 2011, show the capital outstanding on the Promissory Note at US$32 million, and the accrued interest (which had not been collected since 2003) at US$16.3 million, a total of US$48 million, a very significant sum, for which the company now owned by Camilla was liable. Any payment by Croci BV to the Grand Trust under the Promissory Note would inure as to one half to the benefit of Cristiana's trust, Cristiana being someone Camilla had made clear at the taped 4th June, 2011, meeting (attended by Mr Foortse) she did not want to get a penny.

447. The reasons given by Madame Crociani to Mr Le Cornu for the appointment of Appleby Mauritius did not, he said, come as a surprise to him. She and Camilla spent significant periods of time in Mauritius, but had never been to Jersey. He felt that she and Camilla had more in common with Mauritius, where Camilla intended to buy a property. More importantly, Mauritius was a French-speaking country.

448. In her statement, Madame Crociani says that whilst in Mauritius, she was seeking advice on a property development and was introduced to Mr Gilbert Noel, a lawyer in the firm of Appleby in Mauritius, and a director of Appleby Mauritius, who mentioned that Appleby Mauritius provided trust and fiduciary services. That was of interest to her and quoting from her statement: -

"143 I was impressed by the professionalism of Appleby Mauritius and that I could meet them every year, while I had never been to Jersey. This was attractive to me not only because I speak French much better and more easily than I speak English, but also because I thought it would be advantageous to spread our trust business more widely."

449. Mr Foortse was away in Australia and New Zealand at the time, and not due to return until 22nd February, 2012. He was contactable by mobile telephone and said that even though they were on holiday in Mauritius, Madame Crociani and Camilla did not stop thinking about the situation with Cristiana, having contacted him on a number of occasions in relation to it. Camilla had contacted him on 3rd January, 2012, specifically to assist in preparing a reply to the letter from Mr Rossi-Arnaud.

450. Madame Crociani telephoned Mr Foortse saying she had met with Appleby Mauritius and thought it was a good idea for that firm to be put in charge of the Grand Trust, and to move the trust to Mauritius. She said she would feel happy with that arrangement, in particular because she wanted to spread her financial interests more, and because the firm could communicate in French. He was perfectly happy to be replaced as a trustee, and was satisfied that Appleby was a well respected and reputable global law firm with an associated trust and fiduciary business, something he checked by telephone with BNP Jersey.

451. The appointment was undertaken with great speed. Mr Noel e-mailed Mr Le Cornu on 31st January, 2012, saying that Madame Crociani wished to proceed with the retirement of the existing trustees and the appointment of Appleby Mauritius, and copied in Advocate Naomi Rive, of Appleby in Jersey. She produced a draft deed of retirement and appointment, which was approved by Mr Noel that day. Mr Le Cornu made a number of minor comments to the draft the next day and it was executed by Madame Crociani on 2nd February, 2012. By 7th February, it had been signed by Mr Foortse, who was in New Zealand, and finally by BNP Jersey on 10th February, 2012. No due diligence was undertaken by Appleby Mauritius with BNP Jersey, the requests for documentation coming after its appointment.

452. Mr Foortse said he saw no advantage or disadvantage to the beneficiaries of Cristiana's trust in the appointment of Appleby Mauritius and the change of the proper law to that of Mauritius. Mr Le Cornu recollects that he did take oral advice from Ogier, but only on the terms of the indemnity. Again, there is no file note or record of that. He said there was no discussion internally about the proposed change in the proper law. He believed that Mauritius trust law was based on English law and Jersey law, but that was the extent of his knowledge. He did not know that under Mauritian law, there were more restrictive rights of information for beneficiaries, which we understand to be the case. He sought no advice on whether the Grand Trust would be valid

under Mauritian law, or whether any changes might be required to it, bearing in mind it was by its terms, unamendable. There was no discussion with Mr Foortse over the merits of the proposal and there was no trustees' meeting.

453. Mr Le Cornu said that in his mind, he had two beneficiaries, Madame Crociani (through the Foundation) and Camilla, who were in favour of the change, and Cristiana, for whom it was neutral. He didn't see what harm it would do to her, or that she would be prejudiced by it. Indeed, he felt it would be better if there was one professional trustee. He did not contact Cristiana over the proposal, and was unable to say why he had not done so. He conceded that Madame Crociani would have been furious if he had contacted Cristiana and that if Cristiana had been contacted, she would have been opposed to it; circumstances which should make any trustee cautious.

454. It is well established that a power to appoint new trustees, and by necessary implication, to change the proper law, is a fiduciary power, which has to be exercised in the best interests of all of the beneficiaries – see The P Trust and the R Trust [2015] JRC 196, Representation of the Z Trust [2015] JRC 196C and Lewin at paragraph 29-020.

455. Sir Michael Birt, Commissioner, in The P Trust and the R Trust, summarised the duties of the holder of fiduciary power to appoint new trustees in this way: -

> ***"We accept the point made by Lewin that the duties of the holder of a fiduciary power can be formulated in different ways and the formulation may vary having regard to the nature of the particular power under consideration. Without purporting to assert an exhaustive statement of the duties, for the purposes of this case, we would hold that, when exercising the power to appoint a new trustee, the protector was under a duty:-***
>
> ***(i) to act in good faith and in the interests of the beneficiaries as a whole;***
>
> ***(ii) to reach a decision open to a reasonable appointor;***
>
> ***(iii) to take into account relevant matters and only those matters; and***
>
> ***(iv) not to act for an ulterior purpose."***

456. The Grand Trust comprised two separate trusts, Camilla's trust and Cristiana's trust, and in exercising their fiduciary powers, it was incumbent upon the trustees to consider the interests of the beneficiaries of both trusts. Madame Crociani was a remote default beneficiary and her interests as such should have carried very little weight. It is correct, as Advocate Redgrave pointed out, that in the exercise of their powers, trustees can take into account the wishes of the settlor (see Lewin 29-162,) but that cannot detract from their duty to act in the interests of all of the beneficiaries. In any event, the settlor in this case was in open warfare with Cristiana, and bearing in mind her role in the 2010 appointment, the revocation of the Fortunate Trust and the dispersal of the assets throughout the world, her wishes should have carried very little or no weight at all. Indeed, these circumstances should have put her co-trustees on inquiry as to her true motives.

457. The reasons put forward by Madame Crociani, and accepted by Mr Foortse and Mr Le Cornu, related entirely to her own convenience, and this in a scenario in which she would no longer be a trustee of the Grand Trust. What possible bearing can it have had to the interests of the beneficiaries of Cristiana's trust, living as they did in the Dominican Republic, that: -

(i) Madame Crociani and Camilla had more in common with Mauritius, in that they vacated there every year;

(ii) Appleby Mauritius spoke French; and

(iii) Madame Crociani wanted to spread "our trust business" (whatever that meant) more widely?

458. Camilla may well have been in favour of the move, but her wishes would have to be treated with some circumspection, bearing in mind that it was her company that owed the debt under the Promissory Note, the sole asset of the Grand Trust, and she and Madame Crociani had been actively exploring ways of *"making it disappear".*

459. Mr Le Cornu dealt with the matter in evidence in this way: -

> *"I did consider Cristie's interests, and considered it to be neutral, as I said before. But what they told me was: finally I have found somebody that knows about trusts and that can speak French.*

Question That is not a terribly big reason, is it?

Answer It was a big reason for her, and I had – obviously Camilla was also in favour of it. So in my mind I had two beneficiaries, at least Madame was the owner of the Foundation, and Camilla favoured it and wanted it for that reason. And in my mind, and I think I spoke to David Shute about this, and possibly internal legal although I don't have a distinct recollection. I believed it to be neutral as far as Cristie was concerned, her rights were the same under the – and if anything when you mentioned before about her desire to potentially pay the note out, I thought, well if there is just one professional trustee then they won't at least be faced with the situation where they have two trustees that have passed a resolution behind their back or otherwise, so perhaps she is better off."

460. We accept that beneficiaries do not have a right to be consulted (Lewin at paragraph 29-162), but as the Court said in the case of Re Y Trust [2011] JRC 135 at paragraph 60: -

"In the context of this case, and in the absence of allegations or evidence of bad faith or conflict, we must focus on the information available to N when it made its decision in December 2009. By not consulting A beforehand, N took the serious risk that, had he been consulted, he may have provided N with information that would, or might have led it to act otherwise than it did."

461. In circumstances such as this, namely of open warfare, where claims are being threatened, by not consulting with Cristiana, the trustees had no information as to the ways in which she would have been advised such a move could prejudice her interests and those of her children. Although not articulated as a claim in relation to the 2010 appointment at this stage, the two trusts concerned were at the heart of the matters being investigated by her advisers, and at all material times, the trusts had been subject to the proper law of Jersey, with the institutional trustee being BNP Jersey. They were in the course of formulating that claim, which was articulated in Mr Rossi-Arnaud's letter of 24th February, 2012, barely a month later, and we have no doubt that she would have been advised that such a move was not in the interests of the beneficiaries of Cristiana's trust.

462. Advocate Redgrave says that BNP Jersey did not enter into the 2012 appointment for any improper motive or for any ulterior purpose or to facilitate a breach of trust. Mr Foortse made a similar submission. There is no evidence that they were knowingly party to improper conduct of that sort, but if one looks at the events leading up to January 2012, it is clear that BNP Jersey and Mr Foortse had aligned themselves with the interests of Madame Crociani and Camilla and had

relegated the interests of Cristiana and her children to the shadows. This appointment of Appleby Mauritius was done because Madame Crociani and Camilla wanted it in circumstances that should have put BNP Jersey and Mr Foortse on inquiry and in our view, no real consideration was given to the implications of the appointment to Cristiana and her children. The appointment has to be in the interests of the beneficiaries as a whole, not just some of them; particularly where there is hostility between the principal beneficiaries.

463. We conclude that in appointing Appleby Mauritius as a new trustee and changing the proper law to that of Mauritius, BNP Jersey and Mr Foortse were not acting in the interests of the beneficiaries of the Grand Trust as a whole. We now turn to the motivations of Madame Crociani.

464. For the reasons that follow, we conclude that for Madame Crociani, the appointment of Appleby Mauritius was a tactical move, the purpose of which was to impede Cristiana's claims. Whilst BNP Jersey and Mr Foortse may not have knowingly shared that intention, the subsequent conduct of Appleby Mauritius demonstrates that it did; indeed, Appleby Mauritius, as trustee of the Grand Trust, actively impeded the claims of Cristiana, its own beneficiary, against the former trustees, claims which if successful would have reconstituted the trust fund of which Appleby Mauritius was trustee.

465. The only witness Appleby Mauritius produced for the hearing was Mr Lee Chee Kiong Noel Patrick Lee Mo Lin ("Mr Lee"), a director of Appleby Mauritius. He explained that prior to January 2016, Appleby Mauritius was owned by the law firm of Appleby in Mauritius. It had started doing fiduciary business relatively recently, at the end of 2007. Mr Noel was a partner in the law firm and a director of Appleby Mauritius. Following a global management buy-out, which took effect in December 2015, Appleby Mauritius ceased to be owned by the law firm and Mr Noel ceased to be a director, although the law firm continued as its legal adviser. Its name was changed to Estera Trust (Mauritius) Limited.

466. Mr Lee is an accountant and his role at the material time was to deal with human resources, finance and operational matters. He had no client dealing role, and had no responsibility for the Grand Trust file. His only active involvement in the Grand Trust was in the renegotiation of the Promissory Note in January 2016, shortly before GFin was appointed trustee. It was Mr Noel who had direct dealings with Madame Crociani and Camilla, and who was responsible for the affairs of the Grand Trust and so it became quickly apparent to the Court that it was the evidence of Mr Noel that would most assist the court. Advocate Moran informed us that he had refused to give evidence.

467. That led to a letter from Advocate Fraser Robertson of Appleby in Jersey, protesting that this was incorrect. However, Advocate Moran has confirmed that in January 2016, there was correspondence in which a witness statement had been requested from Mr Noel. Although the communications are privileged, she was able to confirm that Mr Noel declined to provide a witness statement. He could not, therefore, be called as a witness – parties wishing to call witnesses were required to file their witness statements under a deadline imposed by the Master. We have no reason to doubt Advocate Moran's statement to us that by declining to provide a witness statement, Mr Noel has refused to give evidence to this Court.

468. There are no notes of any of the meetings between Madame Crociani, Camilla and Mr Noel in which Appleby Mauritius becoming trustee of the Grand Trust would have been discussed. The limited documentary evidence we do have shows Mr Noel acting extensively for and in the interests of Madame Crociani and Camilla:

(i) On 6th January, 2012, Mr Lee was approached by a client relationship manager at AfroAsia Bank in Mauritius, the bank to which Madame Crociani had transferred €15 million.

(ii) The first meeting occurred between 9th and 13th January, 2012, and was attended by Mr Lee, Mr Noel, Madame Crociani, Camilla and Miss Dominique Leung (of Appleby Mauritius). At the meeting, Madame Crociani discussed buying a property in Mauritius, and asked for information about how to create a trust in Mauritius.

(iii) The next meeting took place on 13th January, 2012, which Mr Lee did not attend. There is a file note made by Miss Leung, which records discussions about the establishment of a new trust by Camilla. There is no reference to discussions about family issues, although Mr Lee says he was told that this was discussed at the meeting.

(iv) A typed note by Miss Leung of a meeting on 13th January, 2012, attended by her, Mr Lee, Madame Crociani and Camilla contains the following:

> *"The clients had informed that they wished to wipe out all traces of the source of funds. This was because they did not want the other daughter of Mrs Edoarda Vesel to know that a trust was created for the benefit of Mrs Camilla de Bourbon.*
>
> *Gilbert Noel had previously suggested that the funds be sent to the Jersey client trust account. However, same should first be confirmed with the Jersey office.*

We had recently been informed by Farah Ballands that same would not be acceptable."

Mr Noel therefore appears to have recommended the use of the client account of Appleby in Jersey to hide the source of these funds, a suggestion understandably rejected by Appleby in Jersey.

(v) On 16th January, 2012, the compliance officer at Appleby Mauritius sent Mr Noel and others an e-mail about a trust which Madame Crociani wished to establish for the benefit of Camilla and where there had been a very limited disclosure of the source of funds. The e-mail said this: -

"Following our internal discussion I hereby note the following (some of which are definitely red flags);

The client is very secretive;

The client is one who is liaising with us (note usually high net worth clients appoint other people to do such things);

The client does not want (is not keen) to liaise via email because she stated that she does not want any trail;

She mentioned that telephone calls should be kept to a minimum;

She also mentioned that when she sends money to the trust she wants to do it in such a way that there is no trail (she stated that she wants to wipe out all traces of the source of funds – that is funds transferred);

She also explained that she does not want her other daughter to know the existence of the trust because the beneficiary would be Mrs Camilla Crociani de Bourbon de Siciles and she left only a small amount of money for the other daughter;

I also note that Mrs Edoarda Vesel stated that she wants the distribution to be at her request;

Mr Edoarda Vesel would also be the co-trustee;

Mrs Edoarda Vesel is very verse with the laws relating to trusts as she stated she has various trusts in offshore jurisdictions.

Given these issues I am of the view that it would be quite difficult to monitor the transactions of the client and they would not be too keen to provide for information. Given these red flags the risk profile may be above our risk appetite."

Mr Lee told us that he spoke to Ms Farah Ballands of Appleby in Jersey, who was a director of Appleby Mauritius, because he was not comfortable with taking on Madame Crociani as a client. She warned him against doing so, but said it was Mr Noel's call. Mr Noel evidently took on Madame Crociani as a client, despite these red flags.

(vi) The next meeting was on 18th January between Mr Noel, Madame Crociani and Camilla. Mr Lee was told by Mr Noel that at this meeting a move by the Grand Trust to Mauritius was discussed, together with a change to the proper law. Mr Noel told him that there had also been a discussion about clause Twelfth, conferring the exclusive jurisdiction on Mauritius, which he accepted would have been an odd discussion at such an early stage.

(vii) Mr Lee said that he later discovered that the Promissory Note was also discussed at the meeting on 18th January, 2012, and in particular, that either Madame Crociani or Camilla asked about the ability to assign the Promissory Note to an IBC in the Seychelles.

(viii) On 18th January, 2012, Miss Leung sent an e-mail to Appleby in the Seychelles about setting up companies there and on 19th January, 2016, Mr Noel sent an e-mail to ask whether: -

"(a) a loan may be assigned in favour of a Seychelles company; (b) a Seychelles company as a creditor may waive a loan obligation in favour of the debtor".

The response was that it was technically possible, but the directors would have to be comfortable with the commercial benefit to the company. Mr Noel said he would take further instructions and although Seychelles companies were subsequently incorporated, they appear to have remained dormant. From this, it would seem that Madame Crociani and Camilla were exploring through Mr Noel the possibility of the Grand Trust assigning the benefit of the Promissory Note to an IBC in the Seychelles and that IBC then waiving the loan obligation.

(ix) In an undated note relating to "the Palma Trust", established in Mauritius by Madame Crociani for Camilla, referred to as "the Duchess of Calabria", of which Camilla and her children were beneficiaries, there is the following note: -

"However, they wish to waive all traces of the source of funds".

(x) A client acceptance form of 2nd February, 2012, in relation to another structure set up in Mauritius by Camilla notes that: -

"The client is very secretive – minimum correspondence by e-mail and telephone calls; very secretive as regards the source of funds".

(xi) A compliance form of 2nd May, 2014, describes Madame Crociani as *"secretive and not keen of e-mail exchanges".*

(xii) After the Order of Justice in this case was served, another trust was set up by Appleby Mauritius for Madame Crociani in February 2013, with beneficiaries who were said to be herself, Camilla, Camilla's daughters and Cristiana and Cristiana's daughters, with Madame Crociani as protector. The compliance risk review dated 2nd May, 2014, says this: -

"Risk Profile: High

Reason for Risk Profile:

1) The Trust was backdated – Client approached Appleby for the establishment in February 2013, but the Trust Deed has been dated 16 January 2012.

….

4) Court Proceedings on the settlor Mrs Edoarda Vesel Crociani and Camilla Crociani, whereby the second daughter of Edoarda, Cristiana Crociani, accused them to have taken steps to cut her off financially from the substantial family wealth and to starve her of funds.

5) The client is secretive and not keen of email exchanges".

This would appear, to be an attempt by Madame Crociani, with the assistance of Appleby Mauritius, to demonstrate that she was not cutting Cristiana out of the family wealth, and this by backdating the deed to the first time she had contact with Appleby Mauritius, in January 2012.

469. Whilst acting extensively for Madame Crociani and Camilla, Mr Noel agreed that his firm's trust company, Appleby Mauritius, would also become trustee of the Grand Trust, which would involve Appleby Mauritius in acting in the interests of Cristiana in so far as Cristiana's trust was concerned, someone with whom Madame Crociani and Camilla were in open warfare. On the same date that Appleby Mauritius was appointed the new trustee of the Grand Trust, it entered into a fee agreement and indemnity with Madame Crociani by which she undertook to pay its fees and expenses for acting as trustee. The Grand Trust was a dry trust, and unless interest was paid under the Promissory Note, Appleby Mauritius was dependent upon Madame Crociani for its remuneration. We now review its conduct as trustee.

470. Following its appointment as trustee of the Grand Trust on 10th February, 2012, Appleby Mauritius took no steps to inform Cristiana, as principal beneficiary of Cristiana's trust, of its appointment. The first she learnt of its appointment was in a letter from Ogier of 16th April, 2012, sent in response to a letter from Bedell Cristin on 23rd March, 2012, requesting information about the Grand Trust and the Fortunate Trust. The response from Ogier enclosed a copy of the deed of appointment and retirement and indemnity and stated that any requests for information should be sent to Appleby Mauritius.

471. As a consequence, Bedell Cristin wrote to Appleby Mauritius on 30th April, 2012, asking for information in Cristiana's capacity as beneficiary of the Grand Trust. Mr Lee told us that he took this letter to Mr Noel, who he accepted would have discussed it with Madame Crociani and Camilla, and who instructed that the following response should be sent, albeit some six weeks later on 11th June, 2012: -

> *"We referred to your letter dated 30th April 2012 requesting certain information relating to the above named Trust. The trustee of the Trust has fully considered your request and objects to the disclosure of such information on the basis that terms of the Trust does not so authorise the Trustee to disclosure of such information to any beneficiary of the Trust.*
>
> *Furthermore, to disclose such information will conflict with the trustee's obligations under the Trust deed and the Trust Act 2001 and would have an unreasonable impact on the administration of the said Trust."*

This is a shameful and hostile response to a legitimate request for information by the principal beneficiary of Cristiana's trust from her new trustee. It is also untrue. There is nothing in the terms of the Grand Trust which prevents the trustees from giving her information – indeed clause Eighth expressly authorises the trustees to account to any income beneficiary. The suggestion that complying with its obligation to account to its beneficiary conflicted with its obligations is wrong in law. The obligation to account lies at the heart of the relationship between a trustee and its beneficiary. It is difficult to see how providing information would have had an unreasonable impact upon the administration of the Grand Trust. It took some two years before Appleby Mauritius complied fully with Cristiana's request for information in relation to the Grand Trust.

472. On receipt of the letter before action from Bedell Cristin dated 3rd July, 2012, Appleby Mauritius, against whom no claims for breach of trust were intimated, was put on formal notice of a claim for breach of trust against the former trustees of the Grand Trust (which of course included Madame Crociani, who was paying its fees and expenses), a claim which, if successful, would have led to the reconstitution of the Grand Trust of which it was trustee. That claim constituted trust property, which it was under a duty at least to consider pursuing (Lewin 12-036). That is not achieved by consulting, as it did, the same lawyers as those representing the potential defendants and entering into the Agate appointment, the effect of which, as we shall see, was to appoint its right to recover the assets improperly paid out back to the very person, Madame Crociani (through the Foundation), who had received the assets.

473. Once proceedings had been issued, Appleby Mauritius then aligned itself with the former trustees and allowed Madame Crociani to pay for and lead its defence, joining in with the forum challenge to the jurisdiction all the way through to the Privy Council.

474. In 2015, Appleby Mauritius opposed Cristiana's application for a pre-emptive costs order out of Cristiana's trust to help continue these proceedings as a result of the substantial costs that had been incurred in the forum challenge, and this without seeking directions from the Court as to the proper stance it should take in such an application, in view of it being a defendant in these proceedings.

475. In his affidavit of 19th May, 2015, Mr Noel states that Appleby Mauritius went to great lengths to investigate Cristiana's claims and had at great expense taken advice from lawyers in Mauritius, England and Jersey. The second statement is untrue, because it is clear that Madame Crociani had met all of the legal expenses of Appleby Mauritius up until very recently. The first statement does not stand up to scrutiny, in that Appleby Mauritius only made inquiries of the very people that were accused of this serious breach of trust; no inquiry was made of Cristiana and her advisers.

476. Mr Noel described these proceedings as part of a series of legal assaults that Cristiana had made on other members of the family. She was not, he said, genuinely acting for the benefit of the Grand Trust. Quoting from paragraph 14.4 of his affidavit: -

> *"Appleby Mauritius considers that it is in the best interests of all of the beneficiaries, including each of the Plaintiffs (insofar as they may be beneficiaries), that the Plaintiffs come to their senses and withdraw these proceedings, rather than wasting even more money than has already been wasted, both in these proceedings and in the other proceedings around the world."*

Mr Noel had never met or communicated with Cristiana and yet he was prepared to criticise her in such personal terms. These sentiments surely reflect the views of Madame Crociani. Mr Lee agreed that through these words we were hearing the voice of Madame Crociani.

477. In January 2016 Appleby Mauritius then sought to evade the judgment of the Privy Council, by appointing GFin as the new trustee, assigning to it the Promissory Note and amending the (unamendable) trust deed, to create a platform upon which GFin could, and did, launch rival proceedings in Mauritius and an application for an anti-suit injunction.

478. In her judgment of 5th July, 2016, Judge A. F. Chui Yew Cheong of the Supreme Court of Mauritius in dismissing the application of GFin for an anti-suit injunction gave this damning assessment of the appointment of GFin: -

> ***"Fourthly, and above all an injunction including an anti-suit injunction is an equitable remedy and "He who comes to equity must come with clean hands". No justifiable and convincing reason has been advanced for the retirement of Appleby as Trustee and for the appointment of GFin in the middle of the Jersey Proceedings. And there is more, it is not unreasonable to conclude by the manner in which they are drafted that clauses 2(a) and (b), 7 and 8 have been inserted in the 2010 Deed in response to the reasons given by the Judicial Committee of the Privy Council as to why Clause 12 only determines the proper law for the administration of the Trust, is not a jurisdiction clause and does not confer exclusive jurisdiction on the Courts of Mauritius. It is also not unreasonable to conclude that the purpose of the exclusive jurisdiction clause is to circumvent and defeat the effect of the judgment of the Privy Council. In these circumstances an injunction and the more so an anti-suit injunction cannot and will not lie."***

479. Shortly before appointing GFin as the new trustee, Appleby Mauritius purported to amend the Promissory Note, extending the date of repayment to 2022, thus relieving Croci BV, then owned by Camilla, of the burden of repaying the capital at the end of this year, and this without ascertaining the needs of the beneficiaries of Cristiana's trust.

480. In a letter written to the Judicial Greffier on 9th February, 2016, by Mr Lee, informing the Court of Appleby Mauritius' retirement, he makes reference to the challenges from Cristiana as *"totally frivolous",* a phrase he says was dictated to him by Mr Noel. In our view, no trustee of the Grand Trust, acting properly, could describe Cristiana's claims in such dismissive terms.

481. We review the Agate appointment, the amendment to the Promissory Note, the appointment of GFin and the assignment to it of the Promissory Note in more detail later, but the way Appleby Mauritius acted as trustee of the Grand Trust, and in particular as trustee of Cristiana's trust, from its appointment to its retirement, was consistently hostile and disloyal to the beneficiaries of Cristiana's trust. The duty of loyalty owed by a trustee to its beneficiaries was described in Underhill and Hayton Law of Trusts and Trustees 18th edition at paragraph 57.29 in this way: -

> ***"Duty of undivided loyalty***
>
> ***57.29 More fundamental than the prescriptive duties laid down by trust law and the trust instrument is the proscriptive fiduciary obligation of undivided loyalty owed to the beneficiaries. This fiduciary obligation is the obligation to put the interests of the particular beneficiaries above all other interests (unless otherwise authorised)."***

482. We have no doubt that, obsessed as Madame Crociani was with Cristiana's claims over assets she was determined to keep, the move of the Grand Trust to Mauritius was tactical, the purpose being to place impediments in Cristiana's way and she found in Mr Noel someone who was willing to assist her. She was not acting in good faith.

483. In conclusion, we find that of the three former trustees who exercised the power to appoint Appleby Mauritius and to change the proper law, Madame Crociani was acting for an ulterior and improper purpose, but at the very least all three former trustees were not acting in the interests of the beneficiaries as a whole.

484. For all of these reasons, the appointment of Appleby Mauritius and the change in the proper law must fail and we will set it aside as being void and of no effect.

485. It necessarily follows from this that the contemporaneous assignment of the Promissory Note by the former trustees to Appleby Mauritius was a breach of trust, the consequences of which we come to later.

THE 2012 AGATE APPOINTMENT

486. On 24th February, 2012, Mr Rossi-Arnaud wrote to BNP Jersey indicating a claim by Cristiana as a beneficiary of the Grand Trust and the Fortunate Trust and alleging that BNP Jersey had transferred assets out of those trusts to entities of which she was not a beneficiary, to her detriment. On 23rd March, 2012, BNP Jersey received a letter from Bedell Cristin, asking for a large amount of information in relation to the Grand and Fortunate Trusts and their assets and on 24th April, 2012, Bedell Cristin, having reviewed the documents supplied, wrote formally questioning the 2010 appointment.

487. Mr Le Cornu met with Madame Crociani and Camilla at the Monaco apartment on 21st May, 2012. They were concerned in particular with the letter from Bedell Cristin to Appleby Mauritius, claiming that the 2010 appointment was a breach of trust. For the first time, Mr Le Cornu expressed some reservations about the validity of the 2010 appointment, and his internal e-mail to Mr Walmsley of 25th May, 2012, about this meeting records: -

> *"CC asked what might be the outcome of any court proceedings in Jersey. I explained that if the court agreed that the transfer was indeed a breach of trust then would likely order that the trust be put back as it was and that there were indemnities given by the F trust trustees and MDM that could be called upon if necessary. I did not consider it likely that the court would look to alter the current trustees. In order that we have a clear understanding of what this would mean we should prepare a list of all assets held at the time at the appointment from G to F.*
>
> *I pressed EC on the need for me to understand what had happened to the assets that had been returned to her. EC was not willing to provide me with this information immediately but understands the need to do so and has agreed to do so at our next meeting."*

Madame Crociani never provided that information to Mr Le Cornu and has now refused to provide that information as ordered by this Court.

488. Bedell Cristin gave notice of the plaintiffs' claims in a lengthy and well articulated letter before action dated 3rd July, 2012. Mr Le Cornu was on annual leave at that time and Mr Robert Syvret,

the general manager of BNP Jersey, became involved in the Crociani file. His first direct involvement was in relation to a decision to distribute 21 pieces of art (not that derived from the Grand Trust) from the Little Trust to Madame Crociani and this at her request, as she wanted to *"revise her succession planning".* The Little Trust had been established by Madame Crociani on 24th October, 2011, to hold all of the family artwork, valued at some US$445 million, including the art work derived from the Grand Trust, which at that stage, but not for long, remained within the Little Trust. After a telephone consultation with Mr Le Cornu, the resolution was signed on the 16th July, 2012.

489. A business review form completed in July 2012 stated that *"Family divisions have wrought havoc with Mdm EV's plans with JTC structures being all but stripped of their assets while legal proceedings are pending by Cristiana against Mdm EV and JTC/PF."*

490. Madame Crociani, her adviser Mr Virgilio Ranalli and Camilla came to Jersey on 13th July, 2012, for the purpose of meeting with BNP Jersey and instructing Carey Olsen, who Madame Crociani had arranged, through Lawrence Graham, to be retained to advise the former trustees. Madame Crociani had also separately retained Advocate Jonathan Speck of Mourant Ozannes to represent her. She was making all the running and paying all of the legal costs.

491. Carey Olsen's initial advice was that there should be an application to Court for directions by Appleby Mauritius (as the current trustee), as they made clear in their instructions to Mr Le Poidevin, to which the former trustees and Cristiana would be convened, and this before Cristiana could issue an Order of Justice.

492. The conference with Mr Le Poidevin took place on 19th July, 2012, and was attended by Advocate Andreas Kistler of Carey Olsen, Madame Crociani, Camilla, Mr Foortse, Mr Ranalli and Advocate Speck. Surprisingly, no one from BNP Jersey attended. Advocate Speck's note of that conference shows that in the opinion of Mr Le Poidevin, Bedell Cristin had some points which they needed to answer; it was difficult to justify how the 2010 appointment had been put into effect. Mr Le Poidevin's written opinion, sent out in draft on 25th July, 2012, which we have quoted earlier, concluded that if the Court accepted the wider construction of clause Eleventh, the 2010 appointment would be held ineffective. He approved the strategy of Appleby Mauritius making an application to the Court for directions.

493. Mr Le Poidevin also considered whether the 2010 appointment fell foul of the rule against perpetuities, a point not raised by Bedell Cristin in their letter before action, but he concluded that although arguable, the appointment did not infringe the rule.

494. This pessimistic assessment was obviously unwelcome news to Madame Crociani, and the next day, 20th July, 2012, Advocate Speck retained Mr Brian Green QC, of Wilberforce Chambers, to advise. In his initial letter to Mr Green, he said that if there was doubt as to the validity of the 2010 appointment, they were considering whether there was any basis to challenge the validity of the trust or the dispositions into it, and whether there might be an argument that the Grand Trust deed was void.

495. In the formal instructions to Mr Green of 24th July, 2012, he was told this in respect of the Foundation: -

> *"The Foundation was incorporated under the laws of the Commonwealth of the Bahamas on 6th August 1987. It was established for the sole benefit of the Settlor. It was included as a beneficiary of the Grand Trust so as to allow the Settlor to continue to benefit from the assets settled on the Grand Trust without actually being named as a beneficiary. On 25th June 1991, the name of the Foundation was changed to The Camillo Crociani Foundation IBC (Bahamas) Limited."*

496. There was some suggestion from Advocate Redgrave that Mr Green may have been given the original constitution of the Foundation and so was aware that it originally it had charitable objects, but in the notes of the conferences that followed, no mention is made of this and the way the instruction was phrased *"It was established for the sole benefit of the Settlor"* and the statement that the Foundation's name only was changed in 1991 indicates to us that he was not aware. Indeed, the assertion that the Foundation was included as a beneficiary so as to allow Madame Crociani to benefit underpinned the whole of his subsequent advice.

497. The first conference with Mr Green took place on 26th July, 2012, and was attended by Advocate Speck, Advocate Robert MacRae of Carey Olsen, Advocate Kistler, Mr Foortse and Camilla (who attended after the first hour). Mr Le Cornu attended by telephone, and it would seem from Advocate Kistler's notes that he only participated for some 20 minutes and this at a conference which lasted some 2½ hours.

498. Working from the notes of that conference made by Advocate Kistler, Mr Green gave the following advice: -

(i) Unlike Mr Le Poidevin, he considered the perpetuities point fatal to the 2010 appointment.

(ii) He said that to justify the 2010 appointment on the basis that it benefited Camilla and Cristiana was a very complex defence to run: -

> *"There is an awful lot of factual material that would be necessary, covering the familiarity of the daughters with the Trust structure and the payments made from it, their consent to the appointment, and their understanding of the appointment. That sort of evidential case is hazardous as witness evidence may not come up to proof."*

(iii) There was an alternative way of presenting the case: -

> *"It can be said that the appointment was for the benefit of the Camillo Crociani Foundation because it benefited Madame Crociani, its beneficial shareholder. Mr Green said that was the flip side of what is normally argued, namely that you can benefit the Settlor by transferring funds to a company in which the Settlor is interested. Mr Green acknowledged that this is a novel argument but one that he considers had prospects of success. He considers that it is necessary to interpret the Clause 11 power by reference to the constraint imposed by the relevant tax considerations as those form part of the relevant factual matrix. …the tax constraints did not require that Madame Crociani could not benefit in any way from an appointment under Clause 11."*

Mr Green did not have the benefit of the US expert advice received by this Court that the tax constraints did require that Madame Crociani could not benefit in any way from an appointment under clause Eleventh.

(iv) The former and current trustees of the Grand Trust should now make a confirmatory appointment to the Foundation. He handed a draft confirmatory deed and draft letter to Bedell Cristin *"intended to shut down correspondence from Bedell Cristin and to place them on the back foot".*

(v) Making a confirmatory deed would, he said, *"distract the other side's attention from the perpetuity issue and they will concentrate their efforts in attacking the confirmatory deed, rather than the original appointments."* He went on to say: -

> *"The other side will inevitably say that the appointment was motivated by the intent to defend the Trustees from threats of litigation and defeat Cristiana's claims. In Mr Green's view that argument will fall flat and will be unsuccessful. Mr Green*

said that if it is true that the 2010 appointment was void then property of the Grand Trust is still comprised within that Trust. The assets may have changed shape into alternative assets purchased or if Madame Crociani has used any of the assets up, the assets may have been substituted for causes of action against Madame Crociani. Either way, the present Trustees of the Grand Trust, whether they be Appleby or the three former Trustees are able to make a further appointment. Those Trustees would like to see the property stay with the Settlor as that is the total effect of the events which occurred. The best way to achieve that is by making an appointment to the Foundation. The Foundation is a beneficiary capable of receiving appointment under Clause 11. Therefore, the Trustees can confirm what occurred by appointing the assets to the Foundation. Mr Green is confident that the various advisers will see that this is the best course to adopt."

(vi) There were two ways of defending the claim: -

(a) That the appointment was for the benefit of Camilla and Cristiana – he said that was a possible line, and it should be pursued, but it was a complicated line *"as there were enormous advantages accruing to Madame Crociani from the appointment. It clearly diluted the interests of Camilla and Cristiana."* It was important to look at the whole context, but it was an argument based on a large number of facts, a huge amount of witnesses who would have to be cross-examined and a wide area of dispute. *"There are many pitfalls in the course including that neither Camilla nor Cristiana received independent advice as to the effect of the appointment or their rights under the Grand Trust. Mr Green says that the point should not be surrendered but that it is a very difficult one to win."*

(b) The simpler point, albeit that it has difficulties, was that the Foundation was a beneficiary of the trust under clause Eleventh: -

"It was not possible to use clause 11 for the benefit of the Settlor. However, the purpose of the Foundation was to enable benefit to be conferred on it for the Settlor. The Foundation was an entity that the Trustees could benefit in order to benefit the Settlor. Therefore, in Mr Green's view it is possible for an appointment to be made for the benefit of the Foundation in a way that benefits the Settlor. In the context of the applicable tax regime the words "other than the Settlor" indicates that the Trustees can benefit the Settlor via the Foundation. By doing so the Trustees would be less likely to attract the attentions of the tax authorities (namely the Dutch tax authority, the US IRS and the Mexican tax authorities). The reality is that payments for the benefit of the Foundation were to benefit the Settlor. The question is whether the 2010 appointment was for the benefit of the Foundation. Both the

Settlor and the Foundation will say yes that it was. Ideally, in 2010 the appointment should have been made with the Foundation as its object. But the argument that the appointment was for the benefit of the foundation by benefiting the Settlor is the best way to stop Bedell Cristin's approach."

He went on to say: -

"Another possible argument is that the appointment itself says that it is made for the benefit of Camilla and Cristiana and that it is clear that the Trustees had them in mind as beneficiaries of the appointment. However, in Mr Green's view that does not matter if the appointment was in fact for the benefit of the Foundation and that was within the scope of the Power. Mr Green said that he is not saying that the argument is a slam dunk."

(vii) He had concerns about making an application to the Court, as he was unclear as to what declaration the Trustees would be seeking or what evidence would be necessary – seeking directions was tantamount to an admission that something had gone wrong.

499. Advocate Speck's note of the conference records Mr Green's advice on the second way to defend the claims in this way: -

"The Foundation was put in as a beneficiary for the specific purpose of benefiting EC and we can deal with this clean point without having to consider Cristiana's involvement, knowledge, consent, etc. So the Appointment was applied for the benefit of the Settlor; if you change EC's name for Foundation in the FT, there would be no argument.

A confirmatory deed in favour of the Foundation would therefore enable EC to take whatever steps she needs to take to confirm that the assets may remain where they are now."

500. The draft confirmatory deed was described by Advocate Speck as *"a further obstacle in the way of Cristiana".* The note goes on: -

"Making this deed will displease Bedells and they will attack it, but it will give us a more secure basis to defend the case. They will say the motivation was to defend the case so that it is invalid, but we will say that in all the circumstances, it stands up.

If the Appointment was invalid, the GT assets are in various different places out there. The trustees of GT, whoever they may be, would like to see the property remain where it is now and they do not want to undo everything. How can we achieve this? By appointing it all to the Foundation. What we tried to do in 2010 may not have worked, but we wanted it all to happen and for EC to have the power to revoke, so we just want to ensure now that there are no defects.

It is utterly predictable that the other side will pour opprobrium on this point, but it is the right approach."

501. A second conference took place with Mr Green on 27th July, 2012, and this was attended by Advocate Speck, Camilla, Mr Noel and Mr Matthew Pintas and Mr Nicholas Pell, of Macfarlanes, who had also been instructed on behalf of Madame Crociani. Mr Green had now seen the draft opinion from Mr Le Poidevin, and a draft letter of response to the letter before action prepared by Carey Olsen.

502. Although we have not seen Carey Olsen's draft letter, Advocate Speck's note of this conference makes it clear that they were intending to defend the 2010 appointment on the basis of what we have earlier defined as the defendants' construction, namely that the settlor must benefit from any exercise of the clause Eleventh power.

503. Mr Le Poidevin had advised that this was wrong, and Mr Green was noted as being sure that it was wrong for the same reasons, endorsing further the construction that this Court has placed upon clause Eleventh.

504. According to the note, Mr Green had assumed that he, Mr Speck and Macfarlanes were acting for all of the former trustees. Mr Green wanted Carey Olsen to be stood down. As for Appleby Mauritius, Mr Green is reported as saying we *"need them to buy into the process".* Mr Noel is reported as saying that he preferred *"a lean team and all the trustees together"* and confirmed he would sign a letter of engagement.

505. Bearing in mind that Appleby Mauritius had no involvement in the 2010 appointment, that no breach of trust claim was threatened against it, and that the claim against the former trustees constituted a potential asset of the Grand Trust, the agreement to *"buy into*" the strategy of the defendants in defending that claim is, in our view, only explicable on the basis that this accorded with the wishes of Madame Crociani, who was of course paying its fees and legal expenses. We can see no basis upon which it could be argued that taking this stance was in the interests of the

beneficiaries as a whole of the Grand Trust; it was certainly not in the interests of the beneficiaries of Cristiana's trust.

506. Carey Olsen were accordingly stood down (and Mr Le Poidevin) and Mourant Ozannes wrote a holding letter to Bedell Cristin on 27th July, 2012, confirming that they were acting for the former and current trustees. They said that Bedell Cristin should have received a more substantive reply from Ogier, and that they did not do so was not the fault of the clients: -

> *"Your firm's correspondence is the latest in a series of lawyers' interventions attempted on Cristiana's part since her peremptory and unexplained departure from the family home in October 2010, varied in nature, but having the common theme of trying to get control of family wealth to which she has no right.*
>
> *We are conducting a thorough review of the claims made in your letter. The review process continues, and we will provide a full reply to your letter shortly."*

507. Macfarlanes produced a note dated 27th July, 2012, marked *"Strictly Private and Confidential"* and *"subject to privilege".* It was no doubt not intended to see the light of day, and it sets out, in our view, the true intention behind the Agate appointment: -

> *"What is the issue?*
>
> *In its letter dated 3 July 2012 Bedell Cristin has on behalf of Cristiana Crociani challenged the validity of the transfer of assets from the Grand Trust to the Fortunate Trust on 9 February 2010 ("the 2010 appointment") on a number of technical grounds. While most of their arguments can be easily rebutted, there are a few areas of potential weakness which we have discussed. In the circumstances we should therefore consider what actions can now be taken in order to secure the intended result and, in effect, block the attempted challenge to the 2010 appointment".* (Our emphasis)

508. It sets out the proposals succinctly: -

> *"If the 2010 appointment is successfully challenged, the assets which were subject to that appointment would not have been validly appointed from the Grand Trust. In effect, this would mean that the trustees of the Grand Trust would have a right to recover the assets which were appointed to the Fortunate Trust (most of*

which we understand are now owned personally by Madame Crociani after she revoked the Fortunate trust on 20 June 2011).

Importantly, this potential right to bring a claim to recover these assets is itself an asset of the Grand Trust and it may (in the same way as any other asset) be distributed to a beneficiary of that trust using the powers set out at clause 11 of the Grand Trust.

The proposal is that the trustees of the Grand Trust transfer to the Foundation any right which they may have to recover the Grand Trust assets. This would not involve a transfer of the assets themselves. It would rather be a transfer of the Grand Trust's right to require the assets are returned to it. It could not then be argued that the Grand Trust has any rights to the assets, which would be exploited by Cristiana.

We would then envisage that the rights are distributed from the Foundation to Madame Crociani as the sole beneficial owner of the Foundation. Again, this would not require any actual transfer of the underlying assets themselves, but would confirm and reinforce Madame Crociani's entitlement to them."

509. As to the effect of the proposed appointment, the note continues: -

"If Bedell Cristin were successful in showing that the 2010 appointment was void, the Grand Trust would have a claim for recovery of the assets and could argue that the trustees of the Grand Trust had a duty to seek to get the assets back from them. If, however, that claim for the recovery of the assets has already been distributed to the Foundation it would not be possible for the trustees of the Grand Trust to enforce the claim. There would therefore be no advantage to proceeding with this course of action unless Bedell Cristin could also successfully challenge the 2012 [Agate] Appointment."

510. The note then goes on to consider whether this proposed appointment could be challenged and the risks of proceeding with it. In that respect, it says this: -

"Precisely because the 2012 [Agate] Appointment should severely reduce Bedell Cristin's ability to successfully bring claims against the Grand Trust, it is likely to provoke a hostile response. It is difficult to see however how Madame Crociani's legal position could be weakened as a result (indeed, as noted above) it should be significantly strengthened."

511. Macfarlanes provided two drafts for consideration by the former and current trustees on 1st August, 2012: -

(i) A declaration of trust ("the Agate Trust") by Appleby Mauritius and Mr Foortse as original trustees over £10, the beneficiaries of which were Camilla and the Foundation. The Vesting Day was defined as 7 days from the date of the settlement, and the trustees were to hold the trust fund for the Foundation absolutely on the Vesting Day, provided Madame Crociani was then living, and subject to that, for Camilla. This very short-lived trust was required because the power under clause Eleventh can only be exercised in favour of another trust existing at that time.

(ii) An instrument of appointment (which we have already defined as "the Agate appointment") between the former trustees and Appleby Mauritius, as the current trustee of the Grand Trust, and Appleby Mauritius and Mr Foortse, as the trustees of the Agate Trust. The recital sets out the 2010 appointment, defined as the "Appointment", and provides at paragraph H: -

"Were the Appointment to be invalid:

(i) The property appointed by the Appointment, and

(ii) All rights and interests in or over the same including any claims and rights of action of whatever nature whether of a proprietary or personal nature and all and any other choses in action in relation thereto; and

(iii) All and any property representing the same,

(collectively the "Specified Property") would as to both capital and income continue to be vested in the Grand Trust."

The Foundation and Camilla are recited as being beneficiaries of both the Grand Trust and the Agate Trust. In the exercise of the power under clause Eleventh, the present and former Grand Trust trustees applied the Specified Property for the benefit of the Foundation and Camilla, by declaring that the same shall be held upon the trusts of the Agate Trust.

512. A meeting of the former and current trustees of the Grand Trust was held on 1st August, 2012, at the offices of Macfarlanes. Present were Madame Crociani, Mr Syvret representing BNP Jersey and Mr Foortse, as the former trustees and Appleby Mauritius, represented by Mr Lee, as the current trustee. In attendance were Camilla (by video conference), Mr Green, Advocate Speck, Mr Pintas and Mr Pell.

513. Both Mr Syvret and Mr Foortse explained that Mr Green led the meeting with the lawyers doing most of the talking. The minutes record the following: -

(i) The former and current trustees were clear that if for any reason the assets of the Grand Trust which had been appointed under the 2010 appointment had not validly vested in the Fortunate Trust *"then that was unintended and accidental".*

(ii) In the circumstances of Cristiana's disappearance and series of legal assaults on Madame Crociani's family wealth, the former trustees had understood and respected the reasons for Madame Crociani's actions and acknowledged her beneficial entitlement to the appointed assets. Appleby Mauritius had no issues with this.

(iii) In the light of legal advice which had been received by the Grand Trust trustees, they have been clear that the claims intimated by Bedell Cristin were technically flawed and lacking merit and should be defended.

(iv) The former and present trustees were clear that consideration should be given to ensure that *"any unintended and/or accidental disturbance of the position as regards the Appointed Assets arising from Cristiana's claims might be corrected or put beyond doubt."*

514. We set out in full the reasons put forward in the minutes for taking these steps as follows: -

> *"After leaving the family home on 25th October 2010 Cristiana without explanation ceased all contact with her family and social circle, also leaving behind most of her and her children's personal effects. Despite repeated attempts it has not been possible to contact Cristiana to establish her, her companion's and her children's whereabouts and well-being.*
>
> *It had become apparent that without notice or explanation she had over a period of years removed in excess of $8m from shared bank accounts operated by the family (completely contrary to previous practice).*

Without consultation or authority she arranged for one of the apartments at Fisher Island, Florida which was trust property and which had been made available for her occupation to be rented out to a third party on a commercial basis. She had personally collected the rent paid, and had not accounted for this to the property's trustee owner. She had attempted to remove a valuable painting (a Botero worth in excess of €1,000,000) without authority. She had also attempted to sell this apartment and to let out and sell another apartment at Fisher Island (which was also trust property which had been made available for her), again without consultation or authority from property's trustee owner.

The last telephone contact was on 5 April 2011, following which all contact had been lost.

She had instructed five sets of lawyers around the world with the apparent aim of getting possession or control of a significant proportion of the family's wealth, including claiming that the extremely valuable 50% interest in Croci International NV which Cristiana held as a fiduciary for her mother belonged to Cristiana beneficially.

It is understood that she has taken up residence together with her young daughters in the Dominican Republic. She continues to cut herself off from her family and former social circle. Her (and her young daughters') exact whereabouts remain unknown. Telephone contact has ceased.

A further four firms of lawyers have emerged to make claims on her behalf, of which BC are the latest.

Cristiana took her claim to be beneficially entitled to the Croci International NV shares to Court in Curacao in August 2011, where her evidence was rejected, and she lost decisively. That is the only occasion on which Madame Crociani and Camilla have seen Cristiana since October 2010. She was thin and shaking visibly and protected by an entourage who prevented access to Cristiana.

It appears that she commissioned Mr Cabral Dias, a member of Madame Crociani's staff in Monaco, to steal personal documents and jewellery from the family property at 27 Avenue Princess Grace (Mr Dias is now facing prosecution in Monaco for his actions).

Mr Riguel Dorta had in March 2012 been hired to locate Cristiana, establish her current circumstances and, if possible, put her in contact with her family. His experiences are set out in a letter dated 12 April 2012 which was provided to the

meeting. The harassment, intimidation and handcuffing to which Mr Dorta had been subject, at the apparent instigation of Cristiana, was of great concern.

The US attorney who had retained Mr Dorta (Mr Christopher Byrne) received a telephone message from Cristiana saying that Madame Crociani and Camilla were "dead to me"."

515. The minutes then set out the role of the Foundation in this way: -

"It was noted that Madame Crociani was and had always been the sole beneficial owner of the Foundation, and that it had been incorporated and included as a beneficiary of the Grand Trust as providing the means through which Madame Crociani could benefit from that settlement while she was living in New York."

Reliance was placed upon an affidavit from Mr Kumble about Madame Crociani's subjective intentions, and an explanation given by Mr Foortse, consistent with both their witness statements.

516. The minute then sets out the steps to be taken, which we again set out in full: -

"33 The Grand Trustees were advised, now jointly, that it would not be legitimate to enter into confirmatory documentation simply to defeat Cristiana's claims and the accompanying risk of litigation, 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.

34 The Grand Trustees were clear that they understood this advice.

35 The Grand Trustees have established that it is common ground between them that they do not believe that it would be in the interests of the beneficiaries of the Grand Trust for the Appointed Assets to be returned to the Grand Trust.

36 Given the general circumstances relating to, and lack of communication with Cristiana, it seems likely that the justified concerns regarding Cristiana's situation may remain for the foreseeable future.

37 The letter from BC suggests that Cristiana regards the Appointed Assets as a source of funding that is still available to her.

38 The Grand Trustees agree that it would not be appropriate in the circumstances for the trustee of the Grand Trust to seek to recover the assets subject to the 2010 appointment, if indeed it is open to them to do so.

39 On the contrary, the Grand Trustees believe that it is appropriate for those assets to remain with or under the control of Madame Crociani, as the generator of such wealth and the person best placed to protect it, for the benefit of the family as a whole.

40 The Former Trustees have been advised that if they are indeed still the trustees of the Grand Trust and, if the assets of the Grand Trust include 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 can pass the Specified Property to one or more of the beneficiaries of the Grand Trust if they believe that it is in the interests of one or more of the beneficiaries of the Grand Trust for them to do so.

41 Similarly, the Present Trustee has received advice that if it is indeed the trustee of the Grand Trust, and if the assets of the Grand Trust include the Specified Property, the Present Trustee can pass the Specified Property to one or more of the beneficiaries of the Grand Trust, if it believes that it is in the interests of one or more of the beneficiaries of the Grand Trust for them to do so.

42 The Grand Trustees have received categorical assurance from Madame Crociani that it is her intention to ensure that proper provision be made for Cristiana's children and that her current concerns regarding Cristiana's situation have not displaced that commitment.

43 The Grand Trustees note that both Madame Crociani and Camilla are firmly of the view that it would not be in the interest of Cristiana or her children if funds were returned to the Grand Trust particularly taking into account: -

the concern that Cristiana may not be in a position to make decisions that are truly independent and rational; and

that Madame Crociani may be relied upon to make proper and appropriate provision for her family, including Cristiana and her children and Camilla and her children, having regard to changing circumstances.

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

45 The Grand Trustees have discussed the situation with their professional advisers, as well as with Madame Crociani and Camilla. They have concluded that it is not appropriate for the Grand Trustees to allow the current uncertainty to remain. If Madame Crociani is not entitled to the Appointed Assets, that is unintended and/or accidental, and in all the circumstances it is undesirable for that situation to remain unaddressed if the Grand Trustees have the means to do so.

46 In the above circumstances, the Foundation, being an entity which is beneficially owned by Madame Crociani, was considered to be an obvious safe pair of hands which could receive an appointment of the Specified Property. The existence and/or prosecution of any such claims may then be considered by persons who the Grand Trustees are confident may be trusted to take the family interests into account."

517. Mr Syvret told us that Madame Crociani and Camilla were very genuine and emotional when describing their concerns about Cristiana. The handwritten note of Advocate Speck records Mr Green as saying that Madame Crociani's account was *"so clear and genuine no one could doubt what you are saying*" but we cannot help but notice the difference in what they said to this gathering and what they said in the privacy of the Monaco apartment on 14th June, 2011. It is the case that few of these factual allegations had been substantiated and there was none of the caution advised by Ogier in May 2011 about proceeding with the exercise of an important power on unsubstantiated claims. The right to recover the assets being appointed here had a potential value of some US$132 million.

518. As it is, we find the majority of the factual allegations upon which the trustees relied untrue for the following reasons: -

(i) Cristiana did not cease all contact with her family on 25th October, 2010. As Camilla herself said on 14th June, contact was normal up until 5th April, 2011. It only ceased after Cristiana became aware on 25th April, 2011, of what Madame Crociani and Camilla were secretly planning to her detriment.

(ii) It was indeed possible for Cristiana to be contacted. She had been contacted by BNP Suisse over a distribution of €280,000 made from the Grand Trust on 2nd March, 2011, which she transferred on to her mother. She had e-mailed Mr Le Cornu on 14th April, 2011, asking for copy documentation and on 11th August, 2011, BNP Jersey had sent her an e-mail in error. The fact is that she was never more than one e-mail away and Madame Crociani and Camilla were perfectly aware from the correspondence from her and from her lawyers why she was not dealing directly with them.

(iii) The allegation effectively of theft from a family bank account is untrue. These were distributions made over a number of years to Cristiana's personal bank account, some of which she had passed on to her mother, and the rest of which were her property. In any event, Madame Crociani knew exactly what she did with her bank account, as she had power of attorney over it.

(iv) The Miami apartments had been chosen and purchased by Cristiana out of distributions made to her and they were hers to do with as she pleased. She had been persuaded by Madame Crociani to place the shares in Crica (which owned the apartments) into the Fortunate Trust in April 2010, in circumstances which we describe later, but it was not on the basis that there would be any change in her management of those assets as sole director of Crica and manager of the underlying structure. She and Nicolas deny that they had placed any of the apartments up for sale, but as sole director and manager, the sale or letting of the apartments would have been entirely within her discretion. As for the Botero painting, Cristiana explained that this was her painting, which she had purchased. We have no reason to doubt her.

(v) As for Mr Dias, (Madame Crociani's butler) Cristiana explained to us that she had a good relationship him and after the 25th April, 2011, discovery, she did ask him to go into her bedroom and with the code for her safe, which she had given him, to take out her jewellery and give it to her mother-in-law. This is how she got her jewellery back, but Madame Crociani was not willing to give back her remaining possessions.

519. It is true that Cristiana had instructed a number of lawyers, but on discovering what Madame Crociani and Camilla had done or were planning to do, it took some time for her and her advisers to get sufficient information to ascertain how her interests might have been prejudiced. Challenging her removal as a director of Croci BV and the transfer of her shares in Croci NV, seem to us, as we said earler, to have been logical first steps, albeit unsuccessful. It is also true that she and Nicolas had taken up residence in the Dominican Republic as they were involved in a development there.

520. The incident regarding Mr Riguel Dorta merits a fuller discussion. The meeting on 1st August, 2012, had been given a copy of a report from Mr Dorta, a private investigator, to Mr Christopher J Byrne, Madame Crociani's New York attorney, who had instructed him to locate Cristiana and confirm her address. Cristiana and Nicolas described how in late March 2012 a man arrived at the entrance to the secured resort in the Dominican Republic in which they lived with photos of her family and children and tried to get in. An offer by him to pay money to gain entrance was refused. This was reported to her by the security staff, and she was therefore aware that there was a man looking for her, who had photographs of her and the children. Cristiana was then telephoned by her children's school, saying a man claiming to be a friend of the Crociani family was trying to come in and look at the school. Living in the Dominican Republic, a poor country, they were both very frightened that a man was looking for their children with photographs of them. They were very concerned about kidnapping.

521. They obtained a photograph of the licence plate of the car this man was driving from the security officers, and on the basis that he would be staying at one of the two hotels in the resort, they found his car the next morning and went to confront him. They say he became aggressive and went to his room. They followed him to his room with the manager and hotel security staff. Eventually, he came out of his room and they went to the hotel lobby, where they were able to ascertain what he was doing, and who he had been instructed by. Cristiana made a phone call to Mr Byrne and told him to stop harassing her. Nicolas then drove him to the airport, to ensure that he left.

522. Mr Dorta had been told that Madame Crociani had a personal dispute with Cristiana and had become concerned about her personal safety, as she had not been seen or in direct contact with the family for some time. His report describes the incident at the hotel, but said it was the police who came to his room and threatened to break down the door. They threatened to put him in jail and he was handcuffed and instructed to talk. Cristiana then called Mr Byrne in his presence, and told him that he should tell Madame Crociani and Camilla the following:

> *"1) That she did not want to be contacted by them.*

2) That she had lived in a "golden hell" for the past 35 years.

3) That her mother and sister are dead to her.

4) That she had lived on Fisher Island for part of the year so she could be away from her mother and sister.

5) That she was concerned that I was a "hit man" or a potential kidnapper of her children.

6) She also pointed out that she had political clout in the D.R. stating that she had just had lunch with the President and that I was in a dangerous situation."

523. Cristiana and Nicolas were clear that no police were involved and that Mr Dorta had not been handcuffed, as confirmed in a statement from the hotel manager. Cristiana agrees that she did make the call to Mr Byrne and made the statements to him set out in the report. Mr Dorta said he then had to sign a letter confirming his instructions as a condition of his release. He said he was told that if he did not sign it, he would be in jail for a long time. Cristiana and Nicolas confirmed that he did write such a letter, but had not been put under pressure to do so.

524. We see this incident quite differently to the way it was presented at the meeting on 1st August, 2012. The timing is significant, in that it was in late March early April 2012, long after the family breakdown had taken place, and on the cusp of Cristiana's claims being formulated by Bedell Cristin. We fully understand how concerning, indeed frightening, it must have been to Cristiana and Nicolas to have this strange man armed with photographs of them and the children nosing around their home and their children's school. We were shown a photograph of Mr Dorta and we hope he will not mind us observing that to someone who did not know him, he has quite an intimidating appearance. In our view, it was Cristiana and Nicolas who were being harassed and intimidated by someone sent by Madame Crociani, not the other way around.

525. Going back to the minutes, they then recite that Cristiana's actions were so uncharacteristic that she may have been under the malign influence or control of third parties, who might be seeking to gain access through her to the family wealth, describing Madame Crociani as the generator of that wealth over the last fifty years. This allegation of malign influences, there were references at some point to the involvement of the Mafia, has come to nothing, as there is not a shred of evidence to support it.

526. We have, of course, found that Madame Crociani was not the generator of the wealth that was settled into the Grand Trust and that the Foundation was not included as a beneficiary as a means through which she could benefit, the central tenet upon which the advice was given.

527. Mr Syvret said he felt nervous regarding the proposal put forward by Mr Green, as it was, in his words*, "a highly technical solution",* but nothing in the meeting led him to believe that BNP Jersey should not follow the advice. His file note of the meeting shows he understood the advice. Mr Foortse (who never saw the advice of Mr Le Poidevin) clearly did not understand, as he said the purpose of the Agate appointment was to reconfirm the 2010 appointment, but not so as to defeat Cristiana's claims.

528. Mr Lee attended the meeting on 1st August, 2012, but said it was purely to report to Mr Noel, who could not attend that day. The report to Mr Noel, written by his colleague, Miss Leung, shows she had little understanding of what was proposed:

> *"….. It was noted that a new trust namely the Agate Trust will be set up pursuant to Clause 11 of the trust deed of the Grand Trust and it will hold the capital and income of the Grand Trust (excluding the loan note) and USD 10 (this is the initial property for the Agate Trust). The said trust will have a vesting day of 7 days from the date of the commencement of the trust."*

She goes on to say that Madame Crociani had confirmed that she would indemnify both Mr Foortse and Appleby Mauritius for entering into the Agate appointment. It was Mr Noel who signed the Agate appointment on behalf of Appleby Mauritius, but we have no evidence from him as to what he actually understood of the transaction.

529. The Agate Trust and appointment were executed the following day, namely 2nd August, 2012, at the offices of Macfarlanes, with the same attendees, save that Mr Noel was now representing Appleby Mauritius. The minutes show him confirming that he had been apprised of the views of Mr Lee and Miss Leung, who had attended the meeting the previous day. Two new matters were discussed in addition to those canvassed at the previous meeting:

(i) Madame Crociani had procured a report from her US attorney, Mr Byrne, dated 1st August, 2012, giving his recollections of his dealings with Cristiana over 18 months. The report is self-serving, making reference to Madame Crociani's repeated statements of concern about Cristiana and purports to cast the conduct of Cristiana in a suspicious light. The report concludes that considering her actions and her unending appetite for litigation for reasons unknown, Mr Byrne believed that Madame Crociani's decision to take back the assets in

order to manage them and consider a plan of re-organisation in the best interests of the whole family was prudent. Mr Byrne was spoken to by telephone from the meeting and said he had been unsettled by an experience earlier that week, when he had attended the offices of Kroll in New York, with a view to possibly retaining them in order to attempt to obtain some details of Cristiana's financial dealings and assets *"for purposes of enforcing a judgment"* in the Dominican Republic, where the financial press had indicated that there was a high level of organised crime. This meeting had been abruptly terminated at the mention of the name *"Crociani",* indicating to him that Cristiana had already retained that firm. If Cristiana had retained their services, he said it was an indication of her significant connection in the legal community.

(ii) Secondly, it was noted that a further potential disadvantage to retaining the Grand Trust as a vehicle for the Crociani family wealth for generations to come had been identified, namely that Cristiana's children were illegitimate and may never have been beneficiaries of the Grand Trust. It was decided to explore that issue further, but to proceed with the execution of the documentation as it did not turn on the point.

530. Madame Crociani survived for seven days and accordingly, and as intended, the Specified Property i.e. the right to recover the assets appointed out of the Grand Trust under the 2010 appointment, vested absolutely in the Foundation, which is wholly beneficially owned by Madame Crociani. The Court will now be setting aside the 2010 appointment, and so if the Agate appointment is upheld, the Court will be unable, so it is contended, to order the former trustees to reconstitute the trust fund or pay compensation, as the right to recover the assets appointed has itself been appointed away by the very same former trustees to a company owned by one of them, namely Madame Crociani, who has the assets concerned- a remarkable proposition.

Finding on Agate appointment

531. The defendants rely on the Agate appointment as being a valid exercise of the power under clause Eleventh of the Grand Trust deed, for the reasons set out in detail in the minutes which we have set out at length above.

532. Advocate Redgrave accepted that it was hard not to come to the conclusion that the trustees were being led by the lawyers and although it might be considered that the lawyers were most concerned with the interests of Madame Crociani, he said the other trustees were entitled to assume their interests were being looked after on an equal basis, as the lawyers were acting for all of the trustees.

533. Advocate Redgrave acknowledged that the advice could be considered unorthodox and bold but, he said, the trustees were entitled to assume that the advice which they were being given was not just proper, but orthodox. It was, Advocate Redgrave said, an extraordinary proposition that the trustees should have ignored such firm and demonstrably eminent advice coming from lawyers occupying the top tier of the legal profession in England and Jersey. The Agate appointment was set against genuine concerns for Cristiana, and it was designed to put right technical defects in the 2010 appointment, which at the time was made in the interests of the family. The Agate appointment was therefore intended to resolve any issues as to the 2010 appointment.

534. Mr Foortse relied on the minutes, a key factor in his decision being the categorical assurance from Madame Crociani that she would ensure proper provision was made for Cristiana and her children. He was conscious of the advice that the claims being brought by Cristiana were technically flawed and lacking in merit, and that there was a need for there to be certainty as to the effectiveness of the 2010 appointment. He had known Cristiana for more than 20 years at this point, and he shared the apparent belief of Madame Crociani and Camilla that Cristiana's behaviour was unusual at best, and that there was a possibility that she was not acting in her own best interests.

535. Advocate Moran accepted that Appleby Mauritius was not in a position to know whether the facts put forward at the meeting were true or false, but it had taken advice from very senior lawyers in Jersey and London, that the claims being advanced by Cristiana were *"technically flawed and lacking in merit and should be defended."* Of course, Appleby Mauritius would have been in a much better position to know if the claims being advanced were true or false if it had made inquiry of its own principal beneficiary, Cristiana, something it failed or declined to do at any stage of its trusteeship. It is difficult to understand it attending and participating in such a meeting without having made its own inquiry of her.

536. Advocate Moran went on to say that the decision to accept joint advice with the former trustees was taken by Mr Noel on the basis that he preferred to keep a lean team, but Mourant Ozannes, Macfarlanes and Mr Green were all under professional obligations in relation to conflicts of interest that precluded them from acting in circumstances where there was a conflict of interest in a potentially contentious matter. An individual duty would have been owed by the lawyers to advise each client, including Appleby Mauritius. In the circumstances, Appleby Mauritius was entitled to assume that there was no conflict as between it and any of the former trustees and to the extent that its position differed from those of the former trustees, this would be taken into account by the lawyers advising them. In the circumstances, she said, it was reasonable for Appleby Mauritius to rely on the advice being given.

537. We accept that the trustees were in the hands of lawyers of the highest standing, but trustees cannot delegate the exercise of their discretion to experts, however eminent, as Lord Walker said in Scott v National Trust for Places of Historic Interest [1998] 2 AER 705 at 717: -

> ***"It is, however, for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts".***

538. The decision to enter into the Agate appointment was made against a background of serious disputes within the family and a threat of imminent litigation. Stripped to its essentials one can analyse the reasons given for the Agate appointment in this way: -

(i) If the 2010 appointment was found to be a breach of trust, that was accidental or unintended;

(ii) There were concerns about Cristiana's situation and that if the appointed assets were returned to the Grand Trust, she would regard that as a source of funding for claims against Madame Crociani and Camilla;

(iii) It was not in the interests of the beneficiaries of the Grand Trust for the appointed assets to be returned if they could be used for that purpose; and

(iv) It was therefore in the interests of the beneficiaries of the Grand Trust for the appointed assets to remain with Madame Crociani who would make proper provision for Cristiana and her children.

(v) An appointment to the Foundation was the means by which the appointed assets remaining with Madame Crociani could be achieved.

539. Analysed this way it is immediately striking that this was all about depriving Cristiana of a source of funding to pursue her threatened claims. In any event in our view, the Agate appointment cannot stand, for at least four principal reasons.

540. Firstly, the advice given by the lawyers and the appointment itself was premised upon the fact that the Foundation had been established for the sole benefit of Madame Crociani, and had been included as a beneficiary of the Grand Trust to allow her to benefit through it, and without her

being named as a beneficiary. We have found that this was not the case. The Foundation was established to act as a conduit for the making of donations to charities and it was not intended that Madame Crociani could benefit through it. Her interest under the Grand Trust was that of a default beneficiary in the remote possibility that all of her descendants predeceased her.

541. What was envisaged by the Agate appointment, as made clear in Advocate Kistler's notes and those of Macfarlanes, was that the former and new trustees wanted the assets appointed out of the Grand Trust, if they were found to have been improperly so appointed, to remain with Madame Crociani, who had received them as a consequence of the Fortunate Trust revocation, and to achieve this they used clause Eleventh to appoint the right to recover those assets, via the Agate Trust, to the Foundation, which was wholly beneficially owned by her, so that those assets could remain with her. The Agate appointment was therefore an appointment for the benefit of Madame Crociani, impermissible under the terms of clause Eleventh, and was as much an excessive execution as the 2010 appointment. It is therefore void and nothing further need be said.

542. It was equally a fraud on the power, in that it was exercised in order to benefit Madame Crociani, who under the terms of clause Eleventh was not an object of the power, and is therefore void. It can also be challenged on the grounds that the trustees took into account irrelevant matters, namely Madame Crociani's alleged status as a beneficiary through the Foundation, and the unsubstantiated allegations of fact, which we have found to be substantially untrue.

543. Secondly, the former trustees had a conflict of interest so pervasive as to vitiate any purported exercise by them of the powers under clause Eleventh. The general rule is that a trustee, like other fiduciaries, is not allowed to place himself in a position where his personal interests, or interests in another fiduciary capacity, conflict or possibly may conflict with his duty. The classic statement is that of Lord Herschell in Bray v Ford [1896] A.C.44 at 51: -

> ***"It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondents, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that human nature being what it is, there is a danger, in such circumstances, that the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule."***

544. There is no hard and fast rule that where a trustee exercises a power under such a conflict, the beneficiaries are entitled to have it set aside. Hart J, in Public Trustee v Cooper [2001] W.T.L.R.901 explained the law in this way at page 933: -

> ***"One must, however, beware of supposing, simply because the principle has bred these particular rules, that on every occasion on which the principle can be invoked in areas outside the ambit of the specific rules some similarly rigid rule either exists or should be crafted. There is in fact a surprising lack of English authority on the consequences of trustees acting or purporting to act in situations to which the developed rules do not in terms apply, but where actual or potential conflicts are alleged to exist. The relative absence of authority certainly suggests that there is no iron rule that, where such action has taken place, a beneficiary is entitled ex debito justitiae to have it set aside. Equally, one would expect to find, in the absence of such an iron rule, that where such action is challenged on such grounds, the onus would be thrown upon the trustee to demonstrate that the conflicting interest or duty has not in fact operated in a vitiating way.***
>
> ***In some areas of our law the existence of conflicts of this kind is recognised and managed by a variety of devices, ranging from requiring the affected person to declare his interest to requiring him to abstain from participation in the relevant decision-making process. In the law of private (ie non-charitable) trusts, where unanimity of decision-making is required, such devices are difficult to transplant. The beneficiary is entitled to the decision of all his trustees but, at the same time, he is entitled to require that the decision is made independently of any private interest or competing duty of any of the trustees. Where a trustee has such a private interest or competing duty, there are, as it seems to me, three possible ways in which the conflict can, in theory successfully be managed. One is for the trustee concerned to resign. This will not always provide a practical or sensible solution. The trustee concerned may represent an important source of information or advice to his co-trustees or have a significant relationship to some or all of the beneficiaries such that his or her departure as a trustee will be potentially harmful to the interests of the trust estate or its beneficiaries.***
>
> ***Secondly, the nature of the conflict may be so pervasive throughout the trustee body that they, as a body, have no alternative but to surrender their discretion to the court.***
>
> ***Thirdly, the trustees may honestly and reasonably believe that, notwithstanding a conflict affecting one or more of their number, they are***

nevertheless able fairly and reasonably to take the decision. In this third case, it will usually be prudent, if time allows, for the trustees to allow their proposed exercise of discretion to be scrutinised in advance by the court, in proceedings in which any opposing beneficial interests are properly represented, and for them not to proceed unless and until the court has authorised them to do so. If they do not do so, they run the risk of having to justify the exercise of their discretion in subsequent hostile litigation and then satisfy the court that their decision was not only one which any reasonable body of trustees might have taken but was also one that had not in fact been influenced by the conflict."

545. The former trustees had resigned as trustees of the Grand Trust when Appleby Mauritius was appointed, but that retirement and appointment had been challenged, and the former trustees were therefore brought into the Agate appointment on the basis that they may still be the trustees of the Grand Trust.

546. The minutes show that there was no discussion as to their conflict of interest, other than an anodyne reference to the *"risk of litigation",* and whether it was so pervasive as to give them no alternative other than to surrender their discretion to the court. Mr Green had advised against any application to the Court, as it would amount to an admission that something had gone wrong, and in any event, Madame Crociani said she wanted to avoid court at all costs.

547. The former trustees are therefore saying that they honestly and reasonably believed that notwithstanding their conflict of interest, they were able fairly and reasonably to make the decision to enter into the Agate appointment. Because they have not taken the prudent step of applying to the court first, for it to scrutinise the proposed exercise of this power, they now have to justify the same and satisfy the court that their decision was not only one which a reasonable body of trustees might have taken, but was also one that had not in fact been influenced by the conflict.

548. The *"risk of litigation"* was that if the 2010 appointment was set aside, it was the basic right of the beneficiaries of Cristiana's trust (as we shall see later) to require the former trustees jointly and severally to reconstitute the trust fund or pay compensation out of their own assets; a potential liability of some US$132 million each. Madame Crociani was further conflicted because she actually had possession of the assets that the court would have found, in the scenario being contemplated, had been improperly appointed out of the Grand Trust. Appleby Mauritius and Mr Foortse were further conflicted because they were trustees of the Agate Trust, and therefore owed fiduciary duties both to the Grand Trust and to the Agate Trust. As Advocate Robinson said, the Agate appointment was riddled with conflict.

549. The threat of litigation was real. Bedell Cristin had just issued a lengthy, and as we have said, well articulated, letter before action. Proceedings were therefore going to be instituted, which, if successful, would potentially have had an enormous impact on each of the former trustees. Human nature being what it is, the former individual trustees and the individual officers of the corporate trustee must have been influenced by the fact that a, if not the, consequence of the Agate appointment was to relieve each of the former trustees of this substantial liability. To suggest otherwise is to expect quite impossible mental gymnastics on their part. We find that their decision was influenced by their conflict.

550. Indeed, that seems clear from an analysis of paragraph 33 of the minutes, which is the key paragraph and which we set out again: -

> *"The Grand Trustees were advised that it would not be legitimate to enter into confirmatory documentation simply to defeat Cristiana's claims and the accompanying risk of litigation, 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."*

551. The key risk of litigation was of course the former trustees' own liability, should the plaintiffs' claim succeed. It is clear from paragraph 33 of the minutes that rather than advising the former trustees to put their own liability out of their mind in deciding how to act in the interests of the beneficiaries, the lawyers were advising that the former trustees were entitled, indeed obliged, impermissibly, to take into account their own position in deciding whether to exercise the clause Eleventh power. As Hart J said in Public Trustee v Cooper, beneficiaries are entitled to require that decisions are made independently of any private interest, and this was manifestly not the case here.

552. Thirdly, this was not a decision open to a reasonable body of trustees. The former and current trustees were contemplating a situation in which the Court had set aside the 2010 appointment as being a breach of trust; in other words, that it had been made improperly for the benefit of Madame Crociani, who was not an object of the power. In that eventuality, they decided that rather than have the trust fund reconstituted with the assets that had been improperly paid away, they were going to leave those assets in the hands of the very person who had received them improperly.

553. Paragraphs 38 and 39 of the minutes make that clear: -

> *"38 The Grand trustees agree that it would not be appropriate … to seek to recover the assets subject to the 2010 appointment … 39 On the contrary … it is appropriate for these assets to remain with … Madame Crociani …"*

554. This is to ride roughshod over the provisions of the Grand Trust deed and the basic right of the beneficiaries of Cristiana's trust to have the Grand Trust administered in accordance with its terms and, if it is not so administered, to have the trust fund reconstituted or compensated. It is tantamount to the former trustees determining that if the Court found that there had been a breach of trust on their part, they and the current trustee (not the Court) were going to decide upon the remedy.

555. Despite the advice given to the former trustees, and the high standing of the lawyers involved, we cannot see how, given a finding of breach of trust against them, they could make such a decision. We cite from the leading authority of Target Holdings v Redfern [1996] AC 421 later, but this extract from the judgment of Lord Browne-Wilkinson at page 434 sets out the basic position:

> ***"… the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss."***

The basic obligation of the former trustees, should they have been found to be in breach of trust, was to make restitution or pay compensation; not to decide to leave the assets improperly paid away with the person who had received them and who was not an object of the power. However good a custodian and well-intentioned that person may be said to be, there can be no question of her retaining those assets improperly received by her. They have to be returned. The minutes refer to Madame Crociani being beneficially entitled to the assets received by her, but given a finding of breach of trust, she would have had no beneficial entitlement whatsoever.

556. Advocate Redgrave argues that the Agate appointment was designed to put right technical defects in the 2010 appointment, which at the time he said was made in the interests of the family. Leaving aside our findings in relation to the 2010 appointment and the fact that its defects were far from technical, the family had now fragmented and reconfirming the 2010 appointment was no longer in the interests of the family as a whole. Indeed, as we noted earlier, Mr Le Cornu conceded that following the change in the family circumstances he would not have been willing to make such an appointment again as it was no longer in Cristiana's interests.

557. The position of Appleby Mauritius here is remarkable, in our view. As the current trustee of the Grand Trust, its duty was to ensure that any trust property vested in it. Again, the scenario being considered was the Court finding that some US$132 million had been paid away improperly. In that eventuality, the duty of Appleby Mauritius was to recover that sum for the benefit of its beneficiaries. Instead, it decided that it was not in the interests of its beneficiaries to have the Grand Trust fund reconstituted, a basic right of theirs, and it joined in with the very persons responsible for that breach of trust in deciding that the assets improperly paid away should stay with the person who had received them and who would have had no right to retain them.

558. Article 30(9) of the Trusts Law, provides that a trustee who becomes aware of a breach of trust prior to its appointment: -

"shall take all reasonable steps to have such breach remedied."

On the assumption that Appleby Mauritius would be under a similar duty under Mauritius law, which we were told was modelled (in part) on the Trusts Law, rather than take reasonable steps to remedy the breach of trust of which it had been made aware by Bedell Cristin, it set about doing the exact opposite, joining in with those alleged to have committed the breach of trust in taking all steps that they could to prevent the breach being remedied, allowing the assets improperly paid away to remain where they were, in the hands of Madame Crociani, who is not an object of the power.

559. Paragraph 39 of the minute states that Madame Crociani was the person best placed to protect the family wealth *"for the benefit of the family as a whole"* (our emphasis), but the reality was that this was a family feud which had deteriorated into open warfare, and where Madame Crociani had dispersed assets, which had been paid out of the Grand Trust, to various locations around the world, which she had refused to disclose. One of the purposes (at least) of that disposal was to make it more difficult for the plaintiffs to enforce any judgment for those assets to be returned. Madame Crociani was hardly acting for the benefit of the family as a whole.

560. This was not about protecting and safeguarding the family wealth, but was all about Madame Crociani wishing to keep what she had received out of the Grand Trust, and Camilla the benefit she had received from Cristiana's shares in Croci NV, and making sure that Cristiana did not have the funds to pursue them. Cristiana, for her part, was not attacking the family wealth, but merely wishing to have that part of the wealth represented by the assets appointed under the 2010 appointment restored to its proper place, namely to the trustees of the Grand Trust.

561. Paragraph 46 of the minutes contains what we regard as a wholly irrational statement, which for convenience we set out again:

> *"In the above circumstances, the Foundation, being an entity which is beneficially owned by Madame Crociani, was considered to be an obvious safe pair of hands which could receive an appointment of the Specified Property. The existence and/or prosecution of any such claims may then be considered by persons who the Grand Trustees are confident may be trusted to take the family interests into account."*

562. Bearing in mind that Madame Crociani had received the assets appointed under the 2010 appointment and was one of the trustees that made that appointment, she would be a prime defendant in any proceedings to recover those assets. The former and current trustees, which of course included her, were seriously contending in this minute that she was the appropriate person to decide whether her company, the Foundation, should bring a claim against her to recover those assets from her- in effect whether she should sue herself.

563. As for Madame Crociani's categorical assurances about providing for Cristiana and her children, we are reminded of what was said on the taped June 14th meeting about Cristiana getting nothing. Furthermore, on 3rd August, 2012, the day after the Agate appointment, she revoked the Diamond Trust, created by her on 8th December, 2011, and of which Cristiana and her children were beneficiaries (unbeknownst to them) along with Madame Crociani, Camilla and her children. Its assets of some €9.7 million, held through its company, Platinum Seas Limited, were then paid away from BNP Jersey to Madame Crociani.

564. There is no evidence that we have seen indicating that Madame Crociani has made any provision for Cristiana and her children in the six years or so from when these disputes arose, apart from back dating a trust deed in response to an accusation that she had cut Cristiana off from the family wealth. It is not known whether that trust ever had any funds settled upon it or what its terms are.

565. Fourthly, we stand back and look at what was happening at this time. Bedell Cristin had sent a letter before action on 3rd July. 2012. A holding response was sent by Mourant Ozannes on 27th July, 2012, saying they were conducting a thorough review of the claims and would provide a full reply shortly, but they were doing much more than conducting a thorough review. At great speed, and in secrecy (from the beneficiaries of Cristiana's trust), the Agate Trust was established and the Agate appointment executed. When Mourant Ozannes wrote on 17th August, 2012, in

substantive response to the Bedell Cristin letter before action, they launched straight into the Agate appointment, saying this: -

> *"3 By virtue of the Agate appointment, and in the events which have happened namely Madame Crociani having survived the making of the Agate appointment by 7 days all and any claims of the kind raised in your letter of 3 July 2012 vested in Camillo Crociani Foundation (IBC) Bahamas Ltd ("the Foundation"), in which your client has no interest.*
>
> *4 In consequence, your client has no standing to pursue the arguments (bad as they are) attempted in your 3 July 2012 letter."*

566. Having gone into detail on the high standing of those advising and of those executing the Agate documents and the minutes of the decision, the letter concluded at paragraphs 36 and 37: -

> *"36 All of the Grand Trustees, directors of corporate trustees, the individual professional and Madame Crociani herself, were of one mind and entirely comfortable with the decision reached. They have made it clear that if litigation cannot be avoided, they are all willing and able to explain themselves to the Royal Court.*
>
> *37 Correspondingly, your client should be in no doubt that if she should seek to challenge the Agate appointment, no less than if she were to seek to persist in her misconceived criticism of the original Grand Trust appointment dated 9 February 2010 ("the Original Appointment"), she will be subpoenaed to attend before the Royal Court to explain herself in relation to the above matters, and to be cross-examined in relation to them, as well as her involvement in all matters of complaint raised in your 3 July 2012 letter (both so as to establish that Cristiana's claims are barred, and that any interest which she might have had under the Grand Trust is to be impounded). This is not a threat, but cold realism."*

567. As it transpires Madame Crociani has not been willing to explain herself to the Court and contrary to what Mourant Ozannes said in this last quoted paragraph, we regard it as nothing other than a threat, made on behalf of the former and current trustees against Cristiana.

568. However carefully drafted the documentation, it is clear to us that this was not a genuine exercise by the former trustees, and the current trustee, of their dispositive powers under the Grand Trust. One questions what the former trustees, accused of a serious breach of trust, were doing exercising their dispositive powers at all. It was not as if some crisis had beset the Grand Trust

which required them to act urgently, with Appleby Mauritius, in the interests of the trust estate. Even if some crisis had emerged, trustees in their positon would be most unwise to exercise their powers without the sanction and protection of the Court. On the contrary, the only thing that had happened was that the former trustees had been threatened with a serious breach of trust claim. There was no urgency on the part of the trust estate for the former trustees and Appleby Mauritius to act and whilst such a threat creates uncertainty for some of those concerned, particularly those who had benefitted, it was not an uncertainty that had any prejudicial effect on the trust estate, which only stood to gain if the claim was successful.

569. The former trustees and Appleby Mauritius only acted because of the threat of action made against the former trustees and the implications of a successful claim to those who had benefitted. It seems obvious to us that this was an entirely tactical response to that threat, the purpose of which, as revealed in Macfarlane's confidential note, was *"to secure the intended result and, in effect, block the attempted challenge to the 2010 appointment."* That is an impermissible purpose.

570. The Court found the whole Agate exercise disheartening, given the standing of the lawyers concerned, and for all the reasons set out above, we will set it aside as being void and of no effect.

THE 2016 AMENDMENT OF THE PROMISSORY NOTE AND APPOINTMENT OF GFin

571. We take these two events together, as they are closely related in time, and in our view, are connected.

572. According to Mr Lee, Appleby Mauritius first received a copy of the Promissory Note in April 2013, over a year from its appointment, when they started work on the accounts of the Grand Trust. He also says that he did not know who owned Croci BV; he thought it was an independent company. However, Mr Lee only had an overview of the file, as Miss Leung was responsible for its day to day administration under the direction of Mr Noel, who was the director of Appleby Mauritius responsible for the trusteeship until his resignation as a director in December 2015. As will be seen he remained influential thereafter. We have no doubt that at all times Mr Noel knew who was behind Croci BV. It is clear from the evidence we reviewed earlier that the Promissory Note was a live issue for him and Madame Crociani from the outset.

573. Mr Lee remembered that in early January 2016, he had a general discussion with Mr Noel about assigning a loan and what documents would be required, although apparently this was not specific to this particular Promissory Note.

574. On 12th January, 2016, he and Miss Leung received a letter (by e-mail) from Croci BV seemingly out of the blue, which referred to the Promissory Note, and which proposed an extension to 10th December, 2025, at an interest rate of 4% per annum.

575. Mr Lee replied on 14th January, 2016, asking for the following documents to be provided: -

> *"Report on the value of the assets currently held by Croci International B.V. issued by an independent internationally recognised valuer approved by the trustees;*
>
> *Latest accounts of Croci International B.V. audited by an international audit firm;*
>
> *Documents to demonstrate that the assets have been put on the market, since when they were marketed and income received to date from these assets."*

576. Croci BV replied on 19th January, 2016, providing a number of documents which, apart from the draft (not audited) accounts of Croci BV, related entirely to the real estate held within the Croci group.

577. Mr Lee responded on 21st January, 2016, saying that having considered the documentation, Appleby Mauritius could not accept the terms proposed:

> *"However, taking into consideration the benefit of the beneficiaries, the trustees are willing to consider requests from Croci International B.V. for an extension of the due date up to a maximum of 5 years, which is up to December 2022, but at an interest rate of 11% per annum instead of the current prevailing rate of 8%."*

578. Croci BV responded on 22nd January, 2016, agreeing those terms, with minor amendments, which Mr Lee agreed to by letter of 26th January, 2016. All of these letters were sent by e-mail, and were copied in to Mr Noel, with whom the matter was discussed. Thus, the renegotiation of the Promissory Note, an issue of great importance to the beneficiaries as it was the only but substantial asset of the Grand Trust, was completed in just over two weeks without any

consultation with the beneficiaries, at least of Cristina's trust, and without the benefit of any independent financial advice.

579. A resolution agreeing to these changes was executed by Appleby Mauritius on 26th January, 2016, which does not set out the reasons. The maturity of the Promissory Note was extended from 10th December, 2017, to 12th December, 2022, with interest from 11th December, 2017, increasing to 11% per annum.

580. An undated memorandum was discovered, purporting to set out the reasons for this agreement, and quoting from it: -

> *"Taking into consideration that the economic conditions were not favourable, and the fact that interest rates offered by the banks were very low and nil in some cases, the trustees were of the view that receiving the interest from Croci International BV would not benefit the Grand Trust.*
>
> *The rationale was that the interest receivable from Croci International BV was at 8% compared to the interest rate of 1% receivable from the banks."*

581. As Advocate Robinson pointed out to Mr Lee, and which he accepted, this reasoning is fallacious, as no interest was being earned on the unpaid interest (interest was not compounded) so that to the extent that interest was not paid, it constituted an interest-free loan by the Grand Trust to Croci BV. According to the accounts of the Grand Trust to September 2013 (the latest accounts that we have) accrued interest at that stage amounted to US$21.4 million.

582. In our judgment, the whole of this correspondence 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. We have seen none of the internal and external emails together with notes of calls and meetings, let alone advice, that you would expect to see generated in a matter as substantial as this. In particular we have seen no emails and notes of meetings between Mr Lee and Mr Noel who was the only person outside Appleby Mauritius with whom Mr Lee had any contact.

583. Given the conflict within the beneficial class of the Grand Trust, the existence of these proceedings and the substantial amounts involved, the extension of the liability to pay the capital due under the Promissory Note (US$32 million) for five years was on any analysis a momentous decision, which one would expect a prudent trustee, in particular one whose status as trustee was

being challenged, to refer to the Court for its blessing. Instead it was undertaken secretly and in great haste.

584. Mr Lee, who had no client facing role, appeared to have a very limited understanding of the circumstances of the Grand Trust. According to the correspondence he only considered the real estate (non-income producing) assets owned within the Croci Group to assess its ability to pay, but he had no information on the jewel in the crown Ciset, the generator of cash within the group, and he did not ask for any. He could give no explanation for this. Bearing in mind the substantial sum now due under the Promissory Note, this is inexplicable. He had apparently assumed that Croci BV was an independent company unconnected to the family and was presumably unaware that Camilla now owned it and therefore, there was a conflict between her interests in extending the Promissory Note and the interests of the beneficiaries of Cristiana's trust, in having it paid.

585. Mr Lee paid lip service in the correspondence to the interests of the beneficiaries. Apart from internal discussions he said he had with administrators within Appleby Mauritius, Mr Lee consulted only with Mr Noel, who we know had a close working relationship with Madame Crociani and Camilla and who never communicated with Cristiana. Mr Lee told us that the resolution agreeing the amendment of the Promissory Note was in fact drafted by *"Benoit Chambers"* who as we understand it act for Madame Crociani; indicative of her close involvement in the matter. The interests of the beneficiaries of Cristiana's trust in this important change to the only asset of the Grand Trust were not taken into account and it can safely be assumed that if Cristiana had been consulted, she would have vigorously opposed any extension.

586. 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.

587. Whilst this 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.

588. Mr Lee says that he was away in the Seychelles office of Appleby from 26th – 29th January, 2016. The documentation discovered is very sparse, but there is an e-mail timed at 11.43 on 28th January, 2016, from Mr Noel to Mr Clarel Benoit, Madame Crociani's Mauritius counsel, saying: -

"We need to identify a new trustee a.s.a.p. Please let me know your views."

Without the evidence of Mr Noel, we do not know who *"We"* are, why a new trustee was needed and why it was urgent. We also do not know why he was asking this question of Madame Crociani's counsel and not Appleby Mauritius.

589. Mr Benoit responded at 12.09 that day saying that: -

"GFin were willing to act. Not easy to hire the services of anyone else because of the litigation risks. We are preparing the deed of appointment …."

It was Madame Crociani's counsel, therefore, who proposed GFin and prepared the draft instrument without, it would seem, the knowledge of anyone at Appleby Mauritius.

590. From what Mr Lee subsequently understood, at some point on 28th January, 2016, Mr Noel informed Miss Leung and another administrator at Appleby Mauritius that Appleby Mauritius needed to resign and to get the files ready. No explanation seems to have been provided by him.

591. There is then a brief exchange of e-mails between Mr Noel and Mr Benoit over the lunch period on 29th January, 2016, and we presume representatives of GFin, discussing the terms of the deed of appointment, followed by a meeting that afternoon, when the instrument of appointment and retirement of GFin and, we assume, the assignment of the Promissory Note were executed.

592. Mr Lee says there was only one director of Appleby Mauritius in the office on 29th January, 2016, namely Miss Pinpin Kweton, who had been newly appointed. Mr Noel was no longer a director, but was still its legal adviser. Mr Noel told Miss Kweton that she needed to come to the meeting that afternoon with her ID in order to execute these documents and she did so.

593. Therefore, according to Mr Lee, everything was done by or at the instigation of Mr Noel and Mr Benoit, as the legal counsel for Madame Crociani, under the purported protection of legal privilege, hence the paucity of documents discovered.

594. Mr Lee returned from the Seychelles on the afternoon of 29th January, 2016, and he told us it was on reading through his e-mails that he discovered what had happened. It was pointed out to him that he and Miss Kweton had signed the very detailed resolution dated 29th January, 2016, approving the execution of the instrument of retirement and appointment by Appleby Mauritius.

He said, somewhat unconvincingly, that he was presented with this resolution after the instrument of retirement and appointment had been signed by Miss Kweton, and it was therefore too late for anything to be done about it.

595. The person who actually dealt with the appointment of GFin was Miss Kweton. Appleby Mauritius did not proffer her as a witness, so that we could understand how she came to sign this documentation on 29th January, 2016. Mr Lee said that he had been uncontactable in the Seychelles, so she would not have been able to discuss the matter with him. We are aware that there were two Jersey directors of Appleby Mauritius, and there is no indication that they were contacted by Miss Kweton.

596. Mr Lee said there had been some discussion between him, Miss Kweton and Mr Noel some time before these events, about their desire for Appleby Mauritius to retire as trustee, because of the restrictions the litigation placed upon it as trustee, but there had been no discussion about who the successor might be. He said they never gave instructions for Mr Noel to proceed and never thought it would be accomplished so quickly. It was all done in the two days, namely 28th and 29th January, 2016, in a process in which Mr Noel took the lead. Remarkably GFin appear to have agreed to be appointed a day after it was first approached by Mr Benoit without carrying out any due diligence with Appleby Mauritius.

597. Appleby Mauritius have given inconsistent accounts as to why it wished to resign as trustee of the Grand Trust, explored in the Court's judgment of 18th April, 2016, (JRC 085), but what is at issue here is not its desire to retire, for whatever reason, but its decision to appoint GFin and assign the amended Promissory Note to it.

598. The instrument of retirement and appointment not only provided for the retirement of Appleby Mauritius and the appointment of GFin, but contains the following (somewhat repetitive) provisions: -

> *"2 In the exercise of the powers in the Twelfth Clause of the Grand Trust Deed and of every and any other power enabling them to do so under the Trust, the parties hereby expressly declare that:*
>
> *(a) the proper law of the Trust shall be and continue to be the laws of Mauritius, which is the forum for the administration of the Trust, and the trusts of the Trust shall be read and take effect according to the laws of Mauritius.*

(b) all disputes which may arise out of, or in connection with (whether, in each case, wholly or partially or partially, directly or indirectly) this Instrument and/or the Grand Trust Deed or (whether, in each case, wholly or partially directly or indirectly) the interpretation, application, implementation, validity, breach or termination of this Instrument and/or the grand Trust Deed or any related instrument, agreement or document, or any other provision hereof or thereof, shall be subject to the exclusive jurisdiction of the Mauritius courts;

…

7 This Instrument and the trusts of the Trust shall be governed by and construed in accordance with the laws of Mauritius.

8 For the avoidance of doubt and notwithstanding any provision to the contrary, all disputes which may arise out of, or in connection with (whether, in each case, wholly or partially, directly or indirectly) this Instrument or (whether, in each case, wholly or partially, directly or indirectly) the interpretation, application, implementation, validity, breach or termination of this Instrument or any related Instrument, agreement or document, or any other provision hereof, shall be submitted to the exclusive jurisdiction of the courts of Mauritius."

599. These provisions purport, improperly, to amend the terms of the Grand Trust, which under clause fourteenth is not amendable, and to confer exclusive jurisdiction over all disputes on the courts of Mauritius contrary to the findings of the Privy Council.

600. Following its appointment GFin declined to be made a party to the Jersey proceedings and on the basis of these provisions, then made two applications to the courts of Mauritius:

(i) On 24th February, 2016, seeking a number of declarations from the courts of Mauritius including declarations that the 2016 appointment is governed by the laws of Mauritius and is lawful valid and enforceable and that since the 2012 deed (by which Appleby Mauritius became the sole trustee) and more so since the 2016 appointment, the Grand Trust has been governed by the laws of Mauritius, and all disputes arising in relation to the Grand Trust are subject to the exclusive jurisdiction of the Mauritius courts.

(ii) On 10th March, 2016, seeking anti-suit injunctions restraining and prohibiting the plaintiffs from joining GFin as a party to the Jersey proceedings, from pursuing/continuing the Jersey proceedings and from enforcing any judgment of the Court against GFin. That application

was subsequently dismissed and we have quoted earlier from the judgment of the Supreme Court of Mauritius.

601. The combined effect of GFin asserting that all disputes concerning the Grand Trust since 2012 (i.e. before the Jersey proceedings commenced) are subject to the exclusive jurisdiction of the courts of Mauritius and seeking an interlocutory injunction against the plaintiffs continuing with the Jersey proceedings, is to attempt to argue (once again) that Mauritius is the appropriate forum for the subject matter of the Jersey proceedings, an argument that has been settled finally and conclusively by the Privy Council in its judgment of 26th November, 2014.

602. We have now found that the appointment of Appleby Mauritius in January 2012 was void and it, therefore, was acting as *de facto trustee/trustee de son tort*. As a *de facto trustee/trustee de son tort*, it would not have had the power to appoint GFin as a new trustee. Even if it had validly been appointed trustee, Advocate Moran agreed that there was no power under clause Twelfth, the power expressly relied on in the deed of retirement and appointment, to appoint another corporate trustee in the same jurisdiction, and she accepted the expert opinion of Mr Marc Hein SC of 11th October, 2016, instructed by BNP Jersey, that there is no other power under the laws of Mauritius upon which it could have validly appointed GFin. We also accept that this is the case, as does Advocate Redgrave, and that therefore the appointment of GFin, as conceded by Advocate Moran, was an excessive execution. It follows that Appleby Mauritius, having no power to appoint GFin as trustee, was in breach of trust in assigning the Promissory Note to it.

603. However, Appleby Mauritius, whilst conceding that it had no power to appoint GFin, does not accept that the appointment was a fraud on the power, or that it otherwise acted in breach of trust. The Court was not clear what difference that would make as it is as much a breach of trust to purport to exercise a power you do not have as to exercise a power you do have for an ulterior purpose. In any event, Advocate Moran argued that Appleby Mauritius acted upon the advice and recommendation of Mr Noel, its legal adviser, and there was no evidence that anyone at Appleby Mauritius was aware of any plan by GFin not to submit to the jurisdiction of this Court and to use the purported amendments to the Grand Trust deed to issue rival proceedings in Mauritius. If Mr Noel was aware of such a plan, he did not share that information with them. Had he done so, Advocate Moran stated that GFin, would not have been appointed.

604. That submission, it seems to us, is more relevant to the question of whether Appleby Mauritius should be exonerated from its liability, which we deal with later, but the fact that it claims to have acted on the legal advice or recommendation of its legal advisor has no bearing on whether its actions constitute a breach of trust.

605. The evidence shows Appleby Mauritius in a poor light. Mr Lee says that, without any instruction from Appleby Mauritius, Mr Noel, on his own initiative, arrived one day and instructed Miss Kweton to execute the instrument of retirement and appointment, which had been drafted to allow for one person to sign on behalf of the company, whereas the instrument by which it was appointed trustee in January 2012 was executed under the seal of the company in the presence of two officers. Miss Kweton simply did as she was told, executing it before she even had the authority of a resolution of the board to do so; that was not signed by Mr Lee until after. There is no explanation for the unseemly haste in which this was all done.

606. We do not know why she acted on Mr Noel's instruction, what explanation was given to her, what she knew about the Grand Trust and the proceedings in Jersey, or whether she even read the instrument. 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.

607. 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.

608. Implausibly, Madame Crociani has maintained in correspondence with the Court and in her witness statement to have had minimal involvement in the retirement of Appleby Mauritius and the appointment of GFin. Quoting from her letter of 29th March, 2016: -

"Appointment of GFin

2 I wish to inform the Jersey Court that I had no involvement whatsoever, save and except as specified below, in the appointment of the new trustee of the Grand Trust, GFin Corporate Services Ltd ("GFin").

3 I was contacted by a director of GFin in or about the end of January 2016 and informed that GFin and Appleby Trust (Mauritius) Ltd had been in communication regarding the appointment of GFin as the new trustee of the Grand Trust.

4 GFin wanted specifically during our telephone conversation that I ascertain my intention, at the time the Grand Trust was created, regarding the tribunal that would have jurisdiction to hear any disputes relating to the Grand Trust.

5 I confirmed that at the time that I created the Grand Trust, I intended that all disputes arising in relation to the Grand Trust, including in relation to its administration, should be heard by the courts of the place where the Grand Trust is administered from time to time. GFin requested that I confirm my statement in writing. I herewith attach a copy of the letter sent to GFin to that effect on 28 January 2016.

6 I also had other telephone conversations with GFin regarding, inter alia, an indemnity agreement that GFin wanted me to enter into, as has been the practice with the previous trustees of the Grand Trust. I agreed to provide an indemnity to GFin and I herewith attach a copy of the indemnity agreement dated 29 January 2016."

609. Bearing in mind Madame Crociani's well established desire to control, it is simply not credible that she was phoned out of the blue by a director of GFin, saying that his company was taking over as trustee of the trust she settled, with the conversation being limited to what tribunal she had intended in 1987 should have jurisdiction over disputes.

610. Attached to her letter is a copy of the *"Fee Agreement and Indemnity"* dated 29th January, 2016, under which she agrees to pay GFin's fees and gives GFin a wide indemnity for acting as trustee, the preamble to which anticipates litigation. Madame Crociani is once again the paymaster.

611. 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.

612. 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.

613. Appleby Mauritius was, therefore, in breach of trust as *de facto trustee/trustee de son tort* of the Grand Trust in: -

(i) agreeing to the amendments to the Promissory Note;

(ii) appointing GFin as trustee;

(iii) assigning the Promissory Note to GFin; and

(iv) amending the provisions of the Grand Trust, thus giving GFin a platform to commence rival proceedings in Mauritius.

614. Appleby Mauritius cannot avoid liability for any losses to the trust fund of the Grand Trust caused by these breaches of trust on the grounds that it was not validly appointed as trustee or did not have the Promissory Note properly vested in it, for the reasons we set out below under the heading of *"Remedies".*

DISTRIBUTIONS

615. Between 11th December, 2007, and 3rd March, 2011, Madame Crociani, Mr Foortse and BNP Jersey, as trustees of the Grand Trust, distributed to Cristiana €10,180,000 and US$4,500,000; similar distributions were made to Camilla. Of the distributions made to Cristiana, she redirected €6,630,011.96 and US$1,235,000 to Madame Crociani at her request, and it is those sums which form the basis of the claim. Similar sums were re-directed by Camilla to Madame Crociani, but she makes no complaint.

616. The *modus operandi* was the same in the case of each distribution. Madame Crociani would raise the request with the relationship manager at BNP Suisse, who would then procure standard letters of request for distributions from Camilla and Cristiana. BNP Suisse would then relay the request to BNP Jersey, who would draft the necessary resolutions for execution by the trustees. Most of the impugned distributions took place in 2008, and were unusually high in the context of distributions from this trust. Some related to what was termed *"general expenses"* and others to the acquisition of real estate, understood by BNP Jersey to be secondary homes for the use of the family.

617. Cristiana said that she was told by her mother to sign the distribution requests and pay the money to her once she received it. She was not free to use the money herself – she had to pay it over. She never asked why her mother wanted the money – she simply did as she was told – *"Sign here so we can get the money we need."*

618. It is not disputed that Madame Crociani received these sums. In their letter of 17th August, 2012, Mourant Ozannes state that one of the reasons for the 2010 appointment was to bring the trusts on which the assets were held *"into more transparent alignment"* with the manner in which the Grand Trust had been operated.

619. Madame Crociani says in her witness statement there was a common household arrangement between herself and her daughters, in which their living expenses, which were substantial, were shared in what she described as a transparent and trusting arrangement. Madame Crociani had a power of attorney over their HSBC Monaco accounts, and they had a power of attorney over her HSBC Monaco account. Money, she said, would often be transferred between these accounts. Madame Crociani said she never put Cristiana under any pressure to sign requests for distributions.

620. Cristiana denied that there was any shared arrangement as such, or that their finances were transparent. They all had accounts other than with HSBC, and she had no knowledge of what Camilla was doing with her distributions, to the extent that she retained them, and vice versa.

621. However, they were all living in the same apartment, and as far as Nicolas and Cristiana were concerned, Madame Crociani was paying for all of their living expenses and generally luxurious lifestyle. Cristiana said she never wanted for money.

622. Documents do show that BNP Jersey and, we presume, Mr Foortse, were aware that some of these distributions were made in order to acquire properties, and there was reference to a

distribution being needed because Madame Crociani *"had no money left to meet her daily expenses."*

623. Advocate Robinson argued that Madame Crociani was under a conflict of interest in participating in a discussion to make distributions to Cristiana from which she knew she was going to benefit, and that conflict was not cured, he said, by the majority decisions of BNP Jersey and Mr Foortse, because Mr Foortse was a "stooge" who exercised no independent judgment. They were the safeguard against that conflict, and if they had made appropriate inquiries, and if they had known that money was destined for Madame Crociani, they could not properly have made the distributions.

624. In any event, Advocate Robinson said both BNP Jersey and Mr Foortse were acting under the mistaken belief that Madame Crociani was capable of benefiting through the Foundation. At no point, he said, did they address the question of whether the distributions were for the benefit of the daughters, as distinct from Madame Crociani, or whether a distribution could properly be made to the daughters from which Madame Crociani derived benefit, in circumstances where she was plainly intended to be excluded from benefit. BNP Jersey had simply focused on securing a neat paper trail for its distributions, while exercising no judgment as to the substance.

625. As Advocate Redgrave pointed out, it is incumbent upon the plaintiffs to show that these distributions were made for a purpose foreign to the power in the trust, namely for the benefit of Madame Crociani. Even if sums were re-directed to Madame Crociani, with whom they were living, that is not necessarily a fraud on the power. As stated in Lewin on Trusts at paragraph 92-297: -

> ***"It is open to an appointee, moreover, to apply the property appointed as he wishes and in particular to apply it in favour of persons who are not objects of the power. An exercise of the power is not vitiated merely because the donee is aware that the proposed appointee intends to do so, nor even if there is an arrangement that the appointee should do so, as long as the donee's purpose in making the appointment is the benefit of the appointee and not the benefit of those who are not objects."***

626. It is also well established that ***"benefit"*** has a wide meaning - (Pilkington v IRC [1964] A.C.612 at 625) - and that payment for the benefit of a person is not confined to her direct financial advantage, but includes the discharge of certain moral or social obligations, for example, towards dependants - Re Clore's Settlement Trusts [1966] 1W.L.R.955.

627. We are not going to go into further detail in relation to these distributions, because we conclude that the claim fails for the following reasons:

(i) In 2008, Cristiana was 35, and had two children. She was therefore a mature adult.

(ii) She and her family were living with Madame Crociani and Camilla and her family in one apartment in Monaco and enjoying a luxurious lifestyle, paid for by Madame Crociani.

(iii) To the outside world, they would have presented as a close-knit happy family group. There was no evidence that BNP Jersey were aware of the control Cristiana says her mother exerted over them all. Although Mr Foortse knew the family somewhat better than Mr Le Cornu, and was aware of occasional tensions and brief heated arguments, he said they still had the appearance of a very happy, united family.

(iv) The requests for each distribution were signed by Cristiana and the monies paid into her personal bank account at HSBC Monaco. It was entirely a matter for her what she did with that distribution. There is no evidence that either BNP Jersey or Mr Foortse were aware of the existence of the powers of attorney, or had any prior or subsequent knowledge of how much of the distributions were paid on to Madame Crociani.

(v) To the extent that monies were passed on to Madame Crociani, to enable her to pay for the family's living expenses, they all benefited. Where, unusually, families live together in this way, it is not realistic and would indeed be intrusive to expect the trustees to inquire into and ascertain how the benefit of a distribution to Cristiana was in fact shared by her with other members of the family. Because of these family arrangements, Mr Foortse regarded these distributions as being for the benefit of all of the family, but the key point is that the distributions were made to Cristiana (and Camilla) who was a beneficiary, and it was up to her how these funds were to be utilised.

(vi) Although BNP Jersey may not have been aware of the details of the Croci Group, Mr Foortse was, of course, aware that the properties purchased were owned within the Group, and the whole family benefited from their use. Furthermore, Cristiana and Camilla were the owners of the shares in Croci NV, subject to Madame Crociani's usufruct. Substantial sums were paid on refurbishing a Paris apartment, which, as we understand it, appears to have been owned by Camilla and Cristiana, again subject to Madame Crociani's usufruct.

(vii) That Camilla and Cristiana saw themselves as benefiting is demonstrated by a memo from Miss de Mestral to Mr Le Cornu of 9th October, 2008, in relation to distributions required for the acquisition of real estate:

> *"Her daughters as well as she have expressed current fears regarding the stability of the financial sector as a whole. As such, they prefer to continue to allocate a portion of their wealth into their US and European real estate."*

(viii) We accept that in participating in decisions to make these distributions, Madame Crociani had a conflict, to the extent that she had an expectation that she would benefit, but we think that this conflict was rescued by the majority decision of the other trustees. Although Mr Foortse's conduct as a trustee can be criticised, in particular in the period after the 2010 appointment, we do not think it fair to describe him as "a stooge" and a man who never exercised independent judgment.

628. In conclusion, these distributions were requested by Cristiana and paid into her bank account. The resolutions signed by the trustees show that they were distributions to her and we find that this was the trustees' purpose in making the distributions, even if they were aware that in the unusual circumstances of this family, Madame Crociani would also benefit.

629. For these reasons, this part of the plaintiffs' claim fails.

THE CRICA CLAIMS

630. The two Miami apartments were found by Nicolas and Cristiana and purchased by Cristiana in 2004 and 2008, the first to live in for three months of the year and the second as an investment, which was let out. They were acquired through a structure devised by Baker & McKenzie on Cristiana's instructions, which for tax reasons, comprised a *"tick the box"* partnership for which two beneficial ownership owners were required. Cristiana therefore arranged for Camilla to hold 0.2% of the shares in Crica (for which Camilla had to subscribe in writing) with Cristiana holding the remaining 99.8%.

631. This structure was wholly outside the Grand Trust and funded by distributions requested by Cristiana and paid to her. The first distribution was documented internally by BNP Jersey as a distribution to Cristiana, but the second, after some internal debate, as a distribution to Cristiana and Camilla. However, it is not necessary for us to go into that, as it is clear that: -

(i) both distributions were paid to Cristiana alone;

(ii) Cristiana owned 99.8% of the shares in Crica; and

(iii) Cristiana and Nicolas had the enjoyment of both apartments at all times, to the exclusion of Camilla and Madame Crociani, who never visited.

632. We therefore find that the two apartments were beneficially owned through the Crica structure as to 99.8% by Cristiana.

633. Cristiana says that at the beginning of April 2010, Madame Crociani advised her to transfer the Miami apartments to the Fortunate Trust, to ensure that Madame Crociani could better look after the interests of Cristiana's children should anything happen to her. She told Cristiana that as part of the process of completing the transfer and settling the shares on the Fortunate Trust, it would be necessary to temporarily equalise the shares in Crica with Camilla. She understood this was purely for the purpose of settling the shares in Crica on the Fortunate Trust and that once settled, her interest would be restored.

634. Relying completely on the integrity of what Madame Crociani had asked her to do, which she had no reason to doubt at that time, she arranged to transfer such shares in Crica to Camilla as was necessary to give them equal shareholdings and then they each arranged for their shareholdings to be transferred to BNP Nominees, as nominee for the trustees of the Fortunate Trust.

635. No notice of this proposal was given to Mr Le Cornu, who was first informed of it at the meeting on 7th April, 2010, his note for the file recording: -

> *"The family wld also like to add the shares of a BVI (Crica Investments Ltd) to the Ftrust. This company owns the real estate in Miami (2 appts). The shares are currently held 50/50 by the 2 daughters and we will need to draft a share trf agreement."*

636. According to Mr Le Cornu, there was no discussion about what was to happen to these apartments once in the trust, the discussions being solely related to the transfer. There was no discussion therefore as to whether they would be let or occupied by beneficiaries, who was to be responsible for their management, maintenance and insurance and who would discharge their not inconsiderable annual service and other charges. He said he would have made reference to half

the shares in Crica going to Goodluck Limited, which was in Camilla's Fund A and the other half going to Happiness Limited, which was in Cristiana's Fund B. He was not aware until later in these proceedings of the transfers that had taken place equalising the shares in Crica immediately prior to the meeting. The actual transfer became complicated for unrelated reasons and was not finally effected until December 2010.

637. In her witness statement, Madame Crociani says the suggestion that the Crica shares be added to the Fortunate Trust came from Cristiana, who was concerned about possible claims by Nicolas, something Cristiana denied. Furthermore, Madame Crociani says it was at the meeting of 7th April, 2010, that Mr Le Cornu told her he had discovered that the shares in Crica were not held 50/50. Cristiana's response was to say it must have been a mistake, and it was her suggestion that the shares be transferred to the Fortunate Trust. In her witness statement, Camilla says the shares in Crica were supposed to be held 50/50, (a suggestion at odds with the application documentation she signed) and she supports Madame Crociani's account. All of this is wholly at odds with the evidence of Mr Le Cornu and Cristiana. We prefer the evidence of those witnesses we have heard to those whose statements have not been tested.

638. There were 50,000 shares in Crica in issue, 49,900 held by Cristiana and 100 by Camilla. There are three transfers involved: -

(i) the transfer by Cristiana to Camilla of 24,900 shares on 7th April, 2010, so that they thereafter held 25,000 shares each, made with a view to Camilla then transferring those shares to the Fortunate Trust ("the first transfer");

(ii) the transfer by Camilla of 25,000 shares to BNP Nominees on 30th April, 2010, ("the second transfer"); and

(iii) the transfer by Cristiana to BNP Nominees of 25,000 shares, again on 30th April, 2010, ("the third transfer").

639. The second and third transfers were finally completed on 16th December, 2010, when BNP Nominees certified that it was holding 25,000 shares for the trustees of the Fortunate Trust for Fund A (Camilla's fund) and 25,000 shares for the trustees of the Fortunate Trust for Fund B (Cristiana's fund).

640. Cristiana brings her claim in respect of these transfers under Jersey law, the Fortunate Trust being a Jersey trust (i.e. a trust whose proper law is the law of Jersey) at the time of the transfers, relying on Article 9(1)(b) of the Trusts Law, which provides that any question concerning: -

> ***"the validity or effect of any transfer or other disposition of property to a trust …. shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question."***

641. The second and third transfers by Camilla and Cristiana to BNP Nominees are therefore governed by Jersey law, pursuant to Article 9(1)(b), and in our view, so must be the first transfer by Cristiana to Camilla, because it formed part of one transaction, by which Cristiana had agreed with Madame Crociani to transfer all of her shares to the Fortunate Trust – Camilla was a mere conduit.

642. Camilla pleads in her amended answer that Cristiana cannot challenge the second transfer by Camilla to BNP Nominees, because Cristiana was not a party to it, but Cristiana has challenged the first transfer of 24,900 shares to Camilla, and if that is set aside, then Camilla's subsequent transfer of those 24,900 shares to BNP Nominees must fall with it; BNP Nominees retaining the 100 shares that Camilla originally owned.

643. Cristiana seeks to have these transfers set aside under Article 47E of the Trusts Law, which provides: -

> ***"47E Power to set aside a transfer or disposition of property to a trust due to mistake***
>
> ***..***
>
> ***(2) The court may on the application of any person specified in Article 47 I (1), and in the circumstances set out in paragraph (3), declare that a transfer or other disposition of property to a trust –***
>
> ***(a) by a settlor acting in person (whether alone or with any other settlor); or***
>
> ***(b) through a person exercising a power,***

is voidable and –

(i) has such effect as the court may determine, or

(ii) is of no effect from the time of its exercise.

(3) The circumstances are where the settlor or person exercising a power –

(a) made a mistake in relation to the transfer or other disposition of property to a trust; and

(b) would not have made that transfer or other disposition but for that mistake, and

The mistake is of so serious a character as to render it just for the court to make a declaration under this Article."

644. Cristiana is a person specified in Article 47 I (1) of the Trusts Law.

645. The mistake relied on by Cristiana relates to what she understood to be her interests in the Fortunate Trust. She thought she was transferring the Crica shares to a trust of which she was a current beneficiary, and Mr Le Cornu has confirmed that she would have had that impression, an impression supported by the Features document and the chart, which were referred to at the meeting on 7th April, 2010. Indeed, in his e-mail to Cristiana of 8th April, 2010, (which we set out earlier) he had confirmed that her half of the shares would be transferred into *"your fund",* and on 16th December, 2010, BNP Nominees had certified that it was holding her half of the shares for her fund. In fact, the funds of both daughters only came into effect on their mother's death.

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

647. At the time of the transfers, Cristiana beneficially owned, as to 99.8%, and controlled, the Miami apartments. One was used as her home for three months of the year, and the other let out as an investment. We accept that she would not have transferred these assets to a trust of which she was not a beneficiary until her mother's death, and over which her mother would have had total

control, without any fiduciary obligation, during her lifetime. Furthermore, she would not have transferred these assets to a trust of which her children were not beneficiaries at all. The whole rationale of the transfer, as propounded by Madame Crociani, was to enable Madame Crociani to look after the interests of the children, should anything happen to Cristiana.

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

649. Cristiana also sought to set aside these transfers on the grounds of undue influence, which we have no need to consider.

INTEREST ON THE PROMISSORY NOTE

650. No interest has been paid on the Promissory Note since 2003. The loan note was originally denominated in Italian lira, and converted in 2002 to Euros. The accounts of the Grand Trust are, however, in US dollars, and according to the financial statements of the Grand Trust for the period ending 30th September, 2013, the capital outstanding was US$32 million, and the interest outstanding is US$21.4 million, a total of US$53.4 million, interest accruing at the rate of some US$2.5 million each year. As previously noted, outstanding interest does not itself bear interest, i.e. the interest is not compounded.

651. The plaintiffs claim that in breach of trust the former trustees and Appleby Mauritius have not requested or collected the annual interest and have allowed Croci BV to retain the overdue payments interest free.

652. By way of reminder, the recital to the Grand Trust includes this statement: -

> *"The Trustees shall retain the Note until its maturity, or until its prior redemption …. The Trustees shall collect the income from and proceeds of the Note when due, but shall not be required to institute litigation to enforce payment or to enforce a right which the Trustees have as owner of the Note".*

653. Madame Crociani and Mr Foortse had been trustees of the Grand Trust from 9th April, 1999 until 10th February, 2012. BNP Jersey has been a trustee from 2nd October, 2007, until 10th February,

2012. BNP Guernsey is not a party to these proceedings. Appleby Mauritius was a *de facto trustee/trustee de son tort* of the Grand Trust from 10th February, 2012, to 29th January, 2016.

654. There is no record of the former trustees at any time considering the question of the interest on the Promissory Note that has been discovered. Indeed, there were no meetings of the trustees at any time up to the appointment of Appleby Mauritius, any decisions being taken by written resolution, and we have not seen any minutes of meetings of the directors of Appleby Mauritius, in its purported capacity as trustee of the Grand Trust.

655. BNP Jersey admit that interest has not been collected during the period of its trusteeship, but deny that this constitutes a breach of trust, as it was contemplated that the Grand Trust would not enforce its rights to receive interest. Mr Le Cornu said that non-payment of interest did not hamper the Grand Trust, because there was plenty of liquidity and the value of the Promissory Note was still accruing. Croci BV was a family owned company, and it depended upon its ability to pay the interest. He relied on Madame Crociani and Mr Foortse to let him know if the situation had changed.

656. Mr Foortse made it clear that Madame Crociani controlled what funds were paid up to Croci BV and in reality, he says the decision whether Croci BV would or would not pay the interest under the Promissory Note was hers.

657. Cristiana's application for a pre-emptive costs order in 2015 prompted a response from Appleby Mauritius and Madame Crociani in relation to the Promissory Note. In his affidavit of 19th May, 2015, Mr Noel said that until February 2012, the former trustees took the view that keeping funds within the Croci Group was the best way to further the long-term interests of the Croci Group, the Grand Trust and Madame Crociani's wider family. This allowed Vitrociset to be safe from serious financial constraints and operating difficulties that it had encountered since 2007. In its consultations with Madame Crociani, that it had from time to time in her capacity as settlor, former trustee and principal point of contact with Croci BV (of which there appears to be no record), nothing had happened which inclined Appleby Mauritius to the view that the position had changed, such that it was in the interests of the beneficiaries of the Grand Trust to seek the payment of accrued interest or to enforce any other terms.

658. Madame Crociani, in her affidavit of 19th May, 2015, explained that out of the dividends paid by Vitrociset between 2004 and 2007, some €89 million had been deployed within the Group, in the acquisition of real estate and a yacht. However, from 2007 to 2013, there was limited profitability and indeed, a rights issue had been necessary in 2008, payable in instalments through to 2014.

Accordingly, there were no dividends from 2008 to 2011, and in 2013. She said this in paragraphs 49 and 50 of her affidavit: -

> *"49 It is clear from this summary that, having received total dividends of €122,997,000 from Vitrociset between 2003 and 2014, Ciset has deployed €159,998,084 within the Croci Group: €89,998,084 on investments and expenditure elsewhere within the group (as set out in more detail at paragraph [38] above and reinvested a further €70 million in Vitrociset itself, as I have just described).*
>
> *50 This approach – which has been respected, entirely properly, by all of the trustees of the Grand Trust (including both BNP Jersey and the Fourth Defendant, Appleby Mauritius, since its appointment in February 2012) – has benefited my whole family – including, as she well knows, Cristiana. As a result my family has been able to enjoy assets purchased within the Croci Group, to benefit from the tax-efficient structure of asset holding that the Croci Group represents, and to benefit by protecting the business that has been the source of so much wealth for us all as it, hopefully, will continue to do into the future."*

659. Advocate Robinson submitted that Mr Foortse, BNP Jersey and Appleby Mauritius did not appreciate or have regard to the conflict of interest Madame Crociani had in relation to decisions as to whether or not interest should be paid. We accept that she had a conflict, but the conflicts rule does not apply where the trustee does not place herself in a position of conflict of interest and duty, but is placed in that position by the settlor or the terms of the trust (see Lewin paragraph 20-138).

660. It is important, in our view, to look at the way the Grand Trust structure was established in 1987. The asset settled was the Promissory Note due by a company, Croci BV, wholly owned (through Croci NV) by the settlor, Madame Crociani. The terms of the trust therefore placed her in a position of conflict in which she had an interest as both creditor and debtor. She had to balance, as trustee, the interests of the Grand Trust in receiving interest under that Promissory Note and, as shareholder, the interests of her company in paying that interest. That balance was created on the one hand by her being a trustee of the Grand Trust and, importantly, the trustees being relieved of any duty to enforce the Promissory Note, and on the other hand through her ownership and control of the Croci Group and the decision as to how much money, if any, was paid up to Croci BV and by Croci BV to the Grand Trust; as we said earlier she could turn the interest tap on and off. That conflict therefore was in place from the very outset. From 1996, the shares in Croci NV were held by Camilla and Cristiana, subject to Madame Crociani's usufruct, making the Croci Group truly family owned.

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

662. We therefore do not regard the failure of the former trustees up until the purported appointment of Appleby Mauritius in January 2012 to enforce the payment of accrued and accruing interest on the Promissory Note as a breach of trust.

663. However, contrary to the view expressed by Mr Noel, we think the position changed fundamentally when in April 2011, there was a breakdown in the family relations and in particular, when in December 2011, Camilla became the owner of Croci BV. The careful balance that had hitherto existed from the inception of the Grand Trust had gone. The family was fragmented and there was no longer a community of interest. Camilla now owned Croci BV and had no interest in her company paying the accrued interest, half of which would go to Cristiana's trust, and to the benefit therefore of Cristiana, from whom she was estranged, and her children. Cristiana and her children had no interest in such a large sum being left outstanding.

664. Following this fundamental change in circumstances, there could be no conceivable justification for the trustees of the Grand Trust making an interest free loan to Croci BV out of the trust fund as a whole (as distinct from the trust fund of Camilla's trust) by failing to collect the accrued interest due under the Promissory Note (some US$16.3 million at that stage). The Promissory Note provides as follows:

> *"A failure to pay interest or principal on this Note within 30 days after written notice is sent by Payee that such payment is due shall constitute an event of default. Upon the occurrence and during the continuance of an event of default hereunder, the entire amount of principal and interest on this Note shall become immediately due and payable."*

665. Trustees must be given reasonable time to react to changed circumstances but within a reasonable time from its purported appointment as trustee, Appleby Mauritius should have given 30 days notice to Croci BV to pay all of the accrued interest due under the Promissory Note and its failure to do so constitutes a breach of trust. If there was an event of default, then Appleby Mauritius would have been under a duty to demand repayment of the entire sum due under the Promissory Note.

666. The Promissory Note comprises one indivisible debt due to the trustees of the Grand Trust and although the issue has not been the subject of discussion and therefore remains open, we doubt that it would have been possible for Appleby Mauritius to call in half the accrued interest for the benefit of Cristiana's trust alone, as any payment received would have to accrue for the benefit of both trusts. However, it would seem likely that out of the share of any interest received for Camilla's trust, the trustees in the exercise of their discretion could have made loans or distributions to Camilla out of her trust, which she could in turn use to reduce the financial burden, if any, on Croci BV under the Promissory Note.

667. Advocate Moran analysed in some detail the financial position of Croci BV, as shown by its financial statements, to support her submission that it was not financially able to pay the outstanding interest, but she made it clear that she was not suggesting that the Croci Group as a whole was unable to meet its obligations under the Promissory Note. It was simply that there was insufficient cash in Croci BV and Camilla controlled what might or might not be sent up to that company from within the Group.

668. This part of the plaintiff's claim therefore succeeds, to the extent that Appleby Mauritius is in breach of trust as *de facto trustee/trustee de son tort* in not collecting the accrued and accruing interest under the Promissory Note, allowing Croci BV to retain the overdue payments interest free.

669. Again, Appleby Mauritius cannot avoid liability for the losses to the trust fund of the Grand Trust caused by this breach of trust on the grounds that it was not validly appointed as trustee or did not have the Promissory Note properly vested in it, for the reasons we set out below under the heading of *"Remedies".*

SUMMARY OF FINDINGS

670. To summarise the position to this point, we will be setting aside as being void and of no effect: -

(i) The 2010 appointment;

(ii) The 2012 appointment of Appleby Mauritius;

(iii) The Agate appointment;

(iv) The 2016 appointment of GFin; and

(v) The transfer of the Crica shares.

671. We have also found that the former trustees were acting in breach of trust in assigning the Promissory Note to Appleby Mauritius and Appleby Mauritius was acting in breach of trust as *de facto trustee/trustee de son tort* in: -

(i) agreeing to the amendments to the Promissory Note;

(ii) assigning the Promissory Note to GFin;

(iii) amending the provisions of the Grand Trust, thus giving GFin a platform to commence rival proceedings in Mauritius; and

(iv) not collecting the accrued/accruing interest under the Promissory Note, allowing Croci BV to retain the overdue payments interest free.

672. We now turn to the remedies available to the plaintiffs.

REMEDIES

The Law

673. The starting point is the basic right of a beneficiary to have the trust administered in accordance with the provisions of the trust instrument, as reflected in Article 21(2) of the Trusts Law, which provides that ***"a trustee shall carry out and administer the trust in accordance with its terms".***

674. Article 30(2) and (8) of the Trusts Law then go on to provide: -

> ***"30 Liability for breach of trust***
>
> ***…***
>
> ***(2) A trustee who is liable for a breach of trust shall be liable for –***
>
> ***(a) the loss or depreciation in value of the trust property resulting from such breach; and***
>
> ***(b) the profit, if any, which would have accrued to the trust property if there had been no such breach.***
>
> ***…***
>
> ***(8) Where 2 or more trustees are liable in respect of a breach of trust, they shall be liable jointly and severally."***

675. This reflects the position under English law, set out authoritatively by the House of Lords in the case of Target Holdings v Redferns, a case which concerned a bare trust in a commercial situation. Lord Browne-Wilkinson summarised the basic right of a beneficiary in a traditional trust in this way at page 434: -

> ***"The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Thus, in relation to a traditional trust where the fund is held in trust for a number of beneficiaries having different, usually successive, equitable interests, (e.g. A for life with remainder to B), the right of each beneficiary is to have the whole fund vested in the trustees so as to be available to satisfy his equitable interest when, and if, it falls into possession. Accordingly, in the case of a breach of such a trust involving the wrongful paying away of trust assets, the liability of the trustee is to restore to the trust fund, often called "the trust estate" what ought to have been there.***
>
> ***The equitable rights of compensation for breach of trust have been largely developed in relation to such traditional trusts, where the only way in which all the beneficiaries' rights can be protected is to restore to the trust***

fund what ought to be there. In such a case the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate: see Nocton v Lord Ashburton [1914] AC 932, 952, 958, per viscount Haldane L.C. If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed: Caffrey v Darby (1801) 6 Ves.488; Clough v Bond (1838) 3 M. & C. 490. Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred: see Underhill and Hayton, Law of Trusts & Trustees 14th ed. (1987), pp.734-736; In re Dawson, decd.; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd [1966] 2 N.S.W.R. 211; Bartlett v Barclays Bank Trust Co. Ltd. (Nos. 1 and 2) [1980] Ch. 515. Thus the common law rules of remoteness of damage and causation do not apply. However there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz. the fact that the loss would not have occurred but for the breach: see also In re Miller's Deed Trusts (1978) 75 L.S.G. 454; Nestle v National Westminster Bank Plc. [1933] 1 W.L.R. 1260."

676. The Grand Trust is a traditional trust. It has not been administered in accordance with its terms, as a consequence of which, trust monies have been wrongfully paid away. The joint and several liability of each trustee responsible is to restore to the trust fund what has been lost by reason of the breach or to make compensation for such loss. As Lewin states at paragraph 39-013, if specific restitution of the trust property is not possible, the trustees must pay sufficient compensation to put the trust back to what it would have been had the breach not been committed.

677. The House of Lords confirmed that the test is one of ***"but for"*** causation, so that where, as in Target v Redfern, the loss would have been caused in any event, there is no right to compensation.

678. The quantum of compensation is fixed at the date of judgment, at which date, according to the circumstances then pertaining, it is assessed at the figure then necessary to put the trust estate back to the position it would have been in had there been no breach – Target v Redfern at page 437. Quoting from the judgment of Lord Browne-Wilkinson at page 439: -

"Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach."

679. In AIB Group (UK) plc v Mark Redler & Co Solicitors [2014] 3 WLR at 1367, the Supreme Court applied Target v Redfern holding that: -

"..... where trust property had been misapplied, the principles of equitable compensation required the trustee to restore the trust fund, if still in existence, to the position in which it would have been but for the trustee's breach and, if the trust were no longer subsisting, to pay monetary compensation to the beneficiary on the same basis; that the measure of compensation was to be assessed at the date of the trial, with the benefit of hindsight and on a common sense view of causation so as to establish that the losses had in fact been caused by the breach, but foreseeability of loss was irrelevant."

680. Having made those general observations, we can turn to the remedies in each case.

The 2010 appointment

681. The assets appointed out of the Grand Trust under the 2010 appointment comprised the portfolio, then valued at US$100,347,046, the one share in Twenty-Three Investments Limited, which owned 8 paintings, and a number of loans receivable from that company and associated entities.

682. The loss of these assets would not have occurred but for the 2010 appointment. Advocate Redgrave accepted that these assets are no longer recoverable, and accordingly, the former trustees must pay sufficient compensation to put the trust fund back to what it would have been had the 2010 appointment not been entered into.

683. Thus, Madame Crociani, Mr Foortse and BNP Jersey stand to be ordered jointly and severally to pay: -

(i) The sum of US$100,347,046, being the amount transferred out of the portfolio of the Grand Trust to the Fortunate Trust on 16th May, 2011, together with compensation to put the Grand Trust back to what it would have been as at the date of judgment had that amount not been

transferred, and interest on the same from the date of judgement to the date of payment at a rate to be determined by the Court.

(ii) The balance due in respect of interest-free loans made by the Grand Trust to Croci Investments SA, Goodluck Limited, Happiness Limited, the Foundation and the Fortunate Trust, to the extent that as at the date of the 2010 appointment those loans would have been recoverable, together with interest at a rate and from a date to be determined.

684. In relation to Twenty-Three Investments Limited, there will have to be an inquiry into the value of its assets and an order for the former trustees to pay compensation to the Grand Trust on terms to be determined after further input from counsel.

685. Advocate Robinson also sought an order for the repayment of the interest-free loan due by Twenty-Three Investments Limited to the Grand Trust in the sum of $9,837,293.8 in addition to the value of the paintings owned by it. That company was wholly owned, and the beneficiaries cannot seek to recover both the value of the interest-free loan made to enable the company to acquire these paintings and the value of the paintings themselves. The share in Twenty-Three Investments Limited can only have been worth the value of the assets owned, namely the paintings, and it is that value, in our view, which should form the basis of the compensation.

686. Advocate Redgrave argued that the compensation payable by the former trustees should be limited to Cristiana's trust, because Camilla had clearly acquiesced in the breach of trust, and could not now complain to the Court. The rationale behind the principles set out by Lord Browne-Wilkinson in Target v Redfern were, he said, that the fund which benefits A for life remainder to B has to be reconstituted in order to properly compensate A and B and ensure their interests under the trust continue and are protected. In this case, he said that is the fund which benefits Cristiana and the Foundation during her lifetime and her children after her death. The Court can simply treat Camilla's trust as if it had been distributed out to Camilla.

687. We have some sympathy with this submission, as it is clear that Camilla has not only acquiesced in this breach of trust, but has benefited at least to some extent from the funds improperly appointed out of the Grand Trust. It would be unjust for her to enjoy the fruits of this breach of trust and at the same time to have the Grand Trust reconstituted, so that she can benefit from that as well.

688. The difficulty with Advocate Redgrave's proposal is that Camilla is not the only person interested in Camilla's trust. Her children have an interest, as do Cristiana and her children in default. As Lord Browne-Wilkinson said in Target v Redfern at page 436:

> ***"The obligation to reconstitute the trust fund applicable in the case of traditional trusts reflects the fact that no one beneficiary is entitled to the trust property and the need to compensate all beneficiaries for the breach."***

689. It is the right of each beneficiary of the Grand Trust to have the whole trust fund reconstituted, so as to be available to satisfy their equitable interests.

690. Because Camilla is only a discretionary object under Camilla's trust, she does not have an interest that can be impounded by way of indemnity, pursuant to Article 46(1) of the Trusts Law, but there is support for the proposition that the Court can direct the trustee of the Grand Trust that no appointment can be made to Camilla (and potentially her children) out of Camilla's trust. The issue is discussed in Lewin at paragraph 39-125: -

> ***"The question may then arise when a beneficiary who has lost the right to sue may benefit in the future from the fruits of any claim brought by another beneficiary … the question becomes more difficult when considering the object of a discretion, when such a person has waived the right to sue. May the trustees in the future exercise their dispositive powers in favour of him over funds which have been paid back to the trust fund following a breach of trust to which he consented? There are practical objections to any rule which prevents him from doing so. The compensation paid to the trust fund may be mixed with assets already held by the trustees, such that it may not be possible to ascertain whether an appointment involves assets recovered following a successful claim in respect of a breach to which one object has acquiesced. As we have noted already, it has recently been said that the remedy following a successful claim for breach of trust is fashioned according to the exigencies of the particular case, so as to do what is "practically just" as between the parties. We consider, therefore, that it is open to the court to make a declaration that the trustee may not appoint in favour of one or more objects who acquiesced in the breach, thus requiring a segregated fund to be maintained of the compensation. What we do not consider to be possible on any principled basis is a reduction in the amount of the compensation payable, solely on the grounds that an object has acquiesced unless, perhaps, it is clear that some of the sum in question would inevitably have been paid to the acquiescing individual, say because an appointment has already been made, which could have been paid only from the fund in question. In the absence of***

such a factor, there can be no certainty that the acquiescing beneficiary would ever have received the sum paid by way of compensation, and it is hard to see how it could be just to deprive the other objects of the benefit of the recovery from the successful claim."

691. At the moment, Camilla's trust has one half of the benefit of the Promissory Note and it would be practical, therefore, for the trustee to keep the compensation it will receive in Camilla's trust segregated from its interest in the Promissory Note and its proceeds, with a direction given to the trustee along the lines suggested by Advocate Robinson (potentially extended to Camilla's children): -

"No power or discretion shall be exercised by the trustee so as to confer directly or indirectly any benefit on Camilla, with liberty to apply."

692. The intention would be for that direction to remain in force until such time as Madame Crociani makes full restitution of the assets received by her from the Grand Trust via the revocation of the Fortunate Trust, either to the new trustee of the Grand Trust or to BNP Jersey, on the assumption, which we think is likely, that it will have reconstituted the trust fund.

693. We are minded to give such a direction, having heard further from counsel on the precise wording to be employed.

The 2012 Appointment of Appleby Mauritius and 2016 Appointment of GFin

694. Having succeeded in setting aside the 2012 appointment of Appleby Mauritius and the 2016 appointment of GFin as trustees of the Grand Trust, the plaintiffs seek an order against the former trustees and Appleby Mauritius, who made the appointments, to reconstitute the trust fund of the Grand Trust. The only asset of the Grand Trust at the time of the appointments was the Promissory Note which was assigned away in breach of trust firstly by the former trustees to Appleby Mauritius and secondly by Appleby Mauritius, in amended form, to GFin, which has refused to submit to the jurisdiction of the Court, and is resisting the injunction proceedings brought by Appleby Mauritius.

695. As at the date this Court gives judgment, the former trustees and Appleby Mauritius will be unable to reconstitute the trust fund of the Grand Trust with the Promissory Note as it is in the hands of GFin and Advocate Robinson therefore seeks an order that they should be ordered jointly and severally to compensate the Grand Trust for the full amount due under the Promissory

Note, capital and interest, namely the sum of €50,682,495 as at 1st December, 2016, together with interest from that date, leaving it to them, as he put it, to *"sort out the mess they have created*". The Promissory Note has been lost, and if it cannot be recovered (which is the key question), those responsible must compensate the Grand Trust for the loss.

696. Taking the former trustees first, we are not persuaded that the ***"but for"*** test is met in their case. It is true that on 10th February, 2012, the former trustees assigned the Promissory Note away to Appleby Mauritius in breach of trust, but when these proceedings were served on Appleby Mauritius, it submitted to the jurisdiction of this Court and by so doing, brought with it the Promissory Note, which was from that point under the power of this Court. If it had been lost, it had now been recovered. The Court was in a position, should the plaintiffs succeed, to order Appleby Mauritius to assign the Promissory Note to the new trustee appointed by the Court.

697. It did not occur to this Court or, we are sure, to the parties to these proceedings, other than Madame Crociani and Camilla, that, having lost the forum challenge before the Privy Council, Appleby Mauritius, part of a well-known international group, would seek to interfere with the administration of justice here by transferring the Promissory Note away again, and placing it beyond the power of this Court. It did so: -

(i) When it 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; and

(ii) Secretly, thus depriving BNP Jersey and Mr Foortse of the opportunity of seeking to prevent it from doing so. There can be no doubt that if Appleby Mauritius had given notice of its intention to the parties and to the Court, it would have been restrained from proceeding.

698. In our judgment, and applying a common sense view of causation, the loss of the Promissory Note is attributable not to the breach of trust committed by the former trustees in assigning the Promissory Note to Appleby Mauritius, but to the breach of trust committed by Appleby Mauritius in assigning it to GFin, secretly, at a time when it was party to these proceedings, had accepted the jurisdiction of this Court and knew the validity of its appointment as trustee was being challenged.

699. In her closing, Advocate Moran raised new arguments in relation to the Promissory Note, which, if successful, could have the effect of extricating Appleby Mauritius from any liability for the loss of

the Promissory Note and placing that liability back with the former trustees. In summary, those arguments were: -

(i) If the appointment of Appleby Mauritius was valid, then it was arguable that the Promissory Note, expressly governed by Dutch law, had not been validly assigned to it. There is no separate agreement of assignment, so the only document under which the assignment could have been effected would be the deed of retirement and appointment itself, which was governed by Jersey law. Applying Dicey, Morris and Collins, The Conflict of Laws 15th edition rule 135(1), it would be Jersey law that would govern whether or not a valid contract of assignment had taken place in favour of Appleby Mauritius and Dutch law would govern whether the Promissory Note was assignable, and if so, what conditions, if any, must be complied with for the assignment to be valid, such as a notice. Dutch law would decide whether as a result of the assignment, Appleby Mauritius had the right to require Croci BV to pay the sums due under the Promissory Note to it. There was no evidence of Dutch law before the Court.

(ii) The relevant part of the deed of retirement and appointment is clause 4, which provides: -

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

(iii) Although there are no particular formalities under Jersey law for the assignment of a debt (see Kells v Cashback [2012] JCA 140), it is arguable that clause 4 does not itself purport to assign the Promissory Note, as it envisages the execution of further documentation. Sir Michael Birt, then Deputy Bailiff, said in the case of In the matter of the Antares and other trusts [2016] JRC 099 at paragraph 70: -

> ***"70 Dealing first with the issue of vesting, Advocate Cadin was correct to submit that appointment of a trustee does not of itself vest the trust assets in that new trustee. It will often be necessary for the present trustee to vest title to the asset in the new or additional trustees. This is consistent with Article 17(4) of the Trusts (Jersey) Law 1984 which provides:-***

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

(iv) Mr Le Cornu raised with Mr Foortse in correspondence the question of whether there was a need for a separate document drawn up under Dutch law to assign the Promissory Note to Appleby Mauritius, and he advised that if no formalities were required under Jersey law, then all that was required was a letter informing Croci BV of the new address of the trustee, which resulted in a letter of 25th June, 2012, addressed to Croci BV simply reporting a change of trustee. It appears therefore that even if the deed of retirement and appointment of Appleby Mauritius was valid, it may not have operated as a valid assignment of the Promissory Note.

(v) If the appointment of Appleby Mauritius was invalid, as we have found it to be, then there probably is no valid assignment of the Promissory Note because clause 4 falls away and the letter of 25th June, 2012, does not have any effect by itself.

(vi) The question then arises as to whether Appleby Mauritius became a *de facto trustee/trustee de son tort*, of the Promissory Note. The accountability of a *de facto trustee/trustee de son tort* is limited to property it has received, which in general terms means the acquisition of legal ownership or the right to obtain legal ownership, lesser forms of control are insufficient (Lewin paragraph 42-103). If the Promissory Note had not been validly assigned to Appleby Mauritius, then she argued, it had not vested in Appleby Mauritius. Appleby Mauritius was not the legal owner and had no right to obtain legal ownership.

(vii) The conclusion, therefore, that could be reached was that, as Appleby Mauritius had not been validly appointed a trustee, had not had the Promissory Note validly assigned to it and had not become a *de facto trustee/trustee de son tort* of the Promissory Note, it had no liability in respect of it.

700. We agree with Advocate Robinson that Appleby Mauritius cannot avoid liability for its actions in this way. It is helpful to set out the whole of paragraph 42-103 of Lewin: -

"Liability limited to property received

The accountability of a trustee de son tort is limited to property which he has received. In general receipt means acquisition of legal ownership or the

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

Whether or not there was a defect in the assignment to it of the Promissory Note, Appleby Mauritius nevertheless administered and controlled the Promissory Note as if it had been appointed trustee, and its conduct was the cause of its loss.

701. In Cunningham v Cunningham [2009] JLR 227, Sir Michael Birt, then Deputy Bailiff, reviewed what is meant by ***"de facto trustee"*** and ***"trustee de son tort"*** and, to summarise, it is a person who intermeddles with a trust or who takes it upon himself to act as trustee. Quoting from paragraph 26 of that judgment: -

"If there is no trustee and a person intermeddles and starts acting as a trustee, the only person against whom the beneficiaries would have a remedy will be the intermeddler. He should therefore be liable as if he were a trustee."

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

703. As Mann J said in Jasmine Trustees v Wells & Hind [2008] CH 195 at paragraph 42: -

"The status of a trustee de son tort is limited. He will be liable for breach of trust much as a properly appointed trustee will be but the doctrine is more about liabilities than anything else. The trustee de son tort will be obliged to hold property for, and account to, the beneficiaries, but on the other side of the coin will not have the powers of the trustee conferred by the settlement."

704. We conclude that a *de facto trustee/trustee de son tort* is as much liable for any breaches of trust committed by it as if it had been properly appointed trustee.

705. Croci BV clearly recognised Appleby Mauritius as being the legal owner of the Promissory Note in January 2016, when it wrote proposing and agreeing to amendments to its terms. Any doubt, however, over the title of Appleby Mauritius to the Promissory Note is dispelled by the assignment agreement entered into between Appleby Mauritius, GFin and Croci BV (as debtor) on 29th January, 2016. Paragraph C of that agreement recites: -

> *"C The trust property that is held by the Assignor in the Grand Trust is a promissory note (the 'Note') that was issued by the Debtor on 10 December 1987 for the payment of an initial amount of 75 billion lira on 10 December 2017 and on which payments both on principal and on interest have been duly made throughout the years up to 2004."*

706. Paragraph 3 then goes on to provide:

> *"Debtor's Acceptance*
>
> *For the avoidance of doubt, the Debtor expressly declares that the Note, as modified by the Note Extension is valid and binding on it, and acknowledges that the Assignor has, by this Agreement, assigned to the Assignee all of its rights title and interest to the Note (including the Note Extension), endorses this Agreement, agrees to be bound thereby and shall discharge all its obligations under the Note for the exclusive benefit of the Assignee."*

707. The assignment is governed by the law of Mauritius, but even if, applying Jersey law by way of analogy, Appleby Mauritius can pass no better title to the Promissory Note than it has (Mendonca v Le Boutillier [1997] JLR 142), any doubt as to its title and its ability to assign the same to GFin is dispelled by the terms of the assignment to which the debtor, Croci BV, was a party.

708. Advocate Moran went on to argue that, if Appleby Mauritius was the cause of the loss of the Promissory Note, now that the anti-suit proceedings in Mauritius had been dismissed and the appeal by GFin against that decision abandoned, there was nothing to prevent any judgment of this Court being enforced there and the Promissory Note being recovered from GFin by the new trustee and then enforced against Croci BV in the Dutch courts.

709. In Target v Redfern, Lord Browne-Wilkinson, having quoted from the judgment of Hoffmann LJ in Bishopsgate Investment Management Limited v Maxwell (No 2) [1994] 1 All ER 261, said at page 440 that: -

> ***"It is sound law that a plaintiff is not required to engage in hazardous litigation in order to mitigate his loss."***

710. Advocate Moran said that such litigation by the new trustee would not be hazardous, as the new trustee would be entitled to take over the Promissory Note and enforce it. If necessary, Appleby Mauritius could be held liable for the cost of that litigation, but it would not be right for it to have to pay the full value of the Promissory Note now. Its true value was not known and the Court would be putting the beneficiaries of the Grand Trust into a better position than they would have been had the Promissory Note not been amended and assigned to GFin. At most, the Court should order summary judgment against Appleby Mauritius for damages to be assessed.

711. 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. The liability under the Promissory Note has, of course, ballooned with the non-payment of interest over many years to a very substantial figure and if that liability is discharged by Croci BV, it will benefit Cristiana, who Camilla has made quite clear should receive nothing. Madame Crociani and Camilla have demonstrated that they are prepared to go to great lengths to ensure that Cristiana receives nothing.

712. However, opposition to the enforcement of the Promissory Note on the part of Madame Crociani and Camilla would exist whether or not Appleby Mauritius had amended and assigned the Promissory Note to GFin. If it had retained the Promissory Note in its original form, then upon judgment being handed down, Appleby Mauritius would have been ordered to assign the Promissory Note, unamended, to the new trustee appointed by the Court, at negligible cost to the new trustee. The new trustee would then be in a position: -

    (i) to immediately call in the accrued interest;

    (ii) in default of the payment of the accrued interest, to call in the whole of the sum due under the Promissory Note;

(iii) in any event, to call in the capital on 17th December this year; and

(iv) to take action to enforce its rights under the Promissory Note against what might be determined and well funded opposition and in respect of which it would incur costs.

713. As a consequence of the amendment and assignment of the Promissory Note to GFin, the position now is that when this judgment is handed down, Appleby Mauritius will not be in a position to assign the Promissory Note to the new trustee at all, let alone in its unamended form. The new trustee would have to institute proceedings in Mauritius against GFin for the recovery of the Promissory Note.

714. Assuming that the new trustee was successful in those proceedings in Mauritius, what it would recover would be the Promissory Note in its amended form, allowing it to demand the payment of the accrued interest, but (assuming no default) not the capital until 12th December, 2022, although that would bear interest at the increased rate of 11% per annum. If it was advised that it could challenge the amendment to the Promissory Note, proceedings would have to be instituted against Croci BV, presumably in the Dutch courts, for that amendment to be set aside.

715. The Grand Trust suffers prejudice in at least two ways, firstly the cost of recovering and, if possible, restoring the Promissory Note to its original form and secondly, the delay, during which it may not be in a position to take enforcement action and during which steps might be taken to diminish the ability of Croci BV to discharge its obligations; steps may already have been taken to that end. It is noteworthy in this respect that in the injunction proceedings, GFin has declined to give an undertaking to Appleby Mauritius to maintain the *status quo* in relation to the Promissory Note.

716. What is of concern in this respect is that at the end of the hearing, we were informed by Advocate Moran that there had been a restructuring of Croci BV, in which, by way of a demerger, Ciset had gone to a new Croci BV 2, with the real estate being retained in the original Croci BV. We were told that under the rules of demerger, this did not affect the creditors, because the debts of Croci BV remain the debts of Croci BV 2. The purpose behind this demerger is not known, but it demonstrates how delay in enforcing its rights under the Promissory Note may well prejudice the interests of the Grand Trust, as it gives Camilla and Madame Crociani time and room to manoeuvre. More recently the Court gave leave to BNP Jersey and Appleby Mauritius under the injunction of the 21st March, 2016, to bring proceedings in the Netherlands and Italy to secure the value of the Promissory Note, those parties having learnt that Ciset was about to be sold and the professional directors of Croci BV and its holding company replaced.

717. We ask ourselves whether it is fair to the beneficiaries of the Grand Trust for the new trustee to be required to embark upon hostile, and no doubt costly, litigation in this way against well funded and determined opposition, in order to recover an asset that was transferred away by Appleby Mauritius, in a brazen attempt to evade the decision of the Privy Council and to put the same beyond the reach of this Court?

718. However, we are concerned here with restoration or compensation and as a general rule, there is no element of penalty (Nicholls v Michael Wilson & Partners Limited [2012] NSWCA 383 at 171). Appleby Mauritius must not be ***"robbed"*** nor must the beneficiaries of the Grand Trust be unjustly enriched (Maguire v Makaronis [1997] HCA 23). Without further advice on the prospects of the new trustee recovering the Promissory Note under Mauritian law and procedure, we are not currently persuaded that litigation to recover the Promissory Note from GFin can be described as hazardous. The Privy Council, which is the ultimate Court of Appeal for both jurisdictions, has confirmed Jersey as the appropriate forum for these proceedings and one would expect a final judgment of this Court to be recognised and given effect to by the Courts of Mauritius, so that the Promissory Note should be recoverable.

719. We think that there is force in Advocate Moran's submission, that if Appleby Mauritius is ordered to compensate the new trustee of the Grand Trust with the full value of the Promissory Note now, without exploring further the feasibility of the new trustee recovering the Promissory Note, then the trust estate could be put into a better position than it would otherwise have been.

720. We therefore feel unable at this stage to assess fairly the compensation that Appleby Mauritius should pay to the new trustee of the Grand Trust in relation to the breaches of trust we have found against it and we will therefore give judgment against Appleby Mauritius on liability, but on the basis that the quantum of that compensation is to be assessed.

721. In the meantime, Appleby Mauritius has an interest in taking all steps that it reasonably can to assist in the recovery of the Promissory Note that, but for its breaches of trust, would be payable in full this December. It must be the case that the greater the delay in recovering the Promissory Note, the more likely it will be that Appleby Mauritius will find itself paying the full value or a substantial part thereof.

722. It must also be in the interests of GFin to cooperate in this process, as we suggest that it is likely that Appleby Mauritius will be seeking a contribution from GFin in the Mauritius courts towards discharging any orders made against it.

723. We think it fair to leave open the ability of Appleby Mauritius to seek a contribution from the former trustees, or any one or more of them, towards the cost of discharging its liability, on the grounds that, whilst we have found Appleby Mauritius solely liable for the loss of the Promissory Note on the 29th January, 2016, and it had control of the Promissory Note from 10th February, 2012, to the 29th January, 2016, it might be possible to argue, although at the moment we find it difficult to see on what grounds, that the former trustees still have some residual liability for assigning the Promissory Note to it in the first place.

Setting aside the amendment to the Promissory Note

724. The plaintiffs seek an order setting aside the amendment to the Promissory Note, which we have found Appleby Mauritius agreed to in breach of trust. However, that amendment was negotiated and agreed with Croci BV, which is not a party to these proceedings, and, as matters currently stand, we do not think we have jurisdiction to set aside an agreement governed by foreign law involving a third party which is not before us.

The Agate appointment

725. The Agate appointment will be set aside. It therefore will have no effect and no remedy flows from it.

The Crica shares

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

727. The effect of our decision is to render the trustees of the Fortunate Trust bare trustees of these Crica shares for Cristiana with effect from 30th April, 2010. Ordinarily, the trustees would be ordered to return the shares to her, but they are unable to do so, because they have been transferred to Madame Crociani, or to her benefit, when she revoked the Fortunate Trust. The Miami apartments were subsequently sold and the proceeds received by Madame Crociani and dispersed by her away from BNP Jersey.

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

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

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

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

731. Advocate Redgrave submitted that there had been no breach of trust on the part of BNP Jersey, but we are persuaded that Advocate Robinson's analysis is correct, namely that at the time of the revocation of the Fortunate Trust and following our finding in mistake, the shares were held on bare trust for Cristiana, and to transfer those shares away to Madame Crociani was a breach of that bare trust. There has, therefore, been a breach of trust by Madame Crociani, BNP Jersey and Mr Foortse as bare trustees at the time of the revocation, albeit BNP Jersey and Mr Foortse would argue that the transfer to Madame Crociani was innocent on their part. The issue will be whether BNP Jersey and Mr Foortse should be exonerated under Article 45(1) of the Trusts Law. To the extent that they are not exonerated, they are entitled to be indemnified by Madame Crociani, who received the Crica shares and has benefited from them.

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

EXONERATION

733. There are two grounds upon which the defendants seek to be exonerated from liability for the breaches of trust we have found against them.

Clause Fifth (S)

734. The first arises under clause Fifth (S) of the Grand Trust deed, which is in these terms: -

> *"(S) The Trustees may consult with counsel in the Commonwealth of the Bahamas or elsewhere, who may be the counsel for the Settlor or the Trustees, concerning any questions which may arise with reference to their duties or powers or any of the provisions of this Agreement, and the opinion of such counsel shall be full and complete authorization and protection with respect to any action taken or omitted to be taken by the Trustees in good faith in accordance with such opinion of counsel, and the Trustees shall not be liable for any loss or damage sustained as a result thereof."*

735. Such a provision is to be restrictively construed (Lewin paragraph 39-141).

736. BNP Jersey and Mr Foortse rely on the clause Fifth (S) as providing them with complete protection from any liability arising from the 2010 appointment. Ogier were instructed by Mr Le Cornu to draft the 2010 appointment, and although Ogier's advice was not expressly sought on the exercise of the power under clause Eleventh, it is inconceivable, said Advocate Redgrave, that when instructions are given to Jersey lawyers to draft an appointment (particularly one of such consequence), those instructions do not import a requirement to check that there was a power to do what was being proposed, and that the appointment which was drafted was valid.

737. Ogier did not indicate that there was any problem with the proposed appointment, or the use of the clause Eleventh power to achieve what was proposed. They simply provided the draft, which eventually became the 2010 appointment. That, said Advocate Redgrave, constituted advice for the purposes of Clause Fifth (S) and BNP Jersey (and Mr Foortse) relied on that advice. That is sufficient, he said, to relieve it (and Mr Foortse) of liability.

738. We accept that if there was no power at all in the trust deed to appoint the trust fund to another trust, then Ogier would be expected to so advise, but there is a power in the Grand Trust deed, clause Eleventh, by which the trust fund can be transferred to another trust provided it is *"for the benefit of all or any or more exclusively of the other or others of the beneficiaries (other than the Settlor)".* The draft provided expressly states that the power was being exercised for the benefit of Camilla and Cristiana, who are beneficiaries, and Mr Le Cornu was quite confident that the appointment was for their benefit. The question that needed to be asked was whether, objectively, what was proposed was for their benefit.

739. The instructions given to Ogier, which are executory in nature, are in marked contrast to those given to Advocate Davies in 2001, following what were clearly extensive discussions as to what was or was not within the scope of the power, which expressly raised the question of the extent to which Madame Crociani could benefit.

740. That question was not asked of Ogier, it would seem, because notwithstanding his own initial view in 2001 that an appointment could not be made to the Fortunate Trust because Madame Crociani was a beneficiary and the advice of Advocate Davies, Mr Le Cornu had come to reach his own view that provided that the appointment was for the benefit of Camilla and Cristiana, there was nothing to prevent Madame Crociani from being a beneficiary of the trust to which the assets were appointed, a view he came to hold so firmly, it would seem, that he did not ask for confirmation from Ogier, either then or subsequently, when the 2010 appointment was queried by Mr Kosman.

741. Clause Fifth (S) gives very wide protection to trustees, but only if a question has arisen upon which the opinion of counsel, properly instructed, has been given either orally or in writing. A question as to the scope of clause Eleventh to do what was proposed had not arisen in Mr Le Cornu's mind in 2008, so confident was he in his view as to its scope, and he did not raise it as a question when he instructed Ogier. He cannot point to any opinion expressed by Advocate Le Cornu on the question in writing. Mr Le Cornu did not pretend that an opinion had been expressed by Advocate Le Cornu on this orally in discussions that he had with him.

742. The provision by Ogier of a draft appointment, as instructed, in our view is not sufficient to bring BNP Jersey and Mr Foortse within the protection of clause Fifth (S). The same would, of course, apply to Madame Crociani.

743. Advocate Redgrave submitted that BNP Jersey was able, as was Mr Foortse, to rely on clause Fifth (S) in relation to the 2012 appointment of Appleby Mauritius, because Mr Le Cornu had discussed the proposed retirement with Ogier and it also had the comfort of the deed being

drafted by Appleby in Jersey. We have found that the former trustees were not causative of the loss of the Promissory Note following the appointment of Appleby Mauritius, but in any event, the former trustees cannot rely on clause Fifth (S) of the Grand Trust deed in relation to the 2012 Appointment of Appleby Mauritius, because although deeds were drafted by the law firm of Appleby in Jersey, no question arose upon which the former trustees, who were the parties exercising the power to appoint Appleby Mauritius, obtained an opinion from lawyers either instructed by Madame Crociani as settlor, or by them. The only advice taken, we are told by Mr Le Cornu, was verbally in relation to the indemnity, of which, incidentally, there is no note.

744. Appleby Mauritius claims to be able to benefit from the protection given by clause Fifth (S) in relation to the 2016 Appointment of GFin, the amendment to the provisions of the Grand Trust and the assignment of the Promissory Note, on the grounds that it acted upon the legal advice of Mr Noel. It was not asserted, as far as we are aware, that any legal advice was given on the prior amendment to the Promissory Note.

745. Mr Lee was clear that no instructions had been given to Mr Noel to act for Appleby Mauritius in the appointment of a new trustee, and/or to draft the requisite documentation. His evidence was that the selection of GFin and the drafting of the documentation were done wholly without the knowledge of Appleby Mauritius. Mr Noel simply arrived at the offices of Appleby Mauritius and, effectively, instructed Miss Kweton that the documentation was to be executed. There is no evidence of Mr Noel giving Appleby Mauritius any legal advice and there is no opinion of his upon which Appleby Mauritius can rely in any way. Indeed, we cannot envisage any lawyer advising Appleby Mauritius to act in the way that it did. We therefore reject the claim.

746. Legal advice was given to the former trustees and Appleby Mauritius in relation to the Agate appointment, and we accept, therefore, that the provisions of clause Fifth (S) apply to it. That appointment will be set aside by the Court, and the right to recover property appointed under the 2010 appointment simply reverts back to the trustees of the Grand Trust. There has, therefore, been no loss sustained as a result of the Agate appointment.

747. However, Advocate Redgrave raised an ingenious argument in relation to the Agate appointment that would relieve the former trustees of any liability for the 2010 appointment:-

(i) The effect of exemption from the liability provided by clause Fifth (S), he said, is not to prevent the setting aside of any action that was taken in reliance on the legal advice obtained and followed, but merely as between the beneficial class and the trustees to treat the action as being properly taken. Thus, if the trustees obtained legal advice, and in reliance on that legal advice, improperly paid away trust monies, the right to recover those

monies would remain an asset of the Grand Trust. However, the trustees would have no personal liability to make good the trust fund, because the effect of clause Fifth (S) would be to treat the action they took as having been properly authorised by the Grand Trust.

(ii) In the context of the Agate appointment, the effect of clause Fifth (S) is not that the Agate appointment is not liable to be set aside, but merely that as against the former trustees, it is treated as a valid exercise of the clause Eleventh power. Accordingly, the rights to recover the assets paid away to the Fortunate Trust pursuant to the 2010 appointment would still be vested in the Grand Trust. Clause Fifth (S) would merely relieve the former trustees of the liability to pay equitable compensation in respect of those assets. It would be as if the Court had authorised the former trustees to enter into the Agate appointment, in order to rectify any defects in the 2010 appointment, and accordingly the former trustees would have no liability to pay equitable compensation in respect of the assets paid to the Fortunate Trust under the 2010 appointment.

748. The proposition, therefore, is that by entering into the Agate appointment on legal advice, the former trustees are relieved, not only of any loss or damage sustained as a result of the Agate appointment, but are relieved of their pre-existing liability under the 2010 appointment. Madame Crociani, however, would remain liable under a proprietary claim for the return of the assets she has received.

749. Advocate Redgrave cites Lewin at paragraph 39-131 as support for this proposition: -

> ***"Trust provisions which enlarge trustees' powers or abridge their duties enable trustees to justify what has been done or omitted; where these provisions apply there is no unauthorised act or breach of duty, and therefore, in general terms, nothing for beneficiaries to complain about. A different kind of protection is afforded to trustees by a provision that excludes personal liability for breaches of trust. Provisions of this kind are variously called exemption clauses, immunity clauses, exculpatory clauses, indemnity clauses or exoneration clauses. For convenience, we call these provisions exemption clauses, "exemption" in this context being protection from liability rather than exoneration or reimbursement in respect of expenses. An exemption clause does not justify the acts or omissions of the trustees … However, where such a provision applies, it saves trustees from the personal liability to pay compensation for breach of trust, and so may, to that extent, have a practical effect similar to that of a provision extending the powers or abridging duties. But even in this context, there is a significant difference between an exemption clause and provisions extending the powers or abridging the duties of the***

trustees. A trustee may conscientiously rely on the latter provisions to justify their act or omissions. But a trustee may not consciously rely upon an exemption clause to justify a departure from the trusts, for a trustee who relies on such a clause to justify what he proposes to do will thereby lose its protection. …"

750. Whilst Lewin states that an exemption clause may have a practical effect similar to that of a provision extending powers or abridging duties, this does not support Advocate Redgrave's contention that such clauses go further to treat the actions of the trustee as having been properly taken or authorised by the trust deed, or by the Court itself. The Agate appointment was not properly entered into, as we have found, and was not authorised by the trust deed (it is an excessive execution) or by the Court.

751. Clause Fifth (S) is concerned with the relief from and protection against personal liability for actions taken by the trustees on legal advice. The action taken here was entering into the Agate appointment. The relief from and protection against personal liability can only relate to that appointment, from which no loss or damage to the trust fund arose. It cannot protect the former trustees from their pre-existing liability for an entirely separate and earlier act, namely the 2010 appointment, which was not taken on legal advice, as we have found.

752. We therefore find that the former trustees cannot avoid their liability in respect of the 2010 appointment, because they entered into the Agate appointment on legal advice.

Article 45(1) of the Trusts Law

753. The defendants asked the Court to relieve them from personal liability under the provisions of Article 45(1) of the Trusts Law, which is in these terms: -

"Power to relieve trustee from personal liability

(1) The court may relieve a trustee wholly or partly from personal liability for a breach of trust where it appears to the court that –

(a) The trustee is or may be personally liable for the breach of trust:

(b) The trustee has acted honestly and reasonably;

(c) The trustee ought fairly to be excused –

(i) For the breach of trust, or

(ii) For omitting to obtain the directions of the court in the matter in which such breach arose."

754. The burden of showing a trustee has acted honestly and reasonably and ought fairly to be excused is on the trustee – Re Stewart [1897] 2 Ch 583 at 590. In Santander UK plc v R A Legal Solutions [2014] EWCA Civ 183, Sir Terence Everton said this in relation to the equivalent section 61 of the Trustee Act 1925 at paragraph 111:

> ***"111 Where the trustee invokes section 61 the onus is on the trustee to place before the court a full account of his or her conduct leading to the breach of trust. As Briggs LJ has pointedly observed, it is wrong in principle to cast on the beneficiary the onus of identifying the trustee's unreasonable conduct and of satisfying the court of its causal connections to the loss suffered. The beneficiary may not be in a position to know all that occurred in the chain of events leading to the breach of trust."***

755. It is a two-stage process in which the trustee must persuade the Court firstly that it has acted ***"honestly and reasonably"*** and secondly, that even if has acted honestly and reasonably, ***"it ought fairly to be excused"*** for the breach of trust.

756. It is difficult for a professional and remunerated trustee to come within Article 45(1) or its equivalent under section 61 of the Trustee Act 1925. As Lewin states at paragraph 39-154: -

> ***"It is thought that lay persons, unremunerated, ought to be excused where they take decisions within the limits of their experience and knowledge, listen to reason, and do not act irrationally or obdurately. That same can also be said where the actions of the trustee are the subject of technical legal guidance, when the trustee is unaccustomed to problems of such nature. But with a trustee acting for remuneration (such as a trust corporation), though relief under the section is not barred, the court is reluctant to grant relief and, certainly, a much stronger case for relief must be made out, especially if the trustee has put itself into a position of conflict."***

757. In Re Windsor Steam Coal Company [1901] Ltd, (1929) 1 Ch 151, Lawrence LJ, relying on the decision of the Privy Council in National Trustees Co of Australia v General Finance Co Of Australia [1905] AC 373, said this at page 165 in the context of a chartered accountant occupying a position similar to that of a trust company:

> ***"The appellant here in my opinion occupied a position similar to that of the Trust Company there. He is a chartered accountant carrying on business for his own profit; and in the course of such business and as part of it, he undertakes to act as the liquidator of the company at a remuneration. If in so acting he incurs a loss by acting wrongly, although he may have acted honestly, I have come to the conclusion on the authority of the case I have cited that the Court would decline to hold either that he had acted reasonably or that he ought fairly to be excused for the breach of trust."***

758. BNP Jersey and Appleby Mauritius were paid professional trustees; Mr Foortse, although a lawyer by profession, was not a paid trustee and is to be equated therefore to a lay trustee.

759. A key factor in the assessment of whether a trustee, who has got through the first stage of the test, ought fairly to be excused having regard to all the circumstances is the effect of the breach of trust not only on the trustee but on the beneficiaries. Quoting from the judgment of Briggs LJ in Santander at paragraph 33 and 34:

> ***"33 The second main stage of the section 61 analysis, usually described as discretionary, consists of deciding whether the trustee ought fairly to be excused for the breach of trust. This requires that regard be had to the effect of the grant of relief not only upon the trustee, but also upon the beneficiaries: see Marsden v Regan [1954] 1 WLR 423, PER Evershed MR at 434; and Bartlett v Barclays Trust Co. (No. 1) [1980] Ch 515, per Brightman J. at 538A. Furthermore, section 61 makes it clear that even if the trustee ought fairly to be excused, the court still retains the discretionary power to grant relief from liability, in whole or in part, or to refuse it.***
>
> ***…***
>
> ***34 Relief under section 61 is often described as an exercise of mercy by the court. In my judgment the requirement to balance fairness to the trustee with a proper appreciation of the consequences of the exercise of the discretion for the beneficiaries means that this old-fashioned description of the***

nature of the section 61 jurisdiction should be abandoned. In this context mercy lies not in the free gift of the court. It comes at a price."

760. The reference in Article 45(1)(c)(ii) of the Trusts Law to omitting to obtain the directions of the Court seems to have had its origin under English law going back to the 19th century and section 3 of the Judicial Trustees Act 1896. It was criticised by Kekewich J in Perrins v Bellamy [1898] 1 Ch 521 where he said this at page 528: -

"The question, and the only question, is whether they acted 'reasonably'. In saying that, I am not unmindful of the words of the section which follow, and which require that it should be shewn that the trustee ought 'fairly' to be excused, not only 'for the breach of trust', but also 'for omitting to obtain the directions of the Court in the matter in which he committed such breach of trust'. I find it difficult to follow that. I do not see how the trustee can be excused for the breach of trust without being also excused for the omission referred to, or how he can be excused for the omission without also being excused for the breach of trust. If I am at liberty to guess, I should suppose that these words were added by way of amendment, and crept into the statute without due regard being had to the meaning of the context. The fact that a trustee has omitted to obtain the directions of the Court has never been held to be a ground for holding him personally liable, though it may be a reason guiding the Court in the matter of costs, or in deciding whether he has acted reasonably or otherwise, and especially so in these days when questions of difficulty, even as regards the legal estate, can be decided economically and expeditiously on originating summons. But if the Court comes to the conclusion that a trustee has acted reasonably, I cannot see how it can usefully proceed to consider, as an independent matter, the question whether he has or has not omitted to obtain the directions of the Court."

761. This provision was retained in section 61 of the Trustee Act 1925 and forms part of our Article 45(1), but the criticism remains valid. The question of whether a trustee has omitted to obtain the directions of the Court will form part of the consideration of whether the trustee has acted reasonably. The jurisdiction of this Court to assist trustees by giving directions on questions of difficulty, economically and expeditiously, is well established. It is not clear why it crept into the Trusts Law, but we agree with Advocate Redgrave that whether a trustee has omitted to obtain the directions of the Court will form part of the question of whether it has acted reasonably.

762. Applying these principles, we address the position of each trustee in turn, other than Madame Crociani, who was not present to advance any case that she is entitled to exoneration under Article 45(1), and in any event from the evidence we have heard, such an application would have

failed. Furthermore, as she is the person who has received all of the assets wrongfully appointed out of the Grand Trust, she must account for and return the same.

BNP Jersey

763. We start with BNP's personal liability under the 2010 appointment.

764. Advocate Redgrave accepted that professional trustees have a high bar to cross in obtaining relief from the Courts under Article 45(1), but pointed out that they are by no means debarred from doing so. It was wrong, he said, to judge the actions of BNP Jersey with hindsight. When BNP Jersey took over their co-trusteeship, it did so for an unusually close-knit family, paranoid of third parties. In the event, BNP Jersey had become caught up in a bitter family dispute where the trust assets remain within the family and there was no reason why they could not be recovered.

765. Each of the actions which BNP Jersey took must be approached, he said, on its own terms. BNP had acted reasonably. It is clear that clause Eleventh was susceptible to a number of different views as to its interpretation and when Ogier drafted the 2010 appointment, they did not suggest that the clause the Grand Trustees were relying on in their draft was not wide enough. BNP Jersey was entitled, he said, to rely on Ogier to draft the appointment properly. Indeed, when Mr Kosman raised his query over the 2010 appointment, Ogier were asked to confirm that in their view, it was valid, and they did so, albeit as preliminary advice.

766. Further, if the argument as to benefit to the Foundation fails because it transpires that Madame Crociani could not benefit as everyone thought she could from the Foundation, then BNP Jersey acted entirely reasonably in relying on the belief held by all concerned that the Foundation was a vehicle through which she could benefit.

767. We accept that in entering into the 2010 appointment, BNP Jersey has acted honestly, but we are not persuaded that it has acted reasonably for the following reasons:

(i) BNP Jersey was a paid professional trustee.

(ii) In 2001 Mr Le Cornu had identified limitations to clause Eleventh and that the Fortunate Trust was not an appropriate recipient trust.

(iii) Although BNP Jersey had not formally been appointed trustee, Mr Le Cornu had received clear advice from Advocate Davies in 2001 as to the limitations on the scope of clause Eleventh and been provided with drafts under which Madame Crociani was not a beneficiary and could not be added as a beneficiary. He failed to follow that advice.

(iv) Mr Le Cornu had acknowledged the further advice of Advocate Davies that it was "vital" for Camilla and Cristiana to understand the rationale of the proposed appointment to a new trust, because their entitlements would be removed, and that their understanding be documented. Mr Le Cornu took no steps to ensure that this was done. On the contrary, he accepted a request from Madame Crociani that Camilla and Cristiana should not be a party to the proposed appointment, and indeed, should not be informed of it. He failed to get advice from Ogier as to whether it was appropriate for Camilla and Cristiana not to be parties to the 2010 appointment.

(v) Whilst in the end Madame Crociani came to see the advantages of the proposed appointment, the prime mover in the process was BNP Jersey, not Madame Crociani, and part of its motivation, at least, was to reduce the fiduciary risk it had taken on as co-trustee of the Grand Trust.

(vi) Mr Le Cornu came to a different view as to the scope of Article Eleventh and of the Fortunate Trust as an appropriate recipient trust and appears to have been content to rely on that view, without getting it confirmed on legal advice. In the light of the momentous nature of the appointment, it is difficult to understand why he did not obtain that confirmation from Ogier, properly instructed on the issue and informed of the earlier advice given by Advocate Davies.

(vii) Mr Le Cornu took no advice on the propriety of the questionable delegation to Madame Crociani of the decision as to how much of the substantial portfolio within the Grand Trust should be appointed out to the Fortunate Trust, and failed to recognise the conflict the delegation of such a decision to Madame Crociani gave rise to.

(viii) Mr Le Cornu failed to check the draft deed prepared by Ogier and to identify the error in the recital as to the terms of clause Eleventh; the phrase *"(other than the Settlor)"* being one which he was aware, in 2001 and at least in 2006, restricted the use of clause Eleventh.

(ix) Such was Mr Le Cornu's confidence in his own view of clause Eleventh that when Mr Kosman raised the error in the recital with BNP Jersey, Mr Le Cornu did not out of basic

prudence instruct Ogier to resurrect its file and to advise on the matter formally. This was at a time when the portfolio was still within the Grand Trust under BNP Jersey's control.

(x) BNP Jersey accepted Madame Crociani's instruction to appoint out the portfolio to the Fortunate Trust at a time when the circumstances in the family had changed fundamentally from the time the 2010 appointment was executed, with a complete breakdown in the relationship between Cristiana on the one hand and Madame Crociani and Camilla on the other. Mr Le Cornu accepted that advice should have been taken at that time, and even if Madame Crociani and Mr Foortse had declined to revoke the delegation, BNP had control of the portfolio and was in a position to hold it, pending an application to the Court for directions.

(xi) BNP Jersey failed to obtain the directions of the Court on what was a momentous decision and where there was doubt as to the scope of the trustees' power. The possibility of obtaining the directions of the Court was not even raised for discussion, for which Mr Le Cornu could give no explanation. We accept that such an application would not have met with Madame Crociani's approval, as it would have necessitated convening Camilla and Cristiana, when she had asked Mr Le Cornu, and he had agreed, that they need not be parties to the appointment; indeed, not told about it.

768. For all these reasons, BNP Jersey does not pass the first part of the test, namely that it has acted ***"reasonably",*** and we need not go on to consider the second part of the test. However, in our view, it would not be fair to relieve BNP Jersey of liability. Advocate Redgrave made two points in this respect: -

(i) It would be quite wrong, in his view, for the Court to approach the issue of Article 45(1) in the broad brush way in which the plaintiffs have. The fact that Cristiana was previously a potential object of a substantial trust fund and that she is no longer a potential object does not justify a conclusion that BNP Jersey ought not to be fairly excused. She is not, at the end of the day, being deprived of any funds to which she was entitled. The exercise of discretionary dispositive powers by trustees often leads to one object of the power benefiting at the expense of the other; and

(ii) By obtaining a freezing order against Madame Crociani, BNP Jersey had done what it could in its power to preserve those assets and that must be taken into account in the Court's assessment of whether or not it ought fairly to be excused.

769. However, in our judgment, the impact upon the beneficiaries would override those considerations. By the 2010 appointment the vast bulk of the assets of the Grand Trust were paid out to the Fortunate Trust and from there to Madame Crociani, in circumstances where she has dispersed the same around the world to locations she has refused to disclose, and this with the objective (as recognised by BNP Jersey) of protecting the same from the plaintiffs. The plaintiffs have already had to have recourse to litigation funding, and it would be unjust to place the burden upon them of seeking to recover these assets from Madame Crociani, who is well funded and motivated to resist their claims.

770. Although we have not sought disclosure of Mr Foortse's means, the reality must be that he would not be in a position to reconstitute the trust fund from his own resources, and therefore, enforcement against BNP Jersey is the only means by which the plaintiffs will, in practice, be able to achieve justice. BNP Jersey has the resources and ability to pursue Madame Crociani in order to recover the assets of the Grand Trust from her.

771. We decline therefore to relieve BNP Jersey from its personal liability under the 2010 appointment.

772. Turning to the 2012 appointment of Appleby Mauritius, we have found that the actions of the former trustees in assigning the Promissory Note to it were not causative of the loss of the Promissory Note from this jurisdiction and there is no personal liability from which to relieve BNP Jersey.

773. The Agate appointment did not give rise to any loss to the trust fund of the Grand Trust, and therefore no question of relief from personal liability arises under Article 45(1).

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

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

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

777. As against that, Advocate Redgrave argued that:

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

(ii) Even though there was a mistake on the part of Cristiana as to her interests under the Fortunate Trust, a mistake shared by Mr Le Cornu, she did know that the Fortunate Trust was revocable by her mother, and it was the exercise of that power of revocation that led to the loss of those shares from the Fortunate Trust; and

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

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

(i) It was a paid professional trustee;

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

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

779. For these reasons, BNP Jersey does not pass the first part of the test, namely that it has acted ***"reasonably"*** and we need not go on to consider the second part of the test. However, in our view, it would not be fair to relieve it of liability. The key factor here is the effect of BNP Jersey being relieved upon the beneficiary of the bare trust, Cristiana. If it is relieved, Cristiana will be required to action her mother directly for compensation, presumably in Monaco. If she obtains a judgment there, then she will have the task of searching round the world for assets against which to enforce that judgment. Looking at the way Madame Crociani has conducted these proceedings, in some material part in tandem with BNP Jersey, it is unfair, in our view, that this burden should be placed on Cristiana and fair for it to be placed upon BNP Jersey, which will in all probability be pursuing Madame Crociani in any event in order to recover the sums that, we anticipate, it will have paid to the new trustee of the Grand Trust by way of compensation for the 2010 appointment.

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

Mr Foortse

781. Taking first the 2010 appointment, we accept that Mr Foortse, a lay trustee, acted honestly, but we have found the issue of whether or not he acted reasonably difficult, as there is much that can be criticised about his general conduct as trustee, particularly latterly. As Lewin points out at paragraph 39-149, it is a matter of discretion as to whether the Court relieves a trustee from liability: -

"The power is discretionary

The section confers upon the court a judicial discretion and it is not possible to lay down rules as to the mode in which the court will exercise it: each case must be governed by its own circumstances. An appellate court will be reluctant to interfere with the exercise of its discretion by the lower court."

782. Because each case will turn on its own facts considered as a whole, previous cases may be misleading. A case, described by the Supreme Court of Canada as the very sort of case for which the equivalent provision to Article 45(1) was intended, is Fales v Canada Permanent Trust Co [1977] 2 S.C.R.302, in which a lay trustee had acted as co-trustee with a paid professional trust company, over a will trust which suffered disastrous losses as a result of a failure to sell shares. Quoting from the judgment of Dixon J at page 324: -

"506 In accepting the trusteeship, Mrs Wohleben became obligated to exercise an independent judgment and she assumed a duty to the beneficiaries of the residuary estate which, in failing to sell the Inspiration shares in timely fashion, she breached. With certain exceptions, where two trustees owe a duty to the beneficiaries of an estate and that duty is breached, resulting in loss, the trustee called upon to make good the loss can look to the co-trustee for contribution, subject to s.98. Canada Permanent, however, can look to Mrs Wohleben for contribution and indemnity only if she is liable to the beneficiaries for breach of trust; she is not liable if the Court relieves her pursuant to s. 98. See Waters, Law of Trusts in Canada, p. 855, for a few instances where one trustee has borne the entire burden for a breach of trust. Another instance would be where the Court relieves one trustee pursuant to legislation analogous to s. 98. Should Mrs Wohleben be relieved under s. 98?

Section 98 is remedial legislation, giving statutory recognition to the fact that the standard of conduct which courts have expected of trustees has been, at times and in certain circumstances, unduly harsh and inflexible: see "The Trustee's Duty of Skill and Care", (1973), 37 The Conveyancer and Property Lawyer (N.S.) 48. Section 98 permits the court or a judge to relieve a trustee from personal liability for breach of trust if the trustee has acted honestly and reasonably and ought fairly to be excused. Mrs Wohleben acted honestly. After careful reading of the evidence and examination of the exhibits, I have concluded that she also acted reasonably. Her acts were not greatly less nor more than might be expected of one in her position. At the death of her husband, she was a housewife with four young children. She had been a school teacher and she had taken a three months' night school course on "How to Invest your Money". That would seem to have been the extent of

her business exposure. She was no doubt an intelligent young woman of independent mind who from time to time consulted a broker and the lawyer for the estate, but her investment experience was minimal and she was without experience in the administration of trust estates. She tried to the best of her ability to keep herself informed but Canada Permanent failed to make known to her the contents of papers which were essential to informed opinion. She tried to respond but from less than complete information. She made all decisions which she was asked to make within the limits of her experience and knowledge, and I cannot find that at any time she failed to listen to reason or that she responded irrationally or obdurately. In short, it would seem to me that this is the very sort of case for which s. 98 of the Trustee Act was intended and that Mrs Wohleben ought fairly to be excused for her breach of trust."

783. The case of Mr Foortse may not be the very sort of case for which Article 45(1) was intended in that he was a tax lawyer, and certainly more experienced than Mrs Wohleben. He practised tax law, however, in a civil law jurisdiction, and had no experience of acting as a trustee, a role he took on as a favour to Madame Crociani and for no remuneration.

784. The law does not distinguish between active and passive trustees. In Bahin v Hughes (1886) 31 Ch. D 390, Fry LJ said at page 398 that the court should be very jealous of raising an implied liability attributable to the more active trustee:

"….. because if such existed it would act as an opiate upon the consciences of the trustees; so that instead of the cestui que trust having the benefit of several acting trustees, each trustee would be looking to the other or others for a right of indemnity, and so neglect the performance of his duties. Such a doctrine would be against the policy of the Court in relation to trusts."

785. Even so, in our view BNP Jersey (and BNP Guernsey before it), failed to take the lead which one might reasonably expect a paid professional trustee to take when acting with a lay co-trustee, in that:

(i) It never called a meeting of the trustees. Clause Fourth (M) provides that, unless otherwise determined, there should be at least one meeting a year. Mr Le Cornu did not meet Mr Foortse until 25th October, 2010, after the 2010 appointment had been executed, and even that was not a meeting of the trustees of the Grand Trust. In fact, as far as we can see, the former trustees never met as trustees at any stage up to their retirement.

(ii) It never produced any accounts of the Grand Trust for circulation to and approval by Mr Foortse (or Madame Crociani) as a co-trustee.

(iii) It concurred in a modus operandi in which it dealt exclusively with Madame Crociani, other than to get resolutions signed by Mr Foortse, as did Mr Foortse, so that there was no effective communication between BNP Jersey and Mr Foortse.

786. In Fales v Canada Permanent Trust Co, Dixon J made this observation in relation to the duty one trustee may have to keep a co-trustee informed:

> ***"During argument there was some discussion as to the obligation of one trustee to keep a co-trustee informed. In my view where an asset of the character of the Inspiration shares is involved, constituting the principal asset of the estate, a duty rested upon Canada Permanent to keep its co-trustee as fully informed as possible as to any information touching upon the shifting fortunes of Inspiration"***

787. That comment was made in the context of the particular investment held by that will trust, but on the case before us, Mr Foortse justifiably complains that there was a failure on the part of BNP Jersey to keep him informed of important legal advice it had obtained, and which was highly relevant to the exercise of the power under clause Eleventh: -

(i) He was never informed about the advice given by Advocate Davies over the limitations to clause Eleventh, the drafts he had produced in which Madame Crociani was not a beneficiary and could not be added as a beneficiary and of the *"vital"* need to keep Camilla and Cristiana involved, because of the removal of their fixed entitlements. If he had been informed of this advice, he would have been aware of the issue, and would have had the opportunity of requiring that the daughters be a party to the deed and that confirmation be sought from Ogier that in the light of the advice from Advocate Davies, a transfer to the Fortunate Trust was in this case a proper exercise of the power.

(ii) He was never informed about the query raised by Mr Kosman over the mistake in the recital to the 2010 deed, and the provisional advice given by Ogier. He fairly points out that at that time the portfolio had not yet been transferred out of the Grand Trust. If he had been informed of this mistake, he would have had the opportunity of requiring Ogier to resurrect its files and to advise fully.

788. We think BNP Jersey, as the paid professional trustee administering the Grand Trust and the trustee ordinarily dealing with legal advisers, was under a duty to keep Mr Foortse, as its lay co-trustee, informed of legal advice it had received in relation to the powers of the trustee under clause Eleventh, and its failure to do so is an important factor for us to take into account in deciding whether or not he has acted reasonably.

789. The plaintiffs say he was a stooge who never exercised the independent judgment required of a trustee. He was, they say, Madame Crociani's nominee, appointed for that purpose, but we do not regard him in such derogatory terms. The view expressed by Madame Crociani to BNP Suisse on 7th April, 1999, that she wanted a third trustee in case the corporate trustee proved hostile, and she did not want to lose control, is a view that many a settlor, cautious of giving too much power to a corporate trustee, might express, but it does not follow that the third trustee appointed is therefore to be regarded as a mere nominee or stooge. Mr Foortse was loyal to Madame Crociani, as the matriarch of a close-knit family, and in practice, we accept that he did make decisions in line with her own, but that is not to say that he never put his mind to those decisions, decisions that were clearly preceded by discussions between them.

790. He had no experience of acting as a trustee and was handicapped by having a paid professional trustee that did not communicate effectively with him, save for the signing of resolutions. The absence of any physical meetings is, we think, prejudicial to the good administration of a trust. If there had been an annual meeting, all three trustees would have had an opportunity to consider and approve the annual accounts of the trust, to review the assets held by the trust (including the issue of collecting interest under the Promissory Note) and to review the terms of the Grand Trust deed and the needs of the beneficiaries.

791. We think it is going too far to say, as do the plaintiffs, that if Mr Foortse had been informed of the legal advice obtained by BNP Jersey, he would have ignored it. He was, after all, a lawyer and he can fairly complain that by its conduct, BNP Jersey deprived him of the opportunity that receipt of that advice would have given to him.

792. A further factor relevant to Mr Foortse's position under the 2010 appointment is that this restructuring came about at the instigation of BNP Jersey, not Madame Crociani. It was BNP Jersey, the paid professional trustee, which initiated it, on the grounds that the Grand Trust was out of date and inflexible, and we think he was entitled to assume that a paid professional trustee would not itself promote the exercise of a power unless it had been satisfied, on legal advice, that it was a power that could properly be exercised. Furthermore, he was entitled to assume that Ogier, who had drafted the documents, would have been instructed properly, particularly in the

light of advice given by Advocate Davies in 2001, not just to prepare the drafts, but also to confirm the use of the clause Eleventh power for an appointment to the Fortunate Trust.

793. In essence, the 2010 appointment was presented to him as an appointment which both Madame Crociani and BNP Jersey, as the paid professional trustee, regarded as appropriate and beneficial to make and which had been drafted by Ogier.

794. In addition to that, BNP Jersey had sent him the *"Features"* document, which gave the mistaken impression that Camilla and Cristiana were beneficiaries of the Fortunate Trust, and it neglected to give him a consolidated copy of the amended Fortunate Trust. The preamble to the 2010 appointment states that Camilla and Cristiana were beneficiaries of the Fortunate Trust and although this is technically correct, they were, of course, only beneficiaries after Madame Crociani's death. Mr Foortse also believed, mistakenly, that Madame Crociani was a beneficiary of the Grand Trust herself, through the Foundation, and although he understood that Madame Crociani was to get much more control within the Fortunate Trust, he believed that the appointment was for the benefit of all three members of the family.

795. For all these reasons, we have concluded that in relation to the 2010 appointment, Mr Foortse acted reasonably. In terms of whether Mr Foortse ought fairly to be relieved of liability, the plaintiffs point to his subsequent conduct in aligning himself with Madame Crociani's strategy of cutting Cristiana out of the family wealth, and his disloyalty to Cristiana, as a beneficiary of the Grand Trust.

796. It is the case that he did align himself with Madame Crociani, and in time, lost sight of his duties to Cristiana and her children, as beneficiaries of the Grand Trust, but it needs to be remembered that he had assumed that the 2010 appointment had been properly made, so that all of the assets appointed properly vested in the Fortunate Trust, which Madame Crociani was able to revoke. When she did revoke the Fortunate Trust, as she was entitled to do, all of the assets became hers beneficially, and it was open to her to prefer one child over the other to the extent permitted under the forced heirship rules, which Mr Foortse reminded her of on several occasions.

797. It is also the case that we are not judging Mr Foortse's conduct as trustee over many years, but whether he should be relieved of liability for this particular breach of trust, committed in February 2010. In our view, the effect upon the beneficiaries of his being relieved will be minimal. BNP Jersey is within the jurisdiction and our judgment will inevitably be enforced against it first. It has the means to meet it in full. Enforcement against Mr Foortse would probably only result in his financial ruin.

798. In all of these circumstances, and in the exercise of our discretion, we find that he ought fairly to be excused for this breach of trust. We will therefore relieve him from his personal liability under the 2010 appointment.

799. Turning to the 2012 appointment, Mr Foortse is in the same position as BNP Jersey, in that we have found that the actions of the former trustees in assigning the Promissory Note to Appleby Mauritius were not causative of the loss of the Promissory Note from this jurisdiction and there is no personal liability from which to relieve him.

800. The Agate appointment did not give rise to any loss to the trust fund and therefore no issue arises as to whether or not Mr Foortse should be relieved from any personal liability under it.

801. Finally, in relation to Mr Foortse, we need to consider whether he should be relieved from personal liability for the transfer out of the Fortunate Trust to Madame Crociani of the Crica shares in breach of the bare trust of those shares in favour of Cristiana.

802. Again, we find that Mr Foortse acted honestly, but we also find that he acted reasonably for the following reasons:-

(i) He was a lay trustee;

(ii) He was not a trustee of the Fortunate Trust when the Crica shares were added (he was appointed trustee on the 14th May, 2010,) and he had no part to play in it; and

(iii) He never saw the advice of Ogier of 18th May, 2011, and so would be unaware of the daughters' misunderstanding as to the nature of their interests under the Fortunate Trust.

803. Finally, we find he ought fairly to be excused for personal liability for this breach of trust for the same reasons as we have given for excusing him for liability for the 2010 appointment.

Appleby Mauritius

804. Appleby Mauritius was not involved in the 2010 appointment, and has no liability under it. Similarly, it had no involvement in the transfer of the Crica shares and has no liability under that.

Although party to the 2012 Appointment, by which it became trustee of the Grand Trust, this was a power exercised by the former trustees, and again, Appleby Mauritius has no liability under it.

805. The Court has found that Appleby Mauritius liable for breaches of trust as *de facto trustee/trustee de son tort* and it seeks relief under Article 45(1) from that liability.

806. Taking first its failure to collect the accrued and accruing interest under the Promissory Note, we have quoted earlier from the affidavit of Mr Noel of the 19th May, 2015, in which he states that, having consulted only with Madame Crociani, nothing had changed which inclined Appleby Mauritius to the view that it was in the interests of the beneficiaries of the Grand Trust to seek payment of the accrued and accruing interest. There had, of course, been fundamental changes, namely the breakdown in relations within the family and the acquisition of Croci BV by Camilla.

807. As a paid professional trustee, it failed to take these fundamental changes into account and to appreciate, as we said earlier, that there was no longer a community of interest in the Grand Trust making, in effect, an interest free loan to Croci BV out of the trust fund as a whole. The reality is that Appleby Mauritius was only concerned with the interests of Madame Crociani and Camilla.

808. We have found that Appleby Mauritius was hostile to the beneficiaries of Cristiana's trust from the outset and to repeat:-

(i) It made no attempt at any stage to communicate with Cristiana, the principal beneficiary of Cristiana's trust, in relation to the needs and interests of the beneficiaries of her trust;

(ii) It aggressively rejected Cristiana's perfectly reasonable request for information for reasons which were, in part, untrue;

(iii) When proceedings were issued, it aligned itself with the former trustees, who were accused of a serious breach of trust, without any independent inquiry as to the merits of that claim. The only inquiry it made was with the former trustees and their legal advisers;

(iv) It bought into the Agate process, the purpose of which was to impede Cristiana's claims. It should have played no part in impeding the claims of its own beneficiaries against former trustees, the benefit of which, if successful, would flow to the trust of which it was trustee;

(v) It joined in with the former trustees in the forum challenge all the way through to the Privy Council;

(vi) It opposed Cristiana's pre-emptive costs application without getting directions as to its proper stance; and

(vii) After the Privy Council confirmed Jersey as the appropriate forum, it then set about placing further impediments in the way of Cristiana by:-

(1) Amending the Promissory Note to extend its repayment date through correspondence we have found to be manufactured; and

(2) Appointing GFin as trustee, assigning the Promissory Note to it and purporting to amend the Grand Trust, so as to give GFin a platform from which to issue rival proceedings (which it promptly did). It thus placed the Promissory Note beyond the jurisdiction of this Court, conduct which as we have said we regard as an interference with the administration of justice here.

809. Advocate Moran says there is no evidence that Mr Lee or Miss Kweton were aware of any plan that GFin would not submit to the jurisdiction of this Court, but the very terms of the instrument of retirement and appointment give the lie to that submission. In any event, a proposed change in trustee in the course of these proceedings should have been made under prior notice to the Court and to the parties, and on condition that GFin did so submit; instead it was done secretly.

810. Appleby Mauritius made no inquiries itself as to the suitability of GFin as a new trustee, bearing in mind that it was the entity making the appointment, allowing the choice of successor to be made by Madame Crociani's counsel, Mr Benoit, and allowing that choice effectively to be imposed upon it.

811. It is not open to Appleby Mauritius to say, as it does, that it acted reasonably by following the legal advice of Mr Noel. Mr Noel had no instructions to find a new trustee, or to involve himself in the drafting of the deed of appointment and retirement and there is no evidence that he gave Appleby Mauritius any advice. Mr Lee was unable to point to any. The way the document came to be signed was unusual, to say the least, but Appleby Mauritius cannot avoid responsibility for the consequences of its actions.

812. In our judgment, Appleby Mauritius, a paid professional trustee, has not acted reasonably in relation to any of the breaches of trust we have found against it and there can be no question of it being relieved of its personal liability for the same.

813. In conclusion, of the defendants, it is only Mr Foortse that we will exonerate for his personal liability for the breaches of trust found against him.

NEW TRUSTEE

814. On setting aside the appointment of Appleby Mauritius and GFin as trustees, the trusteeship of the Grand Trust will, on the date that we give judgment, revert to the former trustees. None of the defendants participating in these proceedings resist the appointment of a new trustee in place of the former trustees, and it is clear that we should exercise our power to do so.

815. We anticipate that the plaintiffs will be in a position to nominate a new trustee to fulfil that role, which we will need to make a party to these proceedings, so that the new trustee can be bound by this judgment and can be given appropriate directions.

STATUS OF A AND B

816. Madame Crociani, Mr Foortse and Appleby Mauritius denied in their amended answer that A and B were beneficiaries of the Grand Trust. That contention was withdrawn but we think it right to formally confirm their status.

817. The position is that at the date they were born (the 25th March, 2005, in the case of A and the 28th November, 2007, in the case of B), Cristiana and Nicolas were not married. They were married on 20th November, 2012.

818. Under the terms of the Grand Trust, Cristiana's "issue" are beneficiaries. When in 1987 Madame Crociani executed the Grand Trust, the law of the Bahamas was its initial governing law, and at that time, Bahamian law followed the common law and "issue" meant legitimate issue, in the absence of a contrary intention in the trust document. Under section 10 of the Bahamian Legitimacy Act 1956, the marriage of Nicolas and Cristiana would have legitimated A and B as from the date of the marriage, but a legitimated person would only be treated as legitimate in respect of a disposition, if the disposition came into operation after the date of legitimation. Accordingly, A's and B's legitimation by their parents' marriage in 2012 would not make them

beneficiaries of the Grand Trust created in 1987 if the Grand Trust was still governed by Bahamian law.

819. The Grand Trust is not, however, still governed by Bahamian law. From 2007, the Grand Trust has been governed by Jersey law, because the trustees exercised the power in clause Twelfth. Clause Twelfth authorised the trustees upon the appointment of trustees in another jurisdiction:

> *"…..to declare that the trusts hereof shall be read and take effect according to the laws of the country of the residence or incorporation of such new Trustee or Trustees"*

It then provides that after the change:

> *"the Trust Fund shall continue to be held upon the trusts hereof but subject to and governed by the law of the country of residence or incorporation of such new Trustee or Trustees and thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country".* (Our emphasis)

820. The Legitimacy (Jersey) Law 1973 provides for a child to become legitimated *per subsequens matrimonium* if his or her parents marry after his or her birth – Article 4(1). A child legitimated *per subsequens matrimonium* is treated under Jersey law as a legitimate child for all purposes, whether in respect of an instrument made before or after the marriage. Therefore, under Jersey law, A and B became beneficiaries of the Grand Trust on 20th November, 2012.

821. This analysis assumes that the January 2012 appointment of Appleby Mauritius as trustee is invalid, but even if it were valid, the unchallenged evidence of the plaintiffs' Mauritian expert, Mr Chetty SC, is that under Mauritian law, A and B would be regarded as issue while illegitimate, and further would have been treated as legitimate issue upon the marriage of Nicolas and Cristiana.

822. We will, therefore, confirm that A and B are beneficiaries of the Grand Trust.

BNP JERSEY'S THIRD PARTY CLAIM AGAINST MADAME CROCIANI

823. BNP Jersey's third party claim against Madame Crociani relates to the two indemnities given to it by Madame Crociani under the 2010 appointment and the 2011 revocation of the Fortunate Trust. There is a carve out in respect of the first for fraud, wilful default or gross negligence on the part

of BNP Jersey and under the second, for fraud, wilful default, gross negligence or wilful misconduct on the part of BNP Jersey. On looking at the skeleton argument filed on her behalf, it is clear that she would have been alleging wilful default, wilful misconduct and/or gross negligence on the part of BNP Jersey, and we agree with Advocate Redgrave that the burden of establishing the same is upon Madame Crociani.

824. By failing to appear in these proceedings, she has not discharged that burden, and we conclude therefore, that BNP Jersey is entitled to judgment against her in respect of both indemnities.

825. Quite separately from that, the Court has an inherent jurisdiction to order contribution between trustees who are in breach of trust (Lewin paragraph 39-088). In this case, the assets wrongfully removed from the Grand Trust were passed into the hands of Madame Crociani, which she is under an obligation to return, and we agree with Advocate Redgrave that regardless of her liability under the two contractual indemnities, she should indemnify BNP Jersey for the loss it will incur in complying with the judgment against it in relation to the 2010 appointment. She was also a trustee of the Fortunate Trust with BNP Jersey at the time she revoked it, and BNP Jersey is entitled to an indemnity from her for the loss it will incur in complying with the judgment against it in relation to the Crica shares.

MR FOORTSE'S COUNTER-CLAIM AGAINST BNP JERSEY

826. As Advocate Redgrave pointed out, procedurally this should have been brought by way of a third party claim against BNP Jersey. It is described by him as a novel claim that BNP Jersey, as a paid professional trustee, owed its lay co-trustees a duty of care in relation to the exercise of their trustee powers and duties.

827. It is not necessary for us to consider that counter-claim, because we have exonerated Mr Foortse from personal liability for the 2010 appointment and the transfer of the Crica shares. We have also found that, in joining in on the appointment of Appleby Mauritius as trustee of the Grand Trust, he was not the cause of the loss of the Promissory Note.

FINAL OVERVIEW

828. The position we have arrived at is that the plaintiffs have succeeded:

(i) On the key issue and in having set aside the 2010 appointment, as a result of which the trust fund of the Grand Trust will now be put back to what it would have been if that

appointment had not taken place. That substantial liability will fall on BNP Jersey and Madame Crociani jointly and severally, but because BNP Jersey is in the jurisdiction it must mean that in practice it will initially bear the financial burden, pursuing Madame Crociani and the assets that she has secreted away in various parts of the world by way of contribution and indemnity.

(ii) In setting aside the 2012 appointment of Appleby Mauritius and the 2016 appointment of GFin. The trusteeship of the Grand Trust will therefore pass to a new trustee appointed by the Court in place of the former trustees, with the proper law reverting back to that of Jersey.

(iii) In their claims against Appleby Mauritius for breaches of trust, with compensation for those breaches to be assessed.

829. The plaintiffs have not succeeded in their claims in relation to the distributions out of the Grand Trust and in relation to the alleged failure on the part of the former trustees to call in the accrued interest under the Promissory Note. Cristiana has, however, succeeded in her claim in relation to the Crica shares, as a result of which she will be compensated by BNP Jersey and Madame Crociani jointly and severally, but again because BNP Jersey is in the jurisdiction it must mean that in practice it will initially bear the financial burden, pursuing Madame Crociani by way of contribution and indemnity.

830. We now set out a final brief overview drawn from the facts we have found and inferences we feel we can properly draw from those facts and our observations on the key witnesses we have heard.

831. The fee notes of Finley Kumble, Madame Crociani's US legal advisers in 1987, show that great care was taken in researching and then drafting the Grand Trust deed and its terms were clear. It was for the benefit of her daughters, and, to qualify as a non-grantor trust, she could not benefit directly or indirectly through the Foundation, which had exclusively charitable objects.

832. Contrary to the picture painted by Madame Crociani, the source of the funds settled into the Grand Trust was the wealth created by her late husband, Camillo, a share of which he intended should be passed to his children. We were assisted in reaching that finding by the clear paper trail and by the evidence of Claudio, who we found to be both credible and engaging.

833. Even though the advice given in 1987 has not been handed down over the years from trustee to trustee, Mr Le Cornu was alert to the problems with clause Eleventh when he first reviewed the

Grand Trust deed in 2001, and appreciated that it could not be used to make an appointment to the Fortunate Trust, because Madame Crociani was a beneficiary of it. Advocate Davies had no difficulty in advising on the scope of clause Eleventh from a consideration of the trust deed alone. It was a thorough exercise that he carried out, including the provision of a new draft Grand Trust 2, of which, on his advice, Madame Crociani was not a beneficiary and could not be added as a beneficiary. The meaning of the words *"other than the settlor"* are not difficult to discern; the power could not be exercised for her benefit. He also advised on the *"vital"* need to involve the daughters. It is difficult to understand why this clear advice was not followed.

834. Mr Le Cornu put what he considered to be the unusual provisions of the Grand Trust down to historic tax planning that was now obsolete, and rather than paying heed to the terms of the Grand Trust, he regarded the trust assets as being available to Madame Crociani during her life (albeit through the Foundation), with the daughters receiving *"their inheritance"* on her death. He very much regarded Madame Crociani as the client, and only really heard her voice.

835. We can sympathise with the fiduciary risk that Mr Le Cornu identified in BNP Jersey taking over the corporate trusteeship role from BNP Guernsey. Madame Crociani had engineered herself over the years into a position of some control, firstly through the delegation to her by Chase Bank in 1994 of the investment powers and secondly, through the appointment of Mr Foortse as a co-trustee, a personal adviser loyal to her. BNP Jersey could have found itself in a minority on trustee decisions that arose from time to time.

836. The investment powers enjoyed by Madame Crociani over what became a very substantial portfolio managed by BNP Suisse made her a client, in their view, of considerable importance and Mr Le Cornu was placed under pressure for BNP Jersey to accept the co-trusteeship, notwithstanding the fiduciary risk, in order that the BNP Group could retain the portfolio and close down its Guernsey trust operation. He reluctantly agreed, but on the basis that there would be an early restructuring, and it was BNP Jersey, therefore, that was pressing for the Grand Trust to be restructured, initially against some resistance from Madame Crociani.

837. Having taken on the co-trusteeship, it would seem that the good administration of the Grand Trust was placed in limbo pending the restructuring, in that Mr Le Cornu called no meetings of the trustees, did not procure the production of trust accounts for circulation to his co-trustees and to the principal beneficiaries, did not communicate with Mr Foortse other than for the signing of resolutions and made no attempt to communicate directly with Camilla and Cristiana, mature adults in their thirties, with children of their own and, for so long as the Grand Trust remained in existence, principal beneficiaries of it.

838. Whilst the initial impetus for this restructuring came from BNP Jersey, we think Madame Crociani came to see the appointment from the Grand Trust to the Fortunate Trust as a means to getting greater control over the trust assets and so in late 2009, it was Madame Crociani who was pressing for the 2010 appointment to be signed. In the meantime, within the family, Camilla, who was closer to her mother than Cristiana and who shared the same social interests (not shared by Cristiana who preferred a simpler life), appears to have been lobbying her mother for a greater share of the family wealth, no doubt commensurate with her status as a princess.

839. Mr Le Cornu had, we felt, a surprisingly casual approach to the 2010 appointment and we found his failure to keep notes of meetings and calls, a failing he acknowledged, unprofessional. The absence of such records going back many years left him relying very much on messages sent on his BlackBerry and his memory of past events. Notwithstanding that serious handicap, he did his best to assist the Court and was very open in admitting his misunderstanding of the nature of Cristiana's interest in the Fortunate Trust.

840. This casual approach is all the more surprising when we learned from Mrs Deveney that the Grand Trust had been placed by BNP Jersey on the "At Risk Register" from October 2007 and remained there throughout. Files on the register would be reviewed by the Risk Committee, which had a group function, monthly. Mr Paul de Gruchy, head of legal at BNP Jersey, would also have reported this file up to Head Office Group Legal.

841. Yet with all this risk awareness and oversight, BNP Jersey managed to enter into the 2010 appointment, a momentous decision, without the protection either of legal advice on the scope of the power or of the Court, thus exposing itself to the risk of having to compensate the trust fund of the Grand Trust to the full extent of its loss.

842. The real driver behind the 2010 appointment, as we have found, was to enable Madame Crociani to benefit directly from the trust assets during her lifetime, and to reduce BNP Jersey's fiduciary risk; both impermissible purposes. When examined objectively, as we have done, the 2010 appointment was for Madame Crociani's benefit (and that of BNP Jersey, in terms of the reduced fiduciary risk) and to the detriment of Camilla and Cristiana. Whilst Mr Le Cornu held the view that the Fortunate Trust gave Camilla and Cristiana a more flexible structure, which he felt was beneficial to them (without having consulted them), it only benefited them after Madame Crociani's death to the extent that there were any assets left to benefit from.

843. Madame Crociani's need to control extended to her own family, who, despite her daughters' ages, and the wealth available to the family, all lived with her in one apartment in Monaco, with little privacy or independence. They had a very luxurious and glamorous lifestyle, but it came at a

price. Cristiana has described it as *"a golden hell".* To the outside world, and to the BNP Group and Mr Foortse, they appeared a happy united family, of which Madame Crociani was the matriarch.

844. Advocate Redgrave submitted that Cristiana's evidence was unsatisfactory, and that in important parts it lacked credibility. It included, he said, sweeping statements of an exaggerated nature, vagueness and speculative conspiracy theories. We disagree. Not only did we find her evidence credible, but we consider her to be a woman of some considerable courage in the way that she has pursued her claim, and surmounted the many obstacles placed in her path, and this at very considerable cost to her own health.

845. Cristiana clearly found her mother intimidating, a person who she felt she could not challenge, and of whom she lived in some fear, whilst at the same time having complete trust in her on financial matters; that juxtaposition of fear and trust in a family relationship was understandable to us. The description that both Cristiana and Nicolas gave of Madame Crociani's character was supported by Mr Foortse, Mr Le Cornu, Mr Walmsley and Miss de Mestral. We accept that Cristiana signed whatever was put in front of her by her mother. She did the filing of the bank statements and monitored the fees charged and as a director of Croci BV would have seen the accounts of that company, but we regard it as entirely credible that as far as the trusts were concerned, she was in a fog, and only had a vague knowledge of them, the deeds of which she had never seen or had explained to her before the 2010 appointment or after. With hindsight, she acknowledged that she should have probed and questioned more, but that is the way it was, and we believe her.

846. The first indication of Madame Crociani preferring Camilla arose shortly before the 2010 appointment in the way she apportioned the vast bulk of the very valuable art work, inherited in the main from Camillo, to Camilla. By late 2010, Camilla had persuaded Madame Crociani that she should have the whole of the Croci Group, with the jewel in the crown, Ciset, and the many prestigious family properties. Cristiana had no inkling that this was afoot when she left the Monaco apartment, as usual, for Miami on 25th October, 2010. We accept her account of the events between then and her discovery on 25th April, 2011, as to what had been happening behind her back, namely the creation of the Princess Trust, her removal as a director of Croci BV, the transfer of her shares in Croci NV (she says fraudulently) and the Kosman proposals for the revocation of the Fortunate Trust and the re-settlement of its assets on trusts principally for the benefit of Camilla and her children.

847. Whilst Madame Crociani may not have intended to exclude Cristiana and her children from all benefit at that point, Cristiana perceived the bulk of the family wealth being secretly re-directed in

favour of Camilla; a devastating discovery which shattered the trust she had previously had in her mother, and explains why she cut herself off from them and sought legal advice.

848. In the taped conversation of 14th June, 2011, Camilla confirmed that Cristiana had no idea of these developments. Camilla and Madame Crociani knew, certainly from receipt of Professor Cera's first letter of 11th May, 2011, and Cristiana's subsequent personal correspondence with Madame Crociani exactly why she had cut herself off from them, but they then used her so-called disappearance against her. The evidence shows that Cristiana was never more than one e-mail away from anyone at BNP Jersey who might have thought of contacting her.

849. Madame Crociani's plan to revoke the Fortunate Trust was well in hand before receipt of that letter from Professor Cera, and the discovery of Cristiana's surprise visit of 25th April, 2011, but from that time, it became a question of Madame Crociani and Camilla taking whatever steps they could to prevent Cristiana from restoring to its proper place the wealth of which she felt she and her children had been deprived, wealth in part emanating from her late father. BNP Jersey and Mr Foortse aligned themselves with Madame Crociani and Camilla and their loyalty to Cristiana and her children as trustees of the Grand Trust was lost sight of, to the extent of there being discussions about reducing the value of the Promissory Note, the only asset then of the Grand Trust.

850. Following the revocation of the Fortunate Trust, the assets withdrawn by Madame Crociani, which included the assets appointed out of the Grand Trust by the 2010 appointment, were removed by her from the management of BNP and dispersed around the world to destinations she has refused to disclose and this in order to frustrate Cristiana's claims. Madame Crociani and Camilla then set about placing further impediments in the way of Cristiana through the appointment of Appleby Mauritius in January 2012.

851. We have considered the conduct of Appleby Mauritius in detail, but suffice it to say that it conducted itself in a manner that was consistently hostile and disloyal to the beneficiaries of Cristiana's trust, one of the two trusts comprised within the Grand Trust and of which it was the purported trustee.

852. When Bedell Cristin issued its letter before action of 3rd July, 2012, Madame Crociani was the driving force behind the Agate appointment, the purpose of which was to block the claims of the plaintiffs, and when the Order of Justice was served in January 2013 she took control of the defence, funding the legal representation of all of the defendants. We believe she was also the driving force behind the forum challenge which was taken at her cost all the way to the Privy Council, whose judgement was handed down in November 2014. It was not until May 2015 that

BNP Jersey sought separate legal representation, over two years after proceedings had been issued.

853. 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.

854. Turning to Mr Foortse, whilst we have not accepted the plaintiffs' characterisation of him as a stooge or mere nominee, he was loyal to Madame Crociani, who he saw as the matriarch of a close-knit family and with whom he dealt exclusively, other than to sign resolutions sent to him by BNP Jersey, as did BNP Jersey.

855. His files from 1987 had not been retained, and so he had to rely principally on his memory of his role in the creation of the Grand Trust and, as we found, he played no part in the creation of the Foundation with its charitable objects and its insertion as an income and ultimate default beneficiary. The US tax position is so clear that to qualify as a non-grantor trust Madame Crociani could not be a beneficiary and Mr Zachary could not have told Mr Foortse that she was intended to be. His memory of these events is mistaken.

856. Once Mr Foortse became a trustee, something he had not done before, he was not assisted by the way BNP Jersey conducted itself as his co-trustee and professional administrator of the Grand Trust in the ways that we have elaborated on earlier, and by its failure to share important legal advice with him. Following the 2010 appointment, he did align himself with Madame Crociani and Camilla, losing sight of his loyalty to Cristiana and her children as beneficiaries of the Grand Trust, of which he was still trustee.

857. His loyalty to Madame Crociani over many years has been repaid by her withdrawing the funding of his legal representation on the eve of the hearing, leaving him with no option but to represent himself in a case that had enormous financial implications for him, which he did with skill and great courtesy.

858. Finally, Mr Lee had a very uncomfortable time in the witness box, trying to account for and doing his best to justify, often unconvincingly, the actions of Appleby Mauritius in which, apart from the amendment to the Promissory Note, he had little personal involvement. We felt that he was

within the power of and used by Mr Noel (as was Miss Kweton) at all material times and out of his depth.

ORDERS

859. We invite counsel to meet and agree, as far as they can, upon the wording of the orders that we will make when this judgment is handed down, but in principle, and in summary we will:-

(i) Set aside as void and of no legal effect the 2010 appointment, the 2012 appointment of Appleby Mauritius, the Agate appointment, the 2016 appointment of GFin and the transfer of the Crica shares.

(ii) Order BNP Jersey and Madame Crociani jointly and severally to pay to the new trustee of the Grand Trust within 28 days of its appointment the sum of US$100,347,046, being the amount transferred out of the portfolio of the Grand Trust to the Fortunate Trust on 16th May, 2011, together with compensation to put the Grand Trust back to what it would have been as at the date of judgment had that amount not been transferred, and interest on the same from the date of judgement to the date of payment at a rate to be determined by the Court.

(iii) Order BNP Jersey and Madame Crociani jointly and severally to pay to the new trustee of the Grand Trust within 28 days of its appointment the balances due in respect of the interest-free loans made by the Grand Trust to Croc Investments SA, Goodluck Limited, Happiness Limited, the Foundation and the Fortunate Trust, to the extent that they were recoverable on the 9th February, 2010, plus interest from a date and at a rate to be determined by the Court until payment.

(iv) Order an inquiry into the value of the Crica shares, and order that Madame Crociani and BNP Jersey jointly and severally shall pay compensation to Cristiana on terms to be determined after further input from counsel.

(v) Order an inquiry into the value of the 8 pieces of art work formerly held in the Grand Trust through Twenty-Three Investments Limited and order that Madame Crociani and BNP Jersey jointly and severally shall pay compensation to the new trustee of the Grand Trust on terms to be determined after further input from counsel.

(vi) Exonerate Mr Foortse under Article 45(1) of the Trusts Law from his personal liability for the breach of trust arising out of the 2010 appointment and the transfer of the Crica shares.

(vii) Order Madame Crociani to indemnify BNP Jersey under the two contractual indemnities and under the inherent jurisdiction of the Court.

(viii) Give judgement against Appleby Mauritius on liability arising out of the breaches of trust we have found against it, with compensation for any loss to the trust fund of the Grand Trust arising from such breaches to be assessed.

(ix) Remove Madame Crociani, BNP Jersey and Mr Foortse as trustees of the Grand Trust and appoint a new trustee in their place.

(x) Give directions to the new trustee, to include a direction to revoke the delegation of investment powers to Madame Crociani.

(xi) Confirm the status of A and B as beneficiaries of the Grand Trust.

(xii) Adjourn any outstanding applications for contribution.

(xiii) Make such other orders as may flow from our findings.

Authorities

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