

JERSEY / JUDGMENT

Crociani -v- Crociani [2016]

JRC 089C (27 April 2016)

[2016] JRC 089C

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judgment

the commissioner: 1. On the 15 th April, 2016, the Court made orders aimed at enabling the first and second defendants to be represented in these proceedings by Collas Crill and we now set out our reasons. 2. Up until May 2015, Carey Olsen had represented the first to fourth defendants and, once joined, the seventh defendant. It is not in dispute that the first defendant was paying the legal costs incurred on their behalf. From that time, Baker and Partners represented the third and seventh defendants who have been paying their own legal costs. 3. On 2 nd February, 2016, Carey Olsen gave notice that it had ceased acting for the fourth defendant, which is now represented by Collas Crill. Subsequent documentation indicates that this was a decision taken by Carey Olsen. 4. In mid-February 2016, the first and second defendants indicated that they would terminate Carey Olsen's instructions, which they did with effect from 17 th February, 2016, Carey Olsen having carried out further work at the first defendant's request. They instructed Collas Crill to act for them. That firm wrote to Carey Olsen on 16 th February, 2016, in these terms:- "Crociani v Crociani This firm has been instructed to act for the fourth defendant in the above action your firm having declined to act any further. Given the commonality of the defences being advanced by the fourth defendant and the first and second defendants we have also been asked to act for the first and second defendants. All three defendants are acutely conscious of the numerous deadlines that are looming and, in particular, the hearing scheduled to take place on 24 February 2016. They wish to avoid seeking an adjournment of that hearing if at all possible." Collas Crill asked for the release of all the files in the possession of Carey Olsen and for an orderly handover to be effected. 5. Carey Olsen objected to Collas Crill coming on the record for the first and second defendants because there were outstanding fees and disbursements claimed by them in the total sum of £1,019,312.61. 6. The issue of Collas Crill representing the first and second defendants was not resolved, and this has impacted upon the progress of the proceedings. At a hearing on 6 th April, 2016, the Court said this in the judgment for the file and parties only:- "Fee dispute The Court was informed by Advocate Santos-Costa that the first defendant had instructed an English firm of solicitors who specialise in fee disputes to report and advise on the fees charged by Carey Olsen and its advice was due shortly. It was hoped that that advice would assist in reaching agreement with Carey Olsen. In addition, he, Advocate Kistler and Advocate Kelleher had met with the President of the Law Society, following which Advocate Binnington is

in the course of being instructed to adjudicate on the issue of whether or not Advocate Santos-Costa could act for the first defendant. It was not known when that adjudication would take place. Although the trial is due to start next January, this is a complex case and there is little room for slack. The inability of the first and second defendants to be represented has already placed them in apparent default of a number of court orders and the position will be exacerbated at the end of this month when all the parties are due to exchange witness statements of fact. This court has an overriding duty to ensure that justice is done to all the litigants in this action and we cannot allow this fee dispute (which has gone on now for some seven weeks) to derail the current timetable. Advocate Santos-Costa stressed the importance of his being able to have a cooperative handover with Carey Olsen which we appreciate, but we decided of our own motion, to convene Carey Olsen to a hearing on Friday 15th April 2016 at 2.30 p.m. so that the Court can at that stage, and if necessary, make any orders that may be appropriate to ensure that the first and second defendants are represented. It follows that at that hearing, and for the purposes of that hearing, the first and second defendants can be represented by Advocate Santos-Costa. We would hope that the matter would be resolved by that date, but if not, we invite brief skeleton arguments as to what orders, if any, the Court can properly make to this end." 7. The matter had not been resolved by the hearing on 15th April, 2016. The first and second defendants were represented by Advocate Moran and Carey Olsen by Advocate Kelleher and they both pointed out that there were limitations on the role that this Court, presided over by the designated trial judge, could play in inquiring into the reasonableness of the conduct of Carey Olsen and the first and second defendants, which would necessarily involve matters which are the subject of privilege, which had not been waived by the first and second defendants. Both counsel were careful to ensure that nothing was disclosed to this Court that had not already been disclosed. 8. The position of Carey Olsen is that the fee dispute is synthetic, in that despite two months of correspondence, there had been no articulation of the nature and extent of the dispute until the day before the hearing in a letter (not shown to the Court) sent by the costs assessor appointed by the first defendant, a Mr Lord. Against that absence of articulation, Carey Olsen had offered to accept 90% of its outstanding fees now, with the remaining 10% being subject to adjudication. The first defendant offered to pay the full amount into the jurisdiction to be held in escrow, pending adjudication of the fee dispute, but with no part of it being released to Carey Olsen pending that adjudication, for which there was no set timetable. This was not acceptable to Carey Olsen. On 14th April, 2016, Mr Lord wrote to Carey Olsen on behalf of the first and second defendants, making an offer of the payment of 50% of the outstanding fees, plus all disbursements in full and final settlement of all fees due to Carey Olsen, an offer not acceptable to Carey Olsen. 9. Advocate Kelleher submitted that the obvious way forward was for the Court to order the provision of security for Carey Olsen's fees, with a percentage being paid over to Carey Olsen immediately. He suggested an order upon the following lines:- "43.1 [The first defendant] and [the second defendant] pay money into a designated account within the jurisdiction (whether Carey Olsen or Collas Crill's client account) within a period of time fixed by the Court. 43.2 Carey Olsen be immediately paid from that money a percentage or sum fixed by the Court. 43.3 [The first defendant] and [the second defendant] initiate a fee adjudication before the Law Society within a period of time fixed by the Court. 43.4 On expiry of that time or an adjudication, settlement or sooner disposal of any

adjudication commenced within it (whichever is the sooner) Carey Olsen be paid the remainder of the money lodged or such portion of it as adjudicated or agreed (if applicable)." 10. Advocate Moran emphasised that there were two issues before the Court namely whether Collas Crill could represent the first and second defendants and whether Carey Olsen should be ordered to release the files they were holding. Carey Olsen was objecting to Collas Crill accepting instructions from the first and second defendants whilst the fees claimed by Carey Olsen remained unpaid and, quite separately, was exercising a lien over the files that it held. 11. She referred to Rule 9(1) of the Law Society of Jersey Code of Conduct which is in these terms:- "(1)(a) A member shall not accept instructions from a new client in relation to a continuing matter when he is aware or becomes aware that another member has previously acted for the client in question on that matter until that member has received confirmation to a written enquiry from the other member that there is not a valid objection to accepting such instructions or a reasonable time has elapsed since such enquiry. The handing over of documents (which in this Rule means letters, faxes, e-mails and other documents whether hand-written, printed or stored electronically) on the termination of a retainer with a member shall be in accordance with the provisions of paragraphs

(2) to (4) of this Rule. (b) In the event of there being such an objection the matter shall if not resolved forthwith amicably be referred for adjudication to the Bâtonnier or the President of the Chamber of Solicitors, or for the appointment of an adjudicator who shall act as an expert and not an arbitrator. The decision of such adjudicator shall be final. Nothing herein shall prevent a member from acting on an urgent matter for a new client pending resolution of such dispute where the interests of justice so require." 12. Advocate Moran stressed the last sentence of Rule 9(1)(b). There were a number of deadlines looming, pursuant to orders made by the Master on 11 th April, 2016, and the interests of justice required that the first and second defendants be represented. 13. Advocate Moran sought to analyse the documents held by Carey Olsen by reference to Rule 9 of the Law Society of Jersey Code of Conduct , separating them into:- (i) those created before the retainer began; (ii) those created by third parties where they had been paid; and (iii) those created up to the point where Carey Olsen's fees had been paid, i.e. all documents created up to November 2015. 14. She said there could be no objection to any of these documents being handed over now as they could not be subject to any lien . It was only the work carried out since then, and which had not been paid for, that was subject to a lien , and in respect of which the Court needed to apply the principles set out in the leading case of *Cunningham v Sinel*

[2011] JLR 54 . 15. She sought orders in these terms:- (i) Collas Crill shall have unconditional permission to represent the first and second defendants with immediate effect. (ii) Carey Olsen shall transfer to Collas Crill all documents created before the retainer commenced. (iii) Carey Olsen shall transfer to Collas Crill all documents created by third parties where the third parties have been paid for their work. (iv) Upon payment by the first and second defendants of the outstanding disbursements all remaining third party work shall be transferred to Collas Crill. (v) Carey Olsen shall transfer all remaining files to Collas Crill. No security shall be ordered given that the first defendant has offered to pay 50% of the

outstanding fees. Legal principles 16. In *Cunningham v Sinel*, the legal firm in that case had discharged itself from acting for the plaintiff in the substantive proceedings some three weeks before the main hearing was due to commence and in the view of the Court had not acted reasonably in doing so. In ordering the release of the files to the plaintiff (who was representing himself), the Court held that it had an overriding consideration to give justice to the litigants who came before it. The contractual arrangements between the legal firm and the plaintiff were subordinate to that litigation. Quoting from paragraph 13 of the judgment of Bailhache, then Deputy Bailiff:- "13 It is clear that, as a matter of its inherent jurisdiction over its officers, the court can in its discretion order a solicitor or advocate to deliver the client files to the new lawyer or indeed to the client himself, or indeed order that the solicitor or advocate may retain the files pending either payment of moneys outstanding or the obtaining of good security for such payment. How the discretion might be exercised will be very much dependent upon the facts of the case which is before the court at the relevant time. It seems to us from a perusal of the authorities in question that the following factors, which do not necessarily form an all-encompassing list of relevant factors, might well be generally relevant: (i) Whether the advocate or solicitor has discharged himself from acting for the client, whether he is still acting, or whether he has been discharged by his client. (ii) Whether the nature of the retainer related to a matter pending before the court, or whether it was a non-contentious matter, or indeed a matter which was no longer contentious. (iii) Whether the advocate or solicitor had acted reasonably in relation to his conduct of the relationship with his client. (iv) Whether there were in fact moneys due by the client to the solicitor or advocate and the proportionality of the action which the court was asked to authorize in relation to the amount which was involved. (v) Where the balance of hardship lay between the advocate or solicitor on the one hand and the client on the other." Discussion 17. The Court in *Cunningham v Sinel* was concerned with the release to the plaintiff of files held by a former legal firm by way of lien in respect of its unpaid fees and not with whether a new firm of advocates could act for the plaintiff, but in the view of this Court, a failure to pay outstanding fees was, on the face of it, a valid reason for objecting to a new firm from accepting instructions in relation to a continuing matter, irrespective of the exercise of any lien over files held. 18. Advocate Kelleher expressed some frustration at the first and second defendants on the one hand refusing to waive privilege (thus controlling the information before the Court) and at the same time seeking an order enabling Collas Crill to act for them and for Carey Olsen to hand over all of their files, and this because the first and second defendants had offered to pay 50% of the outstanding fees in full and final settlement. If such an order were made, Carey Olsen would be left unsecured for the substantial balance, which it would have to pursue against the defendants in two foreign jurisdictions. To be fair to Carey Olsen, all the circumstances should be before the Court. 19. In Advocate Kelleher's view, the first and second defendants had chosen to terminate Carey Olsen's retainer, which had come as a complete surprise to his firm, when they were in the middle of a number of substantial tasks and the first and second defendants were now inventing a fee dispute and using the Court's timetable as a device not to pay Carey

Olsen's fees. 20. Advocate Moran asked the Court to accept that the fee dispute was not synthetic. Mr Lord had now written to Carey Olsen at length, admittedly on the day before the hearing, and a substantial offer had been made. She accepted that under the authority of *Cunningham v Sinel*, the Court could order the payment in of security, but was against the Court ordering any payment to Carey Olsen out of such security, as the Court was in no position to make any kind of adjudication as to what, if anything, was due. Mr Lord was reviewing all of the fees that had been rendered by Carey Olsen in this matter from the outset, which totalled some £4.5M, and it was possible therefore that nothing further will be found to be due. 21. She produced no authority for the proposition that an advocate's lien (usually referred to as a solicitor's lien), the principle of which she did not challenge, was limited to the documents which related to the unpaid fees only. Apart from the very real practical difficulties that this would lead to in trying to clarify what documents were or were not subject to the lien, this would severely diminish the value of the lien. It was quite contrary to the Court's understanding that a solicitor's lien extended to all of the property of the client in the solicitor's possession. 22. To the extent that English law is persuasive in this area, the nature of a solicitor's lien is described in Halsbury's Laws of England 5th edition, volume 66 at paragraph 771 in this way: - "A solicitor having a retaining lien over property in his possession is entitled to retain the property as against the client and all persons claiming through him and having no better right than the client, until the full amount of the solicitor's assessed costs payable by the client is paid." A number of 18th and 19th century cases are cited as authority for this. Halsbury goes on:- "The client has no right to inspect the documents or to take copies of them, but delivery of documents which the client requires will be ordered upon payment of the solicitor's costs being secured, as by payment into court...." A number of 19th century cases are cited as authority for this. 23. The right of an advocate to exercise a lien over the property of a client for unpaid fees was implicitly accepted in *Cunningham v Sinel* and in our view that right must extend to all of the property of a client in the possession of the advocate. Accordingly, Carey Olsen were entitled to hold all of the files in its possession by way of lien for its unpaid fees, subject to the discretion of the Court. Decision 24. This is a complex case in which all of the parties have invested substantial sums in terms of legal costs and disbursements in the legitimate expectation that the Court will determine the issues before it efficiently and expeditiously. Although the trial is not due to start until next January, there is a substantial amount of work to be done and the timescale has already been forced back because of the inability of the first and second defendants to obtain representation. The Court had no doubt that to ensure that justice was done, it had to act now and not allow the proceedings to become subordinated to the dispute between Carey Olsen and the first and second defendants, there being no timetable for the resolution of that dispute. Two points arose:- (i) Advocate Moran did not suggest the very large amount of fees already paid to Carey Olsen could be the subject of any adverse inference. This case has been hard fought, with multiple hearings, including an appeal to the Privy Council. Much of the work would have been done when Carey Olsen were acting for the first to fourth defendants, all of whom it would be reasonable to describe as sophisticated clients.

(ii) The first defendant is a person of substantial means and Advocate Moran confirmed that there was no issue as to her ability to pay the amount claimed by Carey Olsen into the jurisdiction - indeed she had already offered to do so but on the basis that none of that would be released to Carey Olsen. Accordingly, her means was not an issue in this case. 25. Unlike the facts in *Cunningham v Sinel*, it was significant, in our view, that it was the first and second defendants who had chosen to discharge Carey Olsen at a time when that firm was heavily engaged in work required to meet various orders made by the Court and not on the face of it because of any complaint about the services that firm was providing. The reason put forward was that it would enable the first, second and fourth defendants to be represented together by Collas Crill. 26. The amount of unpaid work carried out by Carey Olsen appeared to be very substantial and whilst the issue between them and the first and second defendants should be subordinate to the interests of the proceedings as a whole, it would be quite unjust in these circumstances for Carey Olsen to be rendered unsecured, when the first defendant was quite able to pay the disputed sum into the jurisdiction by way of security. It would also be unjust for no part of that sum to be released to Carey Olsen, particularly in the light of the offer that had been made to pay half the amount claimed. 27. We therefore made the following orders:- (i) The first and second defendants will pay jointly and severally the sum of £1,019,312.61 into a designated account within the jurisdiction with Carey Olsen as soon as possible and in any event, within seven days to be held upon the terms of this order. (ii) Upon receipt of that payment in full, (a) the full amount of the disbursements due in the sum of £75,962.61 and (b) one half of the outstanding fees due in the sum of £471,675 shall be released to Carey Olsen by way of an interim payment on account of the fees and disbursements claimed, but on the basis that (a) such release does not constitute an adjudication by this Court that this or any other sum is due to Carey Olsen and (b) in the event of it being found to be an overpayment, then Carey Olsen will repay the excess. (iii) The balance of the sum in the designated account shall be held by Carey Olsen by way of security for the remaining fees claimed and shall not be released other than with the consent of the first and second defendants or by order of the Court. (iv) Upon receipt of the full amount payable under

- (i) above, Collas Crill shall have permission to represent the first and second defendants in the substantive proceedings and Carey Olsen will transfer all of the files held by it to Collas Crill, and this in accordance with Rule 9 of the Code of Conduct. (v) There will be liberty to apply. 28. Thus, the Court was not prepared to separate out the issue of the release of the files held by Carey Olsen and the first and second defendants' need for representation. Both issues can be simply and speedily resolved by the payment we have ordered and the matter is therefore entirely within the hands of the first and second defendants. 29. In ordering the release of funds to Carey Olsen, the Court was not making any adjudication in favour of that firm. The sums released remained secured in the sense that in the event of it transpiring to constitute an over payment, then Carey Olsen, one of the largest firms in the Island and within the jurisdiction of the Court, would be required to repay the amounts involved. Authorities *Cunningham v Sinel*

[2011] JLR 54 . Halsbury's Laws of England 5th edition. Page Last Updated: 03 May 2016 BAILII:
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