

JERSEY / JUDGMENT

Morelli v Morelli 17-Sep-2019

[2019] JRC 180 (17 September 2019)

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judgment

the bailiff:

INTRODUCTION

1. This was an application by the Defendants for a declaration that certain undertakings given by them to the Court in a consent order dated 21 st September 2016 no longer applied, or in the alternative that the Defendants should be discharged from those undertakings. The hearing took place on 17 th June 2019, at the conclusion of which judgment was reserved. This is now the judgment of the Court.

Background

2. On 22 nd June 2016, the Deputy Bailiff granted an ex parte injunction on the application of the Plaintiffs in support of proceedings to be brought in Monaco relating to the estate of the deceased mother of both the Plaintiffs and the Defendants, Annita Morelli ("the Mother"). The injunctions were obtained to freeze assets purported to be held, whether directly or indirectly, by the Defendants in Jersey and to preserve those assets pending the outcome of criminal and civil proceedings due to be commenced in Monaco. The Plaintiffs at all material times have been resident in Monaco and Italy and the Defendants have been resident in the United Kingdom, where the Mother, who all parties agree was domiciled in Monaco, died. There have been previous interlocutory proceedings in relation to these injunctions and a detailed judgment was handed down on 29 th September 2016 and is to be found at Morelli v Morelli

- [2016] JRC 172 . 3. When the Order of Justice was signed, it was on the basis of the Plaintiffs' assertion that they were imminently to commence civil and criminal proceedings in Monaco against the Defendants. As set out in paragraph 7 of the judgment to which we have referred, the law relied upon by the Plaintiffs was:- (i) The Royal Court could grant free standing Mareva injunctions in support of foreign proceedings to preserve assets; (ii) The Royal Court has jurisdiction to grant a freezing injunction before proceedings are commenced where the case is one of urgency or it is otherwise necessary to do so in the

interests of justice; (iii) On an application for such an injunction, the Plaintiff must make full and frank disclosure, must give particulars of his claim against the Defendant, must give some grounds for believing that the Defendant has assets within the jurisdiction, must give some grounds for believing beyond the mere fact that the Defendant is abroad that there is a risk of the assets being removed before the judgment is satisfied, and must give an undertaking in damages. 4. The legal basis for the injunctions changed by the time the application to vary them came before the Court on 24 th August 2016. It was then asserted that the Plaintiffs had obtained proprietary, as opposed to Mareva, injunctions for the purposes of preventing any transfer of title to the shares owned by Lower Bridge Street Investments Limited ("LBSI") or the payment of any dividend or distribution whatsoever, or paying any income to the Defendants, simply for the purposes of preserving the estate of the Mother pending the determination of the Monaco proceedings. By August 2016 it was said that the Plaintiffs had a good arguable case to pursue the Monaco proceedings and that there was a real risk of dissipation if an injunction were not granted. One of the major assets to be subject to the argument in August 2016 was Sun Street Investment Limited ("SSI"), a Guernsey registered company and a subsidiary of LBSI which owned commercial and residential property in Canterbury valued at approximately £3 million, which was transferred to the First Defendant in March 2016 upon the Mother's death in accordance with an agreement between her and the First Defendant on 26 th September 2006. The Plaintiffs asserted that although they had not intended the shares in SSI would be caught by the injunctions, and that the claims in respect of the SSI shares depended on Monegasque law and were not dependent on the alleged fraudulent transfer of the LBSI shares, nonetheless the Royal Court should have regard to that fraudulent transfer for the purposes of holding the status quo in relation to any other assets of the Mother including the SSI shares. 5. The judgment of 29 th September 2016 was that the then current Monegasque proceedings did not contain proprietary claims in relation to the SSI shares and accordingly the Court did not think the injunctions ought to catch those shares. 6. On 19 th September the Court's judgment in this respect was circulated in draft to the parties with a view to receiving any comments as to typing errors, factual errors, wrong references and other minor corrections of that kind, and to enable the parties to consider what consequential orders, if any, they would seek. On 20 th September, the parties reached agreement about the final form of a consent order which was made by the Court on 21 st September (the "Consent Order") and which had the effect of staying the entire proceedings in Jersey, lifting the injunctions but substituting various undertakings which the Defendant would give in lieu. The Court was asked not to hand down the judgment which it had prepared, but the Court resolved that there was no reason not to deliver the judgment in question. It was noted that the consent order would not compromise the SSI issue, nor indeed did it settle all matters in dispute between the parties. It did not even dispose of the Jersey proceedings which were merely stayed and at paragraph 38 of the judgment, the Court noted specifically that there might be further applications in the future either for a discharge or a variation of the undertakings which had been given. 7. With that background, we now turn to the undertakings which were given and embodied

in the consent order. They were in these terms:- "Upon the Defendants undertaking: A. to comply with the terms set out in the Order of Justice at paragraph 1, subparagraphs (1)(a)(i) to (vii) inclusive; and B. that they will not instruct, require or procure that LBSI does any of the acts set out in paragraph 4, sub-paragraphs (1)(a)(i) to (xii) inclusive (subject to the exceptions in paragraph 5) and paragraph 7(1), sub-paragraphs (a) to (e) inclusive of the Order of Justice; And Upon the Parties Cited undertaking: A. to comply with the terms set out in the Order of Justice at paragraph 4, subparagraphs (1)(a)(i) to (xii) inclusive, paragraph 5(1) and (2), paragraph 7(1), sub-paragraphs (a) to (e) inclusive; Save that, in each case: a. the shares in Sun Street Investments Limited and the income arising from the said shares are not subject to these undertakings; b. specifically without any prejudice to the Plaintiffs' assertions that (i) the beneficial interest in LBSI has been fraudulently transferred to the Defendants and (ii) the shares in LBSI ought to form part of the global estate of Annita Morelli and the Defendants' denials of those assertions, that: i. the Second Defendant may receive the income that she would receive in each financial year commencing 1 April from her alleged 30% beneficial interest in LBSI, as if the undertakings were not in place, and ii. the First Defendant may be reimbursed from the income that he would receive in each financial year commencing 1 April from his alleged 70% beneficial interest in LBSI for expenses incurred in respect of these proceedings and the Monaco proceedings up to a maximum of £50,000 in each financial year commencing 1 April provided that copies of the invoices are provided to the Plaintiffs not less than one week prior to payment; provided that if the Monaco criminal or civil proceedings are decided in the Plaintiffs' favour i.e. the Monaco Court affirms the Plaintiffs' assertions as set out above, all monies paid to the Defendants under this paragraph will be returned to the global estate, or taken from their respective shares of the global estate; And Upon the Plaintiffs' undertakings in paragraphs 1 to 7 on pages 9 and 10 of the Order of Justice being continued and applicable as regards the above undertakings by the Defendants; And Upon the First Plaintiff undertaking that he has provided to the Defendants copies of all statements for Annita Morelli's bank accounts in his power, possession or custody and that any such statements previously but no longer in his possession were provided by him to Annita Morelli prior to her death; And Upon the Plaintiffs and the Defendants mutually undertaking: A. not to purport to refer to the existence or extent of these undertakings or the injunctions ordered by the Deputy Bailiff on 22 June 2016 in the Monaco proceedings as any form of admission or validation of their respective cases; and B. to seek to agree the arrangements for and participate in a mediation of the Plaintiffs' claims and the division of Annita Morelli's estate within three months of this order; All of the above undertakings to remain until final resolution of the Monaco civil proceedings or further order of the Royal Court (with liberty reserved to apply)." 8. The consent order then went on to provide that the injunctions ordered by the Deputy Bailiff against the Defendants and the Parties Cited when he signed the Order of Justice on 22 nd June 2016 should be discharged, and the proceedings would be stayed upon reciprocal undertakings to appear on two clear working days' notice. The Applicants' case 9. The Applicants assert that since the undertakings were given, there have been a number of developments:- (i) The criminal

allegation in Monaco, which involved an allegation that a signature was forged, was dismissed for want of jurisdiction. It is said there is no criminal aspect to this case. (ii) Judgment has been given in civil proceedings brought in Monaco and any proprietary claim over the shares in LBSI has either been abandoned, lost at trial or was never pursued at all. The Defendants assert that there never was any proprietary claim and they say that although the Plaintiffs consider that there was a relevant proprietary claim, it is now accepted by all parties that there is no current proprietary claim. (iii) A claim by which the Plaintiffs sought to allege wrongdoing by the Defendants such as to deprive them of inheriting property in the form of the shares in the Jersey company has failed. (iv) The administration of a partage of the Mother's estate is now taking place in Monaco under the supervision of a notary. The Monaco court has ordered that all parties account for property which properly should be considered as falling within the Mother's estate. It has always been accepted that the shares in LBSI should be so considered. (v) The court in Monaco has also held that the shares in SSI (over which an undertaking was never given because there was no proprietary claim) should fall within the estate process. Leonardo Morelli had argued that it should not do so because he paid a commercial price for it. The company will be valued though his purchase price will be factored in to the partage. (vi) There has been no step to freeze or otherwise interfere with any asset of the Defendants held outside Jersey. (vii) No evidence has emerged as to any risk of dissipation of assets. Indeed the Defendants assert that there never was any such risk and both the possibility of dissipation of assets and the possibility of a flight risk by Leonardo Morelli are fanciful. 10. The Applicants accept that there is currently a dispute as to the valuation of the estate assets and the way it is calculated as a matter of a Monegasque law. However the Applicants assert that they have remained open, cooperative and proactive as regards assisting the notary. 11. Finally, it is said that as a matter of construction of the Consent Order, the undertakings no longer apply. The relevant process in Monaco has been finally resolved, the criminal proceedings have been dismissed, there is no proprietary claim outstanding, the claim in *re cel* has been lost, a ruling has been made as regards the transfer of shares in SSI, and all that is left in Monaco now is the administration of the estate under the supervision of a notary. The Plaintiffs' position 12. The Plaintiffs assert the following: (i) The construction argument is hopeless, as there has not been a final resolution of the civil proceedings in Monaco. The basis of this appears to be that all the parties accept there is a long way to go before the liquidation of the estate is concluded, which is the point at which the Defendants will be ordered to pay specific sums to the Plaintiffs. (ii) There has been no significant or unforeseeable change of circumstances since the Consent Order was entered into. The judgment in September 2018 in the Monaco court demonstrates why the undertakings need to be continued. It would be illogical to discharge them before the Defendants' liabilities have been established in Monaco. (iii) There is a continued risk of dissipation and indeed the Plaintiffs' expert evidence that a letter purportedly signed by the Mother in June 2015 is a forgery remains unchallenged by any of the expert evidence filed by the Defendants. 13. The Plaintiffs made three submissions in relation to the Court's exercise of discretion:- (i) The Second Defendant's

nominee breached the consent order in April 2017 by transferring all of its shareholding in the First Party Cited, LBSI, to another nominee company. This was a contempt of court, which the Plaintiffs were still attempting to remedy. We note that it does indeed appear to be common ground that this is so. In June 2019, a fresh consent order was submitted to the Court the effect of which is to vary the September 2016 consent order to add Orion Nominees Limited as a Party Cited, requiring the Parties Cited and Orion (all of which are under common control) to file affidavit evidence to explain how the breach arose, and to pay the Plaintiffs' costs arising from the breaches on an indemnity basis. In August 2019, a further consent order was submitted to the Court to vary the September 2016 order still further so as to allow the registered office provider in Jersey, STM Fiduciaire Limited, to amend the share register to reflect the current shareholding of Orion and to record a change in address of the First Party Cited as a result of STM's own change of address, again with the Plaintiffs having their costs on the indemnity basis. (ii) The First Defendant Leonardo Morelli alleged in his affidavit that the restrictions on his receipt of income from LBSI were causing him financial difficulty. The Plaintiffs have confirmed they would consent to lift such restrictions. (iii) The Defendants wish to change the corporate service provider which administers and provides nominee shareholders to LBSI. The Plaintiffs have confirmed they have no interest in who administers that company or its assets and would consent to a variation of the undertakings to permit a change of service provider provided that the ownership and assets of LBSI remain secure from the risk of dissipation. The offer was rejected. 14. In particular the Plaintiffs submitted that when the Defendants gave the undertakings they did in 2016, they knew that the Royal Court had not accepted the allegation of criminality or of the proprietary claim, and yet they still gave the undertakings. It followed that the fact that the two claims have subsequently been dismissed in Monaco cannot amount to a change in circumstance. Discussion 15. We deal first with the construction argument. The undertakings embodied in the consent order were said to remain in place "until final resolution of the Monaco civil proceedings or further order of the Royal Court (with liberty reserved to apply)". We are required to identify what "the Monaco civil proceedings" means for these purposes, and the relevant date must be 21 st September 2016. At that time there were proceedings taken out in the court at first instance of Monaco by a summons dated 29 th July 2016, number 2017/000028. We have not been advised of any other proceedings taking place in Monaco relevant to the Mother's estate. In saying that, we accept that the administration of the estate is continuing. That is in the hands of the notary. 16. The judgment of the Monaco court at first instance concludes in these terms:- "On these grounds, the court Ruling publicly in a judgment after having heard the representations of all parties and at first instance Finds that the claims of Mario Morelli and Marino Morelli are admissible; Acknowledges that they have withdrawn an original application for a stay of proceedings; Orders that the calculation, liquidation and apportionment of the succession of the late Annita Morelli, who died on 16 March 2016, should be opened. Appoints Mitch Natalie Aureglia-Caruso, Notary, to do so; Appoints Sebastian Biancheri, Deputy Presiding Judge, to oversee said work and make a report if objections should arise; Finds that the judge or

notary thereby appointed may be replaced, if unavailable, under the conditions laid down in Article 915 of the Code of Civil Procedure; Dismisses the claims of Mario Morelli and Marino Morelli relating to concealment of an inheritance; Finds that an accounting of the value of assets in the estate should be made within the meaning of Article 712 of the Civil Code, without prejudice to other assets to be accounted for that might be incumbent upon the heirs, in respect of the following: By Leonardo Morelli 70% of the shares of the company Lower Bridge Street Investments which were transferred 100% of the shares of the company Sun Street Investment By Giannina Morelli 30% of the shares of the company Lower Bridge Street Investments, 100% of the shares of company Iduna Corporation SA, The value of the mooring located in San Remo harbour, The amount of personal effects such as furs and jewellery in her possession, Acknowledges that Marino Morelli has agreed to return to the estate the sum of £900,000, or the equivalent in euros, received by him as an advance on inheritance in October 2012, Dismisses all other claims of the parties; Orders the offsetting of all costs." 17. The Court has seen an affidavit dated 16 th April 2019 from Advocate Richard Mullet, acting for the Plaintiffs, in which he says at paragraph 16 that: "The September 2018 judgment was notified by the Monaco Court bailiff on 11 October 2018 and, because no appeal was filed in the 30 days following that date, it is now definitive and binding on the parties. This appears to be common ground." 18. Advocate Mullet goes on to make further commentary on the September 2018 judgment between paragraphs 17 and 25 of his affidavit. He describes how the Monaco Court has ordered a judicial liquidation based on Articles 912 and following of the Civil Procedure Code, which applies when an amicable liquidation of the estate is impossible. In these cases, the court orders a notary to execute it, with a judge to oversee the process and make a report in case of difficulty. He asserts that if this process becomes unsuccessful, the Monaco Court at first instance might have to judge the liquidation in full and estimate what values are due from whom to whom, following the Monaco legal rules. If at the end of the day, one party is owed money by another, the Monaco Court will if necessary issue an enforceable civil judgment requiring that the money be paid plus interest until date of payment. 19. The Court has also had the benefit of an affidavit sworn by Advocate Donald Monasse, sworn on behalf of the Defendants. Advocate Monasse was the advocate for the Defendants in the Monaco court. Although complaint is made that he is not an advocate at the Bar of Monaco, and therefore ought not to be treated as an expert in Monegasque law, it appears to us that his standing before the court in Monaco must be sufficient for him to address the court, or he would not have been permitted to do so. Respecting that there is a difference between an advocate at the Bar of Monaco and an advocate at the Bar of Nice who is authorised to appear in the courts of Monaco, we nonetheless treat Advocate Monasse as an expert for the purposes of these proceedings. In the view of Advocate Monasse, the Monaco proceedings have terminated. A judgment has been issued and no appeal has been filed. What is left is the administration of the estate by a notary, named in the judgment, who will proceed under the Rules of the Monaco Code of Civil Procedure. 20. The Plaintiffs contend that the purpose of the Order of Justice was to obtain a free standing freezing order in Jersey to preserve assets pending the outcome of proceedings

in Monaco. Reliance in particular is placed upon paragraph 40 of the Order of Justice where it is said that: "...civil proceedings against Leonardo and Giannina to reconstitute the global estate of Annita Morelli (masse successoral) and to reduce the portion received by Leonardo and Giannina since it exceeds what Leonardo and Giannina are entitled to receive by way of forced heirship and to enforce judicially the liquidation of the estate in accordance with the laws of Monaco." 21. Those intended proceedings have in fact been commenced and in our judgment have been concluded. The Plaintiffs contend that the enforced judicial liquidation of the estate has not been concluded, but on the contrary it appears to us to be common ground that the court in Monaco has made an order for judicial liquidation. It follows that the proceedings have been completed even if the liquidation at this stage has not. 22. We can well see that there is scope for further argument in Monaco as to the administration of this estate. There is a process by which that argument may take place. However that process has not commenced because the notary is in the course of preparing the administration. If that administration is completed without objection from either side, there will be no further proceedings in court. In our judgment, it follows that the Monaco proceedings must be treated at this stage as having been completed. We therefore accept the construction arguments advanced by the Defendants, and we consider that the condition in the consent order that their undertakings remain in place until final resolution of the Monaco civil proceedings has been satisfied. 23. Even if we are wrong about the construction of the Consent Order, there is liberty to apply and we now turn to what the position would be if, notwithstanding our conclusions over the construction argument, the consent order remained in place. 24. There is much common ground as to what the law is in relation to the variation of an order obtained by consent. Both parties have referred to *Chanel v Woolworth*

[1981] 1 WLR 485 where the Court of Appeal dismissed the Defendant's application for leave to appeal an order refusing their application to be discharged from undertakings given earlier, stating this at page 492H:- "The Defendants are seeking a re-hearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion.... even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter." 25. This principle was confirmed by the English High Court in *Angel Group Limited v Davey*

[2018] WL 01040329 at paragraphs 27 and 59, and these cases have recently been considered by the Master of the Royal Court in *Bogensberger v Sinel*

[2018] JRC 228 . 26. In our judgment there has been a material change in the position since 2016. At that time it was asserted not only that there were criminal proceedings forthcoming and a proprietary claim but also that the wrongdoing of the Defendants was such as to deprive them of inheriting property in the form of the shares in the Jersey company (the claim in 'Recel'). The claim in Recel has been dealt with by the Monaco Court in these

terms:- "Whereas Mario Marelli and Marino Marelli set out the scope of their claims in this regard as the following assets [these are then listed]; Whereas it does not transpire from the exhibits submitted in the proceedings that Leonardo Morelli and Giannini Morelli wished to misappropriate said assets from the estate, and such guilty intent could not ensue from their possession, it being noted that the Applicants were aware of their existence; Whereas, therefore, it would not be appropriate to issue sanctions relating to concealment of an inheritance;" which recitals lead later to the dismissal of the claims made in this respect. In other words, whereas it was possible in June 2016 that the Defendants might have lost the right to inherit, that possibility no longer exists. This is a material change of circumstance. 27. We have gone on to consider whether there is any real risk of dissipation and we consider that there is not. We have noted: (i) Nothing has been done with the shares in SSI notwithstanding that the undertakings did not apply to them. (ii) There was good reason to change the arrangements for the administration of LBSI. (iii) There is considerable doubt around the alleged forgery, and particularly around the question as to whether the Mother was aware of the arrangements which were made at the relevant time. We have regard in particular to the affidavit of Mr Enoch at paragraph 18 where he said:- "Towards the end of July 2015 I had a telephone conversation with Mrs Morelli in which she informed me that she would like to change the arrangements regarding LBSI so that the shares were held as to 70% for her and Leo jointly and as to 30% for her and Giannina jointly. I said that everything had already been done but I would see whether I could persuade the administrators to change the holdings to reflect what she now wanted....". 28. As Mr Enoch describes, fresh declarations of trust were issued in September 2015 as a result of these arrangements. 29. However, even if the relevant letter was of itself a forgery, it does not seem to us in the light of what Mr Enoch says that that carries sufficient significance to justify an assertion that the Defendants would dissipate the estate assets. In that connection we add that the fact that the valuations of the different property in the estate have not been agreed is not relevant to what we have to decide even in relation to dissipation. The only potential relevance of that dispute would have been if one were able then to say that there was some continuing process in the Monaco courts - this goes back to the construction argument - but it is not relevant to the question of dissipation. 30. We add that we have assumed for this part of the argument that the Plaintiffs have a good arguable case. We note that the Defendants have not conceded that. Resolution 31. The Consent Order of 21 st September 2016 contained a number of undertakings given by the Defendants, the Parties Cited and by the Plaintiffs. Although the order, as prepared by the parties and endorsed by the Deputy Bailiff, indicates that all the undertakings (including the Plaintiffs' undertakings contained in the Order of Justice) would remain in place until final resolution of the Monaco civil proceedings or further order of the Royal Court, we do not consider that the language of the Consent Order could possibly have been intended to remove the Plaintiffs' undertakings contained in the order of justice. We have not been addressed on that subject, and therefore those undertakings will remain in place with liberty to apply. 32. The Defendants' undertakings set out at paragraphs A and B of the consent order are discharged for the reasons which we have

given - both on the construction argument and on the material change of circumstance argument. 33. As to the undertakings of the Parties Cited, to the extent that there has been compliance with the terms of the Order of Justice so far, the Parties Cited have complied with valid orders of the Court. However, to the extent that the consent order reflects continuing undertakings, those undertakings are discharged. 34. If the parties cannot agree questions of costs arising out of this application, we will hear argument. Authorities *Morelli v Morelli*

[2016] JRC 172 . *Chanel v Woolworth* [1981] 1WLR 485. *Angel Group Limited v Davey* [2018] WL 01040329. *Bogensberger v Sinel*

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