Neutral Citation Number: **[2022] EWHC 1098 (QB)**

Appeal no: QA-2020-000190
Case no. F53YJ009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

On appeal from the Central London Civil Justice Centre

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2022

Before :

MR JUSTICE SOOLE

- -

Between :

DIRK VINCENT VAN HECK

Claimant/ Respondent

- and –

GIAMBRONE & PARTNERS STUDIO LEGALE ASSOCIATO

Defendant/ Appellant

Ms Cheryl Reid for the Appellant/Defendant
The Respondent/Claimant in person

Hearing date: 9 March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Soole:

1. This is an appeal by the Defendant Italian based law firm against the Order of HH Judge Parfitt ('the Judge') dated 17 June 2020 whereby he dismissed its application to stay this action by the Claimant barrister on the grounds of *lis alibi pendens* pursuant to Article 29 of EU Regulation 1215/2012 (Brussels 1 Recast; 'the Regulation').

2. The substantive dispute concerns the barrister's claim for professional fees. The jurisdictional dispute concerns the priority between this action for his fees ('the London Claim') and the law firm's prior and mirror action in Palermo which seeks a declaration of non-liability in respect of the barrister's claim ('the Palermo Claim').

3. The first instance court in Palermo has made an order declining jurisdiction but an appeal (or purported appeal) to the court of appeal in Palermo has been lodged and is yet to be determined. In the light of the evidence of a single joint expert in Italian law ('the JSE'), the Judge held that the issue of jurisdiction in the Palermo Claim had been finally determined by the first instance decision; and that in consequence there was no *lis alibi pendens*. The application for a stay of the London Claim was therefore refused. The law firm contends that these conclusions were wrong in law and fact.

Article 29

4. The Article provides, as material: *'1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established…3. Where jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'*

5. There is no dispute on the following matters and principles. First, that the court first seised of the dispute was Palermo; and that the proceedings in the two jurisdictions involve the same cause of action and are between the same parties.

6. Secondly, that the concept of *lis alibi pendens* in Article 29 of the Regulation (and its like predecessors and successors in similar instruments) has an independent and autonomous meaning under Community law: Gubisch Maschinenfabrik KG v Palumbo (144/86) EU:C:1987:528; [1989] E.C.C. 420; The Alexandros T [2013] UKSC 70; also Recital (21) of the Regulation.

7. Thirdly, that the underlying rationale of Article 29 is the avoidance of irreconcilable or inconsistent judgments: see again Recital (21); Gubisch: also The Alexandros T : *'…the purpose of Article 27* [here, 29] *is to prevent the courts of two Member States from giving inconsistent judgments and to preclude, so far as is possible, the non-recognition of a judgment on the ground that it is irreconcilable with a judgment given by the court of another Member State…'*: per Lord Clarke at [27].

8. Fourthly, that the Regulation (including Article 29) relies on 'mechanical tests', not subject to overriding considerations of 'merits': Research in Motion UK Ltd v. Visto

Corporation [2008] 2 All ER (Comm) 560 at [35], further cited in Easygroup Ltd v. Easy Rent a Car Ltd [2019] EWCA Civ 477; [2019] 1 WLR 4630 at [74].

9. There is a dispute between the parties as to whether the time limit under Italian law for appealing the first instance decision in the Palermo Claim is 30 days or 6 months. In the light of the evidence of the JSE, the Judge concluded that the relevant time limit was 30 days; and therefore that the appeal in Palermo was lodged out of time. Although the Palermo documents in the bundle do not make this clear, this present appeal proceeds on the agreed basis that the law firm's appeal in Palermo contends that the relevant time limit was 6 months and that the appeal was therefore lodged in time.

10. In any event, the law firm's central contention is that, as a matter of law, there is *lis alibi pendens* where an appeal has been lodged in the court first seised, whether in or out of time. In this respect it contends that the Judge misinterpreted observations of the Court of Appeal in Moore v. Moore [2007] EWCA Civ 361. It will also be necessary to consider two further Court of Appeal authorities not cited to the Judge: Re M [2018] EWCA Civ 1637; and Easygroup Ltd v. Easy Rent a Car Ltd [2019] EWCA Civ 477; [2019] 1 WLR 4630.

Narrative

11. The relevant factual background can be largely taken from the concise summary within the Judgment. The law firm engaged the barrister to provide legal services. The barrister claims outstanding fees for his legal services between 2016 and 2018. The law firm denies liability.

12. On 22 January 2019 the law firm issued the Palermo Claim, seeking a declaration of non-liability. On 18 April 2019 the barrister issued this London Claim.

13. On 5 September 2019, the Palermo first instance court made a ruling which declined jurisdiction in the matter. On 1 November 2019 the law firm filed an acknowledgement of service in the London Claim, stating an intention to contest jurisdiction. On 12 November 2019 a further hearing in Palermo dealt with some typographical errors in the 5 September 2019 ruling.

14. On 15 November 2019 the law firm issued the subject application for a stay of the London Claim *'pending final determination of the proceedings before the court of Palermo'* (emphasis in the original), in reliance on Article 29.

15. On 16 December 2019 the Palermo first instance court issued a certificate of *res judicata* in relation to the Order of 5 September 2019. That certificate is not in the appeal bundle, but the JSE final Report says that it stated (citing a provision of the Italian Civil Procedure Code on time limits) that *'…the ruling was final because it was not appealed within the terms provided by the law'* (para.4(f)). The Report added: *'Although it is known that the certificate does not form full evidence of the* res judicata, *it is also true that the clerk, before certifying that, has to carry out formal verifications and is subject to truth obligation'* (para. 7).

16. On 4 March 2020 the law firm filed an appeal from the 5 September 2019 first instance decision in Palermo. The appeal was given a case number (No.391/2020) and a first hearing was fixed for 25 September 2020, i.e. postdating the hearing before the Judge

in the London Claim (5 June 2020) and his subsequent Judgment handed down on 17 June 2020.

The JSE

17. The JSE, Avv. Damiano Peruzza, was asked to consider two questions relating to the Palermo Claim, namely as to (i) time limits for appeal and (ii) finality. These were: (i) *'Which time limit applies to appealing the decision of the Palermo Court dated 5 September 2019'*; and (ii) *'As a matter of Italian law and procedure, if such an appeal has not been filed within the time limit, is it regarded as final?'.*

18. In both his preliminary (30 April 2020) and final (14 May 2020) Report the JSE answered the two questions:

'The decision was subject to a time limit for lodging appeal of 30 days, running from the communication of the ruling by the clerk of the Court (5 September 2019) or at the latest from the knowledge of the ruling (surely obtained by the parties in November 2019, during the correction sub- proceeding). This brief time limit is set by Art. 702-quater c.p.c. as interpreted by the Supreme Court of Cassation, which confirms that the long time limit doesn't apply to this special proceeding';

and

'If a ruling is not appealed within the time limit set by the law, it is considered final, in which case the late appeal will be declared inadmissible by the Court of Appeal'.

19. The JSE also answered a number of questions from the law firm, arising from his preliminary Report. Relevant to this appeal, his answers acknowledged that the Palermo court documents showed that the appeal was filed with a case number; assigned to an identified Judge; and the first hearing scheduled for 25 September 2020. The JSE continued: *'The fact that the appeal proceeding was assigned to a Judge doesn't follow any preliminary evaluation by the Court of Appeal: if any appeal is filed, the Court has to decide upon it, even if it is not filed on time, in which case the Court will declare the appeal inadmissible.'*

20. In answer to the next question (*'Please state if you can categorically exclude the possibility that the Court of Appeal in Palermo will accept that appeal lodged by* [the law firm] *was filed and served on time?'*), the JSE replied: *'After an objective exam of the Law, it is my solid opinion that the Court of Appeal will declare the appeal lodged by* [the law firm] *to be not served on time and thus declare it inadmissible*'.

21. On 25 September 2020, the Palermo court of appeal adjourned the matter until 25 March 2022, i.e. postdating the appeal hearing before me. On 8 October 2020 the barrister applied to that court for the adjourned hearing to be brought forward to a date in 2021, but this was refused on the following day. This further information appears from the witness statement dated 18 January 2021 of the law firm's Italian lawyer. Permission to adduce this new evidence was granted by Martin Spencer J by his Order of 28 January 2021 which granted the renewed application for permission to appeal.

22. The decision of the Palermo court of appeal is awaited.

The Judgment of HH Judge Parfitt

23. The Judge stated that it was common ground between Counsel that, even where a court first seised had rejected jurisdiction, that rejection did not release the court second seised from its obligation to stay its own proceedings *'unless and until that decision has become final (i.e. in general terms until an appeal has been determined or time to appeal has passed)'*. The question in the case was *'what finality means in this context and the extent to which it requires this court to make findings about the procedural context of a foreign jurisdiction'* [4].

24. He also stated that it was common ground that the Article 29 requirement for the second seised court to stay its proceedings *'until such time as the jurisdiction of the court first seised is established…'* extended to circumstances *'where an in time appeal could be made or was duly made'* [33]. In support he cited the Court of Appeal in Moore, to be considered below.

25. On behalf of the law firm Ms Reid does not accept that it was common ground that such extension was limited to an 'in time' appeal, nor that Moore or the later decisions in Re M or Easygroup so decide.

26. The Judge summarised Ms Reid's essential argument as that: there is identity of subject matter and parties; the Italian court was first seised; there is an appeal outstanding in Palermo; therefore the London Claim must be stayed. There was no discretion to do otherwise; and this was all necessary to avoid the risk of irreconcilable judgements between the two jurisdictions: [32], also [2].

27. The Judge summarised the barrister's argument as dependent on the concept of the finality of the determination. Supported by the evidence of the JSE, the first instance decision of the Italian court became 'final' when the law firm failed to appeal it within *'the required 30 days'*; and that finality was demonstrated by its certificate of *res judicata*: [3].

28. Having recited Article 29 and described it as *'The starting point (and perhaps the end point)'*, the Judge turned to the decision in Moore. This concerned competing matrimonial proceedings in England and Spain; and where it was agreed by the experts in Spanish law that the time limit for appeal from a material order in the Spanish court (dated 15 March 2006) had expired: see at [101]. The Judge noted that the relevant passages in Moore concerned the predecessor instrument [1] and were obiter; but that neither party suggested that these did not represent the law.

29. His citation from Moore[2] included (emphasis supplied by the Judge):

> *'101…But the experts agree that it is too late to appeal from the order of 15 March 2006, and consequently the divorce proceedings cannot be the relevant proceedings for the purposes of Article 27 or 28.*
>
> *102 In view of our decision that the claim in Spain is not within Article 5.2 and that Brussels I is not engaged, it is not necessary to decide whether Article 27 of Brussels I applies where the court first seised has declared that it is without jurisdiction, but an*

[1] 'Brussels 1', Article 27.
[2] Thorpe LJ, with whom Lawrence Collins LJ and Munby J agreed.

appeal is pending. There are decided cases on the situation where the decision of the court first seised that it has jurisdiction is itself under appeal, such as William Grant & Sons International Ltd v. Marie-Brizard & Roger International SA, 1998 SE 536[3]. *In such a case it is clear that the court seised second should not exercise jurisdiction.*

103. The effect of an appeal from a decision by the court first seised that it has no jurisdiction does not appear to be settled by authority: cf *Dicey, Morris & Collins,* Conflict of Laws, *14th ed. 2006, paras 12-047, 12-062; Briggs and Rees,* Civil Jurisdiction and Judgments, *4th ed 2005, para 2.205. It is true that a judgment for the purposes of Brussels I is final even if an appeal is pending: e.g. Articles 37 and 46. But the object of Article 27 is to prevent irreconcilable judgments, and as a matter of policy it would be very odd if proceedings in the court second seised could continue even if on appeal the jurisdiction of the court first seised is established. Consequently, we consider (contrary to the view of the judge) that Article 27 applies until the proceedings in the court first seised are finally determined in relation to its jurisdiction. That would mean that the expression in Article 27.1 "until such time as the jurisdiction of the court first seised is established" should be interpreted to include the case where the court first seised has declared that it has no jurisdiction, but an appeal is pending against that decision and that it would be unsatisfactory for the matter to be dealt with through a discretionary stay in the court seised second.'*

30. In the light of that citation, the Judge disagreed with Ms Reid as to the essential question in the application: *'It is not whether or not an appeal is outstanding but whether or not the court first seised has made a final determination that it will not accept jurisdiction. In most cases those will come to the same thing but they are not necessarily the same. The statement in paragraph 101 of* Moore v Moore *that the rejected proceedings where time to appeal has passed* cannot be the relevant proceedings *illustrates my description of the question.'*: [35].

31. The Judge continued that this priority of *'the "final determination" question'* was clear from Moore at [103], i.e.: *'Article 27 applies until the proceedings in the court first seised are finally determined in relation to its jurisdiction'*. This was also apparent from a passage in the William Grant case cited in Moore: *'It follows therefore that since, as is agreed, the question of jurisdiction in Bordeaux is subject to appeal in the Court of Appeal of Bordeaux, and has therefore yet to be established, the appropriate course in this action is that it should be sisted meantime'*: per Lord Gill at [28] (emphasis supplied by the Judge).

32. The Judge then observed that no case had been cited to him which directly raised *'the problem in this claim'*, namely that *'…there is an appeal yet the SJE Report says that the Palermo court has finally determined the question of jurisdiction and that the time for appeal was 30 days not the 6 months implicitly asserted by the Defendant's appeal'*: [38].

33. He then turned to Briggs, Civil Jurisdiction and Judgments (6th ed. at 2.272), whose previous edition had been considered in Moore. This addressed the nature of the

[3] This report reference in Moore is incorrect. 1998 SC 536 is the judgment of Lord Hamilton, delivered 19 January 1998, in William Grant & Sons International Ltd v. Marie Brizard Espana SA. The cited passage is from the judgment of Lord Gill, delivered 16 May 1996, in William Grant & Sons International Ltd v. Marie Brizard et Roger International SA at [27-28], reported in [1997] I.L.Pr. 391.

problem, in particular where the author stated: *'Article 29 provides no immediate solution to the problems which may arise if one of the courts ceases to be seised…If the dismissal of the proceedings before the foreign court has come about through a successful challenge to its jurisdiction, the English court may proceed…This is the way Article 29 is designed to work…[Footnote 1555: This must mean a final challenge which is not subject to further appeal: decisions which are subject to appeal cannot be regarded as decisive in this context…]*. Further: *'… A court does not cease to be seised as soon as it rules that it has no jurisdiction if the losing party may still appeal and the appeal has not yet been determined [Footnote 1562 If the claimant indicates that he will not appeal, this point falls away]*. Further *'A court does not cease to be seised until the challenge to its jurisdiction is finally determined…*[An English example is given]…*It is only rational to accept that the English court remains seised at all times during the period in which an appeal may be lodged, without hiatus and until the final determination of the appeal or appeals…*': [39] (emphasis supplied by the Judge).

34. The Judge continued ([40-42)] that the necessary evaluation required the Court to have regard both to the nature of seisin in European law and to the procedural rules under Italian law. This was illustrated by The Alexandros T per Lord Clarke at [80]: *'I recognise of course that the concept of seisin is an autonomous European law device but Article 30 does not make express provision for the circumstances in which it ceases to be seised. In these circumstances, it seems to me to be appropriate for national courts to have regard both to the nature of seisin in European law and to their own procedural rules in deciding whether their courts are no longer seised of a particular set of proceedings.'*

35. Under the heading 'Discussion and Conclusion', the Judge made the following particular points. First, that for Article 29 purposes, seisin from the European law perspective is engaged to prevent the risk of irreconcilable judgments: see e.g. Recital 21 to the Regulation: [43].

36. Secondly, that the cited English authorities made plain that a decision rejecting jurisdiction was only to be treated as determinative once rights of appeal were exhausted: *'However, there is express support for the proposition that such rights will become irrelevant once time to appeal has passed (*Moore v Moore*) or if the Claimant has said he will not appeal (*Briggs*)*. He continued: *'In both those situations which it seems to me are illustrative not exhaustive, the right of appeal implicit in a decision of an inferior court extends the concept of finality to incorporate the due exercise of that right of appeal. This accords with the clear and effective mechanism for resolving* lis pendens *which gives primacy to the court first seised: let that court determine whether it accepts jurisdiction'*: [44].

37. The Judge then noted examples from English procedural rules where a final order might nevertheless be re-examined after the time to appeal had expired, e.g. by application for an extension of time or an application under CPR 52.30 to reopen the final determination of an appeal: *'These examples illustrate a general and unremarkable proposition that parties can make applications and a court on such an application could reverse a final order but such procedural possibility does not undermine the finality of that order until such time as it might be reversed'*: [45].

38. Thirdly, and in consequence, what mattered was *'whether or not the courts in Italy have finally determined that they are not seised of the Palermo claim'*; and 'final

determination' meant *'final for the purposes of Article 29 (i.e. bearing in mind the European and domestic elements)'*: [47].

39. In order to resolve that issue, the Court had to make findings about the proper procedure in Palermo. That issue of foreign law was a question of fact for the English court, to be proved by expert evidence: Dicey, Morris & Collins, 15th ed. Rule 25[4]. He was entitled to reject the JSE's conclusions but needed to give them due weight and consideration: [48]; see also at [42].

40. The JSE had given clear reasoned answers to the two questions posed. The Judge summarised that reasoning as:

'a. In general, the Italian procedural code allows for two time limits for appeal: 30 days and 6 months.

b. If a decision is not appealed within the appropriate time limit then it will be regarded as final.

c. The decision of 5 September 2019…was one to which the 30 days limit applied because the Defendant's proceedings were brought pursuant to Art. 702 of the Italian code which is designed to be a summary procedure. Art. 702 itself provides that the time to appeal shall be 30 days and that 30 days runs from the communication of the ruling to the parties.

d. This is consistent with the procedural aim of the Art 702 procedure which is designed to provide a speedier process and the Supreme Court of Cassation has confirmed this.

e. An irrelevant exception exists where there have been procedural failings which have deprived a litigant of the fair opportunity to participate in the proceedings.

f. The Palermo Court's issuing of the certificate of res judicata *was a declaration of finality which would not have been issued if the time to appeal had not ended. It is itself a declaration by the court that the determination is final*: [50].

41. The Judge then turned to the answers which the JSE had given to written questions from the law firm. He considered some of these questions to be irrelevant and noted that he had not been taken to any of the material during the hearing. The Judge focussed on the argument that the time for appeal was 6 months: [51]. He concluded that the JSE had addressed this argument comprehensively and that his answers were persuasive: see the detail in [52].

42. The Judge then dealt with a submission which Ms Reid had raised in respect of his draft judgment, namely that this misstated the JSE's evidence about the certificate of *res judicata* and had overlooked his statement that this *'…does not form full evidence of the* res judicata*'* (para.7). The Judge observed that the parties had asked no questions of the expert as to what that meant. His assumption was that it meant that the certificate would not be an absolute answer to any challenge to the first instance decision. Having referred to another passage in the JSE report he concluded that the res judicata certificate was *'declaratory and is confirmatory of the views taken by the expert albeit*

[4] 'Rule 25-(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.'

it is not conclusive. I have given it that status in this judgment based on the expert evidence.'

43. On the issue of 'final determination' the Judge concluded: *'In the light of the SJE Report I find for the purpose of determining the present application, that the time limit for appealing the 5 September 2019 decision of the Palermo Court was 30 days and that after that time the order is regarded as "final" under Italian procedural law. In respect of both findings these are supported by the SJE evidence and the certificate of* res judicata *issued by the Palermo Court*': [56].

44. As to the appeal in the Palermo Claim, lodged on 4 March 2020, the Judge rejected what he described as the implicit 'boot strap argument' that the existence of the appeal proved that the 6-month time limit applied: *'In truth the existence of the appeal tells this court only that the Defendant has issued the appeal – nothing about its procedural propriety'*: [57]. *'All the existence of the appeal proves is that the Defendant has made an application to the appeal court which has been categorised as an appeal. Of itself it does not establish that the proper time to appeal is 6 months but only (at best) that the Defendant's opinion or the opinion of its Italian lawyers, if different, is that the time to appeal should be 6 months.* [58]. *'I say "at best" because on the evidence before this court, the 6 month time to appeal in the Palermo Claim is only a theory supported by no proper evidence other than the fact of the appeal…The purpose of Article 29 and the summary procedures described by the expert in Italy include the efficient resolution of disputes. The Defendant's argument that all that is necessary is an "appeal" provides an easy means for defendants to undermine those efficiencies by issuing "appeals" in the jurisdiction first seised regardless of that court's due process requirements'* [59]; see also the Judge's adverse comments on the witness statement of the law firm's Italian lawyer Avv. Gravante: [27, 28].

45. Conversely, the Judge rejected the barrister's submission that he should make a finding that the Italian appeal court would reject the law firm's appeal on the basis, supported by the expert evidence, that it had been lodged out of time: *'I agree with the* [law firm] *that it is no part of this court's role under the Regulations to second guess or anticipate the decisions of the courts of other EC countries. Any attempt to do so would be an impermissible intervention into another court's competence'*: [60]. He refused *'…to speculate hypothetically as to the possible outcomes of that appeal and how it might impact the continuance or otherwise of the London Claim. However, I can point out and it is obvious, that the Italian court's ruling or rulings, including any possible further appeals, could change the factual premise of this judgment. The impact that might have remains speculative and for present purposes, it is beside the point':* [61].

46. He continued: *'In short, although the fact of an outstanding appeal against an order generally means that the court first seised had not made a final decision on its jurisdiction for Article 29 purposes, that is not the case on the evidence before me on this application. The Defendant's appeal based on the wrong time limit does not extend the seisin of the Italian courts beyond the rejection of jurisdiction in the 5 September 2019 order which became final once time to appeal expired, confirmed by the 16 December 2019* res judicata *certificate'*: [62].

47. The Judge summarised his conclusions as that: (a) the Article 29 question was whether or not the Italian court had come to a final decision rejecting jurisdiction; (b) for the English court that was a question of fact to be made in the light of the evidence; (c) on

the evidence the time limit for appeal from the Palermo decision of 5 September 2019 was 30 days; (d) *'On the evidence the Italian court regards its decision as final because it issued a certificate of* res judicata *to that effect on 16 December 2019, which was after the 30 day time limit and would not have been issued if the first instance court considered that the time to appeal was 6 months'*; (e) in the light of those findings of fact, the Italian court's decision was final for the purpose of Article 29; (f) it followed that the Court was not required to stay the London Claim: [63].

Further authorities

48. On reviewing this appeal before the hearing began, I asked the parties to consider the Court of Appeal decisions in Easygroup and Re M and the most recent (7th, 2021) edition of Briggs, Civil Jurisdiction and Judgments; also Tate v Allianz IARD SA [2020] EWHC 3327 (QB); [2021] R.T.R. 24.

49. As to Easygroup, this endorses, as part of its ratio, Moore at [103]: see per David Richards LJ[5] at [19] and [20]. The parties disagree as whether Easygroup also provides support for the proposition that rights of appeal are irrelevant once the time for lodging an appeal has passed.

50. In that case, the Defendant (a company incorporated in Cyprus) applied under Article 29 to stay proceedings brought by the Claimant in England; on the basis of its prior proceedings issued in Cyprus. The application failed at first instance on various grounds. By the time of the appeal to the Court of Appeal, the Cypriot court had struck out the proceedings in that jurisdiction; but an appeal had been lodged, in time, against that decision.

51. As the Court of Appeal stated: *'The immediate effect of the order made on 22 May 2018 was that there were no longer any proceedings pending before the Cypriot court. But, at that time, the defendants had the right to file an appeal against that order, which they did within the time permitted for doing so.'*: [17].

52. In these circumstances the Court held that *'…the Cypriot court remains seised of the Cypriot proceedings until the appeal against the order of 22 May 2018 is determined'*: [20]. In reaching that decision the Court of Appeal agreed with the obiter statements of the Court in Moore at [103]: see at [19].

53. The Court's reasoning also included the following: *'The effect of filing an appeal in these circumstances on the operation of article 29 is, in my judgment, a question of European law, not the national laws of member states. If it were the latter, the operation of article 29 could differ markedly according to the member state concerned, which would run counter to the objective of achieving "a clear and effective mechanism for resolving cases of lis pendens and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending": recital (21) to the Judgments Regulation. Recital (21) continues that for the purposes of the Regulation, the time when a case is pending "should be defined autonomously"'*: [18].

[5] with whom Lewison and King LJJ agreed.

54. Re M concerned concurrent family proceedings in Poland and England[6]. The mother issued custody proceedings in Poland on 2 June 2016. These were dismissed by a paper order on the basis that the court had no jurisdiction. The father subsequently issued proceedings in England. The mother then requested the Polish court, using the same case number, to set aside its previous refusal of jurisdiction. The application succeeded.

55. At first instance in the English proceedings, the judge held that the Polish court had lost seisin when the mother's original application was dismissed; and with the result that the English proceedings took precedence.

56. In allowing the appeal and holding that the Polish court had remained seised, the Court of Appeal cited Moore as authority for the proposition that *'This court has determined that, following a refusal of jurisdiction, seisin continues pending an appeal'*: [42]. Further, it held that this applied at least equally to an application to set aside an order refusing jurisdiction: *'In his second judgment, the judge also noted that there is no case that decides that a successful application to set aside a decision refusing jurisdiction restores seisin. For my part, I can see no reason why the decision of this court in* Moore*, should not apply equally, or indeed* a fortiori *(with stronger reason), to a regularly-constituted application to set aside as it does to an appeal'*: per Peter Jackson LJ[7] at [63].

57. The Court also emphasised the significance of the position under the domestic law of the Member State: *'As these are domestic proceedings, the answer is in all normal circumstances one that the domestic court is best placed to provide. Here, it is in my view of considerable significance that the Polish courts of first instance and of appeal considered that their seisin had continued uninterrupted since 2 June 2016… That was something to which the judge was obliged to give very considerable, and arguably decisive, weight.'*: [61].

58. In the latest edition of Briggs, Re M is cited in support of the statement, cited by the Judge from the previous edition, that *'It is only rational to accept that the English court remains seised at all times during the period in which an appeal may be lodged, without hiatus and until the final determination of the appeal or appeals on jurisdiction*' (emphasis supplied): para.18.12, p.342 and footnote 129. Further, Re M, Easygroup and Moore are all cited in support of the statement that *'A court does not cease to be seised as soon as it rules that it has no jurisdiction if the losing party may still appeal and the appeal has not yet been determined* [Footnote 128*: '…If the claimant indicates that he will not appeal, or abandons an appeal, this point falls away']'.*

Appellant's submissions

Ground 1: errors of law

59. This ground contends that the Judge erred in law in four respects. I shall take the first two together, as they substantially overlap.

Judge applied the wrong test/wrongly interpreted the case-law

[6] Brussels IIa: Council Regulation (EC) No 2201/2003

[7] with whom Hamblen and Moylan LJJ agreed.

60. The Judge wrongly interpreted Moore as limiting the extension of *lis pendens* under Article 29 to circumstances where an 'in time' appeal could be or had been duly made. The correct test was whether *'an appeal is pending against that decision'* (Moore at [103]; endorsed in Easygroup), not whether *'an in time appeal could be made or was duly made'* (Moore at [101]). Moore at [101] was no more than an observation that the order in question had not been appealed in time; as reflected in earlier passages of the judgment at [18] and [26].

61. Thus if an appeal against an order declining jurisdiction was pending in the court first seised, then the matter had not been finally determined and a stay must be granted by the court second seised. That was this case. An appeal was pending against the decision of the first instance court in Palermo which had declined jurisdiction.

62. The Judge's error was exemplified at [44]. His first sentence was correct: *'The English authorities cited above, make plain that a decision rejecting jurisdiction is only to be treated as determinative once rights of appeal are exhausted'.* His second sentence was wrong: *'However, there is express support for the proposition that such rights of appeal will become irrelevant once time to appeal has passed* (Moore v Moore) *or if the Claimant has said he will not appeal* (Briggs)*'.*

63. The decision of the Court of Session in William Grant also supported the proposition that seisin continued when an appeal was pending. Whilst that case concerned a pending appeal against a decision by the court first seised that it did have jurisdiction, its reasoning applied equally to a pending appeal against an order declining jurisdiction. It was not to be inferred from the report that the appeal in that case had been lodged 'in time'.

64. That there was a 'pending appeal' in the present case was further supported by the JSE's answer to one of the questions asked by the law firm, i.e. *'whether you are of the opinion that the power to declare its jurisdiction to deal with the* [law firm] *appeal (i.e. the power to decide whether the appeal was filed on time or not) belongs to the Court of Appeal or to the Court of First Instance'*. Having noted the filing, assignment and scheduled first hearing of *'the appeal',* the JSE responded: *'The fact that the appeal proceeding was assigned to a Judge doesn't follow any preliminary evaluation by the Court of Appeal: if any appeal is filed, the Court has to decide upon it, even if it is not filed on time, in which case the Court will declare the appeal inadmissible'.*

65. Further, the Judge had erred in making a finding about the time limit for appealing the first instance decision in Palermo. It was not for the English court to consider what the Italian appeal court might decide on that issue. The only question was whether there was a pending appeal against the first instance refusal of jurisdiction. The Judge had recognised this when accepting that it was *'…no part of this court's role under the Regulations to second guess or anticipate the decisions of the courts of other EC countries'* (para.60); yet he had done just that by making a finding that the time limit for appealing the first instance decision was 30 days: at [56]

66. As to Easygroup, its effect was limited to a binding endorsement of Moore at [103]. Conversely, it provided no support for the proposition that there could be no 'pending appeal' unless it had been lodged within time. The reference in Easygroup to the appeal in that case having been lodged in time [17] was no more than a reflection of the facts in that case.

67. As to Re M, Ms Reid acknowledged that there was nothing to suggest that the application to set aside the original order of the Polish court had been issued out of time. However the decision provided no support for the proposition that continued seisin was confined to 'in time' appeals: cf. Briggs 7th ed., footnote 129.

68. By contrast, Ms Reid pointed to the further statement in Briggs that *'For the sake of good order, and to protect the power of courts to rule properly and effectively upon their jurisdiction, an English court remains seised until the final determination of any appeals in the procedure which disputes the jurisdiction…'*: para.18.12, citing Moore. 'Good order' required that seisin continue when an appeal, whether made in or out of time, was pending in the court first seised.

Insufficient regard to the underlying rationale of avoidance of the risk of irreconcilable judgments

69. Whilst the Judge recognised that rationale at [43], he disregarded it in his conclusion at [61] that he *'refuse[d] to speculate hypothetically as to the possible outcomes of that appeal and how it might impact the continuance or otherwise of the London Claim'* and that such speculation was *'for present purposes…beside the point.'* This was made only more important by the fact that the appeal hearing listed for September 2020 was only a few months away.

70. As matters stood, the English court had made a decision and a finding that the correct time limit for the appeal in the Palermo proceedings was 30 days. That decision was a matter for the Italian courts alone; and the Judge's decision on the time limits duly gave rise to the risk of irreconcilable judgments.

Unjust weight to the certificate of res judicata

71. The JSE himself acknowledged that *'Although it is known that the certificate does not form full evidence of the res judicata, it is also true that the clerk, before certifying that, has to carry out formal verifications and is subject to truth obligation'*. In his draft judgment Judge had wrongly stated that *'The certificate of res judicata being the procedural manner in which the court first seized makes a formal declaration that it has finally determined that question'*. Upon further submissions being made that statement was removed; and the Judgment revised in terms that *'…the res judicata certificate is declaratory and is confirmatory of the views taken by the expert albeit is not conclusive. I have given it that status in this judgment based on the expert evidence.'*

72. That revision continued to give unjust weight to the certificate. The certificate did not bar a party from appealing the decision, nor mean that the question had been finally determined. If that were so, the appeal would not have been proceeding to a hearing in September 2020 nor to the next hearing on 25 March 2022.

Ground 2

73. This ground alleges that the Judge erred in fact, namely in placing unjust weight on the certificate of res judicata; and relies on the same reasons as advanced under the alleged error of law.

Ground 3

This ground alleges that the Judge erred in the exercise of his discretion. Article 29 provides that in the identified circumstances the court second seised *'shall of its own motion'* stay the proceedings. The Article did not grant any discretion to the Court. However the Judge had wrongly exercised discretion by refusing to stay the matter.

Discussion and conclusion

74. As a preliminary point, I should record that in his skeleton argument and Amended Respondent's Notice the barrister advanced a number of additional grounds to the effect that the law firm's pursuit of the Italian proceedings and associated reliance on Article 29 to seek a stay of the English proceedings constituted an abuse of process designed to frustrate his claim for fees; and so that the law firm's reliance on Article 29 should in any event be rejected on that basis and/or having regard to the provisions of s.3 Human Rights Act 1998. Having considered the authorities which make clear that the Regulation relies on 'mechanical tests'[8], he rightly did not press those arguments.

The correct question

75. In my judgment the Judge rightly held that the critical question for determination was whether the proceedings in the court first seised, i.e. the Palermo Claim, had been *'finally determined in relation to its jurisdiction'*. That is clear from Moore [103], as authoritatively confirmed in Easygroup [19-20].

76. Those authorities provide no support for the proposition that there is necessarily a *lis alibi pendens* where there is an outstanding appeal (or something called an appeal) and regardless of whether it was lodged in time; nor therefore for that to be the relevant question. The references in Moore [103] and Easygroup [19-20] to the position where *'an appeal is pending'* simply concern the resolution of the correct question (i.e. whether final determination) in that particular circumstance. Those words do not imply that they necessarily extend to an appeal (or purported appeal) which has not been lodged in time. If that were so, there would have been no reason for the Court in Moore to have noted the agreed expert evidence that it was *'too late to appeal'* the relevant order [101], nor for the Court in Easygroup to have emphasised that the relevant appeal had been filed *'within the time permitted for doing so'* [17]. I do not accept that these observations can be explained as mere passing statements of immaterial fact.

77. Re M and William Grant take matters no further. The short statement in Re M, that *'This court has determined that, following a refusal of jurisdiction, seisin continues pending an appeal'* [42] simply reflects Moore at [103]. Further, its application of Moore to a *'regularly-constituted application to set aside'* [63; emphasis supplied] runs counter to any implication that *'pending an appeal'* necessarily includes one that has been presented out of time. As to William Grant, there is equally no such implication from the words *'the question of jurisdiction in Bordeaux is subject to appeal'*; nor any basis to infer that the appeal in that case may have been brought out of time.

[8] see paragraph [8] above

78. Accordingly, as the Judge correctly stated, the question *'…is not whether or not an appeal is outstanding but whether or not the court first seised has made a final determination that it will not accept jurisdiction'* [35].

Answering the correct question

79. For the purpose of answering that question, there is no dispute that the concept of *lis alibi pendens* in Article 29 has an independent and autonomous meaning under European law: Gubisch; The Alexandros T.

80. However, as the Judge correctly held by reference to Supreme Court authority, in circumstances where the Article does not make express provision for the circumstances in which the court ceases to be seised, it is also appropriate to take account of the procedural rules in the particular jurisdiction: The Alexandros T per Lord Clarke at [80]; for another example, see Moore which records the agreed evidence of the Spanish law experts that the time for appealing the relevant order of the Spanish court had expired: [101].

81. In consequence, and with the consent of both parties, the Court in the present case appointed the JSE to provide his Report on the two identified questions of Italian procedural law. Whilst the law firm sought to challenge the conclusions of the JSE, there was no suggestion that the evidence was inadmissible.

82. In these circumstances it is unsurprising that the present appeal does not directly challenge the admissibility of the evidence of the JSE. However, as Ms Reid acknowledged in argument, the effect of the principal ground of appeal is to contend that those questions were irrelevant and inadmissible.

83. In my judgment the evidence was rightly admitted. First, because the parties agreed to that course. Secondly because that course accords with authority and practice. As to authority, I should add that I do not consider paragraph [18] of Easygroup to be in conflict with the proposition that such evidence is admissible, nor did Ms Reid so argue. Consistently with the authorities cited above, that paragraph in effect restates the general proposition that *lis alibi pendens* under Article 29 is a question of autonomous European law. However, for the reasons identified in The Alexandros T and as exemplified in Moore, that does not preclude consideration of evidence of domestic procedural law, in the present case Italian procedural law.

84. In accordance with Dicey rule 25, the issues of Italian law were questions of fact for the Judge to determine, as he rightly stated [42]. Having considered the JSE Report and the various challenges thereto, the Judge accepted the expert evidence and concluded that there had been a final determination as to the jurisdiction of the Italian court.

85. In doing so the Judge was not wrong to make a finding as to the relevant time limit for appeal under Italian law. That was a question of fact for him to determine, as part of the decision on the issue of 'final determination'; and was based on the expert evidence of the JSE. By important contrast, he rightly rejected the barrister's invitation to make a finding as to what the Italian appeal court would decide on that issue: [60].

86. Further, and contrary to Ms Reid's submissions, the Judge did not rest his decision on the proposition that there could be no *lis alibi pendens* if an 'appeal' against a decision

declining jurisdiction had been lodged outside the time for appeal. Whilst stating that Moore provided express support for the proposition that rights of appeal become irrelevant once the time for appeal had passed, his decision was solely based on the issue of 'final determination': see in particular at [35-37], [41-42], [47-48], [62] and the conclusions at [63]. That was the correct question.

87. In these circumstances I consider it both unnecessary and inappropriate to determine whether rights of appeal necessarily become irrelevant once the relevant time limit has passed. To do so risks confusion with the correct question. Sufficient to say, in agreement with the Judge, that the two questions *'In most cases…will come to the same thing but they are not necessarily the same'* [35].

Risk of irreconcilable judgments

88. In reaching his decision, the Judge also made no error in respect of the risk of irreconcilable judgments. He took appropriate account of this underlying rationale of Article 29, but rightly understood that his task was to decide, on the evidence before him, whether there had been a final determination of the issue of jurisdiction in the Italian court; and rightly stated that it was not appropriate for him to speculate on the possible outcome of the appeal in Palermo and its consequent effect upon the London Claim.

89. The deeper purpose of the avoidance of inconsistent judgments is to preclude so far as possible, the non-recognition of a judgment on the ground that it is irreconcilable with a judgment given by the court of another Member State: The Alexandros T at [27]. In my judgment there was no such risk in circumstances where (i) the only result of the Judgment was an order that the London Claim should not be stayed and (ii) in making that decision the Judge expressly rejected the barrister's submission that he should make a finding that the Italian appeal court would reject the appeal on the basis that it had been lodged out of time.

90. In addition, it is important not to confuse the application of the *lis alibi pendens* rules in a particular case with their rationale. As the Supreme Court observed in AMT Futures Ltd v. Marzillier [2017] UKSC 13; [2018] A.C. 439, where the issue was whether the English court had jurisdiction to hear a claim in tort, *'To invoke a special ground of jurisdiction the claimant must prove itself within that ground…A claimant cannot establish jurisdiction under the Judgments Regulation by merely invoking the justification or rationale of the ground'* [29]: see the application of this observation in the Article 29 case of Tate at [60-61].

Certificate of res judicata

91. I do not accept that the Judge made an error of law on the issue of the certificate of the court in Palermo and res judicata. First, the questions of Italian procedural law were questions of fact for the Judge to determine. Secondly, there was no error, e.g. perversity, in the Judge's approach to that piece of evidence. Following receipt of the draft judgment, Ms Reid properly reminded the Judge of the relevant passage in the JSE report and the Judge properly took account of that in his revised and final judgment. He correctly recorded the JSE's evidence both that the certificate was not conclusive and that there had been a final determination of the jurisdictional issue. The Judge properly took that into account in his finding of fact on the Italian procedural law.

Ground 2

92. For the same essential reasons, I see no error of fact in the Judge's approach to the evidence of the certificate of res judicata. On the contrary, the JSE evidence justified the Judge's observations that it provided further support for the conclusion that the jurisdictional issue in the Palermo Claim had been finally determined.

Ground 3

93. The issue which faced the Judge under Article 29 did not involve the exercise of a discretion. Rather the Judge had to decide the question which he correctly identified, namely whether there had been a final determination of the jurisdictional issue in the Palermo Claim. Having correctly decided that the answer to that question was in the affirmative, the condition under Article 29 for stay of the proceedings was not satisfied. Accordingly I see no basis for this ground of challenge.

94. For all these reasons, expressed with greater concision in his impressive Judgment, I conclude that the Judge's refusal to stay this action was correct and that the appeal must be dismissed.