Neutral Citation Number: [2024] EWCA Civ 45

Case No: CA-2023-000033

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Tom Leech QC (sitting as a Deputy High Court Judge)
[2021] EWHC 308 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2024

Before:

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE NUGEE

- -

Between:

DOCKLOCK LIMITED	**Claimant/ Appellant**
- and -	
C CHRISTO & CO LIMITED	**Defendant/ Respondent**

- -
- -

Daniel Lightman KC and Reuben Comiskey (instructed by **Herrington Carmichael LLP**) for the **Appellant**
Paul Letman and Kavish Shah (instructed by **Edesia Law**) for the **Respondent**

Hearing date: 17 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 31 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This appeal involves a challenge to the sum which Mr Tom Leech QC (as he then was) ("the Judge"), sitting as a Deputy High Court Judge, found due to the appellant, Docklock Limited ("Docklock"), from the respondent, C Christo & Co Limited ("Christo"), on the taking of an account.

Basic facts

2. The present litigation is a sequel to divorce proceedings between Chris Christoforou ("Mr Christoforou") and Ibtissam Christoforou ("Mrs Christoforou"). On 4 June 2014, Mrs Christoforou issued a divorce petition which was served on her then husband on 19 October 2014. A decree nisi was granted on 3 February 2015, and ancillary relief proceedings were the subject of a final order made by Moylan LJ on 15 May 2017 ("the Moylan Order"). As was explained in paragraph 15(a) of that order, it was designed to achieve "an essentially equal division" of the parties' assets and a "clean break".

3. Under the terms of the Moylan Order, Mrs Christoforou became the sole owner of Docklock. Mr and Mrs Christoforou had hitherto each held 50% of Docklock's shares. Christo has always been, and remains, wholly owned by Mr Christoforou.

4. Docklock is a property company with a portfolio comprising a substantial number of residential and commercial properties. Christo is a property management company which, among other things, formerly managed Docklock's properties. In that capacity, it both received rents from Docklock's tenants and made payments on its behalf. Its role as Docklock's managing agent came to an end, however, on 19 September 2016.

5. In a judgment dated 19 January 2017, Moylan LJ (as he was to become in March 2017) considered whether the ancillary relief order that he was to make should contain a provision allowing Docklock to pursue a claim which it was said to have against Christo. As Moylan LJ explained, it was envisaged that his order would, in general, be in full and final satisfaction of all claims that family companies had against each other, but Mrs Christoforou argued that there should be an exception allowing Docklock to recover rental income for which, Mrs Christoforou alleged, Christo had failed to account to it. Moylan LJ noted that, while all other family companies had been valued for the purposes of the proceedings before him, Christo "had not been ascribed a value in the asset schedule on the basis that it was not a company which had any independent value".

6. Moylan LJ concluded that it was appropriate for his order to include an exclusion along the lines proposed by Mrs Christoforou. He said in paragraph 11 of his judgment:

> "If Christo & Co. has retained cash, which should have been accounted for to the companies, this does not feature anywhere in the balance sheet or asset schedule whereas it would have featured in the asset schedule if the monies had been accounted for. It is a discrete issue. There is an element of, in my view, broad justice and I am not persuaded that to separate out this issue is unfair because the parties might otherwise have

> retained or received an unequal share of the rental income derived from the overall property portfolio in the period …."

7. The exception was subsequently embodied in paragraph 19 of the Moylan Order. This stated:

> "Furthermore, the parties agree that save in respect of the potential claims listed in subparagraphs a, b, and c below, save as otherwise provided elsewhere in this order, this order together with the Mutual Waiver Agreement is intended to be in full and final satisfaction of all and any claims in England and Wales and any other jurisdiction:
>
> i. that the companies have against each other;
>
> ii. that the parties have against the companies; and
>
> iii. that the companies have against the parties ….
>
> The only exceptions to this are the following civil claims at subparagraphs a. and b. and the exception at subparagraph c.:
>
> a. any claim or counterclaim by any of [Mrs Christoforou's] companies against Christo & Co and/or [Mr Christoforou] in respect of any monies received by Christo & Co as agent for any of [Mrs Christoforou's] companies in respect of the period beginning 1 October 2014 and ending on 1 September 2016 for which it is asserted that [Mr Christoforou] and/or Christo & Co has not duly accounted to and/or has not paid over to that company, including in respect of rent;
>
> b. any claim or counterclaim by Christo & Co against any of [Mrs Christoforou's] companies in respect of management fees for the period beginning 1 October 2014 up to 1 September 2016 which Christo & Co asserts are owing to it (it being recorded that in the event that such claim or counterclaim is made, Docklock is not prevented from raising, as a set off, any occupation charge for Christo & Co's occupation of 66-70 Parkway beginning 1 October 2014 up to 1 September 2016.
>
> c. any claim for breach of this order."

8. Docklock was one of Mrs Christoforou's companies for the purposes of the Moylan Order. As for the "Mutual Waiver Agreement" to which there was reference in paragraph 19 of the Moylan Order, this was to be executed by the various companies affected as well as by Mr and Mrs Christoforou. That was achieved by a "Waiver of Claims and Indemnity Agreement" ("the WCIA") dated 26 October 2017, the parties

to which included both Docklock and Christo. Paragraph 1 of the WCIA provided for "Betty's Companies" (of which Docklock was one) to waive all claims they might have against "Chris' Companies" (of which Christo was one) arising out of the dealings between them to date. That, however, was qualified in paragraph 2, which stated:

> "The only exceptions to the waiver and full and final settlement of claims set out at paragraph 1 above are:
>
> a. any claim or counterclaim by any of Betty's Companies against Christo & Co and/or Chris in respect of any monies received by Christo & Co as agent for any of Betty's Companies in respect of the period beginning 1 October 2014 for which it is asserted that Chris and/or Christo & Co has not duly accounted to that company, including in respect of rent;
>
> b. any claim or counterclaim by Christo & Co against any of Betty's Companies in respect of management fees for the period beginning 1 October 2014 which Christo & Co asserts are owing to it;
>
> c. in the event only that any such claim or counterclaim is made as referred to at b. above, any claim or counterclaim by Docklock against Christo & Co in respect of the latter's occupation of 66-70 Parkway up to 1 September 2016;
>
> d. any claim under any of the indemnities set out at paragraphs 4 to 7 below; and
>
> e. any claim in respect of any rights granted by, or for breach of, the Order."

Further, paragraph 3 of the WCIA provided:

> "For the avoidance of doubt, the provisions of paragraphs 1 and 2 hereof shall not prevent Betty, Chris or any of the Companies from raising any set-off (whether legal or equitable), including but not limited to (by way of set-off to any claim made by Christo & Co against Docklock for management fees) any occupation charge for Christo & Co's occupation of 66-70 Parkway, in the event that any of the claims or counterclaims identified at paragraphs 2(a), 2(b) and 2(c) above are made."

9. The present proceedings were issued on 8 June 2018. By them, Docklock claimed, among other things, an account of all sums received by Christo on its behalf between 1 October 2014 and 1 September 2016 and payment of the balance after proper deductions. On 17 May 2019, Deputy Master Smith ("the Master") ordered Christo to make an interim payment to Docklock of £75,801.62. There followed a trial before the Judge extending over some nine days in December 2020 and January 2021. The Judge gave judgment ("the Judgment") on 19 February 2021. After a minor

adjustment explained in a further judgment dated 26 May 2021, the Judge concluded that Christo had received rental income totalling £3,268,421.29 in the period between 1 October 2014 and 1 September 2016 ("the Relevant Period") and that disbursements and charges totalling £2,901,393.49 fell to be deducted. On that basis, he found that, after subtracting the £75,801.62 (i.e. £75,000 plus interest) which had been paid pursuant to the Master's order, the sum due to Docklock from Christo on the taking of the account was £291,226.18.

10. The Judge had to address numerous issues in the Judgment. This appeal is of very limited scope. To a great extent, the Judgment is not the subject of any challenge.

11. The section of the Judgment which most matters in the context of the present appeal is that in which the Judge considered the "Sitting Balance". He concluded in this that, as at 1 October 2014 (i.e. the beginning of the Relevant Period), Christo held £134,118.72 for Docklock. He then proceeded to consider a contention advanced on behalf of Docklock to the effect that certain sums paid by Christo after 1 October 2014 "should be treated as paid out of the Sitting Balance first before they were paid out of any of the income received by Christo during the Relevant Period": see paragraph 57 of the Judgment. More specifically, it was submitted that three payments which Christo made in October 2014 "exhausted the Sitting Balance and should not, therefore, be treated as disbursements (save to the extent that they exceeded it)": see paragraph 58. The argument was founded on "the principle that in the case of a running account, payments are to be appropriated on a 'first in first out' basis unless some alternative position had been agreed", in accordance with *Clayton's Case* (1816) 1 Mer 585, *Cory Brothers & Co Ltd v Owners of the Turkish Steamship "The Mecca"* [1897] AC 286 ("*The Mecca*") and *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22. The disbursements at issue ("the October Disbursements") comprised a payment in respect of VAT of £31,854.96 on 7 October 2014, a payment to Docklock of £80,000 on 8 October 2014 and a payment to Docklock of £50,000 on 24 October 2014.

12. The Judge was not persuaded. He said this:

> "61. I accept [counsel for Christo's] submission and reject [counsel for Docklock's] argument. It assumes that the balance of £134,118.72 'sitting' in Christo's client account on 1 October 2014 still belonged to Docklock after the Moylan Order and the WCIA. However, in clause 1(c) of the WCIA Docklock agreed to waive any right of action to claim or recover that sum. The exception carved out in clause 2(a) extended only to 'any monies received by Christo & Co as agent for any of Betty's Companies in respect of the period beginning 1 October 2014'. This did not include any sums received before that date but still held by Christo. If the parties had intended to preserve such a claim they would have expressly done so in clause 2.
>
> 62. I was initially attracted to the way in which [counsel for Docklock] put his case in closing …. But on analysis, it did not meet [counsel for Christo's] point.

> The principle in *Clayton's* case applies where there is a running account between the parties (such as a bank account). But it is implicit in the passage from the *Mecca* (above) that the agent or bank must have a continuing duty to account to the principal or account-holder. But after the Moylan Order and the WCIA, Docklock had no right of action to claim or recover the Sitting Balance and Christo had no duty to account for it. Moreover, the exception in clause 2(a) was limited to monies received by Christo but for which it had not 'duly accounted to' Docklock.
>
> 63. The position might have been different if there had been an express appropriation of the Sitting Balance to individual disbursements and Christo had been prevented from asserting a claim to it either by contract or by estoppel. But [counsel for Docklock] did not go that far. I find, therefore, that Docklock was not entitled to deduct it from the transfers made by Christo."

The appeal

13. Docklock appeals on two grounds. The second concerns a deduction of £64,127 in respect of "staff salaries", but, as was explained by Mr Daniel Lightman KC, who appeared for Docklock with Mr Reuben Comiskey, it is pursued only if the other ground of appeal fails. That latter ground relates to the October Disbursements.

14. In that regard, Docklock's case is essentially on the following lines. As a result of the Moylan Order and the WCIA, Docklock cannot bring any claim against Christo for rents received before 1 October 2014. It is not doing so, however. Its claim relates exclusively to receipts from 1 October 2014. The question is whether Christo can set against those sums the amounts of the October Disbursements. It cannot do so because there was a running account between Docklock and Christo pursuant to which the October Disbursements were appropriated to what Christo owed on 1 October 2014. The result is that, while £134,118.72 was due to Docklock on 1 October 2014 in respect of rents which Christo had received by that date, nothing at all was due to Docklock in respect of pre-October 2014 receipts by the date of the Moylan Order (or even by, say, 1 November 2014). The fact that the Moylan Order and the WCIA might have barred Docklock from asserting any claim it might by then have had to recover pre-October 2014 rents is thus of no significance: it had long since ceased to have any such claim. It also follows, so it is said, that the Judge was mistaken in giving Christo credit for the October Disbursements; they had served to extinguish the pre-October 2014 liability and so were not available to be set against the liability arising from receipts after 1 October 2014.

Running accounts

15. In *Clayton's Case*, Sir William Grant MR explained at 608 that in the case of a banking account:

> "all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of the £500 paid in on Monday, and this other to the account of the £500 paid in on Tuesday. There is a fund of £1000 to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other."

16. The principle is not limited to banking accounts, but applies to running accounts generally. In *W H Smith Travel Holdings Ltd v Twentieth Century Fox Home Entertainment Ltd* [2015] EWCA Civ 1188, Kitchin LJ noted in paragraph 34 that "[t]ransactions between two parties may be recorded in a running account in a great variety of relationships but it is a characteristic of them all that the parties have expressly or impliedly agreed that the monetary outcome of each transaction shall not be settled separately". In *Airservices Australia v Ferrier* (1996) 185 CLR 483, Dawson, Gaudron and McHugh JJ, giving the judgment of the majority of the High Court of Australia, explained at 505 in a passage which Kitchin LJ quoted:

> "A running account between traders is merely another name for an active account running from day to day as opposed to an account where further debits are not contemplated. The essential feature of a running account is that it predicates a continuing relationship of debtor and creditor with an expectation that further debits and credits will be recorded. Ordinarily, a payment, although often matching an earlier debit, is credited against the balance owing in the account. Thus, a running account is contrasted with an account where the expectation is that the next entry will be a credit entry that will close the account by recording the payment of the debt or by transferring the debt to the Bad or Doubtful Debt A/c."

Christo's position

17. Mr Paul Letman, who appeared for Christo with Mr Kavish Shah, rightly accepted that Docklock and Christo had operated a running account. That that was the case is borne out by the way in which Christo would prepare quarterly "Rental Income and Expenditure Statements" ("RIESs") for Docklock. These did not attempt to link particular payments to specific receipts, but rather showed overall balances after taking account of total receipts and disbursements.

18. The October Disbursements were shown in the RIES for the third quarter of 2014. The RIES was described as being for the period from 1 July 2014 to 30 September 2014, but it was not prepared until 12 November 2014 and it evidently took account of receipts and disbursements after 30 September 2014. The October Disbursements

were all included in the calculation of the balance to be carried forward to the next RIES.

19. Mr Letman did not dispute that, on the basis of the running account which then existed between the parties, the £134,118.72 which Christo owed to Docklock on 1 October 2014 would *at the time* have been deemed to have been discharged by the end of October as a result of the payments that month of £31,854.96, £80,000 and £50,000 (i.e. the October Disbursements). Supporting the Judge's decision, however, Mr Letman argued that Christo had nevertheless been entitled to credit for these sums in the context of the account which the Judge took. Docklock was in substance making a claim in respect of the £134,118.72 which had been owed to it on 1 October 2014, but Docklock had foregone any such claim under the terms of the Moylan Order and the WCIA. On a proper interpretation of the Moylan Order, the account to be taken pursuant to the exception to paragraph 19 of that order was not a running account or, at least, not one extending from earlier than 1 October 2014. The Judge's task, Mr Letman maintained, was to take an account of the claims, counterclaims and set-off for the Relevant Period which Moylan LJ had sanctioned. That conclusion is, moreover, so Mr Letman said, consistent with the approach which the Master adopted when ordering the interim payment.

The implications of the Moylan Order and the WCIA

20. The Moylan Order and the WCIA were both central to Mr Letman's submissions and crucial to the Judge's decision as regards the October Disbursements. The Judge said that Docklock's argument "assumes that the balance of £134,118.72 'sitting' in Christo's client account on 1 October 2014 still belonged to Docklock *after the Moylan Order and the WCIA*" even though "*in clause 1(c) of the WCIA* Docklock agreed to waive any right of action to claim or recover that sum" and that, "*after the Moylan Order and the WCIA*, Docklock had no right of action to claim or recover the Sitting Balance and Christo had no duty to account for it" (emphasis added in each case).

21. While, however, the Moylan Order and the WCIA prevented Docklock from making any claim for rent which Christo received before 1 October 2014, I do not myself think that that matters. Docklock had ceased to have any such claim long before the Moylan Order was made. Christo owed Docklock £134,118.72 in respect of rent on 1 October 2014, but, since there was a running account between the parties, that liability was quickly discharged as a result of the October Disbursements. On the "first in, first out" basis implied by the running account, those payments will have been appropriated to discharging the pre-October indebtedness. By the time the Moylan Order came to be made, accordingly, Christo's liability to Docklock derived entirely from rents which it had received after 1 October 2014. Docklock cannot have waived any claim in respect of pre-October rents or the £134,118.72 because it no longer had any such claim.

22. The approach espoused by Mr Letman would, I think, involve retrospectively undoing the appropriation of the October Disbursements to the £134,118.72 which will have taken place well before the date of the Moylan Order. Nothing in either the Moylan Order or the WCIA seems to me to justify that. Under the terms of the Moylan Order and the WCIA, Docklock remained entitled to bring any claim against Christo "in respect of any monies received" by it as agent for Docklock where it is asserted that

Christo "has not duly accounted to and/ or has not paid over to [Docklock], including in respect of rent". There was no reference to payments by Christo being reallocated; to reviving a claim in respect of pre-October rent which already been discharged; or to an account being taken on the footing that Christo was entitled to credit for sums it had paid in the Relevant Period regardless of whether they would otherwise have been considered to have cleared prior debt. The Moylan Order and the WCIA simply permitted Docklock to pursue whatever claim against Christo it might then have in respect of rents received between 1 October 2014 and 1 September 2016 for which Christo had not duly accounted. As it happens, the £134,118.72 which had been owed on 1 October 2014 had been satisfied by the October Disbursements so the whole of Docklock's claim was in respect of rents received after 1 October 2014. Christo was entitled to credit to the extent that it had accounted for such rent, but neither the Moylan Order nor the WCIA said anything indicating that Christo should be able to rely on payments which had already been appropriated to earlier indebtedness.

23. In the circumstances, I do not, with respect, agree with the Judge that Docklock's case "assumes that the balance of £134,118.72 'sitting' in Christo's client account on 1 October 2014 still belonged to Docklock after the Moylan Order and the WCIA". Docklock's claim does not depend on such an assumption, but wholly relates to rent which Christo received after 1 October 2014. Christo is entitled to credit to the extent that it accounted for such rent, but it cannot claim to have accounted on the strength of payments which had already served to discharge the £134,118.72 indebtedness.

The Master's judgment

24. As I have indicated, Mr Letman also sought support for his case in the Master's judgment of 17 May 2019. Christo had argued before the Master that paragraph 3 of the WCIA allowed it to set off management fees which related to a period other than the Relevant Period. The Master, however, decided otherwise. The Master said in paragraph 39 of his judgment:

> "Paragraph 19 of [the Moylan] Order (and clause 2 of the [WCIA]) intended to limit the recoverability of rents, management charges and occupation charges to the period 1.10.14 to 1.9.16. It cannot have been intended that the parties should be able to recover rents, management charges and occupation charges outside that period by the back door under clause 3. Therefore the reference to 'any set-off' in clause 3 cannot include rents, managements fees and an occupation charge outside the period 1.10.14 to 1.9.16."

"Permitting [Christo] to claim pre-October 2014 management could", the Master observed, "open up areas of dispute which Moylan J meant to close off, and cannot have intended."

25. Mr Letman argued that the Master's conclusions were consistent with his contention that the focus should be exclusively on the Relevant Period and, hence, that the Judge had been right to give Christo credit for the October Disbursements, which were made during that period. However, there is no inconsistency between the Master's decision and the case advanced by Docklock on this appeal. The Master's reasoning reflects the fact that paragraph 19 of the Moylan Order and paragraph 2 of the WCIA

expressly imposed time limits on claims for rent, management fees and occupation charge. In contrast, nothing is said in either the Moylan Order or the WCIA as to the period to be considered when assessing the extent to which Christo has accounted for rent, and there is no question of the Master having purported to define what payments made between 1 October 2014 and 1 September 2016 should be taken into account when determining the extent to which Christo had accounted for rent received in that period, let alone to rule on whether Christo should have credit for every payment it had made during the period.

26. In the circumstances, I do not think the Master's judgment assists Christo. In my view, Christo was not entitled to credit for the October Disbursements.

The second ground of appeal

27. My conclusions on the first ground of appeal make it unnecessary to consider the second ground of appeal.

Conclusion

28. I would allow the appeal. The Judge was, as it seems to me, mistaken in giving Christo credit for the October Disbursements except to the extent that they exceeded the £134,118.72 which Christo had owed Docklock on 1 October 2014. That being so, I would hold that the sum found due on the taking of the account should have been £425,344.90 rather than £291,226.18 and would vary paragraph 1 of the Judge's order dated 30 January 2023 accordingly.

Lord Justice Nugee:

29. I agree.

Lord Justice Lewison:

30. I also agree.