Neutral Citation Number: [2021] EWHC 308 (Ch)

Case No: BL-2018-001310

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CH D)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 February 2021

Before :

Tom Leech QC (sitting as a Judge of the Chancery Division)

- -

Between :

DOCKLOCK LIMITED	**Claimant**
-- and –	
C CHRISTO & CO LIMITED	**Defendant**

- -

14-21 December 2020 and 4 January 2021

- -

Mr Reuben Comiskey (instructed by **Boyes Turner LLP**) for the **Claimant**
Mr Paul Letman and **Mr Kavish Shah** (instructed by **Carter Perry Bailey LLP**) for the **Defendant**

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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.

Tom Leech QC:

I. The Parties

1. This is the trial of a claim for an account which follows the conclusion of divorce proceedings between Mr Christakis Christoforou and his former wife Ms Ibtissam Christoforou. Those proceedings were resolved by an order made on 15 May 2017 (the "**Moylan Order**") and a settlement agreement described as the Waiver of Claims and Indemnity Agreement dated 26 October 2017 (the "**WCIA**"). In this judgment I will refer to Mr Christoforou as "**Chris**" and the former Mrs Christoforou as "**Betty**". I will also refer to their second son, Mr Nicholas Christoforou, who gave evidence, as "**Nicholas**". Counsel referred to them in this way both orally and in writing and I adopt the same terms.

2. The Claimant, Docklock Ltd ("**Docklock**"), is a property company which owns a substantial number of residential and commercial properties. The residential properties are let on assured shorthold tenancies and the commercial properties on commercial leases at a rack rental. Nicholas's evidence was that the value of Docklock's property assets was upwards of £30m and that it owned 14 freehold properties with 45 residential flats and 7 commercial tenancies consisting of both office accommodation and retail. Chris also described Docklock as "the jewel in the crown".

3. On 1 July 1985 Docklock was incorporated and it is common ground that Chris and Betty each owned 50% of the issued share capital of Docklock until the date of the Moylan Order. During the divorce proceedings a number of issues appear to have been raised about the ownership of the shares in Docklock but these were ultimately resolved by the Moylan Order and were not relevant to any of the issues which the Court had to decide in this action.

4. On 23 June 1986 Chris was appointed to be a director together with his father, Mr Panayiotis Christoforou. On 1 November 1987 Panayiotis resigned and on 23 November 1987 Betty was appointed to be a director in his place. On 2 March 2010 Nicholas was also appointed to be a director and immediately afterwards, on 3 March 2010, Chris then resigned as a director. It is common

ground that since 3 March 2010 Betty and Nicholas have been the two directors of Docklock.

5. The Defendant, C Christo & Co Ltd ("**Christo**"), is a property management company. In 1985 Chris started trading as "Christo & Co" and in 2010 he transferred his business to Christo. It is common ground that after incorporation he was the sole director and legal and beneficial owner of the entire issued share capital of Christo and that Betty was the company secretary. On 1 April 2009 Chris resigned as a director and Nicholas was appointed to be a director. On 29 November 2010 Chris was appointed to be a director again. It is also common ground that both Nicholas and Betty were removed as director and secretary respectively following service of the divorce petition.

6. Christo occupies premises on the Ground Floor and part of the First Floor at 66-70 Parkway London NW1 7AH ("**66-70 Parkway**"), which was originally owned by Docklock and then by Counterclaim Ltd ("**Counterclaim**"). Where I refer to 66-70 Parkway below I refer either to the premises occupied by Christo or, depending on the context, the whole building.

7. It is common ground that once the sale had taken place Docklock retained no interest in 66-70 Parkway. It is also common ground that before the sale Christo had no formal written lease or licence of 66-70 Parkway. At one stage of the divorce proceedings there had been an issue whether Christo had rights of occupation protected under the Landlord and Tenant Act 1954 (the "**1954 Act**"). Although the parties called expert evidence in relation to the letting value of 66-70 Parkway, it was unnecessary for me to resolve the terms on which Christo occupied the premises.

8. Christo managed Docklock's property portfolio for many years until about 23 September 2016. This action is concerned with the 23 month period from 1 October 2014 to 1 September 2016 to which I will refer as the "**Relevant Period**". Mr Mark Forrester was Christo's Head of Property Management Services for over 34 years until he left the business in 2020. He and a team of five members of staff were responsible for managing Docklock's properties.

Mr Eamonn Comerford was one of those staff members and Mr Deepak Thapa was Christo's internal accountant. He was referred to in a number of memos as "**Deepak**" and I refer to him in the same way.

II. General Background

9. On 4 June 2014 Betty issued a divorce petition against Chris. The petition was not served until 19 October 2019 and before serving the petition Betty obtained both non-molestation and occupation orders against Chris on a without notice basis, which excluded him from the matrimonial home. On 23 October 2014 the parties reached an agreement which was intended "to hold the ring as the divorce matrimonial proceedings got underway" (as Roberts J described it in a judgment handed down on 30 September 2015).

10. It was common ground that the final version of the agreement was not concluded for some time but it was also common ground that it was intended to take effect immediately. Clauses 1 to 4 dealt with the payment of substantial funds into a new account at the Berenberg Bank in Switzerland and provided for the legal costs of both parties to be funded from that account. Clause 7 provided that Chris would maintain the status quo in relation to Betty's funding of her day-to-day living expenses and clause 9 provided as follows:

> "The Husband and Wife undertake to each other and to the court (and agree that these undertakings will be incorporated into a formal undertaking which will be lodged with the court):
> 9. They will not cause, or take any steps to cause, any of the companies of which they are a director or shareholder (whether legally or beneficially) to deal with (whether by sale, charge, pledge of title deed or documents or otherwise), dispose of, dissipate or diminish the value of any property, or any other asset held by any of the companies other than in the ordinary course of business."

11. Throughout the Relevant Period Betty lived at 28 Cheyne Walk London NW4 3QJ ("**28 Cheyne Walk**"). Before the service of the divorce petition Chris had been living in Cyprus. In October 2014 he returned to England and he was permitted by Docklock to live in Flat B 73 Parkway London NW1 7PP. On 14 July 2016 he also took over the occupation of Flat A after it became vacant

when the previous tenant, Mr Boitteau, moved out. I refer to both flats together as "**73 Parkway**".

12. One feature of the background is that for much of the Relevant Period, it was unclear to the parties whether Docklock and its assets (and the other family companies and assets) would be awarded to Chris or to Betty. For the purposes of one issue, I will have to consider more precisely when it became clear that the Court would award Docklock to Betty and I return to this point below.

13. It is also common ground that for a number of years Docklock had paid the salaries of both Mr Forrester and Nicholas himself. On 7 November 2014 Chris sent a memo to Mr Forrester, Deepak and Nicholas instructing them that as of 1 November 2014 Mr Forrester's salary should be transferred to Christo and that Christo should reimburse Docklock for the costs which it had incurred for their car leases. In a second memo dated 7 November 2014 Chris also wrote to Nicholas raising a number of other points. The third related to the car leasing costs:

> "You have committed Docklock to a Car Hire Agreement for the sum of £559 per month for 3 years and an initial outlay payment in excess of £5,000. This sum should now be paid out of Christo & Co and it will be considered part of your earnings. In conclusion I would ask that you no longer mix the financial affairs of Christo & Co with Docklock Ltd. Docklock Ltd is a financially independent entity from Christo & Co the only relationship is that you hold a directorship in Christo & Co as you do in Docklock. If you are not prepared to comply then please advise as it will be necessary to take immediate steps to prevent unauthorised funds being extracted from Docklock."

14. On 30 January 2015 a board meeting of the directors of Docklock took place at which Betty and Nicholas were both present. Paragraph 3 of the minutes of the meeting which were signed by both of them recorded the following resolutions:

> "In the circumstances it was resolved unanimously that the Company should take the following initial steps to protect its interests:
>
> 3.1 In relation to the flat situated at Flat 2, 73 Parkway, London NW1 7PP owned by the Company and currently occupied by

> CC free of any rental or any other payment obligation, the Company should serve notice on CC requiring him to vacate the flat in one month's time with a view to letting the flat for a market rental, and at the same time to provide CC the opportunity to continue residing in the flat subject to the terms of a tenancy agreement to be agreed between the parties, entailing the payment of a fair market rental capable of being justified objectively.
>
> 3.2 That the Company should serve notice on Christo & Co requiring Christo & Co to vacate the business premises situated at Ground and First Floor (part), 66-70 Parkway, London NW1 7AH in four months' time with a view to letting the premises under a commercial lease on terms that reflect the market value of the property, Christo & Co having not been required to pay any rental or other occupation payment before now; in addition Christo & Co is to be given the opportunity to enter into negotiations for a formal lease on terms that match the legitimate commercial expectations of the Company in accordance with such professional advice as the Company may obtain. The Company's priority shall be to maximise capital value for the benefit of the shareholders.
>
> 3.3 That the Company should serve four months' notice on Christo & Co terminating the arrangement it has had with Christo & Co for provision of property management services in relation to the Company's properties.
>
> 3.4 That the Company should seek to engage the services of an independent company for the provision of professional property management services to the Company on acceptable terms that are competitive in the marketplace.
>
> 3.5 That the Company shall forthwith cease making payment to Christo & Co management charges reflecting the salary paid by Christo & Co to its employee, Mark Forrester in accordance with the request made by CC on 7 November 2014.
>
> 3.6 That the Company shall request from Christo & Co reimbursement of the sums spent on the car leasing agreement entered into by Christo & Co in relation to the Audi motor vehicle provided to Mark Forrester, in accordance with the request made by CC on 7 November 2014."

15. By letter dated 9 February 2015 Betty wrote to Christo on behalf of Docklock giving four months' notice terminating the arrangement for the provision of property management services and requiring Christo to provide a detailed account. In the second paragraph she gave notice in the following terms:

> "It is not accepted that the arrangements provided to date have been provided pursuant to any formal legal contract between

> Docklock Limited and Christo & Co, but we wish to give Christo & Co what we believe to be reasonable notice of termination, and in those circumstances please accept this letter as firstly notice terminating our arrangements for the provision of the property management services, and secondly, to the extent that it is found by a Court that such services were provided pursuant to a contract (which is not admitted) terminating such contract, on the basis that termination is to take effect four months from today's date."

16. The letter also asked Christo to forward all monies held by it on behalf of Docklock, to account to Docklock for all further rental and other income and to provide a detailed statement of account and an estimate of future costs. By letter dated 10 February 2015 Docklock's solicitors, Boyes Turner LLP ("**Boyes Turner**"), also wrote to Christo enclosing a covering letter and a notice terminating Christo's licence to occupy 66-70 Parkway and to deliver up vacant possession by 12 June 2015. In a second letter dated 10 February 2015 Boyes Turner also asked whether Christo would enter into formal negotiations for a lease.

17. On 12 February 2015 Chris applied without notice to the Family Court for an injunction to restrain Betty and Nicholas from carrying their resolutions into effect. By order also dated 12 February 2015 District Judge Aitken granted an injunction against Betty and Nicholas which included the following terms:

> "Until further order of the court the respondent and second respondent are each forbidden to: a. Take any steps to terminate the arrangement, or to give effect to any purported termination of the arrangement, whereby Christo & Co Ltd provides property management services to any other company, including but not limited to Ridlington Ltd and Docklock Ltd; b. Take any steps to alter in any way the working arrangements between Christo & Co Ltd and any other company, including but not limited to Ridlington Ltd and Docklock Ltd;….g. Take no steps to obtain vacant possession of 66-70 Parkway London NW1 7AH; h. Take not [sic] steps to seek to obtain vacant possession of Flat 2, 73 Parkway, London NW1 7PP."

18. The return date of the application was 11 March 2015. The parties agreed to adjourn its hearing with minor variations to the order. The application then came back before Moor J on 19 April 2015, who made an order which included the following terms:

> "a. Christo & Co ('Christo') shall continue to manage the properties of Docklock Ltd ('Docklock') and Ridlington Ltd ('Ridlington') on behalf of each of them respectively as before; b. The rents collected by Christo in respect of Docklock's properties shall be paid promptly to Docklock's bank account in its own name, with account number 20701368 and sort code 309384; c. The Applicant shall be permitted to occupy Flat 2, 73 Parkway, London NW1 7PP rent-free, and the Respondents shall not take steps to evict the Applicant therefrom; d. Christo will be permitted to occupy 66-70 Parkway, London NW1 7AH rent-free, and the Respondents shall not take steps to evict Christo therefrom;…….g. Each of the Respondents will sign the Docklock accounts forthwith and in any event by 4 pm on 5 May 2015, provided that they are provided promptly with any information and/or documentation they reasonably require to enable them to do so;….."

19. On 19 and 24 June 2015 the hearing of the applications took place and in a detailed judgment dated 30 September 2015 Roberts J dismissed Chris's application and discharged the injunction. Her reasons for doing so were not relevant to the issues which the Court had to decide in this action. However, in support of the application Chris gave evidence to justify Christo continuing to manage Docklock's properties on the basis that it had never charged Docklock for property management services. In cross-examination Chris was taken through the relevant passages and Roberts J recorded Chris's evidence at [166]:

> "If what H says is true, and he has never charged either company for any of the management services C Ltd provides, there would not appear to be any loss of its income stream from this source for C Ltd."

20. Following the discharge of the injunction Docklock was free to terminate the relationship with Christo. However, by letter dated 21 December 2015 Macfarlanes LLP ("**Macfarlanes**"), who were by now advising Chris in relation to his shareholding in Docklock, wrote to Nicholas and Betty urging them not to do so. They set out a number of reasons why it was not in the interests of Docklock to do so including the following:

> "1.1 Since its incorporation in 1986, Docklock's property portfolio has been managed by a team of five employees at the property management firm Christo & Co Limited ("**Christo**").

> These services have been supervised for the majority of this time by Christo's employee, Mark Forrester. Mr Forrester is a chartered surveyor and has built up a considerable wealth of knowledge about the operation of Docklock's business and its assets. We understand that Christo has managed Docklock's portfolio competently for 30 years and (without prejudice to its entitlement to claim such fees) this has been at no cost to Docklock other than having passed the costs of Mr Forrester's salary on to Docklock for certain periods of time (of no more than 18 months) and more recently needing to pass on certain administrative costs.
>
> 1.2 Notwithstanding the above, we note that Docklock attempted to terminate Christo's management of Docklock's property portfolio in February 2015 in order to move such management to Savills on arm's length terms. Our client suspects this action was motivated by a desire to withhold information about Docklock's management from our client so as to enable you to take actions such as those set out below in order to: (i) obtain a more favourable outcome in the divorce proceedings; and (ii) further your own interests (as opposed to those of Docklock) without our client's knowledge. Our client does not consider it to be in the best interests of Docklock to terminate Christo's services since:…..1.2.2 Savills will charge Docklock for property management services;…
>
> 1.3 In the event, we note that Docklock was restrained from terminating Christo's services and that Christo has continued to manage Docklock's portfolio without complaint from Docklock's directors. In light of this our client assumes that Docklock does not intend to renew its attempt to terminate Christo's services on three months' notice (since such notice would not expire until March 2016) and that it instead agrees that Christo should continue to manage Docklock's portfolio until after the division of assets at the divorce hearing in April."

21. By letter dated 2 February 2016 Boyes Turner replied in detail to Macfarlanes answering the detailed factual allegations in their letter. They also asked for further information about the precise basis on which Christo was entitled to claim fees and for full details of the administrative expenses referred to above. They also asked how much Christo intended to charge during 2016. In paragraph 18 of the letter they stated as follows:

> "We confirm that pending the provision of this information – and so long as it is provided promptly – Docklock will not take any steps to change the management of its property portfolio. The provision of this information is important so that Docklock's directors can properly appraise whether (as you

> claim) the costs involved in moving to an independent managing agent would be significantly (or at all) greater than the total costs of the current arrangements with Christo."

22. By letter dated 16 February 2016 Macfarlanes replied stating that Christo's services had not been provided free of charge but they also stated that Christo did not intend to pursue a claim for management fees at that point (although it reserved its right to do so). In relation to Christo's fees for 2016 they stated as follows:

> "In relation to Christo's proposed charges for 2016, as this is a forward looking issue, we suggest that your clients discuss this with Christo directly. This will avoid miscommunication or misinterpretation. Christo confirms that it is willing to engage with your clients on this."

23. Neither party suggested to me that Christo ever put forward a fee proposal or that any engagement took place between the parties on an open basis. In the event, Christo continued to manage Docklock's property portfolio without any agreement in place until about 23 September 2016 when Boyes Turner wrote to Macfarlanes confirming that Docklock had informed all of its tenants and licensees that Christo was no longer authorised to receive rents and licence fees on its behalf.

24. On 12 to 15 April 2016 the hearing of Betty's financial remedy application took place before Moylan J and on 22 November 2016 he handed down judgment. He was critical of Chris's evidence and treated it with some caution: see [26]. Both parties had sought the allocation of Docklock but the judge allocated it to Betty: see [183]. However, he also allocated 66-70 Parkway to Chris (even though it was owned by Docklock): see [186] to [189].

25. On 18 January 2017 a further hearing took place at which Moylan J gave judgment allocating a number of remaining assets. In particular, he allocated four companies including Consort Properties Ltd ("**Consort**"), to Chris and a fifth company, Arion Developments Ltd ("**Arion**"), to Betty: see [28]. This allocation was complicated by the fact that Consort was at that stage a wholly owned subsidiary of Arion.

26. On 19 January 2017 Moylan J gave a further judgment in which he recorded that at the final hearing in April Betty had alleged that Christo had retained rental income and had not accounted for it to the companies which owned the relevant properties. He held that there should be an exception to his final order to permit Docklock to bring the present claim against Christo. But he also considered it unfair to deprive Christo of the opportunity to argue that it was entitled to deduct a management fee or to deprive Docklock of the opportunity to argue that it was entitled to charge Christo for the occupation of 66-70 Parkway: see [10] to [12].

27. On 15 May 2017 Moylan J made what has been described at this trial as the Moylan Order. Clause 5b provided that the applicant's companies were Docklock and Arion and clause 5c provided that the respondent's companies included Christo, Counterclaim and Consort and a company called Anglo Properties Ltd ("**Anglo**"). At this stage Anglo was also a wholly owned subsidiary of Arion.

28. Paragraph 18 of the Moylan Order recited that the parties had agreed that the terms of the order were accepted in full and final settlement to a wide group of claims. Paragraph 19 then 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 including for the avoidance of doubt, any claim in respect of 73A Parkway, 73B Parkway, and 28 Cheyne Walk, save in the event and to the extent that either party breaches their obligations under paragraph 59.
>
> 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 the applicant's companies against Christo & Co and/or the respondent in respect of any monies received by Christo & Co as agent for any of the applicant's companies in respect of the period beginning 1 October 2014 and ending on 1 September 2016 for which it is asserted that the respondent 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 the applicant's companies in respect of management fees for the period beginning 1 October 2014 up to 1 September 2016 which Christo 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."

29. Paragraph 20 provided that the parties were released from the undertakings and obligations in the agreement dated 23 October 2014. In paragraph 25a Chris undertook forthwith and by not later than the Completion Date (which was defined as 19 June 2017) to procure the waiver of any intercompany loan owed by Arion to Anglo. Paragraph 30 dealt with the sale of 66-70 Parkway:

> "On the basis that each party shall pay their own conveyancing costs, the applicant undertakes to procure, as a director of Docklock, a sale of 66-70 Parkway by Docklock to the respondent or a UK based company of his choice, subject to the security at paragraph 46 below being executed, at the price of £3,260,000 payable in cash, the sale to take place either at the Completion Date or as soon as possible thereafter and in any event by 10 July 2017."

30. Paragraph 58 referred to certain reports by Matthews & Goodman, a firm of valuers, which had been prepared for prospective lenders and paragraph 59 provided for the continued occupation of both 66-70 Parkway and 73 Parkway (and also 28 Cheyne Walk):

> "The respondent undertakes that he shall ensure that neither he nor any of his companies take any steps to evict the applicant who may continue to reside rent-free in 28 Cheyne Walk until 31st August 2017 and the applicant undertakes that neither she nor her companies shall take any steps to evict the respondent, who may continue to reside rent-free in the property at Flat A and Flat B, 73 Parkway until 31st August 2017 and/or take any steps to evict Christo & Co, who may continue to reside in 66-70 Parkway. Christo & Co's occupation of 66-70 Parkway shall be rent-free save that, for the avoidance of doubt, in the event that Christo & Co brings a claim or counterclaim for management fees against Docklock, Docklock shall be entitled

> to claim (as a set off) occupation rent against Christo & Co for the period beginning 1 October 2014 up until 1 September 2016."

31. Although it is clear from the Moylan Order that the parties and their companies intended to enter into an agreement for the mutual waiver of claims, the WCIA was not executed for some time. Under cover of a letter dated 17 March 2017 Withers LLP ("**Withers**") who were by then acting for Betty, sent the travelling draft to Hughes Fowler Carruthers ("**HFC**"), who were by then acting for Chris, and under cover of a letter dated 11 May 2017 HFC returned it with their amendments. Both drafts contemplated that Arion would become one of Betty's companies and that Anglo, Consort and Counterclaim would become Chris's companies.

32. On 26 October 2017 the WCIA was finally executed to give effect to the Moylan Order. Chris and Betty were parties to the agreement as were Anglo, Arion, Christo, Consort, Counterclaim and Docklock. Clauses 1 and 2 provided as follows:

> "1. In consideration of the entry by the other Parties into this Agreement, subject to the contents of, and the rights granted and obligations imposed by, the Order and subject to the indemnities set out at paragraphs 4 to 7 hereof, and save as set out at paragraphs 2 and 3 below:……
>
> c. Betty's Companies hereby agree to and do waive, and enter into this Agreement in full and final settlement of, all and any claims and rights of action, either existing now or which may arise in the future, which any of them has or may have, whether in England and Wales or in any other jurisdiction, against Chris or any of Chris' Companies, arising out of the dealings between them to date; and
>
> d. Chris' Companies hereby agree to and do waive, and enter into this Agreement in full and final settlement of, all and any claims and rights of action, either existing now or which may arise in the future, which any of them has or may have, whether in England and Wales or in any other jurisdiction, against Betty or any of Betty's Companies, arising out of the dealings between them to date.
>
> 2. 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……
>
> e. any claim in respect of any rights granted by, or for breach of, the Order."

33. The Order was the Moylan Order.[1] Consistently with the Moylan Order the term "Betty's Companies" included Arion and Docklock and the term "Chris' Companies" included Anglo, Christo, Consort and Counterclaim. On 26 October 2017 Docklock also transferred 66-70 Parkway to Counterclaim. But unfortunately clause 2 did not mirror it perfectly because clauses 2a and 2b omitted the termination date of the Relevant Period (to which I return below).

34. On 8 June 2018 Docklock commenced proceedings for an account of all sums received by Christo during the Relevant Period and an inquiry to establish the sums which were properly deductible. On 17 May 2019 Deputy Master Smith dismissed Docklock's application for summary judgment but made an order for an interim payment of £75,801.62. He held that the WCIA had to be construed in the light of the Moylan Order and that Christo was only entitled to claim management fees (including any professional fees) for the Relevant Period. There was no appeal against that order.

35. On 5 November 2020 the PTR took place before Mr Recorder Smith sitting as a Judge of the Chancery Division. He gave directions for Docklock to serve a Scott Schedule setting out its challenges to the expenditure which Christo claimed to have incurred on its behalf. He also ordered that Docklock was not to be permitted to raise at trial any challenge to that expenditure unless it was contained in the Scott Schedule.

[1] The final version of the WCIA referred to it being dated in March 2017 (although its ultimate date was 15 May 2017).

III. The Account

36. No order for an account had been made by the time that the action came on for trial. But it was common ground between the parties that Christo was an accounting party and that the Court's function at the trial was not only to determine the issues in dispute but to take the account and to strike the final balance due to or from Christo. There was no dispute about the law either. In *Exsus Travel Ltd v Turner* [2014] EWCA Civ 1331 McCombe LJ set out the relevant principles (citing from the then current edition of *Snell's Equity*) at [22]:

> "As is well known, the liability to account arises from a variety of relationships, varying from strict trusteeships to an agency where the agent controls property belonging to a principal. "The taking of an account is the means by which a beneficiary requires trustee to justify his stewardship of trust property" (*Ultraframe (UK) Ltd. v Fielding* [2006] FSR 17 at [1513], cited in Snell Op. et Loc. Cit.). The following passage from the text book is of particular relevance to this case:
>
> '*Taking the Account*. (3) The accounting party first submits his verified accounts and supporting documents, and the beneficiary may then raise any specific objections he may have. Objections to an account presented to the court as complete are either by way of surcharge or falsification. The beneficiary surcharges the account when he contends that the accounting party should have charged himself on the incoming side of the account with more than he had admitted. The beneficiary falsifies the account when he challenges an item of discharge entered into the outgoings side of the account.
>
> *Burden of Proof*. (4) The beneficiary carries the burden of proving surcharges and the accounting party carries the burden of proving his discharge. The accounting party must therefore be prepared to document each item, and presumptions may be made against him if he has not kept proper records or has destroyed them…'"

37. The financial information upon which both parties relied was primarily set out in the Rental and Income Expenditure Statements which Christo produced each quarter. I will refer to each such statement as a "**RIES**" and in order to identify the relevant document and period I preface it with quarter and the year (e.g. Q3 2014).

38. Mr Forrester explained that the RIESs were fundamental to the management of a client's property portfolio. They showed all the income received, what expenditure had been incurred (including any fees charged by Christo) and the balance held by Christo at the end of any quarter. He also explained that it would take on average 4 or 5 weeks for the period to be closed and the RIES submitted to the client. In practice, therefore, the account took the form of Docklock challenging individual entries in the RIESs submitted by Christo for the Relevant Period and Christo defending them.

39. Nevertheless, I remind myself that the burden of proof was upon Docklock to surcharge the account or prove the amount of income which Christo had received on its behalf and the burden of proof was upon Christo to prove its discharge and to satisfy the Court that each item of expenditure or disbursement was properly incurred: see *Exsus Travel* (above). Further, the fact that the reporting period for the Q3 2014 RIES was not closed until a number of days after the first day of the Relevant Period that the last day of the Relevant Period fell in the middle of the reporting period Q3 2016 presented additional difficulties which I identify and resolve below.

IV. The Witnesses

40. Nicholas gave evidence for Docklock and Chris and Mr Forrester gave evidence for Christo. Neither Nicholas nor Chris was an entirely satisfactory witness. But in the event there were very few issues which turned exclusively on a conflict between their oral evidence and where there were differences between them I have resolved them by reference to the contemporaneous documents.

(1) Nicholas

41. For the most part, I found Nicholas a reliable witness and I was generally prepared to accept his evidence. However, he was very defensive and it was obvious that he had prepared himself well and was very familiar with the documents. When a document was put to him he often referred to another document to avoid answering the question. For the most part this did not matter but in one instance where he used this technique to deny that he had

received a document, I did not accept his evidence. I did not accept his evidence either about the unauthorised use of Chris's Bank of Cyprus credit card although I did not consider that this generally undermined his evidence.

(2) Chris

42. I was generally prepared to accept Chris's evidence. He made an important concession when he clearly understood the significance of it and this was to his credit. He also made other concessions which Nicholas was unwilling to do. He was not as familiar with the detail as Nicholas and Mr Forrester and he had a tendency to give broad and expansive answers which were not always reliable. I also accept that there were differences between the evidence which he gave in the matrimonial proceedings and his evidence in this action. But for the most part I am satisfied that they were largely differences of emphasis and I am not satisfied that he gave false evidence or that he was trying to mislead the Court (as Mr Comiskey submitted).

(3) Mr Forrester

43. Mr Forrester was an honest and reliable witness who had taken a great deal of trouble to assist the parties and the Court in the taking of the account (for which I was very grateful). There was no challenge to his evidence and I accepted it without hesitation. Indeed, Docklock withdrew a number of challenges after hearing Mr Forrester's evidence.

(4) The Experts

44. Docklock called Mr Richard Beaumont MRICS of Matthews & Goodman to give valuation evidence about the rental value of 66-70 Parkway. He had wide experience but he specialised in the valuation of airports, offices, national charities and not for profit organisations. (One of his major clients was London Luton Airport.) However, he had no experience of the local market and retail was not a specialism. Mr Jonathan Patton of his firm had also prepared a report on the capital value of 66-70 Parkway as at 31 March 2015 in the matrimonial proceedings which he had expressed the view that the rental value of the premises occupied by Christo was £163,200. Mr Beaumont

did not mention this valuation in his report (even though he was aware of it) and although it would have been better for him to do so, I am satisfied that it did not prevent him from complying with his duty as an expert.

45. Christo called Mr Peter Hooper MRICS of Peter Hooper Associates. He had been a general practice surveyor for 35 years in a number of leading firms and he specialised in landlord and tenant, rent review and lease renewals involving both commercial and residential property. He was familiar with the local area and had acted for one of the parties in relation to one of the four agreed comparables, 120 Parkway, on the 2009, 2014 and 2019 rent reviews. He had also obtained first-hand information from the agents on another agreed comparable, 98-101 Parkway.

46. I preferred the evidence of Mr Hooper. The Moylan Order and the WCIA provided no guidance to the parties in relation to the valuation exercise and Mr Beaumont and Mr Hooper agreed to section 34 of the 1954 Act as the basis of valuation (a point to which I return below). Mr Hooper specialised in lease renewals, knew the local market and he had acted in relation to one of the four agreed comparables for over 10 years. By contrast, Mr Beaumont had no similar experience or knowledge.

V. Income

47. The parties could not agree on the amount of the monies received by Christo as agent for Docklock during the Relevant Period. In opening and in the Scott Schedule Docklock submitted that the appropriate figure was £3,229,648.12. However, Docklock's starting figure contained a number of disputed assumptions and it is therefore necessary for me to build up the income figure by reference to its individual components recording what was agreed and then deciding what was in dispute.

48. Most of the figures in the Scott Schedule were agreed. However, the contentious issues related to adjustments to be made to the Q4 2014 RIES and the Q4 2016 RIES. I set out the relevant figures in the following table:

Date	Client (C)	Client (D)	Service Charge	Other	Deposits
Q3 2014	Agreed[2]	**198,192.49**	0	0	0
Q4 2014	427,179.18	Agreed	2,460.00	-16,176.25	7,309.90
Q1 2015	459,215.94	Agreed	3,300.00	3,193.92	-6,388.91
Q2 2015	288,077.27	Agreed	2,580.00	8,162.56	4,795.53
Q3 2015	445,237.57	Agreed	2,760.00	-4,287.39	4,257.00
Q4 2015	501,631.48	Agreed	3,000.00	-1,505.45	4,975.81
Q1 2016	527,613.81	Agreed	2,760.00	286.82	-5,534.72
Q2 2016	416,542.76	Agreed	2,460.00	-2,750.36	6,226.90
Q3 2016	324,001.86	**172,814.39**	1,621.44	3,135.91	-13,763.96
Q4 2016	8,231.85	0	-62.70	-1,914.67	-178,984.78
Totals	3,595,924.72	**3,436,504.89**	20,878.74	-11,855.41	-177,106.93
Total					**3,268,421.29**

49. For the reasons which I now explain I find that the income figure for the Relevant Period was £3,268,421.29 (as set out in bold in the table). I have also set out in bold my individual findings in relation to the figures in dispute. The parties were able to agree the service charge, other income and deposits received by Christo during the relevant period and the principal issue between them was the amount of client income. I summarise the dispute and the way in which it developed as follows:

[2] Docklock agreed this figure subject to the methodology used: see below.

i) Docklock's figure in the Scott Schedule for income was £3,229,648.12 arrived at by adding the service charge income to client income and deducting the two negative balances for other income and deposits. No individual figure for client income was pleaded but adjusting for service charge, other receipts and deposits Docklock's figure for client income was £3,397,731.32.

ii) Christo's figure for client income was £3,238,312.40. The difference between the two figures related to the different treatment of income at the beginning and end of the Relevant Period. I deal first with the beginning of the period. Christo accepted that client income of £198,192.49 had been received after 1 October 2014 but recorded in the RIES for Q3 2014 (which was not prepared until 11 November 2014) rather than the RIES for Q4 2014.

iii) Christo did not incorporate the figure of £198,192.49 into its column of client income in the Scott Schedule. But for convenience I have added a line to the table above giving a total figure of £3,436,504.89 for client income admitted by Christo. There was a slight variance between this figure and the figure of £3,432,854.89 admitted by Christo in the Amended Defence: see Appendix A. This variance was due to the fact that Christo originally pleaded that the income figure shown in the RIES for Q4 2014 was £423,529.18 but by the beginning of trial Christo had admitted the slightly higher figure of £427,179.18 in the Scott Schedule.

iv) Docklock had originally included no figure for Q3 2014 but by the end of the trial it had accepted Christo's figure of £198,192.49 (subject to an argument about methodology which I deal with below). I have therefore added this figure to Docklock's column for client income in the table above. By the end of the trial, therefore, Docklock's total for client income was £3,595,924.72.

v) As for the end of the period, Docklock put forward a figure of £324,001.86 for Q3 2016 whilst Christo put forward a figure of

£172,814.39. The difference was not clearly explained to me. But it appeared that Docklock was claiming the whole quarter's client income rather than the income to 1 September 2016.

50. Mr Forrester gave evidence about these figures on behalf of Christo. After hearing his evidence Docklock accepted his figure of £198,192.49 for the additional client income included in the RIES for Q3 2014 and did not really challenge his figure of £172,814.39 for the income for Q3 2016. However, Mr Comiskey pointed out to him that he had included income up until 30 August 2016 but not income received on 1 September 2016, the last day of the Relevant Period. He was taken to a separate schedule which he had prepared of rent received after the end of the Relevant Period in which he had included three payments of rent totalling £2,639.67 received on 1 September 2016 itself.

51. Mr Forrester also explained in evidence that the date recorded in a RIES for a payment of rent was the date on which it fell due. He also explained that it was possible to identify the actual date of a payment by examining the tenant's records on the underlying "Yardi" computer system from which the RIES was generated or, alternatively, from Christo's bank statements. It was also his evidence that for Q3 2016 he had gone back to the underlying tenant records to identify the date of each payment but for Q3 2014 he had used the due dates recorded on the RIES for that quarter.

52. Mr Comiskey submitted that this difference in methodology meant that it was impossible for the Court to be satisfied that Mr Forrester's figures were accurate. He also submitted that I should reject Mr Forrester's evidence in relation to the end of the Relevant Period because he had not included payments made on 1 September 2016. He therefore submitted that the Court should order Christo to perform the exercise again and account precisely for the income received in Q4 2014 and Q3 2016.

53. I reject that submission. In cross-examination Mr Forrester said that he was satisfied that the exercise which he had carried out was accurate and that it favoured Docklock:

> "I was satisfied that the figures I produced at Q3 – the adjustments that I made here were accurate, because I was taking payments that related to 1st October 2014 onwards and including them in the calculations, rather than disregarding the Q3, 2014 statement completely and saying it was outside the period. I was actually looking at it and bringing figures into the relevant period, rather than taking them out. So, I felt that I was actually giving an accurate, in my opinion, I felt I was giving an accurate position of the financial position. Q. But it was not done on the same basis as the schedules that you have recently prepared in relation to the end period -- the end of the relevant period? A. There is a slight difference, yes, but I maintain that I believe these figures are accurate because we were looking at a period from 1st October. Any tenant whose rent was due from 1st October onwards -- tenants do not tend to pay you a week early. I maintain that I believe these figures are accurate, and, if anything, I was bringing money into the relevant period rather than ignoring it because it was on the previous RIES."

54. I accept that evidence. Although there was a difference between the records which Mr Forrester used to compile his figures for Q3 2014 and Q4 2016, I am satisfied that any difference between the sums recorded on the Q3 2014 RIES and the Yardi system or bank statements is likely to be minimal. I also accept that it is more probable than not that the methodology which Mr Forrester used was more favourable to Docklock. Moreover, in my judgment it would be wholly disproportionate to order a further account in relation to the income received by Christo during the Relevant Period and I decline to do so in the exercise of my discretion.

55. I accept, therefore, Mr Forrester's individual figures for client income for Q3 2014 and Q3 2016 and his overall figure for the Relevant Period of £3,436,504.89. After adjustment for service charge, other income and deposits I find that the monies received by Christo as agent for Docklock in respect of the Relevant Period was £3,268,421.29. For the reasons which I explain below, I have not added the three payments made on 1 September 2016 totalling £2,639.67.

VI. Transfers

(1) The Sitting Balance

56. Each RIES also recorded the balance which Christo held on its client account for each client at the beginning of each quarter and had carried forward from the end of the previous quarter. Christo and the parties used the term "**Sitting Balance**" to describe this figure. In the Scott Schedule Docklock pleaded that as at 1 October 2014 the Sitting Balance on Christo's client account held for Docklock was £346,471.15, which included £148,926.56 of client income. Christo's figure was £134,118.72.

57. By closing submissions, Docklock had conceded that Christo's figure was accurate. Mr Comiskey made that concession subject to his submission that the difference in methodology which Mr Forrester had adopted to the income received during Q3 2014 and Q4 2016 undermined the reliability of his figures. I reject that submission for the same reasons and I find that the Sitting Balance as at 1 October 2014 was £134,118.72. Further, although the Sitting Balance consisted of income received by Christo before the Relevant Period had begun, Mr Comiskey also submitted that disbursements paid by Christo on and 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.

58. Mr Comiskey took me to the Q3 2014 RIES which showed that at the beginning of that quarter Christo had retained a Sitting Balance of £73,897.20 on Docklock's client account. It also showed: (i) that on 7 October 2014 Christo made a VAT payment of £31,854 to HMRC; (ii) that on 8 October 2014 it made a payment of £80,000 to Docklock; and (iii) that on 24 October 2014 it made a payment of £50,000 to Docklock. It was common ground that the Sitting Balance had increased to £134,118.72 by 1 October 2014 and Mr Comiskey argued that the three payments which I have itemised above exhausted the Sitting Balance and should not, therefore, be treated as disbursements (save to the extent that they exceeded it).

59. In support of his argument Mr Comiskey relied upon 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: see *Re Clayton's Case* (1816) 35 AER 767 at 793, *The Mecca* [1897] AC 286 and *Barlow*

Clowes International Ltd v Vaughan [1992] 4 All ER 22 at 27f-g (Dillon LJ). He placed particular reliance upon the following passage in the speech of Lord Halsbury LC in *The Mecca* (at 290):

> "My Lords, it is said that the account dated August 22 brings the question within the authority of *Clayton's Case*, and, in order to see whether this is so, it is necessary to consider what *Clayton's Case* was, and the reasons given by Sir William Grant, who decided it. That learned judge says: where an account current is kept between parties as a banking account, "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." This rule, so formulated, has been adopted in all the Courts in Westminster Hall (see *Field v. Carr*). It is to be remembered, however, that on more than one occasion it has been pointed out that this is not an invariable rule of law; but the circumstances of a case may afford ground for inferring that transactions of the parties were not so intended as to come under this general rule,……."

60. Mr Letman submitted that this dispute was not a question of appropriation at all and that Docklock was in substance seeking to claim an entitlement to monies received by Christo before the beginning of the Relevant Period. His case was that the effect of the Moylan Order and the WCIA was to extinguish Docklock's entitlement to the Sitting Balance. The way in which Mr Comiskey put the argument was set out in paragraphs 81 to 84 of his closing submissions:

> "81. In the Scott Schedule, Docklock accepts that it received transfers of £1,272,073.44. Christo asserts that the correct figure should be a total of £1,550,000. 82. As with the income figure, Docklock's figure for accepted transfers must be amended in light of the evidence as to the sitting balance. Docklock now accepts that (subject to verification of Christo's figures) it has received transfers totalling £1,415,881.28. This is Christo's figure of £1,550,000, less the sitting balance. 83. The reasons for the difference are as set out in Docklock's skeleton argument in relation to appropriation of payments: the first £134,118.72 of the payments out made during the Relevant Period were in fact payments out of sums already sitting in the

> client account. They are therefore not to be taken into account as disbursements of income received during the Relevant Period. 84. Once this is understood, it is clear that Christo's objection is simply wrong. Docklock is not seeking to claim any income received on its behalf prior to the Relevant Period, for the simple reason that this was already paid to it during 2014."

61. I accept Mr Letman's submission and reject Mr Comiskey'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 Mr Comiskey put his case in closing (which I have recorded above). But on analysis, it did not meet Mr Letman'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 Mr Comiskey did not go that far. I find, therefore, that Docklock was not entitled to deduct it from the transfers made by Christo.

64. By closing submissions it was common ground that Christo had transferred £1,550,000 of the total income which it received during the Relevant Period to Docklock subject to the question whether Christo ought to have deducted the Sitting Balance. I find, therefore, that Christo transferred £1,550,000 to Docklock out of the income which it received during the Relevant Period.

(2) Transfers to Parkheath and SHW

65. In or about September 2016 Docklock appointed Parkheath, a well-known firm of estate agents in North London, to act as its managing agent in relation to its residential properties and the Stiles Harold Williams Partnership LLP ("**SHW**") to act as its managing agent in relation to its commercial properties. By closing submissions it was also common ground that Christo had transferred £85,313.18 to Parkheath and SHW after the end of the Relevant Period.

66. Mr Forrester explained that after Docklock had given notice to its tenants that they should pay rent to Parkheath and SHW, a number of tenants continued to pay Christo by mistake. He prepared a schedule which showed the total sum which Christo had received, the expenses which it had paid out of that sum and the amounts which it had then paid over to Parkheath and SHW. There was a slight discrepancy between his schedule and the agreed figure but I adopt the agreed figure of £85,313.18. Mr Forrester's schedule also showed that Christo paid expenses of £44,137.79 (shown on the Q3 2016 RIES) and £50,012.26 (shown on the Q4 2016 RIES) out of the rents collected after 1 September 2016.

67. Although it was agreed that Christo had paid over to Docklock the net rents of £85,313.18, Docklock did not accept that this should be treated as a transfer for the purposes of the account or deducted from the total income figure. It relied on a letter dated 16 September 2016 in which Macfarlanes wrote to Boyes Turner stating as follows:

> "Christo & Co is not unlawfully withholding monies from your client, and there is no net debt owed by Christo & Co to your client. Christo & Co is entitled to set off fees it is owed by your client, in addition to expenses payable to third parties that were

> incurred on Docklock's behalf, before paying any surplus to your client. In this case, the management and other fees your client owes to Christo & Co significantly exceed any amount Christo & Co owes to your client. Our client is in the process of calculating such outstanding fees as at today's date (and of course is entitled to payment of future management and professional fees) but did not wish to delay sending this response in the meantime. Christo & Co is not therefore obliged to pay anything to your client."

68. I deal with the issue of management fees below. But Mr Comiskey submitted that whether or not Christo was entitled to claim management fees in excess of the amount which it was holding, it appropriated the £85,313.18 paid to Parkheath and SHW to the rent and other income received which it received after the date of the letter. It was impossible, so he submitted, for Christo to claim in this letter that it owed no money to Docklock but then to claim later that it had paid Parkheath and SHW out of the money which it was holding on Docklock's behalf.

69. I reject that submission. By asserting a claim to management fees and that nothing further was owing, Christo did not represent that it was giving up any contractual or equitable rights to rely on the payment to Parkheath or SHW in the event that its entitlement to management fees was disputed. Moreover, Mr Comiskey did not assert that Macfarlanes' letter gave rise to a contract or an estoppel. Again, the position might have been different if Docklock had agreed to pay management fees on the strength of this letter. But Docklock did not do that and, indeed, it has hotly contested Christo's entitlement to management fees ever since.

70. Mr Comiskey also relied separately on Mr Forrester's evidence and his schedule. There is no doubt that Christo paid Parkheath and SHW out of the rents which it received after 1 September 2016 and Mr Forrester acknowledged this in both his witness statement and the schedule. Although Docklock later waived any right of action to claim rents received by Christo after 1 September 2016, Docklock's agents had already received the £85,313.18 by the date of the Moylan Order and the WCIA. Docklock had no right of action against Christo to recover this sum after 15 May 2017 or 26

October 2017. But it did not need one because Parkheath and SHW already had the money.

71. I agree with Mr Comiskey, therefore, that the sum of £85,313.18 should be left out of account. I do so for much the same reason that I rejected his submission in relation to the Sitting Balance. In September 2016 Christo paid over £85,313.18 to Parkheath and SHW and in order to bring it into the account, Christo (not Docklock) would have to establish a contractual or equitable right to claim this sum and then set it off against the sums claimed by Docklock. But all but three of the relevant receipts and payments took place outside the Relevant Period. In the same way that Docklock has waived its right of action in relation to the Sitting Balance, so Christo has waived any claims and rights of action against Docklock either to claim the sums paid to Parkheath and SHW or to set them off against Docklock's claim.

72. This may seem like rough justice given that Christo quite properly accounted to Docklock for the rents which it received after the termination of its agency. But when they entered into the WCIA the parties had not carried out the same level of detailed analysis as they have for purposes of this action and no doubt appreciated that what they might win on the swings they might lose on the roundabouts if they agreed to a general waiver of claims to achieve a settlement of the divorce litigation.

73. I therefore find that Christo is not entitled to deduct the sum of £85,313.18 from the income which it transferred to Docklock on the basis that it has already accounted for this sum to Parkheath and SHW. There is one qualification to this finding. Mr Forrester's schedule and the agreed figure included the three sums totalling £2,639.67 paid on 1 September 2016 and therefore within the Relevant Period. It seems to me, and I so find, that Christo has duly accounted to Docklock for these sums by paying them over to Parkheath or SHW. They should therefore be added to the total income but also added to the transfers to Docklock. But since the effect of this would be neutral and neither party asked me to make any adjustment for them, I have left them out of account altogether.

74. Finally, I should record that in closing I was concerned about the expenses of £44,137.79 and £50,012.26 which Mr Forrester had recorded on his schedule. I should also record that Docklock did challenge them on a number of grounds. However, it was unnecessary for me to determine those challenges because they were paid out of income received after the end of the Relevant Period and did not affect the final account.

VII. Management and Professional Fees

75. The principal issue between the parties was whether Christo was entitled to charge Docklock management and other professional fees for the Relevant Period. There were two categories of fees which Christo claimed: first, fees of £166,515.89 for the provision of property management services; and, secondly, professional fees of £149,263.10 for negotiating and completing lettings and renewals of Docklock's properties. These fees were based on a fee for successfully letting a property or renewing a tenancy. Christo claimed 5% of the rent collected for property management services and variable fees of up to 10% of the annual rent for a letting or renewal.

76. Docklock accepted that the exception in paragraph 19(b) of the Moylan Order and clause 2(b) of the WCIA extended to the first category of fees but not the second because it used the term "management fees". Docklock also contended that if the Court found that Christo was entitled to recover management fees (in either or both categories), it had forfeited its entitlement to those fees because of its misconduct. Finally, it also contended that it was entitled to set off against any fees to which Christo was found to be entitled, an occupation charge for Christo's offices at 66-70 Parkway (and this was also reflected in both the Moylan Order and the WCIA). However, Mr Comiskey made it clear in opening that if the Court found that there was no entitlement to fees, then Docklock did not pursue a separate claim for any occupation charge.

(1) Christo's case

77. It is common ground that there was no written contract for the payment of any fees in either category by Docklock to Christo. Christo's case as pleaded in paragraph 6 of the Amended Defence dated 20 February 2020 was as follows:

> "a…..b. Prior to 3 March 2010, when Mr Chris Christoforou was the director/owner of the Claimant, he in his capacity as director/ owner of both the Claimant and the Defendant, agreed on behalf of both of the Claimant and the Defendant that the Defendant would be entitled to charge the Claimant a reasonable fee for the services provided by the Defendant.
>
> c. After 3 March 2010, when Mr Nicholas Christoforou became the director of the Claimant, Mr Nicholas Christoforou on behalf of the Claimant and Mr Chris Christoforou on behalf of the Defendant orally affirmed the agreement that the Defendant would be entitled to charge the Claimant a reasonable fee for the services provided by the Defendant and further agreed orally (in the light of the Claimant having cash at its disposal and in the light of taxation advantages) that the salaries of Messrs Nicholas Christoforou and Mark Forrester, employees of the Defendant, would be paid by the Claimant in lieu of management fees. The oral affirmation and that oral agreement took place in person at the offices of the Defendant a few weeks before the salaries of Messrs Nicholas Christoforou and Mark Forrester began to be paid by the Claimant in about 2013-2014.
>
> d. The payment made by the Claimant of the salary due from the Defendant to Mr Nicholas Christoforou from about 2013-2014 in lieu of management fees could not have been made (and was not made) without his express agreement as the director of the Claimant and the recipient of that salary.
>
> e. Alternatively, it was in the premises an implied term of the arrangement between the Claimant and the Defendant (implied on the basis of the obvious intentions of the parties and/or business efficacy and/or section 15 of the Supply of Goods and Services Act 1982) that the Defendant would be entitled to charge the Claimant a reasonable fee for the services provided by the Defendant."

78. In the Scott Schedule Christo advanced an alternative case that if there was no agreement, it was entitled to claim a quantum meruit in relation to letting and renewal fees:

> "In the alternative, if contrary to D's primary case, there was no agreement relating to these letting/renewal fees as aforesaid, the said services were all carried out by the D at C's request (express or implied above) so as the Defendant is entitled to be paid a reasonable sum upon a quantum meruit equal to the amounts charged or as the court decides."

79. In opening Mr Comiskey objected to this claim and I ruled that I would deal with the objection at the end of the trial but that Christo would not be entitled to rely on any evidence in support of the quantum meruit claim apart from its evidence in relation to the existing defence. In closing Mr Comiskey renewed his objection on the ground that it was a new case which had not been pleaded in the Amended Defence. Mr Letman's answer was that Docklock had not advanced a case that letting and renewal fees were barred by the terms of the WCIA until service of the Scott Schedule when Docklock's own case became clear.

80. I accept Mr Letman's submission. I am satisfied that Docklock's case did not become clear until the service of the Scott Schedule which dealt with each issue in far greater detail than the original statements of case. The order of Mr Recorder Smith for the service of the Scott Schedule also required the parties to demonstrate a spirit of cooperation and flexibility which continued throughout the trial. Further, given that Christo relied on the same documentary and oral evidence as it advanced in support of its contractual claim, the alternative claim gave rise to a simple question of law.

81. However, Mr Comiskey submitted that Docklock had suffered prejudice because it might have wanted to raise a number of defences to the claim for unjust enrichment. I am satisfied that there was no prejudice to Docklock by permitting Christo to advance the claim for a quantum meruit. It relied on the same evidence in support of both its contractual claim and the quantum meruit claim and both were closely related. Docklock had a full opportunity to answer that evidence and to deal with it in cross-examination and submissions. In the event, Mr Comiskey raised no defence of change of position (or any other defences) in his closing submissions. I therefore grant permission to Christo to rely on the quantum meruit claim and, if necessary, to amend the Defence to plead the allegation set out in the Scott Schedule (above).

(2) Background

82. The background to the two claims was as follows. By 2012 Docklock was making substantial profits. Its audited accounts for the year ended 31 March

2012 show that it had an operating profit of £557,970. The profit and loss account also records that during that year it incurred what were described as "management charges" of £70,100. Note 7 also recorded the same sum against "Other creditors". I should add that the directors' report recorded that Chris was a director and he also signed the abbreviated balance sheet on the short form accounts filed at Companies House.

83. It was common ground that the management charges in Docklock's profit and loss account for the year ended 31 March 2012 referred to the salaries of Nicholas and Mr Forrester for which Docklock assumed liability at some point during that financial year. Nicholas was taken to the accounts which were dated 11 January 2013 and also to a memo dated 10 January 2013 (i.e. the day before the accounts were finalised) in which Deepak advised him to register Docklock for PAYE and national insurance contributions and also to acquire the Sage payroll system.

84. Docklock's accounts for the year ended 31 March 2013 were not in evidence. But under cover of a letter dated 20 January 2014 Mr Chrys Petrides of Freemans LLP ("**Freemans**"), the accountants who were then acting for both Docklock and Christo, wrote to Chris enclosing Christo's accounts for the year ended 30 April 2013. In the covering letter (of which only the first page was in evidence) Mr Petrides pointed out that Christo's results had worsened. He also stated that the accounts included the following:

> "A reduction of £70,100 being payroll costs recharged to Docklock Ltd. Please transfer this amount from Docklock Ltd to this company referring to it as reimbursement of payroll costs. We will make the opposite journal in the 2013 Docklock accounts. Please note that we made a similar charge last year."

85. In a handwritten memo dated 24 January 2014 Chris wrote to Mr Forrester, Deepak, Nicholas and Mr Petrides referring to this letter and stating: "Christo and Co owes Docklock £50,000. Therefore, set off and Docklock will have to pay the balance of £20,100 to Christo." He asked Mr Forrester to make the payment and by memo dated 27 January 2014 Mr Forrester wrote to Nicholas confirming that the payment had been made.

86. The draft audited accounts for Christo for the year ended 30 April 2013 provided for Nicholas to sign them and under cover of a letter dated 18 February 2014 he wrote to Mr Petrides enclosing the signed accounts. During the course of the trial Christo produced a copy of the signed version of the abbreviated accounts which had been signed above the typed words "Mr N Christoforou – Director". There was an issue between the parties whether this was Nicholas's signature or whether Chris signed them in his name. In the event, I found it unnecessary to decide who signed the accounts on behalf of Christo because both were directors at the time and had authority to do so.

87. On 29 January 2015 Mr Petrides sent Christo's audited accounts for the year ended 30 April 2014 to Chris for his review and approval. In the covering letter Mr Petrides stated: "As at the year-end the company was owed £64,127 by Docklock Ltd and should be settled by the latter (this relates to previous years payroll costs charged to Docklock Ltd)." By memo dated 30 January 2015 Mr Forrester wrote to Nicholas confirming that the payment of £64,127 had been made.

88. Docklock's audited accounts for the year ended 31 March 2014 also record that it had incurred "management fees" of £80,833 for that year and £79,778 for the year ended 31 March 2013. On 5 May 2015 Nicholas signed the directors' report and on 8 May 2015 he signed a revised version. The revised accounts continued to show that Docklock had incurred management fees of £79,778 for the year ended 31 March 2013 but included no management fees for the year ended 31 March 2014. Both sets of accounts were signed after the first and second hearings of Chris's application for a freezing injunction.

89. Following those hearings Chris also agreed to provide Nicholas with financial information relating to Docklock. Under cover of a letter dated 21 May 2015 Mr Forrester provided copies of the Q2 2014, Q3 2014 and Q4 2014 RIESs to Nicholas. Under cover of a letter dated 15 June 2015 Mr Forrester also sent him a copy of the Q1 2015 RIES covering transactions until 12 June 2015. The Q4 2014 RIES contained an entry for the payment of £1,140 in professional fees to Christo for "VAT Return – 30 November 2014". I was

also taken to the invoice underlying this entry which contained the following narrative:

> "Preparing the VAT return for Docklock Limited for the quarter ended 30th November 2014. Including assessing and analysing all rental income, printing rental VAT invoices, compiling schedules of all income for the VAT period. Analysing and assessing all expenditure over the portfolio on all properties, assessing invoices and producing schedules and breakdowns of all invoices for the period. Undertaking VAT calculations, preparing and submitting VAT return online."

90. The Q1 2015 RIES contained a similar entry dated 7 April 2015 and I was taken to the underlying invoice in which Christo charged the same fee and which contained the same narrative. The Q1 2015 RIES also contained an entry dated 16 April 2015 for the payment of £1,805.52 in professional fees to Christo for the renewal of a lease described as Flat 4. Again, I was taken to the underlying invoice which identified the property as "Flat 4, 1 Prince of Wales Passage". The fee charged was 5% of one year's rental and the invoice provided the following narrative for the fee:

> "Our fees in relation to the letting renewal administration for the above flat. The agreement has been renewed to our applicants for a period of 1 year from the 12th March 2015 at a rental of £29,892 per annum (£574.85 per week). To: Negotiations with tenants, agreeing renewal, preparation of new tenancy agreement and meetings with tenant to arrange signing thereof."

91. By email dated 11 June 2015 Nicholas wrote to Mr Forrester raising detailed queries about the financial information with which he had been provided and by email dated 17 June 2015 Mr Forrester answered them. On 22 June 2015 Nicholas followed this up with another series of questions including a query about the payment of £64,127 by Docklock to Christo. He also took this up with Freemans directly and by email dated 12 August 2015 Mr Petrides wrote to him enclosing a reconciliation and providing him with the following explanation:

> "I enclose a reconciliation from C Christo & Co Ltd's accounting records of Docklock's account with the company. You will note that as at 30 April 2014 (the last accounts

> prepared) Docklock Ltd owed C Christo & Co Ltd £66,994.94. The difference between this amount and the payment made of £64,127 is £2,867 which seems to represent the PAYE liability for January '14 which was paid by C Christo & Co Ltd. I assume that this amount was reimbursed to the company prior to 31 January 2015.
>
> The amount due to [sic] Docklock is primarily made up of two charges of £70,100 each booked in C Christo & Co Ltd's accounts to 30 April 2012 and 2013 respectively to apportion part of the company's payroll costs to Docklock Ltd since the latter did not operate a PAYE scheme (no other administration or management fees were charged). No such charge was made in the 2015 accounts since Docklock Ltd was operating its own PAYE scheme during the year."

92. The Q1 2015 RIES also contained an entry for a receipt of £500 for the increased rent payable after a rent review by Mr Ahmed Haddad for his shop at 186 Camden High Street London NW1. The Q3 2015 RIES then recorded the payment of £1,800 in professional fees to Christo for a "Rent Review Fee" and the underlying invoice showed that it related to the shop at 186 Camden High Street:

> "Professional services in connection with rent review works at 186 Camden High Street, London NW1, including inspection of premises, consideration of lease, undertaking a valuation exercise on 3 different premises, consulting the retail price index and investigating the market, meeting with tenant at our offices, explaining the basis of the rent review and effecting agreement in relation to the rent, consulting with clients and compilation and completion of the Rent Review Memorandum and accompanying documentation. To: Usual fee £8,390.70 but due to nature of rent review basis concessionary hourly rate @ £250 per hour."

93. The Q3 2016 RIES, which was dated 15 November 2016, records that on 7 September 2016 Christo made a transfer of £166,515.89 on account of management fees. This was the figure which Christo claimed to be entitled to deduct for property management services and was reflected in a series of invoices also dated 7 September 2016 in which Christo claimed to be entitled to a fee of 5% of the rental income collected. Christo's separate claim of £149,263.20 for lettings and renewals was recorded in a series of invoices

dated 16 April 2015 to 17 October 2016 in which Christo claimed fees of between 5% and 10% of one year's rental for each successful transaction.

(3) Property Management Services

94. Both counsel argued that there was a stark conflict between the evidence of Nicholas and Chris. In his witness statement Nicholas firmly denied that a conversation took place in which he affirmed that Christo was entitled to charge Docklock a reasonable fee for its services. In cross-examination Chris suggested that a meeting had taken place at which Nicholas had agreed that management fees would be charged. He also stated that Mr Forrester had been present at the meeting. Mr Comiskey urged me to reject Chris's evidence and Mr Letman submitted that I should disbelieve Nicholas.

95. For the reasons which I have given, I found neither of them to be a wholly satisfactory witness. But in my judgment there was no real conflict of evidence between them and, as Mr Comiskey put at the forefront of his closing submissions, the real issue was whether the arrangement between Docklock and Christo gave rise to a binding contract. I say this for the following reasons:

i) On the evening of the fourth day of the trial Chris accepted in cross-examination that he had taken the decision to charge management fees in 2012 or 2013. On the following morning he accepted that he could not be certain that he took the decision before he ceased to be a director of Docklock. He then confirmed that that he had made the decision after March 2010 and not before.

ii) Chris confirmed that the arrangements between Docklock and Christo were informal family arrangements and that they were not recorded in any of the memos which Chris often sent. When it was put to him that this was not a contractual arrangement, the following exchange then took place:

> Q. But if a decision was taken that management fees should be paid, it was not a decision that there would be a contractual liability for management fees, was it? A. Of

> course there would be a contractual liability. Q. You are saying that there was a legal contract that Docklock was liable for management fees? A. If you are going to implement fees, if, let us say, I did not come up with the idea of getting the fees paid in the form of salaries, if there were fees paid and I charged fees, immediately upon that issuing of the fee becomes a contractual obligation. In your terms, in your world, yes, it becomes a contractual obligation. Q. Upon the issuing of the fee? A. No, upon taking the decision, doing the performance of your functions and then issuing the fee. The moment I enter into a contract to do a function for you, then there is a contract. I mean, I am just being clinical again, my Lord. Q. In your mind, when you took the decision in 2012 that management fees would be payable, that is when the contract was made? A. The moment ---- MR. LETMAN: That is a slightly unfair question. THE JUDGE: Can you re-phrase it slightly -- "whenever"? MR. COMISKEY: Whenever you took the decision that management fees would be payable, that is when the contract was made? THE WITNESS: When we took the decision jointly with your client's director, that is where the contract should come into effect. Q. So that is when the contract was made? A. That is where the contract should come into effect. Q. But when was the contract actually made? A. That is the probably problem, is it not? I do have a problem on that, because we do not have minutes of meetings. If we had minutes of the meetings then we would tell you that is the day upon which we decided this will occur. But before that it was totally informal because decisions were taken by me. THE JUDGE: I think what counsel is putting to you and it is not really the question of the date, but when would you say the liability arose to pay the fees -- when you made the decision, when you issued an invoice or when you did the work? When in your mind does the contract arise? A. In my mind I would think the moment the decision is taken that the fees should be paid. MR. COMISKEY: In your mind, suppose you had sold Christo to Mark Forrester. A. Yes. Q. In your mind, as at that date, Mark Forrester could cause Christo to sue for management fees? A. No, if the decision was taken before, then Christo & Co would be entitled to their fees. Q. And Christo could sue Docklock for those fees? A. Christo could sue Docklock for those fees, yes."

iii) When he was asked about Docklock's payment of the two salaries, he said that the most economic and tax-efficient way to deal with the issue of management fees was to "metamorphose" them into a salary from

Docklock. He then described this arrangement as the payment of salaries in lieu of management charges:

> "Q. I would suggest to you that the reason that it says no management charges have been made is because you were not charging management fees? A. Well, you are entitled to your opinion, counsel, but in my simple mind again, what it says -- unless you are saying we will charge the salaries, but we will also possibly charge you management fees in addition to that, or there are no management fees. What we are saying here is -- in actual fact, this confirms what I am saying. It says that we are not charging management fees, but we are charging salaries. We cannot charge both. The reason we are charging salaries is because they are in lieu of the management fees. It would have been very weird if we had said, "We are charging you salaries and we are charging you management fees as well." Q. So on your case, the amount of the management fees was the amount of the salaries? A. That is what I have been saying for two days now nearly. Q. Then you were the person who chose to bring that to an end in November 2014? A. Absolutely. My companies have to -- I knew exactly what was -- I said it yesterday and there is no point wasting the court's time on this."

iv) When Nicholas was cross-examined he accepted that he knew about the salaries being put into the accounts but he suggested that this was no more than an accounting device:

> Q. It is right there was no PAYE system at that stage, that did not get set up for another couple of years. But the point is, these are being entered in Docklock's accounts as management charges because that is what they were? A. I think the PAYE was after 11th January, when these accounts were filed, I think it was established some time in May, just a few months after the preparation of the accounts. But these were not -- I have come to say the truth -- these were not management charges in the form of a contractual or formal relationship as the defendant's case is. This was a means to an end in relation to the accounting. It was a method to put the salaries unconnected to any form of contract. It was the salaries of Mark and myself. Q. You are not suggesting that you did not know about this? A. I knew that the salaries and the -- I knew about the salaries being put into the accounts because it was an arrangement that Docklock had to take Mark Forrester's and my salaries, the accounts were signed by Chris at the time. Again, all part and parcel of this, you

> know, fluid state of affairs where, when the family was harmonious and happy. Even the accountant must have known he was not a director and yet they prepared them. Whether that was on accounting advice, I do not know, I cannot recall."

v) He was then taken to the minutes of the board meeting of Docklock on 30 January 2015, at which he and Betty were present and the term "management charges" was used. He accepted that there was an arrangement for Docklock to pay management charges and a liability to pay the salaries although he did not accept that this arrangement was a contractual one:

> Q. And the way you characterised those payments is as management charges, is it not? A. It says "management charges" there, I am not denying that, but that is not the reading or the intention to create, to adhere to some formal management contract. Q. It is not someone else's entry in an account; this is your minutes, are they not? A. They are prepared by the company and I believe signed by myself, yes. Q. Yes. Those were management charges. That was the case at this point, that there was a liability on the part of Docklock to pay management charges to CCL? A. The liability was to pay the salary, reflecting the salary. Q. It had nothing to do with the occupation or anything like that. There was no arrangement for Docklock not to pay fees because CCL was not paying rent, nothing like that. It was just a liability to paying management charges? A. It was an arrangement that Docklock would pay for the management charges. Whether the term "liability" means a contractual, I am not able to say that, so I will not use that. It was simply a way in which the salaries, the costs of Mark Forrester and myself at the time were paid to lessen the burden on and benefit because Docklock was cash-rich, generating cash. Q. And that arrangement, that agreement, we know that an attempt was made to serve notice, but the notice was of no effect. So the arrangement, the agreement that there was between the two companies at that stage, that continued. That is the simple fact of the matter, is it not? A. I disagree that the arrangement, these notices did not have an effect. It caused a knee-jerk ex parte application to prevent them to occur. I presume you would not need to have gone to do an injunction if they were not taken into effect or they did not have a force. Q. The notice terminating the retainer came to nothing. The retainer continued throughout the entire relevant period? A. The management services provided by Christo & Co, Docklock was unable to change, to effect

> what it had corporately agreed. It was hindered and restricted by an improper injunction that lasted effectively until, I believe, December when the actual order was finally -- December 2015, when the final, I believe, order was sought. I may be wrong. Q. I think it was discharged in September, but I do not think anything in principle turns on that."

96. I am satisfied that no agreement for Docklock to pay management charges to Christo came into existence before Chris ceased to be a director of Docklock which could bind both companies. I accept Chris's evidence that such a decision was not taken until 2012 or 2013 and I give him credit for candidly accepting this even when the significance of the timing was pointed out to him. Indeed, there is a strong possibility that both Chris and Nicholas mistakenly believed that Chris was still a director and had authority to act for Docklock until the true position became clear after their relationship had broken down. Mr Letman did not argue that Chris had actual or ostensible authority to bind Docklock after he ceased to be a director in March 2010 and Christo's primary claim must therefore fail.

97. Nevertheless, I am also satisfied that by January 2013 at the latest Docklock had agreed to pay the salaries of Nicholas and Mr Forrester in lieu of management charges. I accept Nicholas's evidence that there was no meeting at which he expressly agreed with Chris that Docklock would pay a reasonable fee for Christo's services. But I am satisfied that he orally agreed with Chris that Docklock would pay his and Mr Forrester's salaries in lieu of management fees. Such an agreement could not have taken effect without his agreement or the agreement of Mr Forrester and Nicholas fully accepted that there was such an arrangement.

98. Furthermore, the contemporaneous documents all support the existence of such an agreement. The payment of salary as management fees was recorded in the audited accounts of Docklock for the years ended 31 March 2012 and in the version of the audited accounts for the year ended 31 March 2014 dated 5 May 2014. Further, both versions of the 2014 audited accounts show that management fees were included in the audited accounts for the year ended 31

March 2013. Reduction of salary costs were also recorded in Christo's audited accounts for the year ended 30 April 2012 and 30 April 2013.

99. Mr Comiskey relied on two letters sent by Mr Forrester to Macalvins Ltd ("**Macalvins**"), who replaced Freemans as Docklock's auditors at some point during 2014. In the first letter dated 18 March 2014 Mr Forrester wrote to Mr Shailesh Patel stating: "There are no management charges at present." In the second letter dated 14 November 2014 he wrote to Mr Naitik Patel stating: "No management charge has been made by Christo & Co for the year ended 31 March 2014." The letters or emails to which Mr Forrester was responding were not in evidence and neither letter was copied to Nicholas.

100. It is clear from the second letter why Mr Forrester stated that no management fees were payable during the year ended 31 March 2014. It was because Docklock had set up a PAYE scheme during that financial year. Moreover, Nicholas gave this as one of the reasons for the restatement of Docklock's 2014 accounts between the versions dated 5 May 2015 and 8 May 2015:

> "I was able to correct it, and that is why you see 8th May 2015, at page 2023, accounts where I have been able, obviously at this point everything has gone nuclear and the responsibilities of -- I realised my responsibilities, and that is why in the restated accounts, I was able to record the 2014 correctly for the first time. Because, one, we had PAYE set up, and, two, that it gives effect to what I understood, what I had previously understood to be what was in place effectively the salaries of Mark and myself, placed within the accounts in that format."

101. I accept that Nicholas also had in mind the significance of the way in which the salaries were treated in the accounts because a dispute had already arisen. But I have no doubt that he was aware that the salary payments had been recorded as management charges in the 2012 and 2013 accounts. Mr Letman put this to him a number of times and although he was very defensive and chose his words with care, he did not deny it.

102. Mr Comiskey also submitted that any arrangement between Docklock and Christo for the payment of management fees was not binding and in support of this he relied on the statements of principle in *Baird Textile Holdings Ltd v*

Marks & Spencer plc [2001] CLC 226 at [59] and [60] and *Modahl v British Athletic Federation Ltd* [2002] 1 WLR 1192 at [100] to [102]. Both statements were contained in the judgments of Mance LJ (as he then was) and to very similar effect. In the second passage he said the following:

> "100. For there to be a contract, there must be (a) agreement on essentials of sufficient certainty to be enforceable, (b) an intention to create legal relations and (c) consideration. Both the first two requirements fall to be judged objectively. In Chitty on Contracts (28th ed.) para. 1–034, it is pointed out that: "Contracts may be either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination."
>
> 101. The same paragraph concludes: "Since, as we have seen, agreement is not a mental state but an act, an inference from conduct, and since many of the terms of an express contract are often implied, it follow that the distinction between express and implied contracts has very little importance, even if it can be said to exist at all."
>
> 102. One distinction exists however in relation to the ease with which an express or implied contract may be established. Where there is an express agreement on essentials of sufficient certainty to be enforceable, an intention to create legal relations may commonly be assumed: Chitty, para. 2–146. It is otherwise, when the case is that a contract should be implied from the parties' conduct: Chitty, para. 2–147. It is then for the party asserting a contract to show the necessity for implying it: see *The Aramis [1989] 1 Ll.R. 213* , *Blackpool and Fylde Aero Club Ltd. v. Blackpool B.C.* [1990] 1 WLR 1195, *The Hannah Blumenthal* [1983] AC 854 and *The Gudermes* [1993] 1 Ll.R. 311."

103. I have found that the arrangement was the subject of oral agreement between Chris and Nicholas and that they agreed that Docklock should assume the liability for the salaries of Nicholas and Mr Forrester in lieu of management fees. In my judgment this was of sufficient certainty to be enforced and that the intention to create legal relations can be assumed. I therefore find that there was a binding contract between Docklock and Christo to this effect.

104. But even if it were necessary to imply a contract from conduct, I am satisfied that there was an intention to create legal relations. The parties must have intended that Mr Forrester would be entitled to enforce his rights against Docklock as a senior and valued employee even though he remained head of Christo's Property Management Department. I have no doubt that both Chris and Nicholas would have assured Mr Forrester that he had a contractual right to insist that Docklock paid his salary and the costs of his car once Docklock assumed liability to pay for them. In reaching this conclusion I found Mance LJ's analysis in *Modahl* particularly helpful: see [105].

105. Although I have found that there was a binding contract, it is also necessary for me to consider whether it came to an end before the termination of Christo's agency in September 2016. Mr Letman submitted that it necessarily continued throughout the Relevant Period and even if the Court found that it had come to an end at the end of 2014 or the beginning of 2015 it continued thereafter when the parties agreed that the relationship should move to a more formal commercial relationship. Attractively though he made this argument, I am unable to accept it for the following reasons:

    i) Chris accepted without any qualification that he had brought the agreement to an end on 7 November 2014 (and I have set out the relevant passage above). He later accepted that he intended to terminate the payment of both salaries even though Nicholas objected and Docklock continued to pay his salary.

    ii) In my judgment Docklock accepted Chris's termination of the contract on behalf of Christo at the board meeting on 30 January 2015 and communicated its acceptance to Christo in its letter dated 9 February 2015. But even if I am wrong, Docklock must have been entitled to terminate the contract upon reasonable notice. Mr Letman did not suggest that four months was unreasonable. If the contract did not come to an end by mutual agreement on 9 February 2015 I find that it came to an end on 9 June 2015.

iii) In substance, therefore, Mr Letman was inviting the Court to imply a new contract on commercial terms after 9 February 2015 (or 9 June 2015). However, in my judgment, it is impossible to argue that such a contract came into existence by necessary implication when Christo's position before the Court between February and September 2015 was that it was in Docklock's interests to continue the relationship with Christo because it was paying no management fees.

iv) Further, in the correspondence between Macfarlanes and Boyes Turner after the injunction had been discharged, the question of Christo's fees was expressly raised and it was agreed that Christo would negotiate directly with Docklock. But no agreement was ever reached and I formed the clear impression that neither Chris nor Nicholas was willing to raise the issue with each other.

v) Indeed, for much of the Relevant Period both Chris and Betty were asking the Family Court to allocate Docklock to them. Both Chris and Nicholas were aware, therefore, that if Docklock was awarded to Chris at the final hearing it would make little or no difference whether Christo could charge management fees in the meantime.

vi) Finally, Mr Comiskey pointed out (and I accept) that Christo's case as originally pleaded in the Defence was that there was an agreement evidenced by conduct. But in the Amended Defence dated 20 February 2020 Christo withdrew this allegation and advanced a case of express agreement.

106. I have considered whether I should deduct a sum for management fees for the period from 1 October 2014 until 9 February 2015 (or 9 June 2015). But since Mr Letman did not ask me to award Christo a proportion of the management fees for a part of the Relevant Period and neither party addressed me on what might be an appropriate figure, my preliminary view is that I should not award Christo any management fees for this period and I have decided instead to take this point into account in calculating the occupation charge (below).

Nevertheless, I will give Christo permission to apply to the Court to claim such a sum if it wishes to do so.

(4) Lettings and Renewals

107. Docklock argued that as a matter of construction the professional fees charged by Christo for lettings and renewals did not fall within paragraph 19b of the Moylan Order and clause 2b of the WCIA. He put the proposition to Chris that there was a difference between management services and other professional charges by reference to Christo's invoices and Macfarlanes' letter dated 16 September 2016.

108. I reject that argument. In my judgment the natural and ordinary meaning of the expression "management fees" extends to the services provided by Christo in negotiating and documenting the letting of Docklock's properties and the renewal of existing tenancies. There is no admissible evidence that the parties intended to adopt a limited meaning based on Christo's invoices or estate agency practice and, as Mr Letman submitted, Nicholas would have agreed to their inclusion because he wanted to set off the occupation charge for 66-70 Parkway against any claim.

109. Christo argued that the agreement between Docklock and Christo extended to professional fees for letting and renewals and, if not, a contract for the payment of a reasonable fee should be implied. I reject that argument too for the following reasons:

i) Both Chris and Mr Forrester accepted that before the divorce petition Christo did not charge Docklock fees for either lettings or renewals. They also accepted that if Christo incurred third party letting fees to another agent, it would pass those fees on to Docklock but that Christo would never agree to pay renewal fees to other agents.

ii) I have found that there was a binding contract between Docklock and Christo for the payment of salaries in lieu of management fees. But there was no suggestion that this agreement extended to letting or

renewal fees and Chris accepted that there was no agreement for the payment of these fees (although he said that it was clearly understood).

iii) Moreover, I have found that this contract was brought to an end on 9 February 2015 (or 9 June 2015) and that it was not necessary to imply a new contract for the payment of management fees (and such a contract was no longer pleaded).

110. In relation to this issue Mr Letman relied on *Heis v MF Global UK Services Ltd* [2016] EWCA Civ 569 and *Glencore Energy UK Ltd v OMV Supply & Trading Ltd* [2018] EWHC 895 as authority for the proposition that it was appropriate to imply a contract for the payment of professional fees. *MF Global* was concerned with the question whether a contract could be implied between two subsidiaries one of which was an operating company which employed staff and the other was a service company which paid their salaries. *Glencore* was concerned with the question whether a contract should be implied between an owner and the charterers of a ship for performing services which fell outside the charterparty. Mr Comiskey drew my attention to the judgment of Vos LJ in *MF Global* which reinforced my view that these authorities were not particularly helpful. He stated this at [36]:

> "It is important, in my judgment, to avoid reading the helpful dicta in the cases concerning implied contracts as if they were prescriptive deeds. The most significant aspect of the consideration of whether to imply a contract is the court's consideration of all the circumstances and, in particular, of the conduct of the parties."

111. I must therefore consider whether Christo is entitled to recover letting and renewal fees on the basis of unjust enrichment. In *Benedetti v Sawiris* [2014] AC 938 Lord Clarke gave the following guidance where a claim for a quantum meruit for services is made in the absence of contract at [9] and [10]:

> "It is common ground that the correct approach to the amount to be paid by way of a quantum meruit where there is no valid and subsisting contract between the parties is to ask whether the defendant has been unjustly enriched and, if so, to what extent. The position is different if there is a contract between the parties. Thus, if A consults, say, a private doctor or a lawyer for

> advice there will ordinarily be a contract between them. Often the amount of his or her remuneration is not spelled out. In those circumstances, assuming there is a contract at all, the law will normally imply a term into the agreement that the remuneration will be reasonable in all the circumstances. A claim for such remuneration has sometimes been referred to as a claim for a quantum meruit. In such a case, while it is no doubt relevant to have regard to the benefit to the defendant, the focus is not on the benefit to the defendant in the way in which it is where there is no such contract. In a contractual claim the focus would in principle be on the intentions of the parties (objectively ascertained). This is not such a case…….
>
> It is now well established that a court must first ask itself four questions when faced with a claim for unjust enrichment as follows. (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?"

112. In assessing whether a benefit has been conferred and the value of that benefit all of the members of the Supreme Court accepted that the starting point is the market value of the services: see [34], [100] to [101], [143] and [180]. In the first of those passages Lord Clarke stated as follows:

> "In summary, in my opinion, in a case of this kind, (i) the starting point for identifying whether a benefit has been conferred on a defendant, and for valuing that benefit, is the market price of the services; (ii) the defendant is entitled to adduce evidence in order subjectively to devalue the benefit, thereby proving either that he in fact received no benefit at all, or that he valued the benefit at less than the market price; but (iii) save perhaps in exceptional circumstances, the principle of subjective revaluation should not be recognised, either for the purpose of identifying a benefit, or for valuing a benefit received."

113. In his witness statement Mr Forrester explained that the letting services which Christo provided to Docklock and its other clients included advertising, viewings, agreeing the letting, credit and background checks, preparing the tenancy agreement and associated "move-in" documents such as EPC and gas safety certificates, organising the check-in inventory, organising and checking furniture and fittings, cleaning, reviewing the documents with the tenant, dealing with pre-tenancy enquiries and protecting the deposit. He also explained that the services which Christo provided on renewal involved the

preparation of a section 21 notice, agreeing terms with the tenant, preparing the new documentation and lodging the deposit under the protection scheme.

114. In my judgment, Christo's services conferred a direct financial benefit on Docklock which enriched it. Those services generated rental income for Docklock and minimised voids. Moreover, in order to achieve the same rental income, Docklock saved the costs of instructing other agents. Nicholas explained that Docklock currently pays both SHW and Parkheath 4% for rent collection and property management services and Parkheath 6% per annum for lettings and renewals. He also explained that Docklock pays 5% to third party agents if Parkheath is unable to achieve a letting and a £500 administration fee to Parkheath (if the third party agents are successful). Docklock's accounts for the year ended 31 March 2019 showed that it paid property agents' fees of £156,415 in that year and £158,139 in the preceding year.

115. I am also satisfied both that Docklock's enrichment was at Christo's expense and that it would be unjust if Docklock did not pay for the relevant services. I also find that Christo's range of fees, which varied between 5% and 10% of the annual rent, provided market value for its services for the following reasons:

    i) Mr Forrester's evidence was that Christo charged its clients (other than Docklock) 10% for lettings and 5% for renewals. It was also his evidence that Christo would typically split that fee equally with the sub-agent who let the relevant property.

    ii) The experts were agreed that the usual rate charged by an agent for letting commercial premises was 10% of the annual rent and for conducting a rent review was 5% to 6% and for arranging a lease renewal was 6% to 7.5%. They were also agreed that the usual rate charged by an agent for letting residential premises was 6% to 10% and for AST renewals was 3% to 8%.

    iii) Parkheath charges Docklock 6% for lettings and renewals. But it also charges Docklock 4% for property management services. I have already found that Christo is not entitled to recover a management fee

for those services. I therefore accept Mr Letman's submission that the letting and renewal fees charged by Christo must be viewed in the light that it was providing property management services for free.

116. In *Benedetti v Sawiris* the Supreme Court recognised the principle of subjective devaluation and that in principle it is permissible for a defendant to prove that he valued the relevant services at less than market value: see [18]. (There was a difference between the members of the Court about the scope of the principle: see [18] to [26]; but I do not consider it to be relevant to the issue which I have to decide.)

117. In early 2015 Nicholas had interviews with both Savills (UK) Ltd ("**Savills**") and Knight Frank LLP ("**Knight Frank**") to take over the management of Docklock's portfolio. It was clear from his evidence that he was negotiating separate agreements for property management services and for letting and renewals. Knight Frank produced a draft agreement which contained letting fees of 9% for lettings and 8% for renewals. The draft in the trial bundle had been amended in manuscript to show 5% for lettings and 3% for renewals.

118. I am satisfied that Nicholas would have been willing to pay either Savills or Knight Frank for both property management services and for lettings and renewals if Chris had not obtained an injunction to restrain it from terminating Christo's retainer. I am also satisfied that he would have been prepared to agree the figures which he later agreed with Parkheath and SHW. On that basis I am satisfied that there are no grounds for the subjective devaluation of Christo's services.

119. I therefore find that Christo is entitled to recover the invoiced sums for its letting and renewal services for the Relevant Period. Mr Comiskey did not challenge the total figure of £149,263.20 and subject to any occupation charge to which Docklock is entitled, I am satisfied that Christo was entitled to deduct this sum from the amount which it transferred to Docklock.

(5) Staff Salaries

120. On 30 January 2015 Mr Forrester paid the sum of £64,127 to Christo on behalf of Docklock in response to Mr Petrides' letter dated 29 January 2015. In the Scott Schedule Docklock challenged this payment on the grounds that it was unauthorised and that there was no proper explanation for it. In my judgment there was no substance in that challenge. I have found that there was a contract between Docklock and Christo for the payment of the two salaries and it is clear from Mr Petrides' letter and his subsequent reconciliation that this payment was made pursuant to this contract.

121. Mr Comiskey also challenged this payment on the basis of its timing and that it related to a liability which had accrued during the financial year ended 31 March 2012. Again, I reject that submission. It was an outstanding contractual liability for which Docklock was liable to Christo and in my judgment Christo was entitled to use the funds which it held on account to discharge that liability.

(6) VAT Returns

122. Christo charged Docklock £9,120 for preparing and submitting its VAT returns to HMRC. Docklock objected to paying those fees for the same reasons as it objected to paying letting and renewal fees. I reject that argument for the same reasons. There was no suggestion that Docklock would not have paid its accountants a similar figure for dealing with its VAT returns if Christo had not done so. I therefore find that Christo is entitled to recover the sum of £9,120 as a quantum meruit and that Christo was also entitled to deduct this sum from the amount which it transferred to Docklock.

(7) Rent Review Fee

123. Christo also charged Docklock £1,800 (including VAT) for the rent review of 186 Camden High Street. Mr Comerford conducted the review on Docklock's behalf and he had completed it by 14 July 2014. The evidence was that he was entitled to an internal bonus or commission for doing so but that Christo did not submit an invoice to Docklock until 11 months later on 14 July 2015. It was put to Chris that he had deliberately started charging Docklock for work

which had already been done once the divorce proceedings had been issued. He candidly accepted that this was correct:

> "If you are trying to insinuate that was the intent and I could do that, the answer is that I would try my best to achieve that. I am not saying that we did not look at every function we could perform for Docklock so that we could charge the correct fee for the function that we performed. That certainly was the intent."

124. In the light of this evidence Mr Comiskey suggested to Chris that the invoice had been improperly raised. I disagree. It would have been improper for Christo to charge Docklock for services which were never provided or to charge an inflated fee. But neither suggestion was made to Chris. Moreover, any delay in submitting the invoice made no difference because the Relevant Period began on 1 October 2014. If Christo had raised an invoice on 1 September 2014 and then paid it in October 2014, there would and could have been no criticism.

125. I am satisfied, therefore, that Christo is also entitled to recover the sum of £1,800 as a quantum meruit for the rent review of 186 Camden High Street. The rent review memorandum shows that the rent was reviewed to a figure of £178,614 (although a personal concession to £140,000 was agreed with the tenant). A fee of 5% of the annual rent would have been £8,930.70 (as the invoice recorded) but Christo charged a fee of £1,500 plus VAT. I have no doubt that Nicholas would have been prepared to pay this fee to SHW (who replaced Christo).

(8) Occupation Charge

126. By closing submissions Docklock did not challenge Christo's claim to be entitled to £183 for gas safety fees. After adding these fees, I award Christo management fees of £224,493.20 in total. I must therefore consider Docklock's claim to be entitled to set off against these fees an occupation charge for 66-70 Parkway for the Relevant Period under paragraph 19b of the Moylan Order and clause 2c of the WCIA.

127. Docklock's case was that Christo should pay an occupation charge of £273,678 based on an annual rent of £142,500. Christo's case was that it should pay £96,748 based on an annual rent of £79,000. It also accepted that it should be liable for service charges of £14,330.68. It was also Christo's case that it was not liable to pay an occupation charge for the period until 12 June 2015.

(i) "De Facto" Set Off

128. Mr Comiskey's primary submission was that if the Court found that Christo was entitled to management fees, it should simply set off the free occupation of 66-70 Parkway against the management fees on the basis that one was a quid pro quo for the other. Mr Letman strongly resisted this argument on the basis that it was a new point. For a pragmatic reason I consider it to be appropriate to permit a "de facto" set off for the period between 1 October 2014 and 9 February 2015 (although I will permit the parties permission to apply if they wish to do so).

129. Otherwise, however, I reject that submission for the period from 9 February 2015 onwards. I have found that there was an agreement for the payment of salaries in lieu of management fees which was terminated by mutual agreement on that date. In my judgment, there is no contractual basis for permitting Docklock to set off occupation against management fees for the entirety of the Relevant Period when there was no agreement to that effect and Docklock was not paying for property management services at all after that date.

(ii) The Period

130. Mr Letman submitted that the occupation charge should only be payable from 12 June 2015 when the notice given by Boyes Turner in their letter dated 10 February 2015 had expired. Mr Comiskey pointed out that Christo had admitted that it was liable from 10 February 2015 (i.e. the date of service): see the Amended Defence, paragraph 20c. He also submitted that it would be wrong to approach the occupation charge as if it was a claim for damages for trespass or mesne profits and that he was seeking a restitutionary remedy. He

relied on *Goff & Jones* The Law of Unjust Enrichment 9th ed (2016) at 5—33 and 5—34:

> "Where a defendant has permission to occupy the claimant's land but no binding terms are agreed about payment, a claim in unjust enrichment lies to recover the value of the defendant's use and occupation. Although it is easy to confuse the two, claims of this sort differ from wrong-based claims for mesne profits, which lead to an award of damages for the tort of trespass. They are not founded on wrongdoing, but on the defendant's unjust enrichment at the claimant's expense when he freely accepts the use value of the property, knowing that the claimant expects to be paid.
>
> The use value received by the defendant is not quantified by asking what he did with the property, but by assessing the saved costs of his occupation. This use value accrues day by day in the same way as the use value of money, and the normal measure of the defendant's enrichment is the open market rental value of the property."

131. As matter of principle, I accept Mr Comiskey's submission and in my judgment Docklock would have been entitled to an occupation charge for the whole of the Relevant Period. However, I have found that Christo was entitled to charge a management fee for its property management services from 1 October 2014 until 9 February 2015. It seems to me that the simple course is to treat Docklock's entitlement to an occupation charge as the quid pro quo for property management services for that period. Again, this may seem a rather rough and ready approach and if either party considers there to be a significant imbalance between two figures, I will give them permission to apply.

(iii) The Expert Evidence

132. There was a significant difference between the experts about the open market value of 66-70 Parkway. Mr Beaumont's valuation was based on splitting the demised premises into 20 different areas (A to U) and valuing what he considered to be the retail elements at rates between £85 and £90 per square foot for Zone A and £42.50 to £45 per square foot for Zone B. However, he valued most of the premises as office space at £34.50 and after adding additional sums for the courtyard and store and tenant's improvements he arrived at a total figure of £142,550 per annum.

133. Mr Hooper took a more conventional approach. He analysed each of the four agreed comparables by adopting the Zoning Method of Valuation as set out in the Explanatory Notes produced by the RICS in September 2015:

> "Zoning is a standard method of measuring retail premises to calculate and compare their value. It is used by both public and private sector surveyors. Zoning as a method has been applied in the UK to the analysis of shop rents and properties for rating purposes since the 1950s. Shop or retail premises are divided into a number of zones each of a depth of 6.1 metres – or 20 feet. Zone A closest to the window is most valuable with the value decreasing with distance from the frontage: Zone B is the next 6.1 metres and then Zone C until the entire depth of the retail area is allocated to a zone – anything after Zone C is usually defined as the remainder. The established valuation convention is to halve back from Zone A, with Zone B onwards assessed '*In Terms of Zone A*' (ITZA): Zone B = A/2, Zone C = A/4, Zone D, which is usually the remainder of the retail area after Zone C, is assessed as A/8 and any ancillary space will probably be valued as A/10."

134. Mr Hooper analysed each comparable, then calculated the net internal area ITZA and then divided the rent by that figure. I will call this exercise an "**ITZA valuation**". Based on this exercise Mr Hooper arrived at an average ITZA valuation for the four agreed comparables of £80.50. Mr Hooper then took the net internal area of 66-70 Parkway, calculated the total area ITZA and then applied the rate of £80.50 to it and arrived at a total figure of £79,000 per annum.

135. For the reasons which I have set out above, I found Mr Hooper to be the more credible witness and I preferred his evidence. I also accept his opinion that the market rent as at 1 September 2013 was £79,000 per annum for the following reasons:

i) In the Statement of Agreed Facts dated 12 December 2020 the experts agreed to adopt section 34(1) of the 1954 Act as the basis for valuation. It provides that on a statutory renewal the new rent is determined by the Court as follows:

> "(1) The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such as may be

> agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded— (a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding, (b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business), (c) any effect on rent of an improvement to which this paragraph applies, (d) in the case of a holding comprising licensed premises, any addition to its value attributable to the licence, if it appears to the court that having regard to the terms of the current tenancy and any other relevant circumstances the benefit of the licence belongs to the tenant."

ii) Mr Comiskey submitted (and I accept) that the primary difference between the experts was that Mr Hooper had valued 66-70 Parkway on the basis set out in section 34 whereas Mr Beaumont had not. Rather than value the premises as a single demise he chose to value them as if they had been let separately for retail and offices. He had also included tenant's improvements even though they are expressly excluded by the section.

iii) Mr Comiskey suggested that Mr Beaumont's method was to be preferred. I disagree. In my judgment, it was reasonable to adopt the statutory basis and to use the Zoning Method of Valuation. Mr Beaumont gave no explanation for his departure from the basis set out in the Statement of Agreed Facts (and did not explain why he accepted it in the first place if he did not consider it appropriate).

iv) The experts had also agreed all of the terms of the hypothetical lease apart from the terms of the alienation covenant and whether the landlord would permit the tenant to sublet part of the premises (as opposed to the whole). Mr Hooper's evidence was that the hypothetical lease would not have contained a covenant permitting the tenant to sublet part of the premises. He produced the leases of two of the agreed comparables which excluded such a provision. Mr Beaumont provided

no evidential basis for suggesting that the hypothetical lease of the premises ought to have included it.

v) Mr Beaumont had not considered whether consent would have been granted to divide up the premises under the Building Regulations and I was left with a considerable doubt whether the landlord would have been able to obtain it, given the limited means of escape and the requirements for separate and disabled WCs.

vi) Mr Beaumont accepted that the Zoning Method of Valuation was simple to apply and in the Statement of Agreed Facts the experts had agreed the net internal area of 66-70 Parkway. Mr Beaumont's figure of £142,500 produced an ITZA valuation of £145 per square foot which was almost double the average ITZA valuation for the agreed comparables of £80.50. This satisfied me that Mr Beaumont's valuation was much too high.

136. I find, therefore, that the market value of 66-70 Parkway for the Relevant Period was £79,000 per annum and that the daily occupation charge was £216.44. By my calculation the total number of days from 10 February 2015 to 1 September 2016 was 568. If the parties agree to set off the management fee for the period from 1 October 2014 to 30 January 2015, I determine that occupation charge for that period was £122,937.92. If they do not accept that determination and it is necessary to fix a management fee for that period, then I determine the occupation charge to be £151,723 (as stated by Mr Hooper).

137. Mr Forrester gave evidence that he was asked to work out the service charge for the Relevant Period based on the floor area of 63% occupied by Christo. He produced a detailed schedule itemising all of the expenditure totalling £14,330.68. There was no serious challenge to this evidence and I accept it. I also accept Mr Letman's submission that the service charge should exclude £3,540 for cleaning the common areas and WCs on the basis that they were not used by Christo.

(9) Summary

138. Based on the findings which I have made in relation to management and professional fees and the occupation charge I find that Christo was entitled to charge Docklock £224,493.20 in professional fees less £122,937.92 for the occupation charge and £14,330.68 for service charges which produces a net figure of £87,224.60. I make this finding on the basis that the parties agree to set off the management fee for the period 1 October 2014 to 9 February 2015 against the occupation charge. I deal with the question of forfeiture after dealing with the disputed disbursements. I do so because it formed part of Docklock's case on forfeiture that Christo had made a substantial number of unauthorised payments in breach of fiduciary duty.

VIII. Miscellaneous Disputes

139. There were a number of remaining issues between the parties which were collected together in the Scott Schedule under the heading "Miscellaneous Disputes". In each case Docklock disputed disbursements or payments made by Christo on the basis that it had no authority to make them. I begin by considering the extent of Christo's authority to act for Docklock during the Relevant Period in general terms. I then consider each dispute in turn.

(1) Christo's Authority

140. There is no issue that Christo had general authority to act as Docklock's agent and to make payments on its behalf between 1 October 2014 and 9 February 2015. In her letter dated 9 February 2015 Betty gave notice to terminate that authority but on 19 April 2015 Moor J made an order which provided that Christo should continue to manage Docklock's property as before. On 30 September 2015 Roberts J discharged the order but Docklock did not suggest that this retrospectively vitiated any acts which Christo had carried out.

141. In their letter dated 2 February 2016 Boyes Turner confirmed that Docklock did not intend to take any immediate steps to change the management of its property portfolio and in the event Christo continued to manage the properties until on or about 23 September 2016. I have found that there was no contract between the parties for the payment of management fees but it does not follow that Christo's authority came to an end. Mr Comiskey accepted (and correctly

in my judgment) that it was possible for Christo to continue to act as Docklock's agent in the absence of a contract.

142. In my judgment, Christo continued to act as Docklock's agent after the exchange of letters between Macfarlanes and Boyes Turner despite the absence of a contract. Christo continued to have general authority to discharge Docklock's liabilities and to make payments on its behalf and it owed the same fiduciary duties until the end of the Relevant Period. Indeed, Docklock accepted that Christo made unchallenged payments of disbursements, expenses and transfers of in excess of £1,140,000 during the Relevant Period: see the Scott Schedule, paragraphs 2.3 and 3.3. Docklock did not explain why it had not challenged them, if Christo had no authority to make them on its behalf.

143. This does not mean, however, that Christo's authority was unlimited. Mr Letman accepted (as I accept) that Christo was bound by the undertaking which Chris gave in clause 9 of the agreement dated 23 October 2014 not to cause Christo to deal with any of Docklock's assets other than in the ordinary course of business. Docklock was, of course, entitled to give instructions to Christo not to make individual payments or categories of payments even if they fell within the ordinary course of business. But in my judgment Christo was authorised to make such payments and disbursements unless or until it did so.

(2) 33 Ranulf Road (Refurbishment): £15,246.55

144. Chris and Betty owned 33 Ranulf Road NW2 2BS ("**33 Ranulf Road**"). At the time of the divorce proceedings they had begun substantial refurbishment works and had incurred professional fees which had been paid by Docklock. Mr Forrester produced a schedule showing that Docklock had incurred expenditure of £78,032.77 (inclusive of VAT). Many of the invoices had been submitted before the Relevant Period had begun.

145. Docklock challenged £15,426.55 of this expenditure on the basis that Christo did not have authority to make these payments. It advanced two principal arguments to support its challenge: first, it argued that the payments were not

made in the ordinary course of business because 33 Ranulf Road was owned by Chris and Betty and the payments by Docklock were treated as a loan in its accounts (and ultimately forgiven by the declaration of an interim dividend). Secondly, Nicholas gave evidence that he had not authorised the payments and relied on a letter dated 16 December 2016 in which Boyes Turner made this assertion.

146. I reject both arguments and dismiss this challenge for the following reasons. First, I am satisfied that it was within the ordinary course of Docklock's business to fund the refurbishment of 33 Ranulf Road before 1 October 2014. Mr Forrester's schedule shows that Docklock had already incurred substantial costs by that date and that Christo was managing the project on its behalf. Docklock was a property investment company and it was clearly within the ordinary course of its business to fund a property refurbishment. In my judgment, the fact that the property was held by the two individual shareholders makes no difference.

147. Further, because of the divorce dispute a number of the invoices remained unpaid and one contractor, Hardman Structural Engineers Ltd, went so far as to issue proceedings in the County Court. Mr Forrester compromised the claim and paid the outstanding debt of £2,679. In my judgment, Nicholas would have had real grounds for complaint if Mr Forrester had refused to deal with the problem and a creditor had obtained a judgment against Docklock or issued a winding up petition.

148. Secondly, I am satisfied that Nicholas was aware of the payments but did not withdraw his authority. In cross-examination he accepted that Docklock paid the professional fees in relation to the project both before and after the commencement of the divorce proceedings as a loan on behalf of Chris and Betty. However, he suggested that this loan was "cut off and shut down" on 7 November 2014. I reject that evidence for the following reasons:

    i) On 7 November 2014 Nicholas sent a memo to Mr Forrester terminating Christo's authority to pay his salary and car leasing payments. If he had terminated Docklock's authority to pay the

professional fees relating to 33 Ranulf Road, I have no doubt he would have put it in writing at the same time.

ii) Again, if Nicholas had terminated Docklock's authority to make these payments, I have no doubt that he would have objected to them at the first available opportunity. A number of payments were recorded in the Q3 2014, Q4 2014 and Q1 2015 RIESs but in his emails dated 11 and 22 June 2015 Nicholas did not raise any objection to the payments in relation to 33 Ranulf Road.

iii) There was a dispute between the parties about a memo dated 5 November 2014 in which Mr Forrester requested authority from Chris to pay a fee of £720 to Jhai Ltd, the building inspector. In his fifth witness statement dated 15 December 2020 Nicholas denied that he had received it and he denied it again in his cross-examination on the same day.

iv) I found this evidence unconvincing. Nicholas was ready for Mr Letman's questions and he referred without prompting to a letter dated 22 December 2016 in which Boyes Turner asserted that he had not authorised this expenditure. This letter had little or no evidential value because of its date and it is telling that Nicholas was unable to refer to any contemporaneous documents in which he had objected to any of the payments.

v) Moreover, on 29 June 2016 he had approved Docklock's audited accounts for the year ended 31 March 2015 in which all of the expenditure on 33 Ranulf Road was recorded as a loan to the shareholders. This was consistent with the arrangement between Docklock and its shareholders continuing after 7 November 2014 and there was nothing in the accounts to suggest that any of the expenditure was unauthorised. I return to the effect of these accounts in more detail in the context of the payment of £20,000 to Charles Russell (below).

(3) 33 Ranulf Road (Utilities): £6,048.44

149. Docklock also challenged £6,048.44 of utility bills which Christo paid in respect of 33 Ranulf Road. In his fourth witness statement Nicholas clarified the position and limited his objection to the utilities used by the occupier, Mr Ivan Georgievich, on the basis that he was engaged by Christo not Docklock. However, in his evidence Mr Forrester confirmed that £4,430.25 had been recovered from Mr Georgievich and that the Christo had accounted to Docklock for these funds. (He also pointed out that a number of the invoices to which Docklock had objected fell outside the Relevant Period.) I am satisfied that these payments were made in the ordinary course of business and I dismiss this challenge too.

(4) 73 Parkway (Utilities): £8,984.22

150. Docklock also challenged £8,984.22 of utility bills which Christo paid in respect of 73 Parkway. These bills related to Flat B which Chris occupied on his return to the UK in October 2014 when he was served with the divorce proceedings. They also related to Flat A for the period from 14 July 2016 when the previous tenant, Mr Boitteau, moved out. In the Scott Schedule Docklock also raised a concern over what appeared to be a renewal fee in respect of the letting to Chris. But this turned out to be no more than an error in the Q1 2015 RIES.

151. Christo did not suggest that these payments were made in the ordinary course of business. It argued, instead, that because Chris was entitled to occupy 73 Parkway rent-free under Moor J's order and then the Moylan Order, he was not obliged to pay for the utilities and other outgoings. It also relied upon the fact that Blue Sky Investments Ltd, one of Chris's companies, had agreed to pay Betty's living expenses (including the same or similar outgoings in relation to 28 Cheyne Walk). I reject that argument and accept Mr Comiskey's submission that this was a false equivalence. In the agreement dated 23 October 2014 Chris expressly agreed to fund Betty's day to day living expenses and there was no equivalent provision for Chris's benefit.

152. Further, I cannot construe the provision in either order permitting Chris to occupy 73 Parkway rent free as imposing a positive obligation upon Betty or

any of her companies to make payments on Chris's behalf to discharge his outgoings. In any event, on 30 September 2015 Roberts J discharged the order and although Docklock permitted Chris to remain in occupation until the Moylan Order was made, it never undertook to pay any of the outgoings.

153. Mr Letman also submitted that £4,253.34 related to bills rendered after the end of the Relevant Period and that Docklock had waived any challenge to the payment of those bills by the Moylan Oder and the WCIA. I cannot accept that submission either and because he repeated that submission in relation to a number of the disbursements (below) I set out my reasons in full here:

i) The waiver of claims does not extend to all payments made by Christo before or after the Relevant Period. It extends to claims or rights of action. The right of action which Docklock is exercising in the present case is the right to require Christo to prove that it has "duly accounted" for all of the income which it received during the Relevant Period and if it fails to do so, Docklock is entitled to have the relevant items disallowed or, to use the traditional language, to falsify the account. This is the case whether the payment is made during or after the Relevant Period.

ii) Indeed, Christo's liability to account for a particular payment or, to use the traditional language, item of discharge cannot depend on when the individual bills were received or paid but whether they were paid out income received during the Relevant Period. This can be tested very simply. If Christo received two utility bills for 73 Parkway on 1 September 2016 and 2 September 2016 but paid them both out of income received during the Relevant Period, their dates cannot affect Christo's liability to account. In each case, the critical question is whether the disbursement or expense was a proper one.

iii) I should add that there is a difference here between the sums which Christo transferred to SHW and Parkheath because all of that income was received after 1 September 2016 and Christo had no duty to

account for it or to apply it for Docklock's benefit, which had waived any right to recover it.

iv) Finally, I stress that this conclusion does not involve any departure from Deputy Master Smith's construction of the WCIA. The carve out for the management fees only extended to the Relevant Period.

(5) 677 Green Lanes (the Queen's Head): £8,543.46

154. In the Scott Schedule Docklock challenged four invoices in relation to the development of 677 Green Lanes London N8 0QY ("**677 Green Lanes**"), a property which was owned by Docklock (as Mr Forrester confirmed). By closing submissions, Docklock had limited its challenge to an invoice for £6,000 (inclusive of VAT) submitted by Trinéire, a firm of architects and interior designers. I am satisfied that the other three invoices were paid in the ordinary course of business and that there was no basis for challenging the payments.

155. Mr Comiskey submitted, however, that the Trinéire invoice related to work carried out to 33 Ranulf Road. He produced an exchange of emails which suggested that Chris asked Ms Angela Aston of Trinéire to submit an invoice for work to 33 Ranulf Road with an address line "677 Green Lanes London N8". He also produced a notice of planning permission which showed that Docklock had instructed a different architect for 677 Green Lanes. When these documents were put to Chris, his evidence was as follows:

> "Q. So she was asking about which address to put on an invoice in relation to Ranulf Road, was she not? A. Without looking at the follow-up documentation, I cannot make a comment, but I think what you are probably saying is that it follows. Before you asked me did it happen that sometimes invoices were issued for the same company on a different property? It has happened. I have said that. Is this one of those examples? It could be. It does not alter the fact that the service has been provided and the person has been paid. Why the reason this happened, I cannot recall. There must have been a reason behind it and this would have been done with Nicholas's knowledge because Nicholas was involved on the Ranulf Road invoice development very heavily, and in Green Lanes as well. Q. So you did not copy Nicholas into your response? A. In a

> perfect world, I should have done that, yes, but I did not. But if the Ranulf Road development was the responsibility of Docklock, as it was, in my opinion, and as Nicholas agreed and consented, it does not make any difference, in my opinion. It is still Docklock paying for the expense of Ranulf Road."

156. In my judgment, it is not within the ordinary course of business of a property investment company to falsify invoices by attributing the work done on one property to another property. Chris did not accept unequivocally that this is what he was asking Ms Aston to do in relation to the work specified in the Trinéire invoice. But he candidly accepted that this was done from time to time and he accepted that this could have been one of those occasions. Moreover, he did not offer a legitimate explanation for asking her to substitute 677 Green Lanes for 33 Ranulf Road. In those circumstances, I am not satisfied that Christo has discharged the burden of proving that it paid the Trinéire invoice in the ordinary course of business and that it has duly accounted for that sum. I therefore uphold Docklock's challenge to the extent of £6,000.

157. I add that I make no finding on the question whether Nicholas was involved in the issue of the Trinéire invoice. He was not copied in to the relevant emails and this point was not put to him in cross-examination. Indeed, Mr Letman suggested to him that Trinéire carried out the relevant work in relation to 677 Green Lanes.

(6) 66-70 Parkway (Cleaning Charges): £16,580.44

158. Docklock also challenged £16,580.44 of cleaning charges relating to the communal maintenance of 66-70 Parkway. I can deal with this item briefly because Mr Comiskey did not pursue it in his closing submissions. Mr Forrester confirmed that even though Docklock had instructed new managing agents for the building, they did not take over the management of the common parts and Christo continued to pay the bills to maintain the services and to ensure that the insurance did not lapse. In those circumstances I am satisfied that Christo made these payments in the ordinary course of business and I dismiss this challenge.

(7) Charles Russell (Legal Fees): £20,000

159. Docklock also challenged a payment of £20,000 made to Charles Russell LLP ("**Charles Russell**") on 22 October 2014 for Chris's legal fees in the divorce proceedings. There was no suggestion that the payment was in the ordinary course of business. However, Chris gave evidence that Nicholas authorised this payment orally on behalf of Docklock. Nicholas denied that he gave authority for the payment and when asked to authorise a second payment, he refused to do so.

160. I prefer Nicholas's evidence on this issue and I am satisfied that Mr Forrester made the payment on Chris's instructions and without Nicholas's authority because there is clear and contemporaneous documentary support for Nicholas's evidence. On 22 October 2014 the payment was made but on 24 October 2014 the following email exchange took place between Nicholas and Mr Forrester:

> "I am sorry to have to ask, but please advise me as to the transfer from Docklock to Charles Russell."
>
> "I was asked to make the transfer of £20,000 from Docklock Limited. I questioned whether I could do this and should I advise you first. Chris said quite right and copied the instruction and put it under your door. I then had a further talk with Chris as I was uncomfortable about doing this transfer and needed further clarification, and was effectively told that as an employee I was [sic] should be following the employers instruction."

161. Further, by email dated 10 November 2014 Mr Forrester informed Nicholas that Chris had asked him to make a second transfer to his solicitors and that he had told Chris that he could not do so without a director's confirmation. Mr Forrester was sufficiently concerned about these instructions that he submitted a formal memo to Nicholas on the same day confirming that the second transfer had not been made.

162. I accept Mr Letman's submission that there was never any secret about the payment to Charles Russell and that Mr Forrester recorded it in the 2015 Q1 RIES. I also accept that although Nicholas raised a number of detailed

objections to payments made by Christo in his emails dated 11 and 22 June 2015 he did not ask about this payment or object to it. But in my judgment the answer to this point is a simple one. Nicholas was fully aware of the payment two days after it was made and had not authorised the second payment.

163. I turn, therefore, to the accounting treatment of this sum (and a number of other sums) in Docklock's audited accounts for the year ended 31 March 2015 and 31 March 2016. Note 16 to the 2015 accounts recorded that Chris was treated as having made a loan to Docklock of £69,631 at the beginning of the year. Nicholas explained that this sum was made up of the Charles Russell fees of £20,000, the credit card payment of £20,741 (which I address below) and expenditure of £18,390.43 in relation to 33 Ranulf Road. At the end of the year the balance had been reduced to £60,092. Note 6 to the 2016 accounts recorded that an interim dividend of £122,000 had been paid to Chris and Betty and note 16 recorded that this had been used to repay £62,453 on Chris's loan account.

164. Mr Letman submitted that Chris should be treated as having "repaid" the Charles Russell fees of £20,000 and the other sums. Although this was a simple and straightforward approach, I am not satisfied that it is the correct way to characterise the issue for the Court. The burden is on Christo to establish that the payment of £20,000 was authorised and I have already found that it was not. It is clear that no money changed hands and Nicholas's evidence was that the loans and the dividend were a way of presenting payments on behalf of Chris in the accounts which he adopted on the advice of his new accountants.

165. I have considered whether Docklock should be treated as having ratified the payment of £20,000 to Charles Russell and the other payments by treating them as a loan to the company and then forgiving them by declaring a dividend. I found the way in which Docklock accounted for these payments to be of evidential value in relation to the question whether Nicholas terminated Christo's authority in relation to 33 Ranulf Road (because it strongly suggested that the parties treated the expenditure as a loan to Docklock's shareholders both before and during the divorce proceedings).

166. However, Mr Letman did not argue that by recognising the loan and authorising the dividend, Nicholas had ratified the payments on behalf of Docklock. Indeed, I am not satisfied that he adopted them unequivocally (which would be required for ratification). A footnote to note 6 of the 2016 accounts dealing with the dividend stated: "The company reserves its right to rescind/reverse upon determination of litigation." Nicholas also laid great emphasis on the fact that the dividend was an interim and not a final dividend and could be reversed. I agree with Mr Letman that it would by highly unusual for a company's board of directors to reverse an interim dividend. But the situation was an unusual one and the directors of Docklock have reserved the right to reverse the decision depending on the outcome of this litigation.

(8) Bank of Cyprus (credit card payment): £20,741

(9) Lloyds Bank (Amex payment): £16,014.82

167. Docklock also challenged a payment of £20,741 by Christo in relation to Chris's credit card from the Bank of Cyprus and a payment of £16,014.82 in respect of Betty's Amex card from Lloyds Bank. Chris's evidence was that his credit card had been used by Betty or Nicholas without his authority and that they incurred expenditure of £20,741. It was also his evidence that he had discussions with Betty about reconciliation and that in the course of those discussions she agreed that Docklock should reimburse him the funds and in turn he agreed to the payment of her Amex bill.

168. By letter dated 29 January 2015 Chris wrote to Mr Savas Sava, his account manager, at the Bank of Cyprus, complaining about the unauthorised use of his credit card. The credit card statement also shows that it was used to pay Vardags, a firm of solicitors who were acting for Betty, and to make payments to the Arts Club of London, of which Nicholas was a member. Further, when Nicholas queried the credit card payments in his email dated 11 June 2015 Mr Forrester replied stating that Chris had agreed these payments with Betty.

169. I accept Chris's evidence in relation to this issue. I am satisfied that Nicholas used his father's credit card without his authority and that Betty agreed that

Docklock should reimburse him in order to avoid any further investigation. I found Nicholas's evidence on this issue unsatisfactory. He denied a number of times that he had used his father's credit card without his authority. But he could offer no credible explanation for the use of the card at the Arts Club and had to concede that he probably attended one dinner for which the card was used to pay.

170. Further, Docklock did not adduce any evidence from Betty or call her to give evidence although Chris's position had been clear since June 2015. The best which Mr Comiskey could do was to put a without prejudice letter dated 8 April 2015 to Chris and I attach little weight to it. Betty had a strong reason to agree that Docklock should reimburse Chris for this sum and if she had disputed Chris's account, I would have expected Docklock to call her. Mr Comiskey did not suggest that she was unable to give evidence.

171. Mr Comiskey did not suggest either that Betty had no authority to agree to these payments on behalf of Docklock. She was a director of the company and even if she had no actual or apparent authority to bind Docklock as a director, Chris and Betty each owned 50% of the shares. He did submit, however, that this was an unlawful distribution to shareholders. But he cited no authority for this proposition and I reject it. In the 2015 accounts the Bank of Cyprus payment was recorded as a loan to Chris and in the 2016 accounts an interim dividend was declared to repay it. Nicholas took this action on accountancy advice. For these reasons I dismiss both of these challenges.

(10) Arion: £27,190.90

(11) Arion: £3,481.88

172. Arion was incorporated in the Isle of Man and during the Relevant Period it owned 100% of the shares in both Anglo and Consort. Nicholas's evidence was that it had only one asset, a property at 197 Kentish Town Road. The notes to its financial statements for the year ended 31 March 2016 show that Anglo and Consort had lent £59,732 to Arion. The Q4 2016 RIES recorded that during 2016 Anglo had lent Arion £17,000 and Consort had lent it £20,000. It also recorded that on 26 April 2017 and 14 June 2017 Docklock

paid £27,190.90 and £3,481.88 to Arion. It also records that on 16 June 2017 Arion repaid £20,000 to Consort.

173. Docklock challenges these payments. It was common ground that the principal purpose of the loans by Anglo and Consort was to pay the administrators for their fees and the other expenses which they had incurred in relation to the property. The first payment was made before the Moylan Order and the second was made between the Moylan Order and the WCIA. The Q4 2016 RIES did not record a payment by Arion to Anglo but Chris stated in evidence that these sums were used for this purpose.

174. For the reasons which I have set out above I reject Mr Letman's argument that Christo had no duty to account for these payments because they were made after the end of the Relevant Period. The only other issue between the parties was whether Christo made these two payments in the ordinary course of business. I am not satisfied that Christo has discharged the burden of proving that it was within the ordinary course of business for Docklock to advance sums to Arion to repay loans which had been made to it by its 100% subsidiaries. There was no contract and it is not usually in the interests of company A to make a gratuitous payment to company B to enable it to pay its debts, especially, if they are owed to its subsidiaries. Nor is it in the ordinary course of business for the directors of a company to act against its interests or those of its shareholders.

175. Neither party cited any authority for the proposition that the position may be different where the two companies have common shareholders or, indeed, there is a complete identity between them. But even if there were authority for this proposition, Christo has not persuaded me that it applies in the present case. I say this for the following reasons:

    i) The first payment was made after Moylan J's first and second judgments in which he had ordered Docklock and Arion to be allocated to Betty and Consort to be allocated to Chris.

    ii) The second payment was made after the Moylan Order when the parties had agreed to enter into the WCIA and Chris had expressly

undertaken to procure the waiver of the inter-company loan owed by Arion to Anglo: see paragraph 25.

iii) It was, therefore, in the interests of both Docklock and Betty at the date of both payments to wait and see both what order Moylan J might make and also how far the waiver of claims in the WCIA would extend before advancing funds to Arion to repay Anglo and Consort. If Christo had waited, no repayment would have been necessary.

(12) Counterclaim (Rent): £10,849.32

176. In the Moylan Order Betty also undertook to procure that Docklock sold 66-70 Parkway to Chris or a UK based company of his choice for £3,260,000: see paragraph 30. It provided that completion was to take place by 19 June 2017 or as soon as possible thereafter and in any event by 10 July 2017. In the event completion did not take place until the date of execution of the WCIA, 26 October 2017, when Docklock transferred 66-70 Parkway to Counterclaim.

177. The Moylan Order did not contain any provision for an apportionment of the rent. This is perhaps unsurprising because completion of the sale was contemplated within a month or so. Mr Letman also suggested that the parties' legal representatives in the divorce proceedings would have been unfamiliar with the need to provide for an apportionment of rent in the transfer of a leasehold reversion.

178. Shortly before completion Chris's solicitors asked Betty's solicitors to agree to an apportionment of the rent payable by the tenants on the first and second floor. Betty's solicitors refused on the basis that the Order contained no such provision. Nevertheless, on 22 January 2018 Christo transferred the sum of £10,849.32 to Counterclaim in respect of the apportioned rent. Docklock challenges the payment although there was no dispute about the calculation of the apportioned rent in the event that Christo was entitled to apportion it between the parties.

179. One of the leases was in evidence. On 19 December 2013 Docklock demised the first floor premises to Egnaro Ltd ("**Egnaro**") for a term of five years at a

rent of £30,000 plus VAT per annum. In the lease (the "**Egnaro Lease**") Egnaro covenanted to pay the annual rent plus VAT by four equal instalments in advance on or before the rent payment dates which were the usual quarter days: see clause 6.1. It follows that the rent for Q4 2017 fell due on 29 September 2017. I was not taken to the other lease but I approach this issue on the basis that it was in identical terms. It is clear from the correspondence that Docklock had received the rent from both tenants before completion.

180. Mr Letman conceded that the Apportionment Act 1870 does not apply on the forfeiture of a lease where it provides for payment of rent in advance: see *Ellis v Rowbotham* [1900] 1 QB 740. Mr Letman also accepted that as a matter of principle the Court would not imply a term into a lease for the apportionment of rent payable in advance: see *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742. Nevertheless, he argued that the Court should imply a term into the contract or transfer for sale in the present case.

181. Mr Letman's concession was carefully made because *Marks & Spencer v BNP Paribas* was not concerned with the sale of a freehold reversion. In that case the Supreme Court approved *Ellis v Rowbotham* and held that it was not appropriate to imply a term for apportionment of rent payable in advance on the exercise of a tenant's break clause. Lord Neuberger giving the judgment of the majority stated this (at [50]):

> "Save in a very clear case indeed, it would be wrong to attribute to a landlord and a tenant, particularly when they have entered into a full and professionally drafted lease, an intention that the tenant should receive an apportioned part of the rent payable and paid in advance, when the non-apportionability of such rent has been so long and clearly established. Given that it is so clear that the effect of the case law is that rent payable and paid in advance can be retained by the landlord, save in very exceptional circumstances (eg where the contract could not work or would lead to an absurdity) express words would be needed before it would be right to imply a term to the contrary."

182. Mr Letman did not take me to the contract between Docklock and Counterclaim (if there was one) or to the transfer itself and I have some

difficulty in seeing how the doctrine of implied terms can operate in a transfer made pursuant to a Court order. But in any event, I am satisfied that it would not appropriate to imply a term in the present case for the reason given by Lord Neuberger. The principle that rent payable in advance will not be apportioned as a matter of law is so well-known that a professionally advised seller and a professionally advised buyer (as will almost always be the case on the sale of a freehold reversion) can be expected either to accept the general principle or negotiate an apportionment.

183. Mr Letman relied on the Standard Conditions of Sale 5th ed (2011 – 2018 revision) which contains an express provision for apportionment: see Condition 6.3. He submitted that the parties would have expected those terms to apply and Chris confirmed this in evidence. However, contrary to Mr Letman's submission, the Standard Conditions seem to me to provide strong evidence of Lord Neuberger's proposition that: "the non-apportionability of such rent has been so long and clearly established". If Chris had wanted an apportionment of the rent, he should have negotiated with Betty to incorporate the Standard Conditions or an express term to that effect. I therefore uphold Docklock's challenge.

184. I add a footnote to this issue. In the Moylan Order Betty undertook to procure that Docklock completed the sale to Counterclaim by 10 July 2017: see paragraph 30. Neither party suggested to me that the date for completion was extended by agreement or further order. Moreover, if Betty failed to procure that Docklock completed on time in breach of her undertaking so that Counterclaim did not receive the rents from 10 July 2017 onwards, the general waiver of claims did not apply to a breach of the order itself: see paragraph 19c. Since neither Betty nor Chris were parties to the present action, I make it clear that my finding on this issue has no effect on any outstanding claim or its merits.

(13) Counterclaim (Deposit): £9,000

185. On 22 January 2018 Christo also transferred the sum of £9,000 to Counterclaim in respect of the deposit paid by Egnaro under the terms of a

rent deposit deed also dated 19 December 2013 (the "**RDD**").[3] Clauses 1 to 3 of the RDD provided as follows:

> "1. The Landlord acknowledges receipt from the Tenant on the date hereof of the sum of nine thousand pounds (£9,000) and the term "the Deposit" means the said sum (or the balance thereof in the event of any monies being applied in accordance with clause 4 hereof) and shall include any sums paid by the Tenant under clause 5 hereof and any interest earned thereon.
>
> 2. The Deposit shall be held by the Landlord in an interest bearing account in the Landlord's name or in the name of the Landlord's managing agent or solicitor in such bank as the Landlord shall from time to time decide (subject to the right to apply the same in accordance with clause 4 hereof) and all interest earned thereon shall be added to and become part of the Deposit.
>
> The Deposit shall be repaid to the Tenant on the earliest of the following events (after deducting any sums then payable by the Tenant to the Landlord): a. Seven days after the Tenant has complied with clause 27.1 of the Lease; b. Upon lawful assignment of the Lease by the Tenant made pursuant to a licence to assign granted by the Landlord."

186. Clause 4 provided that the Landlord could apply the Deposit against any arrears or breach of contract and clause 5 provided that the Landlord could require the Tenant to replace the Deposit if it fell below three months' rent. Clause 27.1 of the Egnaro Lease provided for delivery up on the expiry of the term. Clause 6a of the RDD also provided as follows:

> "This deed is collateral to the Lease and the obligations of the Landlord and the Tenant respectively are landlord and tenant covenants for the purposes of the Lease and are annexed to and incidental to the whole and every part of the premises demised by the Lease."

187. Mr Letman submitted that upon the transfer of 66-70 Parkway Counterclaim became entitled to the benefit and burden of the covenants in the RDD under sections 3(1) and 28 of the Landlord and Tenant (Covenants) Act 1995. He also submitted that upon the change of ownership Christo properly paid over

[3] The Q4 2016 RIES recorded that the amount of the payment was £8,937.30 but the parties approached the issue on the basis that the full sum was transferred and I therefore do so too.

the Deposit to Counterclaim to hold on the terms of the RDD. I accept both of those submissions.

188. Nevertheless, I uphold Docklock's challenge. Mr Comiskey did not submit that it was a breach of the RDD to hold the Deposit in Christo's client account or that on the transfer of the freehold Counterclaim became entitled to the Deposit. Instead, he submitted that Counterclaim had waived any entitlement to it under the WCIA. I also accept that submission. Mr Letman did not suggest that the RDD gave rise to a trust of the deposit monies and if it had Christo would not have been entitled to hold it in its client account and mix it with other funds or repay it out of current income. In my judgment, therefore, Counterclaim waived any right to claim this sum under the WCIA and the payment was not made in the ordinary course of business.

IX. Forfeiture of management fees

189. Finally, I turn to the question of forfeiture. Mr Comiskey submitted that Christo had forfeited its entitlement to any management fees because of Chris's misconduct. He placed particular reliance on Christo's failure to pay over any income to Docklock between 15 January 2015 and 8 May 2015 and after 11 March 2016. He relied on Chris's evidence that he was shielding or protecting the money from Betty and Nicholas. He also relied upon the payments made by Christo on Chris's behalf including the payment of Charles Russell's fees, the payment of the two credit card bills and the raising of invoices for letting and renewal fees.

190. Mr Comiskey relied on *HPOR Services De Consultoria Ltda v Dryships Inc* [2019] 2 All ER (Comm) 168 where Cockerill J accepted that the remedy of forfeiture is not limited to bribes or secret commissions but available in all classes of breach. She also accepted that the outcome of any claim for forfeiture would turn on the nature and the seriousness of breach. She stated this at [103]:

> "On my reading of the cases the line which the Court is seeking to draw in them is between serious breaches and relatively harmless ones – of which those described under the label of

> "harmless collaterality" are probably the archetype. The result will be fact dependent."

191. Mr Letman submitted that the reasoning in *HPOR v Dryships* was inconsistent with the principles set out in *Bowstead & Reynolds on Agency* 22nd ed (2021) at 7—050 and that remuneration should not be forfeited unless there is fraud or dishonesty going to the root of the relationship or equivalent to a total failure of consideration or it is otherwise disproportionate to strip agents of their remuneration: see, e.g., *Bank of Ireland v Jaffery* [2012] EWHC 1377 (Ch) at [370] to [373] (Vos J) and *Gamatronic (UK) Ltd v Hamilton* [2016] EWHC 2225 (QB) at [170] to [179] (Akhlaq Choudhury QC).

192. In my judgment, is unnecessary for me to decide this point of law on the facts of this case because I am satisfied that this is not a case in which the Court should order forfeiture whichever test applies. I have reached this conclusion for the following reasons:

i) This case is an unusual one because I have found that Christo was not entitled to charge management fees for its property management services for most of the Relevant Period. Between 9 February 2015 and 1 September 2016 there was no contract and the fiduciary duties which Docklock complains that Christo has broken were provided on a gratuitous basis. There was, therefore, no remuneration to forfeit.

ii) It is true that I have awarded Christo a quantum meruit for its professional fees but only on the basis that Christo conferred a direct financial benefit on Docklock for which it would be unjust for Docklock not to pay. However, after setting off the occupation charge I have found that Christo is entitled to a balance of £87,224.60 only. This is a modest figure and far smaller than the amounts in issue in most of the authorities. For instance, in *HPOR* (above) the agent was found to have received US $30m in bribes and was sentenced to a 12 year prison sentence and a fine of US $22.1m.

iii) I accept that Christo deliberately held back sums to which Docklock was entitled during the Relevant Period and for a total of nine months.

But Docklock did not allege that Christo was guilty of any further delays after the end of the Relevant Period and based on my findings and the admissions made by Docklock either in the Scott Schedule or during the trial, Christo ultimately paid a total of £2,823,023.07 (excluding any management fees) either to Docklock itself or to third parties as authorised disbursements. In that context, I am not satisfied that the delay of nine months was serious and certainly not serious enough to justify forfeiture of the balance of £87,224.60.

iv) By comparison, I have found that £85,506.32 of the payments were unauthorised. I have also found that Docklock failed on a number of the allegations on which it relied in relation to forfeiture. I accept that Chris must have known that some or all of the payments which I have disallowed were unauthorised but I am satisfied that those breaches of authority were collateral to the services which Christo provided (for the most part for free). Again, in the context of the divorce proceedings where Chris was a 50% shareholder, I am not satisfied that those unauthorised payments were serious and certainly not sufficiently serious to justify forfeiture of the balance in addition to an order for their payment.

v) I remind myself that I have also found that Christo is entitled to payment of management fees of £64,127 for unpaid fees for the year ended 31 March 2014. But Docklock did not argue that these fees should be forfeited (although it did argue unsuccessfully that the payment was unauthorised).

X. Disposal

193. In its written closing submissions Docklock accepted that Christo paid authorised disbursements of £776,715.41 and expenses and transfers of £365,748.30 out of the monies received during the Relevant Period. In Christo's closing submissions Christo had also deducted supplier payments of £21,519.61 and a VAT payment made on 7 October 2014 of £31,864.96. In oral closing submissions Docklock accepted that these deductions were

properly made. Based on my findings and these admissions, I have set out the account which I have taken in the Appendix to this judgment. Subject to the reservations in [106], [131] and [138] (above) I find that Christo has failed to account to Docklock for £282,372 and I will order Christo to pay that sum.

XI. Addendum

194. On Tuesday 16 February 2021 I handed down this judgment in draft. In his written submissions filed on 18 February 2021 Mr Comiskey asked me to give further reasons for my decision on the quantum meruit claim: see [111] to [119] (above). He referred me to the guidance in *Re T (A Child)* [2002] EWCA Civ 1736 at [47] to [50]. I cite the passage in Thorpe LJ's judgment at [50]:

> "In a complex case, it might well be prudent, and certainly not out of place, for the judge, having handed down or delivered judgment, to ask the advocates whether there are any matters which he has not covered. Even if he does not do this, an advocate ought immediately, as a matter of courtesy at least, to draw the judge's attention to any material omission of which he is then aware or then believes exists. It is well-established that it is open to a judge to amend his judgment, if he thinks fit, at any time up to the drawing of the order. In many cases, the advocate ought to raise the matter with the judge in pursuance of his duty to assist the court to achieve the overriding objective (CPR 1.3, which does not as such apply to these proceedings); and in some cases, it may follow from the advocate's duty not to mislead the court that he should raise the matter rather than allow the order to be drawn. It would be unsatisfactory to use an omission by a judge to deal with a point in a judgment as grounds for an application for appeal if the matter has not been brought to the judge's attention when there was a ready opportunity so to do. Unnecessary costs and delay may result. I should make it clear that there are general observations for assistance in future cases, and that I make no criticisms of Counsel in this case."

195. Mr Comiskey submitted that my judgment did not contain sufficient reasons for a finding that Docklock was unjustly enriched: see limb (3) of Lord Clarke's judgment cited at [111] (above). He also reminded me of the submissions which he had made at the end of his closing submissions. He accepted that Docklock would have been prepared to pay the fees which

Christo incurred to sub-agents for lettings (but not renewals) but pointed out that no separate claim had been made for those fees as disbursements. The following exchanges then took place:

> "MR. COMISKEY: My Lord, I have a strong position and a weak position, which is this. So far as lettings fees are concerned, if they had continued to pass on third party agents' lettings fees, we would not have any issue with that, because that is simply carrying on doing what they had done before. THE JUDGE: They were, in a sense, a disbursement, were they not? MR COMISKEY: Yes, it is a disbursement. However, by not doing so, by trying to, whatever label you want to put on it -- obviously, we have said it was padding, but whatever label you want to put on it -- by trying to claim fees to which they are not entitled, they have not claimed the disbursement and they do not claim the disbursement now."

> "That is an entirely novel form of fee, and so should not be paid by Docklock afterwards. It is all relevant to a quantum meruit. There is more that goes into a quantum meruit claim than this, because we would need to provide detailed evidence about what we did, what we did not do, why we did or did not do what we did; you know, were we essentially coerced into retaining Christo over that period; were we freely accepting any benefits conferred, or were we forced do so? Those are all issues which have not been addressed in the evidence in any sufficient detail and which we would have to address in the evidence. They were not put to Chris. Well, there is an overlap with some things that were put to Chris, but they were not put to Chris as those issues. They were not put to Nicholas as those issues, which is, frankly, quite proper, because you told Mr. Letman he was not allowed to. So, it is not a bare pleading point. It goes to the fairness of the trial that has taken place. THE JUDGE: Can I just be absolutely certain what you say you would have put to Chris. If he had pleaded a quantum meruit in relation to -- if they had applied for permission to plead, I do not know, what more would you have needed to be able to put to Chris? MR. COMISKEY: I do not have full instructions on the quantum meruit, on the defence to a quantum meruit, but I can tell you this much, my Lord, that there is a series of events which took place after the injunction was first obtained. So you have, first of all, the injunction, and then you have various return dates and moratorium agreements, and then there are solicitors' letters, inter partes letters; there is the pressure of the divorce proceedings, and there are actions being taken in the context of the divorce proceedings which hamper Docklock's ability to deal with other matters, bearing in

> mind that the divorce proceedings were extremely contentious, very valuable, and that the ownership of Docklock was in issue in the course of those proceedings. So that, in and of itself, is part of the background that you would have to take into account, because in circumstances where you have Chris potentially coming out as the sole shareholder of Docklock, saying, "I do not want you to move Docklock's management away from Christo", you need to consider whether it would even have been appropriate for Nicholas and Betty to carry on with what they were proposing to do. THE JUDGE: So, it generally goes to free acceptance and that we did not explore any of that material. MR. COMISKEY: None of it was explored."

196. I have reviewed my decision both to give permission to Christo to plead a quantum meruit and my final decision on this issue and I am satisfied that it was just to give permission to Christo and to decide this issue in Christo's favour for the reasons which I gave. At risk of increasing the length of this judgment and adding a detailed gloss to those reasons, I add the following paragraphs to explain my reasons in more detail.

197. In my judgment, it was unjust for Docklock not to pay for the services which Christo provided (and which I itemised in [113]) for the reasons which I set out in [115], [117] and [118]. In particular, Christo charged a market rate (as evidenced by the fees which it charged to other clients, the expert evidence and Nicholas's negotiations with Savills and Knight Frank) and, equally importantly, Nicholas was willing to pay a market rate for those services and, indeed, for property management services as well.

198. I was also satisfied that it would not have assisted me in reaching this decision to hear further evidence about the divorce proceedings or have the solicitors' correspondence put to Chris and Nicholas. This was an account and an inquiry carved out of the divorce proceedings which took seven days to try and involved a number of detailed issues of which the claim for professional fees was only one. All of the material which the parties considered relevant from the divorce proceedings was before the Court and I was taken through it in some detail in relation to a number of issues. Docklock's broad position in relation to both Christo's fees and most of the disputed disbursements was that

there no agreement or authority to pay them and that they should, therefore, be disallowed.

199. Docklock's specific position in relation to the payment of letting and renewal fees was that because it was "coerced" to retain Christo by the injunction which Chris obtained, it did not agree to pay Christo's fees and was entitled to assume that it would continue to provide both those services (and its property management services) on the same basis (i.e. for free). I am satisfied that it would not have assisted me to be taken through the correspondence in detail because this was the thrust of Nicholas's evidence.

200. In cross-examination Mr Letman first explored with him when he first became aware that Christo was charging for letting and renewal fees. It was clear that by 15 June 2015 he had received the Q1 2015 RIES which referred to an invoice dated 16 April 2015 in which Christo had claimed a renewal fee of 5% of one year's rental. I return to this point below. Mr Letman then addressed the question whether he accepted those fees. For the avoidance of any argument I therefore set out the key passage from his evidence:

> "Q. I do not accept that in terms of letting and renewal fees, by saying they might not have been coming through from Christo. There is no question, if you employ an agent, when you came to a point, when you looked in early 2015, I think that is when you, you looked around at other agents, you interviewed, if that is the right way to frame it, you interviewed Savills, you spoke to Knight Frank as to the possibility of appointing them to take over the portfolio, did you not? A. I had interviews with Knight Frank and Savills in relation to in part and partnership of moving away from the previous arrangements and putting everything, as I have, on a commercial basis, correct, yes. Q. Their proposals all included a general management fee and fees, as it were, rates of fees for letting and renewal charges, did they not? A. They had the option of having a letting service separate to a management service. If I had, on the hypothesis that I would give them management, it did not automatically give them letting, they had ---- Q. No. If it did not give them letting, who would the letting remain with? A. The status quo, as I understood it, was that, especially with the communications we received, especially not having information to hand due to the injunction, was that the previous arrangements would occur as such as other letting agents, third party letting agents would do their job

> and Docklock would pay them. And when the renewals occurred, the renewals would occur and there would not be fees charged other than the pass on fees I have already explained or any of the other charges, and that is how it was for many years on our understanding."

201. The injunction lasted from 15 April 2015 to 30 September 2015 (a period of five and half months) but I assumed (and assume) in Docklock's favour that it remained an unwilling party to the arrangement and I have found that there was no contract for the payment of these fees. I have also set out the position adopted by its solicitors in correspondence which was that it was only prepared to let the relationship continue whilst it investigated matters: see [21]. I was also prepared to accept Nicholas's evidence that he assumed that the status quo would continue both before receiving the Q1 2015 RIES and thereafter. It seemed therefore to me that his evidence gave rise to the issue which Lord Clarke framed in *Benedetti v Sawiris* (above) at [26] (when setting out the difference between his own judgment and that of Lord Reed):

> "The only real difference may be this. We agree that in the case where services have been rendered which, viewed objectively, confer a benefit on the defendant, but a benefit which the defendant did not and does not want and would not have paid for, as in the examples of Pollock CB's cleaned shoes or Professor Virgo's cleaned windows (Virgo , p 67), the claimant is not entitled to payment for the services because failure to pay would not unjustly enrich the defendant. The question is whether, in such circumstances, where there was no free acceptance of the services before or at the time they are rendered, but the defendant has accepted that he has received some benefit but not that the value of the benefit is as much as its market value, the defendant's figure should be accepted. In my opinion it should be open to the court so to conclude on the basis, on the one hand there would be unjust enrichment if the defendant paid nothing but, on the other hand, that it would not be just to award more than the benefit conferred on the defendant so calculated. Such an approach seems to me to respect the principle of freedom of choice or autonomy and to meet the case where the defendant sees the value of the benefit but would not have ordered the services save perhaps at a substantial discount to the market rate. I see no reason why a court should not take into account a defendant's subjective opinion of the value of the claimant's services in order to reduce the value of them to him, provided of course that the court is satisfied that it is his genuine opinion. If Lord Reed

> JSC's approach would produce a choice between a nil award and an award of the market value of the services, I would respectfully disagree. I prefer a nuanced approach, which seems to me to be more consistent with principle. However, given Lord Reed JSC's conclusions in para 138 of his judgment, there may be little, if anything, between us, especially since we both recognise the importance of respect for the defendant's autonomy or freedom of choice. It is not necessary to reach a final conclusion on these questions on the facts of this case. I certainly agree with Lord Reed JSC that the expression "subjective devaluation" is somewhat misleading."

202. In my judgment, this was not a case where Docklock did not want and would not have paid for the services like the examples of the shoes or the windows. Docklock wanted and needed these services in order to maximise the rental income from its property portfolio. It was a clearly case therefore where it would have been "unjust enrichment if the defendant paid nothing". The more difficult question was whether "it would not be just to award more than the benefit conferred on the defendant so calculated". However, it was (and is my view) that it was unnecessary to decide between the approach of Lord Clarke and Lord Reed because there was clear evidence that Nicholas was prepared to pay a market value for them to Savills or Knight Frank before the injunction was granted: see [116] to [118]. It has also paid substantial agents fees since the termination of Christo's agency: see [114].

203. I add a final postscript to deal with a submission made by Mr Comiskey that Christo was guilty of "padding" invoices. I did not deal with that submission in my judgment because it was not relevant to the question whether I should award a quantum meruit. But for completeness sake, I deal with it now. I was (and am) satisfied that there was no evidence to support this allegation. This was not a case in which Christo did not provide the services stated on the invoices or in which it inflated its fees for the services which it did provide. It charged Docklock a market rate and the same fees which it charged other clients for the same services: see [115]. Moreover, it was clear from 15 June 2015 onwards that it was charging these additional fees (although I accept that Nicholas may not have fully appreciated this immediately). But I am satisfied that Christo identified these fees in the RIESs in the normal way. In substance, Docklock's complaint was no more than that Christo was charging it fees

which it had not charged in the past and the issue which the Court had to decide and which I have decided in Christo's favour is that it was entitled to be paid for those services and the amounts which it claimed.

APPENDIX: THE ACCOUNT

Income		
Monies received by Christo & Co in the Relevant Period		£3,268,421.29
Less		
Transfers by Christo & Co to Docklock		£1,550,000.00
Management Fees after set off of occupation charge		£87,224.60
Disbursements expressly authorised or made in the ordinary course of business		
33 Ranulf Road (Refurbishment)	£15,246.55	
33 Ranulf Road (Utilities)	£6,048.44	
677 Green Lanes	£2,543.46	
66-70 Parkway (Cleaning Charges)	£16,580.44	
Bank of Cyprus (Credit Card)	£20,741.00	
Lloyds Bank (Amex)	£16,014.82	
Total	£77,174.71	£77,174.71
Less admitted payments		
Disbursements: see the Scott Schedule, 2.3		£776,715.41
Expenses and transfers: see the Scott Schedule, 3.3		£365,748.30
Supplier payments in respect of the Relevant Period		£21,519.69
VAT payment made on 7 October 2014		£31,864.96
Less interim payment		
Payment pursuant to the Order of Deputy Master Smith		£75,801.62
Total		**£282,372.00**

Items disallowed:		
73 Parkway (Utilities)	£8,984.22	
677 Green Lanes	£6,000.00	
Charles Russell fees	£20,000.00	
Arion	£27,190.90	
Arion	£3,481.88	
Counterclaim (Rent)	£10,849.32	
Counterclaim (Deposit)	£9,000.00	
Total	**£85,506.32**	