Neutral Citation Number: [2019] EWCA Civ 127

Case No: A3/2017/2974, 2983 & 2979

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
HH Judge Simon Barker QC
HC-2015-002414

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 February 2019

Before:

LORD JUSTICE DAVID RICHARDS
LADY JUSTICE ASPLIN
and
LORD JUSTICE BAKER

- -

Between:

(1) DINGLIS MANAGEMENT LIMITED	**Appellants**
(2) PAUL ANDREW DINGLIS	
- and -	
DINGLIS PROPERTIES LIMITED	**Respondent**

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Stephen Houseman QC and Iain Quirk (instructed by **Ingram Winter Green LLP**) for the **Appellants**
Mark Hubbard and Jon Colcough (instructed by **Bircham Dyson Bell LLP**) for the **Respondent**

Hearing dates: 16-18 October 2018

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Approved Judgment

Lord Justice David Richards:

Introduction

1. This judgment concerns appeals and cross-appeals against orders made by HH Judge Simon Barker QC, sitting in the Chancery Division as a Deputy High Court Judge. Permission for the appeals and cross-appeals was given by Lewison LJ.

2. By his orders, the Judge directed, first, that accounts be taken on the basis that the first appellant, Dinglis Management Limited (DML), was liable to account as agent for the respondent, Dinglis Properties Limited (DPL), and that the second appellant, Paul Dinglis (Paul), was liable to account as a director of DPL. Second, he ordered that it was not open to the appellants to argue that a limitation period of six years prior to the issue of the proceedings applied to the account, instead ordering that the account should cover the period from 1 August 2002 to 31 July 2015. The appellants appeal against those orders.

3. The cross-appeals are brought by DPL against the Judge's orders (i) setting the basis of the reasonable remuneration that DML was entitled to retain as DPL's agent, (ii) dismissing DPL's claim that DML held rents received by it on trust for DPL, and (iii) dismissing its claim to have suffered loss by reason of the payment of invoices at the direction of Paul.

4. If the appellants succeed in their appeal against the orders for accounts, the appeal on the limitation issue and the cross-appeals identified in paragraph 3(i) and (ii) above fall away.

Facts

5. The present disputes arise in a successful family business in circumstances where family and business relationships have broken down between Andreas Dinglis (Andreas), now in his late 70s, on the one hand and his former wife and their two adult children, Paul and Cheryl, now in their 50s, on the other.

6. Andreas came to England from Cyprus in 1959. He became successful in business and from the mid-1980s concentrated on investment and letting in the residential property sector, as well as owning and running an estate agency engaged in letting and managing properties for other landlords. Many of his properties were bedsits and bed and breakfast hotels let to local authorities for emergency housing.

7. In 1989, Andreas established DPL (then called Dinglis Property Services Limited) to which he transferred the ownership of his property portfolio. In 1998, he decided to separate the ownership of the properties from their letting and management. To this end, the name of DPL was changed to its present name and a dormant company, renamed Dinglis Property Management Services Limited (DPSL), was used for the letting and management of the properties.

8. The reason for this split is important in the context of the agency issue arising on this appeal. It was common ground that, as recorded by the Judge, "DPSL's function was to be an intermediate landlord and managing agent providing a barrier between the property owner, such as DPL, and the tenants. [Andreas'] plan was that DPL would

grant leases to DPSL, which was to be the landlord to third party tenants". This arrangement was not, as the Judge observed, formalised by documentation. The Judge noted that DPSL was not required to remit to DPL rents net of property expenses and of a fee or commission and that to do so "would have undermined the purpose for which DPSL was created and used within the family business".

9. DPL and DPSL carried on business in this way until May 2000 when DPSL was wound up, following a successful claim by Haringey Council for the recovery of overpaid benefits as rent.

10. This had two effects. First, Andreas decided to move from the social housing sector to the private rental market. Second, and again this is important as regards the agency issue, "DPL was left without a shield to protect its asset base from the claims of tenants. Accordingly, DML was incorporated on 25.7.00 to replace DPSL" (judgment at [28]).

11. The function of DPSL and, after it, DML as a protection for the property portfolio was freely acknowledged by Andreas. He said in his witness statement that "DPSL was intended to shield the Property Companies against claims" and that, with its replacement by DML, Andreas was as before "concerned to protect the assets of the Property Companies by shielding them from claims by tenants or others". In his oral evidence, he agreed that it was crucial from his perspective that DPSL should enter into leases on its own behalf, because only then could it act as a buffer between the property companies and the tenants. He also said that there was a policy, but no agreement, that DPSL should provide, out of the rents it received, funds to DPL to meet its loan repayments and to make acquisitions.

12. From about 2000, DPL started to invest in commercial properties, in addition to maintaining a substantial residential portfolio, and my understanding is that by 2014 commercial properties represented in the order of 30% of DPL's portfolio. While the residential properties continued to be let by and in the name of DML, the commercial properties were let by and in the name of DPL but the rents were collected and the properties managed by DML.

13. From 2002 onwards, Andreas lived in Cyprus and, formally, resigned as a director of DPL on 30 March 2002. He made frequent visits to this country and was regularly in touch with Paul and Cheryl who were both involved in the family business. He maintained an up to date knowledge of the business. In his evidence, Andreas described himself as the boss and as being in overall control. The Judge found that there was ample evidence that Paul and Cheryl referred to him as the boss and regarded him as having ultimate authority.

14. During the period primarily relevant to these appeals (August 2002-July 2015), Andreas owned or controlled a majority interest in DPL of at least 64% and Paul held 12%, with the balance being held equally for the benefit of Cheryl and Andreas' former wife.

15. The directors of DPL since 2002 have been combinations of Andreas, Paul and Cheryl. Having resigned as a director in 2002, Andreas was re-appointed in February 2013 and remains a director. Paul was a director until June 2012. Cheryl was recorded

at Companies House as a director for various periods but was aware of being a director only from about May 2012 until February 2013.

16. Andreas was never a director of DML. Paul was initially the secretary and has been a director since August 2006. Cheryl has been a director since October 2008.

17. As the Judge recorded at [33], it is common ground that the family business was run informally as between family members. There were no formal board meetings of any of the companies and "business matters were discussed within the family in a fluid way".

Agency claim

18. DPL claimed that, in letting properties owned by DPL to residential tenants and collecting the rents and managing the properties, DML was acting as its agent. It was therefore liable to account to DPL for the rents, subject to the deduction of costs and expenses, proper expenditure on the properties and a commercial rate of commission. It claimed, and the Judge found, that substantial amounts of rent had been collected by DML (not all of which had been accounted for in DML's own records) and not paid to DPL.

19. DPL disclaimed any reliance on a contract between DPL and DML. Nor was it suggested that there had been any discussions in which an agency relationship had been considered or agreed. Essentially, the agency relationship was to be inferred from the circumstances, which were described by the Judge at [80]:

> "The essential feature of the factual position as between DPL and DML are not contentious. In short, (1) DPL owned residential and commercial properties for letting: (2) DML, with DPL's express or implied permission or authority, acted as landlord and used its own name when granting residential tenancies of properties owned by DPL (DML did not grant tenancies of DPL's commercial properties); (3) with few exceptions, DPL did not formally grant a tenancy or lease to DML, albeit that such leases would have been produced if and when required: (4) the tenancies granted by DML were regarded as valid and binding as between DPL and DML as well as between DML and the tenant; and, (5) apart from a small number of tenancy agreements between DPL and DML, there was no formal contract between DPL and DML, rather the arrangements were informal. Thus, it fell to DML to collect the rents from third party tenants."

20. DPL submitted that, in consequence of these features, the relationship between DPL and DML was a non-contractual but nevertheless binding agency. DPL relied on the propositions of law, not disputed by DML, that a relationship of agency may arise from the unilateral manifestation by the principal of his willingness to have his legal position changed by the agent; that the existence of the relationship is to be determined objectively; and that a contract is not necessary. DPL submitted that, although DML let the properties in its own name, the correct characterisation was that it did so on behalf of DPL as undisclosed principal.

21. The Judge accepted DPL's case and held that a non-contractual agency relationship existed between DPL and DML. He identified the relevant background at [92]:

> "In my judgment, the starting point is that at all material times all relevant parties viewed the enterprise carried on through the various Dinglis family UK companies as a family business. That business was not conducted or operated through formal contractual arrangements and did not need to be so conducted or operated precisely because it was a family business."

22. At [93], the Judge stated that "the common ground and objective evidence" very strongly supported the conclusion that an agency relationship existed between DPL and DML:

> "[Andreas] caused the creation of DML for the very purpose of altering DPL's legal position and DPL unilaterally permitted that relationship to continue until terminated by DPL in 2014. DML made regular payments to DPL to service DPL's borrowings because DPL so required, in other words pursuant to an instruction from dominant entity to the servient entity, or from the principal to the agent. Moreover, DML paid over further sums from rental income to DPL, as and when directed by DPL, so that DPL could expand its property portfolio at will. None of this was the result of arm's length discussions or negotiations, rather it was simply the product of [Andreas] issuing instructions for DPL to DML."

23. The Judge held at [94] that "the essential arrangement in relation to DML's rental income from DPL's property portfolio was that DML was to pay over to DPL rental income as and when required…subject only to DML retaining monies for its own operating expenses, reasonable remuneration of [Paul and Cheryl] and expenditure on DPL's properties or as authorized by [Andreas]". He concluded that it was an "informal relationship based on trust and confidence and a duty of loyalty".

24. The principal ground of DML's appeal is that the Judge's conclusion is fatally undermined by the fundamental agreed purpose for the establishment of DML (and DPSL before it), namely, that DPL and its properties were to be insulated from claims by tenants and others arising out of the letting of the residential properties. The importance of this protection had been underlined by Haringey Council's successful claim against DPSL, which had resulted in its insolvent liquidation. The Judge had recorded this as the function of DPSL and DML and recorded the submissions of counsel for DML to this effect. Nonetheless, when he came to analyse the relationship in [92]-[95], he did not mention this feature, still less take it into consideration. If an agency relationship existed, DPL and its properties were not protected from claims by tenants and others. An undisclosed principal is as vulnerable to claims by counterparties as a disclosed principal and, further, an agent is entitled to be indemnified by its principal, whether disclosed or undisclosed, against liabilities incurred in the course of the agency.

25. In addition, DML points to other circumstances. In particular, although in most cases DPL did not grant a lease of a property before it was let by DML, it did so in those

cases where it became necessary, such as where it was necessary to bring possession proceedings against the tenant. As the Judge noted, "such leases would have been produced if and when required".

26. In resisting the appeal, DPL points out that the finding of agency was an evaluative decision, on the evidence, with which an appellate court will be slow to interfere. While I would accept that this is the correct starting point, this is a case where the finding of agency is essentially a conclusion of law based on largely undisputed evidence and in circumstances where it is common ground that there was neither a contract of agency nor any exchanges or discussions on the subject of agency.

27. As regards the main argument advanced by DML, that an agency relationship was wholly inconsistent with the agreed purpose for establishing DPSL and then DML, DPL submitted that the agency gave practical protection from claims because tenants and other third parties would not be aware of DPL's existence or its position as principal.

28. However, the common ground was not that there would be the appearance of protection but that the arrangement involving DPSL and then DML would in fact provide protection. There was no evidence that Andreas and the other parties desired anything less than legally effective protection. If all that was intended was an undisclosed agency, DPL would always be vulnerable, particularly to investigations and claims by a liquidator of the buffer company.

29. On behalf of DPL, Mr Hubbard strongly relied on the absence of any alternative legal relationship advanced by DML. He submitted that where DPL argued for an agency but DML did not put forward any alternative analysis, the Judge was left with little alternative but to conclude that DPL's analysis was correct.

30. In my judgment, this is not a good point. DML's case that there was no legal relationship as such between DPL and DML is consistent with the Judge's own finding, based on common ground, that this was a family business run informally as between family members, which did not need to be conducted or operated through formal contractual arrangements precisely because it was a family business. In the admitted absence of any agreement, it was not necessary to impose a formal legal relationship or, as Mr Hubbard put it in argument, to fit a legal grid over a family situation. Until the breakdown in family relationships in about 2012, business was conducted on an informal basis, as is the case with many family businesses, with no doubt Andreas as "the boss" carrying the day in the event of any disagreement.

31. The Judge found that DML made regular payments to DPL to service DPL's borrowings "because DPL so required, in other words pursuant to an instruction" and paid over further sums to DPL from rental income "as and when directed by DPL", not because of arm's length discussions or negotiations but because "it was simply the product of [Andreas] issuing instructions for DPL to DML". There is no challenge to those findings, but they are entirely consistent with the informal arrangements that existed with Andreas ultimately being the boss.

32. Perhaps the strongest of Mr Hubbard's submissions rested on the absence, in the great majority of cases, of any leases of properties from DPL to DML. He submitted that, if DML had no estate in the residential property, it can have let the property only as

agent for DPL. However, it was common ground that, as and when necessary, DPL would grant a lease to DML and did so in about 15 to 20 cases. This points strongly to the inference of an arrangement, again no doubt an informal one, that DML let properties against DPL's agreement to grant leases to DPL if necessary.

33. I would not regard the points mentioned in the last two paragraphs as by themselves justifying this court in interfering with the Judge's conclusion, if he had addressed and weighed the important factor of the purpose of establishing DML and its inconsistency with the conclusion of agency. Those points are not, however, inconsistent with concluding that there was no agency relationship.

34. This court is bound to revisit for itself the issue of agency, given that the Judge did not address the purpose of the arrangements in reaching his conclusion. If there had been an express agreement for an agency relationship, the fact that it defeated the underlying purpose would be nothing to the point. But this is a case in which the court is asked to place a legal analysis on the parties' relationship by a process of inference from the facts.

35. In my judgment, it is wholly inconsistent with the express purpose of Andreas and the others in establishing the arrangements involving DML to conclude that DML was DPL's agent. It would, as Mr Houseman QC and Mr Quirk submitted, defeat those arrangements and the intention in establishing them. Having not addressed this point in relation to the agency case, the Judge nonetheless relied on it for his rejection of DPL's case that DML held the rents from the properties on trust for DPL, saying at [104] "it would not have been compatible with the buffer principle and [Andreas] would have been fully alive to this point". Precisely the same reasoning applies, in my judgment, to reject the agency case.

36. In the absence of factors that dictate a contrary conclusion, the Judge's decision that DML was DPL's agent cannot stand and I would allow DML's appeal on this issue.

Breach of duty claim against Paul

37. The claim that Paul was in breach of his duties as a director and employee of DPL was premised on DPL's claim that DML was its agent in the letting and management of residential properties. The claim was pleaded on this basis in DPL's particulars of claim (paragraphs 31-34) and succinctly formulated on this basis in DPL's written closing submissions (paragraph 48) where it was said that Paul was "personally liable in respect of rents due to DPL from DML". Likewise, the summary of the relief claimed (paragraph 87 of the closing submissions) stated that "DML should account for DPL rents" and that Paul was "personally liable in respect of rents due to DPL from DML". Rents were not due from DML to DPL unless DML was DPL's agent. The Judge rightly understood the case against Paul in this way, describing it at [7] as "essentially overlapping with the agency claim" and holding at [112] that "to the extent that DML is liable to account to DPL so too is [Paul] liable to DPL for breach of duties as a director".

38. If it is right, as I consider it to be for the reasons given above, that DML was not DPL's agent and was not under an obligation to account to DPL for rents received by it, it follows that the claim against Paul must fail.

39. DPL cross-appealed against the Judge's orders for accounts against DML and Paul on the grounds that the Judge permitted too large a credit for remuneration. As regards the claim against Paul, a variation in the Judge's order was sought "on the footing that the learned Judge rightly found that Paul was liable to DPL to the same extent as DML or alternatively that Paul is in any event liable to account to DPL for all sums for which DML *wrongly* failed to account to DPL" (emphasis added). This serves only to underscore the same point, because the only basis of claim that DML "wrongly" failed to account to DPL was the claim of agency. In his skeleton argument for this appeal, Mr Hubbard made DPL's position clear: "the Judge was right to find that Paul's liability *was equal to that of DML"* (emphasis added) and that "the finding of equality is submitted to have been in any event correct".

40. It follows, in my judgment, that the appeal as regards the order against Paul must be allowed.

Other issues

41. In the light of my conclusions above, the issues raised by the other appeal and the cross-appeals, save as regards the payment of invoices, do not arise. They were, however, fully argued and I will briefly express my views on them.

42. The appellants' appeal on the limitation issue arises because they say that a claim to an account going back before 2009, six years before the commencement of the proceedings, did not form part of DPL's case until a very late stage. This meant that the appellants had no cause to plead a limitation defence or to raise it in argument. When it became clear that DPL was seeking an account going back to 2002, the appellants raised the limitation point but the Judge ruled that it was too late for them to do so.

43. The Judge gave his reasons in an *ex tempore* judgment given after the point had been argued in a post-judgment hearing on 13 October 2017. The appellants criticise this judgment because, they say, it is impossible to discern the grounds for the Judge's decision. It is fair to say that the judgment is almost entirely a summary of the competing submissions, followed in paragraph 27 by the conclusion that "Mr Hubbard's submissions should prevail and, in the particular circumstances of this case, the account which should be ordered is one that goes back to 2002". I understand the feeling of the appellants that their submissions have not been analysed, even briefly, so that they can see why the Judge rejected them. It is also fair to say that this was not a case management decision but a ruling that might well have a significant effect on the extent of the appellants' liabilities. The only assumption that can be made is that the Judge agreed with each of DPL's submissions and considered that they so completely answered the appellants' submissions that it was otiose for him to add any reasons of his own.

44. If that was the Judge's view, I would respectfully disagree. It seems to me that the appellants were on strong ground both as to DPL's pleaded case and as to the way the case was opened at trial. The problem for them, in my view, came with DPL's closing submissions which made it very clear that an account was claimed back to 2002. The appellants did not respond to that claim either in written or oral submissions or in the period from the end of March 2017 when the trial ended to 12 September 2017 when judgment was given. In those circumstances, it seems to me that the Judge was

entitled to hold that it was too late for the appellants to raise this limitation point at a hearing to decide consequential matters in October 2017. I would therefore have dismissed this appeal.

45. DPL's cross-appeals raise three issues.

46. First, DPL submits that the Judge was wrong to dismiss its case that the rents received by DML were held on trust by it for DPL. Even if I considered that the Judge had been right on the agency issue, I would have dismissed this cross-appeal. Based on the evidence of how DML was operated and Andreas' knowledge of its operations, and having regard to DML's role as a buffer, the Judge dealt with this at [104] with short but unassailable reasons.

47. Second, DPL submits that the Judge wrongly dismissed its claim in respect of the payment by DPL of invoices for work done on properties within the family business but not owned by DPL. This claim was independent of, and unrelated to, the claim against DML. The Judge found that the invoices were paid in accordance with a policy established with the full knowledge and approval of Andreas and simply continued while he was living in Cyprus. His approval is not in the least surprising, given that the properties were assets of the family business. In so far as any breach of duty might otherwise have been involved, the Judge was, in my view, right to hold that it was approved by the shareholders and DPL suffered no recoverable loss. I would therefore dismiss this cross-appeal.

48. Third, DPL challenged the Judge's decision that DML could retain sufficient funds to provide Paul and Cheryl with a comfortable income, notwithstanding his finding that Andreas was content that this should occur. DPL submitted that, as there was no contract between DPL and DML, the only basis on which DML could retain any remuneration was unjust enrichment which would permit only a commission at a commercial rate. I can see no basis on which, in these circumstances, the court should not allow to the agent the remuneration which the principal and agent have agreed, whether or not there is a binding contract to that effect. I would, therefore, have dismissed this ground of the cross-appeal if it had arisen. In addition, DPL challenged the figures used by the Judge to determine the correct level of remuneration on this basis. This would involve a more detailed examination of the evidence before the Judge which, given my view that the principal appeals should be allowed, is not warranted.

Conclusion

49. For the reasons given above, I would allow the appeals against the orders for accounts by DML as DPL's agent and by Paul as a director of DPL and dismiss DPL's cross-appeal on the invoices issue. The remaining appeal and cross-appeals do not therefore arise for decision.

50. There is one further matter, which arose in the course of the hearing of the appeal, that I must address.

51. As I mentioned earlier, DPL from 2000 has invested in commercial properties which are let by and in the name of DPL. The defence based on DML's role as a buffer was not therefore applicable to DPL's claim for an account to the extent that it related to

the commercial properties. This was made clear by DML in its defence. Paragraph 9.6 pleaded the buffer defence as regards the residential properties, while the commercial properties and some other (unspecified) properties which were let by DPL were separately dealt with in paragraph 9.9 in terms that acknowledged that the buffer defence did not apply to them.

52. If DPL had wished to raise an additional but alternative claim for an account as regards the rents on the commercial and other properties let by DPL, if the claim for an account as regards the residential properties failed, it could have done so without difficulty. It could have served a reply and, if necessary, amended the relief it was claiming. Instead, it proceeded to maintain its case on an all or nothing basis. I have found no suggestion of an alternative claim in the written opening and closing submissions for DPL at trial.

53. DML's appeal against the order for an account was put very clearly on the basis that the Judge's decision was incompatible with the admitted status of DML as a buffer as regards the residential properties. By its appellant's notice, it sought an order to set aside the order for an account. If DPL had wished to argue in this court that, if the court accepted DML's case, it should not set aside the order completely but should instead vary it by excluding those properties let by DML, it should have sought such order on a conditional basis in its respondent's notice, for which it might have required permission: see CPR 52CPD.8(2). It did not do so, although it did file a respondent's notice seeking other variations in the order. Accordingly, no submissions were addressed to this point in the parties' skeleton arguments or in the opening oral submissions of counsel for DML. Indeed, DPL made clear in its skeleton argument, after referring to the commercial properties and observing that the "shield" concept had no relevance to them, that "DML's case was and is that there was a single relationship in respect of all properties"

54. The point as to an account limited to the properties not let by DML emerged in the course of Mr Hubbard's submissions on behalf of DPL, prompted as I recall by questions from the bench. The following day, Mr Houseman QC produced to the court a draft order which would have the limited effect of allowing the appeal as regards an account in relation to the properties let by DML, if the court were minded to take that course. It provided for the case to be remitted to the Chancery Division for determination of (1) "the basis and parameters of the Commercial Rents Account (including the Relevant Period)" and (2) any claim by DPL against Paul for alleged breaches of duty as a director of DPL "in light of and consistent with the scope of the Commercial Rents Account". The draft order also provided that DML and Paul would be entitled to introduce limitation defences in respect of those claims.

55. In accordance with our directions, the parties provided written submissions on this point after the hearing.

56. In its submissions, DML sought to show that, in any event, an account would be pointless because DML had paid DPL sums far in excess of rents received on the properties let in DPL's name. DPL does not accept these figures, some of which are based only on Paul's instructions, and it is clear that this court could not resolve this issue.

57. In its submissions, DPL asks that the case should be remitted to the Chancery Division so that directions as regards a limited account can be made. It accepts that the issue of the division between the tenancies in DML's name and those in DPL's name "and what became of each source of income was not explored below and there is no evidence before the court on this topic". It submits that "DPL should have an opportunity to gather and put in evidence on this subject, following a remission to the court below". It accepts that the question of how DML should account for rents received from the properties let by DPL "is not an easy one and is itself a topic suitable for remission to the court below" and that it raises issues as to the remuneration to which DML would or might be entitled for its services.

58. DPL needs the permission of the court to raise this proposal as an alternative outcome, and in my judgment it is far too late to raise it now. It should have been raised as an issue for the trial. If that had been done, all the necessary evidence and submissions as regards these more limited claims against both DPL and Paul would have been put before the Judge to enable him to make all the appropriate findings and orders. As it is, DPL invites this court to remit the case for a second trial on this more limited basis. It has been said too often to need citation of authority that it is for parties to bring their whole case to the trial. If that is not done, the time and resources of the parties and the court are wasted and parties face delay and avoidable uncertainty. There are no special circumstances that would justify the court in taking the exceptional course of remitting this case as proposed by DPL. I would therefore refuse DPL permission to amend its respondent's notice to seek this order and, in any event, would refuse to make the order for remittal proposed by DPL.

LADY JUSTICE ASPLIN:

59. I agree.

LORD JUSTICE BAKER:

60. I also agree.