Neutral Citation Number: [2021] EWHC 3343 (Ch)

Case No: BL-2018-001310

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

Rolls Building
Fetter Lane
London, EC4A 1NL

10 December 2021

Before:

MR JUSTICE LEECH

- -

Between:

DOCKLOCK LIMITED **Claimant**

- and -

C CHRISTO & CO LIMITED **Defendant**

- -
- -

David Holland QC (instructed by **Boyes Turner LLP**) for the **Claimant**
Paul Letman and **Kavish Shah** (instructed by **Carter Perry Bailey LLP**) for the **Defendant**

Hearing date: 15 November 2021

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Mr Justice Leech:

Background

1. In this judgment I adopt the defined terms and abbreviations which I used in my principal judgment dated 19 February 2021 (the "**Judgment**"): see [2021] EWHC 308 (Ch). By Application Notice dated 14 June 2021 Docklock applies now for an order that the Court should revisit the calculation of the occupation charge for 66-70 Parkway under the jurisdiction in *Re L (Children)* [2013] 1 WLR 634 on the grounds that new evidence has emerged which casts doubt on the conclusions which I had previously reached.

2. These proceedings arise out of the divorce proceedings between Chris and Betty which were resolved by the Moylan Order and the WCIA in 2017. They gave Docklock a right to claim an account of the income which Christo had received on its behalf during the Relevant Period between 1 October 2014 and 1 September 2016. One issue which I had to determine was whether Christo was entitled to charge professional fees for its services during the Relevant Period and, if so, at what rate and for how long. Having determined that issue, I then had to decide whether Docklock was entitled to set off an occupation charge for Christo's occupation of 66-70 Parkway.

3. I originally decided that Christo was entitled to charge Docklock £224,493.20 in professional fees during the Relevant Period less an occupation charge of £122,937.92 leaving a net figure of £87,224.60 (after service charges): see [138]. In arriving at that figure, I took a simple approach to the 4 month period from 1 October 2014 until 9 February 2015 and treated the occupation charge as the quid pro quo for Christo's property management services (although I gave both parties permission to apply): see [131]. Overall, I held that Christo was liable to account to Docklock for £282,372 and a glance at the Appendix will show that the management fee and occupation charge were two of many issues which I had to decide.

4. Both parties called expert evidence on the occupation charge which took about one day to hear. I preferred the evidence of Mr Hooper, Christo's expert, whose annual rental value for 66-70 Parkway was £79,000, and I rejected the evidence

of Mr Beaumont, Docklock's expert, whose annual rental value for 66-70 Parkway was £142,550: see [132] to [134]. I did so partly because of Mr Hooper's experience and knowledge: see [46]. But I also preferred his approach and analysis for a number of reasons: see [135] to [137].

5. Even before I had handed down the Judgment, Docklock invited me to re-open the quantum meruit which I awarded to Christo for lettings and renewals on the basis that I had given inadequate reasons. I was far from satisfied that the reasons which I had given were inadequate. As I pointed out, this was an account and an inquiry carved out of divorce proceedings which took seven days to try and involved a number of detailed issues of which professional fees was just one: see [198]. Nevertheless, I gave further reasons for arriving at my conclusion in the Addendum: see [194] to [203].

6. Both parties then exercised their permission to apply and asked the Court to determine both the management fee and the occupation charge on the basis that there was a significant imbalance between the two figures. Docklock argued that the occupation charge should be much higher than the management fee and Christo argued the reverse and I had to determine a further five issues. In a second judgment dated 26 May 2021 I varied the amount of the management charge by only £47.26 (although I also corrected an error in relation to service charges of £8,901.44). Following this second judgment the amount of the management fees which I awarded to Christo after setting off the occupation charge was £78,370.42: see [2021] EWHC 1424 (Ch).

7. A hearing was fixed in June 2021 to deal with costs and any other consequential matters. Shortly before the hearing, I vacated it by agreement between the parties on the basis that Docklock had issued (or intended to issue) the Application Notice inviting me to reconsider the amount of the occupation charge which I set off against Christo's professional fees. Even though I heard the evidence as long ago as December 2020 and oral closing submissions on 4 January 2021 and then delivered judgment on 19 February 2021, it follows that I have still made no final order following the trial.

8. It is against this background that I must consider whether to exercise the power to reconsider the occupation charge. This was only one of many issues which I had to determine at a trial which took place almost a year ago and the total amount at stake is no more than £78,370.42. This is because Docklock was only ever entitled to set off the occupation charge against the management fees and even if I were to change my mind entirely and accept Mr Beaumont's rental value of £142,550, a complete *volte face* could make no greater difference to the final amount for which Christo is liable once the account has been struck.

9. Moreover, even if I granted Docklock's application it would be necessary for me to hear the expert evidence and submissions again and then come to a new decision. Mr David Holland QC appeared for Docklock at the hearing of the present application although he did not appear at the trial. He realistically accepted in his oral submissions that it would not be possible for me to substitute the evidence of Mr Beaumont for the evidence of Mr Hooper. He also accepted that it would take me at least one day to hear and decide the issue.

Judgments: reconsideration

10. In *Re Barrell Enterprises Ltd* [1973] 1 WLR 19 the Court of Appeal held that "save in the most exceptional circumstances" a successful party ought to be able to assume that the judgment is a valid and effective one. In *Stewart v Engel* [2000] 1 WLR 2268 a majority of the Court of Appeal affirmed that decision and held that the court should only exercise the power to recall orders and reconsider judgments in exceptional circumstances. In *Re L (Children)* (above) the Supreme Court rejected this limitation and agreed with the dissenting judgment of Clarke LJ. Baroness Hale JSC stated at [24]:

> "Clarke LJ dissented on this point. He did not think that the court was bound by the Barrell case to look for exceptional circumstances. He clearly took as a starting point the overriding objective in the CPR of enabling the court to deal with cases justly. He considered [2000] 1 WLR 2268, 2285 that the judge had been right to direct himself that the examples given by Neuberger J in In re Blenheim Leisure (Restaurants) Ltd (No 3) The Times, 9 November 1999 —a plain mistake by the court, the parties' failure to draw to the court's attention a plainly relevant fact or point of law and the discovery of new facts after judgment was given—were merely examples: 'How the discretion should be exercised in any particular case will depend upon all the circumstances.'"

11. In *AIC Ltd v Federal Airports Authority of Nigeria* [2021] 1 WLR 1506 the Court of Appeal considered again the scope of the power to reconsider in the context of a change of circumstances. In that case the court had adjourned an application to enforce an arbitration award under the New York Convention on terms that the Defendant provided security in the form of a bank guarantee. The Defendant failed to do so by the time prescribed in the order and the court gave permission to enforce the award. The Defendant obtained the required security shortly after and applied to the court to reconsider its order. The judge reconsidered her order and then recalled it. But the Court of Appeal allowed an appeal. Coulson LJ stated (at [50]) (citations removed):

> "The principle of finality is of fundamental public importance:… Parties who receive a judgment in open court are entitled to act on that judgment, because an order takes effect from the moment it is made by the court, not when it is sealed:….The successful party should not have to worry that something will subsequently come along to deprive him or her of the fruits of victory. The unsuccessful party cannot treat the judgment that has been handed down as some kind of rehearsal, and hurry away to come up with some new evidence or a better legal argument. As identified below, there is a particular jurisdiction which permits a judge to change his or her order between the handing down of the judgment and the subsequent sealing of the order. But in most civil cases, the latter is an administrative function, and it would be wrong in principle to allow parties carte blanche to take advantage of an administrative delay to go back over the judgment or order and reargue the case before it is sealed. Hence it is a jurisdiction which needs to be carefully patrolled."

12. Coulson LJ cited from *Re L (Children)* (including the passage which I have set out above) and then continued as follows at [52] to [54] (citations and footnotes removed):

> "52. Although this exposition of the authorities is very helpful, three points should be made about it. The first is to note that the jurisdiction is founded in the overriding objective (CPR r 1.1). It is therefore clear why a test requiring "exceptional circumstances"—which is not articulated in rule 1.1 (in contrast to, say, CPR r 52.30, which does use those words)—must be illegitimate. But it is still fair to observe that, as a matter of fact, such applications are (and certainly ought to be) rare.
>
> 53. Secondly, the facts of *In re L* were themselves unusual, because they concerned a judge giving a preliminary view and subsequently changing her mind after learning more about the case. Who could sensibly dispute that a reconsideration that arose in such circumstances

> was appropriate and in accordance with the overriding objective? As Mance LJ put it in *Robinson v Fernsby*, "having changed his mind, the judge was in my view not only entitled but bound to give effect to his second thoughts". I would venture to suggest that the authorities analysed by Baroness Hale JSC did not support any contrary approach to that specific issue.
>
> 54. Thirdly, the Supreme Court described the power to reconsider an order as an exercise of judicial discretion. It has subsequently been suggested that it is more properly described as the formation of a value judgment. I consider that this debate misunderstands the basis of the wider jurisdiction and ignores the particular background of *In re L*. The vast majority of applications to reconsider are not triggered by the judge, as happened in *In re L*, but by one of the parties. What is the proper approach of the court in those circumstances?"

13. Coulson LJ then considered a number of more recent authorities including *Heron Bros Ltd v Central Bedfordshire Council (No 2)* [2016] BLR 514 in which Edwards-Stuart J had stated as follows (in a passage upon which Mr Letman relied in this case):

> "16. The examples given by Neuberger J (as he then was) in *In re Blenheim (Restaurants) Ltd* The Times, 9 November 1999, were: 'a plain mistake by the court, the parties' failure to draw to the court's attention a plainly relevant fact or point of law and the discovery of new facts after judgment was given.'
>
> 17. Whilst I accept that this is not to be treated as a closed list of categories, I consider that they are all examples of situations where either something has obviously gone wrong or relevant material was overlooked through no fault of the parties. In my view they do not sit easily with the situation where a party knows the relevant facts (or, where appropriate, the relevant law) but simply fails to appreciate a potential legal consequence of the matters of which it is aware.
>
> 18. It therefore seems to me that in principle there has to be something more than a post-judgment second thought based on material that was already in play. If it were otherwise, any fresh point that occurred to a party following the handing down of a judgment would entitle the party to require the court to hear further submissions with a view to revisiting the judgment. That would then become the rule rather than the exception. It seems to me that this would accord neither with the interests of finality of judgments nor with the overriding objective to deal with cases justly and at proportionate cost, particularly in the sense of ensuring that parties are on an equal footing, avoiding unnecessary expense and dealing with cases expeditiously. However, at the end of the day the court has a discretion which must be exercised judicially and not capriciously……

> 20. It seems to me that the court should approach this application in three stages. First, the court should decide whether the application should be entertained at all. Second, if it is appropriate to consider the application, the court should consider whether the point raised by the application is reasonably arguable. If it is not, the application should be dismissed. If it is, then the third stage is for the court to give directions for a short oral hearing to enable the point to be argued fully (unless the parties have agreed that it can be dealt with on paper)."

14. Coulson LJ then addressed the question which he had posed at the end of [54] (in the passage which I have set out in [12] above). He answered that question in [59] and [60] as follows:

> "59. Although, in the interests of speed and practicality, I would elide the first two stages to which he refers, I agree with Edwards-Stuart J that there are two distinct questions which the court must ask itself if it is asked by one of the parties to reconsider an order which has been pronounced but not yet been sealed. The first is whether the application to reconsider should be entertained *in principle*: is there a reasonably arguable basis for the application? If the court answers that question in the negative, that is the end of the matter. If on the other hand the court concludes that reconsideration is appropriate in principle, then it becomes an open-ended matter of discretion, to be exercised in accordance with the overriding objective, as to whether the order should be changed, or not.
>
> 60. What should the court be looking for at the first stage, when asked to entertain an application for reconsideration? In my view, the court should be looking for a sufficiently compelling reason that may justify reconsideration; something which might outweigh the importance of finality and justify the opening up of a question or questions which, following the pronouncement of the order in open court, appeared to have been finally answered. Of course, it is quite right to say, as the authorities stress, that those categories of case are not closed. But, assuming that the request to reconsider comes from the parties and not the court, the court should instinctively be looking for something which has been missed or otherwise gone awry: a mistake or a fundamental misapprehension; a fundamental piece of evidence or a point of law that was overlooked. The court's undoubted jurisdiction to reconsider its earlier order cannot be permitted to become a gateway for a second round of wide-ranging debate."

15. The parties agreed that the decision of the Court of Appeal in *AIC v FAAN* was the subject of an outstanding appeal and this was confirmed by Westlaw. However, until or unless it is overruled, I am bound by the decision and in any event it provides very useful guidance on the way in which I should exercise the power to reconsider the Judgment. First, it stresses the importance of the principle

of finality and that a final decision based on a reasoned judgment should only be disturbed where there is a compelling reason for reconsideration. Secondly, the fact that the application need only be "reasonably arguable" also suggests that the court should not in substance retry the issue on the merits on the application to reconsider. The compelling reason should stand out without a meticulous examination of all the evidence. Thirdly, and finally, even if there is a compelling reason to reconsider the decision the court must then go on to consider whether to exercise its discretion based on all relevant factors including the overall progress of the dispute and any reliance placed on the judgment.

16. In the present case Docklock relied on a range of different factors. In his Skeleton Argument, Mr Holland advanced a case that Christo had acted dishonestly and presented a false case to the Court. In oral submissions he did not resile from that position. But in answer to a question from me he submitted that the success of the application did not depend on a finding of dishonesty. He also relied on new evidence in relation to the subletting of the premises. I consider the extent to which that evidence was genuinely new and whether it could have been made available at the trial in more detail below.

17. In *L'Oreal (UK) Ltd v Liqwd Inc* [2019] EWCA Civ 1943 the Court of Appeal dismissed an appeal against the decision of Birss J. The case provides useful guidance in relation to applications based on fresh evidence. Mr Holland relied upon the first instance decision in which the judge had accepted a submission that at the heart of the overriding objective was the idea that justice requires the court to get the right answer. Mr Holland submitted that if I was satisfied that I had got the original decision wrong, I was bound to reconsider the decision.

18. Mr Letman relied on the decision of the Court of Appeal. In particular, he drew my attention to a passage where Arnold LJ was considering an application based on fresh evidence. The second and third grounds of appeal were that Birss J should not have placed reliance upon the fact that the new evidence did not make "all the difference between success and failure on the issue of priority" and that he was wrong to attach weight to the fact that the applicant could have sought an adjournment during the trial but decided not to. Arnold LJ addressed those issues at [65] and [66]:

> "Turning to the second criticism, the judge was entirely correct to attach considerable weight to the fact that the new evidence did not amount to a knock-out blow, but rather raised issues which would require a second trial to resolve. As for the third criticism, the judge was again entirely correct to attach weight to the fact that L'Oréal were trying to re-fight an issue on which they had lost at trial having taken the tactical decision to try to establish their case through cross-examination of Olaplex's expert rather than seeking an adjournment to adduce further evidence of their own."

Stage 1: Compelling Reasons

19. In the Judgment I began by recording that there was a substantial disagreement between the experts: see [132]. I also recorded that Mr Hooper had taken a more conventional approach and carried out what I termed an ITZA Valuation: see [133] and [134]. Mr Letman also reminded me that in evidence Mr Beaumont had accepted that an ITZA Valuation was conventional for retail premises (as Mr Holland accepted). I then gave my reasons for preferring Mr Hooper's approach and analysis in six numbered paragraphs at [135]:

> "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."
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> 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.
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> 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.
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> 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.
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> 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….."

(1) Docklock's Closing Submissions

20. Mr Reuben Comiskey appeared at trial for Docklock. I would like to record (as I did at the hearing) that I have no criticism of Mr Comiskey's presentation of Docklock's case and that he argued it well. The first reason which Mr Holland gave for exercising the power to reconsider the occupation charge was that I had mischaracterised his submissions in paragraph ii) (above). His case was that Mr Comiskey had not made the submission that: "Mr Hooper had valued 66-70 Parkway on the basis set out in section 34 whereas Mr Beaumont had not". Mr Holland also submitted that I was wrong to criticise Mr Beaumont in paragraph

iii) (above) by suggesting that he had departed from the basis set out in the Statement of Agreed Facts.

21. It is necessary, therefore, for me to set out in some detail the submissions which Mr Comiskey made in relation to the expert evidence. In paragraph 88 of his written closing submissions, he pointed out that the key difference between the experts was whether the valuation exercise should be approached on "an ITZA basis" or the offices should be valued at their "natural office rate". He dealt with the figures and then made the following submissions:

> "89. The primary differences between the experts, as to subletting and ITZA valuation, were primarily a result of the terms they agreed as to the exercise they would carry out – namely a 1954 Act renewal. In Mr Hooper's case, in particular, this led him to discount an approach which would enable the landlord to obtain a significantly higher return for the property, namely splitting it up into its constituent parts (see LN/907/15]). It also led him to adopt an approach which ignored the fact that the back and mezzanine offices in the premises were in fact used as offices.
>
> 90. However, the correct measure for occupation rent – is the market rent for the premises – not the market rent based on the assumptions necessary for a 1954 Act assessment. It follows that Mr Hooper's concerns, especially as to the necessity for valuation of a single lease as opposed to the multiple leases which would obtain the best return for a landlord, were misplaced in the context of the task for this court (even if they might be justified under the terms of a 1954 Act renewal). Mr Hooper also failed to value the rear and mezzanine offices according to their actual permitted use."

22. It is also instructive for me to set out the passage in the transcript of 21 December 2020 to which Mr Comiskey referred me in paragraph 89 (above). In that passage he was cross-examining Mr Hooper about his methodology:

> "Q. I think what Mr Beaumont says is you assume there is a lease of the – you like to call it the shop, do you not? A. Yes. Q. The shop, a lease of the main retail, a lease of the ground floor offices and a lease of the mezzanine and then once you have got those four leases together, you apply a discount to the overall because you have only got one tenant on one lease? A. No, any subletting requires a discount because you have got the risk of a void, you have got the legal costs, and you have got the management fees of looking after it. Q. Well, a subletting does not put the risk of a void on the landlord does it? A. No, it puts it on the tenant. Q. Yes. A. But the tenant then becomes a landlord so why would he want to take that responsibility. Q. Because you do not need that area

> of the property, you have got a void anyway? It lets you offload the risk of a void, does it not? A. The problem we have here is this is all just hypothetical talk. The fact is estate agents in Parkway have all taken quite long leases, they are all there, and they go in there to take the premises that they require. Foxtons have taken four and half thousand square feet as an estate agent, which is larger than what we have here, so we cannot just say that estate agents only want little shops. We have got a whole range of sizes occupying and they do not want to break it up. Foxtons are not breaking those up. They could do."

23. Finally, in his oral closing submissions on 4 January 2021 Mr Comiskey addressed the court again on this issue. I asked him whether he wanted to draw my attention to anything in relation to the expert evidence and he said this:

> "MR COMISKEY: Just a couple of points in relation to that. First, in relation to the question of subletting or multiple lettings, as I set out in my submissions, it seems that Mr Hooper has been slightly railroaded by the terms that he agreed with Mr Beaumont, which is not a criticism of him; it is just the way in which he has approached this. He has approached this on the basis that it is a single letting by a single landlord to a single tenant because that is what a 1954 Act letting would be. What the court has to do is to work out what the market rent would have been. Here, what you have is a premises which is clearly suitable for occupation as offices and in fact has sole planning as offices for the rear and the mezzanine. They do not have planning consent for retail; they only have planning consent for office use, as was set out in the certificate of lawful use……If you take that together, it simply makes no sense to adopt the approach adopted by Mr Hooper, because he is valuing the whole property for a use that is not available to half the property, and he acknowledged in cross-examination that if the landlord split the leases he would recover significantly more in terms of rent than he would recover under a single lease. So, whether you deal with it as subletting or as multiple leases, it does not really make any difference; the answer should be the same."

24. In the first sentence of paragraph 135 ii) I intended to summarise paragraphs 88 to 90 of Mr Comiskey's written closing submissions. I accept, however, that I over-simplified Mr Comiskey's careful submissions and that he did not state that Mr Beaumont had departed from the agreed basis set out in section 34. I also accept that what Mr Beaumont said in evidence was that the basis of his valuation was section 34: see paragraph 5.1 of his report dated 9 November 2020.

25. But that does not take Docklock very far. Although he claimed to be carrying out a valuation on the basis set out in section 34, Mr Beaumont did in substance depart

from the agreement to carry out a valuation on that basis. Mr Comiskey accurately described the exercise which Mr Beaumont had carried out in his cross-examination of Mr Hooper. He had valued 66-70 Parkway in his report as four separate units and then applied a discount of 7.5% to reflect the fact that they were to be in the sole occupation of Christo: see section 7. In my judgment, this did not reflect the basis of valuation which he had agreed with Mr Hooper for the following reasons:

i) Section 34 provides that the rent payable under a new tenancy may be determined by the court to be that at which *the holding* might reasonably be accepted to be let in the open market by a willing lessor subject to certain disregards (which are not relevant for present purposes).

ii) The court carries out this valuation exercise after it has decided to grant a new tenancy and it has also decided the extent of the holding. Section 32(1) provides as follows:

> "Subject to the following provisions of this section, an order under section 29 of this Act for the grant of a new tenancy shall be an order for the grant of a new tenancy of the holding; and in the absence of agreement between the landlord and the tenant as to the property which constitutes the holding the court shall in the order designate that property by reference to the circumstances existing at the date of the order."

iii) As Mr Holland accepted in reply, a tenant is only entitled to a new tenancy of that part of the premises which it occupies for the purpose of its business. Section 23(3) also provides as follows:

> "In the following provisions of this Part of this Act the expression *"the holding"*, in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies."

iv) It follows that the basis upon which the experts had agreed to value 66-70 Parkway was that Christo was a business tenant applying for a new tenancy of the entire premises and that it intended to occupy them for the purposes

of its business as an estate agent. This is the basis upon which Mr Hooper, but not Mr Beaumont, had valued 66-70 Parkway.

v) Moreover, for Mr Beaumont to bring his valuation within section 34 it was not enough just to apply a discount of 7.5% to the final figure to reflect the fact that all four leases were granted to the same tenant. Mr Comiskey clearly recognised this in both his written and oral closing submissions and sought to persuade me to accept Mr Beaumont's evidence by arguing that a strict application of section 34 significantly under-valued the premises: see, in particular, the first and second sentences of paragraph 90.

26. I am not satisfied, therefore, that it would have made any difference to my decision if I had quoted Mr Comiskey's submissions in full rather than attempted to summarise them briefly (as I did in paragraphs 135 ii) and iii)). My point was that Mr Beaumont had agreed to value 66-70 Parkway on the basis that he was carrying out the statutory exercise under section 34 but then failed to do so. It may be that on reflection he could have justified a higher market rent on a different basis. But he had agreed the basis of valuation with Mr Hooper and, in my judgment, he was bound by it.

(2) Mr Beaumont's Evidence

27. The second reason which Mr Holland gave was that I wrongly stated that Mr Beaumont had provided no evidential basis for his suggestion that the alienation covenant in the hypothetical lease of 66-70 Parkway ought to have permitted the tenant to sublet a part or parts of the premises: see paragraph 135 iv). He pointed out that Mr Beaumont had relied on both the physical layout of the premises and the fact that Christo had marketed part of the ground floor for separate letting.

28. Mr Beaumont exhibited those marketing particulars at Appendix 6 to his report. Those particulars showed that Christo had been marketing 3,200 square feet on the first and second floors and the rear ground floor. Mr Letman dealt with those particulars in cross-examination:

> "On these particulars, just to deal with that separately, those were prepared for a specific purpose and they relate to all the three, potentially letting all three. There is no separate letting here of the

> ground floor or indeed the mezzanine, is there? A. I am not quite sure what is intended. It is just advertising the first and second floors and the rear ground floor. Q. As I understand it, these are part of a strategic attempt to try to get residential planning permission for the upper parts and they tell us nothing about the --- A. I do not know. Q. I see. A. All I know is that they have been advertised."

29. I am satisfied that I said nothing in paragraph 135 iv) which I ought to reconsider. The physical layout of the premises and these marketing particulars provide no evidence that a landlord would have been prepared to permit a sub-letting of a part or parts of the premises. As Mr Beaumont himself recognised, the particulars were just advertising parts of the premises. At best, the physical layout and the particulars provided some evidence that a tenant might have wanted to ask for a relaxation of the alienation covenant. But they provided no evidence that such a tenant would have been willing to pay a significantly increased rent for that privilege. By contrast, Mr Hooper provided reliable evidence that two landlords of comparable properties were not prepared to permit the subletting of a part or parts and that each tenant was prepared to accept that prohibition.

(3) Christo's Case

30. The third reason which Mr Holland gave was that Christo advanced a false case that it was unlawful to sublet 66-70 Parkway. There were two principal strands to this argument. The first strand was that Christo's solicitors, Carter Perry Bailey LLP ("**CPB**") gave a false explanation to Boyes Turner for the marketing of separate parts of the premises and that Mr Letman put that false explanation to Mr Beaumont. The second strand was that Mr Letman cross-examined Mr Beaumont on the false basis that the Building Regulations 2010 (SI 2010/2214) (the "**Building Regulations**") did not permit the sub-division of the premises. I deal with each in turn.

(i) Marketing

31. Docklock was aware that Christo was marketing 3,200 square feet on the first, second and part of the ground floor of 66-70 Parkway in July 2020 because Mr Beaumont produced the marketing particulars as Appendix 6 to his report. Nicholas also exhibited particulars showing that Christo had marketed 1,200

square feet on the ground floor separately. I was told that these particulars were also dated July 2020.

32. On 5 August 2020 Counterclaim granted a lease of part of the ground floor to PEMM Estates Ltd ("**PEMM**") for an annual rent of £60,000 plus VAT for a term of five years from the date of the lease. The demised premises included the retail premises at the front of the building together with some of the office space. By letter dated 4 September 2020 CPB informed Boyes Turner that PEMM were "additional tenants withing the building alongside" Christo.

33. Under cover of a letter dated 20 November 2020 CPB sent a letter dated 18 November 2020 to Boyes Turner. The letter had been addressed to them by Mr Ian Haywood MRICS, a director of Property Tectonics, who expressed the view that 66-70 Parkway could not be sub-let in their present format. He gave four reasons for reaching this conclusion and expressed the view that it would be necessary to submit an application for approval under the Building Regulations. I return to this report below.

34. By letter dated 23 November 2020 Boyes Turner objected to Christo relying on Mr Haywood's report. They asserted that Christo had only commissioned this report after it had been "caught out" marketing the premises. In their reply dated 25 November 2020 CPB addressed both the Haywood report and the marketing of the premises. Given that Docklock asserts that this letter was deliberately misleading, I must set out the relevant passages in full:

> "Since you have raised detail of our client's action in marketing the premises in support of your client's arguments, it is appropriate that we address those directly. The Second Floor offices have been vacant since April 2018 and have been marketed for let since that time. The mezzanine area has not been marketed. The First Floor is subject to a Lease expiring in February 2021. The front retail/office space has been let, since July, to PEMM Estates, with a lease being granted from September 2020 onwards.
>
> As for why the premises were marketed, and as your client will be able to confirm, the office rental sector has been decimated since even prior to the onset of COVID in March 2020. Since, our client estimates, 2016, its team have been recommending to commercial clients that vacant office space should be converted into residential accommodation. Such had been possible under the Permitted Development scheme (which you will note applied to the development of Torriano Mews) and, indeed,

> your client's expert firm reported on Market Conditions in similar terms in 2017 (copy enclosed).
>
> Where our client has endeavoured to let the Second Floor at 66-70 Parkway for over 2 years without success, and given the effect on commercial lettings arising from a combination of Brexit and the pandemic, our client's director took a decision to convert the two upper floors and the rear area into residential accommodation. As your client's expert's report highlighted, 66-70 Parkway offices……lend themselves to residential development under the Permitted Development regime, but only where you can demonstrate to the Local Authority that you have been marketing the premises as office use for more than two years without success. Again, as your client will know, there are stringent requirements that apply – to include instructing agents, marketing details and keeping a record of any substantive enquiries. That is, therefore, precisely what has been done. Whilst the First Floor remains tenanted for a few more months, where the Second Floor has attracted no interest then, in order to meet the qualifying criteria, both Floors and the Rear have been marketed to assist to meet the qualifying criteria.
>
> As you know, our director licensed the use of the Christo & Co name to PEMM Estates. The creation of residential units would, following that turn of events, create an investment income for Mr Christo personally."

35. In their letter CPB also stated that it was not until the sub-letting issue had been raised by the experts that Chris had investigated the issue further. They then continued:

> "As set out above, where such an issue has now been identified, it is plain that any prospective lessee will also discover the restriction it would face in the course of raising preliminary enquiries. This is not an issue of convenience. Our client's Director has sought to take positive action to improve his portfolio by seeking to avail himself of the benefit of the Permitted Development regime. Having begun the process, it has been identified that he is precluded from sub-letting the rear space – not because it does not suit his personal purpose (or that of our client) but because the applicable Buildings Regulation framework positively precludes such subletting."

36. In a witness statement dated 24 June 2021 Chris confirmed that this explanation was correct. In a witness statement dated 5 July 2021 Nicholas challenged his evidence and asserted that the conversion of parts of the premises to residential accommodation was not permitted under the Town and Country Planning (General Permitted Development) (England) Order 2015 (the "**GDO**") because

Camden LBC had made a direction prohibiting such development by using its powers to modify the effect of the GDO.

37. In opening the application Mr Holland referred me to the GDO and relied on Nicholas's evidence to show that it did not permit Christo to change the use of 66-70 Parkway from office to residential use. To meet this point Mr Letman produced the relevant plans accompanying the direction made by Camden LBC and submitted that 66-70 Parkway had been excluded from its effect. In particular, he took me to Article 4 direction area 1A (west) which showed that 66-70 Parkway was in an area excluded from the effect of the Article 4 direction which modified the effect of the GDO.

38. Finally, in support of the application Nicholas exhibited marketing particulars which Christo had produced since the trial. In April 2021 Christo began to market parts of 66-70 Parkway again. I was taken to marketing particulars for 1,292 square feet which I understood to be the re-marketing of the premises demised by the PEMM lease. The particulars suggested that PEMM had not surrendered the lease but intended to assign it on. At the end of May 2021 Christo also began to re-market the rear ground floor (which had originally been marketed the previous year).

39. It is not possible for me to determine on this application whether the GDO permitted a change from office to residential use of 66-70 Parkway or whether the explanation which CPB gave in their letter dated 25 November 2020 was accurate. Likewise, it is not possible for me to determine whether Chris gave instructions to put forward a false case. The terms of the PEMM lease and the fact that Christo began to re-market parts of the premises very soon after I had handed down the Judgment provide some evidence to support such a conclusion. But I would be unwilling to draw an inference that a party (or its solicitors) had deliberately misled an opposing party or the court from this material alone.

40. On the other hand, I cannot dismiss this inference out of hand. Does this provide a sufficiently compelling reason which outweighs the importance of finality and justifies re-opening the valuation issue? In the present case I am satisfied that this

is not a sufficiently compelling reason for me to exercise the power to reconsider the issue for the following reasons:

i) Nicholas was fully aware before trial that Christo was marketing 3,200 square feet on the first, second and part of the ground floor of 66-70 Parkway before trial and Mr Beaumont exhibited the particulars at Appendix 6. Nicholas was also aware that Christo was marketing 1,200 square feet on the ground floor separately because Boyes Turner mentioned this fact in their letter dated 23 November 2020.

ii) CPB informed Boyes Turner about the PEMM lease in their letters dated 4 September 2020 and 25 November 2020 (although they got the date wrong). If Docklock had considered it relevant to Mr Beaumont's evidence or its case on valuation they could have asked for a copy.

iii) The GDO and the Article 4 direction were public documents and if Docklock had wanted to challenge the explanation given by CPB in their letter dated 25 November 2020 they could have done that also. Moreover, Nicholas could have instructed Mr Comiskey to put both the GDO and CPB's letter dated 25 November 2020 to Chris and to Mr Hooper.

iv) Mr Comiskey did not put those documents to Chris or Mr Hooper and, in my judgment, he was right not to do so. This appeared to be a peripheral issue. Mr Letman put Chris's explanation to Mr Beaumont and challenged the marketing particulars but then only very briefly and to persuade me that the marketing evidence was not relevant at all.

v) I accept that it is possible that I might have reached a different conclusion about the terms of the hypothetical lease if Docklock had challenged Chris's evidence about the reason for marketing 66-70 Parkway and explored the PEMM lease with both him and Mr Hooper. But I cannot be satisfied that I would have reached a different decision even if the matter had been fully re-argued.

vi) This is very far, therefore, from being the kind of "knock-out blow" which would outweigh the principle of finality. If I were to permit Docklock to re-

open the point, it would be necessary to recall both Chris and both experts for cross-examination. Moreover, if I were to permit Docklock to put the allegation of dishonesty to Chris, it might require further disclosure and witness statements.

(ii) The Building Regulations

41. In their letter dated 20 November 2020 CPB sought to introduce the Haywood report (see above) and in their letter in response dated 23 November 2020 Boyes Turner objected strongly. In their letter dated 25 November 2020 CPB returned to the subject of Mr Haywood's report:

> "The report was intended to be advisory to assist Mr Hooper to understand the broader ramifications of sub-letting where Mr Beaumont maintains that such is possible given the layout of the Property. Given the conclusions it was/is entirely proper that those findings were relayed to you for consideration by your client and his advisors. If required, we can and will instruct that Part 35 be complied with – though you will recognise that the substance of the conclusions will not change from those conveyed to you. Further, now that the regulatory framework has been identified, your client along with its legal team and its expert should be more than capable of independently confirming that it is not legally permissible to sub-let the property….As you will be aware, the experts are instructed to report as to the rental valuation having regard to the terms of a hypothetical lease. Plainly, if as a matter of law/regulation, no sub-letting was, in fact, capable of taking place as at 2013, it would not matter what other terms were to be implied if no tenant could ever have sub-let."

42. CPB also asserted that this was not an issue which Chris had considered before and I have set out the relevant passage from the letter in the context of the marketing particulars (above). On the same day, 25 November 2020, Mr Hooper returned a draft of the joint statement which included a new paragraph:

> "PH also understands that it is not legally permissible to sub-let the property due to the terms of "Approved Document B-Safety: Volume 2 Buildings Other than Dwellings, of the Building Regulations 2010". PHs understanding in respect of the regulatory framework has been assisted by information provided by Mr Ian Haywood of Property Tectronics in his report dated 18 November 2020."

43. The experts could not agree the joint statement in this form and so never signed the final version. By letter dated 9 December 2020 CPB wrote to Boyes Turner

asking them to concede that it would not be legally permissible to sub-let part of 66-70 Parkway. Docklock was not prepared to make that concession and Mr Letman raised the point in cross-examination. Mr Comiskey objected on the basis that there was no expert evidence before the court on that issue. Mr Letman argued that it was not a point on which expert evidence was necessary and I ruled in his favour. There was then this short exchange:

> "Q. In terms of your valuation, you do have to have regard, do you not, to the practicalities and whether the sub-divided premises would comply with the building regulations? A. Agreed, Yes. Q Here in terms of the means escape in the case of fire, part B of the building regulations is relevant, correct? A. I am not an expert on the building regulations. Q. But have you considered that, it is matter which you ------ A. I have assumed that any subletting would comply with building regulations. Q. So you make that assumption, do you? A. Yes."

44. Mr Letman then put points to Mr Beaumont about the route and dimensions of the fire escape which would have been required if 66-70 Parkway was to be sublet. Mr Beaumont said quite properly that he was not an expert on this issue and that he had not had the opportunity to consider the matter in detail. The following exchange then took place:

> "Q. You say, Mr Beaumont that this is a matter you have not been able to consider in detail. Surely it is relevant to your valuation and you ought to have considered in detail? A. I did not think it is of significance. Q. You did not think it is of significance. A. The fire escape issues are very significant, but in terms of the rental valuation, I do not think it would have a significant impact particularly as I have not had the opportunity to consider all available options."

45. Mr Letman then asked Mr Beaumont to accept that Mr Hooper had invited him to consider the issue by inserting the paragraph in the joint statement and that he had refused to sign it on Docklock's instructions. Mr Beaumont accepted that he had refused to sign the joint statement but justified his position on the basis that Mr Hooper had raised the point very late. Mr Letman then moved on to deal with the number of WCs which would have been required under the Workplace Health Safety and Welfare Regulations 1992 (SI 1992/3004) (the "**Workplace Regulations**").

46. Christo did not rely on Mr Haywood's report at trial and Docklock never sought to obtain or introduce any expert evidence on compliance with the Building Regulations before the trial. In June 2021, however, Docklock obtained a report from Mr Michael Johnson of Innovation Fire Engineering Ltd ("**Innovate**"), in which the author concluded that it would be possible to split the ground floor into two units, one retail and one office with the mezzanine floor.

47. Mr Holland submitted that in the light of the Innovate report I was wrong both to permit Mr Letman to cross-examine Mr Beaumont on the Building Regulations and that he cross-examined Mr Beaumont on a false basis, namely, that it was unlawful to divide or sublet 66-70 Parkway. I reject both of those submissions for the following reasons:

    i) Although CPB took the point about the Building Regulations very late, it was no part of Christo's case that 66-70 Parkway could be divided into separate premises and then sublet. This was Docklock's case and it was always for Mr Beaumont to satisfy the court not only that it was appropriate to value 66-70 Parkway as four separate premises but also that it was possible to sub-divide them in compliance with any relevant legislation (including the Building Regulations).

    ii) In my judgment, therefore, it was perfectly permissible for Mr Letman to explore the assumptions which Mr Beaumont had made in his report and to challenge those assumptions. Mr Beaumont conceded that he had assumed that subletting would comply with the Building Regulations but he was not an expert and had not considered the available options.

    iii) Mr Letman explored the extent of Mr Beaumont's experience of the Building Regulations and his knowledge of the route and dimensions of the fire escape. But as I understood the purpose of the cross-examination, it was not to prove that it was unlawful to sublet the premises but to demonstrate that Mr Beaumont's valuation was unreliable because he had not considered this issue adequately.

    iv) I accepted that submission in the Judgment at paragraph 135 v). It is important to note that I did not find that it was unlawful to sublet the

premises. I recorded that Mr Beaumont had not considered the matter and I was left in considerable doubt about his assumptions.

48. But even if I should have upheld Mr Comiskey's objection and refused Mr Letman permission to cross-examine Mr Beaumont on this issue, I am satisfied that this is not a compelling reason to re-open and reconsider the issue. I say this for the following reasons:

i) There is no reason why Nicholas could not have instructed Innovate to produce a report before the trial and asked for permission to adduce it. Indeed, it may have been sufficient to provide it to Mr Beaumont to ensure that he was fully briefed on the position under the Building Regulations.

ii) With the benefit of hindsight, Mr Beaumont would have been better served if Docklock had agreed to admit Mr Haywood's report on terms that Christo would agree to admit the Innovate report. Time was tight but the trial overran and I agreed to hear closing submissions in January 2021. It is quite likely that I would have agreed to a short adjournment for both parties to produce expert evidence and for Mr Beaumont and Mr Hooper to agree and sign the joint statement.

iii) But even if I had admitted both reports, I consider it highly unlikely that it would have had any effect on my decision. I did not decide whether it would have been possible to divide up the premises in compliance with the Building Regulations and, as Mr Letman pointed out, Innovate did not address the number of WCs which would have been required under the Workplace Regulations.

iv) In my judgment, this case is very similar to *L'Oreal*. Docklock is seeking to refight an issue which it lost at trial after taking a tactical decision to object to evidence about compliance with the Building Regulations. It is far too late for Docklock to change its mind about that tactical decision.

v) Finally, Mr Holland assumed throughout his submissions that the Innovate report was right and Mr Haywood was wrong and this was sufficient by itself to show that a false case was put to Mr Beaumont. I disagree. If I were

to reconsider this issue both experts would have to exchange reports which complied with CPR Part 35 and then give oral evidence. Again, if I were to permit Docklock to put the allegation of dishonesty to Chris, it might well require further disclosure and witness statements.

Stage 2: Discretion

49. Even if I had been satisfied that there was a strong reason to re-consider the amount of the occupation charge, I would not have exercised my discretion to do so for two reasons. First, it would be wholly disproportionate to do so in the context of this action. This was one discrete issue in a complex account which was itself satellite litigation carved out of divorce proceedings because the parties had been unable to agree final terms. The total amount at stake is no more than £78,370.42 and both parties have already had a second bite at the cherry. It is time now to bring finality to this litigation.

50. Secondly, Mr Holland did not challenge paragraph 135 vi) of the Judgment or suggest that the finding which I made there was wrong. But that paragraph contained my primary reason for preferring Mr Hooper's evidence. He had adopted a simple and conventional method of valuation and his final figure was supported by the agreed comparables. By contrast, Mr Beaumont's unconventional method led to a figure which was almost double the average ITZA valuation for the agreed comparables. This was a fundamental problem which Mr Holland did not address, and it might well have been enough to dismiss the application for this reason alone. However, out of deference to the arguments presented by both counsel, I have set out my reasons in full.

Disposal

51. I therefore dismiss Docklock's application. I will hand down this judgment on Friday 10 December 2021. The parties need not attend and subject to any further applications by the parties I will re-list the final hearing of this action for half a day next term. At that hearing I will deal with all consequential matters (including the costs of this application). If the parties are able to agree the form of an order in the meantime, they should notify the court as soon as possible.