[2023 Gib LR 370]

IN THE MATTER OF RECLAIM LIMITED

RECLAIM LIMITED (in liquidation, acting by its joint liquidators LAVARELLO and VAUGHAN) v. LAW ABOGADOS PATRIMONIAL SL and GARCIA

SUPREME COURT (Yeats, J.): May 5th, 2023

2023/GSC/022

Companies—liquidators—powers and duties—power under Companies Act 1930, s.241(1)(b) and s.241(2)(h) for liquidators to terminate contract entered into by company—termination of contract under which funds belonging to company held by other party necessary for winding up

The liquidators of Reclaim Ltd. brought proceedings against the defendants/respondents.

Reclaim Ltd. was a company incorporated and registered in Gibraltar. Two companies related to Reclaim were said to have been involved in a dubious timeshare scheme and as a result the Chief Justice held that it was not in the public interest of Gibraltar for Reclaim to continue operating. It was wound up in 2014 and now acted by its joint liquidators. The first defendant/respondent ("LAP") was said to hold funds belonging to Reclaim. In 2013 in the winding up action LAP stated that it held funds of approximately €1.5m. and £7.1m. on behalf of Reclaim.

An agreement was entered into in 2000 between Reclaim and LAP that LAP would provide Reclaim with professional services in respect of the scheme, including that LAP would open bank accounts for the purposes of receiving moneys from the scheme; receive and process funds paid to Reclaim; pay the costs arising from the management of the accounts; distribute the moneys in accordance with the scheme (including payments due to Reclaim); invest the funds; and perform other advisory functions. The liquidators had written to the defendants in March 2017 giving notice of termination, revocation or cancellation of the 2000 contract. The liquidators claimed that the 2000 contract was the only agreement that governed the relationship between Reclaim and the defendants.

The defendants had referred to a 2004 contract which they claimed superseded the 2000 contract. It was said that under the 2004 contract, LAP was a trustee entrusted with administration of the funds received from Reclaim, and that it was no longer an agreement for services. The defendants

had not produced the originals of the 2004 contract nor any evidence that it was genuine. The liquidators claimed that the 2004 contract was not a genuine or valid agreement.

The liquidators invited the court to determine (i) whether the 2004 contract was a genuine or valid contract; (ii) whether the 2000 contract and/or the 2004 agreement had been terminated or disclaimed, and if so when; (iii) whether it was necessary for the court to give leave to disclaim the agreement(s) if it concluded that it or they had been terminated; (iv) what funds were held by the defendants and in what capacity; and (v) the effect of termination or disclaimer on any entitlement of Reclaim to those funds.

Held, ruling as follows:

(1) The 2004 contract was not a genuine contract entered into between Reclaim and LAP. It therefore did not bind and had never bound Reclaim. The court agreed with the liquidators that the obvious inference was that the defendants had sought to impose the 2004 contract because, under the 2000 contract, title to the funds did not pass to the defendants. It was incomprehensible that a contract which purportedly governed an ongoing relationship between Reclaim and the defendants was first identified and referred to by the defendants in 2018 when proceedings had been underway since 2013. Significantly, the 2000 contract was the one which was referred to by the defendants themselves in the proceedings before the Chief Justice in 2013. There had been no mention of the 2004 contract. No explanation had been put forward for the failure to refer to the 2004 contract prior to 2018 (paras. 11–17).

(2) The termination of the 2000 contract would take effect from the date of the notices of termination in March 2017. Section 241(1)(b) and s.241(2)(h) of the Companies Act 1930 afforded the liquidators the power to terminate a contract that bound a company which was in liquidation. (Although the Act had been repealed, it continued to apply to winding up proceedings commenced prior to November 1st, 2014 by virtue of the Insolvency (Transitional Provisions) Regulations 2014.) The carrying on of business in a way which was beneficial to the winding up (s.241(1)(b)) must include the ability to terminate a contract which bound the company, and the termination of a contract entered into by the company had to be a matter which, depending on the circumstances, could be necessary to enable the winding up of the company's affairs and the distribution of its assets to its creditors (s.241(2)(h)). The termination of the contract in this case must undoubtedly be necessary and in the best interests of Reclaim and its creditors. Funds belonging to Reclaim were being held by a third party under the contract. The third party was supposedly charging for its services. Reclaim's funds must be placed in the hands of the liquidators so that the winding up of the company could proceed for the benefit of its creditors. It had not been suggested that there was any term in or feature of the 2000 contract that would prevent its unilateral termination (paras. 19–23).

(3) The court agreed with the liquidators' submission that in the absence of any evidence from the defendants as to the funds they now held, the court should presume the amount in the most favourable way to the liquidators as possible. The only figures available were those stated by the defendants in 2013. The court could only presume that this amount was still being held on behalf of Reclaim (paras. 25–29).

(4) The defendants held Reclaim's funds as its agent and s.252 of the Companies Act 1930 conferred upon the court the power to require the defendants to transmit the funds. In all the circumstances of the case it was clearly appropriate that such an order be made. The defendants would be ordered to pay to the liquidators the sums of €1.5m. and £7.1m. (paras. 30–31).

Cases cited:
(1) *Armory* v. *Delamirie* (1722), 1 Stra. 504; 63 E.R. 664, considered.
(2) *Indian Oil Corp.* v. *Greenstone Shipping SA*, [1988] 1 Q.B. 345, considered.
(3) *Keefe* v. *Isle of Man Steam Packet Co. Ltd.*, [2010] EWCA Civ 683, considered.

Legislation construed:
Companies Act 1930, s.241(1): The relevant terms of this subsection are set out at para. 20.
s.241(2)(h): The relevant terms of this provision are set out at para. 21.
s.252: The relevant terms of this section are set out at para. 30.

D. Feetham, *K.C.* with *D. Martinez* (instructed by Hassans) for the claimant/applicant;
The defendants/respondents did not appear.

1 **YEATS, J.:** The claimant is Reclaim Ltd. ("Reclaim"). It was wound up on March 31st, 2014 by order of Dudley, C.J., and now acts by its joint liquidators Edgar Lavarello and Colin Vaughan ("the liquidators"). The defendants/respondents to this application are Law Abogados Patrimonial SL ("LAP") and Luis Fernandez Garcia ("Mr. Fernandez"). (I shall refer to LAP and Mr. Fernandez together as "the defendants.")

2 The present action is an originating application made by Reclaim against the defendants on March 31st, 2017. Reclaim sought a number of orders including disclosure, disclaimer of contracts/agreements, termination of contracts/agreements and an account. On May 11th, 2018, the defendants applied for a declaration that the court did not have jurisdiction to try the claims and for a stay in favour of proceedings in Spain. On October 29th, 2019, although I dismissed some of the claims being made by the liquidators, I ordered that the claims we are presently concerned with could proceed—see *Reclaim Ltd.* v. *Law Abogados Patrimonial SL* (2019 Gib LR 165). (I shall refer to that judgment as "the first judgment.") I also

imposed a stay on the claims until further order if the defendants filed a notice of appeal. The defendants did appeal to the Court of Appeal. Their appeal was, in effect, dismissed on December 1st, 2020. (The Court of Appeal's decision is reported at 2020 Gib LR 367.)

3 On May 12th, 2022, Reclaim filed an application by which they sought the lifting of the stay, compliance with previous disclosure orders, and orders as to costs. Further, and importantly, they sought orders that unless disclosure was provided, any contracts/agreements that Reclaim had with the defendants were to be disclaimed or terminated, and that the defendants transmit funds held by them belonging to Reclaim. On September 2nd, 2022, I ordered that the stay be lifted and made orders as to costs. I also ordered (at para. 2) that the defendants comply with an order for disclosure made by Jack, J. on May 9th, 2017 within 28 days of my order being served.

4 The matter then came before me on December 9th, 2022. I was satisfied that the defendants had not complied with the disclosure orders, and I made the following order:

> "1. Unless [the defendants] do within 14 days of service of this Order comply with paragraph 2 of the Order of the 2 September 2022, and file and serve a Response or Defence to the Claimant's Originating Application dated 31 March 2017, [the defendants]:
>
> a. [shall be] debarred from defending the Claimant's Originating Application dated the 31 March 2017; and
>
> b. The Court will proceed to give written judgment based on the submissions made by the Claimant, through its Counsel, at the hearing of the 9 December 2022.
>
> 2. The Claimants are to file evidence as to whether [the defendants] have provided disclosure as required by paragraph 1 above.
>
> 3 Cost reserved."

5 On April 25th, 2023, Darren Martinez, as solicitor for Reclaim, filed a witness statement confirming that the defendants had been served with my order of December 9th, 2022 but have again failed to provide the disclosure. I have therefore proceeded to determine Reclaim's application on the basis of the submissions made on December 9th, 2022 by Reclaim's counsel.

Factual background and issues

6 The background to the matter is set out in the first judgment at paras. 2–6. In short, two companies related to Reclaim were said to have been involved in a timeshare scam and as a result Dudley, C.J. held that it was not in the public interest of Gibraltar for Reclaim to continue operating.

7 Mr. Fernandez is a Spanish lawyer and LAP's principal. LAP is said to hold funds belonging to Reclaim. In an affidavit dated September 25th, 2013 in the winding up action (court action number 2012 Company No. 44), Mr. Fernandez said the following:

> "Currently LAP holds or administers funds of approximately €1.5M and £7.1M on behalf of Reclaim clients. These funds are mostly invested with third parties until maturity and then funds are distributed to persons who have made claim (sic) under [a certificate scheme related to the timeshares]."

8 As was discussed in the first judgment, it is common ground that an agreement was entered into on January 18th, 2000 between Malcolm Willis (a Reclaim director at the time) and Mr. Fernandez ("the 2000 contract"). They agreed that Mr. Fernandez would provide Reclaim with professional services in respect of the certificate scheme. Mr. Fernandez was to open bank accounts for the purposes of receiving moneys from the scheme; receive and process the funds paid to Reclaim; pay the costs arising from the management of the accounts; distribute the moneys in accordance with the scheme (including the payments due to Reclaim); invest the funds; and perform other advisory functions. The liquidators say that this is the only agreement which governs the relationship between Reclaim and the defendants.

9 In support of the applications on jurisdiction made by the defendants on May 11th, 2018, the defendants referred to a second agreement which they say was entered into on May 3rd, 2004 by Reclaim on the one part and LAP on the other ("the 2004 contract"). The 2004 contract was said to have superseded the 2000 contract and to have created a different relationship between the parties. It provided that the funds received by Reclaim would be administered by LAP for the benefit of Reclaim certificate holders. It was submitted that the provisions created "a legal and fiduciary relationship" where LAP was the trustee entrusted with the administration of the funds. It was no longer an agreement for services. The liquidators maintain that the 2004 contract is not a genuine or valid agreement.

10 Mr. Feetham invited the court to deal with the following issues in this judgment:

(i) Is the 2004 contract a valid or genuine contract?

(ii) Has the 2000 contract and/or the 2004 agreement been terminated or disclaimed—if so, when?

(iii) Is it necessary for the court to give leave to disclaim the agreement(s) if it concludes that it or they have been terminated?

(iv) What funds are held by the defendants and in what capacity? and

(v) What is the effect of termination or disclaimer on any entitlement of Reclaim to those funds?

Genuineness/validity of the 2004 contract

11 Mr. Feetham submitted that there is compelling evidence that the 2004 contract is not a genuine contract. Further, that in the course of the hearings in 2019 the liquidators challenged the defendants to produce the original copies of the 2004 contract so that it could be submitted to forensic analysis. The originals have not been produced, nor has any evidence of its genuineness been adduced.

12 In the first judgment I said the following in relation to the 2004 contract (2019 Gib LR 165, at paras. 29–32):

> "29 Nowhere in the judgment of the learned Chief Justice is there mention of the 2004 contract. As can be seen from para. 13 of his judgment which I have quoted above, Mr. Garcia was relying on the fact that title to the funds vested in LAP and that Reclaim were no longer entitled to them. Yet clearly the 2000 contract referred to by the Chief Justice did no such thing . . .
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> 30 Mr. Feetham highlighted that there had been no disclosure of the 2004 contract to the liquidators until after the present proceedings were issued in 2018. Even then, it was not referred to in the first witness statement of [Mr. Fernandez] of July 27th, 2018 but it was exhibited to a later statement dated October 17th, 2018. No effort has been made to explain why the existence of the 2004 contract was omitted from the proceedings before the Chief Justice . . .
>
> 32 Whilst the argument favouring a conclusion that the 2004 contract is not genuine is compelling, I am unable to make such a determination unless I hear evidence on the matter. However, for the purposes of deciding the issues in these applications I must proceed on the basis that the 2004 contract was not before the learned Chief Justice. It is inconceivable that the judge would not have referred to it had it been brought to his attention. Furthermore, there is certainly no evidence that it was known to the liquidators prior to July 2018. The assertion that it was first disclosed in the witness statement of October 17th, 2018 is unchallenged."

13 Mr. Feetham has now also referred to Mr. Fernandez's second affidavit in the winding up proceedings. This is an affidavit dated December 19th, 2013. There, Mr. Fernandez said the following:

> "4. As I elaborated in my previous affidavit, LAP is the Fiduciary for the beneficiaries of the Reclaim scheme. This relationship is exemplified in the agreement between Mr Malcolm Willis, representing Reclaim, and myself dated the 18th January 2000 . . .

> 7. This is the manner in which LAP has been operating in since 2000. LAP, on the advice obtained from financial advisors in various banking institutions, invests in bonds, government debentures and shares as, always as minority investors."

This clearly evidences that, as far as the defendants themselves were concerned, the 2000 contract was the one that bound the parties.

14 The defendants are no longer participating in these proceedings. Indeed, by virtue of my order of December 9th, 2022, they are debarred from defending the liquidators' claims. In the circumstances, I have to decide the point on the basis of the evidence which is before me.

15 Mr. Feetham suggested that the defendants had sought to interpose another contract because, under the 2000 contract, title to the funds did not pass over to the defendants. I agree that this is the obvious inference. I said the following regarding the defendants' position on the 2004 contract (*ibid.*, at para. 26):

> "It is said for the applicants that these provisions created a legal and fiduciary relationship where LAP was the trustee entrusted with the administration of the funds. The dynamic of the relationship changed. It was no longer an agreement for services but a trust agreement and followed the recommendation by the Spanish stock exchange commission."

16 It is incomprehensible that a contract, which purportedly governs an ongoing relationship between Reclaim and the defendants, is first identified and referred to by the defendants in 2018 when proceedings have been under way since 2013. Significantly, the 2000 contract is the one which was referred to by the defendants themselves in the proceedings before the Chief Justice in 2013. There was no mention of the 2004 contract. No explanation has been put forward for the failure to refer to the 2004 contract prior to 2018.

17 In my judgment, the conclusion is clear. The 2004 contract is not a genuine contract entered into between Reclaim and LAP. It does not therefore bind, or has ever bound, Reclaim.

Termination of the 2000 contract

18 On March 30th, 2017, the liquidators wrote separate letters to Mr. Fernandez and to LAP in near identical terms. In the letter to Mr. Fernandez in particular, the liquidators said the following:

> "You and/or LAP hold funds said to have been set aside to deal with the claims of holders of reclaim certificates issued by Reclaim Ltd. You have claimed that the funds cannot be transferred to Reclaim as they are held by LAP for the benefit of the certificate holders. The

> only documentary evidence disclosed in support of the defendants' proposition is a contract dated 18 January 2000 between Mr Willis, acting on behalf of and in the name of RCL, and Mr Fernandez (the 'Service Contract') . . .
>
> As part of the summons and relief sought, Reclaim/the liquidators are seeking leave/permission/or a declaration that they are entitled to terminate, cancel or revoke the or any agreement between RCL and LAP/Mr Fernandez relating to the reclaim funds, and in particular, the Service Contract . . .
>
> Please accept this notice of termination as formal notification that Reclaim/the liquidators is/are terminating, revoking or cancelling the aforementioned contract(s). Please note that Reclaim/the liquidators have asked, as part of the summons proceedings, that the termination, revocation or cancellation take effect immediately upon the order of the Court."

As Mr. Feetham pointed out, there is no doubt that the defendants received these letters because, even if they did not receive these when they were originally dispatched, copies were included in the bundle of documents which was served on the defendants on April 9th, 2018. (They were exhibited to the affidavit of Colin Vaughan dated March 31st, 2017.)

19 The Companies Act 1930 ("the Act") applies to the liquidators' claims because even though the Act has been repealed, it continues to apply to winding up proceedings commenced prior to November 1st, 2014 by virtue of the Insolvency (Transitional Provisions) Regulations 2014. It was submitted on behalf of the liquidators that both s.241(1)(b) and s.241(2)(h) of the Act afford the liquidators the power to terminate a contract that binds a company which is in liquidation. I agree.

20 The first of these provisions states as follows:

> "241(1) The liquidator in a winding up by the court shall have power with the sanction either of the court or of the committee of inspection—
>
> . . .
>
> (b) to carry on the business of the company, so far as may be necessary for the beneficial winding up thereof . . ."

It seems to me that the carrying on of business in a way which is beneficial to the winding up must include the ability to terminate a contract which bound the company.

21 In so far as s.241(2)(h) is concerned, this says:

> "(2) The liquidator in a winding up by the court shall have power—
>
> . . .

(h) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets."

Again, the termination of a contract entered into by the company has to be a matter which, depending on the circumstances, could be necessary to enable the winding up of the company's affairs and the distribution of its assets to its creditors.

22 The termination of the contract in this case must undoubtedly be necessary and in the best interests of the company and its creditors. Funds belonging to Reclaim are being held by a third party under the contract. The third party is, supposedly, charging for its services. Reclaim's funds must be placed in the hands of the liquidators so that the winding up of the company can proceed for the benefit of its creditors. At no point has it been said that there is any term or feature in the 2000 contract that would prevent its unilateral termination. (Of course, the defendants' latest position was that it had been superseded by the 2004 contract.)

23 The termination of the 2000 contract will take effect from the date of the notices of termination, March 30th, 2017. This was the relief sought by the originating application—which has gone unchallenged as a result of the defendants' failure to file a defence or respond to the claim other than by their unsuccessful jurisdiction challenge.

24 As I am ordering that the 2000 contract has been terminated, it is not necessary to consider the liquidators' claim for leave to disclaim the same pursuant to s.308 of the Companies Act.

Funds held by the defendants

25 As noted above in para. 7, in the 2013 winding-up proceedings, Mr. Fernandez said that LAP held €1.5m. and £7.1m. on behalf of Reclaim. No further disclosure has been provided despite the court having ordered disclosure against the defendants on a number of occasions. It is clear that the defendants are refusing to provide any information as to the funds they hold on Reclaim's behalf.

26 In order to determine what funds the defendants hold, Mr. Feetham submitted that this court should apply a principle which dates back to the case of *Armory* v. *Delamirie* (1). There, a chimney sweep had taken a jewel he had found to a jeweller for valuation. When the jeweller refused to return or produce the jewel, the court held that the damages due to the chimney sweep should be presumed to be that of the finest jewel of the particular size.

27 This centuries old principle was applied by the English High Court in *Indian Oil Corp.* v. *Greenstone Shipping SA* (2). The case concerned a claim against a shipowner who had wrongfully mixed oil cargo with oil of his own. The court held that the cargo owner was entitled to receive a

quantity equal to that of his oil which went into the mixture and that any doubt as to the quantity should be resolved in his favour. Staughton, J. said ([1988] 1 Q.B. at 363):

> "If the wrongdoer prevents the innocent party proving how much of his property has been taken, then the wrongdoer is liable to the greatest extent that is possible in the circumstances."

28 Mr. Feetham also referred to the English Court of Appeal case of *Keefe* v. *Isle of Man Steam Packet Co. Ltd.* (3). The claimant had claimed damages against his former employer for deafness said to have been caused by exposure to excessive noise on board the ships on which he had worked. The employer had failed to measure the noise levels which had affected the claimant, and by the time the claim was brought, the ships had been disposed of. The court said ([2010] EWCA Civ 683, at paras. 19–20):

> "19. If it is a defendant's duty to measure noise levels in places where his employees work and he does not do so, it hardly lies in his mouth to assert that the noise levels were not, in fact, excessive. In such circumstances the court should judge a claimant's evidence benevolently and the defendant's evidence critically. If a defendant fails to call witnesses at his disposal who could have evidence relevant to an issue in the case, that defendant runs the risk of relevant adverse findings . . .
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> 20. This has been accepted law since *Armory v Delamirie* (1721) 1 Strange 505 the famous case in which a chimney sweep found a jewel in a chimney and left it with a pawnbroker for valuation. The pawnbroker, in breach of duty, failed to return it and could not be heard, when sued, to assert that the chimney sweep could not prove its value. The court awarded the highest sum realistically possible . . ."

29 Mr. Feetham submitted that in the absence of any evidence from the defendants as to the funds they now hold, the court should presume the amount in the most favourable way to the liquidators as possible. The only figures available are those which Mr. Fernandez himself deposed to in 2013. The court can only presume that this amount is still being held on behalf of Reclaim. In my judgment, the submission made on behalf of the liquidators must be right.

Transmission of funds

30 The liquidators seek an order that the defendants do transmit to them the sums of €1.5m. and £7.1m. They say that the court has the power to make this order pursuant to s.252 of the Act. This section provides as follows:

> "The court may, at any time after making a winding-up order, require any contributory for the time being on the list of contributories, and

> any trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer forthwith, or within such time as the court directs, to the liquidator any money, property, or books and papers in his hands to which the company is prima facie entitled."

The liquidators say that the defendants are simply holding the funds as Reclaim's agents. That being the case, the section applies and the court can make the order.

31 In the first judgment, I made the following observation in relation to the 2000 contract (2019 Gib LR 165, at para. 21):

> "it appeared to me to be common ground that title in the funds remained with Reclaim. This was a contract for services only. It did not create any fiduciary or trustee relationship between the parties."

I agree therefore that the defendants hold Reclaim's funds as its agent and that s.252 confers upon the court the power to require the defendants to transmit the funds. In all the circumstances of the case, it is clearly appropriate that such an order be made.

Service of documents

32 Before concluding, I will deal briefly with a question of service. On December 9th, 2022, I held that the defendants had been properly served with this court's order of September 2nd, 2022 and associated documents. Service had been effected on November 8th, 2022 in Spain by "Burofax" (a form of registered letter scheme administered by the Spanish postal services). This was confirmed in a witness statement dated November 21st, 2022 by Raul Gutierrez Luque, a Spanish lawyer practising from a Hassans' office in Sotogrande, Spain. Mr. Gutierrez confirmed that service by Burofax is a valid form of service in Spain.

33 On November 10th, 2022, Mr. Fernandez, on behalf of both himself and LAP, emailed Messrs. Hassans saying that the documents were all in English and that he could not "interpret" the same. As Mr. Feetham pointed out, Mr. Fernandez, who is LAP's principal, has filed a number of affidavits and witness statements in the English language in the proceedings with Reclaim. Furthermore, Mr. Gutierrez confirms in his witness statement that the fact that the documents have not been translated into the Spanish language "does not, as a matter of Spanish law, have any bearing on whether the documents have been properly served." On this basis, I was satisfied that the documents sent to the defendants on November 8th, 2022 by Burofax had been properly served. (On January 26th, 2023, when acknowledging receipt of a communication from Hassans, which included my order of December 9th, 2022, Mr. Fernandez again indicated that he required the documentation to be sent to him in the Spanish language. For the reasons already set out, in my judgment, the fact

that the documents were in the English language does not in this case invalidate service.)

Conclusion

34 For the reasons set out in this judgment, I conclude that on March 30th, 2017, the liquidators terminated the contract entered into by Reclaim and Mr. Fernandez on January 18th, 2000. I will order that the defendants pay to the liquidators the sums of €1.5m. and £7.1m.

Order accordingly.