

Case No: A3/2009/1470

Neutral Citation Number: [2010] EWCA Civ 198

IN THE HIGH COURT OF JUSTICE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE BIRMINGHAM DISTRICT REGISTRY

HIS HONOUR JUDGE SIMON BROWN QC (Sitting as a High Court Judge)

Insert Lower Court NC Number Here

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2010

Before :

THE RIGHT HONOURABLE THE MASTER OF THE ROLLS

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE

and

THE RIGHT HONOURABLE LADY JUSTICE SMITH

Between :

**THE PERSONAL REPRESENTATIVE OF DEAN
HARDY – MRS MAXINE HARDY**

Respondent

- and -

**WASHINGTON GREEN FINE ART PUBLISHING
COMPANY LTD**

Appellants

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

Mr Philip Marshall QC & Mr Duncan Kynoch (instructed by **C H Hausmann & Co**) for the
Appellants

Mr Nigel Godsmark QC (instructed by **Nelsons Solicitors LLP**) for the **Respondent**

Hearing dates : 1st February 2010

Judgment

Lord Justice Longmore:

1. Rolf Harris is a well-known painter, cartoonist and maker of prints. At an early stage of his career he painted two pictures of Lovers on the Seine. This appeal concerns a painting known as “Lovers on the Seine II” which in or about March/April 2005 was bought for £95,000 by a Mr Dean Hardy from a gallery in the Midlands called the Castle Galleries although the painting was itself seen and purchased at the Halcyon Gallery in London. I shall call it “the picture”.
2. Mr Hardy did not at the time want to take possession of the picture or indeed of various other purchases of drawings and prints by Rolf Harris which he had also bought. He seems to have thought that they would make a good investment for his children. Accordingly Castle Galleries Ltd (“Castle Galleries”) retained the picture together with the other artworks and they were stored at premises known as Unit 6, Tachbrook Park, Warwick. This was the address of the operations office of Castle Galleries and the picture was stored on the mezzanine floor above that office.
3. At about the same time the owner of the Halcyon Gallery was negotiating to buy Castle Galleries Ltd. The formal position appears to be that a Mr Udi Sheleg was the chief executive officer of and a beneficiary of the family trust which was (and is) a majority shareholder in Halcyon Fine Art Galleries Ltd (“Halcyon”). That company had a wholly-owned subsidiary Washington Green Fine Art Publishing Co. Ltd (“Washington Green”), the first defendants and appellants before this court. Halcyon proceeded to buy the shares of Castle Galleries Ltd with the result, as conclusively established at trial, that Washington Green and Castle Galleries Ltd were both wholly-owned subsidiaries of Halcyon.
4. Castle Galleries had originally been owned by the Weatherby-Blythe family and Mr Ian Weatherby-Blythe continued to work for Halcyon and/or Washington after the take-over. He was aware of Mr Hardy’s purchase and in or before October 2005 he noticed that the picture was missing, in the sense that he could not see the picture when he visited Unit 6. He informed Mr Sheleg of the fact but no one, apparently, thought it necessary to inform the owner, Mr Hardy.
5. Mr Hardy died on 2nd May 2006 and, not long afterwards his widow asked about the artwork being stored by Castle Galleries Ltd. She spoke to a Mr Andrew Hardy (no relation) and he put her in touch in June or July 2006 with Mr Darren Weatherby-Blythe (Ian’s brother) who told her that the picture was missing and she should speak to Mr Sheleg. She was able to speak to Mr Sheleg on the telephone. He did not confirm that the picture had been lost and did not appear to accept that he or his companies had any responsibility in the matter. Nevertheless on 1st December 2006 17 pieces of artwork arrived at Mrs Hardy’s address in Nottinghamshire, some of them in wrapping with the name of Washington Green on it. The picture was not included in that consignment.
6. Mrs Hardy then instructed the solicitor’s firm, Nelsons, who wrote to Mr Sheleg on 21st May 2007 at Washington Green’s address in Birmingham alleging that he was in breach of his duty of care in relation to the picture. Correspondence followed which the mercantile judge, HHJ Simon Brown QC, correctly described in para 11 of his judgment as “fobbing off” although it is right to say that CH. Hausmann & Co for Washington Green did on 1st November 2007 say correctly that Halcyon “a

shareholder of Washington Green and Castle Galleries” had purchased Castle Galleries. On 1st August 2008 Nelsons issued a claim form against both Washington Green and Castle Galleries alleging that the picture had been dishonestly misappropriated or lost while it was in their custody.

7. In due course a defence was served on behalf of both defendants which refused (wrongly) to admit that the picture had been paid for and asserted (also wrongly and contrary to their earlier letter of 1st November 2007) that Castle Galleries was a subsidiary of Washington Green. Neither Mrs Hardy nor Nelsons knew that Castle Galleries was not, in fact, a subsidiary of Washington Green but that in truth they were both co-subsidiaries of Halcyon. No doubt they took comfort from the fact that no distinction was being drawn between the defendants in relation to the substance of the case. Indeed the parties defined the issues on 23rd January 2009 for the purposes of a case management conference as being
 - i) Had Mr Dean Hardy paid for the picture?
 - ii) If not, how much had he paid?
8. That all changed on 12th May 2009 (5 weeks before the trial) when Castle Galleries Ltd gave notice that they intended to appoint an administrator and at the pre-trial review the claim against Castle Galleries was stayed by order of the court. On 26th May an administration order was made and that would have caused the action to be stayed in any event pursuant to paragraph 43(6) of Schedule B 1 to the Insolvency Act 1986.
9. The case therefore proceeded against Washington Green alone. Witness statements were served on their behalf, the thrust of which was that Washington Green had never come into possession of the picture. C H Hausmann & Co intimated that an application to amend the defence would be made to withdraw the admission that Castle Galleries was a subsidiary of Washington Green and to assert that Washington Green had never had possession of the picture. That application was made at the beginning of the trial on 18th June 2009 and, not being opposed, was granted by the judge.
10. The judge nevertheless criticised what he saw as “a fraudulent device to attempt to use the corporate veil to try to avoid the consequences of liability as the pleadings originally stood until the last minute”. He also criticised Messrs Hausmann for signing inconsistent pleadings as true, saying that their instructions could only have come from Mr Sheleg in both instances and criticised Mr Sheleg for not being prepared to come to court and give evidence. He also said this:-

“I am satisfied from the evidence that I have heard that this is an arrangement where the Halcyon Group have been treated as a single economic unit under the directing mind of Mr Sheleg for his personal reasons. He has deliberately and consciously not given evidence despite there being allegations of dishonesty against the defendant company.

In making these findings I am also going to draw an adverse inference against Washington Green and Mr Sheleg, in

accordance with the dicta of Lord Diplock in British Rail v Herrington. The managing director of Washington Green personally involved in the circumstances of the loss of this painting ... must be expected to give evidence in this matter particularly because of his involvement with the claimant on the telephone, with the Weatherby-Blythes, and with the corporate structure and custody of this painting. He has not done so. He has effectively sent other people, lesser people in the company, along to give evidence and has allowed his instructing solicitors to sign statements of truth on two mutually exclusive conflicting untruthful defences. It is quite apparent that none of those witnesses have given the instructions on the pleadings in this particular case nor on the letters which the solicitors have been issuing on behalf of Washington Green. There is this missing *eminence grise*, and I am going to draw the adverse inference that Mr Sheleg, who had been asked several times by Mrs Hardy, "Where's my painting?", knows full well where the painting is or where it has gone to and that he is personally and dishonestly responsible for its loss."

11. One might comment that the judge seems to be reaching further than Lord Diplock in British Rail v Herrington [1972] A.C. 877, 930-1 who was prepared to find negligence in the absence of evidence from relevant witnesses. The judge found the absent witness, who had not been personally sued, to be a thief.
12. With all due respect, this is no way to go about finding personal dishonesty. True it is that Mrs Hardy had alleged (inter alia) that Washington Green had dishonestly misappropriated the picture. That alleged corporate dishonesty had not singled out Mr Sheleg as the thief. If Mrs Hardy had intended to make that allegation, her solicitors should have made clear to the defendants that they intended to make that allegation so that Mr Sheleg had notice of it and could defend himself. At the time when the allegation of corporate dishonesty was made it was, of course, an unnecessary allegation in any event because Castle Galleries which had undoubtedly had custody of the picture seemed to be a solvent company and no distinction was being drawn between Castle Galleries and Washington Green. That all changed when Castle Galleries went into administration. Washington Green had intimated that they would amend to deny that they had ever had custody of the picture. Many a judge might have been sympathetic to a request by Mrs Hardy to make a consequential amendment, if she and her solicitors thought it right to do so, alleging that, if it were to be found that Washington Green did not have custody of the picture, a particular individual had appropriated it. But no such allegation was ever made and the judge should not have proceeded as if it had been.
13. The judge's suspicions were aroused not merely by what he called "the fraudulent device to use the corporate veil" but also by the curious fact that no claim has ever been made on Castle Galleries' insurance for the loss of the picture. It is not impossible that that might point to dishonest misappropriation on the part of a person behind Castle Galleries or even a person behind Halcyon who took over Castle Galleries' assets or even a person behind Washington Green which was a subsidiary

of Halcyon. But the curious fact is not made any less curious by the consideration that it would have been open to Mrs Hardy to ask Castle Galleries to claim on their insurance (which covered the picture in 2006 since there is a brokers' cover note so saying) at any time after Mr Darren Weatherby-Blythe had told her it was missing which was well before Nelsons first wrote to Mr Sheleg in May 2007 and even longer before Castle Galleries went into administration in May 2009. But there is no evidence that any such claim has ever been made. There may, of course, still be a claim pursuant to the Third Parties (Rights Against Insurers) Act 1930 or any replacement of that Act.

14. The supposedly "fraudulent device to use the corporate veil" is even less convincing support for an allegation of dishonest misappropriation by Mr Sheleg since the correction of the description of Castle Galleries as "a subsidiary of Washington Green" to become a description of both companies being subsidiaries of Halcyon was no more than a correction to accord with the true facts. If the judge had really thought that this amendment was a "fraudulent device", he should, before giving judgment in the afternoon, have discharged the permission to amend which he had granted that morning.
15. For these reasons Mr Nigel Godsmark QC, who appeared for Mrs Hardy, did not feel able to support with any enthusiasm the judge's conclusion about dishonest misappropriation by Mr Sheleg. The judge also found that Washington Green had had possession of the picture but the judgment is so tainted by the conclusion that Mr Sheleg was a thief that the judge's conclusion on possession cannot be allowed to stand and the judgment in Mrs Hardy's favour will, unfortunately, have to be set aside. The debate between counsel is what is to happen now. Mr Godsmark maintained that, on the evidence, it was clear that Washington Green had had possession and could not explain how it had disappeared. If it was not clear, there should be a re-trial. Mr Philip Marshall QC for Washington Green submitted it was clear on the evidence that Washington Green never did have possession of the picture and that no re-trial was necessary. Both counsel did agree, however that the question of possession by Washington Green was ventilated at the trial.
16. In these circumstances it seemed to me, at the conclusion of the hearing, that the court should do its best to try to reach a conclusion in the matter, if it legitimately can, rather than put the parties to the expense of another trial which would inevitably have to be before a different judge.
17. It will, therefore, be necessary to set out some further facts.

Facts relevant to possession by Washington Green

18. I have already said that the picture was initially stored together with other Castle Galleries' artwork on the mezzanine floor at Unit 6, Tachbrook, Warwick where Castle Galleries had its own office. That continued after the acquisition of Castle Galleries by Halcyon. In September 2005 Castle Galleries relocated its operations office to Spitfire Park in Birmingham but the picture appears to have remained at Unit 6. Mr Tim Goodwin the Operations Director of Washington Green gave evidence that in the same month it was decided that the operations departments of Castle Galleries and Washington Green should be combined but that the stock of each company and the accounts of their financial transactions should be kept separate.

19. As far as stock at Spitfire Park was concerned, Castle Galleries stock was kept at the Spitfire Road end of the building and Washington Green stock was kept at the Ashold Farm Road end of the building.
20. As far as stock at Unit 6, Tachbrook (where the picture was last seen) was concerned, Castle Galleries' stock was on the mezzanine floor. The combination of operations meant that, as from September 2005, stock from both Washington Green and Halcyon started to come to Unit 6 but Washington Green stock was stored on top of the mezzanine floor and Halcyon stock was stored underneath the mezzanine floor in an area isolated by a partition wall and entered by a locked doorway. This continued until February 2007 when Unit 6 was closed down and the Castle Galleries' stock was moved to Erdington. Mr Goodwin did not say that Castle Galleries stock continued to be kept separate from Washington Green or Halcyon stock at Erdington but since Mr Darren Weatherby-Blythe had already told Mrs Hardy in mid – 2006 that the picture was missing that is not, perhaps, of much consequence.
21. Mr Andrew White had been employed by Castle Galleries in various roles between September 2002 and July 2007 when he came to be employed as Washington Green's Director of Publishing. He gave evidence that he saw the picture on the mezzanine floor at Unit 6 at Tachbrook Park. He also said that there came a time when the picture was moved from the mezzanine into a room next to his own office at Unit 6 that being a part of Unit 6 which was used by Castle Galleries. After he moved to Spitfire Park in September 2005 but before Christmas of that year, Mr Ian Weatherby-Blythe asked him if he knew where the picture was. He said that, to the best of his knowledge, the picture was still in the room next to his office but that, when he went to look for it, he could not find it.
22. Mr Corbett who was originally employed by Castle Galleries and Mr Sumner who had worked for Washington Green for eight years confirmed Mr Goodwin's evidence in relation to Spitfire Park but since there was no evidence that the picture was taken to Spitfire Park from Unit 6 that evidence is of no direct relevance.
23. As against this impressive body of evidence which was never directly challenged, evidence was given by Mr Andrew Hardy, who had sold the picture to Mr Dean Hardy, that, although Mr Hardy's purchases were kept together in the mezzanine area in Unit 6, Washington Green stock and Castle Galleries' stock was, as the judge put it "effectively" mixed in the warehouse. What Mr Andrew Hardy actually said in his oral evidence, in his response to the expected evidence of Mr Weatherby-Blythe that the picture was never in the possession of Washington Green or stored with any of their stock, was:-

"I think it would be very difficult to distinguish between Halcyon stock and Washington Green stock. That is my opinion, not fact, my opinion"

There is also the fact that at least some if not all of the artwork delivered to Mrs Hardy in December 2006 was wrapped with Washington Green wrapping.

24. Mr Godsmark submitted that the following 5 factors (if not singly at least in combination) pointed to Washington Green having assumed possession and thus having become a bailee of the picture

- i) Mr Andrew Hardy's evidence of "effective mixing";
 - ii) the delivery of artwork in Washington Green wrapping;
 - iii) the original assertion in the initial defence that Castle Galleries was a subsidiary of Washington Green together with the original mere non-admission, on behalf of both companies, that they had possession of the picture;
 - iv) the change of stance in the pleading at the very last moment;
 - v) the fact that Mr Sheleg chose not to give evidence.
25. In my view most of these factors are no more than neutral and cannot, even in combination, discharge the burden of proving (which Mr Godsmark accepted was on Mrs Hardy) that the picture was ever in the possession of Washington Green so as to make it a bailee.
26. The wrapping point goes nowhere unless it can be said that the artwork which was delivered to Mrs Hardy in December 2006 had been wrapped at a point when it was in the defendants' custody before they got round to returning it. This is most unlikely since artwork does not usually need to be wrapped while it is stored but only when it is being transported. If the artwork was only wrapped at that stage it would only denote that such wrapping was available not that the owner of the wrapping had originally had possession of the artwork. Statements in a pleading, when no distinction was thought to be relevant by the two defendants, are an uncertain guide to the true position when the distinction becomes critical. In any event no admission was ever made that either defendant did have the possession of the picture. That was for the claimant to prove.
27. Mr Sheleg had never been personally accused (or even mentioned) in the pleadings. He was entitled to assume that the companies' employees who operated at Unit 6 and later at Spitfire were the persons to give relevant evidence on the question whether Washington Green had ever come into possession of the painting.
28. The only really persuasive evidence was the stated opinion of Mr Andrew Hardy but, on a true analysis of the case, it was not compelling when set against the combined evidence of Mr Ian Weatherby-Blythe, Mr Goodwin and Mr White who were never in terms accused of being wrong about their evidence. The judge believed Mr Andrew Hardy and disbelieved the other witnesses but that was in the context of his first saying (para 8) that Washington Green had dishonestly misappropriated the picture. If that is a proper conclusion, one might well conclude that the defendant's witnesses were unreliable at best or, at worst, all privy to their employer's dishonesty. But once that conclusion is set aside, as it has to be, there is really no foundation for disregarding the heavy overall preponderance of the evidence that Castle Galleries' stock and Washington Green's stock was kept separate. Indeed when one considers that they had different clients and different accounts, it is more likely than not that separation would be required. At the very least the claimant cannot be said to have discharged the burden of proving that the picture did come into Washington Green's possession.

29. For my part, therefore, I see no necessity for a re-trial in this case since the parties fully deployed their evidence on the critical issue before the judge. I would hold that it has not been shown that Washington Green ever became a bailee of the picture and would enter judgment for the defendant and against the claimant.
30. That means that, sadly for Mrs Hardy, this appeal must be allowed. Nevertheless, we have been given no reason why an application cannot be made, on notice to Castle Galleries' administrators, for the stay of proceedings to be lifted so that judgment can be given for Mrs Hardy against Castle Galleries to enable proceedings against the insurers to take place.

Postscript

31. After I had prepared the substance of this judgment Mrs Hardy's solicitors thought it was possible that the picture might have been found and they asked the court to defer handing the judgment down. This has turned out to be a false hope and the parties have agreed that there is no reason to delay handing down. In a note to the court of 14th February 2010 Mr Godsmark said that, depending on the content of the judgment, he might wish to make further representations on the question whether there should be a re-trial. We do not encourage any such submissions, since this question was canvassed in the oral argument in the circumstances set out in paras 15 and 16 above. Any such representations should therefore only relate to matters outside the knowledge of the parties during the oral argument.

Lady Justice Smith:

32. I agree.

Master of the Rolls:

33. I also agree.

MINUTE OF ORDER

A3/2009/1470

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BIRMINGHAM DISTRICT REGISTRY
HIS HONOUR JUDGE SIMON BROWN QC (Sitting as a High Court Judge)**

**BEFORE THE RIGHT HONOURABLE THE MASTER OF THE ROLLS
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LADY JUSTICE SMITH**

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BETWEEN

WASHINGTON GREEN FINE ART PUBLISHING COMPANY LIMITED

-and-

**THE PERSONAL REPRESENTATIVE OF DEAN HARDY
(MRS MAXINE HARDY)**

MINUTE OF ORDER

Upon hearing Leading Counsel and Junior Counsel for the Appellant and Leading Counsel for the Respondent

IT IS ORDERED THAT:-

1. The Appellant's appeal against the Order of His Honour Judge Simon Brown QC dated 18th June 2009 is allowed.
2. Paragraphs 2 and 3 of the Order of His Honour Judge Simon Brown QC dated 18th June 2009 be set aside.
3. Respondent's application for re-trial is refused.
4. The Respondent's claim below in claim number 8BM40091 is dismissed.
5. The Respondent do pay the Appellant's costs of and occasioned:-

5.1 by this appeal,

5.2 below in claim number 8BM40091;

excluding costs of amending the Appellant's Notice of Appeal

such costs to be the subject of a detailed assessment if not agreed.

6. The Respondent do make an interim payment of £50,000 to the Appellant by 4 p.m. on 30th March 2010 on account of the Respondent's costs liability referred to in paragraph 4.

7. The monies paid into court by the Appellant (£134,500 on 1st July 2009) plus any accrued interest thereon be paid out forthwith to the Appellant's solicitors.

Dated this 9th day of March 2010.

MINI JUDGMENT

BETWEEN

WASHINGTON GREEN FINE ART PUBLISHING COMPANY LIMITED

-and-

**THE PERSONAL REPRESENTATIVE OF DEAN HARDY
(MRS MAXINE HARDY)**

MINI JUDGMENT

Respondent has, despite the contents of the judgment of the court, asked for a re-trial on the basis that the existence of the other Rolf Harris painting called "Lovers on the Seine (The Kiss)" should have been disclosed and, if it had been, the trial may well have taken a different course. The expert valuer would have needed to know about the existence of a similar painting for the purposes of his valuation and, it is suggested, the Halcyon Galleries might have been joined in the action. We are not persuaded by these submissions. Quantum is irrelevant once the Appellants have shown that they did not have custody of the picture. It is not clear what course of action could exist against Halcyon but, if it does exist, it can presumably still be pursued.