Neutral Citation Number: [2021] EWHC 2311 (Ch)

Case No: HC-2017-002742

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 29th June 2021

Before:
MR. JUSTICE MARCUS SMITH

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Between:

ABSOLUTE LIVING DEVELOPMENTS LIMITED (IN LIQUIDATION)
(Acting by its Liquidator, Louise Mary Brittain) — **Claimant**

- and -

(1) DS7 LIMITED
(2) ANDREW JOHN CAMILLERI
(3) CHARLES ALEXANDER CLUNIE CUNNINGHAM
(4) GOZON LIMITED
(5) EPG MANLET LIMITED
(6) UM1 LIMITED (IN CREDITORS' VOLUNTARY LIQUIDATION)
(7) ETRUSCAN (MANCHESTER) LIMITED
(8) PHILIP WRIGHT (T/A PIXEL BOMB)
(9) TIMOTHY ACKREL
(10) ALAN PIERCE
(11) 2380 REVERSIONS LIMITED
(12) SC UNIVERSAL LIMITED
(13) STEPHANIE CAMILLERI (AKA STEPHANIE SPENCER) — **Defendants**

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MR. SIMON PASSFIELD (instructed by **Mischon de Reya LLP**) for the **Claimant**
MR. CHARLES CUNNINGHAM (the **Third Defendant**) appeared in person

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Approved Judgment

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MR. JUSTICE MARCUS SMITH:

1. I have before me an application brought by Mr. Charles Cunningham against a company in liquidation – Absolute Living Developments Limited – and its liquidator, Ms. Louise Mary Brittain. Mr. Cunningham is a litigant in person, and he has moved his application with moderation and care. He has provided voluminous evidence in support. However, the claim that he seeks to make has not been articulated in pleadings, and (for that reason) is at times hard to make out. For instance, it is not, at all times, clear whether the claims he makes are against the company (**Absolute Living**) or the liquidator (**Ms Brittain**) or both.

2. Given that Mr. Cunningham is a litigant in person, I have no intention of allowing a sound application to fail for curable technical reasons. I am not, therefore, going to seek to disentangle the person(s) against whom Mr. Cunningham's claims for relief ought properly to be directed. I am going to refer to claims against the **Company**, but I want to be clear that term is agnostic as between claims or assertions against Absolute Living and/or Ms Brittain as Absolute Living's liquidator.

3. Mr. Cunningham's application is an application for interim injunctive relief against the Company. Essentially, Mr Cunningham seeks to restrain the sale of certain properties by the Company, because that sale is, so Mr. Cunningham alleges, at an undervalue.

4. The Company is selling – or, rather, is aiming to sell – part of a development which is most clearly set out in a plan, which I am referring to now, helpfully provided by Mr Cunningham to me during the course of the hearing. It is important to appreciate that the property or development in question comprises three elements, and I am defining those elements by reference to their ownership rather than anything else. There is edged in yellow the property that is owned, subject to various leasehold and other interests, by the Company. Then there are two other adjoining plots of land edged red and turquoise, owned by other persons, the local authority in one case and a company, called Kingsley Blenkhorn, in the case of the other.

5. The reason these other properties are important is because the essence of Mr. Cunningham's case is that <u>if</u> they are sold as one large unit, a single development, then there is a premium in terms of the price that can be achieved, whereas if the sale is simply that of the property owned by the Company, the premium is lost, and a sale price of far less than the overall price is achieved.

6. The difference between these prices – the price of the sale of the property owned by the Company as a single development versus the price for the same property achieved on the sale of the Company's property as part of a wider development – is a premium that I am prepared to accept is potentially very significant.

7. The reason I have indicated that this application had been more difficult than usual is because Mr. Cunningham has brought the application as a litigant in person. He has done so, if I may say so, with extreme articulateness and great care and diligence, but the fact remains that the application is long on evidence, but short on pleadings and a clear articulation of the case that he, Mr Cunningham, would want to bring against the Company. The reason this is a problem is because when one is seeking to establish whether there is or whether there is not an arguable case against a respondent, a judge

inevitably has close regard in the first instance to the way in which the case is pleaded. That way one can understand whether, and the extent to which, the facts outlined in the evidence support or do not support the pleaded case.

8. There is no pleading in this instance, and this has required me effectively to require Mr. Passfield of counsel, who appears for Absolute Living and Ms Brittain, to articulate why Mr. Cunningham's case is bad (even at an interlocutory stage) and for me then to invite Mr. Cunningham to address those points to explain why, according to Mr. Passfield's list as framed, his case is a good one. That way we have achieved some semblance of focus in terms of the case that Mr. Cunningham wants to make and the basis for his application for interim relief in a manner which enables all the points relevantly to be flushed out. I want to make clear now that I am only going to be addressing the points on that list as the ones which are to my mind determinative of the application.

9. The other difficulty in the way in which the application is put by Mr. Cunningham is that, in his helpful skeleton argument, although clearly aware of the interlocutory nature of the relief that he seeks, Mr. Cunningham has not framed matters by reference to the test for an interlocutory injunction. Rather, the relief he seeks, although undoubtedly interlocutory in nature, is one that effectively seeks to compel the Company to sell the property in the way he, Mr. Cunningham, wishes. In other words, the interlocutory relief sought by Mr. Cunningham seeks to compel the Company to sell its property as part of the wider development, so as to realise the premium that Mr. Cunningham says exists.

10. That, of course, is not how interim injunctions work. What they do is they hold the ring pending trial. They do not force the respondent to the injunction application to do that which he, she or it does not want to do. The whole point is simply to hold the ring pending trial.

11. Mr. Cunningham has accepted that this is an application for interim injunctive relief and we have gone quite carefully through the various *American Cyanamid* stages. That is to say, I have explored with Mr. Cunningham – and, of course, Mr. Passfield – stage 1 (whether there is a good arguable case to be tried); stage 2 (whether viewing the matter from Mr. Cunningham's position an injunction is necessary or whether damages would be an adequate remedy at the end of the day); stage 3 (the converse question, namely, whether if an injunction were to be granted and the usual undertaking in damages extracted from Mr. Cunningham, whether that undertaking in damages would adequately compensate the Company if at trial the Company were to succeed and Mr. Cunningham were to fail). We have spent less time on the last stage of *American Cyanamid*, the balancing exercise between stages 2 and 3, and I really articulate that simply for the sake of completeness.

12. I am going to go through the various *American Cyanamid* stages in a moment. Before I do that, I need to seek to articulate roughly how Mr. Cunningham puts his case against the Company. Essentially, this is a claim which is based upon the sale at an undervalue of an asset of Absolute Living by the liquidator in place (Ms Brittain), either negligently or dishonestly. Mr. Cunningham did not pull his punches, and I encouraged him not to. It seems to me that where allegations are made, particularly allegations of dishonesty, it is vital that they be clearly made. In reality, given Mr.

Cunningham's submissions, this is a case primarily of dishonesty and only secondarily of negligence.

13. Exactly how the claim would be framed is more difficult. The reason for this is that it is in the first instance difficult to see why a claim would lie directly against the liquidator rather than against the company for whom the liquidator acts as agent. The settlement agreement (the **Settlement**), pursuant to which these properties are being realised, contains at clause 15 the usual exclusion of personal liability on the part of the liquidator, and it seems to me that that is an exclusion that would properly apply in relation to a case founded in negligence. It might not, depending on how it was framed, operate as a bar to a claim in dishonesty. The manner in which the claim that Mr. Cunningham wishes to bring is framed does matter, therefore, and I have been significantly disadvantaged, as I say, in not having it properly framed. It seems to me, however, that I should proceed on the basis of looking to the substance of Mr. Cunningham's application rather than looking at the technical details. It seems to me that if I can justly decide the application on the basis of what is the essence of Mr. Cunningham's complaints then I should eschew the contemplation and determination of what might quite possibly be sound technical arguments that Mr. Passfield advances on behalf of the Company. I want Mr. Cunningham to feel that he has had the essence of his points addressed rather than merely the technical patina that overlays them and might thwart them. It is for that reason that I have not heard Mr. Passfield on the question of Mr. Cunningham's standing.

14. Mr. Passfield has made a number of very powerful points to suggest that Mr. Cunningham actually has no standing to bring these claims whatsoever. That submission, which Mr. Passfield would have elaborated at length had I let him, really went to all stages of the *American Cyanamid* test. Mr. Passfield, for instance, wanted to say that Mr. Cunningham had no claim and therefore there was no good arguable case on his part whatsoever. Equally, the question of the adequacy of damages did not arise, *pace* Mr. Passfield, because (Mr. Cunningham having no claim), he could receive no damages. The point was made with some force that what Mr. Cunningham was seeking to achieve was to obtain an injunction in circumstances where he had neither right to that remedy nor a right to any other, lesser, remedy, like damages.

15. As I say, I am not going to decide that point because it seems to me that it is replete with technical questions and it does not, as I say, address the key question, which is whether there is a good arguable case, whether in negligence or in fraud or dishonesty, of a sale of the property at an undervalue. I put it that way because it is quite possible for one of the beneficiaries under the Settlement to assert a claim. They have not done so, which is a point I am going to return to. But they <u>could</u>. For example, one of the parties to the agreement, DS7 Limited (**DS7**) is a beneficiary of a distribution under the waterfall arrangement put in place by the Settlement, in that DS7 will receive 42% of any moneys recovered above £4.5 million. The first £4.5 million will go to Absolute Living, but prior to that there are of course the fees of the liquidator and the liquidator's disbursements, to legal firms amongst others, which amount to roughly £4.5 million in total. £4.5 million is in substance the entirety of what the liquidator, Ms. Brittain, hopes to achieve by way of sale of the property that the Company is selling. That indeed is one of the points that Mr. Cunningham makes: that the sale as envisaged by the Company achieves nothing for the creditors and achieves everything for the liquidator and the liquidator's lawyers. That again is a

point that I am going to return to. The reason I raise it now is that to determine this application purely on the question of standing does not, as I see it, actually resolve the real issues that arise.

16. The last preliminary point, before I address the *American Cyanamid* test, is again related to the manner in which the claim might be framed by Mr. Cunningham. A great deal was made of certain undertakings that the liquidator provided in clause 8.3 of the Settlement pursuant to which the properties are being sold. Clause 8.3 sets out certain undertakings made by the liquidator to sell the property in a certain way. Essentially, what Mr. Cunningham says is that there is an undertaking to sell the property that is owned by the Company in conjunction with or as a package with the other properties ringed in red and turquoise that I have already described. What he says is that whilst there is a discretion in <u>how</u> these undertakings can be discharged, the obligation to sell the property owned by the company in a certain way (namely as part of a wider development) is a more or less absolute one. At times it seemed to me that that was how Mr. Cunningham was putting his case. I want to be absolutely clear, I do not think that is an arguable way of putting the case. It seems to me that the undertaking simply obliges the liquidator to seek to sell part of the property that it holds, the Printhouse, as part of the package. There may be a dubious point or a difficult point about what "package" means. Mr. Passfield suggested that it might only mean the Printhouse being sold as a package with the other yellow edged property and owned by the Company. Now, that may or may not be right. For present purposes I am going to treat it as wrong. I am going to treat the notion of "package" as meaning selling the Company's property (edged yellow) as a package with the whole of the red and the turquoise properties, which are of course not owned by the Company.

17. The reason why I think a claim based solely on clause 8.3 must fail is because the undertaking is <u>not</u> to sell the property as part of a package as an absolute obligation, but to <u>seek</u> to sell the property as part of a package. In other words, the undertaking is not absolute. It seems to me that if, for good reason, the liquidator reaches the conclusion that she cannot sell the Printhouse and the other yellow-edged property as part of the package, then that is something which she is entitled to take a view on and not pursue a sale on that basis. Of course, if the liquidator is eschewing a real opportunity to sell at a higher price as a package so as to trigger the *Cuckmere* properties jurisdiction for negligence, or (even more clearly) if there was dishonesty or fraud in the process, however it might be put, those claims would inevitably mean that the undertaking was also being breached. But it seems to me that the primary claim against the Company is not for breach of an undertaking under clause 8.3, it is, as I have explained, for sale of the Company's property at an undervalue, either negligently or dishonestly.

18. I do not believe it is necessary for me to seek to frame exactly how the claim might be made other than that. Clearly, it is not a straightforward claim to frame; but I am going to assume in Mr. Cunningham's favour that such a claim could be made, and I am going to focus on whether it can be put at such a level so as to satisfy the good arguable case test that constitutes stage 1 of the *American Cyanamid* jurisdiction. It is to that stage that I now turn.

19. It seems to me that there are a number of reasons why Mr. Cunningham's claim as applicant is an ambitious one. I am going to go through them as a list before stating

my conclusion as to whether I consider there to be an arguable claim or not. There are a number of points on which I heard Mr. Passfield first, so as to articulate them and frame them, and Mr. Cunningham in response, so as to indicate why in his submission Mr. Passfield's points were misconceived or wrong.

20. The first point is that the claim that Mr. Cunningham seeks to advance is one that requires me to assume that the liquidator, Ms. Brittain, is acting either negligently or, worse than that, dishonestly. Where we ended up was that Mr. Cunningham's primary case was that the liquidator was acting dishonestly. His alternative case was that she was acting negligently. The point I put to Mr. Cunningham was that where one has a professional person appointed to a position where they are obliged to account for themselves to the court, a court proceeds on the basis that it ought to be presumed, unless it is shown to the contrary, that the liquidator is acting professionally, honestly and competently. That is a starting point which weighs heavily or lightly, depending upon the overall facts of the case. In this case, Mr. Cunningham suggested that the liquidator's track record was such that she was not entitled to any kind of presumption in her favour of either competence or honesty. That is an ambitious submission, and one that I would in most cases have great difficulty in accepting. I am prepared for the sake of argument to proceed on the basis that I should treat the first point that I am presently articulating as a neutral factor. I do so because I consider that I am able to decide this matter by reference to the other factors clearly and unequivocally, and that I can therefore make this assumption in Mr. Cunningham's favour. I make it clear, however, that I do so simply to enable me to frame the points in dispute and I am in no way suggesting that the very serious allegations that Mr. Cunningham is making against the liquidator in any way hold water. I think it is important that I put on the record that I am only considering questions of arguability. I am not making in any findings of fact at all.

21. I move on to the second point, which arises out of the Court of Appeal's decision in *Cuckmere Brick Co Ltd v. Mutual Finance Ltd*, [1971] EWCA Civ 9. Mr. Cunningham placed a lot of reliance on this case, not merely as a legal proposition to support his claim that damages should follow where there was a negligent sale at undervalue, although he did rely on *Cuckmere Brick* for that reason. That is uncontroversial: but Mr. Cunningham also suggested that there was so great a similarity between the facts of *Cuckmere Brick* and the facts of this case that this was a point very much in his favour on this application. I reject that submission. It seems it me that although of course there is a similarity between the facts as found by the Court of Appeal in *Cuckmere Brick* and the facts as alleged by Mr. Cunningham before me today, that is a similarity which does not help me in any way at all, because the existence of the similarity does not assist me in terms of understanding the arguability or otherwise of the points that Mr. Cunningham is advancing. Yes, there is a similarity, but that has no probative value one way or the other as regards the facts of this case. What matters is the evidential material before me, which both parties have taken me through with some care.

22. Moving on to the next factor, which is I think the third factor that I have identified, there is the fact that a sales process has been gone through by the Company. The sales process that has been gone through is described in broad brush terms in Mr. Passfield's written submissions, on which I draw. Essentially, there was, in early February 2021, a request for offers by the agent instructed by the liquidator, SIA,

seeking offers by 1 March 2021. That resulted in five offers being received. The range of offers was from a low of £300,000 to a high of £3.1 million. That then resulted in the three highest bidders being invited to reconfirm, by which was meant "Come back with a higher bid, if you wish", such re-confirmed offers to be received by close of business on 4 March 2021. That resulted in the order of offers changing in terms of their level, and the highest offer coming in at £3.211 million for the yellow edged property. Clearly, these values are significantly less than the value that the applicant suggested the overall grouping of properties would achieve if sold as a whole. In short, the premium that Mr. Cunningham says exists is certainly not evident in the prices that third parties were offering for the yellow-edged property which, according to Mr. Cunningham, lies in the region of many millions of pounds.

23. If Mr. Cunningham is right, and the premium exists, one has to ask oneself "Why did the losing bidder in round 2, indeed the losing bidder in round 1, not push their offers up?" If there is such a premium to be achieved, why not pay a little bit more in order to get its benefit? It seems to me that the offers received in relation to the property that the liquidator has chosen to sell very much indicate that the true price for the yellow-edged property is much closer to what the liquidator says is achievable, and rather suggests that Mr. Cunningham is wrong in articulating the sale at an undervalue in the manner in which he has.

24. Mr. Cunningham's answer to this point was that there was a degree of collusion between at least the top two bidders, with the result that the highest bid in the first round was exceeded by the second highest bid in the second round by a small margin, because the second highest bidder knew that the first highest bidder in round 1 would not put up its bid. Factually speaking, the conduct of the highest bidder in round 1 is accurately described. The bid was not increased in round 2. But it does not follow from that fact that there was collusion between these two bidders or some kind of knowledge that would preclude a proper auction process. It is far more likely that the bids refect the true market value. Of course, Mr. Cunningham may be right – there may have been a distorted auction process – but there was no evidence of this. I am not, of course, making findings of fact. However, it does seem to me that the bidding process undertaken is a pointer away from the suggestion that there has been a sale at an undervalue. I say no more than that.

25. The next factor, the fourth factor in my list, is the fact that it is only the applicant, Mr. Cunningham, who is bringing this claim. Mr. Passfield made great play, and I understand why he did so, of the fact that this application is not being moved by either the creditors of Absolute Living or by the liquidator of DS7, who has a claim, as I have indicated, to 42% of any sums over and above the sum of £4.5 million received by Absolute Living. The fact is that if Mr. Cunningham is right, and the proceeds of the sale of the yellow-edged property are entirely to be subsumed by the liquidator's fees and disbursements, when (if differently sold) there would be a surplus for the other creditors, the creditors of Absolute Living and DS7, acting through its liquidator, would have a very peculiar interest in seeking a higher sale price and in realising the premium that Mr. Cunningham says exists.

26. It seems to me that there is a great deal of force in this point. The fact is that Absolute Living and the DS7 have a direct interest in ensuring a proper sale price in their own interests. They will want to have as much recovery as they can. The liquidator of DS7 is positively obliged to seek the maximum realisation. If there was so big a gap

between the price that Mr. Cunningham says could be realised and the price actually being realised, then it seems to me that the creditors of Absolute Living and DS7's liquidator would have swung into action, and that I can properly draw an inference that the reason they have not swung into action and made a claim like the one made by Mr. Cunningham is that there is, in fact, no premium over the sale price that the Company hopes to achieve. Again, this is a point which is not of itself determinative, but which needs to be weighed in the overall balance. I note also that Mr. Cunningham had an answer to the point. His answer was that the creditors of Absolute Living were actually unhappy with the way in which the liquidation was run, but not sufficiently unhappy or perhaps not sufficiently well-financed in order to bring the claim that he was himself bringing.

27. The same point was made in relation to Mr. Robert Armstrong, the liquidator of DS7. Essentially, it was said that Mr. Armstrong was unable to bring a claim because he lacked the financial resource to do so. I place very little weight on this, because it seems to me that (with litigation funding working in the way it does these days), if there is a good claim on the merits exists, then funding to bring the claim is something that really can be achieved even by a liquidator of an insolvent estate that has no money to bring a claim itself. More to the point, it does seem to me that Mr. Armstrong's silence on this question is telling, even if he was not persuaded that he could bring a claim. The fact that he has rested silent when his creditors are, according to Mr. Cunningham, losing out to the tune of millions of pounds, would (if Mr. Cunningham is right) render his silence in these circumstances a very clear breach of duty on his part *quoad* his own creditors. That is something which I should be slow to assume. It may be right, but it seems to me that the notion that this is a case where two liquidators (Ms. Brittain and Mr. Armstrong) are both acting in breach of their duty to their respective estates and creditors is sufficiently unlikely (absent supporting evidence) to amount to another factor which is telling against the contentions advanced by Mr. Cunningham.

28. The next point, the fifth point, was that this was a case based upon pure speculation. Mr. Passfield said that there was simply no evidence to support the notion that there was any kind of premium of the sort alleged by Mr. Cunningham. I do not accept that submission in its entirety. It seems to me that it is wrong to say that there is no evidence. There is <u>some</u> evidence, but it is slight. The fact is that I have been shown the after-the-event evidence of Mr. Frohnsdorff, who suggests that the property has a value of around £18 million. Certainly, he is saying that the property has a value of rather more than would be achieved if the sale contemplated by the liquidator goes ahead. Of course, I must take account of this evidence, but its weight, as it seems to me, is slight. The statement is not in the shape of an expert report. It is not in the shape of even a detailed factual opinion. It seems to me that if one is talking about the sale of a property at significant undervalue, what one is entitled to see as a judge is a clear articulation as to why the sale is at an undervalue, for whatever reason that might be. The fact is that the packaging of complex developments like this is, by reason of their complexity, a difficult and skilful matter to undertake. Property development can go wrong as many times as it goes right, and for that reason the valuation of a bare site that is to be developed is a tricky and difficult business. It seems to me that I can place very little weight on what is little more than assertion in Mr. Frohnsdorff's witness statement. So, I place little weight on that.

29. I was also referred by Mr. Cunningham to the earlier in time valuations of Messrs Savills and Knight Frank, which again suggested, if one read their valuations, a value in excess of what the liquidator is hoping to achieve by the sale she is contemplating. I place a little more weight on these, because they are, it would appear, very roughly in relation to the same site but not exactly the same properties, and they are presuming the kind of packaged development that Mr. Cunningham contends would achieve the premium that he says is presently being lost. So, I place some weight on these materials, but I have to bear in mind that these are documents done three or so years ago which are not specifically directed to the exact issue before me, nor indeed the exact sale before me, although I accept they relate to a similarly conceived development. So, this is a factor that is in Mr Cunningham's favour, but not one of enormous weight. It is something which goes into the balance.

30. I move on to the sixth point that was articulated by Mr. Passfield, and responded to by Mr. Cunningham, which is the question of why the one package sale (i.e. the development) did not proceed. The fact is it that this is not a case where the liquidator has absolutely refused to contemplate the **one-package sale** as I will call the development Mr. Cunningham advocates. It seems to be common ground between all that Mr. Cunningham's contention that if one could achieve unfragmented ownership of all of the properties here in play and sell them for development purposes or develop them and sell them to individual purchasers, one would make a lot of money. The problem is that the ownership of the development as a whole is fragmented and is not unitary. There are, in particular, a large number of leasehold interests which need to be surrendered and which would otherwise act as some kind of clog or blot on the ability to sell with a unitary title. Now, interestingly, the liquidator has taken a series of steps to procure the surrender of a number of leasehold interests, and that rather tells in favour of a premium being achievable if one can achieve an unfragmented title. The problem is that not all of the leasehold interests have been surrendered. It may be that more have been surrendered than have not been, but the fact is that these incumbrances on the title exist. It seems to me a question of judgment as to whether they make the one-package sale contended for by Mr. Cunningham feasible or not. It seems to me that what has happened is that the liquidator has entirely properly taken steps to see whether the one-package sale can take place and the hoped-for premium achieved, but that she has reached the view that this cannot be done.

31. Support for this derives from two things. First of all, there is the fact that the liquidator began seeking the surrender of leases and then stopped. Now, one must ask oneself, "Why did she stop?" There must be, I would suggest, a rational reason for that. One sees that rational reason from the second point that I make, which is a document that I was referred to by Mr. Passfield. This is an after-the-event explanation by the co-agent for sale instructed by the liquidator, CBRE. The fact that this is not a contemporaneous explanation affects its weight. The explanation is contained in in an e-mail of 24 March 2021 from a representative of CBRE to Mr. Matt Brumpton, who is associated with the liquidator, as being part of the other agent instructed by the liquidator, SIA. The e-mail reads as follows:

> "Good to speak to you earlier. Further to the call, I wanted to drop a line on the question of the wider site assembly at Trafford. The basic reason we did not sell the wider site was that we do not have control of it. Thus it would have meant embarking on a time-consuming and costly site assembly and consolidation process with unclear financial benefit.

> Throughout our marketing campaign it was reiterated to us time and time again that the biggest impediment for purchasers looking to acquire the site was the existing leasehold position of the previously sold apartments. It is our view that these unresolved leases tarnish the site sufficiently to prevent any of the adjoining owners being likely to enter the joint venture with us on a sales process. By adjoining their sites with ours, the leases unresolved, the entirety of the wider site becomes blighted by the leases, rather than the area we treated on in isolation. The ability of the unresolved lease position to blight the entirety of the site also means an acquisition approach to site assembly would have been unlikely to make economic sense.
>
> The lease position resulted in the whole in this instance being unlikely to be greater than the sum of the parts. We could not be confident that acquiring the surrounding sites would ultimately make financial sense to our client.
>
> I hope that is clear and understandable, but please let me know should you require anything further."

32. Mr. Cunningham made the point that this could well be an after-the-event justification, an *ex post facto* rationalisation of a course that was in his submission wrong. That is of course possible. It is also possible that this rationale is entirely made up. However, it does seem to me that it does support the view contrary to that advanced by Mr. Cunningham, namely that what the liquidator did was seek to achieve a one-package sale but discovered that it was actually a course that did not make economic sense, and that therefore her decision not to proceed with the sale that Mr. Cunningham contends should have been pursued is one that can be justified by reason of explanations other than dishonesty or negligence. In other words, it seems to me that the conduct of the sales process is entirely consistent with the liquidator acting precisely as a competent liquidator should in order to achieve maximum value for the property that she is entrusted with.

33. This position is supported by another document which I am going to refer to. This is another after-the-event e-mail. This time it is from Mr. David Rose, who is the agent for the property owned by Kingsley Blenkhorn. This e-mail is addressed by Mr. Rose to Mr. Cunningham and is a document that has – like most of the after-event documents I am referring to – been procured for the purposes of this litigation, which affects its weight. Nevertheless this is material that I need to take into account. What was said was this:

> "I was not approached by the liquidator or SIA about joining their sales process. For the avoidance of doubt, I did consider asking to market Caxton [which is the property he is the agent for] with the main site, but decided that this would not be in my client's best interests, because, to be frank, what is being marketed by SIA is a complete shambles. The title appears to be sounds but all the pre-sold and land registered interest result in a developer's nightmare and I am surprised that the offers to buy are as high as I am led to believe.
>
> The inclusion of Caxton does not enhance the value of my client's interests and could severely reduce it, because of the mess of all the pre-sold units. It is a very brave bullish purchaser that buys at any price and I believe it will be a long haul for those involved.
>
> As you know, I believe that the inclusion of Caxton and also the Trafford owned car park greatly improved the development potential and the time to have meaningful discussions is when the main site is in the control of the developer, capable and able to perform, which clearly the liquidator is not."

34. This is not an unequivocal e-mail. It has passages which go both ways (i.e., both sides can draw some comfort from it) and it is in some parts not completely clear, in particular what Mr. Rose means by "complete shambles" is something which is quite possibly ambiguous. However, it does seem to me that this e-mail underlines the point I made earlier, namely, that it is an indicator that the process of sale contemplated by Mr. Cunningham is by no means straightforward. I remind myself that the question I must ask myself is not whether Mr. Cunningham is right that if the one-package sale advocated by him were to take place, a sale price of the sort contended for by him would be achieved. That is not the question. The question is whether the decision not to take that course but to sell on an unaggregated basis is one that no liquidator properly advised and instructed could take as a course of action. In other words, either the course that the liquidator has embarked upon is negligent or it is worse than negligent. It seems to me that the two communications that I have referred to both indicate that the course of action that is being taken by the liquidator is one that is properly open to her. That says nothing about the correctness of Mr. Cunningham's valuation. What it says is that the conduct of the liquidator cannot necessarily be impugned in the way that Mr. Cunningham must impugn it in order to succeed at stage 1 of *American Cyanamid*.

35. Moving on to the seventh point, the fact is that two agents have been engaged by the liquidator in the sale of this property. They are, as I have said, CBRE and SIA. Mr. Passfield made the point that the liquidator is not a property development or property sale expert. What she has done is that she has employed reputable agents to advise her in relation to the sale of this property. Now, either they have advised her to sell the property on a one-package basis and so achieve the premium, in which case she is wilfully ignoring that advice, or they have advised her to do what she is doing now, selling on a disaggregated basis, and she is following that advice. It seems to me that this second course is overwhelmingly the more likely. I do not consider that there would be much prospect of Mr. Passfield (who is instructed by the solicitors who have had conduct of this matter throughout) telling me that the liquidator was not acting inconsistently with advice received if that were the case. It seems to me inconceivable that Mishcon de Reya would not know this, given the fact that they have been acting for the liquidator throughout. If the liquidator were acting inconsistently with the advice she had received from the agents instructed by her, then some resonance of that fact would have appeared and Mr. Passfield's submissions could not have been made in the way they were made.

36. So, it seems to me that it is overwhelmingly clear, given the stage I am at in these proceedings, that CBRE and SIA have been broadly happy with the course adopted by the liquidator and indeed have advised it. Now, that does not mean to say that the claim articulated by Mr. Cunningham must inevitably fail. It may be that they, that is to say the advisers, have got matters wrong in precisely the same way as other people are said to have got it wrong by Mr. Cunningham. But it does seem to me that I am being asked to assume yet again a collective form of negligence on the part of people who one would not expect to be negligent. That is the seventh point that I am addressing.

37. I move quickly on to the eighth point, which is the series of criticisms that Mr. Cunningham made in relation to the poor marketing of the property. Mr. Cunningham made a series of points, which I am not going to read into the

record, as to why the marketing process was badly run and resulted in his submission in an inadequate sale process and a failure to realise the premium that he says is attainable. It seems to me that this criticism does not go far enough, and is substantially irrelevant. It may very well be that the sales process was too collapsed, too short and there was not enough time to get high offers. The fact is, though, the substance of Mr. Cunningham's complaint is not that the sales process was badly done in the sense that higher price could have been achieved had more time been taken: his point is that the sales process is misconceived in an altogether more fundamental and basic way, in that the one-package sale has been eschewed, and the resultant premium thus foregone. The complaints about a poor process go nowhere, because the process itself (on Mr. Cunningham's case) was misconceived, and that was the essence of his contention.

38. Stepping back, I have identified a number of factors, and I have considered them with some care. I have – as I have described – had to formulate these factors with the assistance of Mr. Passfield and Mr. Cunningham because Mr. Cunningham's case has not been pleaded. Had it been, I would have focussed much more on the particulars of dishonesty or negligence pleaded. It should not be taken because I have had to formulate the relevant factors in the absence of a pleading that I consider that there is an *a priori* arguable case. That is the very question I am seeking to resolve.

39. It seems to me that Mr. Cunningham's case is built, in essence, on the assumption, not evidenced, that the premium of the one-package sale is "there for the taking". That all one needs to do is put the development on the market, and a sale – very much high than that presently contemplated – will fall into the liquidator's lap. It may very well be that if all of the properties comprising the one-package sale could be unified under a single title, then the premium can be obtained. But that is not this case. The suggestion that a unified title could be achieved easily and without significant cost is unevidenced, and presupposes either a collective form of negligence on the part of two liquidators and two sales agents or, worse than that, a collective form of dishonesty on the part of all or some of these people, which has resulted in a fundamentally wrong course being taken. It seems to me that for the various reasons I have given, what has happened is that the liquidator has taken a view as to the proper course in terms of how the assets of the Company are to be realise. She has taken a view, she is following that view and I do not believe that it can arguably be said that she has taken a negligent or dishonest course in doing so. The offers that the sales process for the Company's property edged yellow that have been received are entirely in line with the view that the premium for achieving the one-property sale is not easily achieved, but either not achievable at all or else only achievable at great cost.

40. In short, a cause of action predicated upon misconduct by the Company in selling the property – whether that misconduct is characterised as dishonest or negligent – is hopeless and unarguable on the material before me. It follows that there is no good arguable case to satisfy stage 1 of the *American Cyanamid* test, and it follows therefore that the application for interim relief must fail for that reason alone.

41. I am going to address, but much more briefly, stages 2 and 3. It seems to me that the balancing exercise is one that favours the non-granting of the injunction sought by Mr. Cunningham rather than its granting. I am going to deal with stage 2 and stage 3 and perhaps bit of stage 4 in a composite way.

42. I am going to begin with the prejudice to the Company if the injunction were to be granted, i.e. stage 3. It seems to me that there is clearly prejudice if I were to enjoin the sale of this property for what would be at least a year, probably more like two years, given that this action has yet properly to be commenced. To enjoin the liquidator from proceeding with the sale runs the risk of both a certain and an uncertain future loss. The certain loss is that if the sale of the property is postponed, the value of the money that would otherwise be received by the liquidator is lost. So, the interest earned or the investment and the distribution that could be made to the creditors is lost, and that is a real loss that will inevitably occur if the sale is delayed. The time value of money is something which I am very alive to.

43. The second potential loss is more speculative. One does not know whether a sale could be achieved in the future, and if it can be achieved at what value. The fact is that property prices go up and they go down. Some properties are capable of sale easily. Some properties of capable of sale not at all easily. I cannot say how likely it is that there would be an inability to sell the property in the future or a sale at a lower value than is presently on the table. What is to me clear is that there is a real risk that the present contemplated sale by the Company – contracts have not been exchanged – could quite easily be derailed were I to grant the injunction. It seems to me quite likely that there is a real risk of harm accruing to the liquidator. Of course, the fact that there is harm accruing to the Company is something that presents only the first stage of inquiry. Damages might be an adequate remedy even in this case. Here, it seems to me I must place some weight on the fact that Mr. Cunningham is unable to properly fortify the undertaking in damages that he would have to give. He did make clear that there was some equity in his house of about £250,000, and that he would be prepared to make that available in order to fortify an undertaking. I take that into account, but I also must take into account that it is not a straightforward fortification of undertaking to have a second charge over the limited equity in the home that he shares with his partner. So, it seems to me that there are a number of points against the granting of injunctive relief.

44. I turn to the anterior stage 2, which is the question of whether and, if so, to what extent, an injunction is needed as opposed to a remedy in damages to protect the position of Mr. Cunningham. Here I must note, but for the reasons I gave earlier will disregard, the points made by Mr. Passfield about Mr. Cunningham's standing. Mr. Passfield said, as I have indicated, that actually Mr. Cunningham has no claim here whatsoever. I am going to disregard that, because it seems to that the question of adequacy of damages can be properly considered if one presumes a claim brought not by Mr. Cunningham but by DS7. In effect, Mr. Cunningham's claim was <u>through</u> DS7 because he claims to be a creditor of DS7, and that is the way he has contended that he has standing to bring a claim. Whether that is right or wrong for present purposes does not matter. What it does mean, though, is that I can ascertain the extent to which DS7 is going to be prejudiced, assuming it to be the applicant and claimant in this case, in a manner which cannot be compensated for in damages.

45. The first point to make is that DS7 comes some way down the waterfall. DS7 will recover 42% above £4.5 million to Absolute Living, after the liquidator's costs and disbursements have been accounted for. In other words, DS7's entitlement occurs after the payment out to the liquidator and the payment out to Absolute Living of £9 million in total. So, it seems to me, applying a broad brush, that there is a right to 42

pence in every pound above about £9 million. Now, that means that the remuneration payable to the liquidator can be stretched in a way that I am going to describe. The fact is that if there was an arguable case that ultimately succeeded, the payment to the liquidator that is contemplated would be ranking second in priority to the misfeasance claim that would inevitably arise as against the liquidator, which would enable DS7 to claim the £3.5 million and possibly the additional million in disbursements from the liquidator as compensation for the loss it had established. That means that the contingent entitlement of DS7, 42% above £9 million, can be stretched, as it were, by the £3.5 or £4.5 million that would be available to compensate it. In effect, the £4.5 million, if I take the higher sum, would be effectively doubled, more than doubled, by the fact that DS7 only has a claim of 42%. So it seems to me that the suggestion that Absolute Living is not good for any money and so could not pay compensation does not actually arise in this case because there is a potential for a recovery at least to the amount of £3.5, possibly £4.5 million, as representing the payments received by the liquidator in the form of fees and disbursements.

46. The other point is this. This is, as I said, primarily a dishonesty claim. I wonder whether such a claim, if it succeeded, would prevent recovery of damages from the liquidator. It seems to me that whilst clause 15 of the Settlement makes clear that the liquidator cannot be sued in her personal capacity, I am sceptical as to whether that would be a shield robust enough to withstand a claim based on dishonesty. It is a matter that seems to me open to argument, and I am not going to reach any kind of concluded view. But it does seem to me that balancing stages 2 and 3, one comes to a conclusion that it is better not to grant the injunction than to grant it. It seems to me that the harm to the liquidator in granting the injunction outweighs the harm to Mr. Cunningham (or a claimant with standing, if Mr. Cunningham has none) in refusing to grant it.

47. Accordingly, although I have, as it were, telescoped stages 2, 3 and 4 into one, it seems to me that those requirements of the *American Cyanamid* test are not met and constitute a second and independent reason why the application for interim relief must be refused.

48. So, for those two reasons, I refuse the application for an injunction.

This judgment has been approved by M. Smith J.