TRANSCRIPT OF PROCEEDINGS

[2020] EWHC 3175 (Ch)

Ref. E30MA138

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
PROPERTY TRUST AND PROBATE LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester

Before HIS HONOUR JUDGE HALLIWELL sitting as a Judge of the High Court

B E T W E E N:

(1) DAVID ROSE
(2) DAVID PHILIP WAXMAN
(3) [PARTY REMOVED AS A CLAIMANT]
(4) [PARTY REMOVED AS A CLAIMANT]
(5) PALADOR PROPERTY INVESTMENTS LIMITED

Claimants

AND

(1) CREATIVITYETC LIMITED
(2) ANDREW KNOWLES (as Joint Law of Property Act Receiver)
(3) PAUL GREENHALGH (as Joint Law of Property Act Receiver)

Defendants

MR ROGER STEWART QC (instructed by Field Fisher LLP) for the Claimants
MR IAN CLARKE QC (instructed by Ralli Solicitors LLP) for the Defendants

APPROVED JUDGMENT

26th OCTOBER 2020

DISCLAIMER: The quality of audio for this hearing is the responsibility of the Court. Poor audio can adversely affect the accuracy, and we have used our best endeavours herein to produce a high quality transcript.

JUDGE HALLIWELL:

1. The First, Second and Fifth Claimants apply for an interim order restraining the Defendants from exchanging contracts for the sale of properties at Lower Hillgate, Stockport. I shall generally refer to the properties at Lower Hillgate as "the Stockport Properties". Palador Property Investments Limited remains designated as Fifth Claimant following the withdrawal of the Third and Fourth Claimants.

2. It can be seen from documentation in the Application Bundle that the Stockport Properties are subject to at least four registered titles. No filed plan has been admitted but it is conceivable that, the four registered titles collectively comprise the entirety of the freehold and leasehold titles to a single area of land. Registered title MAN 131782 comprises freehold land at 73 to 87 Lower Hillgate and GM 613096 comprises freehold land on the south-west side of Wesley Street. There are two leasehold titles. GM 6163095 is based on a lease dated 15 January 1971 for a term of 199 years and MAN 262686 based on a lease dated 24 March 1759 for a term of 500 years.

3. Each title is in the registered ownership of the First and Second Claimants. The freehold titles are each subject to registered charges in favour of the First Defendant, Creativityetc Limited. The registered charges in respect of MAN 131782 and GM 613096 was respectively made on 13 July 2016 and 20 January 2015. There are no other registered charges on MAN 131782, and certainly no charge ranks in priority to the Creativityetc charge but GM 613096 is subject to a prior registered charge dated 7 May 2014 to Karunia Holdings Limited and a charge to Creativityetc dated 20 January 2015.

4. The leasehold land comprised in GM 613095 under the title derived from the 1971 lease is also subject to a charge to Creativityetc Limited and a prior charge to Karunia Holdings Limited bearing the same date, 7 May 2014, as the charge in respect of GM613096. If it was not incorporated in the same instrument, no doubt it was charged as part of the same series of transactions. The leasehold land comprised in the 1759 lease is subject only to a

charge dated 13 December 2016 to Creativityetc Limited. It does not appear Karunia Holdings has security in the property comprised in that particular title.

5. In addition to the Stockport Properties, Creativityetc Limited appears to have taken security in respect of some properties at Pinfold Court, Whitefield in North Manchester and another property at 56 Oldham Road. The First and Second Claimants are directors of the Fifth Claimant and, although the factual background is obscure, it appears the First and Second Claimants entered into the charges to secure third party debts. These may have included the Fifth Claimant's debts but little turns on that.

6. One or more of the securities was apparently intended to secure debts owed to Karunia Holdings Limited. Karunia Holdings Limited appears to be a company registered in Cyprus and the Claimants allege that the shares in Karunia Holdings Limited and another company that features in the proceedings, Dreadnought Limited, are vested in the First Claimant. At all material times, Karunia Holdings and Dreadnought Limited have been in receivership subject to insolvency proceedings in Cyprus.

7. The substantive proceedings were for an account of the amounts due to the First Defendant and secured by its charges. No doubt they were commenced with a view to redemption. The proceedings were tried before His Honour Judge Eyre QC in December 2019 but, on the second day of the trial, the parties reached agreement compromising the dispute under a Tomlin Order. By this order, the action was stayed upon scheduled terms subject to a contractual undertaking which replicated one of the provisions of the schedule itself and a direction for monies held by the Court Funds Office in the sum of £200,000 to be released to the Claimant's solicitors for application in accordance with the schedule itself.

8. The schedule incorporated a deed of settlement and was itself designated as "the Deed of Settlement". By the Deed of Settlement, it was provided that the Claimants would pay the First Defendant a total sum of £765,000, designated as the Settlement Sum. Of this amount, £200,000 was payable from the monies paid into court pursuant to an order on 3 August 2018 and £565,000 was to be paid no later than 4.00 pm on Friday 28 February 2020. The sum of £565,000 was to be paid by direct transfer in cleared funds into a designated bank account.

9. Having set out the scheme for payment, the Deed of Settlement contained a series of contractual provisions. These commenced with Clause 2.1 which provided for the First Defendant to give the undertaking embodied in the Court order itself. It was in the following terms.

> "The First Defendant undertakes not to enter into a binding contract for the sale or otherwise to dispose, charge or assign any right, benefit or entitlement to any of those charges or part thereof, to any party or parties, whether corporate, individual or otherwise, against any of the properties registered at HM Land Registry under Title numbers GM 613095, GM 613096, MAN 131782 and MAN 262686 and (collectively, known as Lower Hillgate); LA 235513 and LA 288647 and LA 364168 (known as Pinfold Court) and/or GM601422 (56 Oldham Road) pending the release of its Securities as defined in the Deed of Settlement agreed between the parties, provided that the First Defendant shall be automatically released from this undertaking in the event that the Settlement Sum, as also defined in the said deed, is not paid by 4.00 pm on 28 February 2020".

10. By Clause 2.2, the First Defendant assumed a series of obligations, each of which were to be fully performed within five working days of receipt of the sum of £200,000. Its obligations were as follows.

> 2.2.1. to "…cause the receivers to assign to Messrs Rose and Waxman the cause of action with respect to the proceedings being brought by them in respect of an alleged trespass and another action in respect of a boundary dispute. Messrs Rose and Waxman agree to apply to be substituted as claimants following such assignment. The receivers shall retain the right to recover against the other party any costs incurred prior to the assignment and to retain these for their benefit, including the benefit of any costs orders, and shall be entitled to enforce or have assessed such costs in their own right or as agents for Messrs Rose or Waxman but to retain the benefits thereof".
> 2.2.2. to "…cause to be terminated the appointments of the receivers as Law of Property Act Receivers of the properties listed…"
> 2.2.3: to "…cause Ioannis Moditis or such other person or persons who act as the receiver ("the Karunia Receiver") of the company known as Karunia Holdings Limited, CRNHE 89485 ("Karunia") to apply to discontinue all proceedings brought by the Karunia Receiver in Cyprus with no order as to costs and Mr Rose will procure the directors of Karunia to agree to the discontinuance of such proceedings upon such terms".
> 2.2.4 to "take all necessary steps to cause the appointment of the Karunia Receiver to be terminated and, to the extent necessary…cause to be made an application for the termination of the appointment of the Karunia receiver".
> 2.2.5 to "take all necessary steps to cause the appointment of the Dreadnought Receiver to be terminated and, to the extent necessary…cause to be made an application for the termination of the appointment of Christina S Antoniadou or such other person or persons who act as the receiver ("the Dreadnought Receiver") of the company known as Dreadnought Limited, CRN 226787 ("Dreadnought").

11. By Clause 2.3, it was provided that, on payment of the Settlement Sum in its entirety, the First Defendant would release all its securities, subject to a proviso that it would co-operate with any new lender and instruct its solicitors to give such undertakings as may be required to procure the securities were released.

12. By Clause 2.4, the First Defendant covenanted not to sue, assign or otherwise transfer any causes of action, claims or other rights against the Claimants, Karunia or Dreadnought. Clause 2.5 provided as follows.

> "For the avoidance of doubt, in the event that the Settlement Sum is not paid in accordance with clause 1 above and provided that such non-payment of the Settlement Sum is not caused by any actions or omissions of [the First Defendant], then [the First Defendant] shall be at liberty to forthwith enforce its security and exercise its power of sale in accordance within the terms thereof with respect to such amount of the Settlement Sum as remains unpaid plus interest at the rate of 1.25 per cent, capitalised and compounded monthly from 29 February 2020 until payment, plus [the First Defendant's] reasonable costs and expenses of enforcement of sale as from 29 February 2020 and in such circumstances the Claimants agree not to commence any redemption action to prevent such enforcement or sale".

13. Clause 4.1 provided that the scheduled agreement was in full and final settlement of the parties' liabilities to one another for "existing claims and causes of action…arising out of or in connection with" the dispute between them and the substantive proceedings.

14. By Clause 16.1, it was expressly provided that time would be of the essence as regards times, dates and periods mentioned in the Deed of Settlement or any agreement in writing varying the same.

15. In his submissions for the Claimants, Mr Roger Stewart QC submitted that the Deed essentially provided for a three stage process in which the Claimants would pay the sum of £200,000, the Receivers would be removed and the balance of the Settlement Sum of £765,000 would be paid at which point the First Defendant would release its securities. The commercial logic of the arrangement certainly appears to have been for the First and Second Claimants to redeem the charges by arranging for the First Defendant to be credited with the sum of £200,000 and paying it the balance of £565,000 whilst the First Defendant would take all necessary steps to remove the Receivers prior to the balance payment.

16. The sum of £200,000 was, indeed, released from court funds and paid to the First Defendant on 24 January 2020 but Karunia Holdings Limited and Dreadnought Limited remained in receivership. The Claimants maintain and have continued to do so on a sporadic basis since shortly after the funds were released, that the First Defendant failed to comply with its obligation to take all necessary steps to cause the appointment of the Karunia and Dreadnought Receivers to be terminated. Following exchanges of correspondence in February 2020, the parties reached agreement to vary the Deed of Settlement upon the terms set out an email timed at 14.52 on 28 February 2020 from Mr Ewen Sharp of Ralli Solicitors for the First Defendant to Mr Simon Fagan of Atticus Solicitors for the Claimants. The material terms of that email are as follows.

> "Further to our recent emails, please now note that:
> 1. our clients confirm that:
> (a) Creativity has complied with its obligations to date under the settlement agreement;

(b) Creativity has specifically complied with all of its obligations under clauses 2.2.3, 2.2.4 and 2.2.5 of the Settlement Agreement…by consequence of Ralli Solicitors sending the correspondence dated 29 January 2020 to Moditis Law; and
(c) all allegations that have been raised in previous correspondence as between 20 and 26 February 2020 are withdrawn and that our clients agree not to bring any application or commence any proceedings against Creativity in relation to Creativity's obligations as contained within the Settlement Agreement subject to the understanding that our clients will not be prevented from bringing any such application or commence any proceedings in respect of any future breach: and
(d) they shall pay interest as set out under the Settlement Agreement.

2. In return, Creativity will undertake not to enter into a binding contract for the sale or otherwise dispose, charge or assign any right, benefit or entitlement to any of those charges or part thereof…against [Lower Hillgate and other properties] pending the release of its Securities as defined in the Settlement Agreement agreed between the parties but it is accepted that Creativity shall be automatically released from this undertaking and it should be of no effect in the event that the Settlement Sum (as also defined in the Settlement Agreement) is not paid by the earlier date of:
   (a) 4.00 pm on the 21st day following the formal termination and/or removal of the Dreadnought Receiver and Karunia Receiver, or
   (b) irrespective of the termination of and/or removal of the Dreadnought receiver and the Karunia receiver, 4.00 pm on 28 May 2020".

10. The parties are in agreement that, at this stage, they entered into a binding variation of contract upon these terms but there is a dispute as to its operation and effect. The Defendants maintain that 28 May 2020 was a longstop date and, once it passed, they were entitled to enforce their security as mortgagees. The Claimants maintain that, if it was a longstop date, it was subject to an implied contractual term that the Defendants would not rely on their own breaches of contract.

11. Having made that point, they contend that the First Defendant is in breach of contract because it did not take the necessary steps under clauses 2.2.4 and 2.2.5 of the Deed of Settlement to cause the appointment of the Karunia and Dreadnought Receivers to be terminated and thus enable them to raise the funds, backed by security, to pay the amount due to the First Defendant. The Claimants rely on *Alghussein v Eton College* [1988] 1 WLR 587, which is a case to which I will turn later.

12. It is also open to the Claimants to rely on the proviso in Clause 2.5 of the Schedule to the Tomlin Order which is applicable. Clause 2.5 permits the First Defendant to enforce its security and exercise its power of sale in the event that the Settlement Sum has not been paid within the contractual time scale but it is subject to the proviso that non-payment was not caused by "the actions or omissions" of the First Defendant.

13. The Claimants applied first for interim relief at a hearing before His Honour Judge Pearce on 9th October. The hearing took place in the absence of the Defendants. Judge Pearce made an order to the effect that:

> "Up to and including 22 October [which was originally the return date], the First, Second and Third Defendants will be restrained until further order from exchanging contracts for the sale of the Lower Hillgate properties or otherwise disposing of them".

14. If I am to grant the Claimants interim injunctive relief, I must first be satisfied, in accordance with the *American Cyanamid* test, that there is a serious question to be tried and that there are rights vested in the Claimants which merit the protection of a court order pending trial.

15. So what are the Claimants' rights? To answer that question, it is necessary to consider, first, the rights to which the First and Second Claimants would have been entitled as legal owners and mortgagors of the Stockport Properties before they entered into the Tomlin Order and then assess the overall effect of the Tomlin Order and the 28 February agreement.

16. As mortgagors, they would initially have been contractually entitled to redeem the mortgages on a fixed date and, once that date passed, they would have been entitled to the equity of redemption. To redeem a mortgage by exercising its equity of redemption, a mortgagor must first serve notice of intention to redeem and, once the notice has expired, it must tender the full amount due. Having done so, it is entitled to have the mortgaged property restored to it free from the mortgagee's security.

17. Conversely, a mortgagee is generally entitled to a contractual or statutory power of sale and the statutory power of sale is contained in section 101 of the Law of Property Act 1925. It is generally exercisable once the secured amount is due; there is no suggestion to the contrary in the present case.

18. A mortgagee can be restrained from exercising its power of sale once the mortgagor has tendered the amount due or made a payment into court. The editors of *Fisher and Lightwood* on the *Law of Mortgage (15th edition)* take the view, at *Paragraph 30.3.7*, that "before he makes such a claim, the mortgagor can at least be expected to have offered to redeem, unless it can be shown that the mortgagee is not contractually entitled to exercise his power of sale or that he is not acting in good faith". In my judgment, this is at least a statement of good practice where a mortgagor seeks to obtain injunctive relief to preserve its right to exercise the equity of redemption.

19. In the present case, the Tomlin Order and the Deed of Settlement were apparently intended to provide the Claimants with a window of opportunity to redeem the mortgage by making two payments to the First Defendant in a fixed amount. During that period, the First Defendant undertook not to enter into any contracts for the sale of the mortgaged properties and, following the payment of £200,000 from the monies paid into court, the First Defendant undertook to take specific action in relation to matters such as the appointment of the Karunia and Dreadnought Receivers. However, in the event that the Claimants failed to make payment in the agreed amounts, the First Defendant was to be at liberty to enforce its security forthwith and the Claimants agreed that they would not commence a redemption action to prevent the First Defendant from doing so, including the exercise of its power of sale.

20. It is always open to a mortgagor to entirely release its right to redeem a mortgage or consent to the dismissal of its claim and foreclosure. However, the Tomlin order is likely to have fallen short of this. Had the parties intended the Claimants' equity of redemption to be extinguished, they could have been expected to provide for this in clear and unambiguous terms. On any analysis, there is at least a serious question to be tried. Once the Claimants failed to utilise their window of opportunity, the First Defendant was entitled to exercise its power of sale with the benefit of the Claimants' undertaking not to commence fresh proceedings for redemption subject to the Clause 2.5 proviso. However, it does not follow that the Claimants had altogether given up their right of redemption.

21. In entering into their agreement by exchange of emails on 28 February 2020, it was apparently the Claimants' intention through their solicitors, Atticus, to buy time at the expense of submitting to a longstop date. They confirmed that the First Defendant had specifically complied with its obligations in clauses 2.2.3, 2.2.4 and 2.2.5 of the Settlement Agreement to cause Ioannis Moditis, the Karunia receiver, to discontinue the proceedings it had commenced in Cyprus and cause the appointment of the Karunia and Dreadnought receivers to be terminated. They also confirmed that all their allegations to the contrary in correspondence between 20 and 26 February 2020 were withdrawn. The *quid pro quo* was that the date for payment of the final settlement sum, £565,000, was put back until 4.00 pm on the 21st day following formal termination or removal of the Karunia and Dreadnought Receivers or, irrespective of termination or removal, 4.00 pm on 28 May 2020, whichever be the earlier. In this way, 28 May 2020 was fixed as the longstop date.

22. On behalf of the First Defendant, Mr Ian Clarke QC submitted that the 28 February 2020 agreement leaves no room for doubt that, once the longstop date passed, the First

Defendant became entitled to exercise its statutory power of sale immediately. The agreement provided, in terms, that at the very latest the First Defendant would be released automatically on that date from its undertaking not to enter into a binding contract of sale. That would apply irrespective of the termination or removal of the Dreadnought or Karunia Receivers. It follows, he submits, that it is entirely unnecessary after the longstop date to make any enquiries whether the receivers had been removed and, if not, why they had not been removed.

23. On these issues, Mr Clarke was and is able to advance a strong and compelling case. On the hypothesis that the outcome of the present application depends solely on the parties' prospects of success at trial on these issues, there would be no need for further argument. However, I remind myself that it is only necessary for the Claimants to show that there is a serious question to be tried. Once the test is formulated in this way, I am satisfied that the First Defendant's contractual argument – compelling as it seems – is arguably susceptible to two qualifications.

24. The first qualification is that, whilst the 28 February agreement plainly operated to extend the period of the undertaking in clause 2.1 of the Deed of Settlement and could thus be taken to provide that, once the period expired, the First Defendant would be at liberty to enforce its security, it did not refer to the proviso in Clause 2.5 requiring that the actions or omissions of the First Defendant were not causative of non-payment. It is more than conceivable that, by providing for the long stop date to apply, irrespective of the termination of and/or removal of the Dreadnought receiver and the Karunia receiver, the 28 February 2020 agreement implicitly extinguished the proviso. However, in my judgment, it cannot reasonably be said that on this issue there is no serious question to be tried. The parties could easily have eliminated any doubt by providing, in express terms, that the proviso to clause 2.5 was no longer to apply. They did not do so.

25. Secondly, as Mr Stewart observed in his submissions for the Claimant, the provisions of clause 2.2.4 and 2.2.5 of the Deed of Settlement contained two separate obligations; an obligation to take all necessary steps to cause the appointment of the Receiver to be terminated and an obligation, to the extent necessary, to cause an application to be made for termination of the Receiver's appointment. Mr Stewart submitted that, in each case, the five-day time constraint applied to the obligation to take all necessary steps to cause the appointments to be terminated and not the obligation to cause an application to be made for the termination of the appointments. It is not obvious why the parties might have chosen, in

this way, to draw a distinction between steps to cause the appointment to be terminated and cause an application to be made for the termination of the appointment. If it is necessary to cause an application to be made, it might reasonably be thought this is a necessary step in the process of causing the appointment to be terminated, but the parties did choose to draw the distinction and, on the basis they did so, it is arguable - I would put it no higher than that - that the five-day restriction does not apply to the First Defendant's secondary obligation to apply for the termination of the appointment.

26. This is not entirely without significance. Whilst the 28 February 2020 agreement provided that the First Defendant had specifically complied with its obligations in clauses 2.2.3, 2.2.4 and 2.2.5 of the Deed of Settlement and, more generally, that it had complied with its obligations in the Deed *to date*, the parties cannot logically have confirmed that the First Defendant had already complied with its future obligations.

27. Relying on *Alghussein v Eton College [1988] 1 WLR 587*, Mr Stewart submitted that the First Defendant is not entitled to rely on its own breaches of contract, including its breaches of the provisions of clauses of 2.2.3, 2.2.4 and 2.2.5, to enable it to exercise its contractual or statutory power of sale. *Alghussein v Eton College* related to a contract for the development of land under which one of the parties contracted to build on the land and enter into a lease. The contract was drawn up in infelicitous terms and provided that the parties would complete a lease if the development was not completed owing to wilful default on the part of the tenant. When the tenant failed to complete the development and demanded a lease, the court declined to grant a decree of specific performance on the grounds that it was not entitled to rely on its own breaches of contract. Ultimately, the case was brought before the House of Lords, in which Lord Jauncey confirmed, at 591D to E that it was "... well-established by a long line of authorities that a contracting party will not, in normal circumstances, be entitled to take advantage of his own breach as against the other party". However, it is an essential part of the principle that the contracting party must be specifically relying on his own breach. It is not enough for him to rely on a state of affairs which has arisen from his own breach. In the *Alghussein* case, the requirement was plainly satisfied because the relevant contractual obligation was expressed to be applicable in the event that the tenant was in wilful default. When the tenant sought to rely on its own wilful default to obtain the lease, the court concluded it was not entitled to do so.

28. In my judgment, Mr Stewart is precluded from taking the point that the First Defendant is in breach of clause 2.2.3 or its five-day obligations in 2.2.4 and 2.2.5 of the deed of

settlement. The 28 February 2020 agreement provided, in terms, that the First Defendant was to be deemed to have complied with these obligations. The five-day obligations were to be performed within five days of receipt of the sum of £200,000. Since the sum was received on 24 January 2020 or thereabouts, the five-day period expired five days later and time was of the essence of all provisions in the deed relating to time. It follows that Mr Stewart's case on this point hangs by the narrowest of threads, based on the proposition that the First Defendant is arguably in breach of its continuing obligation to apply for the termination of the Karunia and Dreadnought receivers and, more generally, that the First Defendant's failure to make the applications is causative of the non-payment of the Settlement Sum within the meaning of the proviso to clause 2.5. In my judgment, the *Alghussein* principle does not assist the Claimants because the First Defendant's putative breaches of clauses 2.2.4 and 2.2.5 are merely being deployed in order to explain why the Claimants have been unable to raise the funds required to redeem the mortgages. It is not suggested that the First Defendant will be relying on its own breaches of contract, if and when it exercises its right of sale; rather, it is suggested that, owing to the First Defendant's breaches of clauses 2.2.4 and 2.2.5, the Karunia and Dreadnought Receivers have not been removed and, in consequence, a third party funder who the Claimants approached for a loan facility, TFG Capital Limited, has declined to make an advance to the Claimants to enable them to redeem. I am not satisfied this is enough to engage the *Alghussein* principle. The Claimants are seeking to restrain the First Defendant from exercising its power of sale. However, to exercise its power of sale, it is un-necessary for the Defendant to rely on its own putative breaches of the Settlement Deed.

29. Mr Clarke takes issue with the proposition that the First Defendant is in breach of clauses 2.2.4 and 2.2.5. If the First Defendant hasn't submitted an application to terminate the appointment of the Karunia and Dreadnought receivers, he submits there is nothing to suggest what application could or should have been made. He emphasises the fact that clauses 2.2.4 and 2.2.5 provided, in express terms, that the First Defendant was only under an obligation to make such applications to the extent that it was necessary to do so. Mr Clarke submitted that the main issue in connection with the termination of the company receiverships is in the hand of the Claimants themselves. Relying on the witness statements of Ian Moditis and Christina Antoniadou - the Receivers of Karunia Limited and Dreadnought limited - Mr Clarke submitted that to terminate their appointments it is necessary for the directors of the companies to complete a form, designated as Form HE39, from the Department of the Registrar of Companies and the Official Receiver in Cyprus. At

least in part, this is the responsibility of the First Claimant as a director; he has omitted to do so. However, this aspect of the case is disputed by Mr Stewart who submitted that, in the absence of expert evidence about the law of Cyprus and further evidence from the parties, it is not possible to resolve these issues on the face of the available documentation. No doubt that is correct. However, the Claimants' case on these issues is thus based narrowly on obscure and contentious allegations about the failure of the First Defendant to apply for the removal of the Karunia and Dreadnought Receivers.

30. The Claimants submit that the failure of the First Defendant to apply for the removal of the Karunia and Dreadnought receivers is not without significance. In support of that submission, I was referred to a witness statement dated 8 October 2020 from Mr Andrew Hunt, who is the Operations Director of a company called TFG Capital Limited. Mr Hunt states that he was contacted by the First Claimant on or about 26 February 2020 with a view to refinancing the settlement. It appears from his statement - although it is in somewhat obscure terms - that he would initially have been willing to advance the full amount due had the Karunia and Dreadnought Receivers been removed but, apparently, he is now willing to advance no more than £445,000. In my judgment, Mr Hunt's witness statement raises as many questions as answers. In paragraph 8, he states that, since the end of May 2020, TFG has been ready to allow the Claimants to draw down on the refinancing facility but this has been precluded by the failure to remove the Receivers. However, in the preceding paragraphs of his witness statement, he omits to state that any such facility was ever agreed. Whilst the Stockport Properties were charged to Karunia and it is, thus, easy to see why TFG might have sought clarification about the Karunia receivership, it is less easy to see why it would have sought removal of the Dreadnought Receivers. In argument, Mr Stewart submitted that Dreadnought was entitled to a beneficial interest in the Stockport Properties, but that there is no evidence that Dreadnought is somehow in occupation or that it might otherwise have an interest that could otherwise have been binding on TFG if it was granted a charge over the property. In any event, it would appear from Mr Hunt's witness statement that, following market changes attributable to the Covid-19 restrictions, TFG is willing to advance to Mr Rose or his nominees no more than £445,000.

31. In all these circumstances, whilst it is at least arguable that the First and Second Claimants remain entitled to the equity of redemption in the Stockport properties and there is a serious question to be tried that the First Defendant ought to have applied for the removal of the Karunia and Dreadnought Receivers but failed to do so and thus contributed to the

failure of the Claimants to pay the balance that fell due on 28 May 2020, the Claimants' case cannot be put any higher that. In my judgment, their prospects of success at trial are marginal at best.

32. Before I turn to the balance of convenience, I remind myself that as a general rule a mortgagor was historically required at least to offer to redeem before bringing the mortgagee before the court and could reasonably be expected to make a payment into court or provide some other security before he obtains an injunction to restrain the mortgagee from exercising his power of sale. In the present case, the Claimants undertook not to commence a fresh redemption action if they failed to pay the settlement sum on the date fixed for payment. Their case is, essentially, based on the narrow proposition that, had it not been for the failure of the First Defendant to apply for an order removing the Receivers, they would have redeemed the charges no later than the extended payment date on 28 May 2020.

33. As matters stand, there is no unconditional offer to redeem. There has been no payment into court in support of the present application nor have the Claimants done anything else to secure the amounts outstanding to the First Defendant. There is no satisfactory evidence that the Claimants are able to raise the outstanding amounts or will be able to raise the outstanding amounts by the time the case comes for trial. In their letter dated 4 August 2020, Ralli Solicitors for the First Defendant quantified the outstanding debt at some £608,721, comprising £565,000 in respect of the balance of the Settlement Sum and £43,721 in respect of accrued interest to date. Since then, further interest will have accumulated and will continue to accumulate until the trial. It appears from Mr Hunt's witness statement that, if and once the Karunia and Dreadnought Receivers are removed, TFG Capital might be willing to advance £445,000 but, obviously, that would not suffice to meet the existing indebtedness. In his tenth witness statement, the First Claimant states that the Claimants have aggregate assets of £1,200,000. Consistently with that proposition, I was referred to a letter dated 8 October 2020 in which three properties, including the Stockport Properties, are collectively valued at some £1,505,000 in aggregate on the footing that those properties could be realised to meet any liability under the Claimants' cross-undertaking in damages. I shall deal with the issues that arise in relation to the cross-undertaking in damages separately later on, but it is not suggested that these properties are to be sold in advance of trial in order to raise funds necessary to redeem the Stockport charges and, logically, it is not possible to see how that could be done if the purpose of the exercise is simply to raise funds to allow the charges to be redeemed.

34. The Claimants advance a cause of action against the First Defendant but the cause of action is narrow and obscure. Whilst there is a serious question to be tried, it is by no means strong. If the matter proceeds to trial, it is unlikely, even here in Manchester, that it would come on for hearing before April 2021. Statements of case will have to be delivered, followed by disclosure, witness statements and expert evidence. The time estimate for the trial is unlikely to be less than five days. It will probably be longer. In the event I grant the Claimants injunctive relief for the full period pending trial, there is every prospect that the injunction will continue for upwards of six months, possibly significantly longer. In those circumstances, the Claimants would have to advance a substantial and convincing case were they to satisfy me that it would be appropriate and proportionate to grant them interim relief, up to and including the trial, restraining the Defendants in general terms from exercising their power of sale.

35. In turning to the balance of convenience, the main issues are whether the Claimants would be adequately compensated for their losses by an award of damages if they succeed at trial without the protection of an interim injunction and, conversely, whether the Defendants would be adequately protected by the Claimants' cross-undertaking in damages. In my judgment, the short answer to these questions is that neither party will be adequately protected.

36. If I omit to grant the Claimants an interim injunction, it is likely that the Stockport Properties will be sold and the Claimants will be denied the opportunity to redeem. On that basis, whilst the Claimants could be awarded damages for the losses attributable to the First Defendant's putative breaches of its obligation to remove the Receivers, these will not be straightforward to establish and quantify unless the Claimants are able to establish that they have sustained a recoverable loss based on the difference between the price at which the Properties are sold and their market value. However, if the First Defendant commits a breach of its duty to sell the Stockport properties at a proper price, this will be separately actionable. Mr Stewart submitted there is no evidence that the First Defendant has any substantial assets to meet any award in damages although it is, of course, *prima facie* entitled to the repayment of the Claimants' secured indebtedness. Whilst this is, in itself, a substantial asset, surprisingly little information has been adduced in relation to the First Defendant's overall financial position. The First Defendant has not shown that it would ultimately be good for a judgment in damages and costs if and once it has exercised its power of sale and disposed of the Stockport Properties.

37. Conversely, if I grant an interim injunction to the Claimants, Mr Clarke submits that there is no convincing evidence that the Claimants will be able to satisfy their liabilities under their cross-undertakings in damages. He observes that the Third Claimant is insolvent or, at least, does not have any substantial assets. Based on the evidence that has been filed, he also submits there is insufficient evidence to show that the First and Second Claimants are personally entitled to any assets to meet their cross-undertakings. As I have mentioned, the First Claimant refers to the letter dated 8 October 2020 from TFG Capital in which three properties were collectively valued at £1,505,000 and it is suggested that these could be sold to meet their liabilities. However, as Mr Clarke points out, two of these properties are subject to the so-called Bamberworth Trust and the Stockport Properties are apparently held on trust for Dreadnought Limited and the First Claimant. On this basis, Mr Clarke submits that, for the most part, these properties will not be available to the Claimants to meet their cross-undertakings. It is also open to the Defendants to point out that there is no available evidence, more generally, about the Claimants' liabilities. If and to the extent that assets can be realised to meet the debts secured under the Claimants' mortgages, it matters not that the properties are held beneficially for third parties and a trustee is generally entitled to an indemnity in respect of costs and expenses reasonably incurred on behalf of the trust. However, it remains true there is no convincing evidence that the Claimants would be able to meet their cross-undertaking in damages if, ultimately, their claim is unsuccessful. Mr Clarke is also correct to point out that the Claimants' prospective liabilities under the cross-undertakings will escalate with interest in the period leading up to trial.

38. In these circumstances, Mr Clarke submits that, in the hypothetical event that an interim injunction was to be granted, I should require third party fortification. In view of the fact that the Claimants have not offered to fortify their cross-undertakings, Mr Clarke submits that the application for an interim injunction should be dismissed.

39. I am not satisfied that the Claimants have advanced a convincing case that, in the absence of an unconditional offer to redeem supported by a payment into court or, indeed, anything to secure the amounts outstanding to the First Defendant, they should be granted an interim injunction restraining the First Defendant from exercising its power of sale until the trial of the claimants' present claim. However, I am mindful that it is at least arguable that the Claimants remain entitled to the equity of redemption and I have, thus, considered whether I should grant them a measure of relief narrower and more proportionate to the strength of their underlying rights in order to provide them with a measure of protection.

40. One possibility would be for me to make an order restraining the First Defendant from exercising its power of sale without first giving the Claimants notice of its intention to do (together with the essential terms of the transaction) and providing the First and Second Claimants or their nominee with an opportunity to purchase on these terms. It would effectively confer on the First and Second Claimants a right of pre-emption pending trial but the right would only be exercisable for a short, fixed period. Part of the advantage of an arrangement like that is that, by virtue of *Section 104(1)* of the *Law of Property Act 1925*, it would enable the Claimants to acquire the Stockport Properties free from the charges vested in Karunia Holdings Limited to the extent at least that the First Defendant charges rank in priority ahead of the Karunia charges. Unfortunately, however, it does not completely eliminate the problem because, in the case of two of the registered titles to the Stockport Properties, there is a charge dated 7 May 2014 which ranks in priority ahead of the charge to the First Defendant. Moreover, a right of pre-emption on these terms is distinct from the Claimants' right of equity and redemption in its scope and nature. I am not satisfied it would be a proportionate way of accommodating the Claimants' prospective cause of action against the First Defendant based in its failure to apply for an order removing the Karunia and Dreadnought Receivers. I have decided not to grant the Claimants' relief upon these terms, although the fact remains that it would be open to the Claimants or their nominees to enter into an analogous transaction with the Defendants without recourse to the equity of redemption.

41. Another possibility would be for me to make an order providing that, in the event that the Defendants exercise their power of sale, the net proceeds of sale will be paid into court or otherwise secured pending the outcome of these proceedings. This would accommodate the Claimants' concerns about the financial position of the First Defendant. However, I have decided not to make an order on that basis because it does not reflect the nature of the Claimants' substantive case. If the First Defendant exercises its power of sale, it is difficult to see how the proceeds of sale could attract any form of trust so the order would effectively be analogous to a freezing order with a view to ensuring the Defendants do not dispose of or dissipate the net proceeds pending trial. The purpose of such an order is to ensure that funds will be available to meet subsequent court orders in the Claimants' favour, but there is no substantial evidence to support such an order and, in my judgment, it would be disproportionate to the narrow rights which the claimants are seeking to establish in these proceedings. I shall not make an order on those terms.

42. However, I am not without a measure of sympathy for the position in which the Claimants find themselves, notwithstanding the circumstances in which they do so following the commitments into which they openly entered under the 28 February agreement. I am also mindful that, whilst their prospects of success at trial are marginal at best, they have done enough to persuade me that there is a serious question to be tried. I am thus satisfied it would be appropriate for me to continue the current injunction for a short period of time to give the Claimants a final opportunity to see if they can raise the required funds to redeem the mortgages or explore whether funds could be raised for the properties to be purchased through a nominee so as to take advantage, as I have mentioned, of the provisions of *Section 104* of the *Law of Property Act 1925.*

43. I shall grant the Claimants an injunction restraining the Defendants from selling the Stockport Properties for a period of 28 days. It will be calculated to expire at 4.00 pm on Monday 23 November. In the interests of transparency, I am also minded to make an order providing that the Defendants will not sell the properties without first giving the Claimants no less than seven days' written notice of their intention to do so, accompanied with details of the purchase price. However, before making that particular order, I shall hear submissions from both parties.

44. For the sake of completeness, I shall finally deal with the Defendants' submission that I should decline to renew the order of Judge Pearce on the grounds that the Claimants omitted to make full and frank disclosure of all material facts at the hearing before him. The application before Judge Pearce was made in the Defendants' absence without notice and it is thus well-established that the Claimants were under a duty at the hearing to make a full and fair disclosure of all the material facts. Mr Clarke submits that the Claimants failed in their duty in four specific respects, each of which are summarised in paragraph 37 of his skeleton argument. Mr Clarke's submissions are not without foundation. He has identified facts that are arguably material to the case which were not specifically canvassed before the judge at the hearing. However, the critical aspects of the case, in particular the issues relating to the terms of the 28 February 2020 agreement, were put before the judge. On balance, I am not satisfied it would be appropriate for me to withhold relief on this ground alone.

45. Subject to further submissions from counsel, I shall make an order on those terms.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.