Neutral Citation Number [2021] EWHC 2807 (Ch)

CR-2019-008083

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF ARONEX DEVELOPMENTS LIMITED (IN CVL)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 22/10/2021

Before :

ICC JUDGE BARBER

- -

Between :

SIMON GUY CAMPBELL AND ANDREW WILLIAM WATLING
(in their capacity as Joint Liquidators of Aronex Developments Limited)

Applicants

- and –

THE PURCHASERS OF FLATS AT 47 CLARENCE STREET AND 44 CONDUIT STREET, LEICESTER

Respondents

- -

Christopher Brockman (instructed by Lester Aldridge LLP) for the **Applicants**
Yeh Man Li, Yeh Man Chi and Ran Xu (of the Respondents) appeared in person

Hearing date: 25 August 2021

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 9.30 a.m on 22 October 2021

ICC Judge Barber

1. On 25 August 2021, I granted Berkeley Applegate relief in respect of the costs and expenses incurred by the Applicants in the sale of two properties owned by Aronex Developments Limited ('the Company') and related relief. I did so on the basis that written reasons would follow. This judgment sets out my reasons for granting the order.

Background

2. The Company was a property developer which built, developed and sold student and other letting accommodation and hotels. Individual units were sold 'off-plan' to purchasers, with long leases permitting subletting for income generation. The Company arranged for the units to be sub-underlet to a letting agent, which in turn would let those units to students or other occupiers.

3. The two properties forming the focus of this application were known as 44 Conduit Street Leicester LE2 0JN ('City Heights') and 47 Clarence Street, Leicester LE1 3RW ('#47'); (collectively, 'the Leicester Properties').

4. The Leicester Properties were empty sites with planning permission to build student accommodation. No building works had begun on either site at the point at which the Company went into liquidation. In relation to each site, units were sold by the Company off-plan to purchasers based in a variety of different jurisdictions, including Taiwan, USA, Jersey, Nigeria, Mauritius, Zimbabwe, South Africa and Pakistan. The Applicants have produced a schedule of the purchasers for each site, the final versions of which are exhibited to Mr Campbell's third witness statement (hereafter, 'the purchasers'). The purchasers entered into sales contracts and, save for very few exceptions, each paid a reservation fee and a substantial deposit. The purchasers' investments have not yielded any return, since the proposed developments on the sites were never built. Instead, the Company entered into administration in December 2019 and moved from administration into creditors voluntary liquidation at the end of July 2020.

5. As liquidators of the Company, the Applicants are under a duty to get in, realise and distribute its assets, in accordance with the Insolvency Act 1986 and the Insolvency (England and Wales) Rules 2016. Pursuant to their duties as liquidators, the Applicants set in train arrangements for the sale of the Leicester Properties, but in order to effect such sales, they required the assistance of this Court. On 17 December 2020 the Applicants issued the current application pursuant to s.112 of the Insolvency Act 1986 ('IA 1986'), seeking directions on service, orders directing the removal of unilateral notices registered at HM Land Registry against each of the Leicester Properties, an order that all proper costs, charges and expenses reasonably incurred in the preservation and realisation of the Leicester Properties should be paid out of the proceeds of sale and directions as to the distribution of the net proceeds of sale of the said Properties.

6. On 6 January 2021, Deputy ICC Judge Agnello gave directions on service ('the Service Order').

7. On 28 January 2021, Deputy ICC Judge Barnett gave directions permitting the sale of the Leicester Properties and the removal of various restrictions registered at HM Land Registry ('the Directions Order').

8. On 6 May 2021, the sale of the Leicester Properties was completed. Following completion, the Applicants' solicitors, Lester Aldridge, held in their client account:

   (1) £400,482.64 in relation to City Heights; and

   (2) £500,543.30 in relation to #47.

9. On 17 May 2021, I gave directions as to the manner in which various interests in the proceeds of sale should be valued ('the Proceeds Order'). I adjourned the remainder of the application, which sought Berkeley Applegate relief, in order to allow time for a fuller breakdown of the Applicants' costs and expenses to be prepared and lodged.

10. On 25 August 2021, I granted Berkeley Applegate relief in respect of some but not all of the costs and expenses claimed by the Applicants.

The status of the purchasers and the extent of their interest

11. The status of the purchasers as secured creditors was not in issue. A purchaser of an interest in land has a lien over that land for any deposit or other pre-payments made under a contract: Eason (as liquidator of Alpha Student (Nottingham) Limited v Wong [2017] EWHC 209 per Arnold J; Whitbread and Co v Watt [1902] 1 Ch 835; Chattey v Farndale Holdings Inc [1997] 06 EG 152, CA.

12. As explained by Arnold J in Eason v Wong:

> 'An equitable lien is an equitable right over real or personal property to secure the discharge of a debt. An equitable lien is a form of equitable charge over the subject property. Both an equitable lien and an equitable charge are enforceable by the same remedies, namely by the appointment by the court of a receiver and a judicial order for sale, where the security is over a fund, by an order for payment from the fund. An equitable lien, like an equitable charge, confers on the holder a proprietary right, so that he is a secured creditor in a bankruptcy or winding up.'

13. The issues that arose for determination in Eason were (1) whether purchasers who had entered into contracts for the purchase of student suites in a development which did not get past demolition of existing buildings had the benefit of enforceable equitable lens and if so (2) to what property the purchasers' liens attached.

14. In relation to (1), having undertaken an extremely helpful review of the case law, Arnold J (at [44]) concluded that the liens were enforceable. There was no requirement that the purchaser should be entitled to specific performance. It was not necessary for the legal estate in question to exist. It was sufficient that the vendors

had contracted to create the legal estate in question out of another legal estate which did exist and that the legal estate which was to be created was identifiable. It was immaterial whether the legal estate in question did not exist because (i) construction of the building had not been completed or (ii) because construction had not been commenced: Chattey v Farndale Holdings Inc (1998) 75 P & CR 298.

15. In relation to (2), it had been submitted in Eason on behalf of the purchasers that each purchaser's lien attached to the company's freehold interest in the entire site and, following sale of the site, to the entire proceeds of sale. I pause here to note that some of the purchasers in the present case appear to have proceeded on the same assumption; although they did not articulate it in legal terms, the assumption was that the entirety of the proceeds of sale of the Leicester Properties should be applied in satisfying their claims as secured creditors ahead of any residual interest that the Company may enjoy in the Leicester Properties in respect of unsold flats in the same and its freehold interest. In Eason, Arnold J rejected this argument. In doing so, Arnold J placed great store by the reasoning of Blackburne J in Chattey v Farndale on this issue, quoting the following passage from Blackburne J's judgment:

> 'The reason why, in my judgment, the lien is confined to the vendor's interest in the area of land which is the subject matter of the contract and does not extend to any greater area is because the payment of the deposit is recorded as a part payment for an interest in that land and for no other with the result that, by force of that payment, the purchaser acquires an interest in the land in question. Where, therefore, the contract goes off, the interest does not revert to the vendor but is retained as security by the purchaser. The security therefore is coextensive with the acquisition of an interest in the land by force of the payment. The interest so acquired is in the land which is the subject matter of the contract and not in any other. There is, therefore, no principled basis upon which, if the contract goes off otherwise than for the purchaser's default, the lien should be held to attach to any other land of the vendor.'

16. In Chattey, the purchasers appealed against that conclusion, contending that the lien extended to all the land comprised in the same interest of the vendor. As Morritt LJ recorded at p318:

> 'During the course of the hearing of the appeal the plaintiffs abandoned that contention. Accordingly it is now common ground that the lien to which Mr Chattey is entitled is enforceable over the property comprised in the contract of sale to him …'

17. At paragraph [46] of his judgment in Eason, Arnold J noted that 'nothing in the judgment of Morritt LJ' had undermined Blackburne J's reasoning or conclusions on this issue in Chattey, adding (at [47]) that he found the reasoning behind Blackburne

J's conclusion that the lien is confined to the vendor's interest in the area of land which is the subject matter of the contract 'entirely persuasive'. I respectfully agree.

18. As each lien attached only to the land which formed the subject matter of the contract, rather than the land as a whole, no question of competing priorities between the liens arose: (Eason at [49]). Again, I pause here to note that a similar point arose in the present case, some purchasers contending, for example, that the earliest among them should be paid off in full ahead of later purchasers. In the light of Eason, this argument is unsustainable. In the present case, there is no question of competing priorities between liens and accordingly principles such as 'first in time' are not engaged.

Valuing the purchasers' interest

19. I turn next to the question of how to value the extent of the purchasers' security, given that it does not extend to the vendor's interest in parts of the legal estate corresponding to suites which were not sold or in respect of which no deposits were paid. This point was also addressed in Eason. At [51], Arnold J devised a helpful formula, reasoning as follows:

> '[51] In my view there is no real difficulty in the case of the suites which were not sold or in respect of which no deposits were paid. In the case of the six suites that were sold, but no deposit was paid, the sale prices are known. In the case of the two suites that were not sold, the asking prices are known. Given that all the other suites were sold for prices at, or very close to, their respective asking prices, it seems to me that one can take the asking prices as representing the value of those two suites. It is therefore possible to calculate a total value of all the suites … and apportion it between the value of the purchasers' interests … and the value of the vendor's interest.'

20. Having undertaken that exercise, Arnold J concluded (at [54]) that the proceeds of sale of the site, net of costs and expenses, should be divided between the purchasers and the unsecured creditors in a given ratio.

21. He further concluded that the purchasers' portion should then be distributed pari passu among the purchasers.

22. In relation to the costs of expenses to be deducted from the proceeds of sale prior to distribution, Arnold J granted Berkeley Applegate relief (on an unopposed basis), directing that the costs and expenses of and occasioned by the sale should be met from the assets of the company and the proceeds of sale in given proportions.

Relief sought on 17 May 2021

23. Against that backdrop, at the hearing on 17 May 2021, the Applicants invited me to adopt the approach taken by Arnold J in Eason. They sought an order that any costs and expenses of the sale of the Leicester Properties and attendant costs of this application approved in accordance with Berkeley Applegate principles should be paid out of the proceeds of sale and that the proceeds of sale, net of such approved

costs and expenses, be divided between the Company and the investors in accordance with the formula espoused by Arnold J in Eason at [51]. In summary, this entailed calculating the total asking price of all the accommodation units and apportioning it between the value of the purchasers' interests in the flats presold and the value of the Company's interest in the flats which had not presold. Essentially a three-stage process was proposed:

(1) first, deducting the final costs and expenses related to the sale and this application (once calculated and approved);

(2) second, calculating the percentage value to be attributed to the unsold and sold units, to work out the parties' respective entitlement to share in the net proceeds; and

(3) third, calculating the purchasers' entitlement to share in the fund set aside for the purchasers on a pari passu basis by reference to the amount of the deposits and reservation fee that they have paid (albeit only for purchasers who had not received a refund of such sums prior to the Company entering administration).

24. By his third witness statement, Mr Campbell set out full details on the way he proposed that funds should be divided, including a worked example.

25. From the correspondence in evidence, it appears that very few of the purchasers actively opposed the Applicants' suggested division of the proceeds. Those who did raised a variety of arguments. Two purchasers suggested that interest should be taken into account in the valuing of each purchaser's security. In my judgment this would be unworkable. Some maintained that the purchasers should be paid in full from the proceeds of sale of the Leicester Properties first, with the Company receiving only any surplus remaining. For reasons already explored, this does not accord with authority: see paragraphs 15 to 18 of this judgment. Some maintained that a 'first in time' approach should be applied inter se among purchasers. Again, for reasons already explored, this does not accord with authority: see paragraph 18 of this judgment. At least one of the purchasers pressed for a full refund on health grounds. Whilst this is an entirely understandable request, the Court has no jurisdiction to favour one creditor, secured or otherwise, over others on health grounds. Some purchasers argued that the costs of realisation and distribution should be borne in full by the Company, contending that the purchasers, who have already suffered at the hands of the Company, should not be made to suffer yet further by bearing any of the costs of realisation. This is a point I shall return to when considering Berkeley Applegate relief later in this judgment. In the interests of brevity I shall not attempt to summarise all of the written submissions received. Suffice it to state that I have considered them all with some care.

26. Regrettably, even if the sums sought by the Applicants by way of Berkeley Applegate relief were left out of account entirely, there would be a shortfall to purchasers. Given the sums achieved on a sale of the Leicester properties, there would in any event not be enough money to pay all the purchasers the full amount of the deposits which they paid. Whilst some purchasers have complained at the sale price achieved for the Leicester Properties, that is not an issue before me; directions for a sale of the Leicester Properties and the removal of restrictions at HM Land Registry were given by Deputy ICC Judge Barnett on 28 January 2021 and completion of the sales has

since taken place. The hearings before me which took place on 17 May 2021 and 25 August 2021 took place after completion of those sales and concerned how the proceeds of sale of the Leicester Properties should be applied.

27. At the hearing of 17 May 2021, having considered the evidence, the caselaw and all submissions made, I directed that the approach set out at [51] in Eason for calculating the division of proceeds as between the purchasers and the Company in respect of their respective interests in the Leicester Properties should be adopted.

28. My reasons were as follows. As a matter of law, having regard in particular to the guidance of Arnold J in Eason and Blackburne J in Chattey, it is clear to me that the lien enjoyed by each of the purchasers is in each case confined to the vendor's interest in the area of land which is the subject matter of each contract and does not extend to any greater area. The effect of this is that the purchasers' liens do not attach to the unsold units in each of the Leicester Properties. This in turn means that the purchasers are only entitled to look to a proportion of the proceeds of sale realised on sale of these properties, and not to the entirety of such proceeds. Given the sums realised for the properties, unfortunately this means that none of the purchasers will receive back the entirety of the sums which they invested from the proceeds of sale alone. This does not, however, prevent them from proving in the liquidation for any shortfall as unsecured creditors. Whilst recoveries in the liquidation thus far have been relatively modest, should any further realisations be made as a result of the Applicants' ongoing investigations, the purchasers will be able to share in the same as unsecured creditors.

29. At the time of the hearing before me on 17 May 2021, there was insufficient evidence before the court on which to determine the Berkeley Applegate relief sought by the Applicants. For this reason, whilst directions were given on the formula to be adopted for the division of proceeds (which essentially reflected the three stage process summarised at paragraph 23 of this judgment), the issue of what costs and expenses should be deducted at stage (1) of the three stage process was adjourned to a later hearing, which ultimately took place on 25 August 2021.

The hearing of 25 August 2021: Berkeley Applegate relief

30. By the time of the further hearing before me on 25 August 2021, the Applicants had filed further evidence relating to their application for Berkeley Applegate relief. The further evidence comprised the witness statement of Simon Campbell dated 22 July 2021. This contained detailed breakdowns of the Applicants' time costs, legal expenses and other expenses incurred in relation to the Leicester Properties. All such information was made available to the investors by email notification and uploading to the IPS creditor portal on 26 July 2021. Those of the Respondents for whom no email address was held were contacted by post.

31. The application for an order that the costs and expenses relating to the sale of the Leicester Properties (including the costs of this application) should be paid out of the proceeds of sale before they are divided between the purchasers and the Company is based on the principles set out in Berkeley Applegate (Investment Consultants) Limited (In Liquidation) [1989] 1 Ch 32 at 50-51, where it was held that in giving effect to an equitable interest in trust property, the court had a discretion to require an

allowance to be made for costs incurred and for skill and labour expended in administering the property.

32. In Re Sports Betting Media Limited (in administration) [2008] BCLC 89 at [10] to [11], Briggs J held that, by parity with the reasoning in Berkeley Applegate, the principle applied to cases where an officeholder realises property for the benefit of security holders:

> '[10] The statutory scheme contained in Sch B1 and in para 2.67 of the Insolvency Rules 1986, SI 1986/1925 contains no specific provision which would entitle the new administrators to be paid out of the fund subject to the para 99(4) charge, but Ms Agnello submitted by parity of reasoning with Re Berkeley Applegate … that the court has an inherent jurisdiction to require persons beneficially interested in property to subject their beneficial entitlements to a right of payment to persons who have come otherwise than by officious intermeddling into the position of fiduciaries in relation to the relevant fund and have incurred time and cost in realising the fund and identifying the entitlements of the beneficiaries and paying out to those beneficiaries their entitlements.
>
> [11] In my judgment, Ms Agnello is right to seek to have the Berkeley Applegate principle applied to the position of administrators who, when taking office after the cessation of former administrators, find that they are, whether they realised it previously or not, in the position of having to administer and execute the terms of the statutory charge created by Sch B1, para 99(4). It seems to me, as a matter of common sense, justice and equity, only right that the beneficiaries of that charge should have to pay collectively a reasonable sum towards the cost of having it executed in their favour against the company's assets.'

33. In Townsend v Biscoe (unreported, 10 August 2010), Registrar Simmonds, by analogy to Berkeley Applegate, held that where a security holder had taken no steps to enforce their security and had allowed the officeholder to realise the property in question, they could not claim the entire proceeds of sale without allowing a deduction in respect of the costs properly incurred in connection with that sale. The reasoning was that, had the mortgagee sought to enforce their security, they would themselves have incurred similar cost. On behalf of the Applicants, Mr Brockman submits that Townsend was very similar to this case, involving an administrator who had disposed of a property which was the subject of a mortgage; albeit paragraph 71(3) of Schedule B1 IA 1986 applied, so the security holder was only entitled to the net proceeds of sale in any event.

34. Mr Brockman very properly drew to my attention the comments of HHJ David Cooke in Green (Trustee in Bankruptcy of Tranckle) v Bramston (Liquidator of

Kingshouse Developments Ltd) [2011] BPIR 44 at [34] and [36] where he said of the comments of Briggs J in Re Sports Betting:

> '[34] It does not appear that any attempt was made to separate time involved directly in the realisation and distribution of the charged assets from any other matters requiring to be done in the administration, but on the other hand since the entirety of the assets in the hands of the second administrators consisted of the charged property, there was no question of dividing the costs of the administrators into those falling on free assets and trust property, such as had been in question in Berkeley Applegate and Eastern Capital Futures.'

> '[36] The allowance to be given [under the Berkeley Applegate jurisdiction] is a matter of discretion … I do not say that there can be no circumstances in which an allowance can be given out of trust property in respect of work which would be recoverable from other sources such as the free assets of a company in liquidation, or would in principle be so recoverable if any such assets existed, but in my view it would be unlikely to be appropriate to make such an award if the effect of it is to subject the interests of the beneficiaries to the costs of advancing, or considering whether to advance, an interest adverse to their own, as distinct from matters involved in, or for the purposes of, enforcing and giving effect to their own beneficial interest.'

35. At paragraph [81] of his judgment, HHJ David Cooke went on to point out that it is not necessary that the person to whom the allowance is made should be a trustee of the property in question. It is sufficient that he is 'a person who has done work or incurred expenditure which benefits the beneficiary'.

36. In MK Airlines Ltd [2013] 1 BCLC 9, there were two relevant classes of assets, those subject to a para 99 Schedule B1 IA 1986 charge and those not. The latter would be available to unsecured creditors and the former to the prior administrators. In that case, Sir Andrew Morritt C said at [40]:

> 'The principle that the liquidators should be entitled to recover their remuneration for services rendered in the preservation, realisation and eventual distribution of property in the paragraph 99 pool is not in dispute.'

37. Similarly, such an order was made in the case of Eason (to which reference has already been made), albeit without argument. As Mr Brockman rightly reminds me, Eason bore parallels to the present case, being a case in which proceeds of sale were divided between the secured purchasers and the unsecured creditors.

38. Mr Brockman has also properly drawn to my attention to the case of Patel and another v Barlows Solicitors (a firm) and others [2021] 1 BCLC 231. In Patel, HHJ Mithani (sitting as a judge of the High Court) at [289] set out a number of factors which may be relevant to the exercise of the discretion. These included at (f):

> 'Whether the applicant has lawful recourse to other funds for the payment of his costs, expenses, and remuneration. If he does, the court may only be prepared to exercise the jurisdiction in his favour in relation to a proportion of those costs, expenses, and remuneration.'

39. Mr Brockman submits that the principles to be drawn from the foregoing authorities include the following:

(1) The exercise of the Berkeley Applegate jurisdiction is discretionary;

(2) It is unlikely to be exercised where an office holder has officiously intermeddled or where his actions are adverse to the interests of the security holder;

(3) It is exercised on the basis of fairness, specifically the principle that those who have benefited from the realisations should contribute to the costs of the same;

(4) Whilst the question of free assets is undoubtedly a relevant factor to be considered, it is not necessarily conclusive; the court may, having regard to all of the circumstances of the case decide to exercise its discretion in respect of a proportion of the fund.

40. I accept these submissions.

41. Certain of the purchasers voiced objections to Berkeley Applegate relief being granted at both the hearing of 17 May and the hearing of 25 August, albeit a fairly small proportion of the purchasers overall. The purchasers of units 106 and 107 at City Heights, Yeh Man Li and Yeh Man Chi, for example, briefly addressed the Court at both hearings on this issue. Whilst their spoken English was limited, they made clear that their purpose in orally addressing the Court was to refer the Court to their fuller written submissions, which were prepared in English with assistance. I confirm that I have considered their written submissions, which were included in the various exhibits to Mr Campbell's five witness statements in support of this application. I have already addressed, in generic terms, a number of the arguments raised in those submissions (which went beyond Berkeley Applegate) in the course of this judgment; in the interests of brevity I will not repeat my conclusions. For present purposes suffice it to state that Yeh Man Li and Yeh Man Chi objected to Berkeley Applegate relief being granted and maintained that the costs and expenses in question should be paid out of other assets of the Company.

42. Another purchaser, Ms Ran Xu, also opposed the grant of any Berkeley Applegate relief. Ms Xu had prepared written submissions, set out in a series of emails in evidence before the Court. I confirm that I have considered all of the written submissions of Ms Xu contained in the bundle. Ms Xu also addressed the Court at both hearings. She informed the Court that she suffered from certain health conditions, which were more fully addressed in emails in evidence before me the

Court. It was clear that Ms Xu has found the unfortunate loss of her investment highly stressful and that this has triggered or exacerbated other health conditions. Naturally the Court has every sympathy for the distress which Ms Xu, and indeed other purchasers, have suffered as a result of their failed investments in the Leicester Properties.

43. Ms Xu sought a full refund. For reasons already explored, the proceeds of sale of the Leicester Properties were insufficient to enable a full refund for all purchasers, even leaving aside the question of Berkeley Applegate relief. This does not however prevent the purchasers from proving in the liquidation as unsecured creditors for the balance: see paragraph [28] above.

44. Ms Xu also made serious allegations of wrongdoing against the Applicants and/or their firm Quantuma, alleging not only negligence but fraud. I was taken to no CPR compliant evidence, however, substantiating, or raising a prima facie case in respect of, such allegations, which are denied by the Applicants. When I asked Ms Xu whether she was seeking an adjournment of the application to allow time for her to seek legal advice or representation or to allow time for the filing of formal evidence, she confirmed that she was not and that she was content for the hearing to proceed. On the basis that no adjournment was sought or granted for the filing of further evidence, I continued with the application on the evidence before the Court. Following circulation of this judgment in draft, Ms Xu has since made clear by email dated 21 October 2021 that her intention in raising such matters with the Court was, as she put it, not to seek a judgment on the same within the context of this application, but simply to indicate her intention to take such matters up with 'the relevant authorities' as and when appropriate.

45. Having considered with some care the evidence filed in this matter and the submissions made, I have decided that it is appropriate in the exercise of my discretion to grant Berkeley Applegate relief, albeit not in the full sum sought by the Applicants.

46. The factors which I have taken into account in concluding that Berkeley Applegate should be granted include, in particular, the matters set out at paragraphs 47 to 50 below.

47. As office-holders, the Applicants are under a duty to get in, preserve and distribute the insolvent estate. To adopt the language of Briggs J in Re Sports Betting Media at [10], the Applicants and the agents retained by them in their capacity as liquidators of the Company are 'persons who have come otherwise than by officious intermeddling into the position of fiduciaries' in relation to the purchasers' secured interests in the Leicester Properties and latterly the proceeds of sale of the same. The Applicants have spent considerable time and have incurred significant costs in identifying the purchasers and their entitlements, realising the Leicester Properties and putting in place arrangements to pay to the purchasers their respective proportions of the proceeds of sale.

48. Following the Company's insolvency, the Applicants as office-holders were in reality the only persons who were in a position to (i) reconstruct the Company's books and records, which were incomplete and out of date at the time of their appointment; (ii)

formally require the assistance of the director of the Company and the Company's former solicitors in that process; (iii) locate all purchasers, who were based around the globe; (iv) obtain and carry out complex directions on service to ensure that all purchasers, wherever they might be located in the world, were given a fair opportunity to engage with the Applicants and with this application at every stage; (v) obtain and carry out complex directions on the removal of numerous restrictions registered at HM Land Registry with a view to effecting a sale; (vi) market the Leicester Properties; (vii) preserve, protect and insure the Leicester Properties pending sale; and (viii) take specialist legal advice and seek directions from the Court on the apportionment of the sale proceeds. There was no institutional secured creditor, such as a bank, who could have exercised a power of sale of the whole of City Heights or #47. The purchasers themselves would have been in an impossible position seeking to sell their secured interests in two empty plots of land on an individual basis. Realistically, the only alternative to the Applicants carrying out (i) to (viii) above would have been for court appointed receivers to have been appointed, with the attendant costs of that process, which in all likelihood would have equalled, if not exceeded, the costs of the Applicants.

49. I accept that in this case the Applicants have lawful recourse to other funds for the payment of their costs, expenses and remuneration. Whilst this is undoubtedly a factor to take into account when determining whether or not to grant Berkeley Applegate relief, however, it is not the only factor. The other funds currently available are fairly modest and, if the court does not grant Berkeley Applegate relief, the effect will be that the costs are borne disproportionately by the unsecured creditors. The purchasers have undoubtedly benefited from the hard work undertaken by the Applicants. None of the work undertaken by the Applicants in respect of which Berkeley Applegate relief is to be granted can sensibly be described as 'adverse' to the interests of the purchasers; to the contrary, all such work has been in their interests. It is as a result of the Applicants' endeavours that there are any proceeds to distribute at all; but for the work of the Applicants, the Leicester Properties would remain unsold to this day. Again, to adopt with gratitude the language of Briggs J, it seems to me, as a matter of common sense, justice and equity, only right that the purchasers should have to pay collectively a reasonable sum towards the cost of identifying, preserving and realising their interests in the Leicester Properties.

50. In my judgment the proportion of permitted costs which should be borne by the purchasers of each of City Heights and #47 should mirror the proportion in value of the purchasers' interests in each such property when compared to the value of the whole. The simplest way of achieving this is to direct that the permitted costs be deducted from the proceeds of sale before they are divided between the Company and the purchasers in accordance with the order of 17 May 2021.

Permitted Costs

51. I turn then to address the question of which costs should qualify for Berkeley Applegate relief. In this regard attentions at the hearing of 25 August 2021 were focussed primarily on Mr Campbell's fifth witness statement dated 22 July 2021, considered against the backdrop of his earlier statements. The fifth witness statement contained a detailed narrative of the work undertaken and expenses incurred.

Exhibited to the statement were itemised breakdowns of the same, which were closely considered at the hearing.

52. In the interests of brevity, I will not set out a comprehensive account in this judgment of the individual fee and costs items explored at the hearing. In summary terms however,

(1) the Applicants very properly accepted that the time costs and legal costs forming the subject matter of their Berkeley Applegate application should be limited to the period up to and including 17 May 2021. This concession was made on my indication that the initial evidence filed in respect of time costs and legal costs in the lead up to the 17 May hearing was unsatisfactory and that, had the subsequent evidence relating to the Berkeley Applegate application, which was considered at the hearing of the 25 August 2021, been available to the Court on 17 May 2021, the later hearing would have been unnecessary;

(2) I rejected the Applicants' proposal that, in addition to time costs spent directly on the Leicester Properties, two-sevenths of the Applicants' time costs incurred in administering the general property portfolio should be allowed for. In my judgment these should be treated as a general liquidation expense rather than borne by the purchasers;

(3) Certain of the legal costs sought to be included within the Berkeley Applegate relief were excluded. In summary (a) legal costs relating to the activity stream described as 'general advice' were not included within the Berkeley Applegate relief ordered; only transactional costs relating to the Leicester Properties and legal costs relating to this application (up to and including 17 May 2021) were included and (b) a downwards adjustment of £5,000 plus VAT was directed to allow for excessive partner time (the modesty of the adjustment being a consequence of the relatively small difference between the partner rate charged (£270) and rate charged for a grade C solicitor (£180-£190).

53. Taking all such matters into account, on 25 August 2021, I directed the Applicants to deduct from the proceeds of sale of the Leicester Properties prior to distribution in accordance with the order of 17 May 2021 the following sums:

(1) In respect of officeholder costs and expenses (other than legal costs and disbursements set out at (2) and (3) below) incurred in respect of the Leicester Properties, £58,185.62. This comprised time costs totalling £31,499 and other expenses (such as sales commission, hoardings, insurance, as detailed in the evidence) totalling £26,686.62;

(2) In respect of legal transactional costs incurred on the sale of the Leicester Properties, £19,283.74;

(3) In respect of the legal costs and disbursements of the application (up to and including 17 May 2021), £76,885.62 (including Counsel's fees of £20,234).

54. As previously explored, the purpose of directing that the sums set out at paragraph 53 (1) to (3) above be deducted from the proceeds of sale before dividing the balance between the Company and the purchasers in accordance with the order of 17 May

2021 is to ensure that only the appropriate proportion of such costs are borne by the purchasers: see paragraph 50 above. The Berkeley Applegate relief which I have granted extends only to that proportion in each case.

55. The Applicants' remaining costs of and occasioned by the application shall be costs in the liquidation.

ICC Judge Barber

22 October 2021