IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS AT MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF PRIME NOBLE PROPERTIES LIMITED (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Neutral Citation Number: [2022] EWHC 2271 (Ch)

Case No. CR-2021-MAN-000144

1 Bridge Street West
Manchester
M60 9DJ

Friday, 18th February 2022

Before:
HIS HONOUR JUDGE STEPHEN DAVIES SITTING AS A HIGH COURT JUDGE

B E T W E E N:

PRIME NOBLE PROPERTIES LIMITED (IN ADMINISTRATION)
Applicants

and

THE RESIDENTIAL LEASEHOLDERS
(as named in the Schedule appended to the Claim Form)
Respondents

MR J PICKERING QC (instructed by JMW Solicitors LLP) appeared on behalf of the Applicant
THE RESPONDENTS Regan Blanton King and Abeba Biba Mansour-Waring appearing in person, and Charlie Cunningham appearing as a former director of Prime Noble Charges Ltd in person

JUDGMENT
(Approved)

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HHJ STEPHEN DAVIES

1. This is an application issued on 15 November 2021 by the joint administrators of the company Prime Noble Properties Limited (in administration) seeking an order for possession and sale of a number of residential long leases in relation to a development site at Ford Lane in Salford, Greater Manchester. The application is supported by the witness statement of Mr Stanley, one of the joint administrators of the company. There are no witness statements in response. There is also an updating witness statement from Mr Williams of the applicant's solicitors, which deals with the service of the application which has taken place in accordance with an order made on 26 November 2021 giving directions for service of the application and notice of the application as listed for hearing today.
2. Notice has been given in accordance with the order in relation to the respondents who are the owners of the residential leases to which I shall refer in a moment and, in addition, to the Official Receiver as liquidator of the freehold company to which I shall refer in a moment, and to a company known as Prime Noble Charges Limited ("PNCL") whose former director, Mr Cunningham, has appeared today and also to the Duchy of Lancaster given that PNCL is currently dissolved. Finally, notice has been given to 21 unilateral notice holders, again, to whom I shall refer in a moment.
3. There have been responses from a number of the residential leaseholders. A number have consented to the application. Others have not responded one way or another. None have served evidence, either by the ordered due date of 14 January 2022 or otherwise, but two have attended the hearing and made representations: first, Ms Abeba Biba Mansour-Waring, and second, Mr Regan Blanton King. They have both made helpful relevant observations and I am grateful to them. No one else has appeared or taken any part apart from Mr Cunningham, who has also made some focused relevant observations.
4. This was intended to be a development of 119 flats on a site in Salford. As matters currently stand the site is effectively a cleared site with the benefit of some groundworks but with continuing planning permission for the development. Construction has stalled since around 2017. The freehold title to the property is owned by a company known as FSL Properties Ford Lane Limited which is the company which has been in liquidation since 2016. Freehold title is subject to a charging order granted originally to a third party, a Mr Choudhury, which secured what was in 2014, when it was granted, a relatively modest amount of some £40,000 odd. The charging order is protected by a unilateral notice.
5. The applicant company is the holder of a headlease for a term of 250 years at an annual rent of some £35,000 odd which rent is subject to a side letter providing that it is not payable until the development has been completed. It is also subject to the charging order, because it was entered into after the charging order without Mr Choudhury's consent whilst protected by the same unilateral notice. There is also a mortgage granted in favour of PNCL and there are also 53 residential subleases, each for a term of 150 years, entered into on various dates between March 2016 and November 2017. Each leaseholder paid a deposit, varying in amount, in order to obtain that lease but, as is common with developments like this, the lease was granted before the property had even been constructed. Again, these leases are also subject to the charging order for the same reasons as given above, as well as mortgages in favour of the company to secure the deferred consideration for the balance of the purchase price. Of the remaining 66 intended flats not subject to those leases, 21 unilateral notices have been registered against the headlease, each protecting the still uncompleted agreement for a lease.
6. In 2017 works effectively ceased. By that time it appears that a very substantial amount, some £2.7 million, had been collected in deposits. By the time the applicant went into

administration in February 2019 all of that had effectively been spent, although on what is not currently entirely clear. In 2019 the administrators instructed agents to value and sell the unencumbered freehold interest. Offers were received, the highest being apparently around £2.5 million, but there was no interest in any of the lesser encumbered estates.

7. There is a recent valuation, obtained by the administrators in October 2021, which records that because of the complications of the ownership of this site the headlease has no more than a nominal value, as does the freehold title and the individual residential long leases. Effectively, unless or until something can be done to make the property realisable in legal terms, these interests are effectively unsaleable. By contrast, if all of the encumbrances were to be cleared, the valuers say that the market value for the freehold title clear of the other interests would be in the region of £2 million. Thus, it can be seen the substantial difference in value between the property as it stands and the property if the legal titles are cleared up.

8. Accordingly, the administrators have applied to the court seeking its sanction for that to be done so that everything can be sold as one clear title. In order to further that approach, in October 2020 the applicant took an assignment of the charging order, giving notice to all concerned, and it now seeks to enforce the charging order by seeking an order for possession and sale of the 53 residential long leases pursuant to Part 73.10(c) of the Civil Procedure Rules. The plan then is to sell the property free of encumbrances and to distribute the proceeds of sale in accordance with the draft order to which I shall refer below. It is recognised that it would be necessary at that point for the administrators to make an application under paragraph 71 of Schedule B1 to the Insolvency Act for permission to sell the leases free from the unilateral notices registered by the 21 persons who agreed to purchase the lease but did not, in fact, do so.

9. In terms of the response of the various parties involved, the liquidator of the freehold company is supportive and has consented to the proposal. The company PNCL has been in negotiations with the administrators, which have not as yet led to a resolution, so that there would need to be an further paragraph 71 application if agreement cannot be reached. As to the residential long leaseholders, there are 53 different sets of owners who live in various jurisdictions around the world. It appears from the evidence that about 40% of the leaseholders have consented, whilst others have not responded at all and the two who have appeared today have raised concerns which I shall address in a moment.

10. Insofar as the application for possession and sale is concerned, it is clear that the court has a jurisdiction to make the order and a discretion whether or not to do so. However, as Mr Pickering QC who appears for the applicant submits, on the basis that there is a valid charging order and the procedural requirements have been complied with, the applicant is *prima facie* entitled to an order for possession and sale. As to discretion, Mr Pickering QC submits, rightly in my judgment, that there are no factors to indicate that the court should not exercise its discretion because it is clear from the evidence that as matters currently stand the property effectively is unsaleable and the only sensible way of realising value for everyone is for there to be a process where the property can be sold as one. Therefore, it is plainly in everyone's interests for that to be done. No one has positively objected to that course and there is substantial agreement that it is the appropriate course.

11. Various other options have been identified but, for the reasons given in evidence and in Mr Pickering QC's written and oral submissions, I am satisfied that they would not produce any more beneficial outcome and, indeed, are likely to produce a less beneficial outcome for all concerned. These other options include the option of doing nothing, the option of the administrators seeking to forfeit, and of seeking a court declaration that the leases have been frustrated. For all of those reasons, I am satisfied that I should make an order for possession and sale of the residential long leases under Part 73(10(c) of the Civil Procedure Rules.

12. I now turn to the question of distribution. Strictly speaking, as the applicant recognises and as Mr Pickering QC observes, it is unnecessary for the court to deal with distribution at this stage. It could be left to a further hearing. However, it is obviously right that the court should consider distribution at this stage in a case like this, firstly because it is relevant to the exercise of the discretion and secondly, where the court is dealing with a complex case such as this, it is helpful for there to be as much certainty as possible going forwards, as to what is to happen, who is to get what and how the process is to work. Otherwise, the court is not doing as much as it properly can to assist all parties to achieve the ultimate outcome of trying to get the property sold with the fairest possible distribution of the proceeds.
13. There is no disagreement, for understandable reasons, that the first step is to discharge the charging order by paying off what is due under it. It is, even now, only a relatively modest amount, approximately £60,000.
14. The second step is to allow the administrators to receive payment of their fees, costs and disbursements in relation to the property. As identified by the applicant in the evidence, and by Mr Pickering QC in his skeleton argument, that is on two bases: the first is that the applicant, as the assignee of the charge, is entitled to the costs of sale under section 105 of the Law of Property Act 1925. The second, and arguably wider or alternative basis, is under what is commonly referred to as the Berkeley Applegate jurisdiction, known as such after the case of that name, *Re Berkeley Applegate (Investment Consultants Limited)* 1989 1 Ch 32, referred to by the editors of Lightman & Moss in section three of *The Law of Administrators and Receivers of Companies* to which I have been taken by Mr Pickering QC.
15. Again, there is no dispute, in principle, as to this. I am satisfied that the applicant is plainly entitled to an order to this effect, both under the express terms of section 105 as to payment of all costs, charges and expenses properly incurred as incident to the sale or any attempted sale or otherwise, but also under the *Berkely Applegate* principle where, as Mr Pickering QC submits, in this case the administrators have had to and will need to continue to take steps to realise the respective interests in a way which will realise value and that they are doing so in a dual capacity: first, in their capacity as administrators of the company for the benefit of the company's interest in this property; but secondly in the wider interests of everyone who has an interest on the basis that if they do not do so then either nothing will happen or that if anything is done it could only be done by other professionals being appointed to do such as receivers which would cost even more than would be the case if the administrators were permitted to carry on doing what they have done. I am satisfied, therefore, that in principle the order should properly be made.
16. During the course of the morning concerns have been expressed, both as to the amount of the costs and as to the need for clarity as to what is included and what is not included. Rather than seeking to resolve these issues today, which is simply impracticable, what I should do today is to make an order which firstly produces clarity as to which costs are included and which not, and which secondly provides a process by which anyone who is dissatisfied with the amount which the administrators propose to retain can obtain more information and, if appropriate, seek to make a challenge.
17. As to both, Mr Pickering QC has shown that the administrators have thus far been open with the parties as to the actual and proposed costs going forwards and confirmed on their behalf that they are content to carry on doing so. I have been shown in the hearing bundle the information which they provided as at 15 October 2021, breaking down the actual and estimated costs into various categories, attributable either to property realisation, which are the costs which are claimed in this respect, and costs not attributable to property realisation, which are not.

18. As to the first, I am satisfied that the expanded version of paragraph 7.2 of the original draft order, which Mr Pickering QC has provided during the course of the hearing, will provide clarity as to what costs are included and what costs are excluded so as to limit any uncertainty and scope for dispute going forwards. This provides that the fees, costs, and disbursements of the joint administrators of the applicant in relation to the property should include, but not be limited to, (a) the joint administrators' time costs, (b) legal fees, (c) costs relating to securing and insuring the property, and (d) all categories of expenditure as set out in the statements of costs annexed to this order, but excluding those described in the statement of costs as being "not attributable to property realisation".
19. As to the second, the key objectives in my view are the continuing provision of information together with the ability to challenge any disputed payment within a reasonable time, time limited to provide the administrators with comfort that there will not subsequently be some late challenge which might cause unfair prejudice. Again, that has been dealt with appropriately in my judgment by the introduction of a further clause to the draft order whereby, following completion of the sale and no later than 21 days before the proposed distribution, the applicant will send to the respondents an estimated distribution statement which will update and identify the amounts proposed to be taken out. In the absence of any respondent issuing and serving a court application to challenge that distribution statement by the identified distribution date the applicant should be permitted to distribute in accordance with that distribution statement. This in my view provides reasonable comfort without seeking to prescribe in absolute detail, which would be impossible at this stage, exactly how much is allowable in relation to which particular items.
20. Moving on as to the distribution, the balance is to be divided 30/70 as between the freeholder and the applicant leaseholder. That is a figure which has been agreed as between the freeholder by its liquidator and the administrators of the applicant and there has been either consent or no objection from the residential leaseholders. It is explained as being justified on the basis of a fair proportion of the freeholder claim against the administrators by reference to the value of all claims. As Mr Stanley confirms in his witness statement, it is likely to be less than the estimated value of the freehold interest by reference to ground rent values. It is also subject to a cap by reference to the amount of the freeholder claim. I am satisfied therefore that is an entirely reasonable division.
21. Turning next to the 70% which goes to the leaseholders, that has to be divided as between the applicant as the long leasehold owner and the residential leaseholders. The proposal is put forward as a 55/45 split to reflect the split of flats between those where leases have been granted to the residential leaseholders, and those which have not. Again, there is no objection to that and nor could there sensibly be any objection in my judgment. As Mr Stanley says, it might be possible to undertake some more detailed analysis, seeking to measure the area and the value of each individual proposed flat and to take into account the value of other ancillary items, but that would be costly and time-consuming and unlikely to produce any significantly different outcome, in particular one which would be significantly better for the residential leaseholders. I, therefore, approve that as a split.
22. The final issue is the division as between the 53 residential leaseholders. As the applicant recognises, this is not something which directly concerns the administrators of the applicant, but it is clearly something which the court can and should resolve it if can do so fairly in the context of this application. It has been raised fairly and squarely by the applicant in the application, the respondents have had the opportunity to comment on it, and if the court does not do so today, then that would mean that the whole of the 45% share would have to be paid by the administrators into court, followed by some process whereby these issues were

resolved. It is no one's interests for that to be done. Since it would only lead to further delay and cost and most unlikely to produce any different outcome.

23. The administrator's position, adduced simply to assist the court, is to suggest that an equal division as between the residential leaseholders is the fairest outcome having regard to two particular points. The first is that there is no evidence that there is a substantial difference as between what would have been the valuation of each of the completed flats had the development been completed. That is a good starting point in favour of an equal division. The second point is that because what this court is concerned with is the realisation of proprietary interests in the flats that would have been completed, rather than in their value when completed, then all other things being equal everyone should get the same return on their proprietary interest in these flats.

24. It is right to say that for her part there was some concern expressed, understandably, by Ms Mansel-Waring about the fact that she paid a fairly substantial deposit of some £60,000, whereas it appears from the evidence that the majority may have paid less, something in the region of £25,000, and she says that some may only have paid a few thousand pounds. She queries why she should get no more than the others when, on the face of it, she has paid a lot more. She expresses, understandably, her wider concern that this money, which she says represented part of her retirement fund, may well be lost to her if she only gets a proportionate share and there is no other way of realising or recovering the amount that she has paid.

25. That is, of course, a very serious issue for her and others in her position, and not one which this court or indeed of course the applicant seeks to minimise. The difficulty however is that where developments such as this fail in this way there is a limit under the existing law as to what can be done to recompense investors in full where the reason that the developments have not been completed is that the development company has gone into insolvency. If there is only a limited pot of money, since established legal principles have to be applied in relation to that pot it follows that some people are going to lose out if – as is the case here - they only have unsecured claims in relation to monies paid out by way of deposits and the like. That is very regrettable but it is not something the court can address in the context of this application. There may be other ways of seeking to recover any such claims if companies or individuals with funds to satisfy such claims can be identified and a good cause of action also identified, but that is not something which this court at this stage can address. Since this court has to choose the least worst outcome which accords with recognised legal principles then it seems to me that the fairest way to do so is the principle of equality and that, therefore, each residential leaseholder should have an equal share in their proceeds. For those reasons I am satisfied that this is the appropriate course in this case.

26. All this leads me to the conclusion that the applicants are entitled to an order on the terms proposed as amended before and in the course of the hearing and I will make an order in those terms.

End of Judgment.

Transcript of a recording by Ubiqus
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This transcript has been approved by the judge.