



NEUTRAL CITATION NUMBER: [2022] EWHC 988 (Ch)

Case No: HC-2017-002742

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

Heard remotely at:

7 Rolls Buildings

Fetter Lane

London EC4A 1NL

Date: 29 April 2022

Before:

MR JUSTICE MARCUS SMITH

Between:

**ABSOLUTE LIVING DEVELOPMENTS LIMITED (IN
LIQUIDATION)**

(Acting by its Liquidator, Louise Mary Brittain)

Claimant

Applicant

- and -

(1) DS7 LIMITED

(2) ANDREW JOHN CAMILLERI

(3) CHARLES ALEXANDER CLUNIE CUNNINGHAM

(4) GOZON LIMITED

(5) EPG MANLET LIMITED

**(6) UM1 LIMITED (IN CREDITORS' VOLUNTARY
LIQUIDATION)**

(7) ETRUSCAN (MANCHESTER) LIMITED

(8) PHILIP WRIGHT (T/A PIXEL BOMB)

(9) TIMOTHY ACKREL

(10) ALAN PIERCE

(11) 2380 REVERSIONS LIMITED

(12) SC UNIVERSAL LIMITED

**(13) STEPHANIE CAMILLERI (AKA STEPHANIE
SPENCER)**

Defendants

-and-

**ABSOLUTE LIVING DEVELOPMENTS (ORCHID POINT)
LIMITED**

Respondent

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

Approved Judgment

MR JUSTICE MARCUS SMITH:

1. By an agreement dated 29 November 2018 (the **Settlement Agreement**), the above-named proceedings were settled. The parties to the settlement agreement were the parties to the proceedings, and a company known as Absolute Living Developments (Orchid Point) Limited (**ALDOP**). The proceedings were brought to an end by an order, made by consent, which was in substance a “Tomlin Order” (the **Order**). The proceedings were “stayed on the terms set out in the Settlement Agreement” (paragraph (2) of the Order). The claimant (**Absolute Living**) and some of the defendants (referred to as the **Settlement Defendants**) were given “permission to apply to the Court to enforce the terms of the Settlement Agreement...without the need to bring a new claim” (paragraph (3) of the Order).
2. Absolute Living, I should say, is in liquidation, and acts by its liquidator (the **Liquidator**) Ms Louise Brittain.
3. By an application notice dated 8 April 2022, Absolute Living seeks various declarations and orders regarding certain aspects concerning the enforcement of the Settlement Agreement. Before I set out the declarations and orders sought, I should set out the relevant parts of the Settlement Agreement to which the application relates and the relevant factual history:
 - i) By clauses 6.6 and 7 of the Settlement Agreement, ALDOP agreed: (a) to execute any documents that the Liquidator might, in her sole discretion, consider necessary or desirable to transfer the legal and beneficial ownership of a property known as **Empress Mill** to Absolute Living or any third party nominated by her; and (b) to enter into and deliver to the Liquidator a power of attorney granting her authority to enter into such documents in the event that ALDOP declined to enter into such documents or was otherwise unable to do so or did not do so.
 - ii) The form of the power of attorney was stipulated to be “in substantially the form set out in Annex IV” to the Settlement Agreement (clause 7 of the Settlement Agreement). Obviously, the form in Annex IV is not complete: no dates are included and the identity of the donor is left blank. The form is also unsigned. That is entirely understandable: these details would be inserted when the power of attorney was executed. What is important is that all material terms were set out explicitly in Annex IV.
 - iii) On 29 November 2018, the solicitors for ALDOP (Messrs Banks Kelly) returned to the Liquidator (via her solicitors, Messrs Mishcon de Reya) by email a copy the execution page of the power of attorney (but no other part of the power of attorney). It is quite clear from the formatting and wording of the execution page that the Annex IV precedent was used. The document says “This document has been executed as a deed and is delivered on the date stated at the beginning of it.” Then, there appears a signature panel, which in the Annex IV precedent reads “SIGNED as a deed by [...] in the presence of...”, but which in the executed version reads “SIGNED as a deed by Laura Harding of Absolute Living Developments (Orchard Point) Limited in the presence of...”. There is then a signature in the signature box, and below that the signature and details of the witness attesting to Ms Harding’s signature appear.

The covering email states: “Please find attached...[powers of attorney] for... Absolute Living Developments (Orchid Point) Limited”.

- iv) As a counsel of perfection, Mishcon de Reya should probably have insisted at once that a complete version of the power of attorney be provided. In the event, no such request was made in 2018. A request was made by email on 17 June 2021 to Banks Kelly (“We do not believe that we ever received a full copy of the ALDOP Power of Attorney, please now provide us with a copy by return”) and again on 13 July 2021 (“We should be grateful if you would now provide us with: (i) the original ALDOP Power of Attorney; and (ii) a certified copy of the same”). Neither email received the courtesy of a response and – more importantly – no copy of the power of attorney was produced.
- v) On 30 April 2019, Ms Harding, who had signed the power of attorney, resigned as a director of ALDOP and the third defendant to the proceedings – Mr Charles Cunningham, a Settlement Defendant – was appointed in her place.
- vi) On 28 April 2021, the Liquidator directed ALDOP to transfer Empress Mill to Absolute Living. ALDOP failed to do so. In those circumstances, the Liquidator used the authority conferred on her by the power of attorney to execute the necessary documents. On 19 October 2021, the Liquidator again relied on the power of attorney to send notices to the qualifying tenants of Empress Mill in accordance with section 5 of the Landlord and Tenant Act 1987, again after ALDOP had refused to do so.
- vii) It is plain that ALDOP’s refusal to execute these documents is because Mr Cunningham asserts that the Liquidator has lost the right to direct ALDOP to transfer Empress Mill to Absolute Living (see, for instance, Mr Cunningham’s email dated 29 May 2021). Mr Cunningham also asserts that the power of attorney is no longer valid. By an email dated 12 October 2021, Mr Cunningham stated:

“As you know, I am the sole director of ALDOP. I have already made it abundantly clear, some months ago, that you have no continuing power under the Settlement Agreement to require us to sign anything or to use any power of attorney that you may purport to hold. If you attempt to sign the section 5 notices based on a power of attorney that is invalid, you will be committing an offence.”

It is important to note that Mr Cunningham’s contention that the power of attorney is ineffective is based upon arguments that are not to do with the form of the power of attorney, nor the fact that the complete and executed power of attorney was not provided by ALDOP to the Liquidator.

- viii) On 29 June 2021, I heard an application by Mr Cunningham (made under paragraph (3) of the Order) seeking an injunction against the Liquidator preventing her from seeking to sell pursuant to the Settlement Agreement certain other property, which (although I cannot be sure; and nothing turns on this) did not include Empress Mill. That application was unsuccessful, for reasons set out in my judgment reported under neutral citation number [2021] EWHC 2311 (Ch). Costs were ordered against Mr Cunningham. Mr

Cunningham did not pay those costs and, as a result, he was made bankrupt at the instance of the Liquidator in the County Court at Wrexham on 31 March 2022. As a result, Mr Cunningham was disqualified from acting as a director (without the leave of the Court). In his place, Mr Andrew Cunningham was appointed director of ALDOP.

- ix) On 23 February 2022, the Liquidator agreed heads of terms for the sale of Empress Mill with a purchaser. The application is supported by a statement from the Liquidator's solicitor (Mr Daniel Davis of Mishcon de Reya), which states in paragraph 26:

“The Applicant respectfully requests that the Court deals with the Application on an urgent basis for the following reasons:

- (a) As explained above, a commercial deal has been agreed with a new prospective purchaser to acquire [Empress Mill].
- (b) Heads of terms (dated 23 February 2022) have been agreed with a timeline to exchange of contracts on 30 April 2022 and completion to occur within three weeks of exchange, with a current longstop date of 30 May 2022.
- (c) The new prospective purchaser is in the process of instructing new legal advisers as their previous solicitors have confirmed that they are conflicted, which only further compresses the timeline the parties are working towards.
- (d) The new prospective purchaser is ready, willing and able to acquire [Empress Mill] on the above basis. Any delay in the timeline which pushes completion past the end of May 2022 could result in the new prospective purchaser pulling out of the transaction.

...”

4. The application seeks the following declarations and orders:
- i) A declaration that the Liquidator had the authority to enter into the documents she executed pursuant to the Settlement Agreement under the power of attorney.
 - ii) An order that ALDOP provides the Liquidator with a full copy of the power of attorney.
 - iii) An order that ALDOP execute a new and valid power of attorney within 24 hours, failing which an order that if no new power of attorney is provided, the Court either empower the Liquidator to execute a new power of attorney on ALDOP's behalf or itself do so.
5. Given the prospective sale, the need for a complete version of the power of attorney is obvious and has become urgent. That is because the prospective purchaser will ask to see the complete version. That is entirely unsurprising, and is something I would expect any prudent purchaser to request to see.
6. The need for a fresh power of attorney is less clear. Mr Davis explains the reason for this in paragraph 24 of his statement: apparently, the Liquidator (having taken advice

from her real estate legal advisers) believes that HM Land Registry may require a power of attorney executed within the last 12 months.

7. This application is dated 8 April 2022, and was listed before me (all matters arising out of these proceedings are reserved to me) for hearing on 28 April 2022, with a time estimate of one hour. The application was opposed by ALDOP, who acted by Mr Andrew Cunningham, who asked that Mr Charles Cunningham be given permission to address the Court on behalf of ALDOP. I gave that permission.
8. In the event, even an hour and a half was insufficient to resolve the application, mainly because Mr (Charles) Cunningham (all references to Mr Cunningham from hereon are to Mr Charles Cunningham, unless I state to the contrary) applied to adjourn the application on grounds that: (a) the application was not urgent; (b) there was insufficient time to deal with the application; and (c) ALDOP had had insufficient time to prepare.
9. I rejected the application to adjourn because (for the reasons given by Mr Davies) it seemed to me that the application was urgent. Although part of the urgency was self-inflicted by the Liquidator (the application could, and should, have been made sooner), the potential loss of the sale of Empress Mill is something that must be avoided. It is the Liquidator's primary duty to get in and realise Absolute Developments' assets, and I consider that even if the urgency in this case is to an extent self-inflicted, I should nevertheless seek to assist the Liquidator in her responsibilities, provided there is no other prejudice. I have considered whether there is prejudice ALDOP, and have concluded there is none. ALDOP has had notice of this application since 8 April 2022, and has therefore had ample time to prepare. Although Mr Cunningham was right to say that there was insufficient time to dispose of the application, I have heard substantial argument between 9:00am and 10:30am today (when I had to adjourn in order to continue hearing the trial I am in the middle of) and I directed that Mr Cunningham provide me with written submissions to supplement anything he wanted to say by 4:00pm today and counsel for the Liquidator (Mr Passfield) to respond, if so advised, before midnight tonight. This would enable me to (if necessary) hear the parties further on the morning of 29 April 2022 and to determine the application before 30 April 2022.
10. This is my ruling in respect of the application. I make it having considered not only the oral argument I heard on the morning of 29 April 2022, but also the written submissions of Mr Cunningham and of Mr Passfield. I include in this further written submissions from Mr Cunningham received just before 7:00am on 29 April 2022. Although Mr Cunningham specifically requested further oral hearing on the reasons why he considered the power of attorney to be invalid, for the reasons I set out below, I do not consider that such submissions would assist me. I did not, therefore, list this matter for further oral hearing.
11. I am conscious that this is an application made under paragraph (3) of the Order and it seems to me that this somewhat constrains the extent to which I can give the declarations and make the orders sought in the application. The Order permits applications to "enforce the terms of the Settlement Agreement...without the need to bring a new claim", and it seems to me that most of what is sought in the application goes beyond this limited ability to make an application without issuing fresh proceedings. That said, ALDOP is obviously doing everything it can to thwart the

sale, including by asserting that the power of attorney is invalid. It seems to me that ALDOP's attempts to thwart the sale have both a legitimate and an illegitimate aspect that I need to bear in mind. More specifically:

- i) The contention that the power of attorney no longer has effect because of circumstances which have nothing to do with the circumstances of its execution are, as it seems to me, points that ALDOP is entitled to make, if it wishes to do. The proper forum for that is an application for an injunction to restrain the Liquidator from entering into the contract for the sale of Empress Mill. Such an application could and should, if ALDOP were serious about wanting to stop the sale, have been made many months ago. Indeed, the point should have been made when this matter was last before me on 29 June 2021.
- ii) The application for a declaration that the Liquidator had the authority to enter into the documents she executed pursuant to the Settlement Agreement under the power of attorney is misconceived. That would prevent ALDOP from making a point regarding the power of attorney that had nothing to do with the circumstances of its execution. I say nothing about the merits of such an argument, but to prevent ALDOP from making the point would be to go well beyond enforcing the terms of the Settlement Agreement.
- iii) Similarly, it seems to me that to make an order under paragraph (3) of the Order that ALDOP execute a fresh power of attorney is nothing to do with the enforcement of the Settlement Agreement and, if a fresh power of attorney is needed, then a Part 8 Claim needs to be issued and such an order sought. I make clear that I have a great deal of sympathy with the Liquidator's position, and the urgency of matters: if such a claim were issued, I would deal with it myself, and would be prepared to hear argument in relation to abridgements of time.
- iv) So much for the legitimate aspects of ALDOP's efforts to derail the sale. The illegitimate aspects of these efforts relate to the meretricious attempt to take advantage of ALDOP's breaches of the Settlement Agreement and its failure to provide a proper version of the executed power of attorney. I consider that I can deal with these illegitimate aspects under paragraph (3) of the Order, in that they are clearly directed to enforcing the terms of the Settlement Agreement.
- v) In my judgment, the Liquidator is entitled to have produced to her the original power of attorney. Mr Cunningham says he does not have a copy, and does not know who does. I consider that I have got to accept what he says, but I would be most surprised if Banks Kelly did not have this document (and Mr Cunningham said he did not know the position in this regard). Accordingly, I consider that the Liquidator is entitled to an order, as against ALDOP and Mr Cunningham, that they require Banks Kelly to produce to Mishcon de Reya all versions of the power of attorney in their possession, custody or power. The request should be made by ALDOP and Mr Cunningham by no later than 10:30am on 29 April 2022; and Banks Kelly should be directed by ALDOP

and Mr Cunningham to produce this material or confirm that they do not have it by no later than 4:30pm on 29 April 2022. I also consider that the order directing this should contain a recital recording Mr Cunningham's assertion that neither he nor ALDOP themselves have any copy of the power of attorney.

- vi) I appreciate that this order may not result in a complete version of the power of attorney being produced. Accordingly, it seems to me that the Liquidator is also entitled to a declaration that a power of attorney, in the form set out in Annex IV to the Settlement Agreement, was duly and properly executed by Ms Harding on or about the 29 November 2018. I am satisfied that this is the case because:
- a) ALDOP was obliged to execute a power of attorney in substantially this form by virtue of the Settlement Agreement.
 - b) The email from Banks Kelly, which I have described in paragraph 3(iii) above, with the appended signature page, confirms that ALDOP did what it was obliged to do.

There was some debate as to whether the decision in *R (Mercury Tax Group Ltd) v. HMRC*, [2008] EWHC 2721 (Admin) was authority to the effect that the power of attorney was invalid. I consider that reference to this case substantially misses the point. In that case, the power of attorney was not regularly executed (the version signed was not the final version, and there were illegitimate changes in the wording) whereas in this case, all the evidence is that the power of attorney was properly executed, in the form I have described, it is simply that Banks Kelly have declined to provide it. I appreciate that the relevant guidelines from the Law Society may not have been followed (although I make no finding in this regard) in regard to the execution of the power of attorney, but at the end of the day the question is not "Was the guidance followed?" but "Was the power of attorney executed?". I am in no doubt that it was.

- vii) I cannot say whether the orders that I am prepared to make will resolve the Liquidator's issues regarding the power of attorney, but I hope that they will. Otherwise, it seems that the swift issuing of a Part 8 Claim is called for. I very much regret that this will occasion additional cost, but (given my view as to the limitations of paragraph (3) of the Order) that additional cost is unavoidable.
12. I have not heard argument on costs. My provisional view is that the costs of this application should not be paid by ALDOP, but by the director who has caused ALDOP to take points that I consider to be illegitimate, indeed, meretricious. However, since I have not heard argument, that is a provisional view only and I will receive written submissions on whether a different costs order should be made.
