



Case No: HC-2017-002742

Neutral Citation Number: [2022] EWHC 2351 (Ch)

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY DIVISION

Royal Courts of Justice

Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 16/9/2022

**Before: Charles Morrison
(sitting as a Deputy Judge of the High Court)**

Between:

**(1) ABSOLUTE LIVING DEVELOPMENTS
LIMITED (in Liquidation)**

Claimant

- and -

(1) DS7 LIMITED

(2) ANDREW JOHN CAMILLERI

**(3) CHARLES ALEXANDER CLUNIE
CUNNINGHAM**

(4) GOZON LIMITED

(5) EPG MANLET LIMITED

**(6) UMI 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

Simon Passfield (instructed by **Mishcon de Reya LLP** Solicitors) for the
Claimant

Emma Read (instructed by **Direct Access**) for the **Defendants**

Hearing date: 9 September 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archive. The date and time for hand-down is deemed to be 10.30 am on 16 September 2022.

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Charles Morrison (sitting as a Deputy Judge of the High Court):

Introduction

1. The judgment which I will now deliver arises out of an application issued in this court on 27 July 2022, by the Liquidator (the **Liquidator**) of the company Absolute Living Developments Limited (**ALD**). The application seeks a declaration that, in accordance with the terms of a Settlement Agreement dated 29 November 2018 (the **Settlement Agreement**), a company by the name of Absolute Living Developments (Orchid Point) Limited (I shall refer to this company as, **ALDOP**) is obligated to transfer certain leasehold property known as Empress Mill, Empress Street Works, Empress Street, Manchester (**Empress Mill**) to ALD, or otherwise to a third party nominated by the Liquidator.
2. The application made by the Liquidator was strongly contested by ALDOP, initially by its former sole director Mr Charles Cunningham, however at a hearing three days before the application finally came before the court, I held that Mr Cunningham was not entitled to represent the company, being neither a solicitor nor counsel, and suffering the additional impediment of a disqualification from acting as a director of a company. The reasons lying behind my decision are set out in the judgement I delivered on the day of the hearing and there is no need for me to go further into that matter now. Suffice it to say that when the application came before the court for full argument, ALDOP was represented by Ms Read of counsel; the Liquidator was again represented, as she has been on a number of occasions, by Mr Passfield. I ought to remark in passing, that I received considerable assistance from both advocates at the hearing.
3. In addition to the declaration, I was also asked to deal with the costs of ALD's application dated 6 July 2022, for an interim injunction restraining ALDOP from dealing with Empress Mill pending the final determination of the Application ("the Interim Injunction Application"), which the parties agreed to have reserved to this hearing before me.

Background

4. This matter has, as I have indicated, already been before this court on a number of occasions. The background facts appear in previous judgments in, what I might be permitted to describe as, this protracted saga, particularly in earlier decisions of Marcus Smith J, to whom until recently, the matter was reserved. It is though necessary for me to record that ALD was in the business of marketing and selling leases of apartments at various development properties on an off-plan basis, to foreign investors. ALD entered compulsory liquidation in April 2016.
5. The Liquidator of ALD has alleged that the company was controlled by Mr Cunningham, who she says dishonestly caused ALD to divert to him, monies received from investors, which ought properly to have been used to fund the company. It is also alleged sham charges were permitted to be registered over assets of ALD, in favour of the first defendant, DS7 Limited (**DS7**), a company of which Mr Cunningham was the sole director.
6. ALDOP it seems is also connected to ALD, and certainly so far as the Liquidator sees it, has at all material times been under the control of Mr Cunningham. For the purposes of the matter now before me, it is important to note that ALDOP owns the long leasehold title to one of the development properties marketed by ALD. This is Empress Mill.
7. On 25 September 2017, ALD (acting by the Liquidator) issued proceedings seeking an order releasing or discharging the allegedly sham charges, and also equitable compensation from Mr Cunningham and others, in the sum of more than £14.5m.
8. On 29 November 2018, the Liquidator entered into the Settlement Agreement with nine of the Defendants (the **Settlement Defendants**) and also ALDOP. Before me, it was common ground between the parties that on 8 October 2018, ALD had applied for summary judgment of its claim against the Defendants seeking an order that charges against the various properties held by the Defendants be discharged; the application had been listed for hearing on 27 and 28 November 2018. The hearing was adjourned on the first morning to permit negotiations with a view to settling the claim; as I have already indicated, the parties entered into the Settlement Agreement on 29 November 2018.
9. The Settlement Agreement provided for the claims against the Settlement Defendants to be stayed on terms that are, as to their meaning, the subject of the argument before me. So far as the Liquidator is concerned, her view of the Settlement Agreement is that she accrued the right to sell ALD's development properties free from what she considered to be the sham charges, and thereafter divide the proceeds between ALD and DS7 in accordance with an agreed waterfall. Although not a party to the proceedings, ALDOP, it is said, irrevocably consented to transfer Empress Mill to ALD (or any third party nominated by the Liquidator) and to waive all rights in relation to Empress Mill to which it was entitled. It is the Liquidator's case that ALDOP also agreed to enter into and deliver to her, a power of attorney granting her authority to enter into any documents which she may consider necessary or desirable in order to transfer Empress Mill.

10. It is now said that following the execution of the Settlement Agreement, Mr Cunningham and the new ALDOP director Mr Andrew Cunningham, have made repeated attempts to frustrate the Liquidator's attempts to sell Empress Mill. My attention was drawn to lengthy correspondence between the parties and also numerous applications to the court, turning on the Liquidator's right to compel a sale of Empress Mill, and her ability to avail herself of the benefit of the power of attorney in the Settlement Agreement. At all events, no sale has been possible and ALDOP, and insofar as relevant, Mr Cunningham, continue to reject the notion that the Liquidator has any right under the Settlement to enforce a transfer of Empress Mill.

This Application

11. At the beginning of July in this year, ALDOP gave notice to the Liquidator of its intention to dispose of Empress Mill. ALD's response was to invite ALDOP to undertake not to make any disposal until the determination of the application which ALD proposed to issue within 21 days: ALDOP declined to do so. The Liquidator thereupon issued this application and also an Interim Injunction Application, which was granted by Sir Anthony Mann on 7 July.
12. Before me, the Liquidator sought to pose what was described as a simple and straightforward question: on a proper construction of the Settlement Agreement, has ALD lost the right to require ALDOP to transfer Empress Mill? This is the question that must be answered in the negative, if the Liquidator is to secure the declaration that she seeks, that being:

“a declaration that, in accordance with the terms of the Settlement Agreement dated 29 November 2018, Absolute Living Developments (Orchid Point) Limited is obligated to transfer the leasehold property known as Empress Mill, Empress Street Works, Empress Street, Manchester, M16 9EN (registered at HM Land Registry under title number GM457307) to the Claimant, or a third party nominated by the Liquidator of the Claimant;”

13. The Application was listed as vacation business on an urgent basis, because I was told, the Liquidator has identified a purchaser who is ready, willing and able to purchase Empress Mill. If that purchase is not completed by 20 September 2022, it will, it is said, be necessary for the Liquidator to undertake a further process under s.5 of the Landlord and Tenant Act 1987 (the **Act**), which will delay the sale by at least 2 months.
14. Having heard the matter during the course of Friday 9 September, it is self-evidently incumbent upon me to seek to deliver a judgment in the shortest possible time. That, I indicated to the parties, I would seek to do.

The Settlement Agreement

15. I ought at this stage to set out the relevant terms of the Settlement Agreement. The provision at the heart of the dispute between the parties, is clause 6. It provides:

“TRANSFER OF EMPRESS MILL

6.1 Within 7 days of Execution, ALDOP will:

6.1.1 procure that any and all steps be taken by ALDOP including, but not limited to, board decisions or directors' resolutions, as are required to give effect to the transfer of Empress Mill to the Claimant or any third party nominated by the Liquidator (pursuant to clauses 6.2 and 6.6 below) (the Empress Mill Transfer Steps); and

6.1.2 deliver to the Claimant's Solicitors evidence of the Empress Mill Transfer Steps having been taken (including evidence of any applicable board decisions or directors' resolutions).

6.2 Subject to clauses 6.3 and 6.4, the Liquidator may (at her sole discretion) direct (by giving written notice to the Nominated Person) that ALDOP transfers the full legal and beneficial ownership of Empress Mill (free from any Encumbrance including, without limitation, the Empress Mill Charge) to the Claimant or any third party nominated by the Liquidator, together with all rights and benefits attaching to Empress Mill, subject to having achieved the Surrender of at least 50% of the leases over Empress Mill (the EM Surrender Threshold).

6.3 In the event that the EM Surrender Threshold has not been achieved within 21 months of Execution the Liquidator shall thereafter be free to direct that ALDOP transfers the full legal and beneficial ownership of Empress Mill (free from any Encumbrance including, without limitation, the Empress Mill Charge) to the Claimant or any third party nominated by the Liquidator, together with all rights and benefits attaching to Empress Mill regardless of the number of surrenders obtained in respect of Empress Mill.

6.4 Notwithstanding clause 6.2, if in the Restricted Period the Liquidator has not achieved the EM Surrender Threshold, the Liquidator may still (at her sole discretion) at any time during the Restricted Period direct (by giving written notice to the Nominated Person) that ALDOP transfers the full legal and beneficial ownership

of Empress Mill (free from any Encumbrance including, without limitation, the Empress Mill Charge) to the Claimant or any third party nominated by the Liquidator, together with all rights and benefits attaching to Empress Mill, provided that any Sale Proceeds obtained in the Restricted Period in relation to Empress Mill where the EM Surrender Threshold has not been achieved shall not be applied in accordance with clause 9 but shall be split equally between the Claimant and DS7.

6.5 Notwithstanding clauses 6.2 to 6.4, the Nominated Person may at any time waive the EM Surrender Threshold in writing in which case the Sale Proceeds of Empress Mill shall be applied in accordance with clause 9.

6.6 Within 7 days of written notice sent by the Liquidator to the Nominated Person pursuant to clauses 6.2, 6.3 or 6.4 above, ALDOP will execute at the cost and expense of itself or the Settlement Defendants any documents that the Liquidator may (in her sole discretion) consider necessary or desirable to transfer the legal and beneficial ownership of Empress Mill to the Claimant or any third party nominated by the Liquidator (free from any Encumbrance including, without limitation, the Empress Mill Charge).

6.7 ALDOP covenants that:

6.7.1 it has the full right, title and capacity to transfer the legal and beneficial title to Empress Mill on the terms of this Settlement Agreement; and

6.7.2 Empress Mill will, at the point of transfer to the Claimant (or any third party nominated by the Liquidator) pursuant to clause 6.6, be free from any Encumbrance including, without limitation, the Empress Mill Charge (whether or not known about by ALDOP, any Settlement Defendant, or the Claimant).

6.8 ALDOP and each Settlement Defendant irrevocably consents to the transfer of Empress Mill for no monetary consideration to the Claimant (or any third party nominated by the Liquidator) and ALDOP and each Settlement Defendant hereby waives and agrees to procure the waiver of all rights which may exist in relation to Empress Mill to which that Settlement Defendant or any other person (including ALDOP) may be entitled.”

16. The other important clause which I must set out in full, is clause 11.

“NON-COMPLETION

11.1 If Completion does not take place within 12 months of Execution (or such other period as may be agreed in writing by the Parties or as extended, but not reduced, by the Liquidator pursuant to clause 11.2 below), then:

11.1.1 the Liquidator shall not be permitted to give notice that Empress Mill be transferred by ALDOP to the Claimant (or any third party nominated by the Liquidator) pursuant to clause 6.2 above;

- 11.1.2 *the Liquidator shall not be permitted to give notice that DS7 release the Prighthouse Charge pursuant to clause 4.2 above;*
- 11.1.3 *the Liquidator shall continue to apply any Sale Proceeds in accordance with clause 9 above; and*
- 11.1.4 *the Liquidator may, at her sole discretion, direct that the Parties consent to, and take all necessary steps to obtain, a court order setting aside the court order referred to at clause 3 above.*
- 11.2 *The Liquidator may, at her sole discretion, extend the 12 month period referred to at clause 11.1 above in increments of no greater than three months by written notice from the Liquidator to the Settlement Defendants up to a maximum period of 24 months unless otherwise agreed between the parties.”*

The Issues to be resolved.

17. On behalf of the Liquidator of ALD, Mr Passfield's primary case before me was that, by clause 6.3 of the Settlement Agreement, from 29 August 2020, the Liquidator was free to direct ALDOP to transfer Empress Mill to ALD or her nominee. This right accrued, regardless of the number of tenancy surrenders by then obtained. This, Mr Passfield submitted, was a freestanding right, independent of, and surviving the expiry of, the discrete right under clause 6.2.
18. Thus, he submitted, since 29 August 2020, the Liquidator has had the right under clause 6.3 to direct ALDOP to transfer Empress Mill to ALD (or a third party nominated by the Liquidator), and that that right survives the expiry of the deadline in clause 11.1, because clause 11.1.1 applies solely to prevent the Liquidator from serving a notice under clause 6.2, that is to say, on the basis of having achieved "the EM Surrender Threshold" – after the expiry of the stipulated 11.1 longstop date.
19. I am invited to read the Settlement Agreement as it is, and give effect to the words that appear in it. It is plain that 11.1.1 expressly refers only to 6.2. It does not, on its face at any rate, seek to impose a restriction on the operation of clause 6.3. So far as Mr Passfield is concerned, that is the end of the matter. But if the court holds against him on this interpretation of mechanics, he has a second string to his bow. He points to the notice served on 28 April 2021 (the **April Notice**); the April Notice he submits, was served more than one month prior to the deadline that might be said to apply to it; it is also said that it was quite properly labelled a "6.2 Notice" albeit that it was obvious to all, that it was being served under the circumstances foreshadowed by clause 6.3, that is to say the Surrender Threshold had not been met.
20. In essence, Ms Read appearing for ALDOP, advanced two arguments in response. I was invited to decline the request to make a declaration on the basis that the April Notice could not be complied with as the necessary information to allow due service of a mandatory s.5 notice under the Act had not been provided, alternatively, as a fact, no such notice had been served. Thus it would be wrong to seek to compel ALDOP to perform an obligation in a manner which would be unlawful. Any requirement on ALDOP to transfer Empress Mill must have been conditional upon the Liquidator having provided ALDOP with the necessary information to allow it to serve valid s.5 notices in relation to the proposed transaction. If the transfer was to be direct to ALD, this would be for no monetary consideration.
21. Miss Read also urged upon me a different approach to the interpretation of clauses 6 and 11, of the Settlement Agreement. In particular Miss Read invited me to construe the contract as a whole and take account of the circumstances prevailing at the time of its execution. I should have regard to the reason for, and commercial intention lying behind, the entering into of the Settlement Agreement. Having done so, it was submitted that I ought to find it perfectly possible, indeed necessary, to read in to the final line of clause 11.1.1, the number 6.3, and also the number 6.4. In the context of the Settlement Agreement read as a whole it was submitted, 11.1.1 just does not make sense unless it is read to include the additional sub-clauses.

22. Although both possibilities were canvassed in discussion before me, I heard no argument based upon a claim for rectification of the Settlement Agreement, nor was any serious attempt made to make out ALDOP's case on the basis of there being implied terms. The Liquidator was however put on notice that ALDOP has it in mind to issue a fresh application so as to advance the rectification claim in a manner, *mutatis mutandis*, consistent with the construction argument advanced before me

The Law

23. There was no disagreement before me as to the relevant law. In approaching the questions before me, I have considered two of the well-known authorities which provide guidance on the task of interpretation of the meaning of words used in an agreement. The first case is *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 W.L.R. 896, where at 912, Lord Hoffman said:

“Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”

24. I also had regard to the more recent decision of the Supreme Court in *Arnold v Britton* [2015] AC 1619 at [15], where Lord Neuberger said:

“When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common

sense, but (vi) disregarding subjective evidence of any party's intentions [...]"

25. In Volume one of the current (33RD) edition of *Chitty on Contracts*, the following view is expressed by the learned authors at [13.083]:

“However, in [*Chartbrook Ltd v Persimmon Homes Ltd*](#), Lord Hoffmann cautioned that “it clearly requires a strong case to persuade the court that something must have gone wrong with the language” in order to justify a meaning which departs from the words actually used. Not only must it be clear that “something has gone wrong with the language”, it must also be “clear what a reasonable person would have understood the parties to have meant”: in other words, both the “problem” and the “solution” must be clear if the court is to give to the words a meaning other than that which they ordinarily bear. It is thus “only in exceptional cases” that commercial common sense can “drive the court to depart from the natural meaning of contractual provisions”. It is no part of the court’s function to rewrite the contract for the parties so that, where the draftsman has not thought through the consequences of his own drafting, he will not be permitted to say that “something has gone wrong with the language” in order to save himself from the consequences of his own poor or inadequate drafting. But in the case where from the language of the contract the court can discern that an event has occurred which was plainly not intended or contemplated by the parties and it is clear what the parties would have intended in the circumstances which have occurred, the court may give effect to that intention even if that intention is not consistent with the primary meaning of the words of the contract. It is, however, important to note the limits on the latter principle. The event must “plainly” not have been contemplated by the parties and it must also be “clear” what the parties would have intended in the

circumstances which have occurred. The principle does not
“extend to re-formulating or altering the parties’ bargain”.”

26. There can be little doubt that in a commercial setting, and as here where an agreement is the result of careful negotiation over several days, with the resulting document having been prepared with the benefit of what appears to me at any rate to have been competent legal advice, the court will strain to give the usual and ordinary meaning to the actual words appearing in the contract. It is my view of the law that the court will not readily interpolate words into a written contract unless it is clear that words have been omitted. If applying ordinary sense to the meaning of the words would lead to an absurdity or a manifest inconsistency with the remainder of the contract that may be one thing, but the court will not lightly engage in verbal manipulation if the actual words used in a contract make good sense without any modification: see generally the judgement of Lord Goff, albeit in a landlord and tenant context, in *Mannai Investment Co. Ltd v Eagle Star Life Assurance Limited* [1997] A.C. 749. If it is to be treated as a matter of corrective interpretation, any mistake in the words used must be clear and plain. But the burden will be an onerous one if, as was the case here, the parties have benefitted from legal advice and the document has been the subject of a period of negotiation.
27. It also appears to me to be an uncontroversial approach to hold that if the provision under scrutiny is said to lead to a position otherwise than that which the parties clearly intended, and so requires an amount of “corrective interpretation”, then the body of evidence before the court to make good that proposition must be substantial; moreover in the circumstances as I have indicated apply to the instant case.

Discussion

28. There was no serious, if any, attempt by Ms Read to seek to persuade me that the meaning of clause 6.3 was not as plain and obvious as any reader of the clause would immediately apprehend on a straightforward reading of it; nor was there any real attempt to suggest that, in the context of the relationship between the parties and the circumstances in which the Settlement Agreement came into effect, it ought to bear any different meaning. The question was rather what effect should be given to it in the context of clause 11.1.1.
29. The case made was that clause 6.3 was not a simple free-standing right to “direct that ALDOP transfers the full legal and beneficial ownership of Empress Mill... to the Claimant or any third party nominated by the Liquidator” as claimed by Mr Passfield. That is because 11.1.1 really must be read as bringing down a guillotine on such right as 6.3 gives rise to. I must read 11.1.1. as applying not just to a notice under 6.2 but also to a direction given, in the terms I have just recited, under clause 6.3. Why would there be such a free-standing right, asks Ms Read; and why bother with the elaborate extension provisions to 6.2, if 6.3 provided such an uncomplicated route to a transfer? It was also submitted that the commercial reality was that the Liquidator was given a certain period to bring about a transfer of the property and, if she failed in that endeavour, then she would be put back to her claim in the underlying action.

30. I have to say that I am not persuaded that it would be right for the court to intervene between the parties to effectively re-write their bargain, because of a view that, it is said, I can take as to the true intention of the parties, gleaned from an appraisal of the Settlement Agreement as a whole and the circumstances leading to its execution. It is not for me to say whether the Liquidator was to be time-limited in the way suggested, certainly where I have no evidential or other basis upon which I can properly rely for so holding. It is perhaps an equally sensible construction to place on the Settlement Agreement to understand that the Liquidator could only sell in the period after execution of the Settlement Agreement if she achieved the relevant threshold of tenancy surrenders, thereby enhancing the sale value for the benefit of all the parties however if that did not happen, then at a later stage she would be free to bring about a transfer and apply the proceeds through the agreed upon waterfall. Any earlier attempt to bring about a transfer in the absence of meeting the tenancy surrender threshold, would have meant distributing the proceeds on terms less beneficial to the Liquidator
31. It does not seem to me to be decisive of the argument to point to the absence of any time limit upon the Liquidator taking the steps permitted by 6.3. It could well be expected by the parties that the Liquidator would not want to let any rights go stale and would promptly seek to recover such assets to which she had an entitlement for the benefit of the liquidation.
32. Seeking to give a particular meaning to clause 11, because of the way in which other provisions of the Settlement might operate, seems to me to be one thing, but adding new words, because of a supposed meaning, based upon what the Liquidator might or might not be able to do if the Settlement Agreement is interpreted in the way contended for, is altogether another. It might also be said against this case made by ALDOP, that the very purpose of the Settlement Agreement was to bring about a settlement. It was for that reason that there was the irrevocable consent on the part of ALDOP and the Settlement Defendants to transfer “Empress Mill for no monetary consideration”. That consent, and the language following it, was not couched in terms that reflected the availability to the Liquidator of only a short window of opportunity.
33. For all of these reasons I am not prepared to give clause 11.1.1 a meaning any different from the plain words appearing in the Settlement Agreement. In my judgment there is no reason for holding otherwise than when 6.2 was written at 11.1.1, that was the intention of the parties. There was clearly a decision to have discrete provisions at 6.2, 6.3 and 6.4. In other places in the Settlement Agreement, for example 6.6, express reference is made to those discrete provisions. A clear reference to 6.3 could easily have been made at 11.1.1: it was not. In my judgment, it is not for the court to supply, by a process of corrective interpretation or otherwise, such additional numbers to the clause.

34. It is said that I cannot make the declaration sought because it is simply not possible for ALDOP to make a transfer in the absence of having duly served notices under s.5 of the Act. To this submission Mr Passfield offers a simple response: on the basis, as I have found, that clause 6.3 provides a free-standing right, unfettered by clause 11.1, a fresh Direction can be given, and reliance placed upon the extant s.5 Notices; had I been against him on that construction, reliance would have been placed upon the April Direction, served within the clause 11.1 time constraint, and new s.5 Notices would be delivered so as to make it lawful. In this context, Mr Passfield was quick to remind me of the availability of a Power of Attorney in favour of the Liquidator. He also pointed to clause 6.1 of the Settlement Agreement, by which ALDOP agreed to procure that any and all steps be taken by it as were required, in order to give effect to a transfer within seven days of execution of the Settlement Agreement.
35. In my judgment this provides a complete answer to the technical impediment that ALDOP seeks to place in the way of the Liquidator, and I am not persuaded that, on account of it, the Liquidator should not be entitled to the declaration sought. In any event, there must be compliance with the Act; the criminal law is engaged if it is not. Ensuring that there is compliance is not a reason, especially taking account of the contentious circumstances of this case, to withhold the declaration sought.
36. Having heard argument on the point, it seems to me that I ought also to express a view on the second line of argument relied upon by the Liquidator. It will be recalled that on this footing, even if clause 11.1 were to be construed so as to impose a deadline on the service of a direction or notice under 6.3, the April Notice in any event met that time constraint. It was served more than one month prior to the deadline in circumstances where the parties knew that the Surrender Threshold had not been met. I have to say that I agree with Mr Passfield that there could have been no doubt as to what the basis for the notice was.
37. The principal objection to the suggestion that the April Notice can be relied upon for the purposes of the claim for a declaration is that ALDOP was in no position to lawfully comply. There was an impediment in the form of the requirement of s.5 and s.5A of the Act. Once again, the Liquidator has a short answer to the point. Reference is made to paragraphs 14 to 16 of the April Notice. In that letter from the Liquidator's solicitors to the Nominated Party under the Settlement Agreement, it was made clear that an opportunity would be afforded to ALDOP to serve the requisite notices. In other words, no attempt would be made to enforce performance of clause 6, in circumstances that would expose ALDOP to criminal liability.
38. In my judgment, this was a perfectly proper course for the Liquidator to take. I cannot see how it serves to stand in the way of the making of a declaration. The Notice was served, and arrangements must be made for the appropriate notice under the Act. The Liquidator does not dispute this. The suggestion that the Liquidator cannot have her rights because that would give rise to unlawful conduct simply does not arise. In my judgement the argument put forward by ALDOP has as its foundation, a contrivance.

39. In all the circumstances, I am prepared to make the declaration sought. I invite counsel to put an agreed form of order before the court. Costs must follow the event and I would expect to see that reflected in the order. I cannot see how ALDOP can avoid the costs of the injunction proceedings, and again I would expect to see that reflected in the draft order. If however further assistance is required from the court, the matter may be listed for consequential argument.