Respondents' combined counsel's note of judgment of Mr Justice Trower, 31 January 2025

Agreed between Mr Peachey of Counsel for Central Young Men's Christian Association and Mr Ollech of Counsel for Criterion Capital Limited 05.02.2025

Trower J – 31.01.2025 at 1:40PM.

1. This is an application by PJ for himself and ostensibly on behalf of all other users of the gym at 112 Great Russell Street for an injunction against CYMCA and Criterion, seeks various heads of relief designed to keep the club open. I will explain the background shortly, but before doing so I note that in resisting the application the Association as I shall call it has stressed that the closure which is now in the course of progress was decided upon by its trustees with a very heavy heart.

2. The club contains what I am told is the largest gym with other facilities in London.

3. The application was issued on 21 January supported by a lengthy witness statement.

4. Although this was done 12 days ago, a claim form has not been issued nor draft particulars of claim. Although therefore none of the specific circumstances normally required to grant an injunction have been met I have decided it is appropriate that I hear and rule on it as a matter of substance.

5. The background is as follows. On 5th July 2024 the association sold its interest in the property to Zedwell North Oxford Street Limited, a company in the same group as the second defendant, Criterion.

6. The Association remains registered as the freehold proprietor but the application to register Zedwell is pending.

7. The Association was granted a lease of the club for 12 months from and including 05.07.2024, the evidence is that this was solely to allow it to wind down in an orderly manner. The Association's position is that after 05.07.2025 it would become a trespasser. Closure of the club was announced publicly on 2nd December with a 2 month window to wind down. This requires closure by 07.02.2025 followed by 10-week period of decommissioning.

8. The announcement was a crushing blow to the Claimant. He is a regular user of the club and depends on it because of his health and financial position. He was not warned that the club might close. The announcement also caused a significant number of complaints about the handling of the announcement and about the sale. There have been petitions and a campaign group formed to prevent the closure.

9. Such was the level of complaints, that the Association submitted a serious incident report with the Charity Commission as required to do. The Charity Commission replied to that and referred to the complaints that it had received. The letter concluded "we trust our guidance for disposing of assets was followed".

10. [Unclear: *The response explained was regulatory response to ensure trustees are managing responsibly and set out immediate act. Small number of individual complaints and noted [ongoing press coverage*]

11. The response stated the decision to sell the property was within trustees' powers and not of regulatory concern. The Association's position is that the club is and has been loss making. It says it will cost a very large amount of money if it is made to continue, which is accepted. The evidence of a single weeks' delay is in excess of 58k. The Association's evidence is that the day to day operation of the club is already in wind down. Memberships have already been cancelled. Some equipment has been removed, with agreements for sale in place for the remainder. Consultations with staff have almost reached conclusion. The consequence is that any requirement to re-open or delay will increase its losses yet further.

12. It is also Association's position the club is located in ageing and dilapidated building constructed in the 1970s and significant capital investment required to keep club open. The way in which the association characterises the Claimant seeks to keep operational, where the main source of income is membership. As Mr Peachey put it graphically in submissions – the ship has hit the iceberg, it is sinking, and Mr Joy wants to shovel more coal into it in the hope of reaching New York.

13. Because a claim form has not been issued there is some uncertainty as to the precise cause of action. He identifies various difference breaches of trust, duty of care and sale at undervalue he would claim sale void. I should add that Mr Wells helpfully assisted how cause of action could properly be formulated if and when the pleading is to be served.

14. PJ also asserts criterion had notice of breach of trust, but Mr Wells acknowledges that there is no evidence that that was the case. He also acknowledges that Criterion is not the right party, although he says it is because they did not know that. I am dealing with notice to Criterion however it is now recognised the proper second defendant will be Zedwell; the reason they were not aware was because they did not have the evidence.

15. Against that background the first question is whether there a serious issue to be tried. If there is no serious issue to be tried.

16. Although not analysed in these terms, the first aspect in relation to that is PJ's standing to bring proceedings.

17. On the face of it these are charity proceedings in the scope of s115 of the Charities Act 2011. So a claim can only be taken by a person interested in the charity, and only proceeded with where the taking of proceedings are authorised by the Charities Commission.

18. As matters stand that permission has not been sought or obtained.

19. As to to the former, I have doubts that Mr Joy is a person interested. Under the authorities what is required is an interest materially greater or different from public. It may not be entirely clear, whilst it is possible that it falls on the right side of the fence, my view is that the better view in this case is that he does not. He is not a Full Member or Associate Member of the Association, he is entitled by way of contract. His interest is as a member of the club to use the facilities for a modest fee. There is no suggestion that his use of the club is not available to or materially greater than the general public provided they pay a fee. This aspect of the standing position, was argued more strongly by Criterion than the Association, but I don't think taken on its own it would be ground to refuse if PJ's application were to be a good one.

20. More substantive in my view is the restriction imposed by restriction by s115(2). There is no evidence that he has asked for permission. Mr Joy recognises this because he says he intends to write to Commission but no particulars of what he is going to say have been given and I am not satisfied on whether permission would be given. The Commission has been informed but has expressed the view that no regulatory issues arise. In the absence of substantial new evidence it seems improbable that the Commission will grant authority to proceed.

21. Mr Wells says that this not a complete answer, because court proceedings started in breach of s.115 are not a nullity. The Court has jurisdiction to grant an injunction even though proceedings should be stayed, and then that can survive a stay imposed under r.25.10 if the Court so ordered. That may be true so far as it goes but it seems to me that these difficulties point to a policy that a person in Mr Joy's position should not be able to make a claim until a much later stage of process.

22. Mr Wells points to s115(5) which gives a High Court judge power to grant leave to take proceedings where Commission refused. But that stage has not yet been reached. There has been no application to the commission and there is no application under s.115(5) before the court. Even if the Commission had decided Norris J in Rai observed that such a decision would be entitled to respect.

23. The way in which policy was explained by Mr Peachey was if there is something in a complaint, the Commission will take up torch for all who might be affected by it. If there is nothing in it, the Commission prevents charity resources being wasted on responding. I agree.

24. Even if s.115(5) was engaged, I would not give permission in the current proceedings. I would not because the claim suffers from a number of defects on the current evidence.

25. Mr Joy's real challenge in this case is to the sale of land to Zedwell. The disposal of land by charities is controlled by s.117- 121 of the CA 2011. No land is to be disposed without order of court or commission unless s119 has been complied with – that section's requirements oblige the trustees to obtain and consider a written report from a designated adviser.

26. Mr Joy claims in the present case that s119 have not been complied with. Mr Joy says that he has been told Knight Frank carried out the work and believes that they are not independent. But it is an unevidenced assertion. I do not doubt that Mr Joy asserts what he believes to be the case, but it is a speculative, unevidenced assertion and self-evidently driven by concern as to whether there was a sale at an undervalue. The court cannot give any weight to this sort of serious allegation without much more detail and particularisation. The directors have given specific statutory confirmation of compliance, and on the face of it Knight Frank are respectable and professional. It follows that I do not consider that Mr Joy has come close to establishing a serious issue to be tried that the sale did not comply and could not be challenged for breach of duty, it also follows that there is nothing on the evidence that Criterion or Zedwell were on notice.

27. Mr Joy also submits he has private law cause of action to bring a claim in tort against the Association. He says the Association owes him duty of care which it has breached by not providing alternatives and by keeping the sale secret. I do not accept he has established that any such duty is owed. The way Mr Wells advanced it was based on s.1(2) CA 2011 which required charity to operate for public benefit. This was simply a way of dressing up the claim as something other than charity proceedings.

28. More specifically, it is also said the association is in breach of duty to consult. Mr Wells complains of a breach of the s.121 duty to advertise. Mr Wells has not established an arguable case that the sale engaged this provision. More specifically I was unable to established an argument that the association owed Mr joy duty to give notice or provide alternative, which caused harm.

29. I have difficulty in seeing any reasonable argument or that even if there was a duty to give notice, that 2 months' notice was not enough. The court was not shown any provisions for his arranged membership that allowed more notice. I have real difficulty in seeing any reasonable argument for this. There is no serious issue to be tried on this basis either.

30. I also consider that there is no serious issue to be tried for another reason. Continued operation of the club is impractical in the circumstances, membership contracts have been terminated and equipment removed, staff redundancy almost complete, club running at a loss. The odds of the Court at trial requiring the club to stay open is completely fanciful.

31. Furthermore damages would be an adequate remedy, and balance of prejudice comes firmly against interim relief.

32. Mr Joy says it would not. He says most of the claims do not give rise to claim in damages, but if he has standing the claims in equity mean he would also be entitled to equitable compensation that serves to emphasise he had no standing in the first place. I have of course considered what are the factors why he prefers the club, but it does not seem to me that these are facilities he cannot enjoy elsewhere just that they may be more expensive. The club is not the only place in central London where these services are available, nor does Mr Joy say that it is. It follows as a matter of law if he has a claim in tort then that it is compensable in money for having to move to a different facility. I have considered the factors that caused him to prefer this club, but it doesn't seem that the reasons are factors are not compensable in damages where they may be alternative provision.

33. As to balance of convenience, the running costs of the club are substantial and the club is loss making. Mr Joy does not have the financial resources to compensate on his undertaking. The evidence says, and I accept, that damages sustained would be catastrophic.

34. An Undertaking would be substantial, and Mr Joy is A retired postal worker who accepts no fortification of undertaking in damages. Nobody else has offered to give an undertaking. Of course I accept that Allen v Jambo Holdings means that the inability to afford a an undertaking is not in itself a reason to not give injunction, however it is a serious discretionary consideration, all the more so where the impact on the Defendant would be severe.

35. I must set that against the prejudice to Mr Joy. I fully appreciate Mr Joy's feelings and emotions but the real objection is that there are no other facilities. The right way to analyse this is the increased cost of another local gym, of course it will be different but they do at least include the Association's other facilities. That does way in the balance, but that does not outweigh the serious consequences to the charity.

36. Mr Wells advances a whole raft of reasons in his skeleton that the charity could have made different decisions but in my view they do not assist Mr Joy's case in a context which if challengeable at all is only challengeable under the Charities Act.

37. Finally, Mr wells relies on status quo. He said club remains in possession of association. No entry made, it has not been stripped out, the club equipment is still in with staff, members have not switched membership.

38. The Association does not accept that these are an accurate reflection and points to timetable which has been adopted under tenancy agreement leading to the Association going out of possession in July under a contract with a party who is not a party to proceedings and in respect of which Mr Wells has to accept there is no evidence of knowledge of breach of duty. Although several of the factors identified by Mr Wells are self-evidently accurate in expression, I do not consider it is possible maintain existing status quo.

39. On the contrary, in circumstances where a business is loss making and a decision has been made to sell the balance of convenience is most unlikely to be in favour of the relief sought by Mr Joy. And it is in effect a mandatory injunction, despite being phrased in the negative. It requires many positive acts including what in any view will be significant

expense. In these circumstances it seems to be that a clear cut case is required and that is the test that I must bear in mind.

40. I fully understand why so many feel so strongly, but on the material before me, this is not a matter in which the court is able to intervene, I am not satisfied and I decline to do so, and for those reasons, this application is dismissed.

<u>Costs</u>

41. DP: the observation than an order at trial was fanciful, because of those reasons and this application be marked completely without merit. And ask for Association's costs, on standard basis, not indemnity,
42. LW: I don't agree the claim was brought without merit, I remind justice must be done and must be seen to be done, with a huge costs order received again my client would be poorly received.
43. Judge: I will not mark it as totally without merit, but by a shade. Very nearly was but wasn't.
44. JO: Criterions seeks it costs also on standard basis. Sols wrote on 27.01 explaining flaws and imploring to withdraw.
45. LW: would have been helpful to know Zedwell.
46. Judge: Will not be summary assessment.
47. DP: Costs order sought total just over 24k. Seek payment on account of 2 thirds of that.
48. Judgment: Applicant to pay costs on detailed assessment if not agreed. Payment on account 15k on Mr Peachey's costs statement for Association, 12k for Mr Ollech's costs statement for Criterion. Applying normal principle that there is an estimate of what likely to be and something on uncertainty.