Neutral Citation Number: [2017] EWHC 209 (Ch)

Case No: 2015-008993

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 February 2017

Before :

MR JUSTICE ARNOLD

Between :

(1) GEORGINA EASON **(2) MICHAEL SANDERS** **(as joint liquidators of Alpha (Student) Nottingham Ltd)**	**Applicants**
- and -	
ANTHONY YIU-WING WONG	**Respondent**

Navjot Atwal (instructed by **Howard Kennedy LLP**) for the **Applicants**
Asela Wijeyaratne (instructed by **Howard Kennedy LLP**) for the **Respondent**

Hearing date: 3 February 2017

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.

MR JUSTICE ARNOLD

MR JUSTICE ARNOLD :

Introduction

1. This is an application by the joint liquidators ("the Liquidators") of Alpha Student (Nottingham) Ltd ("the Company") under section 112 of the Insolvency Act 1986 to determine the question of whether a number of investors ("the Purchasers") who entered into contracts for the purchase of student suites ("the Suites") at 1 Hockley, Nottingham BG1 1FH ("the Site"), pursuant to which the Purchasers paid deposits to the Company, have enforceable equitable liens over the Site, or now its proceeds. The Company is in liquidation, and if the Purchasers do have enforceable equitable liens, they will be secured creditors rather than unsecured creditors.

2. The application was issued on 17 November 2015. The matter originally came before Snowden J in the interim applications list on 11 December 2015. At that hearing, Snowden J directed the removal of various unilateral notices and a legal charge over the Site, with the consent of the charge holder, to enable the Liquidators to sell the Site on terms that any liens held by the Purchasers were transferred to the proceeds of sale. He also invited the Liquidators to bring forward proposals by which the Purchasers could be represented on the application.

3. Registrar Barber subsequently made a representation order under CPR rule 19.7(2)(d)(ii) on 30 June 2016 to enable the Purchasers' interests to be represented. Under paragraph 1(a) of Registrar Barber's order, Anthony Yiu-Wing Wong was appointed to represent the interests of the Purchasers listed in Schedule A of the order. Under paragraph 1(b) of Registrar Barber's order, the Liquidators, with appropriate consent having been obtained from the unsecured creditors, were appointed to represent the interests of the unsecured creditors listed in Schedule B of the order.

Factual background

4. The Company was incorporated on 8 November 2012 as a special purpose vehicle to acquire and develop the Site as student accommodation. Planning approval was granted on 11 December 2012, and amended on 9 September 2013, for an 8-storey structure to be built on the Site. The plans for the Site included provision for ground floor retail space and a partial basement for plant. The superior floors were to comprise 131 Suites.

5. After the Company had acquired the freehold title to the Site on 19 December 2012, the Company entered into contracts for the sale of 999 year leases of the Suites to the Purchasers. All of the Purchasers were individuals (or in some cases companies or couples) resident abroad, in China, Dubai, Hong Kong, Kenya, Kuwait, Malaysia, Singapore and South Africa. The Purchasers paid deposits to the Company in accordance with the relevant contracts for sale. In each case the deposit consisted of 50% of the purchase price. Each contract of sale provided for the grant of lease in the form of a draft annexed to the contract which in turn referred to a floor plan showing the Suite to which the contract related.

6. The Company received deposits totalling £3,232,574. Suites 29 and 53 were unsold. Furthermore, although contracts appear to have been exchanged, no deposits were paid in respect of Suites 121 to 126.

7. Development of the Site did not progress beyond the demolition of the existing buildings, which was completed in August 2014. The Company ran into financial difficulties, and on 29 July 2015 the Company informed the Purchasers that it was unable to complete the development. The Company was placed into creditors' voluntary liquidation on 17 August 2015.

8. Pursuant to the terms of the contracts for sale, the Company obtained deposit insurance (referred to as the "Master Bond") from Northern and Western Insurance Company Ltd ("NWIC"), a company registered in Nevis, dated 7 December 2012. NWIC was placed into liquidation in January 2015 with joint liquidators appointed from Ernst & Young.

9. NWIC, in turn, entered into an Agreement of Indemnity dated 16 December 2012 with Bridgeport Ventures LLC ("Bridgeport"), a company registered in Florida, and Seer Acquisitions Ltd ("Seer"), a company registered in England and Wales, by which they jointly and severally agreed to indemnify NWIC against all claims under the Master Bond. Bridgeport has been dissolved. Seer entered liquidation on 25 August 2015.

10. On 19 December 2012 the Company granted a charge by way of a legal mortgage ("the charge") over the Site in favour of NWIC in respect of all liabilities and obligations of the Company to NWIC under the "NWIC indemnity". The NWIC Indemnity was described as:

> "a validly completed indemnity granted by the Developer for the benefit of NWIC in connection with each Insurance Bond".

11. The Liquidators are not aware of any such indemnity having been granted by the Company to NWIC. As mentioned above, the charge has in any event been removed over the Site to enable it to be sold. In circumstances where the Liquidators of NWIC have not received claims from the Purchasers and where a sale of the Site had been agreed, NWIC did not oppose an order from the court vacating the legal charge. The Liquidators of the Company and NWIC have been cooperating in this respect to ensure an orderly sale of the Site for the benefit of the creditors as a whole.

12. The Company's statement of affairs as at 17 August 2015 shows a total estimated deficiency of £1,898,314.94. The Site is shown as having a book value of approximately £3 million, although the "estimated to realise" figure is £1.25 million. The difference between these figures is represented by fees incurred by the Company in relation to the development.

13. The known creditors' claims are, in summary, as follows:

    i) The Purchasers who paid deposits totalling £3,232,574;

    ii) Seer has a claim for a debt of £209,125 arising from its appointment as a sales agent by the Company;

    iii) HMRC have a claim for unpaid VAT for £1,998; and

    iv) Howard Kennedy LLP has a claim for legal work for £7,599.

14. The Liquidators were able to effect a sale of the Site for the sum of £1.125 million (plus VAT) to FFGI Nottingham Ltd on 7 June 2016. The proceeds of sale have since been held pending the court's determination of the present application.

The issue

15. 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 or, 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.

16. The issue that arises for determination on the present application is whether the Purchasers have the benefit of enforceable equitable liens over the Site given that the building was never built. The Purchasers contend that they do have enforceable equitable liens over the Site, and hence rank as secured creditors. The Liquidators accept that an equitable lien arose in respect of each Purchaser's interest in the subject matter of the relevant contract of sale when the deposit was paid, and in particular accept that the subject matter of each contract was identifiable by reference to the draft lease and the relevant floor plan. The Liquidators nevertheless contend that such liens are unenforceable.

Previous case law

17. I was referred to a number of authorities which it is convenient to consider in chronological order.

18. In *Wythes v Lee* (1855) 3 Drew 396 at 403, 61 ER 954 at 957 Kindersley V-C stated the principle on which equitable liens are founded as follows:

> "… it does appear to me that it is consistent with natural justice, that if a purchaser, on the faith of the contract being complete, and the estate becoming his, had advanced money in payment or part payment for the purchase, he had advanced it under circumstances which entitle him to say, 'If you cannot complete, not only are you bound to given me back my money, but I have a right to a lien on the estate.'"

19. In *Rose v Watson* (1864) 10 HL Cas 672 at 678, 11 ER 1187 at 1190 Lord Westbury stated the principle as follows:

> "Where the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase-money so paid

> does, in equity, finally transfer to the purchaser the ownership of a corresponding potion of the estate."

20. Similarly, Lord Cranworth stated at 683-684 and 1192:

> "There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mortgage to him of the estate to that extent.
>
> It seems to me that that is founded upon such solid and substantial justice, that if it is true that there is no decision affirming that principle, I rejoice that now, in your Lordships' House, we are able to lay down a rule that may conclusively guide such questions for the future."

21. In *Middleton v Magnay* (1864) 2 H & M 233, 71 ER 452 the purchaser paid for certain improvements to a paper-mill pursuant to an agreement under which the vendor agreed to grant a 21-year lease of it. The agreement could not be completed because the vendor could not make title. The vendor's interest was an eight-year term in one moiety only of the premises. Page-Wood VC held at 237 and 454 that the purchaser was entitled to a lien for his expenditure "on such estate or interest as the Defendant has in any of the property and effects mentioned in the agreement".

22. In *Whitbread & Co Ltd v Watt* [1902] 1 Ch 835 the Court of Appeal held that the principle extended to sales of land where the sales contract had been rescinded by the purchaser. Vaughan Williams LJ stated at 838:

> "The lien which a purchaser has for his deposit is not the result of any express contract it is a right which may be said to have been invented for the purpose of doing justice. It is a fiction of a kind which is sometimes resorted to at law as well as in equity. … When Lord Westbury in *Rose v Watson* speaks of a 'transfer to the purchaser of the ownership of a part of the estate corresponding to the purchase-money paid,' and Lord Cranworth speaks of the purchaser being exactly in the position of a mortgagee of the estate to the extent of the purchase-money which he has paid, those expressions are merely verbal vehicles to carry the right which justice demands that the purchaser should have."

Stirling and Cozens-Hardy LJJ expressed themselves in similar terms.

23. In *Lehmann v B.R.M. Enterprises Ltd* (1978) 88 DLR (3rd) 87, a case in the British Columbia Supreme Court, the purchaser paid the purchase money for a residential unit within a block newly constructed by the vendor. The purchaser could not obtain good title to the unit because it had yet to be registered under the local Strata Titles Act by the time of the vendor's insolvency. The vendor's trustee in bankruptcy argued that a lien could not be recognised because it could not be enforced against interest of the owner in the unit. Hutcheon J rejected this argument, saying at 90-91:

> "If the purchaser is not able to obtain title because the vendor has failed to complete registration under the Strata Titles Act, 1966, or has failed to file a subdivision plan, I know of no reason in principle that would prevent a Court of Equity from placing a lien on the whole of the vendor's property of which the subject-matter of the sale formed part."

24. In *Hewitt v Court* (1983) 149 CLR 639 the appellants had entered into a contract with a company under which the company agreed to construct a transportable house in accordance with certain plans and specifications at its premises for installation on land owned by the appellants for a price of $34,116. The contract provided for the appellants to pay a deposit of 20% on execution of the contract and a stage payment of 40% on pitching the roof, which were duly paid. Subsequently the company became insolvent. The appellants agreed with the company to take delivery of the partially built house on payment of the outstanding balance ($13,647) less the cost of the unfinished work ($7,236). The liquidators of the company subsequently contended that the appellants had obtained a preference on the basis that the appellants had no proprietary interest in the unfinished house and had obtained a house worth $26,880 on payment of $6,411. The majority of the High Court of Australia held that the appellants had been entitled to an equitable lien, and therefore had not obtained a preference.

25. It is important to note that all the members of the Court were agreed that the contract was one for work and materials, and not for the sale of goods. Nevertheless, the majority (Gibbs CJ, Murphy J and Deane J) held that a lien had arisen by the point where the stage payment was made, because specific identifiable property was appropriated to the contract at that stage.

26. Gibbs CJ said at 648 (emphasis added):

> "The contract required the appellants to pay all but $1,000 of the price of $34,116 before obtaining property in the home. The payment (other than the deposit) was to be made in respect of an identified building which the company was bound to complete and set up on the appellants' land. The contract impliedly recognised that if the appellants terminated the contract they should be entitled to the product of the work for which they were required to pay. In these circumstances it seems to me that the appellants were entitled to a lien for the amount of the purchase money paid when the contract could not be completed through no fault of theirs. The case is so closely analogous to that of a sale that the principles which entitle the purchaser to a lien are in my opinion applicable. *No doubt if the construction of the building had never been commenced there could have been no*

> *lien for the deposit*, but it does not follow that once the construction had been commenced to the stage of pitching the roof there could be no lien in respect of all moneys paid, including the deposit."

27. He went on, however, to say at 649:

> "... I can see no distinction in principle between a case in which the construction had commenced at the date of the contract, although it had not then been completed, and one in which no construction was commended until after the contract was made but the subject of the contract was subsequently identified."

It is clear from this that the statement I have italicised in paragraph 26 above was directed to the circumstance that, because of the nature of the contract, there would have been no identified property to which the lien could attach if construction of the house had not been commenced.

28. Wilson and Dawson JJ dissented, saying at 658:

> "Apart from the absence of authority there are obvious difficulties which suggest that an equitable lien cannot arise in the case of a contract such as this. At the time when the deposit was paid there was nothing to which a lien could attach. Even as the construction of the house proceeded and it became identifiable as a house being constructed for the appellants, no property in it passed to the appellants and there was no obligation on the part of the company to transfer that particular house to the appellants; they might have constructed an identical house to fulfil their contractual obligations to the appellants. When the contract was completed the house was to become annexed to and form part of the land comprising the site."

Thus what divided the majority and minority was the narrow question of whether or not specific identifiable property had been appropriated to the contract by the time of the stage payment.

29. All of the members of the majority clearly held that the existence of an equitable lien did not depend on the availability of specific performance as a remedy for the purchaser: see Gibbs CJ at 650, Murphy J at 651 and Deane J at 665-667. It appears that Wilson and Dawson JJ agreed with this at 654.

30. In *Re Barratt Apartments Ltd* [1985] IR 350 the company had planned to build a block of flats on a site it owned. It received deposits from 14 intending purchasers. Only two of the purchasers entered into contracts with the company, however. One of these was a Mr Cummins. The other 12 purchasers paid what were described as "booking deposits" prior to the execution of contracts, which were expressly agreed would be returnable upon notice by either party and would not give rise to any "right of action at law". The company become insolvent before the block was built, a mortgagee appointed a receiver and an order for compulsory winding up was made. The liquidator

applied to the High Court of Ireland for directions as to whether the purchasers ranked as secured creditors.

31. Keane J held that all of the purchasers had equitable liens as a result of the payments of their deposits and therefore were secured creditors. So far as Mr Cummins' claim (and by implication that of the other purchaser who had entered into a contract) was concerned, Keane J reasoned as follows at 354:

> "It was submitted on behalf of Mr. Cummins that the deposit paid by him was in part payment of the purchase money; and that, accordingly the company was a trustee for him to that extent of the legal estate in the property. It was further submitted that, in these circumstances, he was entitled to a lien on the property in respect of the deposit so paid, in accordance with the decision of the Supreme Court in *Tempany v. Hynes* [1976] I.R. 101, and entitled to rank as a secured creditor. It was submitted on behalf of the receiver that such a lien only arose in the case of a contract of which the Court would grant specific performance; and that no decree for specific performance could be granted in the case of the contract with Mr. Cummins. It was pointed out that this was not merely a contract for the sale of an interest in land, but was also a building contract; and that, in addition to the normal difficulties which attend the specific performance of such a contract, there were additional difficulties in the present case, having regard to the fact that the block of apartments had never been built and would not now be built and that, accordingly, save in the case of apartments on the ground floor, it was manifestly impossible, as it was urged, to perform a contract such as that with Mr. Cummins by completing the construction of the apartment in accordance with its terms. In support of these submissions, counsel for the receiver relied upon a passage in *Williams on Vendor and Purchaser* Fourth Edition at p. 545.
>
> I am satisfied that the submissions advanced on behalf of Mr. Cummins are well founded. Whatever the position may be where there is no contract in existence, it seems to me clear that where there is a contract in existence, the payment by the purchaser of part of the purchase price entitles him to a lien on the property in respect of the money so paid. There may be many reasons why a purchaser who has paid part of the purchase price may be precluded from specifically enforcing the contract in circumstances which are no fault of his; and his right to recover the purchase money actually paid by him, and the existence of an equitable lien to secure the payment, cannot depend on the availability to him of such a remedy. This is clear from the decision of the House of Lords in *Rose v. Watson* (1864) 10 H.L.C. 672, the principles laid down in which were applied by the majority of the Supreme Court in *Tempany v. Hynes* [1976] I.R. 101."

32. The receiver settled the claims of Mr Cummings and the other purchaser who had entered into a contract, but appealed to the Supreme Court with respect to the other 12 purchasers. The Supreme Court allowed the appeal, holding that those purchasers had not been entitled to equitable liens since they had not entered into contracts and thus the payment of the booking deposits did not confer on them any estate or interest, legal or equitable, in the property.

33. The key authority for present purposes is *Chattey v Farndale Holdings Inc* (1998) 75 P & CR 298. In that case each of the two plaintiffs agreed to purchase the lease of one of a large number of flats which were being constructed on a site in which the vendor had a leasehold interest. Each purchaser paid a deposit of 20% of the purchase price in advance. The construction work necessary for the creation of the flats was paid for out of the deposits paid by the purchasers and money borrowed from banks on the security of the development. The vendor became insolvent and the development was sold at the instance of the banks holding the security over the development. The plaintiffs claimed to recover their deposits from the subsequent owners by means of equitable liens. The claim was a test action, and similar claims had been made by 239 other purchasers.

34. The case for the plaintiffs was that they had obtained equitable liens over the developer's interest in the land to the extent of the deposits. The defendants argued that no lien arose either because the contracts were conditional on the grant of planning consent ("the conditionality argument") or because the contracts were for the grant of leases which had not previously existed and thus there was no beneficial interest capable of being transferred ("the conceptual argument"). Blackburne J and the Court of Appeal rejected both these arguments. If there was a lien, there was an additional issue before Blackburne J as to the geographical extent of the land in which the interest subsisted which was subject to the lien ("the geographical issue"). This issue did not arise in the Court of Appeal for the reasons explained below.

35. It is not necessary to consider Blackburne J's reasons for rejecting the conditionality argument. The Court of Appeal rejected it for reasons which Morritt LJ expressed at 305-306 as follows:

> "It seems to me that the argument for Farndale would give rise to anomalies. First, the lien would be directly related to the purchaser's payments sought to be secured and would be denied in those circumstances where such protection was most required. Thus on the facts of this case no lien would have arisen when the deposits were paid ..., notwithstanding that in accordance with the statement of Sir George Jessel MR [in *London and South Western Railway Co v Gomm* (1882) 20 Ch D 562 at 581] the plaintiffs then had an equitable interest in the property by virtue of their respective conditional rights to call for the legal estate in their respective flats. Secondly, if, as Farndale contends, the lien arises at the time of and in consequence of the accrual of the right to specific performance of the contract it is hard to understand why the lien does not cease if the right to specific performance is subsequently lost. That the lien is not lost is conceded by Farndale and in any event established by the decision of Stirling J in *Levy v Stogdon* [1898] 1 Ch 478. Thirdly, it is hard to see why the substantive right of the purchaser to a lien should depend

> on the availability to him of a remedy, particularly one which if successfully invoked would negate the need to rely on the right at all.
>
> In my view both principle and authority support the argument for the plaintiffs. The statement of George Jessel shows that the purchaser has an equitable interest or estate in the land if he has a right to call for the legal estate, albeit future and conditional, which the vendor has no right to refuse. In this case the vendor was contractually bound to use his best endeavours to obtain a satisfactory planning consent on the grant of which the contract became unconditional. The equitable interest or estate of the purchaser was one which entitled him to seek specific relief in the form of injunctions so as to protect that right notwithstanding that a claim for specific performance might have been premature."

36. Blackburne J rejected the conceptual argument for the following reasons:

> "... if the contract is to create and convey a derivative interest, the lien attaches to whatever interest the vendor has, if any, out of which the derivative interest is to be created so that the vendor's interest becomes encumbered by that obligation in favour of the purchaser when the contract is made and the deposit paid. This means that the where the contract is to grant a lease of a freehold plot the lien attaches to the vendor's interest in that plot.
>
> In *Middleton v. Magnay* (1864) 2 H & M 233 a purchaser was held by Page-Wood V-C to be entitled to a lien for his expenditure for certain improvements ... paid pursuant to an agreement under which the vendor agreed to grant a 21 year lease. The agreement went off because the vendor could not make title. The lien was declared to be 'on such estate or interest as the Defendant has in any of the property and effects mentioned in the agreement'. In fact, the vendor's interest was an 8 year term in one moiety only of the premises in question. ...
>
> It is no doubt true that, if the vendor had purported to grant a 21 year lease, the lease would have taken effect as an assignment, but that consequence cannot, as it seems to me, affect the vendor's contractual obligation. That obligation was to grant a 21 year term. The agreement went off because the vendor could not fulfil that obligation. In my view, whilst it is true that the conceptual difficulty which has been raised in argument before me does not appear to have been considered in that case, the decision is nevertheless an example of a lien over an interest which was not itself the subject matter of the contract but out of which a derivative interest was agreed to be created. I cannot think that the decision would have been any different if the

> vendor's interest had been a freehold in a moiety only of the premises or a 22 year term in such moiety."

37. Morritt LJ agreed, saying at 308:

> "Once it is established that the existence of the lien is not restricted to cases where the purchaser has been entitled to specific performance the concept on which the objection is based disappears too. What is important is that the purchaser shall have had the right, whether present, future or conditional, to call for the legal estate. It would be absurd if the lien should be denied merely because that legal estate did not exist but another out of which the vendor would grant it did."

He went on to say that he entirely agreed with what Blackburne J had said about *Middleton v Magnay* in the last paragraph of the passage quoted above.

38. Turning to the geographical issue, Blackburne J rejected the plaintiffs' argument that the liens attached to the whole of the vendor's leasehold interest for reasons he expressed as follows:

> "I can well see that there may be difficulties in effecting a sale, whether by way of assignment or lease, of a part only of a vendor's leasehold interest in a building such as this and that any consents necessary to achieve such a disposal may not be forthcoming (in which event the lien cannot be enforced by a sale). I cannot see why, however, where the interest is freehold, the lien is confined to so much only of the freehold as is the subject of the contract (as Mr McDonnell, Mr Boyle and, I think, Mr Macdonald accepted) but, where the interest is leasehold, the lien attaches to the whole of the vendor's leasehold interest notwithstanding that that interest may be in an area of land far greater than that which is the subject matter of the contract.
>
> Mr Macdonald cited *Lehmann v BRM Enterprises Limited* (1978) 7 British Columbia Law Reports, in which Hutcheon J held a purchaser of one of a number of plots in a residential property development to be entitled to a lien over the whole of the property (and not just over the unit which he had contracted to purchase). In coming to that conclusion the judge declined to follow a statement in an earlier appellate decision to the effect that the lien is confined to the land covered by the agreement in question but stated, without giving reasons, that he knew 'of no reason in principle that would prevent a court of equity from placing a lien on the whole of the vendor's property of which the subject-matter of the sale forms a part'.
>
> 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 regarded 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 co-extensive 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."

39. The plaintiffs 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 318 (emphasis added):

> "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 exercisable over the property comprised in the contract of sale to him for the interest therein conferred by the underlease. We were informed that the development had advanced sufficient far when work ceased in December 1990 to enable that property to be identified physically without any difficulty. Accordingly there should be no difficulty in making declarations giving effect to the rights of the parties in accordance with the judgments of the court. *The question of how to give effect to a purchaser's lien in cases in which the relevant building or part does not exist does not arise.*"

40. It will be appreciated that the question which did not arise in that case does arise in this one.

The Purchasers' case

41. The Purchasers' case, in summary, is that:

i) Each sale contract identified with sufficient specificity the future legal estate in each Suite for a lien to arise.

ii) Each Purchaser benefits from an equitable lien to the extent of the deposit paid (together with interest and costs). Each Purchaser is therefore a secured creditor to the extent of his lien.

iii) Each Purchaser's lien attached to the Company's freehold interest in the Site and now attaches to the proceeds of sale of the Site.

iv) The Purchasers' liens do not compete. The Purchasers therefore rank equally as secured creditors.

The Liquidators' case

42. As noted above, the Liquidators accept the Purchasers' proposition (i). They also accept proposition (ii) to the extent that a lien arose when the deposit was paid, but contend that the lien is unenforceable because the building was never built. The Liquidators also take issue with proposition (iii) and question proposition (iv).

Analysis

Are the liens enforceable?

43. Counsel for the Liquidators submitted that, although the liens arose, they were unenforceable because the leases had never come into existence as the Suites had not been built and thus there could be no sale of the property. He also submitted that enforcement would give rise to practical difficulties.

44. As counsel for the Purchasers submitted, the first argument is essentially the same as the conceptual argument which was rejected in *Chattey v Farndale*. As the Court of Appeal held in that case, and as the High Court of Australia held in *Hewitt v Court*, there is no requirement that the purchaser should be entitled to specific performance. It follows that it is not necessary for the legal estate in question to exist. It is sufficient that the vendor has contracted to create the legal estate in question out of another legal estate which does exist and that the legal estate which is to be created is identifiable. It is immaterial whether the legal estate in question does not exist because construction of the building has not been completed or because construction has not been commenced. Accordingly, I agree with the conclusion reached by Keane J in *Barrett Apartments*. For the reasons explained above, I do not regard *Hewitt v Court* as supporting the contrary conclusion.

45. As for the second argument, the practical difficulties postulated by counsel for the Liquidators were predicated upon the assumption that each lien attached to the subject matter of the contract rather than to the Site. That is disputed by the Purchasers, and I shall consider that issue below. Assuming for the moment that the Liquidators are correct, the supposed difficulties are all to do with valuation of the property the subject of each lien. It is not suggested, however, that, apart from the question of valuation, there is any problem in enforcing the liens against the proceeds of sale of the Site. That being so, I do not see why any difficulty in valuation should affect the Purchasers' rights as a matter of principle. I shall return to the question of valuation below.

To what do the liens attach?

46. Counsel for the Liquidators submitted that the liens attached to the subject matters of the respective contracts, namely the leases which the Company had agreed to grant. This submission is supported by the passage from the judgment of Blackburne J in *Chattey v Farndale* quoted in paragraph 38 above and nothing in the judgment of Morritt LJ undermines his reasoning or conclusion on this point.

47. Counsel for the Purchasers submitted that the passage from Blackburne J's judgment quoted in paragraph 36 above showed that the liens attached to the Company's interest in the Site as a whole. I do not accept this submission. In that passage Blackburne J was addressing the conceptual argument, and not the geographical issue. When he did turn

to consider the geographical issue, he was clear that 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". Furthermore, I consider that his reasoning with respect to the latter issue is entirely persuasive.

48. I recognise that in the present context, given that the building was never constructed, the subject matter of each contract was in effect the legal estate in the relevant air space which would have been occupied by the Suite when constructed. I do not consider that this means that Blackburne J's reasoning is inapplicable, however.

Do the liens compete?

49. It is common ground that if, as I have concluded, each lien attaches only to the land which forms the subject matter of the contract, rather than the land as a whole, then no question of competing priorities between the liens arises. Rather, the Purchasers rank equally and are each entitled to a *pro rata* distribution of the proceeds of sale to the extent of their security.

How should the proceeds of sale be distributed?

50. For the reasons given above, it seems to me that, in principle, the Purchasers are each entitled to a *pro rata* distribution of the proceeds of sale to the extent of their security. The question is how to value the extent of their security given that it does not extend to the vendor's interest in the parts of the legal estate corresponding to (i) the Suites which were not sold or in respect of which no deposits were paid, (ii) the ground floor retail space and (iii) the partial basement. In principle, I consider that the vendor's interest in those parts should be available for the unsecured creditors. The question is whether it is realistically possible to ascribe any value to that interest, and if so how.

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 (£6,803,375) and apportion it between the value of the Purchasers' interests (£6,439,455 or 94.7%) and the value of the vendor's interest (£363,920 or 5.3%).

52. Turning to the ground floor retail space, there is no evidence that this had any significant value as at 17 August 2015. Unlike the Suites, it had not been pre-sold or even marketed. Furthermore, given the small size of the unsecured creditors' claims relative to the Purchasers' claims, it would be disproportionate for the Liquidators to have to incur the expense of a professional valuation of the retail space. Accordingly, I propose to proceed on the basis that the value of the vendor's interest in the retail space may be disregarded.

53. As for the plant in the partial basement, this appears to have been intended to service the whole building, and thus to be benefit all parts of it equally. I therefore think it is justified to regard it as having no separate value.

54. Accordingly, the proceeds of sale of the Site, net of costs and expenses, should be divided between the Purchasers and the unsecured creditors in the ratio 94.7:5.3. The Purchasers' portion should then be distributed *pari passu* amongst the Purchasers.

Berkeley Applegate relief

55. The Liquidators seek an order of the kind granted in *Re Berkeley Applegate (Investment Consultants) Ltd (No 2)* (1988) 4 BCC 279 that the costs and expenses of realising the proceeds of sale of the Site should be met from the assets of the Company and the proceeds of sale. This is not opposed by the Purchasers, and I shall grant it.