



3 HARE COURT

RE ALPHA STUDENT (NOTTINGHAM) LTD (IN LIQUIDATION) [2017] EWHC 209 (Ch)

Purchaser's Lien

A purchaser's lien is a form of equitable lien that first took shape in the 19th century as "a right which may be said to have been invented for the purpose of doing justice" (*Whitebread & Co. Ltd v Watt* [1902] 1 Ch. 835 at 838). The effect of an equitable lien is to create a right *in rem*, so that the holder of the lien can call on the property of another to discharge a monetary obligation. This ensures that the holder of the lien is a secured creditor in a winding up. The equitable lien seems in the 19th century to have been a method of protection for purchasers of land at risk of losing their deposits following the vendor's default on a contract for sale. Over the course of its history, the equitable lien has slowly become a more widely applicable protection for purchasers. *Re Alpha Student* represents a further development in this direction.

The first evolution of the protection afforded by a purchaser's lien came with the decision in *Whitbread & Co. Ltd v Watt* [1902]. This case concerned a contract for the sale of land that had been rescinded by the purchaser. The Court of Appeal held that the existence of a purchaser's liens was not restricted to instances of default by the vendor, but could exist where a contract reserves to the purchaser a power to rescind. The next shift occurred in the Canadian case of *Lehmann v B.R.M. Enterprises Ltd* [1978] 88 D.L.R (3rd), in which the purchaser paid the purchase money for a residential unit within a newly constructed block built by the vendor and the vendor later became insolvent. The case was complicated by the fact that the vendor had failed to complete the statutory registration of the individual residential unit or file a subdivision plan for the block. However, not only did the court extend the purchaser's lien to cover improvements made to the property, the lien was extended to cover the whole of the vendor's property, not just an individual unit.

A further shift occurred in the Australian case of *Hewitt v Court* (1983) 149 CLR 639 (High Court of Australia). Significantly, this case did not concern the sale of an estate in land at all, but was a contract for work and materials, specifically the construction and installation of a transportable house on land owned by the purchasers. The purchasers had paid a deposit and a stage payment on pitching the roof, after which the vendor became insolvent. The purchaser agreed to take the unfinished house from the vendor on the payment of the outstanding balance, less the cost of the unfinished work. The vendor's liquidators challenged this as a preference. The majority of the High Court of Australia decided that the purchaser had not received a preference as they had the benefit of a purchaser's lien over the unfinished house. This was a remarkable decision for a number of reasons. First, the relevant contract was not a contract for the sale of a legal estate in land. Second, at the time the deposit was made by the purchaser, there was nothing to which a lien could attach and the vendor had no obligation to transfer the particular house in question to the purchaser. The Court in *Hewitt v Court* also held that the existence of an equitable lien did not depend on the availability of specific performance as a remedy. That was a proposition that the English Court of Appeal accepted in *Chattey v Farndale* [1998] P&CR 298 CA, which held that it was the equitable interest, even if future and conditional, which gave rise to the purchaser's lien, not the fact that specific performance was a possible remedy.

Re Alpha Student

This case concerned the purchase of off-plan leasehold interests in 131 suites in a proposed tower development, for which planning permission had been granted. The purchasers, all individuals and companies resident abroad, had paid deposits of 50% of the purchase price. Each contract of sale had a draft grant of lease annexed to it which referred to a floor plan indicating the corresponding purchased suite. The vendor developing the site became insolvent before the structure was built, and in July 2015 informed the purchasers that it would be unable to complete the development. The companies from which the vendor had obtained deposit insurance entered into liquidation in 2015. The issue before the court was whether the purchasers in the case had the benefit of enforceable equitable liens, even though no building was ever built.

The arguments advanced on behalf of purchasers were that: each sale contract identified with sufficient specificity the future legal estate in each suite for a lien to arise; each purchaser benefitted from an equitable purchaser's lien to the extent of the deposit paid, interest and costs. Each purchaser was therefore a secured creditor to the extent of their lien; each purchaser's lien attached to the vendor's freehold interest in the site and then attached to the proceeds of its sale; the purchasers' liens do not compete and the purchasers therefore rank equally as secured creditors. The vendor's liquidators argued that while a lien arose when the purchasers made their deposits, the liens were unenforceable as the suites' overall structure was never built. Furthermore, the liquidators questioned whether any lien could attach to the proceeds of sale of the site.

Mr Justice Arnold found in favour of the purchasers, deciding on a number of important points of law in the process. Persuaded by the judgements in *Chattey v Farndale* and *Hewitt v Court*, he held that, as there is no requirement that the purchaser should be entitled to specific performance for the liens to be effective, it follows that it is not necessary for the legal estate in land to exist. It was sufficient that the vendor had contracted to create an identifiable legal estate from an existing legal estate. Each purchaser was therefore a secured creditor, entitled to a *pro rata* distribution of the proceeds of sale to the extent of their deposit.

The decision in *Re Alpha Student* represents an important development in the protection offered by a purchaser's lien to off-plan investors, in circumstances where the developer becomes insolvent before the completion (or even commencement) of the development.

Written by [Samuel McNeil](#) pupil at [3 Hare Court](#)