

Case No. 2015-008993

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Rolls Building
Fetter Lane
London
EC4A 1NL

Friday 11th December 2015

Before:

MR JUSTICE SNOWDEN

IN THE MATTER OF ALPHA STUDENTS (NOTTINGHAM) LIMITED
(in liquidation)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

(1) GEORGINA EASON
(2) MICHAEL SANDERS

Applicants

MR NAVJOT ATWAL (instructed by Howard Kennedy LLP, London SE1 9BG)
appeared on behalf of the Applicants

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J U D G M E N T
(As Approved)

2,393 Words /34 Folios

MR JUSTICE SNOWDEN:

1. I have an application before me by the joint liquidators of Alpha Students (Nottingham) Limited, a company which is in creditors voluntary liquidation. The application seeks directions, pursuant to section 112 of the Insolvency Act 1986, for the determination of questions as to whether a number of persons ("the purchasers"), who entered into sales contracts for the purchase "off-plan" of various apartments ("student suites") to be constructed by the company at a site in Hockley, Nottingham ("the site"), have any interest in the land which forms the site.

2. The basis for the potential interest of the purchasers in the site is that, pursuant to individual contracts for the eventual grant of a lease of an identified student suite, each purchaser paid a deposit of 50 per cent of the purchase price. Regrettably, the company has become insolvent before any construction has taken place on the site, which is currently, in effect, simply a flat piece of land which is no more than a building site. The total deposits that have been paid amounted to £3,232,574 in respect of most, but not all, of 131 student suites which were anticipated to be constructed. All of the purchasers entered unilateral notices on the Register of Title of the land in respect of the agreements for lease into which they had entered. In addition, there was anticipated to be the construction and lease of a commercial unit on the ground floor of the building.

3. The liquidators of the company now wish to sell the site. They have, as I understand it, a potential purchaser who is interested in buying the site at a price which I am told may be about £1.125 million. That, unfortunately, will not enable all the deposits paid by the purchasers to be refunded to them. As I have indicated, the total amount of the deposits that were paid was £3,232,574, and there is a deficiency so far as the company's creditors are concerned, of about £1.89 million.

4. As a matter of law, the potential interest of the purchasers in the site arises because they paid a deposit pursuant to their agreement for a lease. In a number of cases it has been decided that a purchaser who pays a deposit which represents part of the purchase price for land should be entitled to assert a purchaser's lien over the land for the purpose of securing the repayment of the deposit. The cases are most fully examined in the decision of the Court of Appeal in *Chattey v Farndale Holdings Inc*, (1996) 75 P&CR 298. In that case, Morritt LJ referred to the earlier House of Lords' case of *Rose v Watson* (1864) 10 HL Cas 671, and to the consideration of that case by the Court of Appeal in *Whitbread v Watt* [1901] 1 Ch 911 and [1902] 1 Ch 835. That latter case appears to decide that a purchaser's lien arises as a matter of equity in order to do justice to a purchaser who, without fault, is unable to obtain a conveyance of the legal estate for which he has contracted, in circumstances where the contract is not capable of being performed either because of the default of the vendor or for some other reason. The jurisdiction therefore appears to have been put on a very broad basis.

5. In *Chattey v Farndale Holdings*, the Court of Appeal also confirmed, relevantly for present purposes, that the existence of a purchaser's lien is not defeated if the contract for sale is rescinded pursuant to a contractual term in the agreement. But the lien does not extend to land which was not that comprised in the contract for sale. The Court of Appeal also indicated in that particular case that there was no difficulty in a purchaser maintaining a lien in relation to a leasehold interest which had yet to be created by the freehold owner over an identified flat which had been constructed in a block of flats, although the Court of Appeal left open (at page 318): "the question of how to give effect to a purchaser's lien in cases in which the relevant building or part does not

exist".

6. In the instant case the liquidators have very properly raised for the court the question of whether, in circumstances where no identifiable construction has taken place on the site, it would be possible for the purchasers still to maintain that they have the benefit of a purchaser's lien, and, if so, over what part of the land and in what proportions relative to each other. They have also drawn attention to the fact that an argument may exist on behalf of the unsecured creditors, either that no purchaser's lien should exist at all where the flat which is the subject matter of the contract for lease has not yet been built, or possibly where parts of the site were not intended to be the subject of the leases to be sold to the purchasers at all.

7. All those questions are, in my judgment, matters which the court will need to adjudicate upon in a way which allows arguments to be put on behalf of the purchasers and on behalf of the unsecured creditors and so that all those parties are bound by the result. That is something which plainly cannot be done now, not least because the purchasers are almost entirely, if not entirely, located outside the United Kingdom in a variety of jurisdictions, and, with two or three limited exceptions, have not responded to a communication from the liquidators informing them of this application.

8. However, it seems to me that, in circumstances where the liquidators have an available buyer, the court ought to enable, if at all possible, the sale of the site to take place. In that way the dispute over the destination of the proceeds can take place at a later time, so that, in effect, the dispute is over a sum of money rather than a piece of land which is rendered unsaleable and sterile until the legal debate has concluded. The liquidators' concern is that unless the unilateral notices in relation to the agreements for lease are removed from the Register of Title, the sale to the prospective buyer cannot proceed.

9. The only objection which has been voiced to that course has come from one of the few purchasers who did respond to the letter from the liquidators. That person is a Mr Anthony Wong, who responded from an email address that is believed to be overseas, as follows:

"I object to the removal of the unilateral notice because I have instructed my lawyer for the rescission of the purchase contracts under a condition listed in the contract. I believe as joint liquidator you have an obligation to refund me before I consent to the removal of the unilateral notice.

Should no refund be given to me, I have the right to bargain for a price agreeable to me with the potential buyer."

10. It seems to me that Mr Wong's objection is misconceived. It may be true that Mr Wong has the benefit of an obligation on the part of the company to refund his deposit, but without the benefit of any lien or security that obligation simply ranks as an unsecured claim and would receive, at best, a dividend – and possibly a very small dividend – in the liquidation. It is obvious that Mr Wong's better interests are served by the assertion of a claim to a purchaser's lien which, if successful, will rank ahead of the claims of unsecured creditors. As I have indicated, the fact that the contract may be rescinded under a condition in the contract does not prevent a purchaser's lien from being asserted over the land; nor is the maintenance of a unilateral notice essential to the creation or existence of a purchaser's lien. I therefore do not

think that Mr Wong's interests will be in any way adversely affected if the notices are removed on terms that any purchaser's lien over the land is transferred to the proceeds of sale, as the joint liquidators accept that they would be.

11. The only other point made by Mr Wong is that he has the right to bargain with the potential buyer for a price agreeable to him as a price for removal of his unilateral notice. It seems to me that that is wholly unrealistic, because all the purchasers of student suites in this proposed block have registered unilateral notices in respect of their agreements for lease. It would therefore be wholly impracticable for all of them to attempt to negotiate with a buyer for a price that suited each of them, not least because they are for the most part resident abroad. There is a real risk that the sale would be stymied and lost were this to occur, with the result that there would be no money to refund any of the purchasers.

12. Moreover, where there are a number of persons who would each seek to use the existence of a unilateral notice as a bargaining counter to increase the price which a potential buyer may offer, it seems obvious that the greater potential price would be obtained by those who could hold out in that negotiation for longer, because a potential purchaser would, as he bought off a number of unilateral notices *seriatim*, be likely to pay more to the last holder of the unilateral notice in order to ensure that the money spent up until then was not wasted. One therefore envisages an unseemly scramble in reverse on the part of the holders of unilateral notices to be the last to agree with a potential buyer a price for removal of their unilateral notice. It seems to me that that is a wholly unrealistic and illogical process in which Mr Wong would seek to participate.

13. I therefore conclude that, in reality, the registration of a unilateral notice in respect of the agreement for a lease is, for reasons that I have endeavoured to explain, of no real value to the purchasers in this particular case. In *Donnelly v Weybridge Construction* [2006] EWHC 348 (TCC) Mr Peter Coulson QC (as he then was) considered that in such a case the court would have the jurisdiction to direct the Registrar to remove the unilateral notices from the Register. In this case that would allow the sale of the property to proceed. Plainly, however, I should not do that unless the balance of convenience was in favour of my doing so: see the discussion by Mr Coulson at [17] to [19] of his judgment.

14. In this case it does seem to me that the balance of convenience lies entirely in favour of removing the unilateral notices. First, because, as I have indicated, they cannot be turned into value in any meaningful way, whether as suggested by Mr Wong or otherwise. Secondly, because the unilateral notices are not themselves a precondition to the existence of any purchaser's lien that may exist. Thirdly, because the interests of the purchasers must be to ensure that the property is sold so that there is a fund of money from which they can be repaid. And fourthly, the purchasers' interests will be protected by the ability to argue for a lien over (a part of) the pot of money which is obtained when the property is sold, rather than delaying the sale which the liquidators contend is at an appropriate price.

15. For those reasons I think that the balance of convenience lies entirely in favour of directing the Registrar to remove the unilateral notices, to allow the liquidators to proceed with the sale, and for the questions that arise for determination as to the interests of the purchasers on the one hand, and the unsecured creditors on the other, to be transferred from the land to its proceeds of sale. I will make directions to that end.

16. I should say by way of further detail that I am also asked to direct the removal of a restriction and the registration of a charge in favour of the North and Western Insurance

Company Limited, which appears on the title. That is not contentious, because North and Western Insurance Company Limited, which is itself in an insolvency process, has consented to the removal of that restriction and charge, and I will so direct.

17. Finally, the liquidators seek a direction that their expenses and remuneration in connection with the realisation and sale of the site and the costs of this application shall be paid from such realisations or from the company's assets. I do not doubt that it is appropriate for the liquidators' expenses and remuneration in those regards to be paid; but the question of whether they should be paid from the realisations which would otherwise be payable to the purchasers (if the purchasers can establish their liens), or from the company's assets which would otherwise be available to unsecured creditors, should, in my judgment, be determined as part of the exercise which I have indicated should follow the sale of the property.

18. I have had a discussion with counsel as to the appropriate mechanisms by which those questions could properly be brought before the court in such a way as to enable the participation of any of the purchasers, if they express an interest in doing so, or otherwise by lawyers appointed to represent their interests. I shall leave it to the liquidators to bring forward proposals for the most cost-efficient and expeditious resolution of those questions in due course.
