Neutral Citation Number: [2023] EWHC 1820 (Ch)

Case No: CR-2020-002205

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY & COMPANIES COURT (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18/07/2023

Before :

MR JUSTICE MILES

- -

Between :

(1) STEVEN JOHN WILLIAMS
(2) PHILIP LEWIS ARMSTRONG
(as the Joint Administrators of Signature Living Residential Limited)

Applicants

- and -

(1) ALTER DOMUS TRUSTEES (UK) LIMITED
(formerly Cortland Trustees Limited)
(2)THE PURCHASERS DESCRIBED IN SCHEDULE 2 TO THE APPLICATION
(3) ION INSURANCE GROUP S.A

Respondents

- -

Ian Tucker (instructed by **Gateley Legal**) for the **Applicants**
Matthew Smith (instructed by **TLT LLP**) for the **First Respondent**
Andrew Twigger KC and Oliver Hyams (instructed by **Gordons Partnership**) for the **Third Respondent**

Hearing dates: 28 and 29 June 2023

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APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10:30am on 18 July 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

Mr Justice Miles :

Introduction

1. This is the resumed hearing of an application by the joint administrators (**the JAs**) of Signature Living Residential Limited (in Administration) (**the Company**) made under paragraph 71 of Schedule B1 to the Insolvency Act 1986. It concerns a property known as Ralli House, 60 Old Hall Street, Liverpool L3 9PP (**the Property**). The Company bought the Property in October 2015 with a plan to develop it into a mixed-use building with 123 apartments and some commercial space. Some of the apartments were to be in new upper floors. A number of the apartments were sold off-plan to purchasers under agreements for lease (**AFLs**) which specified a relevant apartment by number and description. The AFLs were described as "contracts for sale" but what was being sold was a lease.

2. After the development of some parts of the Property was completed, work ceased during 2020 and the project remains incomplete. The Company went into administration on 16 April 2020.

3. The JAs marketed the Property and ultimately agreed to sell it to a buyer, on the basis that it would be unencumbered by security interests.

4. The JAs' application sought orders: permitting the JAs to sell the Property free from various security interests; allocating the net sale proceeds (**the Sale Proceeds**); and providing for the JAs to be paid their fees and expenses.

5. At a hearing of the application on 24 March 2023 ICC Judge Jones ordered that the JAs were at liberty to sell the freehold interest in the Property to a named buyer free from the security interests. The Judge was referred to confidential evidence about the sale price and valuations - confidential because dissemination might be against the interests of the administration if the sale does not complete. The Judge also gave directions for a further hearing to address distribution of the Sale Proceeds, and adjourned the issues about the JAs' fees to another occasion.

6. The First Respondent, Alter Domus Trustees (UK) Limited (**AD**), is a secured lender with a mortgage over the Property. It registered its security against the Property at the Land Registry (**HMLR**) on 14 February 2019. It was represented by Mr Smith.

7. The Second Respondents contracted to purchase apartments in the Property under AFLs (**the Purchasers**). It is common ground that some of the Purchasers have equitable liens in respect of the deposits they paid, and that at least some of those Purchasers are entitled to some of the Sale Proceeds. The material groups of Purchasers broadly fall into three categories.

8. The Category A Purchasers entered into contracts for leases and protected their interests at HMLR by notices (mainly unilateral notices) against the registered title before AD registered its security on 14 February 2019. There are potentially 36 purchasers in this category - potentially because there are disputes about the treatment of a small number of cases (see below).

9. The Category B Purchasers entered into contracts for leases and protected their interests by unilateral notices against the registered title after AD registered its security. The Category C Purchasers did not protect their interests by notices at all.

10. The Third Respondent, ION Insurance Group, S.A. (**ION**) entered into a deposit bond in August 2016 in favour of the Company and Purchasers to guarantee repayment of deposits to the Purchasers in certain events, and it may well be liable to the Purchasers to the extent that the Sale Proceeds are not used to repay their deposits (and it already has paid out to some of the Purchasers). ION is therefore able to step into the shoes of the Purchasers. It is the party with the real economic interest in the outcome. The position of the Purchasers has been argued before me by ION, represented by Mr Twigger KC and Mr Hyams.

11. The JAs, represented by Mr Tucker, were neutral on the question of distribution of the proceeds.

Further background

12. The Company was incorporated on 28 July 2015 and acquired the freehold interest in the Property in October 2015. The freehold is registered at HMLR with title number MS285438.

13. The Company planned to convert the Property into a mixed development with commercial units on the ground floor and basement and flats on the floors above that. Initially there were to be 116 apartments, but planning permission was eventually obtained for 123.

14. The flats were sold off-plan to investors, who were required to pay a deposit (typically 25%) on exchange of the AFL.

15. Completion was intended to be achieved between April and August 2017. The earliest AFL was exchanged in late May 2016.

16. The Company originally obtained finance to develop the Property in October 2015 from a funder known as Amicus. That debt was secured over the Company's freehold interest. In October 2016, the Company re-financed with another lender called Saving Stream. In late November/early December 2018, the Company re-financed its existing debt through AD and obtained new borrowing facilities from AD up to a total of £12.9 million plus a fee of approximately of £130,000.

17. The Company granted AD a mortgage over the Property and a debenture (which does not matter for this application). AD advanced a capital sum in excess of £10.15 million to the Company. The sums lent by AD were due for re-payment on 29 November 2019 but have not been re-paid and the debt with interest now stands at more than £40 million.

18. Following the presentation of a winding up petition by another creditor, and a demand made by AD, the JAs were appointed on 16 April 2020. Their term of office has been extended more than once.

19. The Property is the Company's only valuable asset. There is no prospect of any return to unsecured creditors and a number of secured creditors will also suffer a shortfall.

20. At the date of the JAs' appointment the Property was at various stages of development, with significant amounts of outstanding work remaining to reach practical completion. The work carried out on the ground floor commercial space and to the fifth floors and above was relatively minimal. A commercial space in the basement had been completed and was being operated as a gym by a tenant under a five year lease expiring in December 2023. The tenant under that lease was dissolved on 30 November 2021.

21. Twenty of the apartments had reached practical completion, and leases had been granted to the relevant Purchasers. A number of these apartments were indeed occupied. After the administration the JAs obtained vacant possession. The sale of the Property pursuant to the order of ICC Judge Jones is subject to these twenty leases.

22. The AFLs included a plan showing the floor plan and location of the relevant apartment.

23. The key terms of AFLs may be illustrated by taking a sample agreement (for apartment 004). The agreement included the following terms – with some comments in square brackets:

    a. The Purchase Price was "£113,000 + the Furniture Pack Payment". [The price of the Furniture Pack was not a payment towards the apartment being purchased but, as its name shows, was for furniture.]

    b. The £113,000 was split into a Reservation Fee of £2,500, a Deposit of £25,750, and a Completion Payment of £84,750. [It is common ground that the Reservation Fee is part of the purchase price and is therefore added to the Deposit for the purpose of the issues discussed below about purchaser's liens.]

    c. The Deposit was paid to the Company's conveyancers, as agent for the Company. The Buyers consented to the Company using the deposit in building the Property or for other reasonable purpose connected with the Property.

    d. The purchase was of the "Leasehold property known as Apartment 004 on the ground floor of the Building and more particularly referred to in the Lease". [The draft Lease was a separate document annexed to the AFL.]

    e. Interest ran at 5% above Barclays Bank Base Rate.

    f. Completion was to take place within 10 days of service of a Completion Notice. If this had not happened by 31 August 2017 the buyer was able to rescind the agreement.

    g. The Company as Seller agreed as a condition precedent of the Agreement to put on risk Deposit Insurance to protect the Deposit paid by the Buyer under the terms of the Agreement.

24. In the case of three of the agreements, for apartments nos. 004, 008 and 910, there was an additional rider. This provided that the Deposit would be held by the Seller's Conveyancer as stakeholder until Satisfactory Planning Permission had been granted and the Deposit Insurance had been placed on risk, at which point the Deposit would be released to the Seller.

25. As to ION's documentation, pursuant to a Master Bond dated 16 August 2016, ION guaranteed to the Purchasers that in the event of a breach of the AFLs and/or any default of the Company of its performance of its obligations under the AFLs and/or in the event that the services of the Company were determined pursuant to the AFLs, ION would pay the Purchasers the "Deposit Amount" less any part of the Deposit Amount paid to the Purchasers by the Company in accordance with the AFLs up to the "Bond Amount". The persons who entered AFLs were expressed to be parties to the Deed.

26. ION has to date made payments to some of the Purchasers.

Issues to be determined at this hearing

27. The parties have agreed a list of issues to be resolved at this hearing:

(a) Were there binding agreements for sale between the Company and each of the Category A Purchasers?

(b) Did the AFLs between the Company and the Category A Purchasers impliedly exclude, alternatively postpone in priority behind the interests of the holder of any registered charge over the Company's entire freehold interest in the Property, any equitable lien which otherwise arose by operation of law in favour of the Category A Purchasers upon the payment of their deposits under the AFLs in the circumstances of this case?

(c) If the answer to (b) is in the negative, in the circumstances of this case (including those set out at paragraph 9 of the letter of Gordons Partnership Solicitors dated 9 March 2023), do each of the equitable liens (the "Equitable Liens") held by the Category A Purchasers attach either (i) to the Company's entire freehold interest in the Property or (ii) only to the Company's interest in the area of land which forms the subject matter of each individual Category A Purchaser's contract with the Company?

(d) If the answer to (c) is in sense (i), does the fact that the unilateral notices registered against the Company's title by each individual Category A Purchaser were all expressed to affect only the area of land which forms the subject matter of each individual Category A Purchaser's contract with the Company (and not the Company's entire freehold interest) mean that the Equitable Lien is

(i) not properly registered at all; or

(ii) unregistered in so far as it extends to any greater interest in the Company's property,

such that R1's registered charge is (in case (i)) not subject to the Equitable Liens at all or (in case (ii)) subject to the Equitable Liens only to the extent of the area of land which forms the subject matter of each individual Category A Purchaser's contract with the Company as recorded on the face of the register?

(e) Should Lawrence Edmund Ian Waller and Sophie Jane Thorpe be treated as if they were Category A purchasers, rather than Category D purchasers, in respect of apartment 104?

(f) Do the Equitable Liens otherwise rank before the security held by AD?

28. I shall return below to address the further factual points mentioned in this list of issues.

Illustrative distributions

29. It is helpful to illustrate the issues between the parties by considering the different distributions they seek.

30. If AD is correct about exclusion or postponement of the liens under issue (b) its charge will have complete priority.

31. Assuming AD does not win that issue, the key question arises under issues (c) and (d), which concern the extent of the liens and the priority given by notices on HMLR. The other issues only affect a small number of cases and can be disregarded for illustrative purposes at this stage.

32. AD's position is that the distribution of the proceeds of sale (assuming against it on issue (b)) should proceed on the following lines:

    i) Certain costs of realisation need first to be deducted from the proceeds of sale to give a net amount.

    ii) The Category A Purchasers each have an equitable lien for their deposits over the part of the Property specified in the relevant AFL (or having been protected as such on HMLR). They do not enjoy a wider lien over any other part of the Property.

    iii) These liens take priority over AD's charge because the relevant AFLs were registered before AD's charge.

    iv) Apportionments need to be carried out to determine the amount attributable to the commercial parts of the Property on the one hand and then residential parts on the other; and to determine the proportion of the residential element attributable to the Category A Purchasers. The Category A Purchasers are entitled to share in a relevant part of the residential element of the net proceeds of sale so calculated.

    v) The balance is to be paid to AD.

33. ION argued that the distribution should be as follows:

    i) The same costs of realisation need to be deducted from the sale proceeds.

    ii) Each Category A Purchaser has an equitable lien over the whole of the Property for their deposits. This is not limited to the part of the Property specified in their respective AFLs.

    iii) These liens rank in priority according to their registration. The notices on the register extend to the whole of the freehold title.

    iv) They have priority over AD's charge, having been registered before it.

v) The whole of these deposits should therefore be repaid before any amount is paid to AD under its charge.

34. It may help to look at some illustrative figures. These assume that there are 35 Category A purchasers. The actual figures depend on some of the issues addressed below and they differ from these ones. On current calculations the net proceeds are anticipated to be c. £1.58m. The total of the deposits repayable to the 35 Category A Purchasers is c. £1.3m. On the calculations proposed by the JAs for the apportionment process described above, the amount attributable to the Category A Purchasers is c. £370,000. On AD's case those Category A Purchaser would get that sum and AD would get the balance of the net proceeds, being c. £1.2m. On ION's case the Category A Purchasers would get c.£1.3m and AD would get the balance, being £280,000.

Equitable liens

35. The authorities cited to the court included *Rose v Watson* (1864) 10 HLC 672; *Middleton v Mangay* (1864) 2 H&M 233; *London and South Western Ry Co v Gomm* (1881) 20 Ch 562; *Whitbread v Watt* [1902] 1 Ch 835; *Barclays v Estates & Commercial* [1997] 1 WLR 415 ("*Barclays*"); *Chattey v Farndale per* Blackburne J (Lexis transcript 24 May 1996) and in the Court of Appeal (1998) 75 P&CR 298 ("*Chattey*"); and *Eason v Wong* [2017] EWHC 209 (Ch) ("*Eason*").

36. Arnold J carried out a helpful survey of the cases in *Eason* which I will not repeat. I was also referred to "Conveyancing liens" by Professor Barnsley in Conv. 1997, 336-361.

37. In the present case it is helpful to have in mind the following points which are established by these cases:

i) The purchaser's lien arises in equity to give the purchaser protection for any part-payments made under a contract to acquire an estate in land.

ii) The lien is in the nature of an equitable charge. It extends to part payments, interest and costs thrown away.

iii) It arises by operation of law and depends on there being an enforceable contract, but does not arise from the express terms of the contract and is not a implied term of the contract.

iv) The lien may be excluded or postponed to other security by a process of necessary implication from the terms of the contract or the nature of the transaction.

v) The lien arises when a contract to acquire an estate is made. It becomes exercisable on the making of a part payment.

vi) Though the lien only arises where there is a valid contract to acquire an estate, the lien does not depend on the contract being specifically enforceable. The lien will arise where the purchaser has a present, future or conditional right to call for a legal estate, including under an option.

vii) The lien comes to an end when the legal estate contracted for is conveyed or granted to the purchaser.

viii) The protection of the lien persists where the contract goes off for reasons other than the default of the purchaser; the position is otherwise where the contract goes off because of the default of the purchaser.

ix) The lien continues to apply where the contract goes off as a result of the exercise by the purchaser of a right to rescind and does not depend on showing that the vendor is in default.

x) Where the relevant contract is protected by a notice on HMLR the purchaser's lien (which arises by operation of law) will also be protected even if not separately mentioned in the notice.

Issue (a): binding contracts?

38. This issue concerns five of the AFLs.

39. As already noted, the existence of an equitable lien depends on the existence of binding contracts to create an estate in land.

40. A contract for the sale of land is not binding unless it is signed by or on behalf of each party - section 2(3) of the Law of Property (Miscellaneous Provisions) Act 1989. That subsection provides:

> "(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract."

41. There are two sub-issues under this head. The first concerns the AFLs for apartments nos. 004, 008 and 910. It is whether the three relevant AFLs were signed for the purposes of s.2(3) of the 1989 Act. The issue was argued by reference to the AFL for no. 004. The position is the same for the other two.

42. In the AFL for no. 004 the Seller is the Company and the Buyer is Ihor Lemshka. On the front page the date, 7 July 2016, has been inserted in manuscript, as have the words "16:33 "B" Michelle Peters + Richard Garner". The printed particulars have been amended in manuscript by making some changes to the numbers for the Completion Payment and the Deposit. On the last page the date has been inserted. The printed signature section of the last page of the document has a dotted line, beneath which are the printed words "Signed for and on behalf of the Seller". Beneath that is another printed dotted line and the printed words "Signed by the Buyer". On that second dotted line are the manuscript words, "Signed for and on behalf of the Buyer." The printed words, "Signed by the Buyer" beneath the line have been left intact.

43. The three AFLs were treated by the parties as binding. The relevant Buyers paid their deposits and the agreements were protected by notices on HMLR.

44. AD submitted that the three AFLs were not signed and were therefore not binding. ION argued the contrary.

45. The parties referred to a number of cases about statutes which require documents to be signed. These included (a) *Re Sperling* (1863) 3 SW&TR 272, where the words "Servant to Mr Sperling", but no name, were held to be a valid signature of a witness to a will; (b) *Re Cook* [1960] 1 ALL ER 698 where a will was held to be validly signed by the words "Your Loving mother"; and (c) *Bassano v Toft* [2014] EWHC 377 (QB), where a consumer credit agreement created online was held to be signed for the purposes of the relevant legislation by clicking on a tile saying, "I accept".

46. There are also cases about s.2 of the 1989 Act. In *Neocleous v Rees* [2019] EWHC 2462 (Ch) HHJ Pearce (sitting as a judge of the High Court) held that an automated email footer containing the name of one of the parties met the signing requirements of s.2 of the 1989 Act. At para 42 he referred to the policy of s.2 as described by the Court of Appeal in *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567: the section was intended to simplify the law and to avoid disputes, the contract now being in a single document containing all the terms and signed by the parties. Thereby it has been sought to avoid the need to have extrinsic evidence as to that contract. Judge Pearce then reviewed the authorities. At para 53 he concluded that the question was whether the name in the email footer was applied with authenticating intent.

47. *Hudson v Hathaway* [2022] EWCA Civ 1648 was also a case under s.2 and was again concerned with emails. Lewison LJ noted at para 55 that there is no relevant statutory definition of "signed". The touchstone for determining what is a signature for the purposes of the statute is use of words or marks with an intention to authenticate the document. Lewison LJ referred to *Neocleous* with approval.

48. Counsel for AD submitted that AFL no. 4 had not been signed within the meaning of s.2. He accepted it was possible that the writer of the words "Signed for and on behalf of the Buyer" had authenticating intent. But that was not clear: the words could also be regarded as a manuscript amendment. There was simply no signature. The words were neither a name nor a description of an identifiable person (contrast *Re Sperling* and *Re Cook*).

49. I have concluded, in agreement with the arguments of ION, that when agreement no. 004 is read as a whole the court can be satisfied that the words "Signed for and on behalf of the Buyer" were used with authenticating intent and constitute a signature for the purposes of s.2. My reasons follow.

50. The reference to "B" and the specific time in manuscript on the front page is clearly a reference to Formula B stipulated by the Law Society for telephone exchange of contracts.

51. That formula is used where each solicitor or conveyancer holds their own client's part of the contract. Following the telephone call effecting exchange, each solicitor dates their part of the contract, inserts the agreed completion date and send their client's signed part of the contract to the other.

52. The names on the front page are those of the solicitors or conveyancers, Ms Peters for the Seller and Mr Garner for the Buyer. The agreement has been dated in hand, in accordance with Formula B. The handwritten words "Signed for and on behalf of the Buyer" were clearly inserted on the Buyer's copy by Mr Garner.

53. AD points out that the words "Signed for and on behalf of the Buyer" are neither a name nor a description which on their own identify the person who added the words. I am nonetheless satisfied that they were inserted with authenticating intent and that, reading the document as a whole, it is clear that the writer was Mr Garner, the Buyer's solicitor.

54. What Mr Garner did was certainly an unusual way to authenticate the document, but the inevitable inference is that he thought that by inserting the words he was authenticating it "on behalf of the Buyer". The alternative explanation advanced by AD is that the words were a manuscript amendment of the printed words "the Buyer" appearing below the relevant dotted line. But Mr Garner left the words "the Buyer" intact and he inserted the words "Signed for and on behalf of the Buyer" on the dotted line rather than beneath it.

55. I conclude that the insertion of the words by Mr Garner on the signature page amounted to his signing on behalf of the Buyer for the purposes of s.2 of the 1989 Act.

56. The second sub-issue concerns two AFLs where the JAs have found incomplete agreements, lacking signature pages. The JAs have undertaken searches of their files. Their solicitors have approached the solicitors for the two remaining contracts. One firm has said that they cannot find a copy of the agreement but referred to a letter from them sent in December 2017 which enclosed their clients' "signed contract". The other firm has not replied to the JAs' inquiries.

57. The issue is whether, on the one hand, there were never signed agreements or whether, on the other, there were signed versions which cannot now be found. The parties accepted pragmatically I should determine this on the balance of probabilities, on the current evidence. There was no suggestion that there needs to be further disclosure of documents or a trial process to determine this.

58. I am satisfied on balance that the two agreements were signed but that the signature pages have been lost, for the following reasons.

59. First, the JAs have explained that the records of the Company were poorly maintained. There is therefore good reason to believe that parts of documents could have gone missing. In the case of one of the apartments the solicitors have sent a copy of a letter from the time the contract was entered referring to it as signed by their clients. The lack of a response from the other firm of solicitors does not show tend to show that there was no signed contract at the time.

60. Second, both parties had solicitors or conveyancers. It is unlikely that they would have agreed the payment of the deposits or the registration of notices without complete agreements.

61. Third, HMLR was, it can be inferred, satisfied that valid purchase contracts existed. HM Land Registry Practice Guide 1914 states, at paragraph 6.3, that:

> "A contract for sale may be protected by agreed notice or unilateral notice. If you are applying for an agreed notice, you must lodge form AN1 a certified copy of the contract, and the consent of the registered proprietor, if available. If you are

> applying for a unilateral notice you must lodge form UN1, completed with either a statement or conveyancer's certificate setting out details of the contract, including the date of the contract and the parties."

It is unlikely that HMLR would have entered notices on the title without the provision of this information, which required the existence of a contract.

62. For these reasons the answer to issue (a) is yes.

Issue (b): did the contracts of sale impliedly exclude or postpone any equitable lien?

63. AD argued that there was an exclusion of the lien in those AFLs which contained a rider (nos. 004, 008 and 910 – the three agreements). These agreements expressly provided that the deposit was paid to the Seller's Conveyancer as stakeholder pending the grant of Satisfactory Planning Permission and the Deposit Insurance being placed on risk.

64. As already noted, the terms of an agreement for sale or the transaction under which it is said to arise may impliedly exclude a purchaser's lien or may require that it be postponed to another interest. Although an equitable lien does not arise as a matter of contract, its terms depend upon and are shaped by the contract: see *Barclays v Estates & Commercial* [1997] 1 WLR 415 (*"Barclays"*) at 420B-C.

65. AD relied on two further principles. First, that payment to a stakeholder does not give rise to an equitable lien: *Combe v Swaythling* [1947] 1 Ch 625 at 629.

66. Second, where the parties have agreed an alternative form of security, an equitable lien may be excluded (even if that alternative form of security proves to be invalid): *Capital Finance Co Ltd v Stokes* [1969] 1 Ch 261; *George Wimpey Manchester Limited v Valley & Vale Properties Limited & others* [2012] EWCA Civ 233 at para 36.

67. AD submitted that the parties' arrangement in the three agreements was for each purchaser's deposit to be held by a stakeholder until Deposit Insurance was obtained and thereafter for the deposit to be released to the vendor to be expended in the development of the Property as a whole on the basis that the purchaser was protected by the Deposit Insurance (as a form of alternative security). In these circumstances, no equitable lien arose on payment of the deposit to the stakeholder and no lien could subsequently arise to protect the interests of the purchaser since the Deposit Insurance was the alternative means by which the parties agreed to protect such interests.

68. AD referred to *Barclays* at p.421 where Millett LJ said that the intention of the parties is to be objectively ascertained from the documents they have executed and that what is required to exclude the lien if that there should be a clear and manifest intention that it was the parties' intention to exclude it.

69. I am unable to accept AD's submissions for the following reasons, which substantially reflect the arguments of ION.

70. In *Barclays* at p.421 Millett LJ said that the intention of the parties is to be objectively ascertained from the documents they have executed and that what is required to exclude

the lien is a clear and manifest intention that it was the parties' intention to exclude it. That was said of a vendor's lien but there is no reason not to apply the same approach to a purchaser's lien.

71. There is in general no reason to see deposit insurance (which is a form of guarantee) as inconsistent with the purchaser's lien. The lien gives a charge over the property; the deposit insurance gives additional rights against a surety. There is no clash between them. A purchaser who asks for a belt is not giving up his braces. There is good reason for wanting both: the protection of the guarantee is only as strong as the covenant of the guarantor.

72. Third, this was expressly spelt out in clause 1.2 of the Master Bond which provided that the liability of ION and the rights of the Purchasers in relation to the Bond "shall be in addition to, and shall not merge with or otherwise prejudice or affect or be prejudiced or affected by any other right, remedy, guarantee or other security now or at any time hereafter held by the Purchasers in relation to the [AFLs]."

73. Fourth, as to the express terms of the rider, it was common ground at the hearing that Satisfactory Planning Permission had already been given by the dates of the three agreements.

74. The other condition precedent was the provision of Deposit Insurance. Once that condition was satisfied any deposits subject to stakeholder arrangements were released to the Company and the equitable liens thereupon became effective (cf. *Cabra Estates v Glendower Investments* (Lexis transcript 11 November 1992)). For the reasons already given the terms of the Deposit Insurance did not exclude the liens.

75. AD also submitted in the alternative that any purchaser's lien should be postponed behind the security interest of the provider of development finance for the entire site. AD argued that it was always contemplated that, once planning permission and Deposit Insurance were arranged, that deposits paid under the AFLs would be at the free disposal of the Company to develop the Property (which, inevitably, involved building from the ground floor up, whereas the residential units were to be located on the higher floors). Those deposits amounted to only 25% of the purchase price of the completed flats. It was thus inevitable that other secured finance would be required to facilitate the completion of the development. Indeed, such finance had already been arranged from earlier lenders (whose lending was refinanced by AD). Hence, it was always contemplated that other secured lending would be required to complete the building (and thus the purchasers' own flats).

76. ION submitted that it was not inevitable that the Company would have to raise external funding but that even if external funding was needed, it was not inevitable that the funder would require prior ranking charges. If the Purchasers had considered this issue at all, they might have thought that the developer – a substantial business – was funding the development out of its own monies (backed by shareholders); or that the completion of some flats would pay for the construction of others; or that the Company had good credit terms with its builders. In any case the Purchasers cannot be taken to have agreed by necessary implication from the terms of the transactions to exclude or postpone their liens.

77. This is supported by the fact that in the events that happened AD did not require a charge that ranked before the liens of the Purchasers. The Category A Purchasers' notices appeared on the register at the time AD took its security; AD must have appreciated that its security would subject to their prior interests. Had AD wanted to obtain priority over those interests, it could and should have taken steps to do so, including by requiring a deed of priority.

78. I prefer the submissions of ION on this point. On the authority of *Barclays* at pp.424 and 425, a lien will only be postponed to another lender where something in the terms of the transaction leads to the necessary, irresistible, inference that the parties must be taken to have agreed to postpone it to another lender's rights. This is an objective exercise and does not turn on the subjective intentions or expectations of the parties. There was nothing in the AFLs or their surrounding circumstances that leads inevitably to the inference that the parties must be taken to have agreed that any lien that would otherwise arise would be excluded or postponed to new development funding. It was always possible that any new funder would be prepared to take security ranking after the Category A Purchaser's liens. Indeed, that is what happened as the notices for those liens appeared on the Land Register at the time of registration of AD's charge. I also agree with counsel for ION that, looked at objectively, it was possible that the Company would be able to undertake the development from its own resources and without the need for fresh funding.

79. For these reasons the answer to issue (b) is no.

Issue (c): geographical extent of the lien

80. As already explained AD's case is that a given Purchaser's equitable lien attached to only that part of the Property over which that Purchaser contracted to take a lease. ION's position is that the lien of each Purchaser extended to the whole of the Property.

81. Much of the debate concentrated on two cases which have discussed this "geographical" question. These were *Chattey* (Blackburne J and Court of Appeal) and *Eason* (Arnold J). As the parties analysed these cases closely in their submissions I should set them out in reasonable detail.

82. *Chattey* concerned the development of the West London Air Terminal on Cromwell Road in London into around 400 flats. The building was renamed Point West. The developer held an underlease of the property. Sub-underleases of around 360 of the flats were contracted to be sold in advance, and the purchasers paid deposits which were used to finance the development. Following various transactions arising out of financial difficulties experienced by successive developers (both of which had become insolvent), the underlease became vested in Farndale Holdings Inc. Many of the purchasers brought claims against Farndale (and one of the developer's lenders) seeking, among other relief, declarations that they were entitled to an equitable lien on the underlease for their deposits plus interest. Mr Chattey and Mr Strebel were test claimants. The former entered into his contract to purchase a flat on 1 April 1987, which was before the original developer applied to HM Land Registry for first registration of the underlease on 27 May 1987. The latter entered into his contract after that date, on 28 May 1987.

83. The Court of Appeal ultimately held that Mr Chattey's rights had priority over those of Farndale, but Mr Strebel's did not. The decision turned on the interpretation of the statutory provisions concerned with first registration, which are irrelevant here.

84. At first instance Blackburne J addressed a number of issues. Most are irrelevant for the instant case.

85. At pp.12-13 Blackburne J summarised some principles applicable to equitable liens, which are undisputed before me. These include a number of points already discussed above: (a) One of the ordinary incidents of a contract for the sale of a parcel of land is that the purchaser, on paying his deposit to the vendor, acquires a lien over the land to secure repayment of his deposit. (b) The lien arises by implication of law and not by virtue of any term to be implied into the contract. (c) The lien arises as soon as the contract is made and the deposit paid, although it is only enforceable when the contract goes off otherwise than through the purchaser's default. (d) The lien is in the nature of an equitable charge on the vendor's interest in the land and, therefore, must be protected by registration if it is to bind subsequent purchasers for value. (e) The purchaser achieves protection for the lien by protecting his rights under the contract, which carries with it protection of any lien arising by implication on payment of the deposit. (f) The lien may be precluded or qualified by the express agreement of the parties to the contract, or by necessary implication as being inconsistent with the contractual arrangements into which the parties have entered.

86. On pp.13-17 Blackburne J addressed the issue which gave rise to the ratio of his decision (on which the Court of Appeal later reversed him). He decided that clause 21 in each of the purchase contracts was inconsistent with the existence of a lien, so both Mr Chattey's and Mr Strebel's claims failed. In case he was wrong about that, however, he also considered (obiter) the other issues.

87. On pp. 17-19 Blackburne J considered what he described as the "conceptual objection". The "conceptual objection" was that if the subject matter of the contract was an interest which did not exist at the date of the contract (i.e. a sub-underlease on the facts in *Chattey*) and was never created because the contract goes off, there could be no lien.

88. Blackburne J rejected this argument. He explained (at the top of p.19) that, "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".

89. On pp.19-20 Blackburne J considered the geographical extent of the interest to which the liens attach when the vendor's interest was an underlease of the whole of a building, whereas each of the purchase contracts involved the grant of a sub-underlease of only part of one of several floors in the building comprised within the underlease. He referred to the Canadian case of *Lehmann v BRM Enterprises Limited* (1978) 7 BCLR, in which Hutcheon J held that, in these circumstances, the lien attaches to the whole of the vendor's property. Blackburne J said, on p.20:

> "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 that for the purchaser's default, the lien should be held to attach to any other land of the vendor."

90. When the case reached the Court of Appeal, the only parties remaining were the two purchasers and Farndale. Four issues were argued, the first of which was whether, in view of the fact that the contracts were (a) conditional until the grant of satisfactory planning consent on August 11, 1988, and (b) for the grant of leases not previously in existence, the plaintiffs could ever have been entitled to a purchaser's lien to secure the return of the deposits paid exercisable in priority to the debenture and those, such as Farndale, claiming under it (the "conditionality argument"). The second of the four issues resulted in the Court of Appeal reversing the Judge's decision that clause 21 in each of the purchase contracts was inconsistent with the existence of a lien. The remaining two issues do not matter for present purposes.

91. As to the conditionality argument, Morritt LJ (with whom Kennedy and Potter LJJ agreed) set out (on p.303) some passages from the speeches of Lord Westbury and Lord Cranworth in *Rose v Watson*. He agreed with the purchasers that those remarks were directed to the facts of the case and said (on p.306) that they did not establish that beneficial ownership of the land under a constructive trust arising from a specifically enforceable agreement was necessary for the establishment of a lien. Morritt LJ relied on the decision of the Court of Appeal in *Whitbread & Co. Ltd v Watt* [1902] 1 Ch. 835, in which it had been held that a lien could arise even when the reason for the relevant purchase contract going off was not a default of the vendor, but the election of the purchaser to rescind. In particular, Vaughan Williams and Stirling LJJ had, in that case, recognised what Morritt LJ described (at the bottom of p.306) as "a far wider principle" than that expressed in *Rose v Watson*.

92. *Whitbread* established that a purchaser's lien is not founded upon a technical analysis of the rights arising from a particular contract, but is "a right which may be said to have been invented for the purpose of doing justice." The court in that case also explained that:

> "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 same 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."

93. Morritt LJ concluded that "the circumstances in which a purchaser's lien will arise are not limited to those in which the contract is or has been specifically enforceable but include those in which there is or has been a right to call for the legal estate, whether presently, in the future or conditionally so as to give rise to the equitable interest or estate to which Sir George Jessel referred [in *London and South Eastern Railway Company v Gomm* (1882) 20 Ch.D. 562]."

94. Turning to the "conceptual objection", Morritt LJ said (on p. 308) that "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." He regarded it as "absurd" that a lien should be denied merely because a legal estate did not exist, but another out of which the vendor would grant it did.

95. Morritt LJ concluded his judgment (on p.318) by referring to the issue as to the geographical extent of the land which was subject to the lien. He quoted the passage from p.20 of the decision of Blackburne J quoted in [89] above. He said that, although the purchasers had originally appealed that finding, they had abandoned the appeal during the course of the hearing. Morritt LJ continued as follows:

> "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 sufficiently 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 this 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."

96. On the facts of *Chattey*, the relevant parts of the building containing the flats had been substantially developed by the time work ceased. It appears on the other hand that very little work had been carried out at the time the two purchasers had entered their contracts or advanced their deposits. At those times the building was a disused office block.

97. *Eason* concerned a development of a building. A company called Alpha Student (Nottingham) Ltd ("Alpha") acquired the freehold of a site for development into an eight-storey block with 131 residential suites, some retail space on the ground floor and a basement for plant. Contracts were entered into for the grant of 999- year leases in respect of all but two of the suites. Deposits were received from all but six of the purchasers, totalling over £3.2 million. The existing building on the site was demolished, but nothing was built. Alpha became insolvent, and liquidators were appointed. The sole asset was the site, which was expected to realise around £1.25 million. Alpha's creditors were the purchasers, claiming return of their deposits, and three other entities with unsecured claims which together amounted to a little less than £220,000. A charge had been granted to a third party, but it was not in respect of borrowing and the charge-holder, which made no claim for payment, consented to the Court vacating the charge. So there was no creditor with a charge competing with the purchasers' equitable liens.

98. Mr Wong, who was appointed to represent the purchasers, argued that they were entitled, as secured creditors, to share the whole of the proceeds of sale between them, leaving nothing for the unsecured creditors. The purchasers' case was that they ranked equally between themselves. The liquidators, who represented the unsecured creditors, argued that the purchasers' liens were wholly unenforceable, so that the proceeds of sale should be distributed between all the creditors on the basis that they were unsecured.

99. The liquidators advanced two principal arguments. First, that the liens had never come into existence because the suites had not been built (see para 43). Arnold J dismissed that argument on the basis that it was the essentially same as the "conceptual objection" taken and rejected in *Chattey*.

100. The liquidators' second argument was that, because the liens attached to the subject matter of each contract, rather than the site as a whole, there were practical difficulties with the valuation of each lien which meant the liens were, in effect, unenforceable (see para 45). The judge also rejected that argument, saying that difficulties in valuation should not affect the purchasers' rights as a matter of principle.

101. In paras 46-48 Arnold J accepted the liquidators' argument that the liens attached to the subject matters of the respective contracts, saying that Blackburne J's reasoning in the relevant passage from *Chattey* (quoted in [89] above) was "entirely persuasive."

102. In para 48 Arnold J addressed the point that the building was undeveloped and said,

> "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 this means that Blackburne J's reasoning is inapplicable, however."

103. He concluded on the facts that neither the ground floor retail space nor the plant in the basement had any material value as at the date of liquidation (see paras 52-53). That meant that the value of the site was equivalent to the value of the suites; and that the part of the site to be ascribed to the vendor's interest could be limited to the two unsold suites. The judge calculated the value of the suites by reference either to their sale prices or, in the case of the two unsold flats, their asking prices.

104. *Eason* has been followed in a number of subsequent cases. These include *Williams v Broadoak Private Finance Ltd* [2018] EWHC 1107 (Ch) and *Re Aronex Developments Limited* [2021] EWHC 2807 (Ch). It seems that there was no argument in these cases that *Chattey* or *Eason* was wrongly decided.

105. ION accepted that the present issue was covered by *Chattey* and *Eason* (though *Chattey* was obiter on the issue). ION also accepted that, though not strictly bound, a court of first instance should follow earlier first instance decisions unless convinced that they are wrong. ION submitted that the court should conclude that the two earlier decisions were clearly wrong and should not follow them.

106. ION argued that Blackburne J was wrong in *Chattey* for several reasons.

107. First, the passage in which the judge concluded that the lien must be limited to the land which is the subject of the contract of sale has a false premise. A purchaser does not necessarily become a beneficial owner of the land forming the subject of the contract, merely as a result of a part-payment. Whether he does so will depend, amongst other matters, on whether the purchase contract is specifically enforceable. Blackburne J's reasoning is based on the notion of partial specific performance derived from the dicta in *Rose v Watson*. This cannot survive the Court of Appeal's subsequent conclusion that there is no necessary link between a purchaser's lien and the kind of constructive trust arising from a specifically enforceable contract for sale.

108. Second, even if the purchaser did initially in some sense become a beneficial owner, that beneficial ownership could no longer subsist after the contract goes off (because the contract would no longer be specifically enforceable). The notion, therefore, that the purchaser "retains" an interest in the land as security does not make sense. Unlike a common law lien, which arises from possession and gives a right to retain property until payment is received, a purchaser's equitable lien arises separately from the agreement to purchase and is, by its nature, comparable to a charge over property which continues to be owned by someone else.

109. Third, there is an inconsistency between Blackburn J's conclusion in relation to the geographical extent of the lien, which he strictly limits to the interest in land which is the subject of the contract, and his conclusion in relation to the nature of the estate covered by the lien. He rightly concluded, in response to the conceptual objection, that the latter could extend beyond the interest in land to be created by the contract to cover the whole of the vendor's interest out of which the derivative interest is to be created.

110. Fourth, if justice requires a lien to extend beyond the interest to be conveyed pursuant to the contract when a lesser estate is to be created out of a greater one, why should the lien not extend geographically beyond the interest to be conveyed, if that is what justice requires? The lien arises as a matter of law outside the purchase contract; it does not depend on the purchaser "retaining" the specific property which he has tried to buy. The Court of Appeal made plain in *Whitbread* that a purchaser's lien is "a right which may be said to have been invented for the purpose of doing justice."

111. Fifth, equity justifies the imposition of a wider lien because it is unconscionable for the vendor to retain the deposit in circumstances where he is no longer bound to perform the agreement. Where the vendor contracted to sell part of a larger property, there is no reason why, in appropriate circumstances, the security for the return of the deposit should not extend to the whole of the property. This is especially so where (as in this case) the parties intended that the vendor would use the deposit to benefit the whole of the property, and the vendor has done exactly that.

112. ION submitted the court should decline to follow *Eason* on the footing that it is not strictly binding and obviously wrong. It applied and followed the reasoning in *Chattey*, which was wrong for the reasons just summarised. Alternatively, *Eason* should be regarded as justified on its own unusual facts, but not as determinative of the appropriate application of the relevant principles in the present case.

113. ION contended that in para 48 of *Eason* Arnold J failed to explain how a lien might be said to attach to something which does not yet exist and, in reality, has no value. He rightly recognised (at para 15) that the remedies of a lien-holder, where the lien is not

over a fund, are appointment of a receiver and a judicial order for sale. On the facts before him the lien was over a fund (namely the proceeds of sale) and the purchasers were all acting together. So the court did not have to confront the issue about ordering a sale of "the legal estate in the relevant air space."

114. On the present facts if the lien does not attach to the vendor's interest in the site as a whole, the purchaser in such a case is left with a lien worth very little (if anything), while the vendor retains the full value of the site and the purchaser's deposit.

115. ION argued that if the approach in *Eason* is correct, purchasers of suites would have had no way of knowing what their security was worth at the time of their contracts.

116. ION also argued that the approach taken by the JAs, based on *Eason*, involved an arbitrary and potentially unfair approach to valuation. There are a number of points here. There is no separate valuation of the portion of the Property attributable to the apartments; there is only a valuation of the commercial parts which is then deducted from the price achieved under the recently ordered sale. As for the apportionment among the apartments these have been taken either from the sales price (where sold) or asking price (where not). This may not be comparing like with like. Moreover the money notionally available to the Purchasers is not intended to be divided pari passu on the basis of the amount of their claims. Nor is any adjustment made to reflect the state of development of the various apartments.

117. ION submitted that these problems of valuation would not arise if the liens attached to the whole of the Property. The priority of the liens, like other interests in the Property, would depend on the date of their registration on the Land Register. In the present case the Category A Purchasers would recover their deposits in full.

118. AD submitted that this court should follow the decision in *Chattey* and *Eason*. Those decisions were right for the reasons given by the judges in them. In any case they are not clearly wrong and they should be followed. AD advanced a number of detailed submissions in support of this reasoning, which are reflected in the discussion that follows.

119. I have concluded that I should follow *Chattey* and *Eason*. In my view the reasoning in those cases is persuasive. I am not persuaded that they were clearly wrong.

120. The essential reasoning of Blackburne J in *Chattey* was that the lien is a form of protection arising by operation of law but by reason of a contract to acquire an estate in land. Blackburne J considered that the lien is geographically co-extensive with the subject matter of the contract. This is shown by his discussion of what would happen in a case where the subject matter of the contract was a freehold plot. It was accepted by counsel in that case that the lien would extend only to that plot. Counsel before me did not suggest that that was wrong. The essence of Blackburne J's reasoning was that the extent of the protection given by the lien is co-extensive with the subject-matter of the contract. I do not think that this part of his reasoning turned on any particular conclusion about the specific enforceability of the contract (see further below).

121. In my judgment the idea of co-extensive protection accords with the principles underlying liens. While a purchaser's lien arises as a matter of law and is not an implied term of the contract, it is nonetheless closely related to the contract. If there is no valid

contract there can be no lien; and the lien can be excluded by or postponed by the terms of the contract. For a lien to arise, the contract need not create a beneficial interest in the sense of a constructive trust in favour of the purchaser, but the contract must nonetheless have a specific interest in land as its subject-matter.

122. If the contract is fully performed the purchaser receives the subject matter of the contract and there is no need for resort to liens or other forms of protection.

123. But there may be stages before that. Where the purchaser has the right, present, future or conditional to call for the legal estate he has an equitable interest to that extent (see *Gomm*). The purchaser may protect that interest by seeking an injunction to prevent contrary dealings with the land the subject matter of the contract. But it is hard to conceive of the court restraining the vendor from dealing with any land other than that forming the subject-matter of the contract.

124. Where the contract goes off through no default of the purchaser, he is protected instead by the equitable lien, which persists. This protects his interest, in order to recover deposits and other advance payments against the purchase price. This interest is inchoate at the time of the contract, but becomes enforceable as such when the contract goes off.

125. To my mind it is logical and accords with principle that the protection given by the lien should be co-extensive with the subject matter of the contract. If the contract is performed the purchaser gets that subject-matter (i.e. the relevant estate); pending performance the purchaser will be able to seek the protection of an injunction to protect that subject-matter (and no more); and where the contract goes off the purchaser is entitled to a lien in respect of the subject-matter.

126. Counsel for ION did not suggest that in a case where a developer had agreed to sell a series of freehold plots in freehold land, conditionally on completion of the whole development, the lien would extend to more than the particular plot which a purchaser had contracted to buy.

127. He also accepted that in a case of an apartment block where the flats were physically identified and had actually been developed, the purchasers' lien would be restricted to the particular flat.

128. He argued however that a key difference between those cases and the present case was that, at the time of the contracts, the flats had not been physically built out and, in the case of some of them, there was nothing but airspace. It followed that the value of the deposits (which were generally some 25%) were likely to be far greater than the value of the relevant land (some of which was mere airspace). He submitted that this factor, together with the recognition that the deposits could and would be used to fund the development, justified the imposition of a lien over the whole of the Property.

129. This is similar to the argument rejected by Arnold J in *Eason* that the physical non-existence of the flats meant that there was no proper subject for the liens to attach to. ION did not indeed take issue with that conclusion or seek to say that a lien could not apply at all because the flats had not been built; instead it said that in such a case the lien should extend to something other than the flats, i.e. other land of the vendor which the Purchasers had not agreed to acquire.

130. That would involve an extension of the lien to property other than that which the Purchasers had agreed to acquire. As already explained it appears to me (as it did to Blackburne J and Arnold J) that the principles underlying the purchaser's lien limit its scope to a charge over the thing which the purchaser had agreed to acquire (or in the case of a derivative estate, the land from which such estate was to derive).

131. The consent of the Purchasers to their deposits being used to develop the Property adds little to the analysis. Where a deposit is paid to a seller of land the seller has the right (subject to any special agreement and the purchaser's lien itself) to use the money for its own purposes. The express consent in the AFLs simply reflects the default legal position.

132. Moreover, once it is accepted that, in the case of a fully developed block the lien would affect only the relevant flat, it seems to me that ION's arguments would lead to significant legal uncertainty. There may indeed be a spectrum of cases even in a single development. There could be a building where some parts had been developed with identifiable flats but others had not. Or there may be various sales during the development of a block: at the time of earlier sales there may have empty airspace while, by the time of later ones, there were identifiable flats. I do not think that it can sensibly be argued that the extent of a purchaser's lien could depend on the state of development of the building at the time of the contract (or payment of the relevant deposits). These issues do not arise if the co-extensiveness principle is correct.

133. ION placed much emphasis on the potential gap between the value of the lien and the deposits paid by Purchasers. It may of course be that a purchaser's lien is of restricted value where the property in question has not been constructed at the time of the contracts or the payments of the deposits. But that was the position in *Chattey* - at the time the deposits were entered into no redevelopment had occurred. And in *Eason*, the whole building was demolished, so there were no flats at all. In such cases the purchaser's protection may indeed be insufficient to cover his claim to repayment. It seems to me that Morritt LJ had in mind the possibility that an equitable lien might be of limited practical effectiveness in a case where the apartment was not physically built (see the passage cited in [95] above). But these cases show that the lien may in the particular case have a limited value. I do not consider that issues of practical effectiveness would justify extending the protection of the purchaser's lien to something beyond the property which the purchaser has agreed to acquire.

134. Purchasers of unconstructed flats may of course seek to protect themselves in other ways. One is to insist on deposit insurance of the kind that was put in place here. Another is to require a charge over the building in which the flats are to be located.

135. ION referred to the proposition in *Whitbread* that the equitable lien has been invented for the purpose of doing justice. ION argued that to restrict the lien to the subject-matter of the agreements for lease would not achieve justice, as their value was likely to be less than the amount of the relevant deposit. However it seems to me that the court in *Whitbread* was explaining the origin of the doctrine rather than suggesting that a court may simply fashion what seems to it a just remedy on particular facts of a given case. Purchasers' liens are part of property law, and they should follow established principle (like other interests in property). This is of importance in cases where third parties, such as lenders - or indeed subsequent buyers of apartments – will need to assess the extent and value of their own subsequent security. Legal certainty is at a premium in this

context and I do not think that the extent of the lien can depend on the court's view of what is just in a given case.

136. ION submitted that the court in *Eason* had sidestepped the problems that might arise in a case where there had been no sale and the lien holders were seeking to enforce. They said that enforcement would be much simpler if they had a lien over the whole Property. Like Arnold J in *Eason*, this court is concerned with the distribution of a fund (the proceeds of sale of the Property). But even supposing it had not been I do not see why in principle the court should not order a sale of undeveloped land at the suit of one or more lien holders against the wishes of a reluctant vendor. As already explained I do not think that potential practical issues about enforcement of a lien in respect of undeveloped (or underdeveloped) flats should cause the court to extend the purchaser's security to other property of the vendor.

137. As to the criticisms of the passage from *Chattey* cited at [89] above, this has to be read in context. It comes after a passage where Blackburne J refers to the co-extensiveness principle. I do not think that in the disputed passage Blackburne J was basing his reasoning on the premise that the contract must be specifically enforceable. Elsewhere in his judgment he rejected the argument that a lien could not arise where the contract was conditional and he referred to the *Gomm* case which concerned an option to acquire land which depended on the giving of notice before it became a fully fledged contract to acquire an estate. The essential point being made by Blackburne J was that the interest of the purchaser arises in relation to the contract and the payment of money under it. I do not think that he was basing himself on any requirement that the contract had to be specifically enforceable. Though the passages from *Rose v Watson* which are echoed by Blackburne J can be so read, as Vaughan Williams LJ explained in *Whitbread*, they are better seen as verbal vehicles to explain the right which equity says the purchaser should have.

138. Nor do I think that there is any inconsistency between Blackburne J's decision on the conceptual argument and the denial of the wider geographical lien over the vendor's other property. The conceptual argument was that there can in principle be no lien for an agreement for a lease because no lease had been granted. There was therefore nothing for the lien to attach. That was rejected on the ground that the lien could attach to the land from which the lease was to be granted. So there was no conceptual problem. It did not however follow in logic that the lien much be over other land of the vendor. They are separate and independent questions. I note that the Court of Appeal in *Chattey* appears to have seen no logical inconsistency in Blackburne J's approach to the two issues: though the point was no longer being pursued, Morritt LJ recorded the position reached by Blackburne J without seeing any illogicality. Nor did Arnold J in *Eason*. Nor did Professor Barnsley in his Conveyancer article, which commented on *Chattey*.

139. I do not find ION's submissions about the valuation issues persuasive. Any approach to valuation in circumstances such as these will involve elements of judgment. I am satisfied that the JAs' approach, based on *Eason*, is rational and that the figures they have reached are justified by the evidence. ION did not advance an alternative way of carrying out the valuation exercise or suggest any different outcome on the available evidence. Nor did it suggest that the evidence was insufficient or that some further process was required.

140. For these reasons the answer to issue (c) is in sense (ii).

Issue (d): the effect of the notices registered at HMLR

141. In the light of my decision on issue (c) this point does not arise. However I shall address it in case I am wrong.

142. The issue proceeds on the assumption that liens of the Category A Purchasers extend to the whole of the Property and not just the subject matter of their respective AFLs.

143. The Category A Purchasers registered entries in respect of those agreements on the Charges Register for the Property. This was by notices, unilateral (UN1s) or agreed (AN1s). As already explained, these entries were made before the registration of AD's mortgage.

144. The notices were expressed in the following (or materially identical) terms:

i) (in case of UN1s), "UNILATERAL NOTICE affecting Apartment [number] in respect of an Agreement for Sale dated [date] made between (1) [the Company] and (2) [Purchaser]"; or

ii) (in case of AN1s), "Agreement for sale affecting apartment [number] dated [date] in favour of [Purchaser]".

145. The relevant statutory provisions start with ss.29 and 30 of the Land Registration Act 2002 which provide materially as follows:

> "**29. Effect of registered dispositions: estates**
>
> (1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.
>
> (2) For the purposes of subsection (1), the priority of an interest is protected—
>
> (a) in any case, if the interest—
>
> (i) is a registered charge or the subject of a notice in the register …,
>
> 30. **Effect of registered dispositions: charges**
>
> (1) If a registrable disposition of a registered charge is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the charge immediately before the disposition whose priority is not protected at the time of registration.

> (2) For the purposes of subsection (1), the priority of an interest is protected—
>
> (a) in any case, if the interest—
>
> (i) is a registered charge or the subject of a notice in the register, …"

146. Sections 32 to 36 contain further provisions about notices. A notice is an entry in the register. The existence of a notice does not necessarily mean that the interest is valid but if valid, it gives priority for the purposes of ss. 29 and 30. Notices are to be submitted to the registrar, who may only approve a notice if it is made by or with the consent of the relevant registered proprietor or person entitled to be registered as such, or the registrar is satisfied as the validity of the applicant's claim. The registered proprietor or person entitled to be registered as such may apply to remove a unilateral notice.

147. Rule 84 of the Land Registration Rules 2003 provides as follows:

> **"Entry of a notice in the register**
>
> 84.—(1) A notice under section 32 of the Act must be entered in the charges register of the registered title affected.
>
> (2) The entry must identify the registered estate or registered charge affected and, where the interest protected by the notice only affects part of the registered estate in a registered title, it must contain sufficient details, by reference to a plan or otherwise, to identify clearly that part.
>
> (3) In the case of a notice (other than a unilateral notice), the entry must give details of the interest protected.
>
> (4) In the case of a notice (other than a unilateral notice) of a variation of an interest protected by a notice, the entry must give details of the variation.
>
> (5) In the case of a unilateral notice, the entry must give such details of the interest protected as the registrar considers appropriate."

148. AD submitted that the purpose of requiring that entries on the register relating only to part of a registered estate should clearly identify the relevant part is to allow the reader of the register to see whether existing entries relate to that part of the registered estate with which the reader is concerned.

149. AD submitted that if (contrary to its case) the Category A Purchasers had an equitable lien over the Company's entire freehold interest, their registration of that interest in terms which limited it to the geographic bounds of their intended flat, conferred priority over AD only to the extent of the registered interest, not some wider (unregistered) interest. Any other conclusion would leave a prospective lender in the position of AD unable to determine the extent of its intended security when considering whether to advance funding on the basis of a first fixed charge over land. (I note that AD did not

seek to argue before me that the liens were not properly registered at all – the first of the alternatives in issue (d).)

150. ION submitted that the Purchasers had properly protected their interests under the agreements for lease by registering them and specifying the apartments to which they related. They had therefore done what was required by Rule 84. They say that they could not have done more.

151. ION also submitted on the authority of *Chattey* that registration of the agreements was sufficient to protect the equitable liens which arise by implication of law by reason for the existence of those agreements. This was not contested by AD (though it reserved its rights to take the point on appeal).

152. ION argued that the issue is governed by the decision of the Court of Appeal in *Bank of Scotland v Joseph* [2014] EWCA Civ 28. In that case BoS entered a unilateral notice described as "in respect of a mortgage dated 10 March 2005 in favour of Bank of Scotland". At the time the mortgage was executed, BoS thought it was protecting the mortgage and it was only because of facts which came to light later that it sought to enforce its subrogated right to rely on an unpaid vendor's lien. That lien arose as a matter of law from then fact that mortgage advance had been used by one of the parties to discharge a debt. The registered proprietor, Ms Joseph, argued that the wording of the notice made reference to a mortgage, not the unpaid vendor's lien, and thus it was incapable of protecting the latter. BoS argued that the notice protected not just the mortgage, but all rights and interests arising thereunder, including by operation of law. BoS obtained summary judgment at first instance and on a first appeal.

153. The Court of Appeal held that the entry protected any interest in the relevant property which derived from having lent money under the charge, even though the interest arose as a matter of law rather than as a matter of interpretation of the charge (see [26]-[31]).

154. ION submitted that in the present case each purchaser would have thought they were protecting their rights under the contract, rather than a lien. But *Chattey* establishes that such a notice also protected any interest (including a lien) which derived from having entered into the contract. If the lien turns out to affect the entirety of the vendor's title, the notice on the register is sufficient to protect that interest.

155. I prefer the submissions of AD on this issue.

156. In accordance with Rule 84 the purchasers properly registered their AFLs as affecting part of the registered estate i.e. the particular apartment.

157. *Chattey* shows that this is sufficient to protect the priority of their equitable liens.

158. The notices specified the part of the estate affected by the interests of each Purchaser. Each of them claimed an interest affecting only part of the registered estate.

159. The *Joseph* case establishes that registration of a notice of a charge by way of mortgage gives priority to all rights arising under and by reason of the charge (including rights arising by operation of law). The charge holder is not required to spell out in the notice all of the legal rights its charge may happen to give rise to.

160. But that was a case where the notice was registered in respect of the whole of the registered estate and was not restricted in its terms to part only of the estate. In my judgment that that is materially different from a case where the notice in fact registered was expressed to affect only part of the registered estate (i.e. the numbered apartment). It seems to me that in a case where a notice is restricted (as it is required to be under Rule 84) to a specific part of the registered estate, a reader of the register is entitled to suppose that the rights of the purchaser (including rights arising by operation of law) extend only to such part of the registered estate and no further. In other words *Joseph* supports the view that the notices in this case protected rights arising by operation of law, including any equitable liens. But it provides no support for the view that the notices provide protection beyond the parts of the land stated to be affected by the notices.

161. In short, where the notice specifies only part of the registered land as affected, the interest of the party registering the notice is, in my judgment, restricted to that part, however those rights arise.

162. This can be tested by assuming a case where parts of a development are sold in lots and the vendor grants to the purchaser of part of the land a charge for advance payments over the whole of the vendor's registered estate. In such a case it is hard to see how the registration of the agreement in respect of the part could give the purchaser priority over a subsequent chargee in respect of any land other than that particular part. It would have been open to the purchaser in such a case to state in the notice that some of its rights extended to the whole estate. It seems to me that the same is true here. It was not suggested by counsel for ION that it would not have been open to the purchasers to register a notice in respect of a lien over the whole of the registered estate as part of or alongside notice of the agreements for lease.

163. I have not ignored the fact that the Court of Appeal did not find in favour of the broad argument of counsel for the appellant in *Joseph* that a reader of the register should be able to rely on it without further inquiry (see [22]). It seems to me that the Court of Appeal did not accept that the argument compelled the conclusion being urged on the facts of that case. But that was a case where the bank was asserting rights derived from a charge over the property specified in the registered notice. It was asserting a claim which arose in law from the existence of its charge. The bank was not attempting to assert rights in respect of other property. In finding in favour of the bank the Court of Appeal did not suggest that a reader of the register should not be able to rely on it when deciding whether to enter into dealings in respect of the property or that the accuracy of the register did not matter or not matter very much.

164. For these reasons the answer to issue (d) is yes, in sense (ii).

Issue (e): the position of Mr Waller and Ms Thorpe

165. This issue concerns one apartment. The issue is whether it should be treated as falling within Category A.

166. Mr Waller and Ms Thorpe entered into AFLs in respect of apartments 706 and 104. In respect of the latter, the title page of the AFL, the draft lease, the title plan and the reservation form all correctly refer to apartment 104. However, the body of the AFL erroneously referred to apartment 106.

167. Wosskow Brown acted for Mr Waller and Ms Thorpe on the purchase of apartment 104. The AN1 application submitted by that firm correctly referenced apartment 104. A notice was entered on the register on 12 August 2016. However the entry refers to apartment 106.

168. By email on 1 June 2018, Wosskow Brown notified HM Land Registry that the register incorrectly referred to apartment 106. Mr Waller and Ms Thorpe's present solicitors, CMP Legal, raised the issue with HM Land Registry again by email on 9 March 2023. On 17 March 2023, HMLR confirmed that: (i) it had made an error; (ii) an amended entry would rank before AD's charge; (iii) the error could be corrected; and (iv) "… [it would] amend the error made without a specific application being made."

169. CMP Legal and HMLR exchanged further correspondence. By letter dated 27 March 2023 HMLR suggested that CMP Legal apply to alter the register under Sch. 4 to the Land Registration Act 2002 using form AP1. CMP Legal submitted a form AP1 on 4 April 2023.

170. The application has not been processed. The application has now been superseded by the Order of ICC Judge Jones dated 24 March 2023. Paragraph 2 of that Order directed HMLR to remove the notices on the register in respect of the (inter alia) the existing notice in respect of apartment 104.

171. ION submitted that Mr Waller and Mr Thorpe should, however, be treated as Category A purchasers for the purposes of a distribution of the Sale Proceeds for the following reasons:

    i) The Order of 24 March 2023 recorded that: "The parties shall not be otherwise limited or prejudiced by this Order in relation to any arguments concerning the distribution of the Sale Proceeds."

    ii) The court could previously have made an order for alteration of the register for the purpose of correcting a mistake: para 2(1)(a), Sch. 4, LRA 2002.

    iii) An order for rectification may be retrospective: per Snowden J in *Rees v Portland Place Investments LLP* [2020] EWHC 1177 (Ch) at [33]; see also Emmet at [9.029].

    iv) In the present case there was a mistake on the register, as described above. Mr Waller and Ms Thorpe took steps to protect their interest; sought to remedy HM Land Registry's error before AD's security was created.

    v) Had the Application to HM Land Registry been determined, it would have succeeded. If the Court been required to determine whether to order the rectification of the register, it probably would have done so.

    vi) In the circumstances, it would be unjust if Mr Waller and Ms Thorpe were not considered to be Category A Purchasers in respect of apartment 104.

172. AD did not contest these submissions. It accepted that the court has the power, by reason of the express preservation of rights in the Order of 24 March 2023, to direct the

JAs to treat Mr Waller and Ms Thorpe as Category A Purchasers. The JAs did not suggest that the Court lacked power to give this direction.

173. I accept ION's submission that, had it not been for the parts of that order as required the removal of the relevant notice in respect of apartment 104, the register would inevitably have been rectified, whether by the Registry itself or by order of the Court. It appears to me that properly to give effect to the preservation provision contained in the Order of 24 March 2023 I should give the direction sought.

174. For these reasons the answer to issue (e) is yes.

Issue (f): do the Equitable Liens otherwise rank before the security held by AD?

175. No separate argument was advanced on this issue. The answer is determined by the earlier answers.

Disposal

176. The answers to the issues set out in [27] above are (a) yes; (b) no; (c) sense (ii); (d) yes, in sense (ii); (e) yes; and (f) answered by the above.