



Neutral Citation Number: [2022] EWHC 2327 (Ch)

Case No: CR-2018-004817

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROEPRTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF PINNACLE STUDENT DEVELOPMENTS (LEEDS) LIMITED
AND
IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
The Rolls Building
London EC4A 1NL

Date: 13/09/2022

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

Between :

SCOTT CHRISTIAN BEVAN AND SIMON DAVID **Applicant**
CHANDLER (As Joint Liquidators of Pinnacle
Student Developments (Leeds) Limited)
- and -
(1) VALEO USL LIMITED
(2) MARC HORN **Respondents**

Matthew Weaver QC (instructed by **Howes Percival LLP**) for the **Applicant**
Marc Horn appeared in person

Hearing dates: 12 & 13 April 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

Insolvency and Companies Court Judge Burton :

1. The Applicants, as joint liquidators of Pinnacle Student Developments (Leeds) Limited (“Pinnacle” or “the Company”) seek directions to identify and determine entitlement to monies received by the First Respondent prior to 26 July 2018 which it has since paid into court (the “Funds”).

2. The Funds comprise £392,938.36 collected as rent from students living at a property known as Austin Hall and Asquith House (the “Property”). The Property was developed by Pinnacle with the benefit of monies provided by investors, mostly from overseas, who would be granted long leases of the completed units for their own or a family member’s occupation (as a student) or for them to decide to grant short term leases to third parties to use as student accommodation. Approximately 139 units within the Property were sold and rented out to students. However matters did not proceed as intended for all of the investors. Contracts for sale were exchanged with parties who invested in approximately 160 units (the “Exchange Investors”) but the sale of those units did not complete before Pinnacle entered liquidation on 8 August 2018 (the “Uncompleted Units”). The Funds comprise rental payments collected from occupants of the Uncompleted Units.

3. At an earlier hearing of the Liquidators’ application, Deputy ICC Judge Agnello QC added Mr Horn as a respondent to the application, with Mr Horn’s consent, and directed that any other of the Exchange Investors wishing to do so, could apply to be joined to the proceedings. No other Exchange Investor made such an application and Mr Horn was the only Exchange Investor to file any evidence in the proceedings.

4. It is not in dispute that other than variations in respect of the description of the units, the price paid and relevant dates, the sale agreements Pinnacle entered into with all of the Exchange Investors were in standard form and, insofar as relevant for the Liquidators’ application before me, include identical terms to those on which it contracted with Mr Horn. Whilst Mr Horn is not formally a representative respondent, as all Exchange Investors held the same rights in the Uncompleted Unit(s) that they contracted to buy, the court’s ruling will apply as much to their rights, if any, to a share of the Funds.

Background

The Sale Agreement

5. On 23 June 2014, Pinnacle entered into an agreement for sale with Mr Horn and Ms Tee (defined in the agreement as the “Buyers”) whereby they would purchase an off-plan property, Unit 609 on the sixth floor of the proposed student development, Austin Hall, for £52,995 (the “Sale Agreement”). No mention was made in Mr Horn’s witness statement nor during the hearing of Ms Tee’s interest in Unit 609. For the purposes of this judgment I shall refer only to Mr Horn on the basis that insofar as Ms Tee retains an interest in Unit 609, her entitlement if any to the Funds, will be reflected in the order made.

6. The Sale Agreement provides for a deposit of £26,797 to be held by Pinnacle Student Buyer (Leeds) Limited (“PSB”). PSB was to hold the deposit subject to the terms of a declaration of trust, broadly to enable Pinnacle to buy the estate on which the Property would be built, repay any loans Pinnacle had taken out to buy the estate and to meet the costs of building the Property.

7. The Sale Agreement defined “Completion Date” to be ten working days after the date of issue of a certificate of practical completion (the “PCCertificate”).
8. The “Intended Building Completion Date” was defined as:

“ 31 January 2015 or such later date as shall be certified by the Supervisor from time to time to allow reasonable extensions of time for completion of the Works and/or the Works to take into account Non Default Delays.”
9. The Sale Agreement included a “Long Stop Date” defined as 31 December 2015.
10. Schedule 1 to the Sale Agreement included a draft 999-year lease of Unit 609 between Pinnacle, Mr Horn and Ms Tee (defined as the “Tenant”) for a “Premium” of £52,995 plus basic rent and insurance rent (the “Lease”). Clause 3 of the Lease provides, inter alia, that Pinnacle, having received the Premium and in exchange for the Tenant’s obligations, lets Unit 609 to the Tenant with full title guarantee from the Start Date (which, being merely a draft, is left blank).
11. Schedule 2 to the Sale Agreement is a draft management agreement between the Buyer and Harper Brooks (UK) Limited (“Harper”) (the “Management Agreement”), whereby Mr Horn and Ms Tee would appoint Harper as their agent to manage Unit 609 upon the terms set out in the Management Agreement, for a minimum period of five years.
12. Clauses 3.1.3 and 3.1.4 of the Sale Agreement provide:

“3.1.3 The Buyer shall upon the Completion Date pay the Balance (less any payments previously made pursuant to the Payment Terms) and the Document Fee.

3.1.4 Upon completion the Buyer will execute the Counterpart Lease and the Management Agreement and deliver the same to the Sellers Solicitor and the Seller shall execute the Original Lease and shall procure that one copy of the Management Agreement is executed by the Management Company and delivery the same to the Buyers Solicitor.”
13. Pursuant to Clause 10.1 of the Sale Agreement, on completion, the Buyer would have the option:
 - i) if he was a student, to occupy the purchased unit himself or to permit a relative or friend who is a student to do so;
 - ii) to appoint the Management Company (as defined) to let the unit on his behalf in accordance with the terms of a management agreement;
 - iii) to manage the letting of the unit himself; or

- iv) to appoint a local management company of his choice to let the unit on his behalf

(together, for the purposes of this judgment, the “Letting and Management Options”).

14. The Buyer was required to give Pinnacle not less than one month’s notice before the “Intended Building Completion Date” of its intention not to enter into the Management Agreement, in default of which it would be bound to enter into it. If a purchaser entered into a Management Agreement and received during any quarter of the year, less than was due by way of assured rent, Pinnacle would top up the payment.
15. The Sale Agreement defined the “Rental Guarantee Period” as the period of five years from 31 January 2015 or, if later, the Completion Date.
16. The contractual documentation also included:
- i) a rent guarantee agreement between PSB and Pinnacle in which PSB undertook to hold the Rental Guarantee Deposit (which would initially be £190,000) on trust for Pinnacle upon terms that following a “Default” as defined, PSB would be entitled to withdraw such amount from the Deposit as may be reasonably necessary to make good the default; and
 - ii) a legal charge dated 9 April 2014 granted by Pinnacle to PSB as security for Pinnacle’s obligations to build the Property and also for such of the investors’ deposits as stood in PSB’s account which it was said to hold as stakeholder for the investors.
17. On 29 June 2016, the Company sold its freehold interest in the Property to Tuscola (FC105) Limited (“Tuscola”) whereupon Tuscola leased it back to the Company on a 999-year Lease. As part of this arrangement, the legal charge given by Pinnacle to PSB was released. The transfer to Tuscola was not registered until February 2017. Mr Horn draws attention to this delay and states that it was:
- “‘coincidentally’ shortly before the dispute between investors of completed units under management agreements with HOL which commenced in early 2017, resulting from delayed rent payments and payments less than the assured rent to the completed leaseholders from the period before registration of the newly created headlease from the sale and leaseback.
- Had the investors received their contractual entitlements it is unlikely they would ever have known their security by way of the Sellers Legal Charge was discharged, or that the freehold was sold.”
18. By the end of August 2016, the sale of 136 units had been completed, there were approximately 160 Uncompleted Units and ten units remaining unsold.
19. On 12 July 2017, an assured shorthold tenancy of Unit 609 was granted to a party who I understand to be a student (the “AST”). The AST was on a document bearing an “Urban Student Life” logo. It defined the Landlord as:

“for the purposes of service the landlord representative or the leaseholder representative Bloom Estates Ltd.”

20. Bloom Estates Ltd (“Bloom”) was also defined in the AST as the Agent. The AST recites:

“Please Note: The Agent has the full authority of the Landlord to enter into this Agreement for and on behalf of the Landlord and may itself use subcontractors or sub-agents.”

The signature page of the AST includes an electronic signature and details for Bloom next to the space for the Landlord to execute the agreement.

21. Just over two weeks later, on 31 August 2017, the PCCertificate was issued. Pursuant to the Sale Agreement, completion of Mr Horn’s purchase of a 999-year lease of Unit 609 should have taken place ten working days later.
22. On 26 July 2018, two weeks before Pinnacle was wound up, Tuscola purported to forfeit Pinnacle’s head lease. The Liquidators’ application in respect of the Funds only refers to the period prior to the alleged forfeiture.

Managing agents

23. The managing agents of Austin Hall and Asquith House changed throughout the relevant period. The Sale Agreement defined the Management Company as Harper. Harper subsequently changed its name to Hollinberry Estates Limited (“Hollinberry”). According to the witness statement of James Fownes, solicitor for the First Respondent dated 23 January 2020, Hollinberry subcontracted many of its duties to Urban Student Life (“USL”) pursuant to various management services agreements. Mr Fownes states that the managing agent’s responsibilities came to his firm’s attention in early summer 2017 when some of the investors claimed that they had not received rents to which they were entitled and asked USL to refrain from passing the collected monies to Harper. He states that in an effort to resolve matters, it was agreed in November 2017 that the management services agreements with Harper would be terminated and USL would carry out the role of managing agent, no longer as Harper’s sub-agent. In early January 2018, the First Respondent purchased USL, and as part of the sale, received the Funds.

Mr Horn’s claim

24. Mr Horn claims that the Exchange Investors have an interest in the Funds that takes priority to Pinnacle. This is on the following bases:
- i) Pinnacle was in breach of contract by failing to complete within ten days of the issue of the PCCertificate;
 - ii) PSB and Pinnacle were in breach of contract by releasing and discharging the legal charge thereby removing the Exchange Investors’ remedy to force a sale of the freehold in order to procure the return of their investment;
 - iii) by failing to complete the 999-Leases with the Exchange Investors, “Pinnacle had no right under clause 10.2 of the Sale Agreement which grants a

conditional future right under clause 10.10 to sell the freehold and thereby removing the buyer's remedy for breaches of contract and denial of rent";

- iv) following and as a result of exchange of contracts:
- a) the Buyers obtained, in equity, a proprietary interest in the property, enforceable against third parties (that would include Tuscola),
 - b) a relationship of trustee and beneficiary arose as between Pinnacle as vendor and the Exchange Investors as Buyers and equity imposes a duty on the vendor to protect, pending completion, the interest which the Buyers acquired. In Mr Horn's case, the interest which Pinnacle thereby became obliged to protect was:
 - i) the proposed 999-year lease of Unit 609; and
 - ii) Mr Horn's entitlement to choose a Letting and Management Option.
 - c) As part of the relationship of trustee and beneficiary, on making pre-completion payments on account of the price, a purchaser acquires an equitable lien on the land to secure their repayment (subject to any set-off or possible forfeiture of the deposit). The lien extends to matters such as interest on the deposit and the costs of any action to recover the deposit. As a result of the amounts already paid by the Exchange Investors, Pinnacle would only be entitled to a proportion of the rents received under the AST, with the Exchange Investors entitled to the balance pursuant to their equitable lien. Once the sums paid by the Exchange Investors exceeded the full purchase price, they were entitled to the full rent paid received by the managing agents in respect of the unit they had contracted to buy.
 - d) At the time the Sale Agreement was entered into, there were no rents to which Pinnacle could be entitled, as Austin Hall and Asquith House had not yet been built. The Sale Agreement made no provision for Pinnacle to receive any rents from the units, whereas the intention behind each investor entering into a sale agreement was to receive income from their investment.
 - e) Any rental income that did arise and any right of Pinnacle to receive such rent expired ten days after the PCCertificate: on 10 September 2017, in the case of Unit 609, six days before the AST was granted. As *Snell's Equity* describes a purchaser's beneficial entitlement (following exchange but before completion) as "passing to the purchaser by stages as the various conditions upon which completion of the contract depends are fulfilled", fulfilment of the conditions of the Sale Agreement was met 10 days after the Certificate. Consequently Exchange Investors are entitled to the rental income from their units from 11 September 2017 (or in Mr Horn's case, from 16 September 2017 as that is the date the AST was created) in proportion to the

purchase price they had paid plus the amounts secured by their equitable lien.

- f) The Exchange Investors' right to apply for specific performance of Pinnacle's obligation in their sale agreements and the principle that equity sees as done that which ought to have been done further enforces the Exchange Investors' right to rental income derived from units from 11 September 2017 (ten days after the PCCertificate);
- g) Under the terms of a management services agreement dated 25 March 2015 ("MSA"), USL was obliged to keep full and accurate monthly accounts of the rents received. This "reaffirmed" the Exchange Investors' entitlement to receive rental income;
- h) Bloom, USL and Valeo have failed to provide any evidence of authorisation from either Pinnacle or Exchange Investors to manage the Uncompleted Units. They thereby trespassed upon the trust that arose following exchange of contracts and became trustees de son tort and accountable to the Buyers for the monies they received as such;
- i) in the light of its breaches of the Sale Agreement, permitting Pinnacle to receive the Funds would amount to allowing it to set up its own iniquity as a defence to a cause of action which equity will not allow; and
- j) Pinnacle's claim to the Funds defies logic as:
 - i) its refusal to complete could have persisted, giving rise to a situation where notwithstanding its breach of the Sale Agreement, it indefinitely received rental payments, leaving Exchange Investors with nothing; and
 - ii) it would mean that any person without authority is entitled to rent out another's property.

Identifying Mr Horn's / the Exchange Investors' rights

- 25. Both parties referred to extracts from *Megarry & Wade: The Law of Real Property* and *Snell's Equity*.
- 26. The editors of the 9th edition of *Megarry & Wade: The Law of Real Property*, describe the effect of a contract for sale of land and the nature of the trust created:

"14-051 1. The purchaser as owner. If the purchaser is potentially entitled to the equitable remedy of specific performance, he or she obtains an immediate equitable interest in the property contracted to be sold. He or she is, or soon will be, in a position to call for it specifically. As equity "looks upon things agreed to be done as actually performed", the purchaser becomes the owner in the eyes of equity from the date of contract. It is therefore irrelevant that the date for completion (when the purchaser may pay the price and take

possession of the land) has not arrived. The purchaser becomes owner in equity through the operation of the doctrine of conversion. However, conversion will operate only if:

- (i) the contract between the parties is valid, i.e. one which is “sufficient in form and in substance, so that there is no ground whatever for setting it aside”; and
- (ii) title to the land is made by the vendor or is accepted by the purchaser.

The purchaser’s equitable ownership is, as has been seen, a proprietary interest, enforceable against third parties, though if it is to be protected against purchasers it must be the subject of a notice on the register (or the registration of a land charge where title is unregistered).

14-052 2. *The vendor as trustee.* As between the parties to it, the contract creates a relationship of trustee and beneficiary, though it is one which does not have all the incidents normally associated with a trust. The vendor is said to be a trustee for the purchaser, and the purchaser is regarded as the beneficial owner, at least for the purposes of disposition. However, the nature of this trust must be carefully understood. Although as against third parties it creates an equitable interest, the proprietary consequences between the parties themselves are limited, because the vendor retains a lien over the property for the price until it is paid. It imposes obligations on the vendor and transfers the risk of damage to or destruction of the property to the purchaser.

The vendor’s principal obligation under this curious form of trust is to manage and preserve the property with the same care as is required of any other trustee. “Equity imposes duties on the vendor to protect, pending completion, the interest which the purchaser acquired under the contract.” The duty does not go beyond that. Thus, for example, a vendor was held liable when between contract and conveyance a trespasser removed a large quantity of surface soil from the land, for with reasonable vigilance he should have observed and prevented the damage.

However, provided that the vendor has acted with due care since the date of the contract, the purchaser cannot complain of the condition of the property, even if (for example) a house turns out to be unfit for habitation. The vendor’s liability is that of a trustee in possession and ceases if the purchaser goes into possession before completion.

14-053 3. Nature of trusteeship. It is necessary to distinguish the trusteeship that arises from the existence of a specifically enforceable contract between vendor and purchaser and the trust or lien that arises from a payment of some or all of the purchase price by the purchaser:

“A purchaser who enters into a specifically enforceable contract for the sale of land acquires an equitable interest in the land and retains that interest for as long as the contract remains enforceable. On making pre-completion payments on account of the price the purchaser acquires also an equitable lien on the land to secure their repayment (subject to any set-offs and the possible forfeiture of the deposit) if the contract goes off.”

14-054 (a) Trusteeship arising from specifically enforceable contract. While the vendor remains unpaid, the trusteeship arising from a specifically enforceable contract is of a peculiar kind, because although a trustee, the vendor has “a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it”. The vendor may occupy the land and take the rents and profits up to the day fixed for handing over possession. Until the purchase price is paid the vendor may stay in possession under the vendor’s common law lien, which arises at the date of contract. Ordinarily both these rights will expire when the contract is completed by delivery of the conveyance or transfer, the purchase-money is paid, and the purchaser is let into possession. But if the vendor parts with possession of the land before receiving payment, he or she has an equitable lien on the land and is entitled, if he or she cannot obtain payment, to ask the court for an order for sale. It has been held that an unpaid vendor’s lien can arise only where the contract is one of which a court would order specific performance. This limitation appears to be unjustified however, and the better view is that a valid contract between the parties is the only prerequisite.

The vendor must pay all expenses properly attributable to his or her period of beneficial enjoyment, e.g. rates and taxes apportioned up to the date of completion, for in respect of these the vendor does not have the ordinary trustee’s right of indemnity against the beneficiary. Conversely the vendor may take the benefit of statutory compensation falling due to the “owner” before completion. But broadly speaking, “as between vendor and purchaser generally the powers of the vendor to act as owner of the property, and (inter alia) to change tenants and holdings, are suspended pending completion of the purchase”.

14-055 (b) Trusteeship or lien arising from payment of the purchase price. It has been explained that the proprietary

consequences of the trust arising from a specifically enforceable contract are in practice limited as between vendor and purchaser because of the vendor's lien for the price. However, the purchaser does become in some sense the owner of the property in equity to the extent that he or she pays all or part of the price (or furnishes other consideration). There is some uncertainty as to the nature of this ownership. It is often said that the purchaser has a lien over the property for the amount that has been paid, but there is also authority that the vendor holds the property on trust for the purchaser, and will hold it on a bare trust once the whole price has been paid. All modern cases treat the purchaser's right as a lien. It is as if "the vendor had executed an equitable mortgage in favour of the purchaser for the amount of his deposit, interest and costs". The purchaser may assert a proprietary claim not only against the land, but should the vendor sell it to some third party in breach of contract, to the proceeds of that sale as well.

The lien extends not only to the sums paid by way of deposit or part purchase, but also includes other sums ancillary to the deposit, such as interest on the deposit, interest paid on the unpaid balance of the purchase money paid to the vendor, the costs of any action to recover the deposit, and, apparently, the purchaser's costs of investigating title.

For the lien to arise there must be a valid contract between the parties though it need not be specifically enforceable. A purchaser can assert a lien only "where a purchase goes off by reason of some default on the part of the vendor". The basis for the imposition of the lien is not wholly clear, but it appears to arise out of the relationship of the parties by operation of equity as a correlative of the unpaid vendor's lien. The lien can be excluded expressly or impliedly by the contract between the parties."

27. The editors of the 34th edition of *Snell's Equity*, describe the nature of the trust in the following terms:

"24-003 The vendor's trusteeship is a special one, and the duties arising from the vendor's trusteeship are limited. In general, his duty is to preserve the property until completion in its state as at the time of the contract. Thus he will be liable to the purchaser if he fails to take reasonable steps to prevent damage to the property by trespassers or by the elements, or if he damages it himself; if he grants tenancies of it on unfavourable terms; or if he withdraws an application for planning permission to develop the land. If, before completion, the vendor wrongfully sells the property to another purchaser, he may be accountable qua trustee to the first purchaser in respect of the proceeds of sale. On the other hand, subject to the terms of the contract, the vendor is entitled to retain possession

and the income of the property between contract and completion, and any statutory compensation payable before completion in respect of prior damage to the land. Since the vendor's duty as trustee arises from his contractual duty to convey the specific land in the contract, he would not generally be liable for failing to take steps in relation to other properties which might indirectly affect the land he has agreed to convey."

The purchaser's interest under the trust, through proprietary in character, is not absolute. It is not the case, for example, that the vendor is a bare trustee to the purchaser from the moment they conclude the contract. The trust only exists to secure the purchaser's right to a conveyance under the contract. The purchaser's interest under the trust is therefore defeasible and only subsists for as long as the contract remains specifically enforceable. The purchaser's beneficial entitlement to the property may be best treated as passing to the purchaser by stages as the various conditions upon which completion of the contract depends are fulfilled.

24-004 The trust has been said to be constructive. The significance of this classification is that the trust is enforceable even though the vendor has not made any signed writing to evidence an intention to declare it. The relationship of trustee and beneficiary is created between the parties to the contract by operation of law, though in response to the vendor's intentionally assumed obligation in the contract to convey property to the purchaser.

It is essential to the explanation of the trust that the contract between the vendor and purchaser is capable of specific enforcement. For this reason, the trust is most commonly encountered in contracts to sell an interest in land, though it would also arise under contracts of sale of personal property, such as shares, provided that they were not readily obtainable in the market. The trust arises on the hypothesis that the parties are treated as having already performed all the obligations which they have undertaken in the contract. Although the formalities necessary to complete the agreed transaction, such as a conveyance at law, have still to be fulfilled, the parties are already in a position to compel each other to secure that result by obtaining specific relief in equity. There is a strong analogy therefore with constructive trusts which arise to give effect to incomplete inter vivos gifts and to those under the doctrine of mutual wills. In those instances, however, the beneficiary is permitted to compel the obligations of the person who has the legal interest in the relevant property even though he has given no consideration under a binding contract."

Analysing the Exchange Investors' rights following Pinnacle's liquidation

Exchange Investors' contractual rights

28. It is not in dispute that Pinnacle breached its obligations under the Sale Agreement by failing to complete following the issue of the PCCertificate.
29. ***Megarry and Wade*** explain at paragraph 14-101 that whilst an action for damages is the primary remedy under the law of contract, it is less important in relation to contracts for the sale of land than specific performance. The authors describe specific performance at paragraph 14-113:

“The performance which can be compelled is the due completion of the transaction in the proper form according to the contract.”

30. The Court was not taken to evidence of any of the Exchange Investors having applied for an order for specific performance. As a result of Pinnacle's insolvency, any claim of the Exchange Investors for damages would comprise unsecured claims.
31. The Sale Agreement provides at clause 1.21 “Tenancies” that the Unit was to be sold with vacant possession. Clause 3.1 expressly provides that Pinnacle agreed to sell and Mr Horn agreed to buy Unit 609 with vacant possession. Neither provision is consistent with Mr Horn or any of the other Exchange Creditors being entitled to any rental income paid prior to completion of the contract.
32. Mr Horn relies upon further alleged breaches by Pinnacle of the Sale Agreement: releasing and discharging the legal charge (which he submits was intended to provide a degree of security for the Buyers) and selling the freehold “thereby removing the Buyer's remedy for breaches of contract and denial of rent”. He refers specifically to clause 10.10 of the Sale Agreement which, he submits, create a conditional future interest:

“once the investors were all completed and expressed their management options, then under clause 10.10 [Pinnacle] gains a current right to sell the freehold instead of taking annual ground rent”.

He contends that by failing to complete, Pinnacle was not entitled to sell the freehold and thereby release the charge, removing the Buyers' remedy for breach of contract and denying them rent.

33. Clause 10.10 provides:

“10.10 The Seller agrees with the Buyer and [PSB] that it will not sell mortgage or otherwise dispose of the Seller's freehold interest in the Estate without [PSB's] consent unless the Seller first enters into the Secured Deposit Deed with [PSB] and deposits with [PSB] upon the terms of the Secured Deposit Deed a sum ascertained by reference to the year of the Rental Guarantee Period in which the disposition is made as set out in Table 1”.

34. If and to the extent that, in selling its freehold interest, Pinnacle breached clause 10.10 of the Sale Agreement, the Buyers will be entitled to pursue a claim in damages against it. However, I find in none of clauses 10.2 through to 10.11 any suggestion that the Buyers were entitled to receive any rental income from the units prior to completion of the Sale Agreement.
35. Mr Horn relies upon the terms of the MSA and USL's obligation to keep full accounts of monies received, as "reaffirming" Investors' entitlement to rental income. As set out above, there is, in my judgment, no contractual provision entitling Exchange Investors to receive rental income prior to completion of the Sale Agreement. There can consequently be no reaffirmation in the MSA of a right that does not exist.
36. Mr Horn relies upon the fact that the buildings housing the units had not been constructed at the time he entered into the Sale Agreement to explain why no reference is made to Buyers being entitled to receive rental income. I reject this submission. The Sale Agreement expressly provides for the Buyer to be given vacant possession of the unit once constructed and includes the Letting and Management Options regarding post-completion rental arrangements. Neither provision is consistent with the Exchange Investors having a contractual right to receive rental income before completion.

The intervention of equity

37. Both parties agree with the statement at paragraph 14-054 of *Megarry & Wade* that as a consequence of the trust that arises under specifically enforceable contracts, a vendor may occupy the land and take the rents and profits up to the day fixed for handing over possession. The parties disagree on the effect of equity on the entitlement to rents which were paid by tenants of the units after the date on which the Sale Agreement should have completed.
38. Mr Horn contends that the trust that arises on exchange, protects the Buyers' interest under the contract. The Sale Agreement includes an option to manage and rent out the unit(s). That, he says, is part of the resulting trust, entitling the Exchange Investors to the Funds.
39. I do not accept that this is a correct interpretation of the Exchange Investors' rights as beneficiaries under the trust in relation to their specifically enforceable Sale Agreements. A trust is imposed at common law only to secure the purchaser's right to a conveyance under the contract. In *Berkley v Poulett* [1977] 1 EGLR 86 at 93 Stamp LJ said:

"These duties and rights [of a purchaser] arise from the contract of sale and it is because of their existence that the vendor is said to be a constructive trustee, or a trustee sub modo, of the estate for the purchaser from the time when the contract is constituted. But to say that it is the duty of the vendor as trustee for the purchaser to care for the property is to put the cart before the horse and may lead you into error. He is said to be a trustee because of the duties which he has, and the duties do not arise because he is a trustee but because he has agreed to sell

the land to the purchaser and the purchaser on tendering the price is entitled to have the contract specifically performed according to its terms. Nor does the relationship in the meantime have all the incidents of the relationship of trustee and cestui que trust. That this is so is sufficiently illustrated by the fact that prima facie the vendor is until the date fixed for the completion entitled to receive and retain the rents and profits and that as from that date the purchaser is bound to pay interest. And you may search the Trustee Act 1925 without obtaining much that is relevant to the relationship of vendor and purchaser. Thus, although the vendor because of his duties to the purchaser is called a trustee, it is wrong to argue that because he is so called he has all the duties of or holds the land on a trust which has all the incidents associated with the relationship of a trustee and his cestui que trust.”

40. At paragraph 54 of his judgment in *Englewood Properties Ltd v Patel* [2005] EWHC 188 (Ch), Lawrence Collins J explains the reason for equity imposing a trust in relation to a specifically enforceable contract:

“The reason is that equity imposes duties on the vendor to protect, pending completion, the interest which the purchaser has acquired under the contract.”

41. As Stamp LJ noted in *Berkley v Poulett*, the duties do not arise because the vendor is a trustee in the ordinary sense but because he has agreed to sell the land to the purchaser when the purchaser tenders the full purchase price, at which point he is entitled to have the contract specifically performed according to its terms.
42. Clause 3.1.3 of the Sale Agreement requires the Buyer, on the Completion Day, to pay the Balance (less any payments previously made pursuant to the Payment Terms) plus the Document Fee (all terms as defined). The Balance was not paid. Moreover, as I have already noted, the Sale Agreement which would have entitled Mr Horn to receive the 999-year lease of Unit 609 on payment of the Balance, included no right on the part of the Buyer to receive rents from the units before completion.

An equitable lien

43. At paragraph 14-053, *Megarry & Wade* explain that it is necessary to distinguish the trusteeship that arises from the existence of a specifically enforceable contract between the vendor and purchaser (which I have considered above) and the trust or lien that arises from a payment of some or all of the purchase price.
44. The Contract Particulars at the start of the Sale Agreement provide:

“1.5 the Purchase Price is: £52,995.00
1.6 the Deposit is: £26,797.00
1.7 the Reservation Fee is: £5,000.00
1.8 the Balance is: £21,198.00 payable in
accordance with clause 3.1 of the Sale Agreement ...”

45. Mr Horn highlights that *Snells Equity* describes a purchaser's beneficial entitlement to the property as passing in stages as the various conditions upon which completion depends, are fulfilled and that paragraph 14-055 of *Megarry & Wade* explains that the trust extends to other sums ancillary to the deposit such as interest on the deposit and, according to the transcript of the judgment in *Cabra Estates Plc v Glendower Investments* [1992] E.G.C.S. 137, the purchaser's costs of investigating title.
46. He contends that as equity sees as done that which ought to have been done, the Exchange Investors became entitled, ten days after the PCCertificate, to the proportion of the rents that reflects the proportionate value of their equitable lien in the unit(s) they contracted to buy, with Pinnacle entitled to the proportion owed from the agreed purchase price which reflects its remaining vendor's common law lien.
47. Mr Horn submits that as time went on, the Exchange Investors' entitlement pursuant to their equitable lien to a share of the fund, increased. He demonstrates this in the following way. In relation to Unit 609, adding together each of the payments made by him plus interest, reveals (according to his calculations) that by 31 December 2016, he had paid 93.8% of the total sum due in respect of the unit. The AST was entered into on 12 July 2017. By 8 August 2017, USL had received £5,605.60 advance rent under the AST. Adding that sum to the payments Mr Horn had made by then, plus interest, results in his equitable interest exceeding 100% of the total price and the value of Pinnacle's common law lien as vendor of Unit 609 being reduced to zero. From that point in time, he submits, Pinnacle was holding Unit 609 on bare trust for him and he is entitled to receive all of the rents paid after that date.
48. In *Chattey v Farndale Holdings Inc* (1998) 75 P & CR 298 the Court of Appeal considered a contract where, as in this case, the vendor was to grant a lease, as opposed to transferring the entirety of its interest. The Court noted that in these circumstances, the lien would attach to the vendor's freehold interest from which the derivative interest was contractually due to be created. Initially the purchasers appealed against Blackburne J's finding at first instance that the lien did not extend to the entire freehold interest. However they abandoned that contention during the hearing of their appeal and the Court of Appeal noted that it was then common ground that the appellant purchaser's lien was exercisable only over the interest which the contract for sale proposed to confer in the form of the underlease.
49. In *Eason and Sanders v Wong* [2017] EWHC 209 (Ch) Arnold J considered the rights of investors in a development to create student accommodation in Nottingham. In that case, the construction of the building had not been completed before the company entered liquidation. The claimants had paid a 50% deposit in anticipation of being granted a 999-year lease. They contended, and the liquidators accepted, that each sale contract identified the unit that each purchaser had contracted to buy with sufficient specificity for a lien to arise and that they were entitled to an equitable lien to the extent of the deposit they had paid plus interest and costs, such that they were secured creditors to the extent of their lien. However, the liquidators contended that the lien was unenforceable because the building was never built and the lien could not simply attach to the vendor's freehold interest in the site. Arnold J concurred with the liquidators' submission that the purchasers' equitable lien attached to the subject matter of the contracts, namely the leases which the company had agreed to grant to each purchaser. It did not attach to the

vendor's interest in the site as a whole. The purchasers in that case were entitled to a pro rata distribution of the proceeds of sale to the extent of their security.

50. In Mr Horn's case, the subject matter of the contracts was a proposed 999-year lease of a unit with vacant possession which, after payment of the Balance and completion could be rented out by the Buyer exercising one of the Letting and Management Options. That is the subject matter to which the Exchange Investors' lien attaches. In my judgment it is clear from the authorities I have cited that the equitable lien does not extend to any or all of the rental income arising from the AST, even where that tenancy agreement was entered into after the date when the Sale Agreement should have completed.
51. As I do not consider that Mr Horn is entitled to any of the rent paid pursuant to the AST, it also follows that the amounts received by USL cannot be included in the total amount paid by Mr Horn such that Pinnacle should be considered to have held the unit on bare trust for him (entitling him, as claimed, from that point, to receive all of the rents).

Conclusion

52. I reject Mr Horn's argument that allowing Pinnacle to receive the Funds would amount to allowing it to set up its own iniquity as a defence. A vendor's failure to complete a contract for the sale of land entitles the purchaser to apply for specific performance and/or damages. Equity steps in to grant a trust to secure the purchaser's right to the conveyance it was entitled to receive under the contract and imposes an equitable lien as security to ensure the return of monies paid prior to receiving possession of the property contracted for. In most cases, a disappointed purchaser is not without remedy. Whilst Pinnacle's insolvency renders a damages claim of limited value, that does not, in my judgment, give rise to a wholly new right, in equity, for the Exchange Investors to receive rental income which formed no part of their contracts.
53. As Pinnacle remained entitled to receive rents and profits, and was not holding Unit 609 on bare trust for Mr Horn, there is no need for this court to consider the authority under which Bloom, USL and/or Valeo collected rents in respect of the Uncompleted Units. That is a matter between Pinnacle and each relevant company. The Funds have, in any event, been paid into court pending the outcome of this application.