Neutral Citation Number: [2019] EWHC 1722 (Ch)

Case No:2984 of 2017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
COMPANIES AND INSOLVENCY LIST (ChD)

Date: 4th July 2019

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court

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IN THE MATTER OF CHARLOTTE STREET PROPERTIES LIMITED IN ADMINISTRATION
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

(1) STEPHEN LEONARD CONN
(2) JONATHAN AVERY-GEE
(Joint Administrators of Charlotte Street Properties Limited)

Applicants

- AND –

JACOB AZOURI EZAIR

Respondent

- -
- -

Mr Mark Cawson QC (instructed by **DrydensFairfax**) for the **Applicants**
Mr Richard Lander (instructed by **Chandler Harris LLP**) for the **Respondent**

Hearing dates: 17th, 18th and 19th June 2019

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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.

His Honour Judge Halliwell

(1) Introduction

1. The Applicants, Stephen Conn and Jonathan Avery-Gee ("the Administrators") are the joint administrators of Charlotte Street Properties Limited ("the Company") and the liquidators of an associated company, Northern Estates Limited ("NEL"). As administrators of the Company, they seek an order under *Section 234(2)* of the Insolvency Act 1986 requiring the Respondent ("Mr Ezair") to transfer to them the registered title to six properties ("the Properties"). The Properties are at 16 Mayfield Road, Whalley Range, 22 Zetland Road, 12 Maple Avenue and 15, 17 and 19 Warwick Road, Chorlton.

2. The Application raises issues in relation to the nature of a sub-purchaser's rights in respect of registered land and the operation of the equitable doctrine of conversion and proprietary estoppel following the decision of the Supreme Court in *Southern Pacific Mortgages v Scott [2015] AC 395.*

3. At the trial before me, Mr Mark Cawson QC appeared on behalf of the Administrators and Mr Richard Lander, of counsel, appeared on behalf of Mr Ezair.

(2) Factual sequence

4. Mr Ezair is registered as freehold owner of each of the Properties. He acquired them, as investment properties, between 1973 and 1984 as part of a significantly larger portfolio ("the Original Properties") which he managed and let out in the name of "Northern Estates" ("the Business").

5. NEL was formed with the object of acquiring the Business and, from the outset, Mr Ezair was appointed as a director. By a written agreement dated 5th April 1999 ("the 1999 Agreement"), Mr Ezair agreed to sell the Business to NEL in consideration of the allotment of some 98 ordinary £1 shares.

6. By clause 6.2 of the 1999 Agreement it was provided that "completion of the sale of the [Original] Properties (or any one or more of them) shall take place seven days after either party gives notice in writing to the other party to complete the transfer of the [Original] Properties (or of that one or more of the

[Original] Properties specified in the notice)". Subject to the special conditions, the Standard Conditions of Sale (Third Edition) applied.

7. The shares were allotted to Mr Ezair who thus received the contractual consideration in full.

8. On 2nd September 2002, Mr Ezair set up a family trust known as the Jacob Ezair Settlement ("the Family Trust"). He appointed a company based in Jersey, Rathbone Trustees Jersey Limited (later Hawksford Trustees Jersey Limited ("Hawksford")) as trustee of the Settlement. On the same day, the Company was incorporated in Jersey. The Family Trust and the Company were established with a view to the avoidance of UK tax liability on property assets held in England.

9. At all times, the share capital of the Company has been held on behalf of the Family Trust. Until 2015, the registered directors were employees of Hawksford and, later, corporate directors under Hawksford's control. However, at all times, the day to day business and affairs of the Company were under the management and control of Mr Ezair himself.

10. By a written agreement dated 28th November 2003 ("the 2003 Agreement") between NEL and the Company, NEL agreed to sell the Company eight of the Original Properties. This included the Properties. The total purchase price of £1,300,000 was broken down into specific amounts for each of the constituent properties. The contractual completion date was defined so as to mean "28 days after the Seller or the Buyer has given to the other written notice to this effect." Subject to the special conditions, the Standard Conditions of Sale (Third Edition) applied.

11. The contractual consideration of £1,300.000 was apparently funded from a Northern Rock loan of £800,000 and an inter-company loan from NEL. The Company furnished consideration by assuming liability for repayment of the loans.

12. Although Mr Ezair and NEL were thus provided with the consideration to which they were entitled under the 1999 and 2003 Agreements, no transfers of the legal title to the Properties have been executed. The legal title thus remains vested in Mr Ezair. Mr Ezair accepts that this was to avoid Stamp Duty. Nevertheless,

in the annual accounts for the Company, the Properties were treated as assets at the market values shown in the 2003 Agreement.

13. The Company fell into arrears of repayment under the Northern Rock loan and, on 23rd December 2010, LPA receivers were appointed. In these circumstances, Mr Ezair approached Barclays Bank plc for an alternative facility, funds were advanced and the Properties were re-mortgaged to the bank under a registered charge dated 2nd June 2011.

14. During 2011-2012, Mr Ezair apparently signed a document headed "Loan Agreement" and drawn up in obscure terms. Mr Ezair, NEL and the Company were each joined as parties and Mr Ezair signed the document, as a deed, on behalf of NEL and himself. The document was dated 25th May 2011. However, below the signature for the Company, another date had been added in manuscript, namely "17th December 2012". The document referred to "a portfolio of six properties"-presumably the Properties-and recorded that these had been "acquired on commercial terms by [NEL] but remained 'resting in contract' in the name of Jacob Ezair as security". Later it was recorded that the relevant properties had been sold to the Company and Mr Ezair had "secured a personal loan from Barclays Bank the proceeds of which he provided [NEL] who in turn lent the entire sum to [the Company]….to meet the redemption sum plus costs" amounting to £906,931. It was provided this amount was repayable on demand but, in any case, it must be repaid within 24 months and that "for the time being the…Properties shall remain resting on contract in the name of the Guarantor and charged to Barclays Bank as security". Mr Cawson relies on this document as an acknowledgment that, by then, the Company had paid for the Properties in full and assumed liability to repay the loan from NEL.

15. In the Company's annual accounts for the year ending on 31st March 2014, the Properties were recorded on the balance sheet as assets of the Company. Until 2016, tenancies for the Properties were granted in the name of the Company but Mr Ezair continued to collect the rents in bank accounts held in his own name but designated as the Company's client accounts.

16. On 12th November 2015, an order was made winding up NEL and, on 16th October 2017, the Company went into administration. Mr Ezair continues to

collect the rents. Since the Company went into administration, he hasn't accounted to the Administrators for the rents but maintains he has personally incurred expense in connection with the management of the Properties.

17. Following the winding up of NEL but prior to the administration, Mr Ezair's solicitors, BPS Law LLP, explained his case, in a letter dated 4th February 2016, to Occasio Legal LLP on behalf of the liquidators.

"Our client's position is as follows:

1. At all material times he was the owner of these properties.
2. He accepts that pursuant to the original contract in 1999 he held these properties in trust to [NEL].
3. Thereafter a deal was done between [the Company] and [NEL] whereby the properties were sold to [the Company]. It was agreed that the properties would remain in the name of our client but he would now hold them in trust for [the Company]…
4. Subsequently there was an intervening receivership of the properties. The properties were subject to the appointment of an LPA Receiver. Our client thereafter bought the properties back from the Receiver (and in effect back from [the Company]) and they now belong to him in their entirety".

18. There is no reason to doubt the propositions in the first three paragraphs of this letter. However, there is no substantial evidence that the LPA receivers purported to sell the Properties to Mr Ezair and he no longer advances such a case. During the course of these proceedings, he has sought to maintain that during 2013 or 2014 he entered into an agreement ("the Alleged 2014 Agreement") with a director of the Company, Mr Robinson, to transfer the beneficial interest back to him. This case was advanced in Paragraphs 36 and 37 of his third witness statement dated 11th May 2018 and remained Mr Ezair's case until shortly before trial.

19. By letter dated 17th October 2017 ("the October 2017 Letter"), the Administrators' solicitors, Drydensfairfax, enclosed part completed TR1s in respect of each of the Properties, and requested Mr Ezair to execute and return

the TR1 forms immediately and, in any event, within 7 days to enable them to deal with the realisation of the assets for the benefit of the Company's creditors. However, Mr Ezair has declined to do so.

20. On 15th November 2017, the Administrators thus commenced proceedings for an order requiring Mr Ezair to deliver up validly executed TR1 forms in respect of the Properties. In substance, this is essentially a claim for an order directing him to transfer the registered title to the Properties. The proceedings also encompass a claim for the delivery up of documents and "further or other relief".

21. During the course of these proceedings, directions were made for the determination of a preliminary issue, in unusual terms, as to whether the Administrators are "potentially entitled to the relief claimed". On 9th July 2018, this came before His Honour Judge Eyre QC who concluded that the dispute essentially related to issues of ownership and, in the light of Warner J's decision in *Re London Iron and Steel Company (supra)*, the Administrators were potentially entitled to relief in relation to the Properties. However, he endorsed the Administrators' concession that the Court would not, on an application under *Section 234(2)* of the *Insolvency Act 1986*, have jurisdiction to make an order for the recovery of rent.

22. Meanwhile, the Administrators issued an application for summary judgment. This came before HHJ Eyre QC again, this time on 24th October 2018. He declined to give summary judgment and found that, whilst it was a borderline case, Mr Ezair had real prospects of success by relying on the Alleged 2014 Agreement or, at least, dealings between the parties in April 2014.

(3) Witnesses

23. On behalf of the Administrators, three witnesses were called to give evidence, namely Messrs Steven Robinson, Daniel Hainsworth and Jonathan Avery-Gee. They were not cross examined at length and I am satisfied their evidence was given to the best of their recollection.

24. Until 22nd February 2017, Mr Robinson was a director of Hawksford. He was also a trustee of the Family Trust. He confirmed the evidence in his witness statement about the nature and structure of the Family Trust and his discussions with Mr Ezair in 2013-2014 refuting any suggestion that he entered into any

agreement with Mr Ezair to transfer back the beneficial interest in the Properties. In cross examination, he was not challenged on these issues. However he had no recollection of the terms of the 2003 Agreement and, in the absence of access to the Company file for many years, he was unaware of the service of any notice fixing the date for completion. Mr Hainsworth is still a director of Hawksford. Again he confirmed the factual background as stated in his witness statement, much of which is uncontentious. In cross examination, he indicated that, having become aware that the Company owned the Properties, only later did he discover that the Company was not the legal owner.

25. As one of the Administrators, Mr Avery Gee confirmed the formal evidence in his witness statements. However, his evidence was essentially based on the records available to him and he was thus unable to give evidence, from his own knowledge, in relation to anything material prior to his appointments.

26. In his Skeleton Argument, filed shortly before trial, Mr Lander disclosed that Mr Ezair no longer intended to rely on the Alleged 2014 Agreement at trial maintaining that Mr Ezair had been prejudiced in dealing with this part of the case by the late disclosure of documents. In his Skeleton Argument and, again, at the commencement of the trial, Mr Lander submitted that it would thus be un-necessary for me to determine whether such a defence has a sound evidential basis. However, this only amounted to a concession for the limited purposes of the present proceedings and did not extend any further. At this stage, he also confirmed that he did not intend to call Mr Ezair to give evidence although Mr Ezair was present in Court. However, until very recently, the parties have proceeded on the footing that this issue would be fully disposed of at trial and the parties have filed evidence on that basis. Indeed, much of Mr Cawson's Skeleton Argument was directed to that issue. I thus indicated that I intended to determine this issue on the totality of the available evidence rather than to base it on Mr Lander's limited concession.

27. Although Mr Ezair elected not to give oral evidence, he has filed some five witness statements in which he set out the factual background at some length. By virtue of *Rule 12.1* of the *Insolvency Rules 2016*, the provisions of the *CPR* apply generally. In the present case, directions were made for the parties to file witness statements and give oral evidence. No notice of intention to rely on Mr

Ezair's witness statements as hearsay evidence has been served. However, they are contained in the Trial Bundle and I have a discretion to take them into consideration; indeed Mr Lander and Mr Cawson each sought to rely on limited passages from Mr Ezair's evidence. In these circumstances, I have taken his witness statements into consideration. Where they are consistent with the contemporaneous documentation and plausible in the context of the evidence as a whole, they provide a useful insight in relation to the factual background. However, Mr Ezair's evidence has not been tested in cross examination. Where contradicted by the other witnesses or inconsistent with contemporaneous documents, I have concluded it is of no significant evidential value. In particular, I unhesitatingly prefer the evidence of Mr Robinson to the un-tested evidence of Mr Ezair in relation to the discussions that took place between them in 2013-14.

(4) Mr Ezair's Admissions

28. In these proceedings, the Administrators have relied, from the outset, on Mr Avery-Gee's witness statement dated 14th November 2017 in which it was asserted that, having purchased the Properties under the 2003 Agreement, the Company was beneficial owner and recorded as such in its annual accounts. It is the Administrators' case that, although the 2003 Agreement was executory in nature, the Company furnished NEL with the contractual consideration by assuming responsibility for repayment of the Northern Rock loan and the inter-company loan from NEL. The Company was then treated as beneficial owner in the Company's annual accounts.

29. By his third witness statement dated 11th May 2018, Mr Ezair confirmed that, following the 1999 Agreement, the legal title to the Properties remained vested in him but he held the same on trust for NEL (Para 17). Mr Ezair then made the following assertions ("Mr Ezair's Assertions").

    i) "Pursuant to the [2003] Agreement, NEL transferred its beneficial ownership in the…Properties to the Company. As with the [1999] Agreement, the [2003] Agreement did nothing which affected legal title to the…Properties. No transfer of legal title took place as requisite notice was not given. This meant that subsequent to the [2003]

Agreement, I retained legal ownership of the…Properties, holding such ownership on trust for the Company" (Para 25)

ii) "The Company essentially stepped into the shoes of NEL and continued to deal with the…Properties and their tenants in the same way as NEL had done previously" (Para 26).

iii) "On 25th May 2011 I entered into an agreement with NEL and the Company…The…Properties were to remain resting in contract in my name. The phrase 'resting in contract' meant that I would continue to retain legal title but the Company would have a contractual right to require me to complete the sale" (Para 32).

30. Contrary Mr Lander's submissions, in my judgment Mr Ezair's Assertions amount to admissions in respect of part of the Administrators' case within the meaning of *CPR 14.1(1).* They amount to admissions that, following the 2003 Agreement, the Company stepped into the shoes of NEL and Mr Ezair held the Properties on trust for it ("the Admissions"). "Stepping into the shoes" of NEL connotes taking up the same position as NEL in relation to the Properties. However, I accept Mr Lander's submission that there was and is no express admission that Mr Ezair held the Properties on *bare* trust for NEL or the Company.

31. Since the Admissions were incorporated in a witness statement that Mr Ezair has filed and served on the Administrators, the Administrators have been given notice in writing of the admissions within the meaning of *CPR 14.1(2).*

32. In Paragraph 57 of his fifth witness statement dated 13th May 2019, Mr Ezair sought to modify or resile from Admissions. He did so when referring to other paragraphs of his third witness statement in the following terms.

"At paragraph 35, 36, 55 and 56 of my Third Witness Statement I suggested that prior to the 2014 transaction I held the….Properties on trust for [the Company]. I realise that this was the subject of some discussion at the hearing of the summary judgment Application. I reiterate that I did not intend, in my witness statement, to make any legal submissions about the parties' respective interests in the…Properties. From my perspective, the relevant dealings with the…Properties were (1) the initial purchase by me, (2) the agreement between

me and NEL, (3) the agreement between NEL and [the Company] and (4) the 2014 transaction. I shall leave it to my lawyers to discuss whether the effect of these transactions was to create any sort of trust".

33. If, after the commencement of proceedings, a party makes an admission within meaning of *CPR 14.1*, the permission of the Court is required to amend or withdraw the admission. Before me, Mr Lander has thus sought permission to withdraw the admissions under *CPR 14.1(5)* and *PD14, Para 7.1(1).*

34. I decline to do so. The Admissions are simple, discrete and easy to understand. "Stepping into the shoes" is in common use as a metaphor and the gist of the admission is unambiguous. As a businessman experienced in buying, selling and mortgaging properties, and instructing lawyers in connection with property transactions and the formation of companies and the family trust, Mr Ezair can be taken to have a clear understanding of the concept of beneficial ownership and trusts. When stating that he held "ownership on trust for the Company", he can be taken have accepted that, whilst the legal title was vested formally in his name, the Properties would be held for and on behalf of the Company.

35. *CPR PD14 Para 7.2* provides guidance in relation at least to some of the relevant circumstances. I shall address these now using the same sub-paragraph designation.

    a) Mr Ezair seeks to withdraw the Admissions following legal re-appraisal or, at least, a tactical re-assessment by his lawyers; it is not based on new evidence. Whilst Mr Ezair mentioned in his fifth witness statement, that he wished to leave it to his lawyers to discuss the effect of the relevant transactions, he was well capable of describing his own understanding of them at the time.

    b) His case is not advanced by his own personal conduct. The most obvious explanation for the Admissions is that Mr Ezair made them because he believed them to be true. It is at least conceivable that Mr Ezair didn't fully understand the restrictions on equitable ownership following *Southern Pacific Mortgages v Scott (supra).* However, he can be taken to have understood the concept of beneficial ownership and may have considered it

helpful to make the Admissions as a prelude to his case in relation to the Alleged 2014 Agreement. Conversely, once Mr Ezair had decided not to pursue his case in relation to the 2014 Agreement, it was to his perceived advantage to withdraw the Admissions.

c) If the Admissions are withdrawn the Administrators are likely to sustain prejudice. Mr Cawson advised me that his clients' approach to issues of tactics and procedure has been influenced by the nature of the case that Mr Ezair has advanced against them. On the footing that, following the 2003 Agreement, the Company stepped into the shoes of NEL and the Properties were then held on trust for it, the Administrators have not explored the possibility of entering into an assignment with NEL or taking other steps to advance their case.

d) No doubt, Mr Ezair will be prejudiced if not permitted to withdraw the Admissions. However, in all the circumstances, it will be difficult to avoid the conclusion that he will have brought it on himself.

e) Mr Ezair sought permission to withdraw the Admissions very late, during the Trial itself.

f) The Admissions relate to a critical aspect of the case and are thus capable of having a significant bearing on the outcome of the proceedings.

g) Mr Ezair's admissions are consistent with the evidence as a whole. To hold him to the admissions would not be contrary to the administration of justice. By placing minor limits on the evidence and precluding Mr Ezair from re-opening issues, it is also consistent with the requirements of the overriding objective.

(5) Issue estoppel and abuse of process

36. Mr Cawson submitted that Mr Ezair was precluded, on other grounds, from denying he held the Properties on trust for the Company. In doing so, he relied on the case Mr Ezair advanced before HHJ Eyre QC at the hearings on 9th July

and 24th October 2018 for the determination of the preliminary issue and the Administrators' application for summary judgment.

37. It appears from Paragraph 1 of HHJ Eyre's judgment on 9th July 2018 and Paragraph 5 of his judgment dated 24th October 2018 that, on each of these occasions, Mr Ezair's case was presented on the basis that, following the 2003 Agreement, he held the Properties on trust for the Company. His defence to the application for summary judgment was primarily based on the Alleged 2014 Agreement.

38. Not surprisingly, it is at least implicit in his judgments that HHJ Eyre QC was also satisfied that, until 2014 or thereabouts, the Properties were held on trust for the Company.

39. Intially, Mr Cawson relied on arguments based on issue estoppel and abuse of process. However, he wisely abandoned the issue estoppel argument. Judge Eyre's conclusions on this issue (and, indeed, the concessions on which they were based) were collateral to his decision. Moreover, they did not furnish Mr Ezair with a free standing right of appeal.

40. Mr Cawson continued to maintain that it would be an abuse of process for Mr Ezair to deny that the Properties were held on trust for the Companies. However, the conceptual basis for this argument is obscure and, given that I have refused to allow Mr Ezair permission to withdraw the Admissions, it does not substantially add to the Administrators' case.

41. I decline to make any determination in the Administrators' favour based on issue estoppel or abuse of process.

(6) Privity of contract, contractual notice and equitable interests

42. *Section 234* of the *Insolvency Act 1986* confers powers on the office holders in support of their statutory functions to collect and realise the Company's property. However, it is procedural only; it does not enlarge the Company's rights in such property, *Re Leyland DAF Ltd [1994] 1 BCLC 264 at 270b.*

43. To establish their case under *Section 234(2)* of the *Insolvency Act 1986*, the Administrators must thus show that the Company "appears to be entitled" to "property". "Property" is widely defined in *Section 436(1)* so as to include

"money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of or incidental to, property". This is obviously wide enough to include any contractual right and any legal or equitable interest in respect of the Property. However, in a case such as this where the Administrators seek an order providing for the transfer of the legal title, the right or interest must itself dictate that they are entitled to such an order.

44. Before me, Mr Lander wisely conceded that the statutory jurisdiction encompasses a transfer to the office-holders as agents for the Company. Consistently with the earlier judgment of HHJ Eyre on the preliminary issue, he also accepted it is implicit in the statutory requirement that the Company must "appear…entitled" to property that the Court has jurisdiction to determine a dispute of entitlement, *Re London Iron and Steel Co Ltd [1990] BCLC 375h-376e.* Indeed, he invited me to determine the dispute in the present case by concluding that the Company does not have a sufficient contractual right or other interest in the Properties. This is on the basis that:

    i) Mr Ezair and the Company do not have privity of contract;

    ii) NEL has not assigned its contractual rights to the Company;

    iii) no date has yet been fixed for completion of the 1999 or 2003 Agreements and Mr Ezair is thus under no contractual obligation to transfer the Properties; and

    iv) the Company is not entitled to a beneficial interest under a trust or sub-trust since the 2003 Agreement operated only to grant personal rights given that NEL was, itself, entitled, as purchaser, to no more than an equitable interest in the Properties under a contract that has never been completed. For the final proposition, he relies on *Southern Pacific Mortgages Limited v Scott [2015] AC 385*.

45. Mr Lander's submissions were skilfully advanced and they are not without foundation. The Company was not party to the 1999 Agreement and Mr Ezair was not party to the 2003 Agreement. Together, they have not entered into a written agreement for the sale and purchase of the Properties. Conversely, NEL

and the Company have not executed, in compliance with *Section 52(1)* or *53(1)(c)* of the *Law of Property Act 1925*, a conveyance or other written agreement or instrument transferring NEL's rights to the Company. Notwithstanding that the 1999 and 2003 Agreements incorporated formulae requiring the date for completion was to be fixed by notice, Mr Lander submitted that no such notice has ever been served.

46. Moreover, it is true that, in *Southern Pacific Mortgages v Scott (supra)*, the Supreme Court has concluded that, where a purchaser purports to create rights in property, such rights do not assume a "proprietary character" (Paras 60-79) and thus become capable of taking priority over recognised interests in land until the purchaser acquires the legal estate.

(7) Southern Pacific Mortgages v Scott [2015] AC 385

47. The *Scott* case was one of a series of test cases, in which home owners contracted to sell their properties at a reduced price on the understanding that the properties would be leased back at a discounted rate. The purchasers took out a mortgage to fund the transactions but, following completion, defaulted. The lenders then brought possession proceedings. Mrs Scott was one of the vendors. She unsuccessfully sought to defend the proceedings on the basis that she was entitled to an over-riding interest arising from the purchaser's assurances about her future rights of occupation.

48. Lord Collins gave the main judgment and the other members of the Supreme Court at least agreed with his conclusions about the character of the purchaser's rights. There was an issue about the extent to which the constituent parts of the transaction-exchange of contracts, transfer and mortgage-were indivisible. The majority resolved this issue in Mrs Scott's favour. Ultimately, however, the critical question was whether her material rights were capable of binding the mortgagees on completion.

49. Mrs Scott's case-as deployed before the Supreme Court-was that, by virtue of the purchasers' assurances, she was entitled to "a proprietary right and not a mere personal equity, because the purchasers had proprietary rights as from exchange of contracts, out of which they could carve the obligation to lease back the properties to the vendors, and it did not matter that the contract of sale did

not reflect that obligation" (Para 27). This right was alleged to take effect from the time it arose by virtue of *Section 116* of the *Land Registration Act 2002* and was to be accorded priority as an over-riding interest by virtue of *Schedule 3, Paragraph 2* to the *2002 Act.* On this basis, it was alleged to bind the purchasers' mortgagees.

50. After considering a series of historic cases in relation to trusts of land, including *Lysaght v Edwards (1876) 2 ChD 499, Shaw v Foster LR 5 HL 321* and *Berkley v Poulett [1977] 1 EGLR 86*, Lord Collins concluded that they did not involve the creation of proprietary rights binding on third parties. At Paragraph 79, he dismissed Mrs Scott's appeal on the "principal ground that the vendors acquired no more than personal rights against the purchasers when they agreed to sell their properties on the basis of the purchasers' promises" and "those rights would only become proprietary and capable of taking priority over a mortgage when they were fed by the purchaser's acquisition of the legal estate on completion".

51. The other members of the Supreme Court agreed with Lord Collins on this aspect of the case. At Paragraph 111, Baroness Hale reached the "provisional conclusion…that under the ordinary law of property the nominee purchaser…could not give Mrs Scott a tenancy which would bind the lenders….before her purchase of the land was completed". She then addressed the scheme of priority in the *Land Registration Act 2002* which, for her, presupposed "…an estate before there can be an interest which affects it" (Para 112). She also considered the statutory provision, in *Section 27(1)*, that a registered disposition of an estate or charge "does not operate at law until the relevant registration requirements are met" and thought that "this might suggest that rights granted by the purchase to an occupier could not be 'fed' until registration" (Para 113). On analysis, these matters thus confirmed her provisional conclusion.

(8) The equitable doctrine of conversion

52. In *Lysaght v Edwards (1876) 2 ChD 499* at *506-7*, Jessel MR explained the doctrine of conversion in the following terms.

> "The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession…As regards real estate, however, another element of validity is required. The vendor must be in a position to make a title according to the contract, and the contract will not be a valid contract unless he has either made out his title according to the contract of the purchase has accepted the title, for however bad the title may be the purchaser has a right to accept it and the moment he has accepted the title, the contract is fully binding upon the vendor. Consequently, if the title is accepted in the lifetime of the vendor, and there is no reason for setting aside the contract, then, although the purchase-money is unpaid, the contract is valid and binding; and being a valid contract, it has remarkable effect, that it converts the estate so to say, in equity: it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded on this, that a valid contract actually changes the ownership of the estate in equity".

53. For the doctrine to apply the purchaser must potentially be entitled to the equitable remedy of specific performance, *Megarry and Wade on the Law of Real Property (9th edn) Para 14-051* (see also *Sookraj v Samaroo [2004] UKPC Para 15* (Lord Scott)). The vendor retains a lien over the property until the price is paid in full, *Para 14-052*, and the purchaser is entitled to a lien in respect of any part payment, *Para 14-053*.

54. However, the view generally taken is that, once the vendor has received the purchase price in full, he is no more than a bare trustee since, from that point, he must hold the property in trust for the purchaser absolutely and indefeasibly with no active duties other than to preserve the property, *Clarke v Ramuz [1891] 2 QB 456 at 459-60,* and transfer it to the purchaser at his direction. This is certainly consistent with the view taken by the editors of *Underhill and Hayton on the Law of Trusts and Trustees (19th edn) Para 31.1* and *Megarry and Wade*

on the Law of Real Property (9th edn) Para 14-055. It is also consistent with the following passage from the judgment of Lord O'Hagan in *Shaw v Foster (1871-72) L.R. 5 H.L. 321 at 349.*

> "By the contract of sale the vendor in the view of a Court of Equity disposes of his right over the estate, and on the execution of the contract he becomes constructively a trustee for the vendee, who is thereupon on the other side bound by a trust for the payment of the purchase-money; or, as Lord Westbury has put it in *Rose v. Watson*: "When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is in Equity transferred by that contract." This I take to be rudimental doctrine, although its generality is affected by considerations which to some extent distinguish the position of an unpaid vendor from that of a trustee. Thus, as it is stated by the Master of the Rolls in *Wall v. Bright*: "The vendor is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate."

55. For his part, Lord Cranworth, observed, in *Rose v Watson [1864] 10 HLC 672*, that "when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is in equity, considered as the owner of the estate".

56. Consistently with these principles, in *Jerome v Kelly [2004] 1 WLR 1409*, Lord Walker stated, at Para 32, that "it would…be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, such as rescission of the contract (either under a contractual term or on

breach). If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchaser price is paid".

57. "The vendor's share of the beneficial ownership, reflective of his right to possession or to receipt of rent, does not survive payment to him of the purchase price or the balance of it: *Wall v Bright (1820)1 Jac & W 494 at 503*" and the purchaser thus becomes entitled to require the vendor to transfer the legal title, *Maharaj v Johnson [2015] PNLR 27 (Para 17)*

58. Since, at this final stage, the property is held on bare trust for the purchaser, Harman J adjudged, in *Bridges v Mees [1957] Ch 475*, that the statutory limitation period in the *Limitation Act 1939* was then deemed to commence in favour of the beneficial owner.

59. There is also authority for the proposition that, where property is held on sub-trust and the sub-trustees themselves have no active duties to perform, the sub-trustees are not entitled to assert any claim to the property and the trustee can thus act on the directions of beneficiaries under the sub-trust, *Re Lashmar [1891] 1Ch 258.*

60. The conclusions of Lord Collins (and, indeed, Baroness Hale) in the *Scott* case relate to the creation rather than the devolution or transfer of beneficial interests. It thus remains possible for a purchaser to enter into a written disposition of its existing beneficial interest which will be binding on third parties subject to the statutory requirements of the *Land Registration Act 2002.* This would include a signed agreement in writing sufficient to satisfy *Section 53(1)(c)* of the *Law of Property Act 1925*. Although more than strictly necessary to transfer an equitable interest, it would also include a deed of assignment, transfer or assent. However, an agreement creating new rights and obligations, such as an obligation to lease back the properties, will only be enforceable personally.

61. Lord Collins did not specifically refer to sub-sales in the context of the doctrine of conversion. However, at Paragraph 66, he endorsed the judgment of Stamp LJ in *Berkley v Poulett [1977] 1 EGLR 86* as authority for the proposition that a purchaser under a sub-sale does not obtain proprietary rights against the vendor in the head contract.

62. In *Berkley v Poulett (supra),* the original owner sold his ancestral estate, including a house, its grounds and some forestry, to a company which promptly re-sold the house and grounds to the plaintiff. The original owner then sold the contents of the house separately. The plaintiff sued the original owner on the basis that the sale included fixtures to which he was by then entitled. The claim failed. Scarman and Stamp LJJ each adjudged that the disputed items were not fixtures. This was sufficient to dispose of the appeal. However, in the judgment endorsed by Lord Collins, Stamp LJ's principal reason for dismissing the plaintiff's appeal was that he had no right to bring a contractual claim against the owner. Goff LJ gave a dissenting judgment.

63. In *Berkley v Poulett (supra)* the factual and procedural context was significant. The head contract and the sub-sale were completed well before the plaintiff issued his proceedings, and the company chose to complete the head contract without any claim for compensation or, so it appears, otherwise reserving its rights. No doubt, at that point the contract merged in the conveyance. Specific performance was thus no longer possible and the company was not joined as a party to the proceedings. Elsewhere in his judgment, Stamp LJ took the opportunity to emphasise that the plaintiff was not an assignee of the company's rights.

64. By the time the plaintiff commenced proceedings, it was no longer possible for him to bring a claim against the company to compel specific performance of the head contract. It was thus too late for him to deploy the equitable doctrine of conversion in support of such a claim. However, Stamp LJ's analysis does not preclude such a claim at least where the purchaser under the head contract remains potentially entitled to specific performance. Moreover, where the sub-purchaser is himself entitled to compel the intermediate vendor to sue the vendor, it matters not for the purposes of contractual enforcement whether this right is characterised as a "personal right" under the guidance of Lord Collins or a "mere equity" for the purposes of *Section 116(b)* of the *Land Registration Act 2002.*

65. In the light of Lord Collins's judgment in the *Scott* case, the sub-purchaser does not acquire a separate equitable interest when he enters into the sub-sale agreement. However, the Supreme Court's decision does not disturb

established principles in relation to the transfer of the intermediate purchaser's equitable interest. In accordance with these principles, the sub-purchaser becomes entitled to the intermediate purchaser's equitable interest if and when the sub-contract is completed and the intermediate purchaser's interest is assigned to him. By analogy, the same is true if and when a point is reached where the intermediate purchaser holds on bare sub-trust for the sub-purchaser and the original vendor can thus act on the directions of the sub-purchasers in accordance with the principle in *Re Lashmar* (supra).

66. Moreover, until completion of the head contract, the sub-purchaser remains personally entitled to claim specific performance of the sub-contract so as to require the intermediate vendor to obtain specific performance of the head contract.

67. Lord Collins's analysis is, of course, independent of any equity to which the sub-purchaser might be entitled against the owner of the legal estate. In the *Scott* case, the actionable assurances were made by the purchasers at a time they had no more than an equitable interest in the relevant property. There is nothing to suggest that the purchasers' mortgagees were aware of the assurances at any time prior to completion. No doubt, the conclusion of the Supreme Court would have been different had the purchasers' mortgagees done anything, during this period, to acquiesce in the assurances so as to encourage the purchasers to act to their detriment. In these circumstances, it would be no answer for the mortgagees to contend they did not own the legal estate during that period if they acquired a legal title later so as to feed the estoppel.

(9) The Company's rights under a constructive trust

68. In my judgment, Mr Ezair holds the Properties on bare trust for the Company under the 1999 Agreement. He has done so, at the latest, from the time the Company assumed responsibility, under the 2003 Agreement, for repayment of the loans and the Properties were thus entered as assets on the Company's balance sheet with the rents paid into bank accounts held by Mr Ezair and designated as the Company's client accounts.

69. I have reached this conclusion on the following basis.

70. The 1999 Agreement has never been formally completed. However, at the outset, NEL furnished Mr Ezair with the contractual consideration in full, through the allotment of share capital, and he thus held the Property on bare trust for NEL.

71. Whilst Mr Ezair, as legal owner, was not a party to the 2003 Agreement, he signed the same in his capacity as director of NEL and, although he was not formally appointed as a director of the Company, he was in control of both companies at all material times. In his capacity as legal owner, he facilitated the transaction and co-operated in all the attendant formalities, including, the management of the properties and collection of the rents.

72. It is to be inferred, from the available evidence, that the transaction was concluded in order to avoid UK tax liability on property assets. To achieve that outcome, no doubt beneficial ownership of the Properties would have had to pass from NEL to the Company. Mr Ezair would have been fully aware that this was the case and acted on this basis.

73. There is no evidence that the 2003 Agreement was completed. To do so, NEL would have had to enter into a formal assignment of its rights under the 1999 Agreement. However, at all times NEL and the Company were under Mr Ezair's control. He arranged for the two companies to enter into the transaction under which the Company assumed liability for the relevant loans; he also arranged for the Properties to be let and the rents to be collected on the Company's behalf. The Properties were treated as assets of the Company in its annual accounts. No doubt this was on the footing that NEL's rights had been assigned to the Company and beneficial ownership had thus passed from NEL to the Company. Mr Ezair would have acted in his capacity as a director of NEL and, if he was not a *de facto* or shadow director of the Company, he plainly had a measure of control over its affairs. However, in his personal capacity, he was the legal owner of the Properties and in that capacity he acted as trustee and acknowledged the Company's beneficial interest. In my judgment, Mr Ezair is thus estopped from denying that NEL's rights under the 1999 Agreement have been assigned to the Company and that, following assignment, the Company is entitled to exercise NEL's rights under the 1999 Agreement, including its right to serve notice fixing the completion date.

74. This conclusion is consistent with the judgments of the Court of Appeal in *Rodenhurst v Barnes [1936] 2 AER 2* in which a company was adjudged to be estopped from denying it had entered into an assignment of a lease by its conduct in entering into possession of property and paying the reserved rents. At p11, Sir Boyd Merriman surmised that it sufficed as detriment that the landlord had permitted the original tenant to take his goods off the premises and allowed the company to put in its own goods. At p14, Scott LJ considered that it was enough for the landlord to have been kept in the dark. In the present case, the Company can be deemed to have acted to its detriment by permitting Mr Ezair to enter into the tenancy agreements and collect the rents on its behalf.

75. Moreover, since the Company was deemed to have furnished, in full, the consideration for the 2003 Agreement by assuming responsibility for repayment of the loans, it must be taken to have assumed the rights of a full beneficial owner by permitting Mr Ezair to grant tenancies and collect the rents on its behalf. There could have been no good reason for NEL to retain any rights from that time and there is no evidence to suggest it did so.

76. The decision of the Supreme Court in *Scott* does not preclude nor, indeed, is it inconsistent with these conclusions.

77. Firstly, in the present case unlike *Scott*, there have not yet been any third-party transactions in relation to the Property. At all times, the legal estate has remained vested in Mr Ezair himself. As legal owner, Mr Ezair is himself estopped from denying that NEL has assigned its rights under the 1999 Agreement to the Company.

78. Secondly, following the 2003 Agreement, the Company has effectively "stepped into the shoes" of NEL and assumed its rights under the 1999 Agreement. On analogy with *Re Lashmar (supra),* NEL no longer has any duties to perform. It is thus un-necessary for the Company to rely, as Mrs Scott was required to do, on the creation of new rights. No separate written disposition is required under *Section 53(1)(c)* of the *Law of Property Act 1925;* NEL's rights under the 1999 Agreement have passed to the Company by constructive trust so as to give effect to the common intentions of NEL, the Company and Mr Ezair himself or by virtue of the equitable doctrine of conversion and the

Company's rights by estoppel. On this basis, *Section 53(2)* of the *1925 Act* applies.

79. Thirdly, the Company is entitled to hold Mr Ezair to the Admissions (supra) that, following the 2003 Agreement, the Company stepped into the shoes of NEL and Mr Ezair held the Properties on trust for it. Mr Ezair does not admit the precise nature of the trust but, on the basis that the purchase price has been paid in full and he has no active duties to perform otherwise than to preserve the Properties and transfer the title, he holds on bare trust for the Company.

80. For the avoidance of doubt, I am also satisfied on the evidence, including the testimony of Mr Robinson, that there was never any evidential basis for the Alleged 2014 Agreement and the parties have not entered into an agreement under which the Company promised to transfer its beneficial interest in the Properties to Mr Ezair.

81. A beneficiary who is absolutely entitled to land is entitled to call on the trustee to transfer the legal estate either to the beneficiary himself or his nominees, *Lewin on Trusts (19th edn) (2015) Para 24-002 (*cit *Stephenson v Barclays Bank Trust Co Limited [1975] 1 WLR 882)*. By the October 2017 Letter, the Administrators called on Mr Ezair, by his solicitors, to transfer the legal title. Before me, Mr Lander submitted that, if the Properties are held on trust, it remains necessary for the beneficiary to comply with the provisions of the 1999 Agreement by serving notice so as to fix a completion date. I am content to assume that this is correct. Where there is a contractual mechanism controlling the method by which a beneficiary calls on the trustee to transfer title to the trust assets, he can be expected to comply with it.

82. In the present case, Clause 6.2 provided for completion to take place "seven days after either party gives notice in writing to the other party to complete the transfer of the Properties…" Originally "either party" was apt to mean the original parties to the 1999 Agreement only, namely Mr Ezair and NEL. However, Mr Ezair is estopped from denying that NEL's rights under the 1999 Agreement have been assigned to the Company and are exercisable by the Company itself, including its right to serve a notice fixing the date for completion.

83. On this basis, I am satisfied that the October 2017 Letter satisfied the contractual requirements. It amounts to a notice requiring Mr Ezair to complete the transfers. Although it also specified a seven-day time scale which, as it happens, replicates the seven day period in Clause 6.2, this did not form part of the notice requirements.

84. By this route, I am satisfied that Mr Ezair is now under an obligation, as trustee, to transfer the Properties to the Company.

(10) The Company's contractual rights and obligations

85. The Company seeks to advance its rights by an alternative route. This is on the basis that, if NEL remains contractually entitled to enforce the 1999 Agreement, the Company can seek specific performance of the 2003 Agreement by obtaining an order against NEL to compel Mr Ezair to comply with his obligations under the 1999 Agreement.

86. On this hypothesis, I am satisfied the Company would be entitled to sue for specific performance. It matters not whether NEL or Mr Ezair have served notice fixing the completion date, *Hasham v Zenab [1960] AC 316.* However, the Company will not be entitled to compel performance until the completion date has expired. Mr Cawson submitted that the date for completion of the 2003 Agreement must be deemed to have expired a long time ago and, if not, the Administrators have waived the notice requirements in their capacity as liquidators of NEL and administrators of the Company. As liquidators of NEL, they can also forthwith serve notice under Clause 6.2 of the 1999 Agreement so as require completion of the same no later than seven days after service. Each of these submissions is plainly well founded.

87. Mr Cawson submitted that a sub-purchaser is entitled to sue for specific performance without joining the intermediate party. In support of that proposition, he referred me to *Snell's Equity (33rd edn) 24-003, Shaw v Foster (1872) LR 5HL 321, Spry's Equitable Remedies (8th edn), p86 and Jones and Goodhart "Specific Performance" (2nd edn) pp213-4.* In the light of these authorities and, indeed, *CPR 19.8A*, I am satisfied such a claim will not generally fail owing to the non-joinder of the intermediate party, particularly in a case such as this where the intermediate party supports the claim.

88. On this hypothesis and by this device, the Administrators would be entitled to an order directing Mr Ezair to transfer the registered titles to the Properties no later than seven days after NEL serves a notice to complete under the provisions of Clause 6.2 of the 1999 Agreement. However this is un-necessary owing to my conclusions on the constructive trust issue.

(11) Disposal

89. Relief under *Section 234* of the *Insolvency Act 1986* is discretionary.

90. Mr Lander submitted that, in the event the Administrators are otherwise entitled to relief, relief should be declined for a number of reasons.

91. Firstly, he submitted that the statutory procedure in *Section 234* was manifestly inappropriate for the present case on the basis that it amounts to a summary jurisdiction designed for use in simple and straightforward cases. In the more difficult or complex cases, office holders can generally be expected to issue proceedings by way of ordinary action, in the name of the company. They can be expected to bring such claims under *CPR Part 7*. In addition to paying the standard court fees for such a claim, they will be expected to file statements of case and comply with the procedure governing cost management and disclosure. They can also be met with an application for security for costs.

92. Secondly, he submitted that, in view of the fact that *Section 234* does not confer jurisdiction on the Court to entertain pecuniary claims or claims to an account and damages, the Court is being invited in the present case to deal in isolation with the issues of title. It is thus unable to see the dispute in its full perspective. Moreover, there is likely to be wasteful duplication of court time if and when the court considers any application on the part of the Company for an account of the rents due.

93. More seriously, Mr Lander submitted that, as a trustee, Mr Ezair is entitled to be indemnified out of the trust assets in respect of his expenses and he is entitled to a lien over the Properties in respect of the same. If I make an order for the transfer of the Properties, Mr Ezair will be deprived of his lien.

94. There is substance in each of Mr Lander's submissions. However, in my judgment it would be inappropriate for me to decline relief on this basis.

95. Firstly, proceedings were issued as long ago as 15th November 2017. Since then, the Court has made directions for disclosure, delivery of witness statements and the determination of the preliminary issue in relation to the Administrators' entitlement to relief. By consent, on 28th November 2018, the Court made a series of directions providing *inter alia* for the case to be referred to trial with an estimated duration of four days. Had it been envisaged the Administrators have adopted the wrong procedure, the issue should have been addressed at a formative stage of the proceedings.

96. Secondly, it has been fully understood since the hearing before HHJ Eyre QC on 9th July 2018, if not before, that the issues of title in these proceedings will have to be heard separately from the parties' respective claims for pecuniary relief. Whilst it is true that this will involve separate judicial determinations on overlapping issues and a certain amount of duplication of costs and expense, there is no logical reason why they cannot be heard separately. If I decline relief, the title issues will have to be re-visited on a future occasion and further costs consumed in doing so. It is conceivable I could make some determinations in these proceedings which would operate to pre-empt some of those issues. However, in my judgment it would be inappropriate for me to embark on such an exercise at this stage.

97. During the course of these proceedings, Mr Ezair has adduced evidence in relation at least to some of his outgoings on the Properties, including mortgage repayments. However, he has also been in receipt of the rents for which, in breach of trust, he has failed to account to the Company since it went into administration. Mr Cawson maintains that the rents almost certainly exceed the total amount of his outgoings and that, upon the taking of accounts, there will be a substantial amount due to the Administrators. In the absence of cogent evidence to the contrary, I am not satisfied that the amounts to which Mr Ezair is entitled by indemnity exceed the rents he has collected in respect of the Properties. Not least this is because Mr Ezair has elected not to give oral evidence.

98. It is now some 20 months since the Company was placed in administration. Mr Ezair holds the Properties on trust for the Company and the Administrators seek to realise the Properties as part of their statutory functions. It appears from Mr

Ezair's third witness statement that the Properties have been professionally valued in the sum of £1,600,000. At the time of the statement, 11th May 2018, some £681,562.64 was secured by the charge to Barclays Bank but there is obviously a substantial equity. In my judgment, there is no good reason for me to decline to make an order providing for the Properties to be transferred to the Administrators immediately so that they can be realised in the proper course of the administration.

99. I shall thus make an order requiring Mr Ezair to transfer the Properties and will hear further submissions in relation to the form of the order and consequential directions.