[2015] UKFtT 0395 (PC)

REF/2013/0046, 49, 50, 51, 52, 53

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF REFERENCES FROM HM LAND REGISTRY

BETWEEN

ROSEFAIR LIMITED

APPLICANT

and

(1) JEFFREY EDWARD BUTLER
(2) TALAT AHMED
(3) ALAN LEONARD CALDWELL & VALERIE ELIZABETHE CALDWELL
(4) KALWINDER SINGH SANDHU & KAMALJIT KAUR
(5) ANGELA BIR
(6) SURRINDER UPPAL

RESPONDENTS

Property Address: St. James Place, 1 Newgate, Croydon CR0 2PE

Title Number: SGL661803

Before: Judge Martin Dray

Sitting at: 10 Alfred Place, London

On: 29 July 2014

Applicant Representation: Greville Healey, Counsel, instructed by DKLM LLP.

Respondent Representation: David Taylor, Counsel, instructed by JR Jones LLP, for the First, Second, Fourth, Fifth and Sixth Respondents.

DECISION

KEYWORDS:

Contract – sub-contract – head contract not protected by notice on register – sub-contract the subject of a notice against the freehold title – disposition of registered freehold title – whether notice in respect of sub-contract to be cancelled.

Sub-contract – whether giving rise to an interest affecting registered freehold title – whether any interest defeated by want of protection of head contract.

Cases referred to

Bank of Scotland v Joseph [2014] 1 P&CR 18
Barrett v Hilton Developments Ltd [1975] 1 Ch 237, CA
Berkley v Poulett [1977] 1 EGLR 86, CA
Chattey v Farndale (1996) 75 P&CR 298, CA
Coles v Samuel Smith Old Brewery (Tadcaster) Ltd [2008] 2 EGLR 159, CA
Fenwick v Bulman (1869) LR 9 Eq 165
Greaves Organisation Ltd v Stanhope Gate Property Co Ltd (1973) 228 EG 725
Hasham v Zenab [1960] AC 316, PC

Introduction

1. The Applicant seeks the cancellation of unilateral notices entered by the Respondents against the freehold title to the subject property which the Applicant has since purchased.

2. At the hearing the Applicant was represented by Mr Healey. Mr Taylor appeared for the Respondents except the Third Respondents, Mr & Mrs Caldwell, who (with the Tribunal's permission) had previously withdrawn their objection to the Applicant's application. There is a claim by the Applicant against the Third Respondents for costs. This has yet to be determined. It was not considered at the hearing; it was agreed that it should be dealt with after the determination of the substantive issues in the case generally. I have therefore yet to receive submissions on costs. I will deal with questions of costs in due course.

3. With one possible exception (concerning an outstanding issue to which I allude below), it emerged at the hearing that the facts are not in dispute. Consequently, no oral evidence was called; no witnesses testified. Further, I was referred to very little in the way of the documentation in the hearing bundle. Instead, I heard detailed and interesting legal submissions on the points in issue, bolstered by citation of several authorities. I am grateful to both Counsel for their skilful, stimulating and helpful argument.

The facts

4. The agreed facts are in a narrow compass. They are as follows:
   (1) In August 2007 a developer, St James's Croydon LLP ("SJC"), was registered as the owner of freehold land in Croydon registered under title no. SGL661803, having purchased it for £12m.
   (2) SJC proposed to build an apartment block on the land and to grant long leases of the apartments when built.
   (3) In or around October 2007 SJC entered contracts with purchasers of the intended apartments. Each apartment was the subject of a separate contract. The contracts – agreements for lease – were in a common form.
   (4) The sales were off-plan. Pursuant to the contract SJC agreed to build the apartment. Completion of the contract, and the grant of the lease, would occur following practical completion of the build. A 5% deposit was payable by the purchaser on entering the contract.
   (5) Clause 14.2 stipulated that the Contracts (Rights of Third Parties) Act 1999 did not give any benefits to anyone who was not named in the contract. Clause 17 provided that SJC would allow the benefit of the contact to be the subject of an assignment or sub sale subject to certain specified conditions.
   (6) One purchaser was Demetrius Services Ltd ("Demetrius"). Although there was initially some dispute on this, it is now common ground that it entered into 6 contracts with SJC in respect of apartments 3, 23, 37, 177, 179 & 181, and that it paid the requisite deposits.
   (7) Demetrius could have, but did not, cause a notice to be entered against the registered title of SJC in respect of its contracts.
   (8) Demetrius proceeded to sub-sell the various apartments, one by one, to the respective Respondents. The sub-sales occurred between November 2007 and March 2008.

(9) The sub-contracts were in a common form. In each instance they were made, as one would expect, between Demetrius and the relevant Respondent. SJC was not a party to the sub-contracts, although it was defined therein as the "Homebuilder".

(10) So far as is material, the provisions of the sub-contract substantially mirrored those of the head contract, except that (understandably) Demetrius undertook not itself to build but rather to procure that SJC build the apartment. As regards price, Demetrius was to make a profit on the sub-sales, for in each instance the Respondents (sub-purchasers) agreed to pay more for the apartment in question than Demetrius had agreed to pay SJC. Also, under the sub-contracts a 10% deposit was payable and was duly paid. Therefore, the deposits paid by the Respondents and received by Demetrius exceeded the deposits it had paid to SJC.

(11) Between January 2008 and (somewhat belatedly) October 2010 – but in each case at a time when the freehold remained vested in SJC – the Respondents applied to HMLR for the entry of unilateral notices against SJC's title. Such notices were duly entered.

(12) I have seen a copy of the form UN1 pursuant to which each of the applications was made. The applicant was the relevant Respondent (panel 6). Panel 12, the opening text of which reads, "I certify that the applicant is interested in the property .... as:", was completed with details of the sub-contract. No reference was made to the head contract. A copy of the sub-contract was lodged with the form (panel 5). No copy of the head contract accompanied it.

(13) The omission of any reference in the UN1 to SJC, the then registered proprietor of the freehold, prompted HMLR to raise a requisition as follows: "*The registered proprietor ... is SJC whereas the contract has been signed on behalf of the seller who has no registered interest in the property. Please account for this discrepancy.*" The response from the Respondents' solicitors (each used a firm called Heer Manak) included the following:

> "We enclose a letter from the solicitors for the seller, wherein they confirm that they have already exchanged contracts with the developer [sc: SJC] for the purchase of this property. We believe in these circumstances we have the right to register our restriction against the title."

(14) This persuaded HMLR to accede to the applications and enter unilateral notices against the freehold title. In each instance the relevant entry reads:

"UNILATERAL NOTICE affecting Apartment ... in respect of a Contract for sale dated [date of the relevant sub-contract] made between (1) St James's Croydon LLP (2) Demetrius Services Limited and [the relevant Respondent].

BENEFICIARY: [the relevant Respondent]."

(15) This description, seemingly the work of HMLR, is strictly inaccurate since, as outlined above, there was no tripartite contract.

(16) SJC did not honour its contractual obligations. It did not build the apartments. It ran into financial difficulties and was placed in administration.

(17) In November 2011 the Applicant acquired the freehold of the land (plus other property) from SJC (acting by its administrators) for £10m. It was registered as the proprietor in place of SJC.

(18) At the time of the Applicant's purchase and registration the unilateral notices entered at the behest of the Respondents remained on the title.

(19) In July 2012 the Applicant applied to HMLR for cancellation of the notices. The Respondents objected to this. That lead to the dispute being referred to the Adjudicator, now the Tribunal.

The dispute – an overview

5. The issue is whether in the circumstances described above the Respondents are entitled to maintain their unilateral notices against the Applicant.

6. I start with some uncontroversial matters. It is accepted that a chain of interests was created: SJC to Demetrius; Demetrius to the Respondents. It is common ground that there was no direct contractual relationship between SJC and the Respondents. There is also no disagreement that pursuant to each head contract Demetrius acquired as against SJC an immediate equitable interest in the relevant apartment.

7. However, the parties disagree as to:
   (1) Whether the Respondents' interest was ever one which was binding against and affected the title to SJC's estate (as opposed to binding Demetrius only): the Applicant says no; the Respondents say yes.
   (2) The consequences for the Respondents vis-à-vis the Applicant given the failure by Demetrius to enter a notice in respect of the head contract and the Applicant's acquisition of the freehold for valuable consideration: the Applicant says that even

if the Respondents previously had an interest enforceable against the freehold in the hands of SJC, that was lost when the Applicant was registered as the new proprietor; the Respondent disputes this. In a nutshell, the Applicant says that it took free from any rights of both Demetrius and also the Respondents, despite the presence of the notices on the title.

8. These are the central issues which I must address.

Issue 1: Did the Respondents ever acquire an interest binding on SJC's title?

9. If this question is answered in the negative, it will follow that the unilateral notices should never have been registered and must therefore be cancelled.

10. In this regard it is rightly accepted by Mr Taylor that by reason of section 32(3) of the Land Registration Act 2002 ("the 2002 Act") the mere entry of a notice does not render the interest which is the subject of the notice valid. The notice serves only to protect the priority of the interest, if valid. If the interest is invalid, its status is not elevated or improved simply because it is (wrongly) the subject of a notice.

11. Further, by s.32(1) of the 2002 Act a notice is an entry in the register in respect of the burden of an interest affecting a registered estate. S.132(3)(b) provides that references to an estate affecting an estate are to an adverse right affecting the title to the estate. By s.132(1) "registered estate" means a legal estate the title to which is entered in the register. Consequently, the issue is whether, by reason of their sub-contracts, the Respondents obtained rights adversely affecting SJC's registered title, i.e. rights which were (at least initially) properly capable of being the subject of a notice against that title. If they did not, their case must fail.

12. In summary, the Respondent maintains that, despite the absence of any direct contractual relationship with the head vendor, a contracting sub-purchaser nonetheless acquires an equitable interest which direct affects the estate and title of the head vendor. By contrast, the Applicant's case is that this is not so and that, although a sub-purchaser obtains, courtesy of his status, an equitable entitlement of some kind (a package of certain equitable rights), he never receives an equitable interest binding on and adversely affecting the head vendor's title.

13. It is thus necessary to examine the legal nature of the rights of a contracting sub-purchaser and, in particular, to determine whether a sub-contract gives rise to an equitable interest in the property in question vis-à-vis the head vendor. This is an issue which, it seems, is the subject of scant treatment in the textbooks.

14. I was referred to a handful of cases. None of them is straightforward. As will become apparent, each is factually quite distinct from the present case. Nonetheless, they help to shed some light on the matter. The parties' respective counsel analysed them differently. I set out my thoughts below.

15. *Fenwick v Bulman* (1869) LR 9 Eq 165 is a decision of the Vice-Chancellor, Sir John Stuart. Simplified, the facts were as follows. Bulman contracted to sell an estate to Wilson in 1863 for £1,200. In 1866 Wilson sub-contracted to sell part (2 acres) of that estate to Fenwick for £600. Wilson became bankrupt in June 1868 and Stephenson was appointed his trustee in bankruptcy. In November 1868 Bulman had sued (amongst others) Stephenson and Fenwick for specific performance of the 1863 agreement. It is not clear from the report what had become of that claim.

16. In May 1869, seeking to cut out the middle man (Wilson/Stephenson), Fenwick had tendered to Bulman the purchase price for his 2 acres. Bulman had declined to accept it and to proceed with a conveyance of the 2 acres direct to Fenwick because Wilson's head contract in relation to the whole estate had not been performed and so Bulman had not been paid the full price. This led to Fenwick suing Bulman, Wilson and Stephenson.

17. The claim before the Vice-Chancellor was that brought by Fenwick in October 1869. Fenwick sought specific performance of (i) 1866 sub-contract and (ii) so much of the 1863 head contract as related to the 2 acres. He asked that Bulman be ordered to deliver a conveyance of the 2 acres to him. Bulman challenged the claim, maintaining that it was ill-founded because, so it was, Bulman was not a proper party to the claim. The argument was that there was no privity of contract of between Fenwick and Bulman. Fenwick was seeking to enforce a contract to which it was a stranger. Fenwick was limited, said Bulman, to claiming against Wilson/Stephenson; Fenwick could not claim against Bulman direct.

18. The Vice-Chancellor rejected the objection. There is no doubt that his decision rested at least in part on the fact that, having previously sued Fenwick, Bulman could not complain about the tables being turned; Bulman was hoist by his own petard. However, as I read the judgment, he also firmly considered that Fenwick's case was good in law quite irrespective of the earlier twist in proceedings. In other words, there were dual bases for the decision. It is the second of these which is of interest in the present context.

19. Having expressly acknowledged that Fenwick, as sub-purchaser, was suing Bulman "with whom he [had] no contract at all" (p.167), Sir John Stuart continued @ p.168:

> ".... looking at ... the facts in this [case], *can it be successfully contended that [Fenwick] is not entitled to a right arising out of the original contract [sc: the head contract]? I think not, for if that contract be not performed, he can have no performance of his contact with the original purchaser* [i.e. the sub-contract]."

20. Sir John Stuart followed that with:

> "... if I entertained any doubt in this case, it would be dispelled by the decision of Lord Hardwicke in *Dyer v Pulteney, in which the obvious equity of a sub-purchaser is clearly recognised. ...*"

21. I was not referred to *Dyer v Pulteney* itself, and both counsel disclaimed any desire to rely thereon. So I say nothing about that case.

22. I draw from *Fenwick v Bulman* the following:
    (1) A sub-purchaser has rights arising out of the head contract, and can seek specific performance of head contract against the head vendor.
    (2) That entitlement is regarded as an "obvious equity" and reflects the sub-purchaser's interest in seeing the head contract (and thus in turn the sub-contract) performed.

23. I thus accept Mr Taylor's contention that the case supports the notion that in an appropriate case a sub-purchaser can obtain a direct remedy against the head vendor. However, I acknowledge that it was not distinctly stated by the Vice-Chancellor whether such entitlement to relief is an interest in land as such binding on the head vendor.

24. I next turn to *Berkley v Poulett* [1977] 1 EGLR 86, CA. This is a difficult case which I had drawn to the parties' attention before the hearing and on which I received submissions from both Counsel.

25. In very condensed form, the facts of *Berkley v Poulett* were as follows. Earl Poulett was the owner of the Hinton Estate. He contracted to sell it to Effold Ltd. Effold in turn sub-contracted to sell Hinton House to Mr Berkley. Between contract and completion various contents of Hinton House (paintings, a statue and a sundial) were removed on the instructions of the Earl and some Chinese prints were damaged. Mr Berkley complained about this. Despite that, Effold complained its purchase of the estate and in due course Mr Berkley completed his acquisition of the house.

26. Mr Berkley then sued the Earl (and others) for delivery up of the items, the property in which he said had passed to him on the sale as fixtures (as opposed to chattels). He did not sue Effold. Effold was not a party to the litigation. What is more, having completed its purchase from the Earl without complaint, Effold could not sue or maintain any claim against the Earl: per Goff LJ @ 91B & Stamp LJ @ 93E-F.

27. The claim was defended by the Earl. It was tried by Sir Anthony Plowman V-C. He dismissed the claim. Mr Berkley appealed to the Court of Appeal. By a majority the Court of Appeal (Scarman and Stamp LJJ, Goff LJ dissenting) dismissed the appeal. However, as I explain below, the basis of the decision of the majority rested, at least in large measure, on the ground (not relevant to this case) that the contents were chattels, not fixtures. Moreover, the issue of the rights (if any) of Mr Berkeley as sub-purchaser against the Earl (the head vendor) was one of some controversy.

28. Scarman LJ gave the first judgment. He said that if the items were fixtures, "very difficult questions arise as to the entitlement of the plaintiff to sue the head vendor": p.88A. Conversely, if none was a fixture, the claim failed *in limine*: pp.88B & 89J. He then determined that all the items (other than the Chinese prints) were chattels: p.88B. As for the prints, there was no evidence that the Earl was responsible for the damage and so on no basis could liability be established in that regard: p.89H-K. Given his conclusions on the "preliminary, but fundamental" (p.88B) fixture/chattel issue, Scarman LJ did not

need to express any view as to whether a sub-purchaser can sue a head vendor and he deliberately refrained from so doing @ p.89J. His judgment is thus not in point here.

29. Goff LJ would have allowed the appeal (except in relation to the Chinese prints on which the evidence failed to establish the Earl's liability: p.90A). He explained that, although the claim had been pleaded as based on breach of trust etc., at the hearing counsel for Mr Berkley (Mr Millett QC, later Lord Millett) had proceeded on the basis of a right to specific performance of the head contract. It was this with which he dealt: pp.89L-90A.

30. Goff LJ first considered the fixture/chattel issue. Contrary to Scarman and Stamp LJJ, he ruled that the disputed items were fixtures: p.90. This meant that it was necessary for him to go on to consider whether Mr Berkley as sub-purchaser was entitled to relief against the Earl as head vendor: p.90L. I cite a lengthy passage (pp.90L to 92G) from his judgment on the point:

> "… I turn to consider whether the plaintiff as sub-purchaser is entitled to relief against the first defendant as head vendor. *It is clear that after Effold paid the contract price and took a conveyance without the disputed items, without compensation, and without reserving any rights in respect thereof, it could have no claim against the first defendant. It is said that the plaintiff is a stranger to the head contract and so cannot in any event claim under it, and even if he could have done so at one time he cannot now, as he cannot be in any better position than the original purchaser, Effold.* I think it is also suggested that in any case he cannot now pursue any remedy against the first defendant, since he has completed the sub-contract. *I cannot accept these arguments, and I regret to say that I find myself in disagreement with my brother Stamp LJ as to the law on this question. I agree that the sub-contract did not make the first defendant a trustee of the land or fixtures for the plaintiff, but with all respect in my view Effold became a trustee, in the sense that a vendor is a trustee, of the benefit of the head contract, which entitled the plaintiff to specific performance of the head contract subject to notice of the sub-contract having been given to the first defendant*, which it clearly was. In the present case he had express notice of the sub-contract and of the plaintiff's claim to the disputed items. This being so, *although the subsale was not an assignment of the head contract, the plaintiff acquired an equitable interest in it, which the first defendant was bound to recognise and protect*, and he and Effold could not, with notice of the plaintiff's claim, agree to rescind the head contract and make new terms, or vary the terms, to the prejudice of the plaintiff, leaving him with no more than a remedy against his own vendor, Effold. In my judgment, therefore, *notwithstanding the first defendant and Effold purported to complete the head contract, and Effold could not thereafter maintain any claim against the first defendant, nevertheless, as they excluded part of the property agreed to be sold, the plaintiff remained entitled to sue the first defendant for specific performance …*
>
> In my judgment this is well supported by authority, which begins with the very ancient case of *Dyer v Pultenay* (1740) Barn Ch 160 at p 169. With respect I cannot limit that case, as I think Stamp LJ does, to a special case of getting in an outstanding legal estate. A large part of the purchase money under the head contract in that case had not been paid. What the sub-purchaser sought, but could not get, was to stand in the purchaser's shoes to compel the vendor to perform not the original contract but his own contract, but it was made quite clear that the sub-purchaser, had he been willing to complete the original contract, could have had a specific performance of it. But if the matter would remain doubtful on that authority it becomes clear in the later case *of Fenwick v Bulman* (1869) LR 9 Eq 165. True, in that case

the vendors had sued not only their own purchaser but the sub-purchaser in an action for specific performance, and this was held against them when they resisted his suit, but the rights of the sub-purchaser were laid down in perfectly general terms. Sir John Stuart VC said at p 168: "…can it be successfully contended that the plaintiff is not entitled to a right arising out of the original contract? I think not, for if that contract be not performed, he can have no performance of his contract with the original purchaser," and again: "However, if I entertained any doubt in this case, it would be dispelled by the decision of Lord Hardwicke in *Dyer v Pultenay*, in which the obvious equity of a subpurchaser is clearly recognised." Next in my respectful view, the speeches in the case of *Shaw v Foster* (1872) LR 5 HL 321, to which Stamp LJ has drawn attention, support my view of the legal position and not his. … *In the present case, however, there was an actual binding contract of subsale which was an assignment in equity of the benefit of the head contract, or at least gave the subpurchaser an equity in it, and the first defendant was given express notice of the equity and that the plaintiff claimed the disputed items.* The first defendant did not perform the head contract, but broke it by retaining the fixtures. The speeches, however, in my view clearly recognised *the right of a subpurchaser to sue the head vendor for specific performance* where proper notice of the subcontract has been given. ….

It is true that the instant case is a subsale and thus different from the examples given by Lord Cairns, but the authorities already cited show that *the subpurchaser has an equity*, which is in my judgment equivalent to the position in those examples.

Finally, there is the case of *Harmer v Armstrong* [1934] Ch 65. There the purchaser entered into the contract as a trustee, and then, claiming that he had been acting on his own behalf, purported to agree with the vendor to rescind the contract, and the beneficiaries successfully sued for specific performance. There the purchaser offered, if he were held to be a trustee, to perform the contract, but that was too late, unless the beneficiaries had an independent right which they could enforce against the vendor. This case in my judgment is a complete answer to the proposition that because the purchaser had lost its right to sue in respect of the disputed items the subpurchaser's right was also defeated. *I agree that a subpurchaser can only have a specific performance on the terms that he performs the purchaser's part of the head contract, so far as it remains to be performed. Here, however, Effold paid the price, and so the only question in this respect arises with regard to the inventory and valuation, and it is true that it never offered to pay. In my judgment, however, that does not prevent him from obtaining specific performance now on submitting to be charged with the value of the disputed items. If the first defendant had required payment and the plaintiff had refused, that no doubt would have prevented him obtaining specific performance, at all events once the first defendant had accepted it as a repudiation, but the first defendant refused to allow the plaintiff to have the disputed items on any terms, nor did the first defendant himself take any steps towards having the requisite valuation.*

…

Where a subpurchaser seeks to enforce this equity he should make the original purchaser a defendant, or obtain leave from the court to sue in his name, and neither course was pursued in this case; but instead, a few months after the conveyance from Effold, the plaintiff took an assignment containing the following provisions: recital (6):

…

I am not sure that that was the correct way to deal with the matter, but as I understood it no objection was raised on the score of parties if as a matter of equity the plaintiff could in any form enforce the head contract.

The plaintiff is in my judgment, therefore, entitled to an order for delivery up of the unsold portrait formerly in the Dining Room, and to an order for payment of the value of the remaining disputed items, except the sundial, and as *this is by way of specific performance* …"

31. I distil the following from the judgment of Goff LJ:

    (1) Despite being a stranger to the head contract, a sub-purchaser can seek specific performance of the head contract, provided notice of the sub-contract is given to the head vendor.

    (2) This entitlement exists even though the head purchaser may be unable to bring any such claim.

    (3) The sub-purchaser can only obtain specific performance of the head contract if he agrees to perform the outstanding obligations shouldered by the purchaser under that contract.

    (4) The sub-purchaser is regarded as acquiring "an equitable interest" and an "equity" in the head contract, which the head vendor is bound to recognise.

32. As foreshadowed by Goff LJ, Stamp LJ took a somewhat different view. At the very beginning of his judgment, Stamp LJ said that he agreed (with Scarman LJ) that the items in dispute were not part and parcel of Hinton House (i.e. fixtures) and that the claim accordingly failed on that score (p.92M) However, because the case as to the plaintiff's entitlement to relief in principle had been fully argued, he went on to deal with that.

33. In that context Stamp LJ started by focussing on and examining the plaintiff's pleaded contention that the Earl had a duty "as trustee for Effold" (p.93H). He rejected that notion: pp.93H to 94D. After that, Stamp LJ dealt (@ p.94D-H) with the claimed entitlement to specific performance, which matter Goff LJ had determined in Mr Berkley's favour, in the following terms:

> "*It was submitted, relying on the authority of the judgment of Lord Hardwicke in Dyer v Pultenay (1740) Barn Ch 160 and Fenwick v Bulman (1869) LR 9 Eq 165, that a subpurchaser willing to perform the head contract is entitled as against the vendor to specific performance of that contract. And, so the argument runs, the subpurchaser being entitled to specific performance of the head contract is in the same position vis-a-vis the head vendor as is the purchaser, and is as regards the land which he has agreed to purchase entitled, pending completion of that contract, to the same rights as the purchaser himself. This submission is not in my judgment well founded.* A purchaser of land is against the vendor entitled on completion to the execution by all necessary parties of a conveyance vesting the legal estate in him. Thus if there is an outstanding legal estate not vested in the vendor he is bound to get it in. *So as between purchaser and subpurchaser the subpurchaser is entitled to require the purchaser, if he can, to get in the legal estate from the head vendor. If the purchaser will not or cannot do so, Dyer v Pultenay is authority for the proposition that the subpurchaser by joining his vendor and the head vendor as defendants to an action brought for the purpose may, standing in the shoes of his vendor, obtain an order for the conveyance of the land.* But the head vendor cannot be required by the purchaser to convey any part of the land comprised in the head contract except upon performance by the purchaser of all the terms of the head contract, and the subpurchaser standing in the shoes of the purchaser can

be in no better position. Thus *the specific performance which the subpurchaser obtains is specific performance of the head contract and in my judgment, far from establishing the right of a subpurchaser to specific performance of the subcontract against the head vendor, establishes the absence of such a right.* Nor is it because the head vendor is a trustee for him that he can obtain the land which he has contracted to purchase but because of *his right to insist that his vendor gets in the legal estate* and, if he will not do so, to stand in his shoes to seek performance of the head contract. *In the instant case the plaintiff never offered to perform the estate contract* [sc: the head contract – see p.93A]. …"

34. Stamp LJ dismissed the claim because in his judgment the Earl had never become a trustee for Mr Berkley and had not entered into any contract with him and had not assigned the items to him: p.94K-L. The final part of his judgment (p.94L onwards) explains why he agreed with Scarman LJ that the items were chattels in any event.

35. As I read Stamp LJ's judgment:
    (1) He accepts that a sub-purchaser is entitled to stand in the shoes of his vendor (the purchaser) and to seek against the head vendor specific performance of the head contract (joining both head vendor and purchaser to the claim).
    (2) Like Goff LJ, he states that the head contract cannot be specifically performed otherwise than in accordance with its own terms (not those of the sub-contract).
    (3) He rejects the proposition that the sub-purchaser can obtain specific performance of the sub-contract against the head vendor.
    (4) He seems to have rejected Mr Berkley's claim on that basis (p.94H) that "*in the instant case the plaintiff never offered to perform the estate contact*" [sc: the head contract], and because (unlike Goff LJ) he was of the opinion that, although (in determining whether the Earl had a duty to take care of the items) he had had to consider whether there was a right to some form of specific performance, the action was not one "*for specific performance*" (p.96D-E) – an observation which effectively endorsed a pleading point.

36. In my judgment, the contrasting views of Goff & Stamp LJJ are not so far apart as their language might lead one to think at first blush:
    (1) They agreed that, because a sub-purchaser is not an actual assignee of the head contract, the head vendor owes him no fiduciary duties; there is no trust relationship between those persons.
    (2) But, more significantly for present purposes, there was, I believe, a consensus that, despite there being no privity between the parties, a sub-purchaser can in principle

claim specific performance of the head contract against the head vendor, although, to succeed, he will need to be prepared to honour all the terms of the head contract (not the sub-contract). To this extent, an implicit disapproval of seems to have been made (or limitation put) on *Fenwick v Bulman* (in which the claim had been for specific performance of part only of the head contract).

37. Further, to my mind, some of the apparent differences are more illusory than real and, what is more, are not germane to the present case:
    (1) Stamp LJ said that specific performance of the sub-contract against the head vendor was not possible. However, I do not read Goff LJ as having said that it was. Goff LJ was dealing with Mr Millett's contention that there should be specific performance of the *head* contract. As noted above, it seems to me that both Lords Justices were agreed on that in principle. In any event, whether or not specific performance of the sub-contract (cf the head contract) is possible is immaterial in this case if it is the case that the sub-purchaser's rights to enforce the head contract are founded in/constitute an equitable interest.
    (2) Aside from the fundamental issue of fixture/chattel (which alone would have determined the outcome of the case), it appears that the main split in judicial opinion/outcome was because Stamp LJ did not treat the claim as one for specific performance as such and, furthermore, regarded as fatal the fact that Mr Berkley had never offered to perform the head contract, whereas Goff LJ took the claim as being for specific performance and was not troubled by the plaintiff's failure to have offered to perform the head contract, provided he was willing to do as a condition of specific performance.

38. Mr Healey submitted that the case merely establishes that a sub-purchaser is able to obtain something indirectly, to make another do something, and to see that the next person up the chain (the purchaser) performs its obligations. The decision certainly shows that this is achievable but, in my judgment, it is not so limited. In my view, it goes further; it show the nature of a sub-purchaser's status. It demonstrates that by virtue of his sub-contract a sub-purchaser is regarded as acquiring "*an equitable interest*" in the head contract, which the head vendor is bound to recognise. Certainly, this was the view of Goff LJ and, despite the differences between them, I do not read Stamp LJ as disputing

that that is the origin of the sub-purchaser's undoubted entitlement to seek specific performance of the head contract.

39. I take *Chattey v Farndale* (1996) 75 P&CR 298, CA next. That case did not concern a sub-purchaser. A developer was constructing a block of flats. The plaintiffs contracted with the developer to purchase leases of the to-be-built flats and they paid deposits. The contracts were conditional on planning consent being obtained. The developer vendor became insolvent. Its interest was sold. It ended up held by Farndale. The issue was whether the plaintiffs could assert a purchaser's lien against the property in the hands of Farndale. Farndale denied this, maintaining that because the contracts were initially conditional and could not specifically be enforced at the outset, no lien had arisen until the contracts had become unconditional (which, on the facts, meant that any lien would have been subject to a debenture).

40. The Court of Appeal disagreed with Farndale. Morritt LJ gave the judgment of the Court. He said @ p.306:

> "The statement of Sir George Jessel [in *London and South Western Railway Co v Gomm* (1882) 20 ChD 562 @ 581] shows that *the purchaser has an equitable interest or estate in the land if he has a right to call for the legal estate, albeit future or conditional, which the vendor has no right to refuse.* In this case the vendor was contractually bound to use his best endeavours to obtain a satisfactory planning consent on the grant of which the contract became unconditional. *The equitable interest or estate of the purchaser was one which entitled him to seek specific relief in the form of injunctions so as to protect that right notwithstanding that a claim for specific performance might have been premature.*"

41. In his judgment, the purchaser's beneficial or equitable ownership arising in consequence of a contract to purchase was sufficient for the creation of a purchaser's lien, whether or not the contract was or had been specifically enforceable: pp.307/8.

42. *Chattey v Farndale* thus confirms the well-established proposition that if a purchaser is *potentially* entitled to specific performance, he obtains an <u>immediate</u> equitable interest in the property contracted to be sold: see Megarry & Wade, The Law of Real Property, 8th ed., para.15-052. He becomes the owner in the eyes of equity from the date of the contract: *ibid.* There was no dispute about this – and Mr Healey also mentioned *Hasham v Zenab* [1960] AC 316, PC as being in like vein. Although I was not referred to the report, having consulted it, I note that @ p.329 Lord Tucker said:

> "Their Lordships are of opinion that the fallacy of the submission consists in equating the right to sue for specific performance with a cause of action at law. *In equity all that is required is to show circumstances which will justify the intervention by a court of equity. The purchaser has an equitable interest in the land and could get an injunction to prevent the vendor disposing of the property*."

43. *Chattey v Farndale* shows also, to my mind, that it is the equitable interest so created and vested in the purchaser which founds the purchaser's entitlement in equity to claim appropriate equitable relief, whether that be specific performance (see e.g. *Fenwick v Bulman* and Goff LJ in *Berkley v Poulett*) or some other remedy. The same can be said of *Hasham v Zenab*. In my judgment, the equitable interest is the root of the entitlement to seek equitable relief.

44. Although *Chattey v Farndale* was not itself a sub-purchaser case, nonetheless in my judgment, it provides a suitable platform for analysing the status of a sub-purchaser. I consider that for present purposes there is no material difference between the position of a purchaser and that of a sub-purchaser. The purchaser obtains from the vendor an equitable interest in the land by dint of the head contract. In turn, the sub-purchaser obtains from the purchaser an equitable interest in the land courtesy of the sub-contract. I do not believe that there is any reason in principle why the sub-purchaser's equitable interest (and the rights attaching thereto, such as the entitlement to seek the intervention of equity, e.g. to enforce the head contract) is not binding on and enforceable against the head vendor (subject always to due protection/notice, if/as necessary). This is not to ignore to absence of contractual privity between the head vendor and sub-purchaser; it merely recognises the incidents of the proprietary interest which is conferred on the sub-purchaser by the chain of contracts in the land.

45. *Barrett v Hilton Developments Ltd* [1975] 1 Ch 237, CA concerned unregistered land. In April 1972 Richard Costain Homes Ltd contracted to sell land to the plaintiff. The following day the plaintiff contracted to sub-sell the land, at a profit, to the defendant. The defendant caused a class C(iv) land charge to be entered in respect of the sub-contract. However, the registration was effected in the name of the plaintiff, not Richard Costain Homes Ltd. The plaintiff later completed its purchase from Richard Costain and, notwithstanding the sub-contract (which it maintained had been repudiated), proceeded to convey the land to a third party. The plaintiff sought vacation of the land charge.

46. The Court of Appeal held that the s.3(1) of Land Charges Act 1972 required a land charge to be registered against the "estate owner", i.e. the owner of a legal estate (see s.205(1)(v) of the Law of Property Act 1925). S.3 of the 1972 Act provides: "A land charge shall be registered in the name of the estate owner whose estate is intended to be affected."

47. I pause to observe that the wording of the 1972 Act has at least some similarity (albeit no strict equivalent) to that in s.32(1) of the 2002 Act: "the burden of an interest affecting a registered estate …". In both contexts: (i) one is essentially concerned with "burden" (although the 1972 Act uses the language of "charge on or obligation affecting land": s.2(1)); (ii) the focus is on an "estate" which is "affected" by the interest concerned (see also s.32(2)) and which the adverse right can be said to be "affecting".

48. Returning to *Barrett v Hilton*, in the circumstances, because the plaintiff had not owned the legal estate in the land (cf an equitable interest which entitled it to have the legal estate conveyed to it) at the date when the land charge had been registered, the registration was a nullity. Hence the plaintiff's claim succeeded.

49. Being a ruling on the provisions of the 1972 Act, the decision must inevitably be approached with some care. I recognise that it is dangerous to place too much weight on a decision on a different statute. However, the following *obiter dictum* of Russell LJ is, I consider, apposite:

> "A final point, which does not strictly arise. If the defendants had known the facts [sc: of the identity of the head vendor], I consider that they would have been entitled to register their contract as an estate contract against Richard Costain Homes Ltd, the estate owner."

50. To my mind, this reflects a belief that the defendant's sub-contract was properly regarded as something affecting the estate of the head vendor. In this respect, therefore, it is in line with the analysis set out above. Even though not determinative of matters, it is nevertheless a useful pointer in the same direction.

51. Finally, there is *Greaves Organisation Ltd v Stanhope Gate Property Co Ltd* (1973) 228 EG 725. Again, the facts were somewhat involved. The following summary should suffice. Stanhope granted a lease to Falcon Pipes Ltd. The lease was within Part 2 of the Landlord and Tenant Act 1954. Falcon applied to the Court for a renewal tenancy. An

order for a new tenancy was made. In turn, Falcon entered into an agreement for a sub-tenancy in favour of Greaves. Stanhope failed to grant the new headlease. Falcon went to court and obtained an order requiring Stanhope to execute the same. Following that Stanhope and Falcon did a deal whereby Falcon agreed to vacate the premises in return for some money. In essence, therefore, the head tenancy was surrendered. (On this point Foster J said that, whether the agreement was a surrender or an agreement not to act on the court order, its effect was to merge Falcon's interest in the superior interest of Stanhope such that the former ceased to exist.) That left Greaves *in situ*.

52. Issues which arose included: (a) whether the Falcon/Greaves agreement was binding (an enforceable contract); (b) if so, whether Greaves could obtain specific performance thereof against Stanhope. Incidentally, as a fallback Greaves had its own 1954 Act tenancy, albeit that the renewal thereof was opposed by Stanhope. Foster J answered both issues in the affirmative. He remarked that Falcon had an equitable interest (courtesy of the court order for a new tenancy) and could grant Greaves an underlease carved out of that equitable interest. Again, therefore, this supports my belief that a sub-purchaser can – through the chain – acquire a derivative equitable interest in the subject property.

53. As for enforcement against Stanhope, Foster J is reported as having said:

> "... Were Stanhope bound by the agreement between Falcon and Greaves, to which of course they were not parties? This question did not depend on notice, nor did he (his Lordship) think it depended on registration or non-registration, for Greaves were in possession of the first floor ... and their interest was thus an overriding interest within section 70(1)(g) of the Land Registration Act 1925. *In his judgment, Greaves's interest was binding on Stanhope.* It was true that Stanhope were not contractually bound in any way to Greaves, and that normally specific performance could be granted only at the request of one of the parties to a contract against the other. But where one of the contracting parties had transferred his interest to another there were a number of exceptions to the general rule, and in the presence case Greaves's overriding interest entitled them, in his (Foster J's) judgment, to an order for specific performance against Stanhope ..."

54. In my judgment, one may draw from this decision:
    (1) A person who obtains by way of sub-transaction an equitable interest can thereby acquire an interest which is (subject to protection by registration/as an overriding interest) potentially binding on the superior owner.
    (2) That interest may entitle to the person in whose favour the sub-transaction was made to claim specific performance against the superior owner.

(3) In an appropriate case, specific performance may even be obtained of the sub-contract itself (not the head-contract) – at least, where the chain of interests has been shortened such that the relationship of the superior owner and sub-purchaser has become a direct one in practical terms.

55. I regard the first two such propositions as in line with the other authorities listed above. So, broadly, the case supports the notion that a sub-purchaser can potentially enforce rights against a superior owner. That said, its bearing is limited because the immediate owner (Falcon) had dropped out of the picture at the relevant time (and it is to be noted that a surrender of a lease does not prejudice a prior sub-lease and that, although not cited in the report, by s.139 of the Law of Property Act 1925 the superior interest is deemed to be reversion in relation to the continuing sub-tenancy). In the circumstances, the case is not really on all fours with the present (where there is a chain) and, in my view, takes matters little farther. I derive only limited assistance from it.

56. I next test the conclusion which I have drawn from the case law against the limited material found in the textbooks etc. As will be seen, there is something of a dearth of discussion and a lack of in-depth analysis and reference to authority. Nonetheless, as will appear, the fact that there appears to be a general consensus on the point, in line with what I have extracted from the authorities, fortifies me in my conclusion.

57. The Law Society's Conveyancing Handbook, 20th ed., para.14.8 reads:

> "Protection of sub-sale contract.
>
> 14.8.1. The third party is in a more vulnerable position than a normal buyer since completion of his contract is dependent on the buyer's completion of his own contract with the seller. It may therefore be advisable for the third party to protect his contract by registration. ... *When the title is registered protection is by the entry of notice in the register of title.*"

58. Since a notice can only properly relate to and protect (in terms of priority) "an interest affecting a registered estate" (s.32(1)), a belief that a sub-contract gives rise to a property interest which affects the head vendor's title is necessarily implicit in the text. Alone of the various interests in the chain, it will be the head vendor's title which is a registered estate (because the head-purchaser's uncompleted contract cannot be substantively registered: like the sub-purchaser's interest, the head-purchaser's own equitable interest

cannot be more than the subject of a notice). If the position were otherwise, the sub-contract could not be validly noted against the superior title at all.

59. HMLR's own guidance, Practice Guide 19, similarly envisages the possibility of causing a notice to be entered against the head title in respect of a sub-contract. The relevant part of para.8.3 reads:

> "In the case of a sub-sale, you must also lodge certified copies of both contracts if an agreed notice is sought. If an unilateral notice is applied for you must provide details of both contracts, as above, and establish the link between the registered proprietor and the applicant."

60. Ruoff & Roper, Registered Conveyancing, para.42.016 speaks with like voice:

> "... as in the case of subsale, an application to enter a notice to protect the agreement may need to be accompanied by prima facie evidence showing the connection between the [applicant] and the registered proprietor."

61. This too indicates a belief that a notice can be used to protect a sub-contract.

62. Are these texts mistaken? Do they proceed on a false premise? I do not think so. In my view, they reflect the fact that, as explained above, a contracting sub-purchaser acquires by virtue of the sub-contract an equitable interest in the subject property, which interest is capable of binding the head vendor (and a facet of which is that the court's equitable jurisdiction may be invoked against the head vendor). That being so, the sub-purchaser's interest may validly and effectively be protected by notice under the 2002 Act.

63. In his skeleton argument Mr Healey contended that "the sub-purchaser's interest is parasitic upon the purchaser's interest and never directly binds the vendor". He added, "*it does not follow from this that the Respondents were not originally entitled to maintain their unilateral notice*, so long as any relevant [head] contracts remained binding and enforceable. However, it is another reason why, as soon as those [head] contracts fell away, so did the Respondents' entitlement to keep it unilateral notices" (paras.32/33). To my mind, this may fairly be read as suggesting that a sub-purchaser's interest is initially binding on the head vendor, else it is not immediately obvious on what basis it could maintain a notice against the head vendor's title in the first instance. I add that para.28 of the skeleton argument ("once they became unenforceable because all [the head] contracts

fell away, *those sub-interests ceased to be capable of being valid interests as against the Applicants*") points in the same direction, in my view.

64. At the hearing I pressed Mr Healey as to whether it was his case that a sub-purchaser cannot protect its interest by notice from the outset. Is it is devoid of any means to secure its position? Acknowledging the unanimity of view expressed in the publications, and unwilling to contend for an extreme (and, it might be thought, unattractive) position, his stance was:
    (1) The sub-purchaser never had an interest directly binding the head vendor;
    (2) But it did not follow that it was never entitled to the entry of a notice;
    (3) This was, he said, because the priority conferred by such a notice is *in relation to the interest of the (intermediate) purchaser*;
    (4) He explained this to mean that the sub-purchaser obtained protection as against a competing assignment or sub-sale of the property made by the purchaser (i.e. one conflicting with the sub-sale to the sub-purchaser).

65. In passing, it is right to say that in *Barrett v Hilton* Russell LJ stated (@ 244B) that, had a land charge been validly registered, a proposing purchaser from the plaintiff (the purchaser under the head contract) would have been fixed with notice of the defendant sub-purchaser's rights. Mr Healey submitted that this dictum suggests that the protection for a sub-purchaser from a notice is against the purchaser (his immediate vendor) and that protection is not given in respect of the "non-existent direct link" between head vendor and sub-purchaser. However, given the context of *Barrett v Hilton* (in which it was the purchaser, rather than the head vendor, who was seeking to deny the sub-purchaser), it is wholly understandable why Russell LJ spoke in the terms he did. Since he was not considering any issue of enforcement against the head vendor, it does not follow that Russell LJ was expressing any view or limitation in that regard. Indeed, Stamp LJ (@ 244D) indicated that the 1972 Act was designed to give notice to a purchaser of the legal estate (i.e. from the head vendor), and not against a dealing by a sub-purchaser's vendor in respect of the equitable interest which he had acquired under his contract with the head vendor. Although based on the 1972 Act, that certainly does not support the notion that the purpose and effect of registration is simply to protect the sub-purchaser vis-à-vis the purchaser; it runs counter thereto and positively supports the idea of the sub-purchaser's interest binding and being enforceable against the freehold owner.

66. I am unable to accept Mr Healey's submission. Based on the authorities, I reject the suggestion that a sub-purchaser never acquires an interest in the property which it can directly assert the head vendor. Admittedly, there is no direct contractual relationship between them, and if the head contract goes off all may potentially be lost for the sub-purchaser (a point to which I return below), but nevertheless I conclude that a sub-purchaser acquires at day 1 an equitable interest which adversely affects the head vendor's title and which in appropriate circumstances may enable the sub-purchaser to seek vis-à-vis the head vendor specific performance of the head contract or such other relief as is apposite, e.g. an injunction to restrain the head vendor from putting it out of its power to complete the head contract and thereby frustrate the sub-sale.

67. What is more, I regard Mr Healey's acceptance that (for whatever benefit) a notice can be validly entered against the head vendor's title by the sub-purchaser – an acceptance which, to my mind, is tantamount to a concession (correctly made, in my judgment) – as providing strong confirmation for my conclusion. In the light of s.32(1) of the 2002 Act, only an interest affecting a registered estate can be the subject of a notice. That rules out the entry of a notice in respect of mere contractual, non-proprietary, rights. But, as explained above, a sub-purchaser obtains an equitable interest. So it is not disqualified on that account. Further, given s.132(3)(b), an interest affecting a registered estate is an adverse right affecting the title to that estate. A registered head vendor has a registered estate, whereas a contracting purchaser does not. So if, as Mr Healey accepts, a notice can be entered by a sub-purchaser, it can surely only be because the sub-purchaser holds an interest which affects the title to the head vendor's estate.

68. Also, I add that it seems to me that the equitable entitlement to which a sub-contract gives rise in favour of a sub-purchaser constitutes at the very least a "mere equity" enforceable against the head vendor and that (in the context of registered land) such a right amounts to an interest in land (capable of binding third parties): s.116 of the 2002 Act.

69. In paragraph 45 of his skeleton argument, Mr Taylor expressed diffidence about the sub-purchasers' rights being specifically enforceable before the flats were built. In my judgment, this does not matter. I do not see that any inability to obtain specific performance at that time disqualifies the sub-purchasers from obtaining equitable rights

enforceable against the head vendor. As *Chattey v Farndale* shows, an equitable interest, with the associated entitlement to seek relief to protect that interest, arises on the making of the contract. The right to specific performance is but one incident of such an interest.

70. At this point I record that, as an alternative to the equitable right of a sub-purchaser to seek specific performance of the head contract as against the head vendor, Mr Taylor submitted that in this case the sub-purchasers could rely on the Contracts (Rights of Third Parties) Act 1999 to enforce the head contract. However, given the conclusion I have reached on the above, I do not find it necessary to express a view on this point (which was strongly contested by Mr Healey).

71. Mr Taylor also rested his case, heavily, on a purchaser's lien. Because of the Applicant's arguments on issue 2 (below), namely that any pre-existing interest of the sub-purchaser (and any associated right to seek specific performance etc.) lapsed when the head contract lost its priority as against the Applicant, it is appropriate that I deal with this contention.

72. A purchaser's lien is an unqualified equitable right affecting the vendor's title. Where a purchaser has paid to the vendor a deposit (or other money towards the purchase price) the lien – in respect of the money so paid – arises by operation of law from the parties' contract unless it is modified or excluded by express agreement or by necessary implication from the parties' contractual arrangements: *Chattey v Farndale* @ pp.309/310. It subsists even if the contract goes off, so long as that is not due to any misconduct or default on the part of the purchaser: see e.g. *Rose v Watson* (1864) 10 HLC 671 @ p.678, cited in *Chattey v Farndale* @ p.303.

73. There is, I believe, no dispute that a purchaser's lien arose in favour of Demetrius when it paid the deposits under the head contracts – and I determine that such a lien did indeed arise. That lien bound SJC. Subject to registration, being a proprietary right, it could in principle bind the freehold in the hands the Applicant, notwithstanding that the Applicant was not itself the recipient of the money paid to SJC.

74. I add that no point was taken on the geographical extent of the lien and no issue was raised before me as to how effect may be given to a lien in cases where the relevant

building or flat does not yet exist (issues touched on in *Chattey v Farndale* @ p.317/8). Therefore, I say nothing about such matters.

75. Mr Taylor sought to take the analysis one stage further. He contended that pursuant to the sub-contracts the sub-purchasers themselves acquired a lien enforceable against and binding on SJC.

76. As a preliminary, I have no difficulty with the notion that, as was the position under the head-contracts (*mutatis mutandis*), the sub-contracts gave rise to a purchaser's lien in favour of the sub-purchasers vis-à-vis their immediate vendor, Demetrius (and all others deriving title under it). However, Demetrius only had an equitable interest, out of which it was carving the sub-purchaser's interest, and so, without more, such an independent lien would not bind the head vendor, SJC, whose title was separate and superior. Thus it would not avail the sub-purchasers in the present case.

77. Mr Taylor seeks to sidestep this problem by contending that, rather than acquiring what I would term a sub-lien in their own right, the sub-purchasers effectively inherited the original purchaser's lien which had arisen in favour of Demetrius against SJC. The argument was put two ways. Initially, it was said that the sub-purchasers were subrogated to the purchaser's lien which Demetrius had obtained. However, this contention was effectively dropped during the hearing and I say no more about it. It was replaced by a claim that, by virtue of the sub-contract, the purchaser's lien was in each instance assigned to the sub-purchaser so that the sub-purchaser obtained security against the head vendor *pro tanto*, i.e. corresponding to the deposit paid by Demetrius, albeit that that was less than the sum paid by the sub-purchaser.

78. No authority for this proposition was cited to me. In the absence of authority, I am not persuaded that it is correct. A lien arises by operation of equity from the relationship between the parties. The test is an objective one: the intention of the parties is to be ascertained from the documents they have executed. It is one thing to create a lien. It is quite another for an existing lien derived from an antecedent arrangement with a superior party to be transferred from seller to buyer. From the viewpoint of the buyer, it may be eminently desirable for this to occur. However, from the perspective of the seller the same is not obviously so. Is he, being in the middle of the chain and continuing to

shoulder liability to the head vendor notwithstanding the sub-sale, really divested of his lien with the consequence that he has no security against the head vendor in the event that the head vendor defaults? What is to happen if, in the meantime, the sub-contract is determined by reason of the sub-purchaser's default? Is the lien which arose when the head contract was made and which (Mr Taylor submits) passes from purchaser to sub-purchaser on their entry into the sub-contract somehow to re-vest in the purchaser? If so, how? And what if (although I accept it is not this case) the purchaser contemporaneously sub-sells parts of the whole to different sub-purchasers, each of whom pays a deposit exceeding the deposit paid to the head vendor? Would there be a *pro rata* apportionment (an assignment of the head lien as to part)? And what if, by reason of payment by instalments, the relevant proportions paid by the respective sub-purchasers altered? Such uncertainties, to which there is no immediately obvious or satisfactory answer, militate against the idea of an assignment of the lien.

79. Therefore, I reject the contention that the sub-purchasers acquired purchasers' liens enforceable against the head vendor. That might well have been the outcome if, instead of sub-sales, the contracts had been assigned, but that is not what happened. In my view, the position of a sub-purchaser is not properly to be equated with that of an assignee. Mr Taylor's case essentially seeks to elide the two, wrongly in my judgment.

80. However, for the reasons given above, I consider that the each of sub-purchasers had – at the outset – an equitable interest in the subject property which bound, and conferred on them rights enforceable against, the head vendor's estate. In short, each obtained an interest the burden of which affected SJC's registered title, and which was capable of protection by notice.

<u>Issue 2: Did the Respondents lose their status and rights on the registration of the Applicant?</u>

81. The Respondents are not yet out of the woods. All is not lost for the Applicant. It relies on later, supervening events. It says that these resolve matters in its favour.

82. Mr Healey maintains that, because Demetrius failed to protect its own interest (that in respect of the head contract) by notice against the registered title of SJC, when the Applicant acquired the freehold it took free from Demetrius's rights and equitable interest

(including its lien). Thus Demetrius itself cannot assert its interest against the Applicant. The Applicant's estate has priority thereto.

83. Pausing at this point, I consider the scope and effect of the unilateral notices.

84. I believe it to be common ground that that the unilateral notices did not relate to or protect the interest of Demetrius, i.e. they did not do what might be termed 'double duty' and protect not only the rights of the Respondents but also those of Demetrius. Mr Taylor certainly did not press the point, maintaining that the notices sufficed by protecting the Respondents' interests – a separate matter which I consider below. In any event, I consider that it is correct to say that the notices did not protect the head-contract as such. On a fair reading, and the true construction of, the entries on the register, they relate exclusively to the sub-contract, not the head-contract, even though they misdescribes the documentation and refer to SJC. Moreover, unlike the content of a unilateral notice as regards the description/details of the interest protected, where the legislation does not impose a particularly rigid or exacting standard (see r.84(5) of the Land Registration Rules 2003: "the entry must give such details of the interest protected as the registrar considers appropriate"), the identity of the beneficiary of a unilateral notice is of the essence: see s.35(2)(b) of the 2002 Act. Coupled with this, only the named beneficiary (or someone entitled to be registered in place of, or in addition to, the registered beneficiary) is to be notified of a cancellation application: ss.36(2) & (4) & r.86(7). Here the beneficiary in each case is the relevant Respondent, not Demetrius.

85. Also, I do not believe that there was any real disagreement between the parties that the notices did relate to the sub-contracts and so were in principle capable of protecting any interest of the Respondents arising thereunder, notwithstanding the minor misdescription in the wording of the entries noted above. Again, I consider that this is correct. *Bank of Scotland v Joseph* [2014] 1 P&CR 18, CA shows that it is not necessary to specify the beneficiary's interest with absolute precision for it to be protected by the notice.

86. Returning to Mr Healey's submission recorded in paragraph 82 above, I accept that. Given the position in relation to the notices, it is uncontroversial. It simply reflects the operation of section 29 of the 2002 Act. I add that, the apartments never having been built, there is no possibility or suggestion in this case that anybody (whether Demetrius or

the Respondents) has been, or could have been, in actual occupation of the subject premises at any time. So there is no question of any overriding interest under the 2002 Act, Sch.3, para.2.

87. With Demetrius's loss of its own status (vis-à-vis the Applicant) under his belt, Mr Healey seeks to press home his advantage. He contends that any interest of the Respondent sub-purchasers formerly binding on the head vendor SJC must likewise have ceased to bind the estate acquired by the Applicant. He maintains that, consequent on the loss of Demetrius's priority, was the loss of status/any enforceable interest for the sub-purchasers too. As previously noted, s.32(3) shows that a notice counts for nothing where the underlying interest has gone and ceased to be valid. Hence the issue is whether, notwithstanding the notices, the underlying interest of the Respondents, have failed.

88. The Applicant's case is that a sub-purchaser's interest is always parasitic on that of the purchaser. Being derived therefrom, it is dependent thereon. The branch falls with the tree, as in the case of a forfeiture of a lease which entails the termination of all inferior interests. As Mr Healey put it, "What is in the sub-purchaser's hands is no more durable than that out of which it is carved." He says that the head contracts "fell away" (skeleton argument, paras 28 & 33) and as soon as that occurred, the sub-contracts similarly perished and any interest of the sub-purchasers (and any associated entitlement to keep a notice on the register of the freehold title) evaporated. In short, his case is that the chain was broken and everything came crashing down.

89. Mr Taylor contends that Mr Healey's "beguilingly simple" analysis cannot be right because it would undermine the widely held belief that the priority of a sub-purchaser's interest can ever be adequately protected. I am not convinced that that is a sufficient answer in itself.

90. First, as acknowledged in the Law Society's Conveyancing Handbook, "the third party is in a more vulnerable position than a normal buyer since completion of his contract is dependent on the buyer's completion of his own contract with the seller." The (obvious) dependency to which Mr Healey points is there confirmed. A sub-purchaser is at risk of a loss of its proprietary interest if the head contract is validly terminated by the head vendor

by reason of the purchaser's breach. In that scenario, the sub-purchaser will be left with only a damages claim against the purchaser.

91. Second, quite apart from any issues relating to the termination of the head contract, the belief (recorded in the publications) that a sub-contract may be protectable by notice does not automatically carry with it the notion that the status and priority of a sub-contract is impregnable if the head contract has not been protected too. The texts do not state unequivocally that notice of the sub-contract alone suffices. The question whether that is so is begged. It is at least conceivable that the expectation is that head contract and sub-contract will each be the subject of notices on the register and that, unless that belt and braces mechanism is used, the sub-purchaser's position is insecure. After all, it is open to a sub-purchaser to insist that his immediate vendor enter a notice against the superior registered title of the head vendor, so that the chain is secure. It can be said that it is for the sub-purchaser to protect itself in this fashion: cf *Barrett v Hilton* per Russell LJ @ p.242E-G.

92. That said, I do not believe that Mr Healey's contention (outlined in paragraphs 87 & 88 above) is well-founded in the circumstances of this case.

93. I accept that, in general terms, a sub-contract cannot outlive the head contract. If the head contract is truly gone, it is impossible and meaningless to speak of the sub-purchaser having any ongoing right to enforce the same and e.g. claim specific performance against the head vendor. In that scenario the head vendor (whether the original vendor or a successor) is not subject to any ongoing liability, the contract having absolutely perished.

94. However, in my judgment, that is not the state of affairs which here prevails. The landlord and tenant forfeiture analogy is not entirety apt, for the head contract has not died – certainly not for all purposes. On the contrary, it has an enduring life, albeit that it may no longer be directly enforceable by the purchaser against the new freeholder.

95. Section 29 of the 2002 Act lays down what is in effect a special rule of priority. Where it applies, an unprotected interest is trumped by, and subordinated to, the registered estate. The statutory language is of postponement and loss/retention of priority: hence "postponing" in s.29(1) and "the priority … is protected" in s.29(2).

96. I consider that there is a fundamental difference between postponement on the one hand and the termination of a contract/property interest on the other. Despite the want of protection by notice, the head contract remains a valid, subsisting contract. It remains enforceable as against SJC. Indeed, in an appropriate case (albeit not this case), depending on the relationship between the original vendor and the current owner of the freehold estate, a postponed contract could be ordered to be specifically performed at the suit of the purchaser (with the original vendor being required to procure the new owner to transfer the property in completion of the contract): see e.g. *Coles v Samuel Smith Old Brewery (Tadcaster) Ltd* [2008] 2 EGLR 159, CA @ [11, 12, 20 & 29], applying *Jones v Lipman* [1962] 1 WLR 832. The bottom-line is that the head contract has not gone off as such, even though the purchaser (Demetrius) can no longer assert its property interest against the current owner of the freehold (the Applicant).

97. To meet this point, in oral argument Mr Healey submitted that the effect of the statutory postponement in a case like this (where the estate which gains priority is a freehold, as opposed to a leasehold) is "*as if*" there had been a determination of the contract in question; the two scenarios are, he said, equivalent. I am not convinced that that is so. For the reasons already given, I do not believe that the analogy is safe or accurate. The statute does not provide for a deemed termination. If determination had been intended, which plainly it was not, the 2002 Act would have said so. Determination would be far more wide-reaching in its impact than mere postponement: it would affect not only the position between the registered disponee of the estate in question and the holder of the unprotected interest but also the position of and in relation to third parties (including, but not limited to, sub-purchasers) – which is here what matters.

98. Mr Healey's contends that the sub-purchaser's interest cannot have a life independent of the continued enforceability of the head contract by the purchaser. The sub-purchaser's rights are contingent on the well-being of the head contract; their lifespan is commensurate therewith. He maintains that if the freeholder takes free of the head contact, the indirect route (enforcement of that contract) is blocked and ceases to be available. The purchaser has lost its entitlement to enforce its own contract, and no one else can keep it. However, this argument rests on the premise that the head contract is dead. As I have said, that is not so. Further, the case law indicates that a sub-purchaser's

rights include the right directly to enforce the head contract (if the purchaser cannot or will not do so). That entitlement is, in my judgment, independent of the purchaser's own standing to enforce the head contract. It is not reliant on the continuing enforceability of the head contract at the suit of the head purchaser. I derive this from the decision in *Berkeley v Poulett*. As noted above, Effold had lost its own right to sue the Earl but in the eyes of Goff LJ that did not prevent Mr Berkley bringing a claim against the Earl based on the head contract. Further, Stamp LJ seems to have acknowledged that such a claim could have been brought; he simply rejected the claim on the basis that Mr Berkley had not agreed to perform the head contract and that the claim was not, as pleaded, one for specific performance. That apart, he does not appear to have any issue with the principle of Mr Berkley being entitled to enforce the head contract (according to its terms).

Conclusion

99. All in all, because in each case the interest of the Respondent sub-purchaser was (unlike that of the head purchaser, Demetrius) was protected by notice on the register, the Respondents' rights (which include the right to see that the head contract is performed, so that the sub-contract can in turn be performed) continue to subsist, and remain enforceable, against the freehold estate in the hands of the Applicant.

100. I add that this result accords with the apparent justice of the situation. The Applicant must have been aware of the sub-purchasers' notices on the register when it purchased the freehold. It went ahead eyes wide open. The sub-purchasers had flagged their interests. The Applicant has little cause to complain if it is held bound thereby.

101. If it be said that the result provides an adventitious advantage for Demetrius, which failed to protect its own interest, the answer is that such protection is now only indirect and available through the Respondents. Demetrius has no enforceable rights or remedies in its own hands, and it has lost the lien which it previously enjoyed. The fact that it may obtain an indirect benefit courtesy of the Respondents is, in my judgment, no reason to deny them the Respondents the protection which they availed themselves of and to which the Applicant took subject.

Disposition

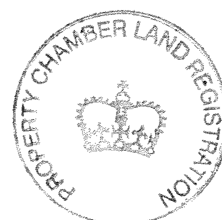
102. Subject only to the point mentioned in the following paragraph, I propose to direct the Chief Land Registrar to cancel the Applicant's original applications for cancellation of the Respondents' unilateral notices.

103. Near the beginning of this decision I alluded to one possible outstanding issue. It is this. The Applicant does not accept that the sub-sales complied with the requirements of clause 17 of the head contract and contends that, for this reason, the sub-contracts did not bind SJC and in turn do not bind the Applicant. This is disputed by the Respondents. This particular issue could not be dealt with at the hearing: further disclosure, possibly to be obtained from Demetrius's solicitors under an intimated witness summons, evidence and consequential submissions are (or may be) required. In the circumstances the parties discussed with me how to deal with matters procedurally. They proposed that I should decide the case, leaving over this single issue in the first instance. I agreed to that course: hence this decision. I also agreed that, having done so, I would refrain from immediately making a substantive order and would instead invite the parties to advise me whether the issue still remains live and, if so, as to their proposals for its resolution. In the meantime I said that I would extend the time for any application for permission to appeal generally, so that both parties can have a ruling on all issues before consideration need be given to any possible visit to the Upper Tribunal. This course I now take. It is reflected in the accompanying directions order.

104. Counsel have my email address in Chambers and for administrative convenience they (or, as appropriate, their instructing solicitors) should send their responses to the directions order to that email address *in addition to* sending the communications to the Tribunal office in the normal way. All communications should, of course, be copied to the other parties.

Judge Martin Dray

Dated this 8th day of September 2014



BY ORDER OF THE TRIBUNAL