# CASENOTE: EZAIR v. CONN [2020] EWCA (Civ) 687

## BY


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In Ezair v. Conn [2020] EWCA (Civ) 687, the Court of Appeal has struck a blow in favour of established doctrine, in a case involving uncompleted contracts for the sale and sub-sale of land.

By way of background, a purchaser under an uncompleted contract for the sale of land which either is, or has become, unconditional enjoys certain equitable property rights over the land in addition to his legal rights under the contract. These equitable rights arise if (as is usually the case) the contract is specifically enforceable, and are an illustration of the maxim that equity regards as done that which ought to be done.

The precise nature of the purchaser's rights vary, according to whether the contract is wholly executory, or has instead been performed on the purchaser's side, by payment of the price (or furnishing of other consideration). In the case of a wholly executory contract, the purchaser's rights take the form of an equitable interest – an estate contract – capable of binding third parties (subject to appropriate protection on the register), together with certain further limited rights against the vendor requiring him to preserve the land he has contracted to sell. Where the purchaser has paid the purchase price, or supplied the other consideration for the sale, equity treats the purchaser as the owner of the land, with the result that the seller holds the

land on trust for the purchaser (though some of the cases attribute the purchaser's rights in this instance to the existence of a lien over the land).

The courts have frequently been called on to decide the detailed content of the purchaser's equitable property rights under an uncompleted contract. One such instance is Berkley v. Poulett [1977] 1 EGLR 86 - a case about a sub-purchase. In that case, in the Court of Appeal, Stamp LJ (whose judgment was approved in Southern Pacific Mortgages v. Scott [2015] AC 385) expressed the view that the contract of sub-sale did not operate to confer on the sub-purchaser any interest in the trust of the land created by the contract of head-sale. Instead, the sub-purchaser's only rights were his contractual rights under the sub-sale agreement, including the right to compel the sub-vendor complete the head-sale. The sub-purchaser enjoyed no property interest enforceable against the head-vendor as such.

In Ezair v. Conn [2020] EWCA Civ 687, the Court of Appeal re-asserted the position expressed by Stamp LJ - doing so in the face of an attempt to circumvent it by means of (it will come as no surprise) the "doctrine" of proprietary estoppel.

Mr Ezair was an investor in real property, who, in 1999, decided to incorporate his business into a newly-formed company, NEL, to be owned and controlled by him. Mr Ezair and NEL duly made a contract for the sale of Mr Ezair's investments to NEL, in return for the allotment to Mr Ezair of 98 of NEL's 100 authorised shares. The completion date under the contract was 7 days after either party gave notice to the other requesting completion. Following the contract, the shares were duly allotted to Mr Ezair. But for tax reasons, no notice seeking completion was ever given; no registered transfer of the

properties to the company ever took place; and the contract remained uncompleted.

In 2003, NEL itself agreed to sell the properties to Mr Ezair's family trust company, CSP. The purchase price under the contract was £1.3million, and the completion date was 28 days following a notice given by either party. Again, no such notice was given, and the 2003 contract remained uncompleted at all material times - though again, the buyer, CSP, in fact furnished the agreed consideration to the seller, NEL. Following the 2003 contract, the properties were shown in CSP's accounts as assets of the company. The same accounts also showed as liabilities the indebtedness incurred by CSP to fund payment of the purchase price, as well as the rental income accruing to CSP from the investments.

In due course, CSP went into administration, and NEL into liquidation.

CSP's administrators applied to the court under s.234 of the Insolvency Act 1986, seeking an order that Mr Ezair transfer the properties to them for the purpose of the administration. Under s.234 of the 1986 Act the court has power to require a person in possession or control of "property to which the company appears to be entitled" to convey or transfer that property to the administrator. In Ezair the administrators founded their application on the ground that by reason of the 1999 and 2003 contracts, CSP was beneficially entitled to Mr Ezair's investment properties. The administrators' application succeeded before the Judge, but the Court of Appeal, disagreeing with the Judge, allowed the appeal and dismissed the application.

Patten LJ gave the only substantive judgment. He pointed out that it had been open to the administrators to serve a 28 day completion notice under the 2003

contract, and thereafter sue NEL for specific performance, requiring NEL to take steps under the 1999 contract to compel Mr Ezair to transfer the properties to it, and thence to CSP. However, such an entitlement could not found an application under s.234, which was concerned with property to which a company appeared to have some form of subsisting title *without* the need for contractual enforcement and resolution of a (possibly disputed) claim for specific performance. Accordingly, the outcome of the administrators' application turned on the correctness of their claim that CSP had an existing beneficial entitlement to the properties.

As to that claim, the Judge had accepted in accordance with the Berkley and Southern Pacific decisions that the sub-contract did not of itself confer on CSP an equitable property right binding on Mr Ezair. But he went on to hold that when, in reliance on the 2003 contract, CSP took on loan finance, paid the purchase price to Mr Ezair's company, NEL, and subsequently treated the properties as assets in its accounts, CSP became entitled to an equity arising by estoppel, to be satisfied by the creation in favour of CSP of a beneficial interest binding on Mr Ezair.

Patten LJ disagreed with this analysis. He said:

> "38. The relationship between Mr Ezair and NEL and between NEL and CSP is contractual. The rights which the Administrators now rely upon as the basis of their claim are derived from the 1999 and the 2003 Agreements and the enforceability of the same. They have no other legal basis. When CSP obtained the loans from Northern Rock and NEL in order to fund its purchase of the Properties it did so on the basis that it had entered or was about to enter into a contractual obligation to pay the sum of £1.3m for the Properties in return for the obligation on the

part of NEL to transfer the legal estate. It agreed under the contract that completion should not take place until 28 days after the service of a written notice but it could have served such a notice at any time and required NEL to make title by enforcing its own rights under the 1999 Agreement.

“39. In these circumstances, I am unable to accept that the financing of the £1.3m purchase price or the consequent treatment of the Properties as assets of CSP took place in reliance on anything but the execution of the 2003 Agreement. That gave CSP the means of acquiring the legal estate in the Properties which it had bargained for and remained enforceable up to and including the hearing of this application. CSP was never promised or relied upon the prospect of being assigned the benefit of the 1999 Agreement. Nor was it the common intention of Mr Ezair, NEL and CSP that there should be an assignment of the benefit of that contract to CSP. The property transactions between them took the form of a sale followed by a sub-sale and the rights under both remain legally enforceable.

“40. There is therefore no basis for the intervention of equity in this legal relationship by way of a constructive trust. This is not a case where Mr Ezair or NEL are asserting their own legal rights in order to deny some arrangement with CSP which it would be unreasonable for them not to give effect to. CSP's only expectation was that it would have the rights to the transfer of the Properties which it was given under the express terms of the 2003 Agreement and those rights are not in dispute. The accounts do no more than to reflect the economic reality

> that CSP has paid for the Properties and can call for their transfer under the contract.

It is, with all respect, impossible to disagree with this analysis. CSP was neither promised, nor did it expect to get, any interest in the benefit of the 1999 contract. It only ever bargained for rights under a contract of its own – precisely the situation to which the approach in Berkley v. Poulett was addressed. Those rights remained enforceable, and it was therefore both unnecessary and wrong to resort to an estoppel. As a result, the fact that the 1999 contract was performed on NEL's side - when it furnished the consideration (shares) to Mr Ezair, so as to confer on NEL a beneficial interest in the properties concerned - took CSP's position no further forward. Indeed, one might comment further that had the facts of Ezair given rise to an estoppel, the effect would have been to drive a coach and horses through the Berkley v. Poulett rule itself – because in almost every case where both contracts (head and sub) had been performed on the purchaser's side, it would then be possible to say that the sub-buyer's very performance amounted to reliance, sufficient to generate an equity.

The Court of Appeal's rejection of the administrators' application therefore represents a welcome assertion of orthodoxy, over the siren song of the doctrine of estoppel.

Having disagreed with the Judge on the estoppel point, Patten LJ also dealt with a further point, arising because Mr Ezair, in his evidence in response to the application, had made certain statements arguably amounting to admissions that he held the properties on trust for CSP. Patten LJ said that even if Mr Ezair's statements were admissions, again, they did not advance the administrators' case. This was because any trust for the benefit of CSP was a

trust to give effect to the 1999 contract. It followed that any such trust was subject to the terms of that contract, including the term providing for completion to take place only after service of a 7 day notice. That had never happened, and therefore Mr Ezair's admissions (if that was what they were) did not affect the outcome.

This latter conclusion was itself based on the decision of the House of Lords in Jerome v. Kelly [2004] 1 WLR 1409 – and again represents orthodoxy. However, Mr Ezair's victory may yet prove to have been shortlived: between the trial of the application and the appeal, NEL assigned the benefit of the 1999 agreement to CSP, following which CSP served the requisite 7 day completion notice on Mr Ezair. Whether the transaction proceeds to completion is something we may yet hear about, if further litigation follows. In the meantime, the saga has provided the profession with two reminders: a useful reminder of the Berkley rule, and a salutary reminder of the proper limits of the doctrine of estoppel.

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