Case No: HC-2016-000077

Neutral Citation Number: [2016] EWHC 2656 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/10/2016

Before :

MASTER MATTHEWS

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- - - - - - - - - - - - - -
Between :

Melissa Menelaou — **Claimant**

- and -

Bank of Cyprus UK Limited — **Defendant**

- -
- -

Mark Warwick QC (instructed by **direct access**) for the **Claimant**
Timothy Polli (instructed by **Dentons UKMEA LLP**) for the **Defendant**

Hearing date: 27 July 2016

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Judgment

Master Matthews :

1. This is my judgment on part of the counterclaim in this action. The claim itself was begun by claim form issued on 2 November 2010 under CPR Part 7, for an order in effect cancelling a charge by way of legal mortgage in favour of the Defendant bank ("the Bank") registered against the home of the Claimant and her family, 2 Great Oak Court, Hunsdon, Hertfordshire ("the Property"). As will be seen below, that claim was successful. This judgment is not concerned with the claim.

2. The counterclaim was for a declaration that the Bank was entitled to be subrogated to an unpaid vendor's lien over the Property, and then for an order for sale. As will also be seen below, the counterclaim failed at trial, but the Bank was successful on appeal to the Court of Appeal. However, that court determined only the question of principle, and not whether an order for sale should actually be made. The Claimant appealed to the Supreme Court on the question of principle, but the appeal failed. That left the order of the Court of Appeal undisturbed.

3. The order of the Court of Appeal, dated 4 July 2013 (amended on 23 July 2013), so far as relevant provided as follows:

> "IT IS DECLARED that
> 3. the Appellant [*ie* the Bank] is entitled to be subrogated to an equitable charge by way of an unpaid vendor's lien over [the Property], pursuant to which (in the event of a sale of the Property pursuant to the counterclaim) from the net proceeds of sale of the Property, there shall first be paid to the Appellant £875,000 plus interest thereon [at a certain rate].
> […]
> 7 The Appellant's counterclaim for an Order for Sale of the Property be listed before the Master for directions."

Background and procedural history

4. The background facts and the history of the proceedings up to the time of the decision of the Supreme Court can be largely taken from the judgment of Lord Clarke in the Supreme Court:

> "The background facts
>
> 2. The facts can largely be taken from the agreed statement of facts and issues. Melissa, who was born on 27 January 1990, is the second of the four children of Mr Parris and Mrs Donna Menelaou ("the Menelaou parents"). The other children were Danielle, born on 9 August 1986, Max, born on 24 June 1991 and Ella-Mae, born on 6 February 2002. In mid-2008, the Menelaou parents and their three youngest children lived at Rush Green Hall, Great Amwell, Hertfordshire ("Rush Green Hall"), which was a property owned by the Menelaou parents jointly. Melissa was 18 and a student at a nearby college. Rush Green Hall was subject to two charges in favour of the Bank. The Menelaou parents directly owed the Bank about

£2.2m, and had personally guaranteed loans made by the Bank to their companies.

3. The Menelaou parents decided to sell Rush Green Hall, to apply some of the proceeds to buy a smaller property as the family home, to provide funds for Danielle to pay the deposit on a house which she wanted to buy with her future husband and to free up capital to invest in a further development project. The Menelaou parents instructed Boulters to act for them in the conveyancing transaction. The senior partner of Boulters was Mr Menelaou's sister. They used Mr Paul Cacciatore, who was employed by Boulters as a legal executive and who was also one of Mr Menelaou's brothers-in-law. On 15 July 2008 contracts were exchanged for the sale of Rush Green Hall for the price of £1.9m. The contractual purchasers of Rush Green Hall paid a deposit of £190,000 to Boulters for the account of the Menelaou parents.

4. About a week later, Mr Menelaou informed Mr Cacciatore that he had found a new property to serve as the family home at 2 Great Oak Court, Hunsdon, Hertfordshire ("Great Oak Court"). On 24 July 2008 contracts were exchanged for the purchase of Great Oak Court for the price of £875,000. On Mr Menelaou's instructions, the purchaser of Great Oak Court was to be Melissa. The deposit payable was £87,500. This deposit was paid from the £190,000 held by Boulters as the deposit for the sale of Rush Green Hall. Mr Menelaou told Melissa that Great Oak Court was being bought in her name as a gift to her, on the basis that she would hold the property for the benefit of herself and her two younger siblings. She agreed to the arrangement.

5. The Bank was not approached about the proposed arrangement prior to the exchanges of contracts. The Bank sanctioned the proposed arrangements with some reluctance given the overall indebtedness of the Menelaou parents and their companies. On 5 September 2008 Boulters wrote to the Bank saying that it understood that the Bank was to take a charge over Great Oak Court from Melissa, which Boulters understood would be a third party charge. Completion was to be on 12 September. On 9 September 2008 the Bank wrote to Boulters in these terms:

> "Thank you for your letter dated 5 September 2008. We confirm that upon receipt of £750,000 we will release our charges over [Rush Green Hall] subject to a third party legal charge over [Great Oak Court] which is registered in the name of Melissa Menelaou."

Melissa was not aware of the Bank's intention to take any charge over Great Oak Court.

6. The Bank also instructed Boulters to act as its solicitors to deal with the discharge of its charges over Rush Green Hall and to obtain a charge in favour of the Bank over Great Oak Court. On 10 September 2008 Boulters replied to the Bank's letter of 9 September enclosing a certificate of title undertaking to obtain an executed mortgage in Melissa's name over Great Oak Court and to confirm that they had complied or would comply with the Bank's instructions. On 11 September 2008 Boulters sent the Bank a form of legal charge over Great Oak Court, purportedly signed by Melissa and identifying her as "the customer". It was (and is) Melissa's case, supported by her brother and by handwriting evidence, that the signature on the charge was not hers. Indeed, she was unaware of the existence of the charge until 2010. On the same day, 11 September 2008, the Bank telephoned Boulters and pointed out that the identity of the customer in the charge should be the Menelaou parents and not Melissa. Boulters did not contact Melissa. Instead, an employee of Boulters simply changed the name of the customer in manuscript on the charge from that of Melissa to those of the Menelaou parents.

7. On 12 September 2008 completion of the sale of Rush Green Hall by the Menelaou parents and the purchase of Great Oak Court by Melissa both took place. As part of the completion process, Boulters received the balance of the price of Rush Green Hall from its purchasers. They remitted £750,000 to the Bank and sent a further £785,000 to the vendors of Great Oak Court to meet the remaining 90% of the purchase price for Great Oak Court. Boulters also sent the Bank two deeds to be sealed by the Bank authorising the cancellation of the entries in respect of the two registered charges over Rush Green Hall. The discharge of mortgage forms were not returned by the Bank until 13 October 2008. After a considerable delay, Melissa was registered as the proprietor of Great Oak Court. The Bank was also registered as the purported chargee. Following completion, the Menelaou parents, Melissa, and her two younger siblings moved into Great Oak Court and occupied it as their family home.

8. In the spring of 2010 Melissa was told by her parents that their business was experiencing difficulties. It was proposed that Great Oak Court would be sold and a smaller property purchased. It was at this point that Melissa discovered the existence of the charge dated 12 September 2008 over Great Oak Court. Melissa's conveyancing solicitors then corresponded with Boulters. The Bank was made aware of the challenge to the validity of its charge and, through its solicitors, intimated a claim against Boulters. Many allegations of breach of duty (fiduciary and otherwise) were made by the Bank against Boulters.

The procedural history

9. On 2 November 2010 Melissa issued a Part 7 claim in the Chancery Division seeking orders that all references to the charge, as appearing in the Charges Register for Great Oak Court, be removed. The main basis for this claim was that, not having been signed by Melissa, the Bank's charge was void. The Bank defended the claim but also counterclaimed for a declaration that the Bank was entitled to be subrogated to an unpaid vendor's lien over Great Oak Court.

10. On 14 January 2011 the Bank issued a Part 20 claim against Boulters for damages for breach of trust and/or fiduciary duty, and an indemnity against all costs and expenses that it might incur in the main claim. After the exchange of witness statements, it became clear to Melissa and her advisers that Boulters had altered the charge without consulting her. By consent of the parties, pursuant to Melissa's application dated 13 April 2012, the particulars of claim were amended to rely upon this alteration as a further ground for rendering the charge void. The Bank's response was to continue to challenge the invalidity of the charge.

11. As stated above, the trial of the case began on 16 May 2012. At the commencement of the trial all issues were live. Melissa was called to give evidence and was duly cross-examined. Thereafter, following an interchange between counsel and the judge, Boulters conceded in the Part 20 claim that the charge was void and that Melissa was entitled to the relief sought in her claim and, as it is put in the statement of facts and issues, reflexively, the Bank conceded the same in the main claim. The issue of liability in the Bank's claims against Boulters was then compromised and a written agreement was entered into between the Bank and Boulters whereby Boulters accepted that it was in breach of its duties in both contract and tort and was liable to indemnify the Bank for its losses as a result of an invalid charge being entered against Great Oak Court. As a result of that agreement, the only remaining live issue for determination at the trial was the Bank's counterclaim against Melissa.

12. Judgment was reserved and (as stated above) was handed down on 19 July 2012 dismissing the counterclaim. No formal order was made on that day but a further hearing took place on 23 October 2012, when the judge made an order that the Bank's charge be removed from the Register (reflecting the Bank's and Boulters' concession that the Bank's charge was void) and formally dismissed the Bank's counterclaim with costs. The

judge granted the Bank permission to appeal against the dismissal of its counterclaim.

The judgment

13. The judge made these findings in the course of his judgment. Whether by operation of law or as a result of any agreement or understanding between the parties, there was nothing to qualify the straightforward position that, in receiving the sale proceeds of Rush Green Hall, Boulters was acting as agent for Mr and Mrs Menelaou and held all the moneys for them alone (para 17). As regards the totality of the purchase price of Great Oak Court, it was not discharged by the use of moneys belonging to the Bank (para 19).

14. The judge approached the matter on two bases, which he described as the narrow or traditional approach to the doctrine of subrogation to the unpaid vendor's lien and the wider approach based on the law of unjust enrichment (para 14). He held that the fact that the moneys provided for the purchase were not paid by, and did not belong to, the Bank was fatal to the counterclaim on the narrow or traditional approach (para 19). As to the wider approach, he concluded that there was both benefit to Melissa, namely the gratuitous acquisition of Great Oak Court (albeit to be held on trust for her two younger siblings), and detriment to the Bank, namely the release of its two charges (para 22). He held that "The existence of both detriment and benefit does not however establish the further element that the latter should have been *at the expense of the Bank* (para 22 - original emphasis)".

15. He added, also in para 22:

> "It is sufficient for me to say that there must in my view be something in the nature of, to use the formula proposed in *Burrows*, The Law of Restitution, 3rd ed (2010) p 66, a transfer of value from the Bank to the claimant. But here the claimant's benefit enured and was complete on 12 September 2008, while the Bank's detriment through the mistaken release of its charges over Rush Green Hall occurred a month later. Whether or not time's arrow must always and with full rigour be respected in the law of unjust enrichment, I am clear that this is

not a case in which economic or any other kind of reality calls for its wholesale rejection."

16. The judge concluded that, although this left Melissa without any charge over her property, it did not leave the Bank without all recourse. This was because the Bank had an indemnity for its losses from Boulters (in reality with that firm's indemnity insurers), which indemnity was agreed during the course of the trial (para 11).

The Court of Appeal

17. In a judgment handed down on 2 July 2013 the Court of Appeal unanimously allowed the Bank's appeal. The question in this appeal is whether it was correct to do so. I will consider its reasoning in the course of my discussion of the issues argued before us. On 4 July 2003 the Court of Appeal handed down a further judgment dealing with a number of consequential issues. It declared that the Bank was entitled to be subrogated to an equitable charge by way of an unpaid vendor's lien over Great Oak Court for £875,000 plus interest. The result of the Court of Appeal's decision is that Melissa's property, Great Oak Court, has been subjected to an equitable charge for £875,000 plus interest. The Bank's application to a Master in the Chancery Division seeking to enforce the equitable charge has been stayed by agreement pending the outcome of this appeal."

Subsequent procedure

5. On 4 November 2015 the Supreme Court handed down its judgment. On 23 November 2015 the Defendant issued an application notice for a directions hearing to be listed. By order dated 20 January 2016 I directed that such a hearing be listed for 6 April 2016. On 23 March 2016 a further application notice was issued for an order that Jennifer Harrison be added as Second Defendant as "next friend" [sic] for Ella-Mae Menelaou, the Claimant's (minor) younger sister. I directed that this application be listed at the directions hearing on 6 April 2016.

6. On that occasion the Claimant appeared in person and Mr Mark Warwick QC appeared for the intended Second Defendant. Part of the argument for the joinder of the intended Second Defendant was that she was legally represented and the Claimant was not. I gave directions for evidence (including expert evidence) and trial of the outstanding part of the counterclaim, the application for an order for sale. I also dismissed the application to join Ms Harrison, for reasons which I gave at the time.

7. At the substantive hearing of the application for an order for sale, on 27 July 2016, Mr Timothy Polli of counsel appeared on behalf of the Defendant applicant, and Mr Warwick QC this time appeared on behalf of the Claimant respondent. I had before me the following witness statements:

   Jennifer Harrison, dated 15 March 2016;
   Andrew Michaelides, dated 19 April 2016;
   Donna Menelaou, dated 17 May 2016;
   The Claimant, dated 17 May 2016;
   Andrew Michaelides (2), dated 7 June 2016;
   The Claimant (2), dated 19 July 2016.

8. Pursuant to paragraph 4 of my order of 6 April 2016, notice had to be given to require a witness to attend for cross-examination. No such notice was given, and accordingly the application for an order for sale was made without the benefit of cross-examination of any of the witnesses. The only evidence before me was in the witness statements to which I have referred. In the event, despite my direction so permitting, no expert evidence was tendered.

9. I make two comments at this point. One is that, pursuant to the well-known rule exemplified by cases such as *Long v Farrer & Co*, [2004] EWHC 1774 (Ch), though subject to limited exceptions, the court should not disbelieve the evidence of a witness given on paper in the absence of the cross-examination of that witness. The other is that, where a party could give or call evidence on an important point without difficulty, a failure to do so may entitle the Court to draw an inference adverse to that party: see *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, CA; *Jaffray v Society of Lloyds* [2002] EWCA Civ 1101, [406]-[407]; *Thames Valley Housing Association v Elegant Homes (Guernsey) Ltd* [2011] EWHC 1288 (Ch), [19]. Mr Polli for the Bank invited me to draw inferences adverse to the Claimant; Mr Warwick QC resisted this. I shall deal with that later.

10. At the conclusion of the hearing I directed that the Defendant should lodge certain further documents which had been referred to at the hearing but which were not then available, and I also gave permission for the parties to lodge certain further written submissions. This was done on 3 August 2016. The documents lodged by the Defendant bank (and on which the Claimant commented in short written submissions) were:

    a. The Claimant's witness statement from the trial;
    b. The parties' Agreed Statement of Facts and Issues as submitted to the Supreme Court;
    c. The Agreement with Boulter & Co as agreed at trial;
    d. The judgment of the trial judge;
    e. A letter from Boulter & Co dated 8 August 2012 confirming that they would indemnify the Defendant in respect of the costs of the appeal to the Court of Appeal;
    f. The parties' submissions to the Court of Appeal following the hand-down of the substantive judgment, which led to the supplemental judgment of the Court (handed up during the present hearing).

11. Also on 3 August, Mr Warwick QC responded in writing to a query I had raised during the hearing. This arose from the fact that the Claimant and her family were living in the property, but in effect paying nothing to anyone. I asked was what was the Claimant's position in relation to the interest accruing on the outstanding £875,000. Mr Warwick QC told me that the interest worked out at about £3855 per calendar month, but that the Claimant was able to afford only £2000 per month "in return for a sale of the Property being deferred (or no sale for the time being)".

12. The present position is that the Defendant has an interest in the Property to secure £875,000 plus interest, but no means of realising it without an application to and an order of the Court. The Claimant and her family are occupying the Property, but not currently paying anything of the interest, much less the capital, of the sum so secured. The Defendant accordingly seeks an order for sale. The Claimant strongly opposes it.

13. The issues for decision seem to me to be the following:

    a. What is the legal nature of the rights to which the Defendant bank has been held entitled, what priority do they have, and what are the remedies available in respect of them?
    b. If sale of the Property is in principle possible, what legal regime (if any) is applicable to an application for such sale?
    c. If sale of the Property is possible, should the court accede to the Defendant's application for an order for sale of the Property?

14. As to the first issue, the Court of Appeal declared that the Defendant

    > "is entitled to be subrogated to an equitable charge by way of an unpaid vendor's lien over [the Property], pursuant to which (in the event of a sale of the Property pursuant to the counterclaim) from the net proceeds of sale of the Property, there shall first be paid to the Appellant £875,000 plus interest thereon".

    The Defendant argues that it is entitled in equity to the same security rights as the holder of an unpaid vendor's lien would have. It says this is an equitable charge, as the Court of Appeal said. The Claimant does not challenge this analysis.

The unpaid vendor's lien

15. An unpaid vendor's lien arises both at law and in equity as soon as a contract for the sale of land is made. The equitable lien (which is the more extensive) survives both completion and the vendor's giving up of possession, to the extent that purchase money remains outstanding, despite any receipt clause in the conveyance. It is excluded only so far as inconsistent with the terms of the contract or the nature of the transaction: see *Barclays Bank plc v Estates & Commercial Ltd* [1997] 1 WLR 415, 419-20, per Millett LJ, relied on by Floyd LJ in the Court of Appeal in the present case.

Nature

16. The nature of this equitable lien has been described as "in effect, an equitable charge" (*Halifax plc v Omar* [2002] 2 P&CR 26, [61], per Jonathan Parker LJ). I note that in *Re Stucley* [1906] 1 Ch 67, where the Court of Appeal held that the unpaid vendor's lien applied to personalty as to realty, Cozens-Hardy LJ made the same point at greater length when he said (at 83):

> "Now, it is quite settled that a vendor's lien is not a mere personal equity, and that it really creates a charge upon and an interest in the property sold, in the same manner as if that charge had been created by writing."

In the Supreme Court in the present case Lord Clarke simply said that the Defendant was "entitled to a lien on the property, which is in principle an equitable interest which it can enforce by sale" (at [49]).

17. But there is at least one odd feature of this kind of lien or charge. Normally, a lienee or chargee is interested only to the level of the debt secured by the lien or charge. So if the security were sold by the creditor (*eg* under an order of the court) for more than the debt, the creditor would have to account for the surplus to the debtor. But where an unpaid vendor sells the property, a second time, for more than on the first sale, he has no obligation to account to the defaulting first purchaser for the excess: see *Ex parte Hunter* (1801) 6 Ves Jun 94, 97, per Lord Eldon. So, as Lord Eldon says in that case, "it is not in the nature of a mortgage".

18. On the other hand, on the facts of this case, the Defendant is not *actually* an unpaid vendor. Instead, it is *subrogated* to the rights of the vendor who sold the Property to the Claimant, and who was paid using £875,000 of the Defendant's funds. So the subrogation to the vendor's lien is only to the extent of £875,000 (plus interest). Beyond that, the Defendant has no rights in the Property. If therefore the Property were indeed ordered to be sold, and sold now for *more* than the amount secured, a question would arise as to whether the Defendant had to account to anyone for the surplus, and, if so, to whom. But that can be left for an occasion when (if ever) it does arise.

Priorities

19. More conventionally, it is clear that the vendor's lien is a proprietary interest in the land affected. It is good against successive owners of the land and every interest in it (including a legal estate in the land), unless and until it reaches the hands of one who, by reference to the relevant priorities rule, takes free of it (or at least in priority to it): see *eg Mackreth v Symmons* (1808) 15 Ves 329, 349-50, per Lord Eldon. A devisee of the land takes subject to it: *Re Birmingham* [1959] Ch 523. It was held to be an overriding interest in land for the purposes of the Land Registration Act 1925, though (where the land was bought by a company) not a registrable charge under the Companies Acts because it was not "created" by the company: see *London & Cheshire Insurance Co Ltd v Lapgrene Property Co Ltd* [1971] Ch 499.

20. During the argument, Mr Warwick QC made oral submissions to me as to how far the Claimant and her siblings (as co-beneficiaries under the trust recognised by Lord Clarke in his judgment at [4] and [20]) were bound by the vendor's lien, and therefore by the Defendant bank's rights. At first he accepted that the lien bound the whole

legal title to the Property (held by the Claimant), and the Claimant's equitable interest under the trust, but *not* the interests of the other two beneficiaries. He then resiled partly from that, arguing that only the legal estate was bound, and that *none* of the beneficiaries' interests was. Finally he accepted that the beneficial as well as legal interests in the Property were all bound, though the beneficiaries (and in particular the Claimant's minor sister Ella-Mae) could still rely on factors that went to discretion in deciding whether or not to make an order for sale.

21. In my judgment Mr Warwick QC was right to concede this point. The unpaid vendor's lien has priority over whatever it is that the vendor sells and transfers. It "comes off the top", so to speak. What the purchaser/transferee receives is whatever is left. It is as if the vendor is selling the freehold out of which a leasehold has already been granted. The purchaser simply never gets that. As Mr Polli put it, the purchaser takes only that which, if the lien were a mortgage, would be the equity of redemption. What is made subject to the trust is only whatever the Claimant receives. The other beneficiaries can have no claim under the trust to rights which their trustee has never acquired. So the unpaid vendor may exercise his rights even in priority to the interests of the beneficiaries, as well as in priority to those of their trustee.

Remedies

22. I turn now to the question of remedies. According to the authorities, the unpaid vendor has a number of possibilities open to him. These include damages, rescission, retaking possession, the appointment of a receiver, and sale. Not all of these could apply in the present case. Even though the Claimant was made the contractual party to purchase the Property, the Claimant had no contractual relation with, and accordingly has no personal contractual liability to, the Defendant bank. Her parents, who *were* contractually bound to the Bank, have been discharged from their personal debt liability by their subsequent bankruptcy (December 2011-December 2012). Here the Defendant bank, standing in the shoes of the unpaid vendor, wishes to sell the Property, rather than to obtain any other remedy. It appears that it is not entitled to sell as of right, but must first obtain the sanction of the court: see *eg Williams on Vendor and Purchaser*, 4th ed 1936 by Williams and Lightwood, 63. In any event such a sale is opposed and the Claimant and her family will not willingly give up possession for that purpose. Hence this application.

Ordering a sale of the Property: the legal regime

23. The question therefore arises as to the legal regime (if any) to be applied by the court in considering whether to order such a sale. Candidates debated in the argument before me include the Law of Property Act 1925, Part III, the Administration of Justice Act 1970, s 36, the Trusts of Land and Appointment of Trustees Act 1996, s 14, CPR rule 73.10C and 73PD4, and the Human Rights Act 1998, or some combination of these.

24. As appears from what I have already said, an unpaid vendor's lien is an equitable charge, created by operation of law but having the force of one created consensually by writing, to secure the payment of the purchase price. It therefore falls within the definition of 'mortgage' for the purposes of the Law of Property Act 1925, s 205 of which defines 'mortgage' to include 'any charge or lien on any property for securing

money or money's worth'. The fact that, as Lord Eldon observed, it has characteristics meaning that it does not have the *nature* of a mortgage in the traditional sense does not matter. This means that the power to realise equitable charges contained in s 90 of the 1925 Act applies to this case. That includes power to appoint a person to convey the land and vest a term of years in the 'mortgagee' to enable him to carry out the sale, as is commonly done in the case of enforcing charging orders.

25. Similarly, by the Administration of Justice Act 1970, s 39(1), "'mortgage' includes a charge". Hence an unpaid vendor's lien could be a mortgage within s 36 of that Act, which confers certain powers on the court to stay proceedings or postpone the giving up of possession of a dwelling-house in certain circumstances. But that section only applies where the 'mortgagee' "brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made". This is aimed at conventional legal mortgages, in which the mortgagee already has the right to sell the property without the need to go to court, and is entitled to claim possession at any time, or at any rate at least once a default has been committed. As Mr Warwick QC cogently pointed out, in the present case the Bank primarily seeks an order for sale. An order for possession is only secondary, as part and parcel of the order for sale. That is not what s 36 is about. In my judgment s 36 does not apply to this case.

26. The Trusts of Land and Appointment of Trustees Act 1996, s 14, confers power on the court to make orders, including orders for sale, in relation to land subject to trusts of land. Under s 14(1), such orders may be sought by a trustee of land or a person "who has an interest in property subject to a trust of land". The Bank is not a trustee of any of the land comprised in the Property. So the question is whether it has "an interest in property subject to a trust of land". As it happens, and as set out in paragraph 4 of Lord Clarke's judgment in the Supreme Court, it appears that the Property *is* subject to a trust of land, of which the Claimant is currently the sole trustee. But, as I made clear earlier, the unpaid vendor's lien is created and subsists in the property *before* it is subjected to the trust. Accordingly, the Claimant in this case

> "takes only that which, if the lien were a mortgage, would be the equity of redemption. What is made subject to the trust is only whatever the Claimant receives."

27. Mr Warwick QC argued that I should not give the statutory phrase "interest in property" a narrow meaning, but a wide one. But in this case it is purely fortuitous for the Claimant and her family that she is holding the Property on a trust of land for herself and her siblings. If it had been a beneficial gift to her alone there would have been no trust, and the argument now made could not have been run. The meaning of "interest in property subject to a trust of land" cannot vary according as the acquirer is or is not a trustee of land for the benefit of others. That would be simply capricious. In my judgment the unpaid vendor's lien to which the Bank is subrogated is not an interest in any property which is subject to a trust of land, and accordingly the 1996 Act regime does not apply.

28. CPR rule 73.10C and PD73 para 4 deal with claims (to be made under CPR Part 8) for an order for sale of property subject to a charging order to enforce the charging order. An unpaid vendor's lien is not a charging order, because it arises by operation of law

rather than the order of the court, and because it secures the payment of an agreed price rather than the amount of a unilaterally imposed judgment on property. So those provisions cannot apply in terms to an unpaid vendor's lien. Some of the information required to be supplied under PD73 para 4.3 on a claim for an order for sale, for example details of the debtor's title to the asset, is unnecessary or inappropriate in the case of an unpaid vendor's lien. Nevertheless it makes good sense to supply the rest so far as available to the creditor, because it will probably be relevant to the exercise of the court's discretion.

29. The Human Rights Act 1998 gives direct effect in English law to certain provisions of the European Convention on Human Rights. It does this by enacting rights equivalent to those in the Convention provisions, subject to the limitations set out in the Act. Because these new rights are rights in domestic law they are justiciable in English courts. Relevant rights are those arising under Art 8 (right to respect for private and family life and the home) and Art 1 of Protocol 1 (right to peaceful enjoyment of possessions). In a private sector landlord and tenant case, it is clear that, "at least where … there are legislative provisions which the democratically elected legislature has decided properly balance the competing interests" of the parties, "it is not open to the tenant to contend that article 8 could justify a different order from that which is mandated by the contractual relationship between" them: *McDonald v McDonald* [2016] 3 WLR 45, [40]; see also *Barclays Bank plc v Alcorn* [2002] EWCA Civ 817, [8]-[10].

30. Mr Warwick QC argued that, although in that case the judge could not be required to consider the proportionality of ordering the defendant to give up possession of his home in such circumstances, this case was different. I agree with him to this extent: this is a private sector case, and moreover one not involving landlord and tenant, and regulated only by the caselaw and s 90 of the Law of Property Act 1925. Nevertheless, it is hard to think that a different conclusion could be come to if the issue arose between the vendor and purchaser of land used as a home if the purchaser having completed the purchase and paid the purchase price found he could not obtain possession from the vendor who relied on Article 8 to retain it.

31. It is true that Parliament has not legislated to balance the competing rights of the parties in that case, but the parties have used the common law and their agreement to determine what should happen. The absence of parliamentary intervention in the parties' contractual arrangements for sale and purchase, when it has intervened so willingly, so much and so often when it is a question of landlord and tenant, is an indicator that Parliament was content with the common law position. If that is so, I do not see why it should be different in the converse case where the unpaid vendor gives up possession to the purchaser and, unpaid, later relies on his lien to get it back again. The lien, though imposed by law, directly flows from the contract made by the parties, and is certainly in the contemplation of them or at least their lawyers. Here the Bank is subrogated to the rights of such an unpaid vendor and to that extent must therefore be in the same position.

32. But in any event the right under Art 8 is the right of a person "to *respect for* his private and family life, his home and his correspondence" (emphasis supplied). It is plainly not absolute. And interference with this right may be justified as being "in accordance with the law and necessary in a democratic society … for the protection of

the rights … of others". The English caselaw on the existence and exercise of the lien has been settled for more than a hundred years. It is not shifting or uncertain. The lien is imposed as the simplest and most efficient way to protect the rights of the vendor, and responds to the most basic of a layman's morality: if you buy something in the market, but do not pay the price that you agreed to, you cannot expect to retain it. Moreover, the 'home' acquired by the purchase of the Property is in fact a flawed asset, because it is always subject to the lien. In my judgment you cannot acquire a home of certain legal dimensions, and then rely unilaterally on Art 8 to expand them. The cases show that rights of possession arising from express grants of tenancies and mortgages are not incompatible with Art 8. Notwithstanding the lack of parliamentary intervention, I see no reason here to suppose that the remedy of an order for sale to vindicate an unpaid vendor's lien arising on a consensual purchase is so incompatible either.

33. As it seems to me, with the exception of s 90 of the 1925 Act, there is no legislative code in point in relation to the lien. Yet the remedies available to the unpaid vendor in right of the lien, being essentially at the discretion of the court, will not be awarded unless the court considers it just to do so. It is an equitable remedy. And, in so considering, the court will take into account all the relevant circumstances of the case. That will take into account practically everything that any of the statutory regimes might have required to be taken into account anyway. I therefore turn to consider those circumstances.

Ordering a sale of the Property: discretion

34. The Claimant and her parents are not personally liable for the sums secured on the Property by the lien. The Claimant is not liable because she never accepted liability for the debt to the Bank. The parents are not liable because, although they borrowed the money (and spent it), they have been through the bankruptcy process and their debts have been discharged. They all (and the Claimant's siblings) are able to enjoy the benefit of living in the property without paying a penny. As I have already said, they have not in fact paid anything towards the interest accruing on the capital sum.

35. At the end of the hearing I raised with Mr Warwick QC the question of possible payment of the interest by his client. After taking instructions, he told me in an email of 3 August 2016 that he calculated the amount of continuing interest as about £3855 per calendar month, but that his client, even with assistance from her family, was unable to offer to pay that sum. However, but without prejudice to his other submissions, she was in a position to offer £2000 per month, "in return for a sale of the Property being deferred (or no sale for the time being)".

36. This case undoubtedly presents some particular features. One is that the members of the family who borrowed the funds originally and arranged the purchase of the Property are not its owners, and have no other proprietary right to occupy it, but still live there. Another is that the owner (the Claimant) although technically the purchaser of the Property (apparently for tax planning reasons) did not provide the purchase monies. A third is that the Claimant was not (as the Bank appears to have thought) a nominee for the parents, but a trustee for her two of her siblings, and the Bank was not told this: see Andrew Michaelides' witness statement of 19 April 2016, [13.3]. A fourth is that the minor beneficiary of the trust of land to which (the "equity of

redemption" in) the Property is subject and who has her home there is not, as is commonly the case, the child of the owner but her younger sister. A fifth is that the occupation of the Property by the family was intended to be temporary rather than permanent (see in particular the Claimant's witness statement of 23 July 2011, [4], and the witness statement of Andrew Michaelides of 19 April 2016, [13.2], [17]), and the problem arose within a limited time (about 18 months) of the acquisition. So this is not the case of a problem arising years afterwards, by which time strong roots might have been put down. But none of these particular features seems to me to be of any real importance. Indeed, the last is the only one which in my view has more than minimal weight (and that in favour of, rather than against, sale). More importantly, I must and do take into account the fact that this was purchased as, and is first and foremost, a family home (albeit, according to what the Bank was told by the Menelaou parents, a temporary one), and that all the members of the family oppose the sale desired by the Bank.

37. The evidence before the court of the means of, and resources available to, the Claimant and her family is limited. Mrs Menelaou senior has disclosed some of her recent tax returns, in support of her view that she is unable to secure a home for Ella-Mae. Unfortunately none of Mr Menlaou senior, Max and the Claimant (the three in work) has done likewise. It would have been easy for them to do so. They have deliberately chosen not to. That is their right. But I am entitled to, and do, draw an adverse inference, *ie* that they do have financial resources which could be put towards providing a home for Ella-Mae.

38. In addition, the Bank relies on what it calls "all the trappings of wealth", including three cars, one bearing a personalised number plate. This is rebutted by the Claimant in her witness statement of 19 July 2016, who says that two of the cars are leased. But in any event there is the offer made by the Claimant through Mr Warwick QC to pay £2000 pcm towards the interest on the capital sum. At its lowest it means that the family could afford £2000 pcm for another home. In circumstances where the Claimant has chosen to give me only a partial picture of the family's resources, I very much doubt that this represents the maximum affordable.

39. So far as I know, however, and as was submitted to me, none of the family members currently has alternative accommodation, in the sense of being an owner or even tenant of another residential property, and I proceed on that basis.

40. Together with interest, the amount secured by the lien on the Property as at April 2016 was £1,183.266.15. Mr Warwick QC calculated the accruing interest as £3855 pcm. It must now therefore be more than £1,200,000. No expert valuation evidence having been obtained, the value agreed between the parties (*before* the referendum vote in favour of Brexit) for the purposes of this application is £1,200,000. On this basis there is therefore no equity in the Property. If there is any, it can only be marginal at best. From this point on, more or less, the Bank has no further security in the Property, although of course it has the benefit of the indemnity from Boulters, discussed below.

41. I turn to consider the position of the members of the family. Mr and Mrs Menelaou senior are adults. They or their companies voluntarily borrowed and spent the money

which led to the problem. So far as I am aware, they have no especial needs other than those which any other person has. Mrs Menelaou made a statement in evidence before me, which did not refer to any health or other issues. They are not beneficiaries of the trust of land of (the "equity of redemption" in) the Property. They obviously care and provide for their minor daughter Ella-Mae, whom I shall consider separately, but that is about it. In my judgment they do not weigh much in the balance of the exercise of my discretion. Their eldest (adult) daughter, Daniela, lives elsewhere. I do not need to consider her further. The Claimant and her brother Max are also adults, and are in employment. They live at the Property, though, as I understand it, only intermittently.

42. However, the position of the minor beneficiary, Ella-Mae, must be particularly considered. Her mother's evidence, contained in particular in paragraphs 12, 13 and 17 of her witness statement dated 17 May 2016, is to the effect that Ella-Mae was diagnosed at the age of 6 years with dyslexia, and moved from Duncombe School in Hertford at the age of 9 years to Ralph Saddler Middle School, in order for her to be able to attend Freman College in Buntingford, Hertfordshire. She believes that this school provides the resources and support that Ella-Mae needs, and offers the best opportunities to go on to tertiary education. Ella-Mae is now studying for her GCSE examinations, and is apparently doing well. She has a good network of friends with whom she has been for more than five years. Mrs Menelaou takes her to school every day by car some 10 miles away.

43. Whilst I accept this evidence, it is nevertheless thin. Dyslexia varies in severity, but there is no medical evidence at all about Ella-Mae's case even at the age of 6, let alone anything about the up to date position. There is no suggestion in the evidence that any of the schools that she has attended has particular or special attributes for pupils who have dyslexia. Nor is there any evidence of exactly what are the resources and support that Ella-Mae needs, and why no other school is able to provide them. Nor is there any evidence of Ella-Mae's academic attainments to date such as to provide support for a belief that she is likely to go on to tertiary education. A network of friends is a good thing, and if it were necessary for Ella-Mae to move schools she would probably lose some, maybe many of these. But families do move house from time to time, and indeed, even if their families do not move, many school students change schools for their A-level courses, so I cannot treat this factor as of particular gravity.

44. Of course it is up to the Claimant what material she chooses to put before the court. But I consider that I am entitled to comment that such evidence on the face of it would have been evidence which the Claimant could have procured and adduced without any difficulty, yet she has not done so. I further consider that this failure considerably weakens the force of the points the Claimant, through her mother, was seeking to make.

45. Moreover there is no evidence to suggest that the family will not be able to find an alternative property to occupy (*eg* by renting) within a reasonable distance of Ella-Mae's present school. If they can do that, there is not then any question of Ella-Mae's having to move schools anyway. The evidence is that Ella-Mae travels 10 miles to school every day. Since Ella-Mae's mother does not have outside employment, and drives her daughter to and from school every day, there is no reason to suppose that they are limited to exactly 10 miles. It could be more. This provides a large catchment

area in which to look. Nor is there any evidence to demonstrate that the Claimant and her brother Max (both adults in work) have to be accommodated in the same residential unit. This further multiplies the possibilities.

46. It is a striking feature of this case that although the Court of Appeal in the present case made its decision (confirmed subsequently by the Supreme Court) that the Bank had a secured interest in the Property as long ago as 3 July 2013, the Claimant and her family appear from the evidence adduced to have made no efforts whatever to identify a suitable alternative property, or to demonstrate that no such property exists. Such evidence could have been provided without much difficulty, one way or the other. I infer that suitable alternatives are likely to exist.

47. I have also to consider the interests of the Bank as a secured creditor. In the present case the security interest is rather particular – an unpaid vendor's lien. As a general proposition, and subject to specific statutory provision, an unpaid vendor should be entitled to come first. But the Bank is only *subrogated* to such a lien. It is not *actually* an unpaid vendor. I consider therefore that I should look at the position of the Bank as a secured lender rather than as an unpaid vendor. In the present case the Bank is being kept out of its money, and is therefore suffering a loss. This is a powerful consideration: *Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 FLR 809, per Peter Gibson LJ. Difficulties in enforcing security for advances made by Banks put up the cost for others and may render banks in general either less willing to lend on favourable terms, or less willing to lend at all. None of this is in the general interest. As I have already held, the Bank's lien has priority to any interest of the Claimant and her siblings. That does not conclude the matter, but it is a further important factor in favour of sale in a case of this kind.

48. On the other hand, the Bank has the benefit of an indemnity from Boulters, the solicitors involved in the conveyancing. This is contained in (i) an agreement entered into during the course of the trial, supplemented by (ii) a letter from Boulters' solicitors to the Bank's solicitors dated 8 August 2012. The agreement accepts that the original charge over the Property is void, and that Boulters are liable to the Bank for the losses which flow from that. The supplemental letter covers the Bank's costs, including in-house legal costs up to a certain level, any costs it might be ordered to pay the Claimant, and any costs the Claimant is ordered to pay it but which for any reason are not recoverable from the Claimant, up to the conclusion of the appeal process. Mr Warwick QC relied on this indemnity as demonstrating that the economic consequences for the Bank in the court's refusing to order a sale at this stage are nil, because its claim is still secured on the Property, it can recover from Boulters any losses over and above the amount secured, and it will not lose the costs.

49. I do not agree. In the first place, the fact that Boulters give an indemnity to the Bank has nothing to do with the counterclaim by the Bank against the Claimant, and everything to do with the fact that Boulters are, or at least may be, in law responsible for the position in which the Bank finds itself. Whatever the Bank lost as against the Claimant was always likely to form the subject-matter of a claim against Boulters. The indemnity is a realistic acknowledgement by Boulters of the probable legal position in the case of such a claim. As against the Claimant, however, it is *res inter alios acta*. Secondly, the position of Boulters is (to the extent of the indemnity given)

in effect that of insurers. Prima facie, therefore, like any insurers, they take over the rights of the Bank against the Claimant, for what that may be worth.

50. Mr Warwick QC also argued that, since the Bank would seek to pass its losses down the line to Boulters, and would not suffer the loss itself, it would be wrong to make an order for sale until Boulters is actually ordered to make good the loss. He said it would otherwise be a case of the tail wagging the dog. This view suffers from the same faults as the one just expressed. The loss in the first instance from non-repayment of the monies advanced to the parents is that of the Bank, not of anyone else who may also be responsible in law. If the Bank has rights against the Claimant, then they can be exercised without first waiting for others to indemnify the Bank.

51. Mr Warwick QC also referred me to a paper by Prof Graham Virgo in the *Legal Studies Research Papers* series for February 2016, and also criticism by Prof Julian Farrand in a bulletin for the looseleaf work *Emmet & Farrand on Title*. In Prof Virgo's paper it is written that

> "*Menelaou* is arguably the worst decision in the history of the Supreme Court…"

Mr Warwick QC argued that the novelty of the Supreme Court's decision in this case, coupled with the academic criticism of it to which he referred me, meant that it was not a sound basis for ordering a sale.

52. I am not sure how serious this argument was meant to be. But there can be no doubt that the decision of the Supreme Court in this case was to remit this case to me to decide whether or not a sale should be ordered on the basis of the unpaid vendor's lien. It is therefore not for me, sitting here, to tell their lordships that, because academic lawyers (even famous ones) have criticised the reasoning of some of them, I should decline to order a sale, or even take that into account as a factor in the exercise of my discretion. Moreover, it is to be noted that the very criticism which Mr Warwick QC referred me to did not say that the *decision* that the Bank should be subrogated to the unpaid vendor's lien was wrong. On the contrary, it criticised some of their lordships' *reasoning* in reaching that decision, whilst pointing out that others of their lordships had reached the same decision on grounds which the academics considered entirely justified. So in my judgment the criticism takes us nowhere in any event.

53. The Claimant seeks either a refusal of an order for sale, or (as a fall-back position) a postponement of sale until Ella-Mae, now aged a few months short of 15 years, "has finished full-time schooling". In my judgment all the major factors in this case point in favour of a sale. The only factor of any real weight against this conclusion is the disruption to the family members and in particular to Ella-Mae of moving their family home. For the reasons which I have given, I consider that this is nothing like as serious as it was painted, and that it is far outweighed by the countervailing factors that the parents voluntarily created this situation by borrowing or causing to be borrowed the money in question, the Bank is being kept out of its money, that its interest takes priority in law over that of the Claimant and her siblings, and that its security is no longer sufficient to cover the mounting interest. As I have already made clear, in my judgment, ECHR Article 8 does not require the application of a

proportionality test in this case any more than in *McDonald*. But, given the strength of the factors in the Bank's favour, and the comparative weakness of those against, if it were necessary for the Bank to pass the test of proportionality in this case, in my judgment it would do so with flying colours.

54. Accordingly I will order a sale of the property. On the evidence before me I am not satisfied that it will be necessary for Ella-Mae to change schools, and therefore the timing of the order does not need to take account of that. As I have already noted, the Claimant and her family have had a considerable time to make alternative arrangements, and I see no need to be particularly tender about when the order should take effect. But it will obviously cause less disruption if the Claimant and her family give up possession during the coming end of year holidays (but certainly before the end of the year), with a view to a sale at about that time, or at the latest very early in the new year. I will therefore make an order pursuant to section 90 of the Law of Property Act 1925, in terms which I will settle if they cannot be agreed between the parties.

Interim charging order

55. A final point arises in relation to the interim charging order over the Property made by me in favour of the Bank on 25 May 2016, in respect of the Claimant's liability to repay the sum of £90,000 to the Bank arising under paragraph 5 of the order of the Court of Appeal dated 4 July 2013. The Bank seeks an order making this charging order final. Mr Warwick QC argues that the order should be discharged without regard to the merits on the grounds that an untrue statement was made by the Bank's solicitors in the application notice. This was to the effect that the Property was believed to be in the occupation of Mr and Mrs Menelaou senior "possibly with one or other family members but it is not known whether they have any interest in the Property".

56. Given the terms of the decision of the Supreme Court, holding that the Property was held on trust for the Claimant, Max and Ella-Mae, this was an obvious error. But I do not consider that it was any more than that. Moreover, in making the interim charging order, I was already aware of the terms of the judgment of the Supreme Court, and accordingly I could not have been misled by the statement. In my judgment this is a very weak point indeed.

57. A further argument made by Mr Warwick QC is that, since the Bank has its indemnity from Boulters, the charging order serves no purpose and should be discharged. In my judgment, this is an equally poor point. If by a court order there is a debt due from the Claimant, the Bank is entitled to execute on that judgment debt in the usual way. The fact that another person may have agreed to indemnify the Bank in respect of the same loss does not take away the Bank's right to seek to execute the judgment. It would be the same if the third party were jointly and severally liable for the same debt. In fact, here the position is a fortiori, as the third party's obligation to indemnify arises from a different source, and there is no joint and several liability with the Claimant.

58. There is however a further point. As I have already said, there may well be no equity left by now in the Property anyway. In an ordinary case, where a judgment creditor had no interest in a property other than in the charging order, as a matter of discretion I might well not make an interim charging order final when there was no equity in the property on which it could bite. But here, if I make a final order, the position is that *the Bank* will take up to the value secured by the lien first, and then up to a further £90,000 if there is any surplus. At present it is uncertain for exactly how much the Property will sell. If the Property does sell for more than the value secured by the lien, I do not see why the Bank should not be repaid the costs ordered by the Court of Appeal out of any surplus proceeds of sale. In my judgment there is no reason here why the interim order should not be made final and accordingly I will do so.