



Neutral Citation Number: [2020] EWHC 141 (Ch)

Case No: CR-2017-006015 and PT-2008-000915

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT LIST

In The Matter Of PINNACLE (ANGELGATE) LIMITED (In Liquidation)
And In The Matter Of THE INSOLVENCY ACT 1986 AND CPR Part 64

Royal Courts of Justice
Rolls Building
Fetter Lane
London, EC4A 1NL
Date: 30/01/2020

Before: INSOLVENCY AND COMPANIES COURT JUDGE JONES

Between :

- (1) DUNCAN KENRIC SWIFT**
(2) NEIL JAMES DINGLEY

(Liquidators of the above-named company)

Applicants

- and -

- (1) ANGELGATE MANCHESTER (BUYERS)**
LIMITED
(2) THE PERSONS LISTED IN THE SCHEDULE
TO THE APPLICATION NOTICES

Respondents

AND

ANGELGATE MANCHESTER (BUYERS)
LIMITED

Applicant

Ms Bridget Williamson (instructed by **Lester Aldridge LLP**) for the **Liquidators**
Mr Gary Blaker Q.C. and Ms Isabel Petrie (instructed by **Addleshaw Goddard**) for the **1st**
Respondent/Applicant

Hearing dates: 21 January 2020

Approved Judgment

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

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I.C.C. JUDGE JONES

I.C.C. Judge Jones:

(A) Introduction – The Applications

1. This is another case where investors who purchased property off-plan have found that the development was not completed, the vendor developer became insolvent and the site has had to be sold at a value far below the amount required to repay their deposits and other payments. It reflects the fact that, even assuming good intentions, construction of residential and/or retail developments is a complicated process needing the original purchase price to be realistic, the proper and economic performance of the building contracts and a total expenditure within the funds available for the project's completion. The recent history of low interest rates makes such enterprises attractive to investors but such investment carries risk.
2. In this case the "Angelgate site" in Manchester ("the Property") was purchased by Pinnacle (Angelgate) Limited (now in liquidation) ("the Company") for £6.2 million plus VAT on 23 January 2015, the Company having entered into a £22.1 million design and build contract with PHD1 Construction Limited on 15 January 2015. The site would be primarily residential. The flats to be built within two tower blocks would be sold on long leases as potential "buy-to let investments" with heavy marketing internationally including Asia and in particular Hong Kong.
3. Investors ("the Purchasers") would be required to pay deposits ("the Deposits") as large as 50-80% of the purchase price. Apparently, the Deposits were essentially the Company's only source of funding for the marketing of the intended flats, the purchase of the Property and the construction of the Development ("the Project"). They were to be paid into an account opened for the First Respondent ("the Trustee") and held by the Trustee as stakeholder subject to rights of use by the Company for the Project. The total sum raised from the Deposits was just over £32 million.
4. Despite such large sums having been paid by the Purchasers, by early 2016 the development, which had started the previous year, was well behind schedule. It never progressed beyond preliminary groundworks but as at 11 February 2019, only just over £2.1m remains from the Deposits ("the Designated Account Sum"). Administrators were appointed over the Company by Court Order on 28 September 2017. After the possibility of a "build out" solution had to be rejected, the Property was sold for some £5.2 m., the reserve price at auction, and this sum is currently held by the Liquidators after deduction of the costs and expenses of sale ("the Net Proceeds of Sale").
5. There can be little doubt that the Purchasers will want to know how this sorry state of play was reached. There may be a logical, economic explanation consistent with the relevant contractual documentation or there may be scope for criticism and even potential litigation against those involved and/or advisers. I note, for example, that the Liquidators are considering the fact that some £13 million was paid in marketing fees apparently to an entity connected to the Company.
6. I refer to this because the Purchasers are international and I do not want it to be thought that this court, whose jurisdiction includes the overall supervision of all insolvencies, is not concerned by the outcome of the Project and the consequences for them.

7. However, those concerns do not fall to be addressed within the issues before me on the current applications. I am only concerned with distribution of the Designated Account Sum and the Net Proceeds of Sale. The Liquidators will be investigating what has occurred in accordance with their statutory duties and in due course will report upon their investigations to creditors accordingly. Whilst the ability of the Liquidators to do so will inevitably be constrained by the need for funding, I am informed that some £200,000 has been made available for that purpose with the agreement of the Trustee. What will result is a matter for further consideration by the Liquidators, the creditors and the Insolvency Service.
8. The applications before me are by the Liquidators seeking directions upon distribution under *section 112 of the Insolvency Act 1986* and by the Trustee asking for guidance upon the distribution of any trust funds pursuant to *Part 64 of the Civil Procedure Rules*.

(B) Overview of the Contractual Arrangements

9. The contractual arrangements involved: (i) standard form agreements for the sale of each flat intended to be built (“the Sale Agreements”); (ii) the grant by the Company by deed to the Trustee of a legal charge over the Property to secure the Company’s obligations under the Sale Agreements and any future additional obligations (“the Charge”); and (iii) a declaration of trust by the Trustee to hold the security created by the Charge and all rights and obligations resulting on trust for the Purchasers in accordance with the terms of the deed (“the Trust”).
10. In principle, those arrangements were intended to meet the following (amongst other) requirements: (i) to ensure that the Deposits could be used for the expenditure required for the Project; (ii) to provide the Purchasers, as a group, with rights in the Property to secure performance of the Sale Agreements; and (iii) to provide for what should happen when the Project was complete or if that stage was not reached.
11. As an overview:
 - 11.1 The Sale Agreements are for the purchase of a long leasehold interest in a flat, identifiable by number but only from plans (subject to a 5% net internal floor area leeway) with an agreed purchase price and a Deposit. There will have been a “Reservation Payment” (which was around £2,000) and may also have been a later “instalment payment” to be added to the Deposit.
 - 11.2 The Sale Agreements provide for the Deposits to be paid to the Trustee and held by it as “*stakeholder*”. They were to be placed in a designated bank account (“the Designated Account”) defined as an “*account in the name of [the Trustee] in the [Trustee’s] solicitors designated client account at the Bank*” (clauses 1.25 and 3.1.1 of the Sales Agreements). The Deposit would be “*held in trust by the Company in accordance with a declaration of trust*”. The solicitor was able to pay from the Designated Account sums required for two categories of payment. In summary:

- a) First the purchase price of the Property including repayment of purchase monies borrowed and professional invoices relevant to “*the exchange of the Agreement that clearly relate to the Estate and its development upon production of invoices Delivered and certified by the Supervisor*” appointed by the Company under the Project’s JCT building contract.
- b) Second, payments incurred in the course of the sale, marketing and construction of the Property as certified by the Supervisor.
- 11.3 The Sale Agreements provide that completion would occur after notice by the Company of the intended issuing date for the Certificate of Practical Completion. In summary, the Property had to be built to a practical completion standard before one could be issued. A building warranty would follow.
- 11.4 The Purchasers had an express right to rescind if completion has not occurred by “*the Long Stop Date*”, 31 May 2017 (Clause 8.6 of the Sale Agreements) Although it may be that a different date appears in different agreements, there is no suggestion that anything turns on that..
- 11.5 If there was termination by a Purchaser under Clause 8.6 of the Sale Agreements, the Company:
- “shall repay to the [Purchaser], the Deposit, Reservation Payment and Instalment payment (if any) including all funds, released out of the Designated Account for and on behalf of the [Purchaser] within 10 Working Days of such date of termination and in the event of the [Company’s] failure to return such funds the [Purchaser] shall be at liberty to pursue the repayment of all funds paid on the part of the [Purchaser] out of the Designated Fund [sic] by way of enforcement of the [Charge]”* (Clause 8.7 of the Sale Agreements)
- 11.6 The Trust provides that the Trustee holds “*the Property charged and the obligations assumed by the Company under [the Charge], the receipts thereof and the rights of [the Trustee]*” on trust for the Purchasers (clause 2.1 and the definition of “*Trust Property*” in clause 1.1 of the Trust).
- 11.7 The Charge recites (amongst other matters):
- “The [Company] has the conduct of developing the Property in the manner referred to in the [Sale] Agreements.*
- With a view to securing the obligations of the [Company] [under the Sale Agreements with the Purchasers] [the Trustee] has been established as nominee of [the Purchasers] who have or will in future contribute towards the cost of the acquisition of the Property and the [works referred to in their Sale Agreements].*
- [It] is intended to secure performance of additional obligations to be entered into in the future by [the Company] with [the Purchasers] as well as those remaining to be performed at the date of this deed”.*
- 11.8 Clause 3 of the Charge provides that it secures:
- a) “*the funds held now or at any time in the future from time to time in the Designated Account pursuant to the [Sale] Agreements*” (clause 3.1.1); and

- b) *“the performance of the Secured Obligations”* (“the Secured Obligations”), defined as *“the obligations on the part of [the Company] incidental to the development and letting of the Property in the manner set out in the [Sale] Agreements”* (clause 3.1.2)

11.9 The Charge also provides that the Designated Account is to be operated in accordance with the Purchase Agreement whilst the Charge is extant (clause 5).

11.10 The Trust requires the Trustee when exercising any discretion to act in accordance with the written instructions of the majority of the Purchasers measured as 50% or more of the aggregate amount of the sums due to each under the Sale Agreements. Agents can be employed in the performance of any of the Trustee’s duties.

11.11 The Trust provides that any sums:

“from time to time received or recovered by the [Trustee] in connection with the realisation or enforcement of all or any part of the [Charge] shall be held by the [Trustee] on trust to apply them at any time the [Trustee] sees fit, to the extent permitted by applicable law, in the following order of priority [sic]:”

- (a) *“first, in or towards payment of or provision for all costs, charges and expenses incurred by or on behalf of the [Trustee] (and any receiver, delegate, attorney or agent appointed by him) including the remuneration of a receiver;”*
- (b) *“secondly, to each [Purchaser] in the proportion which the amounts then due to him or her in respect of the [sum secured by the Charge] bears to the then aggregate amount of such [secured sums];*
- (c) *as to the surplus (if any) to the Company or other person(s) entitled to it”* (Clause 5 of the Trust).

(C) Distribution – General Observations

12. Although stating the obvious, the starting point for a decision upon distribution is to appreciate that the Net Proceeds of Sale are only to be distributed to the Purchasers via the Trustee if the liabilities they are owed by the Company are secured by the Charge.

13. A charge is an appropriation of property to the satisfaction of an obligation without the transfer of title to the chargee. For the purposes of distribution it is necessary to identify from the Charge: the obligations of the Company to be satisfied; the property of the Company appropriated for that purpose; and the amount to be paid to the Purchasers and the balance, if any, to be returned to the Company. The importance of the Charge, therefore, is that the realisations of assets owned by the Company but appropriated as security will fall outside the liquidation. The *Insolvency Act 1986’s* statutory waterfall will not apply to those realisations.

14. Also stating the obvious, only the Property has been charged and, therefore, appropriated. Therefore, distribution of the Designated Account Sum will depend upon the terms upon which the Deposits are held by the Trustee as stakeholder.

15. However, although the two funds are to be viewed separately, Clause 3 of the Charge provides that the Property is continuing security “*for*” the funds currently or at any time in the future, from time to time credited to the Designated Account (see paragraph 11.8(a) above, clause 3.1.1 of the Charge). Whilst the sub-clause does not expressly identify the obligation of the Company to be satisfied by this appropriation of the Property, it is plain that the terms of the Charge need to be borne in mind when considering distribution of the Designated Accounts Sum.

(D) Distribution - Decisions

16. The main questions for the purposes of distribution, therefore, are:
- 16.1 Whether the Net Proceeds of Sale are to be distributed as realisations of the Charge or are realisations of the liquidation to be distributed in accordance with the statutory waterfall?
- 16.2 Whether the Designated Account Sum is to be returned to the Purchasers or is to be distributed in accordance with the statutory waterfall? And
- 16.3 How the sums to be distributed should be shared between the Purchasers?

D1) The Net Proceeds of Sale

17. Clause 8.7 of the Sale Agreements provides that a Purchaser who terminates the Sale Agreement under clause 8.6 because completion of the purchase of the relevant flat has not occurred by 31 May 2017 (or such other date as may be provided) is entitled to be repaid “*the Deposit, Reservation Payment and Instalment payment (if any)*”. The Deposit is repayable in full whether it remains credited to the Designated Account or not. The Company has 10 working days to repay the debt. If not, clause 8.7 provides that the Purchaser can pursue repayment by enforcement of the Charge.
18. There is no doubt that Clause 8.7 has been activated. Whilst clause 8.6 refers to termination by the Purchaser, it cannot be argued in respect of any Purchaser that this has not occurred when the Property has been sold before completion of the Project as described above. It is also to be noted in any event that written notice of termination may be given at any time after 31 May 2017 (or other relevant date) provided practical completion does not occur. Termination by notice will be deemed insofar as it has not actually occurred.
19. There is also no doubt that the Net Proceeds of Sale will be distributed to the Purchasers if the Charge secures the liability arising under clause 8.7 of the Sale Agreements. It is necessary to turn to clause 3 of the Charge.
20. Sub-clause 3.1.1 of the Charge secures the Property “*for*” the funds currently or at any time in the future, from time to time credited to the Designated Account (see paragraph 11.8(a) above). As stated, this does not expressly identify the obligation of the Company to be satisfied by the appropriation of the Property. It is certainly (at least)

arguable, applying standard principles of construction, that this refers to any obligation to repay those funds. However, the position is resolved in any event by sub-clause 3.1.2.

21. By sub-clause 3.1.2, the Charge secures the Property to satisfy the Secured Obligations, namely “*the obligations on the part of [the Company] incidental to the development and letting of the Property in the manner set out in the [Sale] Agreements*” (see paragraph 11.8 (b) above). These need to be identified.
22. Before doing so, it is probably worth remembering that the word “*incidental*” means something that occurs or is liable to occur in conjunction with something else. It is also worth noting that Lord Justice Atkin in *National Provincial and Union Bank of England v Charnley* [1924] K.B. 431 at 449 whilst considering it unnecessary to give a formal definition of a charge, explained that there is a charge “*where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt*”.
23. The Secured Obligations include the obligations under Clause 8.7 of the Sale Agreements), which arise in the event of rescission under Clause 8.6 of the Sale Agreements if completion has not occurred by 31 May 2017 (see paragraphs 11.4 – 11.5 and 13 above). That is because the Company’s obligation to repay the Purchaser “*the Deposit, Reservation Payment and Instalment payment (if any)*” is “*incidental to the development and letting of the Property*”. This obligation is a debt subject to the security of the Charge.
24. It follows that the Net Proceeds of Sale are realisations secured by the Charge. As a result, they are to be paid to the Trustee, the chargee. They are or will be amounts “*from time to time received or recovered by the [Trustee] in connection with the realisation or enforcement of all or any part of the [Charge]*” (see paragraph 11.11 above). Therefore, they are subject to and must be applied in accordance with Clause 5 of the Trust. That means their distribution must be proportionate after payment of the costs charges and expenses as provided for in Clause 5.

D2) The Designated Account Sum

25. The Deposits were paid to the Trustee as stakeholder to be held in the Designated Account in accordance with the terms of the Trust (see paragraph 11.2 above).
26. The Company nevertheless had rights to use those credited funds. First, in accordance with the permitted expenditure for the Project (see paragraph 11.2 above) and second, as payment towards the completion price assuming completion occurred when the Designated Account was in credit.
27. Those rights ended when the Sale Agreements terminated under clause 8.6. As a result, the sums then credited to the Designated Account were held in accordance with clause 5 of the Trust (see paragraph 11.11 above).
28. It is, of course, the case that the description of “*stakeholder*” normally means that a contractual or quasi-contractual relationship has been created under which the deposit should be paid to the vendor on completion or forfeiture or returned to the purchaser in

the event of the vendor failing to complete. However, the Purchasers have entered into Sale Agreements which result in the Deposits being used as a common fund for the purposes of the Project and within that context have agreed that the Deposits credited to the Designated Account are held by the Trustee in accordance with the terms of the Trust (see paragraph 11.2 above). They have not agreed that each Deposit will be held on trust for the respective Purchaser.

29. Clause 5 is to be construed as applying because the Designated Account Sum is now recovered in connection with the enforcement of the Company's obligation to repay the Deposit, Reservation Payment and Instalment payment (if any). Distribution must be proportionate after payment of the costs charges and expenses as provided for in Clause 5.

(D) For Completeness

30. The nature of the two applications before me meant that the Liquidators, through Ms Williamson, took a neutral stance but sought to assist the outcome by raising matters they considered arguable for the purposes of the decision.

31. I consider the outcome to be sufficiently clear to make it unnecessary for me to deal in any detail with alternative arguments. However, for completeness I note the following:

23.1 This decision has taken into consideration all three primary documents. I have applied the principles of construction laid down by the Supreme Court in *Arnold v Britton and others* [2015] UKSC 36, [2015] A.C. 1619 and in particular, paragraphs [15-23].

23.2 The decision is entirely consistent with the concept of the Designated Account being used as a "common pot" to ensure completion of the Project and receipt by all Purchasers of the opportunity to complete the purchase of the flats. Whether that means the Project was marketed as and/or was otherwise a collective investment scheme is not an issue before me. It may be a matter of interest for the Financial Conduct Authority, however.

23.3 It makes no practical difference that the Deposits were in fact wrongly held by the Trustee's solicitors in their general account without allocation to a designated client account. Fortunately, the Deposits have been traced.

23.4 The separate argument that the security provided by the Charge ended when the funds were released for payment of Project expenditure is unsustainable as a matter of construction.

23.5 There is no need to address the concept of an equitable lien because the parties have agreed to the Charge.

23.6 There is no room for the application of the "first in, first out" rule in "*Clayton's Case*". The Designated Account Sum is to be held by the Trustee and distributed in accordance with clause 5 of the Trust.

32. Mr Blaker Q.C. and Ms Petrie for the Trustee submitted that the Charge should be construed far more widely and apply to the performance of the Company's obligations under the Sale Agreements to build and complete the Project. I had difficulties with their submissions but a wider construction is not required for the purpose of these applications and my decision. I need say no more.
33. Ms Williamson observed for the first time, as I understand it, in her skeleton argument and during the hearing that a distinction might be drawn between those Purchasers who entered into Sale Agreements before and after October 2015. From that date it appears the Company knew the Development was underfunded by about £10m. It was suggested that those Purchasers may have additional rights entitling them to priority of payment, including as a result of the existence of resulting, purpose and/or constructive trusts. It was made clear that the Liquidators suggest not, however, based upon the available evidence.
34. As to that proposition, I have not heard any argument undermining my decision that the Net Proceeds of Sale are to be distributed as realisations of the Charge or that they and/or the Designate Account Sum are not held in accordance with clause 5 of the Trust. As a matter of caution, however, I am willing, if required, to make an order for distribution by the Trustee or its agent to the effect that any Purchaser who wishes to make a separate claim should do so by a specified date after which distribution will occur in accordance with Clause 5 of the Trust subject, at the Trustee's discretion, to any such claim.
35. As a final matter of "completeness" I should mention that the distributions will leave the Purchasers with claims for the balances of the sums they are owed. They can prove for those debts in the Company's liquidation if there are realisations available to pay unsecured creditors. The potential absence of any such realisations may be a reason for the Liquidators being funded to continue their investigations and to pay for consequential claims.

(E) The Liquidators' Costs and Expenses and Other Issues

36. The fact that the Net Proceeds of Sale are realisations of the Charge and the Designated Account Sum is held upon the terms of the Trust for the Purchasers means they will not be available under the terms of *the Insolvency Act 1986's* statutory waterfall to pay the Liquidators' costs and expenses dealing with them.
37. However, it obviously would not be right on the facts of this case to leave the Liquidators without recourse. A "Berkeley Applegate Order" should be made in the normal terms (see *Re Berkeley Applegate (Investment Consultants) Limited (No1)* [1989] CH 32). There may be issues concerning what can be recovered under such an order but that will be for the Trustee and the Liquidators to address. They may return for further directions should dispute remain.
38. There is also a practical issue as to whether the Trustee will retain the Liquidators or others as agent to distribute. I observe that I will not permit the funds to be dealt with by anyone other than the Liquidators (including the Trustee itself) without being satisfied that the person concerned is trustworthy and appropriate. This is a general

statement without suggesting that I have formed any adverse view of the Trustee or any proposed agent. It is simply that large sums are concerned (albeit far smaller than the Purchasers would have hoped) and they must be protected. This also does not mean the Liquidators must be used if there are suitable alternatives. I have heard from the parties on this point and their current approach is sensible both with regard to the type of person who might be retained and the need to consider reasonableness of cost.

39. Finally, I should record that I have reached this decision without the attendance or representation of any of the Purchasers, although some have representatives in court with “noting briefs”. They have all been served and I conclude that it is right to proceed as I have. There has been no requirement for creditors of the Company to attend or be represented other than to the extent that the Liquidators appear and are represented.

(F) Conclusion

40. For the reasons above, I have decided that the obligations under clause 8.7 of the Sale Agreements are secured by the Charge. The Net Proceeds of Sale are to be applied by the Trustee in accordance with Clause 5 of the Trust. The Designated Account Sum is also subject to that provision on the basis of the terms of the Sale Agreements. For that purpose, the Trustee may ask for an order in the form identified in paragraph 34 above. There will be a “Berkeley Applegate Order” in favour of the Liquidators in the usual terms.

Order Accordingly