Neutral Citation Number: [2022] EWHC 763 (Ch)

Case No: CR-2021-MAN-000041

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

In the Matter of Sky Apartments 2018 Limited (in administration)
And in the Matter of the Insolvency Act 1986

Date: 1 April 2022

Before :

HHJ HALLIWELL SITTING AS A JUDGE OF THE HIGH COURT

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Between :

James Fish and Craig Johns (as joint administrators of Sky Apartments 2018 Limited) **Claimants**

- and -

(1) Sky Apartments 2018 Limited (in administration)
(2) Terence Patrick Riley
(3) The Investors in Jubilee Baths Brunswick Street, Newcastle under Lyme (listed in Schedule 1 to the Court order dated 14 October 2021) **Defendants**

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Ms Claire Bunbury and Mr Richard Moore (instructed by **Farleys LLP**) for the **Administrators**
Mr Steven Fennell (instructed by **Contract Law Chambers Limited**) for the **investors identified in the schedule to the witness statement of Helen Swaffield dated 11 October 2021**
Ms Emma Read (instructed under the Public Access Scheme) for **Ayaz Abid** and **Tabasum Naz Kushi**

Hearing date: 4 March 2022

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APPROVED JUDGMENT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The time and date for hand-down is deemed to be 2pm on 1 April 2022.

His Honour Judge Halliwell:

(1) Introduction

1. This application arises from a transaction in May 2018 under which Sky Building Limited ("**Sky 1**") transferred to Sky Apartments 2018 Limited ("**Sky 2**") its registered title to a development site ("**the Property**") at Jubilee Baths, Brunswick Street, Newcastle-under-Lyme, SF543525. The development comprised partially constructed student accommodation. However, the transaction took effect subject to the rights of investors who had purchased units off plan, at least to the extent such rights were properly secured.

2. On 14 October 2021, I made an order ("**the October Order**"), under *Paragraph 71(1)* of *Schedule B1* to the *Insolvency Act 1986*, authorising the administrators ("**the Administrators**") of Sky 2 to dispose of the Property subject to registered leases but free from the secured rights of the investors who held equitable liens. The October Order was made on condition that, after the deduction of defined costs, charges and expenses, the net proceeds would be applied, in priority, towards the amounts originally secured.

3. Under *Paragraph 63* of *Schedule B1*, the Administrators now seek an order determining the class or classes of investor entitled to share in the net proceeds of sale as holders of an equitable lien. This is a contentious issue since some investors maintain they are entitled to share by virtue of rights acquired prior to registration of Sky 2's title notwithstanding that such rights were not protected by registration at that time under *Section 29* of the *Land Registration Act 2002*. Prior to the hearing, the Administrators obtained an Opinion from Mr Richard Moore, of counsel, concluding that Sky 2 took free of the rights of these investors. The Administrators did not assert privilege and the Opinion was circulated.

4. The hearing before me was conducted remotely. Ms Claire Bunbury, of counsel, and Mr Moore appeared on behalf of the Administrators with Ms Bunbury dealing with the issues of insolvency and Mr Moore dealing with the property law issues. Mr Steven Fennell, of counsel, appeared on behalf of some of the investors un-protected by registration. Ms Emma Read, of counsel, appeared on behalf of two investors, Ayaz Abid and Tabasum Naz Khushi, on whose behalf notices had been registered to protect their interests before the title was transferred to Sky 2. Some investors attended the remote hearing but declined to take the opportunity to make submissions when invited to do so.

(2) Background

5. Sky 1 was formed in February 2015 as a SPV for the acquisition and development of the Property. As envisaged, it acquired the Property, commenced the development and marketed units for sale off plan. Some investors were granted leases and others entered into agreements for lease which were noted on the registered title or protected by unilateral notice. Some investors contracted to purchase an interest but failed to take steps to register their rights.

6. Significant parts of the factual background are obscure. However, Sky 1 was formed by a property developer, Mr Kerry Tomlinson, who accumulated substantial debts to a business acquaintance, Mr Terry Riley, and companies under Mr Riley's control. On 23 May 2018, Mr Tomlinson entered into a deed with Mr Riley, denoted as a Deed of Consolidation of Borrowings ("**the DOC**"). In addition to Mr Tomlinson and Mr Riley, there were some fifteen other parties to the DOC, including companies under their respective control.

7. In the DOC, it was recorded that Mr Tomlinson and his companies had failed to provide Mr Riley with adequate security for their indebtedness and the parties intended to enter into transactions with a view to reducing the debt whilst providing Mr Tomlinson with a mechanism for his companies to continue to trade. As part of the arrangements, it was recorded that Sky 1 had agreed to sell the Property to Sky 2, recently formed by Mr Riley himself, "at market value upon a valuation from Keppie Massie" and that Sky 2 had "agreed to grant a Call Option…to [Sky 1] to permit [Sky 1] to buy back the …Property…"

8. By Clause 5.1 of the DOC, it was provided that Mr and Mrs Tomlinson and their companies would make three repayments, amounting altogether to £3,000,000, "… and in security for the outstanding balance of the Tomlinson Debt … grant a charge over some shares "and transfer the…Property to [Sky 2] for market value less £650,000". The sum of £650,000 was apparently deducted on the basis that Mr Riley undertook, under Clause 5.2.1, to redeem a third party charge by paying the sum of £650,000 to another company, Lendy Limited. Any Stamp Duty Land Tax paid by Mr Riley or his companies in connection with the acquisition of the Property was to be added to the Tomlinson Debt and repaid to Mr Riley or his companies by 10 July 2018 under the provisions of Clause 5.4.

9. The market value of the Property was not quantified or otherwise defined in the DOC. However, a valuation report dated 3rd July 2017 was admitted before me in evidence. This was addressed to Lendy Limited when considering whether the Property would provide sufficient security for the third party charge and was no doubt available to Mr Tomlinson

and Mr Riley when they entered into the DOC. In this report, the Property was valued at £3,100,000. When subject to a restricted sale period of 180 days, it was valued at £2,800,000.

10. On the day the parties all entered into the DOC, Sky 1 and Sky 2 entered into a registered transfer ("**the Transfer**") under which Sky 1 transferred the Property to Sky 2. Under the heading "Consideration", a box was ticked indicating that "the transferor has received from the transferee for the [P]roperty the following sum…£2,500,000". There was no other reference in the Transfer to the contractual consideration.

11. Amongst the documentation exhibited before me, there was an un-signed HMRC Land Transaction Return identifying a transaction dated 10 May 2018 for the sale of the Property at a consideration of £2,500,000. The identified purchaser was "Ascot – SPV". This is likely to have been a reference to Ascot Waterloo Limited, Ascot Properties UK Limited – each of which were parties to the DOC - or an associate company under the control of Mr Riley. It was recorded in the Return that the total amount of tax payable was £114,500 and this amount was notified to HMRC.

12. On the balance of probability, the sum of £114,500 was paid to HMRC. There is certainly nothing to suggest otherwise and, before me, the parties were content to assume that it was paid. Mr Fennell submitted it can be taken to have been paid by one of the Ascot companies, not Sky 2.

13. More significantly, however, Mr Fennell submitted that, in the absence of evidence that Sky 2 or, indeed, any other company paid any part of purchase price to Sky 1, it can reasonably be assumed that no such payment was made notwithstanding the acknowledgment of receipt in the Transfer itself. There is no documentation – contemporaneous or otherwise – to suggest that such a payment was made. The Administrators themselves have not seen any such evidence in Sky 2's accounting records. Conversely, it was not suggested to me that Sky 1 has ever submitted a proof for the purchase price.

14. However, Lendy Limited's charge was redeemed from funds introduced on behalf of Mr Riley.

15. On 19 October 2018, Sky 1 charged the Property to Mr Riley to secure its accumulated indebtedness in the sum of £2,700,000. This encompassed a fixed charge over the Property

and a floating charge over its assets and undertaking. The instrument was registered at Companies House. It was also registered at HM Land Registry.

16. By a letter dated 12 August 2020, Sky 2's solicitors served notice ("**the Section 5 Notices**") on at least some of the investors of a disposal of the Property for a consideration of £2,747,000. The Section 5 Notices were served or purportedly served under Section 5 of the *Landlord and Tenant Act 1987*. In Paragraph 4, it was recorded that the "proposed disposal will be made subject to the leases, tenancy agreements occupancies and other interests affecting the Property that exist at the date of the proposed disposal. The details of the leases, tenancy agreements, occupancies and other interests that subsist as at the date of this notice are as follows;

    - All the leases referred to in the schedule of leases on title number SF543525
    - All the completed but unregistered leases
    - All the agreement for leases"

17. There were no further details of the disposal in the Section 5 Notices and there is no explanatory evidence. If intended to refer to a future transaction, no such transaction was implemented.

18. On 13 November 2020, ICC Judge Jones made an administration order in respect of Sky 1 but, on 20 November 2020, declined to make an order authorising disposal of the Property free from security under *Paragraph 71* of *Schedule B1* to the *1986 Act*, *Sky Building Limited v HMRC [2020] EWHC 3139 (Ch).* By that stage, Sky 1 had already disposed of its interest but it can be seen, from the judgment at [2], that Sky 1 considered it could achieve the re-transfer of its interest once placed in administration.

19. On 5 February 2021, Snowden J made an administration order in respect of Sky 2. The Administrators marketed the Property for sale. Consistently with the advice of their professional valuers, they concluded that the best offer – submitted by Built4Learning Limited ("**Built4Learning**") – was in the sum of £2,150,000 for the purchase of the Property subject to existing registered leases but otherwise free from the interests of other investors and unit purchasers. The Administrators were professionally advised that this offer achieved market value. Built4Learning was owned beneficially by Mr Riley who offered to waive his security if the transaction proceeded.

20. By the October Order, I authorised the Administrators to sell the Property to Built4Learning on this basis at a purchase price of £2,150,000. It was expressly provided that the Property would be sold subject to the registered leases but free from the interests of those investors who held equitable liens having entered into agreements for a lease, whether or not the subject of a unilateral or agreed notice entered against the charges register for the Property or the subject to any pending application for entry of such a notice at HM Land Registry. This was on condition that Mr Riley would release his security so that the net proceeds of sale were distributable to the Company's creditors.

21. Pursuant to the October Order, the Property was sold. On this basis, the October Order provided as follows.

> "The net proceeds of sale … (being the proceeds of sale after the deduction of all proper costs, charges and expenses reasonably incurred in the preservation and realisation of the property as an asset of the administration) shall be applied towards discharging the sums secured, in order of the priorities of the securities, which for the avoidance of doubt shall not include a payment to [Mr Riley, Mr Riley] having agreed to waive the security (if any) secured by the legal charge dated 19 October 2018 in respect of the debt (if any) due to him from [Sky2]".

22. The October Order also contained directions providing for determination of the issue as to how the net proceeds are to be applied or distributed. This is now the issue for determination.

(3) ***Legal principles***

23. The statutory scheme in *Paragraph 71(1)-(4)* of *Schedule B1* to the *1986 Act* is as follows.

> 71 (1) The Court may by order enable the administrator of a company to dispose of property which is subject to security (other than a floating charge) as if it were not subject to that security.
>
> (2) An order under sub-paragraph (1) may be made only –
>
> (a) on the application of the administrator, and
>
> (b) where the court thinks that disposal of the property would be likely to promote the purpose of administration in respect of the company.

(3) An order under this paragraph is subject to the condition that there be applied towards discharging the sums secured by the security –

(a) the net proceeds of disposal of the property, and

(b) any additional money required to be added to the net proceeds so as to produce the amount determined by the court as the net amount which would be realised on a sale of the property at market value.

(4) If an order under this paragraph relates to more than one security, application of money under sub-paragraphs (3) shall be in the order of the priorities of the securities."

24. *Paragraph 71(3)* thus provides for the net proceeds to be applied so as to discharge sums secured prior to disposal if the security has been released by a transaction pursuant to the operative order.

25. In the present case, the development was intended to encompass some 273 residential units as student accommodation. At the time of the authorised disposal, the development was unfinished. However, some investors had already been granted leases and others had entered into agreements for a lease of the unfinished units. There is no issue about the registered leases since the authorised disposal expressly took effect subject to them. However, other interests would only have been binding upon Sky 2 and thus reflected in a share of the net proceeds of sale if and to the extent that Sky 2 acquired its estate subject to the same or itself created the putative interest.

26. It was established in *Eason v Wong [2017] EWHC 207 at [33]-]54]* that where a flat is purchased off plan and the purchaser pays a deposit, this is capable of giving rise to an equitable lien in respect of the flat or the airspace notionally allocated to it and would thus be capable of binding on Sky 2. A purchaser's equitable lien is a security within the meaning of *Paragraph 71.* Sky 2 would ultimately have been bound by any contractual interest that it granted or created itself. The contentious issue is as to the extent to which, at the outset, Sky 2 acquired its registered estate subject to rights or interests granted by Sky 1 and secured against the registered title.

27. For these purposes, *Section 29* of the *Land Registration* Act 2002 provides as follows.

"29 (1) If a registered disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of

> postponing to the interest under the disposition any interest affecting the estate immediately before the disposition show priority is not protected at the time of registration.
>
> (2) For the purposes of subsection (1), the priority of an interest is protected –
>
> (a) in any case, if the interest-
>
> (i) is a registered charge or the subject of a notice in the register,
>
> (ii) falls within any of the paragraphs of Schedule 3, or
>
> (iii) appears from the register to be excepted from the effect of registration, and
>
> (b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate.
>
> (3) Subsection (2)(a)(ii) does not apply to an interest which has been the subject of a notice in the register at any time since the coming into force of this section.
>
> (4) Where the grant of a leasehold interest in land out of a registered estate does not involve a registrable disposition, this section has effect as if –
>
> (a) the grant involved such a disposition, and
>
> (b) the disposition were registered at the time of the grant."

28. In the present case, the disposition of the registered title to Sky 2 was completed by registration on 25 May 2018. During the hearing, Ms Bunbury took instructions to ascertain whether Sky 2 made an official search for priority protection under *Section 72* of the *2002 Act* and, having done so, confirmed there is nothing on the Administrators' files to indicate any such search was conducted. On that basis, it can be taken that Sky 2 did not obtain priority protection prior to 25 May 2018. It follows that Sky 2 would *prima facie* have taken subject to all registered charges and other interests noted or subject to a notice on the register as at 25 May 2018.

29. However there remains an issue as to whether Sky 2 took subject to unregistered interests. There is no suggestion that any of the investors ever became entitled to an over-riding interest, whether under *Paragraph 1* (leasehold estate for a term not exceeding seven years) or *Paragraph 2* (interest belonging to a person in actual occupation) of *Schedule 3* to the *Land Registration Act 2002*. However, Mr Fennell submits that the Transfer was not for

"valuable consideration" within the meaning of *Section 29(1)* of the *2002 Act* and, if it was for valuable consideration, Sky 2 acquired the Property subject to a constructive trust.

(4) Valuable consideration

30. Relying on the judgment of Norris J in *Halifax plc v Curry Popeck [2008] EWHC 1692 at [46],* Mr Fennell submits that the burden of proof would notionally have been on Sky 2 to prove that the Transfer was for valuable consideration rather than for his clients to prove it was not for valuable consideration. As it happens, the Administrators are not presenting a positive case, they are simply seeking directions under *Paragraph 63* of *Schedule B1* to the *1986 Act.* As proponents of the issue, it would be for the investors who assert that, by reason of the Transfer, Sky 2 took free from the dispositions unregistered on 25 May 2018 to show that the Transfer was for valuable consideration. However, the matter is more nuanced than Mr Fennell allows since this issue imports at least one sub-issue on which the burden of proof is on his clients. If, on its face, the Transfer appears to be for valuable consideration, there is at least an initial evidential burden on any person challenging the Transfer to adduce evidence to the contrary.

31. To determine whether the Transfer was for valuable consideration, I shall determine what consideration, if any, Sky 2 promised to provide or is deemed to have provided in return for the transfer. I shall do so before determining whether such consideration, if any, is to be regarded as valuable consideration. In addressing the initial question, I shall first consider the stated consideration and whether it would have been capable, in itself, of amounting to contractual consideration. I shall then determine whether the Transfer is sufficient evidence of payment. If not, I shall determine whether payment was made. If not, I shall determine whether Sky 2 is entitled to rely on any other promise, implicit or otherwise, as consideration for the Transfer.

32. The stated consideration was not a promise rather it was a statement or acknowledgment that Sky 2 had paid £2,500,000 for the Property. However, if such a payment was made prior to the Transfer, it would almost certainly be treated as good consideration, not past consideration, on the hypothesis that it was made as part of the relevant transaction, *Chitty on Contracts (34th edn) Para 6-030.*

33. Although the Transfer contains an express acknowledgment of receipt, I am satisfied that the acknowledgment is not conclusive at least when examining the competing interests *inter se* of the investors with interests acquired prior to 25 May 2018. Once the investors

challenging the acknowledgment have shown there is reason for doubt, I can examine the evidence more generally to ascertain whether the sum of £2,500,000 was indeed paid to Sky 1 as the Transfer would suggest or, indeed, whether any other amount was paid by Sky 2 to Sky 1. I have reached this view consistently with the historically established principle that, where contained in a deed, a receipt is not conclusive and evidence of non-payment can thus be given, *Burchell v Thompson [1920] 2 KB 80, 86 per Lush J.*

34. However, the position of the purchasers after 25 May 2018 is less straightforward since *Section 68(1)* of the *Law of Property Act 1925* expressly provides that a receipt for consideration in the body of a deed shall generally be treated as evidence of payment in favour of a *subsequent* purchaser. This does not of course apply to the original purchaser, Sky 2. Whilst, in my judgment, "the reference in *Section 68(1)* to "a subsequent purchaser" is apt to included subsequent purchasers of each and every part of the property originally purchased, it cannot be deployed by a subsequent purchaser against a purchaser of an interest in the property that had already been disposed of prior to the relevant deed, in this case the Transfer.

35. I am thus satisfied that the Transfer does not, in itself, amount to conclusive evidence of payment. In the light of such evidence as is available from the surrounding circumstances, the provisions of the DOC and the way in which the whole transaction was structured, I am also persuaded Mr Fennell has done enough to show I can examine the available evidence as a whole to determine whether Sky 2 made a payment to Sky 1 as consideration for the Transfer notwithstanding the acknowledgment of payment in the Transfer itself.

36. Since no witness statements have been filed from Mr Tomlinson, Mr Riley or anyone else with contemporaneous knowledge, I must approach this issue with a measure of caution. However, no evidence other than the Transfer itself has been produced to suggest such a payment was ever made. Whilst Sky 2's accounting records will have been delivered to the Administrators following their appointment - it is not suggested otherwise - they have seen nothing in the contemporaneous correspondence or Sky 2's accounting records to suggest that such a payment was ever made. Nor has any other evidence been adduced, contemporaneous or otherwise indicative of a payment. I am satisfied, on the balance of probability, that the stated purchase price of £2,500,000 was not paid to Sky 1 at the time of the Transfer or, indeed, afterwards. For the sake of completeness, although the available evidence is incomplete, there is nothing to suggest that Mr Tomlinson, Mr Riley and their

respective companies ever agreed the purchase price could be appropriated to the discharge of the accumulated indebtedness of Mr Tomlinson or his companies.

37. On the basis that, contrary to the Transfer itself, the stated purchase price of £2,500.000 was not paid, there would have to be some other consideration for the Transfer. For this, there are at least three different possibilities. These are as follows, namely that (1) regardless of whether the sum of £2,500,000 was paid, the Transfer implicitly contained a promise to pay £2,500,000; (2) in entering into the Transfer Sky 2 entered into collateral obligations to other parties in the DOC which constituted good consideration; and (3) it was implicit in the Transfer and the factual matrix or surrounding circumstances that Sky 2 would provide consideration by assuming responsibility for the Property subject to the contractual rights of the investors.

38. In my judgment, Sky 2 provided consideration in each of these respects. When the Transfer and the DOC are construed together, it can be seen that Sky 2 assumed a contractual obligation to pay £2,500,000 for the Property. It was provided by clause 5.1 of the DOC that the Property would be transferred to Sky 2 for "market value less £650,000". The valuation report dated 3 July 2017 suggested the market value of the Property was in the sum of £2,800,000 or £3,100,000 at that stage subject to the length of the sale period. If, by May 2018, the market value was thought to be in the region of £3,150,000 and the sum of £650,000 was deducted, this would equate with a net purchase price of £2,500,000. No doubt, £650,000 was deducted on the basis that, pursuant to the DOC, Mr Riley or one of his companies would attend to the repayment of the loan from Lendy Limited under which £650,000 was secured.

39. If the Transfer did not, in itself, impose a contractual obligation on Sky 2 to pay £2,500,000 for the Property as consideration, I am satisfied that the DOC was a collateral contract and the obligations, under the DOC, of Sky 2 and, indeed, the parties associated with Sky 2, including Mr Riley and his companies, can be treated as consideration for the Transfer, *Weg Motors v Hale [1962] Ch 49*, see also *City and Westminster Properties (1934) v Mudd [1959] Ch 129* and *Shanklin Pier v Detel Products Ltd [1951] 2 KB 854.* The relevant obligations included Sky 2's promise, in clause 5.1 of the DOC, to pay market value for the Property less £650,000 and the obligation of Mr Riley or his companies, in clause 5.2 to redeem the charge to Lendy Limited by paying it the sum of £650,000.

40. Had this not been the case, Sky 2 could be taken to have provided consideration by assuming responsibility for the Property subject to the investors' contractual rights. Whilst this was not spelled out as consideration in the Transfer or the DOC, it can be treated as such. This can be seen from the judgments of the Court of Appeal in *Johnsey Estates Ltd v Lewis and Manley (Engineering) Ltd (1987) 54 P&CR 296* and *Pitts v Jones [2008] QB 76* in which the assumption of obligations was held to suffice as contractual consideration notwithstanding that it was not expressly denoted as such. In *Johnsey v Lewis (supra),* a lease of business premises was assigned for the stated consideration of £1. The Court of Appeal concluded that the assignee furnished consideration by assuming obligations to pay the rent and observe the other covenants of the lease notwithstanding that this was not described as consideration. In *Pitts v Jones [2008] QB 76* the employees of a company confirmed they would waive or release their rights of pre-emption in respect of the managing director's shares to enable him to sell such shares to a third party after the managing director advised them he would purchase their shares himself if the third party did not purchase their shares too. This was not denoted as consideration. Indeed, at [18], Smith LJ observed that the employees had not "consciously worked out exactly what they had given". However, by implication, it was consideration for the employees' waiver; a conclusion characterised as "invented consideration" by the editors of *Chitty on the Law of Contracts (34th edn) Para 6-010*.

41. Having concluded that Sky 2 provided consideration for the Transfer, I must next determine whether it was "valuable consideration" within the meaning of *Section 29* of the *Land Registration Act 2002.*

42. "Valuable consideration" was not comprehensively defined in the *Law of Property Act 1925* or the *Land Registration Act 1925* when first enacted. When defining "purchaser", the opportunity was taken, in *Section 205(1)(xxi)* of the *Law of Property Act 1925*, to provide that "valuable consideration includes marriage but does not include a nominal consideration in money". This was mirrored in the statutory definition of "valuable consideration in *Section 3(xxxi)* of the *Land Registration Act 1925*. The statutory definition in *Section 205(1)(xxi)* of the *LPA 1925* was subsequently modified so as to include the formation of a civil partnership in addition to marriage. Conversely, *Section 132(1)* of the *Land Registration Act 2002* now provides that "valuable consideration" "does not include marriage consideration or a nominal consideration in money". However there remains no comprehensive statutory definition.

43. In the context of negotiable instruments or cheques, valuable consideration was historically taken to include "some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other: Com. Dig. Action on the case assumpsit B1-15", Lush J sitting in the Exchequer Chamber in *Currie v Misa (1875) LR 10 Ex. 153*; endorsed by the Privy Council in *Fleming v New Zealand [1900] AC 577*. This principle was applied by the Court of Appeal in *Johnsey Estates Ltd v Lewis and Manley (Engineering) Ltd (supra)* in relation to the consideration implicitly provided by an assignee in assuming primary responsibility for the rent and covenants of a lease. On the basis that, by doing so, the assignee had furnished valuable consideration for the assignment, the implied covenants then contained in *Section 77(1)(c)* of the *Law of Property Act 1925* thus applied.

44. If, as I have found, Sky 2 implicitly promised to pay or account for the sum £2,500,000 as consideration for the Transfer, there can be no dispute this was valuable consideration. The same is true of any analogous collateral obligation under the DOC, on the part of Sky 2 or the parties associated with it, including their promise to pay market value less £650,000 or redeem the charge to Lendy Limited. Whether Sky 2 can be said to have provided consideration to Sky 1 simply by assuming responsibility for the Property is less straightforward. However, on balance, I am satisfied that this would, in itself, have sufficed as valuable consideration. The Transfer related to freehold land and, in entering into the Transfer, Sky 2 did not specifically undertake to comply with covenants relating to the land when it entered into the Transfer. However, the freehold title was transferred to Sky 2 subject to the "landlord covenants" within the meaning of *Section 3(3)* of the *Landlord and Tenant (Covenants) Act 1995* and Sky 1 thus became entitled to apply for release under the provisions of *Section 7* of the *1995 Act.*

45. On the basis Sky 2 provided valuable consideration for the Transfer, completion by registration had the effect of postponing to the disposition any interest affecting the freehold estate immediately before the disposition that was not protected by registration at that time, whether on the basis that it was noted on the register or the subject of a notice or priority search. However, this is subject to Mr Fennell's constructive trust submissions.

(5) The Constructive trust issue

46. Mr Fennell submitted that, if the Transfer was for valuable consideration, Sky 2 took subject to the rights of all investors by then entitled to an equitable lien. This was on the

basis the investors were to be treated as beneficiaries under a constructive trust which arose from or survived the Transfer itself. In support of this submission, Mr Fennell referred to *Lyus v Prowsa Developments Ltd [1982] 1 WLR 1044*, *Chattey v Farndale Holdings Inc (1998) 75 P&CR 298* and *Lloyd v Dugdale [2001] EWCA Civ 1754*.

47. In *Lyus v Prowsa (supra)*, the plaintiffs contracted to purchase a building plot with a house to be constructed. The land was subject to a mortgage. When the builder defaulted on its obligations to the bank, the bank could have exercised its power to sell free from the plaintiffs' contractual rights but chose to sell the property expressly subject to and with the benefit of such rights. The property was then re-sold to another builder subject again to such rights so far as enforceable. When the plaintiffs sought to enforce the original contract against the successive purchasers, the latter sought to maintain they had taken free from the plaintiff's contract by virtue of the provisions of the *Land Registration Act 1925.* However, Dillon J gave judgment in favour of the plaintiffs on the basis that it would be a fraud for the purchasers to rely on the *1925 Act* since it would involve them reneging on a positive stipulation in the bargain under which the land was acquired from the bank. Dillon J's conclusion was thus based on an analogy with the principle, in *Rochefoucauld v Boustead [1897] 1 Ch 196*, that the provisions of the *Statute of Frauds* should not be used as an instrument of fraud.

48. In *Chattey v Farndale (supra)*, the purchaser of a flat sought to rely on the same principle in a case relating to the priority of purchasers' interests in a development in West London. The Court of Appeal concluded that the principle was inapplicable in the absence of a contractual provision providing for the assignee to take subject to the rights of a flat owner notwithstanding that it had notice of the purchaser's rights.

49. In *Lloyd v Dugdale (supra)*, a mill owner agreed to sell a unit in the mill to a company. Following his death, the company went into liquidation and the premises as a whole were sold to a third party. On appeal, the Court of Appeal were not satisfied that the managing director of the company had somehow acquired an interest which was binding upon the third party purchaser. However, at [52], Sir Christopher Slade provided further clarification about the scope of the principle in *Lyus v Prowsa*, observing that "the court will not impose a constructive trust in such circumstances unless it is satisfied that the conscience of the estate owner is affected". For this purpose, "the crucially important question is whether he has undertaken a new obligation, not otherwise existing, to give effect to the relevant

incumbrance or prior interest." He stated that "if, but only if, he has undertaken such a new obligation will a constructive trust be imposed".

50. Following *Chattey v Farndale* and *Lloyd v Dugdale*, there is no room, for the imposition of an interest under a constructive trust binding upon a contractual purchaser if the latter does not expressly purchase subject to the relevant interest or undertake new obligations recognising or promising to give effect to the interest. In the present case, Sky 2 did not expressly purchase its interest subject to the rights of the investors nor did it expressly undertake obligations in respect of such rights. On that basis, it cannot be said that non observance of such rights would involve reneging on the contractual terms of the bargain under which the Property was acquired. In contrast with *Lyus v Prowsa*, there was no express provision in the Transfer for Sky 2 to take subject to the interests of third parties. Nor, indeed, was there any such provision in the DOC. Moreover, in entering into the Transfer and the DOC, Sky 2 did not purport to enter into new obligations in support of the interests of the investors. No doubt Sky 2 thus became subject to the landlord covenants under the provisions of *Section 3(3)* of the *Landlord and Tenant (Covenants) Act 1995* if and to the extent investors were already entitled to a tenancy of residential units. However, it is not suggested there were any contractual provisions in the Transfer or the DOC requiring Sky 2 to observe or otherwise recognise the contractual rights of the investors.

51. Mr Fennell submitted that Sky 2 can be deemed to have recognised the contractual rights of the investors by authorising its solicitors to serve the Section 5 Notices. In support of this submission, he relied on the provision in Paragraph 4 for "the proposed disposal [to] be made subject to the leases, tenancy agreements, occupancies and other interest affecting the Property that exist at the date of the disposal…". However, in my judgment the Section 5 Notices do not assist him for the following reasons. Firstly, in contrast to *Lyus v Prowsa (supra)*, they were not contained in the operative disposition of the registered title; they were made upwards of two years afterwards. Secondly, as Mr Moore observed in his written Opinion, the Notices did not contain a comprehensive and narrowly defined description of the rights to which the proposed disposal was intended to be made subject. They simply recorded that the disposal was "intended" to be "subject to the leases, tenancy agreements, occupancies and other interests affecting the Property that exist at the date of the proposed disposal". The reference to "other interests affecting the Property" could easily be construed as a reference only to interests binding upon Sky 2 as registered owner of the freehold title. Whilst the factual background is obscure, Mr Moore also observed

that, if otherwise apt to do so, the Section 5 Notices would not have been capable of constituting a declaration of trust pursuant to *Section 53(1)(b)* of the *Law of Property Act 1925* because they were signed by an agent.

52. For these reasons, Sky 2 did not acquire its interest subject to the rights of investors through the device of a constructive trust.

(6) Conclusion

53. I am thus satisfied that, upon registration of the Transfer, Sky 2 took free from the rights of all classes of investors other than the investors protected, immediately prior to registration of the Transfer, by a registered entry or notice at HM Land Registry and those, if any, who had by then submitted a priority search pursuant to which there was a registered disposition during the priority period (together "**the Protected Investors**").

54. By the October Order, the net proceeds of sale of the Property were defined so as to encompass the proceeds of sale after deduction of all proper costs, charges and expenses reasonably incurred in the preservation and realisation of the Property as an asset in the same administration. The net amount should now be distributed rateably among the Protected Investors and, if there is a surplus, the same distributed rateably among the Investors to whom Sky 2 itself granted binding contractual rights.

55. I shall hear further from counsel on all consequential matters and issues.