Application concerning ownership and beneficial rights of sale, the ability of Guernsey law to recognise equitable lien rights, the priority afforded to the unsecured creditors, the distribution of proceeds of sale and the priority of the liquidators within the creditor rankings

[2019]GRC038

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

IN THE MATTER OF AN APPLICATION UNDER PART XXIV OF THE COMPANIES (GUERNSEY) LAW, 2008

AND

IN THE MATTER OF THE LIQUIDATION OF CONQUEROR HOLDINGS LIMITED ("the Company")

BENJAMIN ALEXANDER RHODES **Applicants**

and

JAMES ROBERT TOYNTON

(as the Joint Liquidators of the Company)

and

ANDREW ALBERT DAVIS **Respondent**

Judgment handed down: 25 June 2019

Before: Sir Richard Collas, Bailiff

Advocate for the Applicants: Advocates M J Adkins and J A Tee

The Respondent appeared in person

The Application

1. By Application dated 21 November 2018 ("the Application") the Liquidators applied for the following Orders:

   "1. A direction that persons ("Room Buyers") who entered into contracts with the Company and paid a deposit for the construction and lease of hotel rooms in the property proposed to be developed by the Company at 228 Tunnel Avenue, North Greenwich, London ("the Property") shall be admitted as creditors of the Company and shall rank as unsecured creditors of the Company in the distribution of the Company's assets in the respective amounts paid to the Company by each of them;

   2. The costs of the application be paid from the assets of the Company.

   3. In the alternative to paragraphs 1 and 2:

(a) *A direction as to the proper admission and ranking of the Room Buyers in the liquidation of the Company, and/or the Room Buyers' rights with respect to the proceeds of sale of Property;*

(b) *A direction that the Joint Liquidators send to each of: (1) the Room Buyers; and (2) other persons claiming as unsecured creditors of the Company, a letter substantially in the form annexed as Annexures A and B respectively;*

(c) *An order that the Applicants have permission to rely on the opinion of Josh Lewison dated 17 May 2018 as expert evidence of English Law;*

(d) *An order that an inter partes hearing date be set for the first available date that is convenient for the Court after 7 January 2019; and*

(e) *An Order that the Joint Liquidators' costs of and in connection with this application be paid from the assets of the Company, alternatively the proceeds of sale of the Property; and*

(f) *Orders generally as to the further conduct of this application."*

2. At a hearing before me on the 17 January 2019, I ordered:

"1. Mr Davis be joined as the Representative Respondent to the proceedings and is appointed as the representative of those creditors who entered into contracts for the construction of and purchase of long leases of individual rooms at a development that was owned by the Company located in North Greenwich, London referred to throughout the Application as the Room Buyers.

2. The Applicants have permission to rely on the opinion of Josh Lewison dated 17th day of May, 2018 as expert evidence of English law.

3. The Representative Respondent has leave to obtain expert English law opinion in respect of the issues arising out of the Application and the reasonable and proper costs of such opinion are to be paid out of the assets of the Company, subject to any further order of the Court.

4. The Representative Respondent may instruct a Guernsey advocate to produce a written opinion in respect of the legal issues arising out of the Application and the reasonable and proper costs of providing this written opinion shall be payable out of the assets of the Company, subject to any further order of the Court.

5. The Representative Respondent will serve copies of the opinions detailed at paragraphs 3 and 4 above and any evidence and/or written submissions by 4pm on Friday 15th day of February, 2019.

6. The Applicants will serve any further evidence or submissions by 4.00 pm on 1st day of March, 2019.

7. The Greffe shall set down the Application for a one day hearing on the first available date after 1st day of March, 2019 upon being provided with the Parties dates of availability.

8. *The Applicants' costs and fees of the Application shall be payable from the assets of the Company, subject to any further order of the Court.*

9. *The Representative Respondent's reasonable and proper expenses of attending the hearing on 17th January 2019 and at future hearings, if the Court should determine that Mr Davis appearance at any such hearing is reasonable or necessary, shall be payable from the assets of the Company.*
10. *The Parties have leave to apply to the Court to vary any of the above directions upon 4 days' notice to the other party."*

3. Acting under that Order of the Court, Mr Davis instructed Ogier who gave a legal opinion under Guernsey law by letter dated 15 February 2019. In turn, Ogier instructed English counsel, Jonathan A Titmuss of Hardwicke Chambers, to advise in respect of English law issues. His opinion is dated 11 February 2019. In it he commented on the Opinion obtained by the Liquidators from Mr Josh Lewison of Radcliffe Chambers. After receiving Mr Titmuss' Opinion, Mr Lewison provided an Addendum to his Legal Opinion which is dated 27 February 2019.

4. In advance of a hearing on 11 April, many issues had been resolved between Ogier (acting for Mr Davis) and Collas Crill (acting for the Liquidators). I was invited to decide one remaining issue without an oral hearing but because there were some questions I wanted to have clarified, I directed that there be an oral hearing. Mr Andrew Davis appeared in person and Advocate James Tee appeared on behalf of the Liquidators. I am grateful to them both for their assistance.

Background

5. A brief summary of the background to the Application begins with the formation of Conqueror Holdings Limited ("the Company") in Guernsey on 8 May 2014 as a special purpose vehicle ("the SPV") to acquire an area of land attached to which was planning permission to construct a 50 room hotel in North Greenwich. The project was financed by a mix of secured lending and "off the plan" sales of long leases on individual rooms to private investors. The Company raised £1.45 million of interest bearing secured loan notes and, in addition, raised commitments for £8 million, of which £5.78 million was paid, from 41 individuals who entered into construction contracts leading to the sale of long leases of individual rooms within the hotel project ("the Room Buyers"). The Company acquired the site for the hotel in September 2014 and construction work began in March 2015. It was due to be completed in December 2015 but that was not achieved because the Company did not have sufficient funds and could not raise any further finance. In late 2016, Grant Thornton were instructed to advise on insolvency issues. They wrote to all Room Buyers on 16 December 2016 explaining the situation and offering three options, the third of which was to place the Company in insolvency process.

6. On 8 February 2017, the Company was placed in Administration; the persons who are now the Liquidators were appointed as Joint Administrators.

7. Prior to then, on 16 January 2017, the Company had received notices of rescission from twelve of the Room Buyers. I will adopt the terms used in the documents prepared for the hearing and refer to those twelve Room Buyers as "the Pre-Insolvency Room Buyers". The other Room Buyers I refer to as the "Post-Insolvency Room Buyers". On 4 April 2017, the Joint Administrators wrote to the Post-Insolvency Room Buyers notifying them that their agreements had been terminated.

8. On 12 September 2017, the Joint Administrators sold the hotel property for £4.6 million plus VAT. On the following day they paid £1,990,953 to the secured loan note holders.

9. On 20 March 2018, on the Joint Administrators' application, the Royal Court ordered that: the Administration be terminated, having achieved its purpose; that the Company be compulsorily wound up; and that the Joint Administrators be discharged and re-appointed as Joint Liquidators of the Company.

The Deposits

10. The Room Buyers had entered into Agreements For Lease with the Company, all of which were in materially identical form ("the Agreement" or "the Agreements"). The Agreements provided for the Room Buyers to make payments, defined as "Deposits", as part payment of the purchase price. The Deposits were payable in either two or three tranches, with the first payment due on or before signing the Agreement. That Deposit could be 50% of the purchase price in which case a second Deposit was payable two months after the date of the Agreement and there was no third Deposit. Or a second Deposit was payable two months after the date of the Agreement and a third Deposit four months after the date of the Agreement.

11. Clause 21 of the Agreements provided for what was to happen on 30 June 2016 (defined as the "Termination Date" in the Agreements,) if notice of practical completion had not been served on the Room Buyer's conveyancer beforehand and that clause also provided for what was to happen in the event of the occurrence of an "Insolvency Event" in relation to either the Company or a Room Buyer prior to completion of a lease. The term "Insolvency Event" was widely defined and included bankruptcy and the appointment of administrators and administrative receivers.

12. The Liquidators considered the wording of Clause 21 to be ambiguous and sought advice from Mr Lewison as to its interpretation. He applied the principles of contractual interpretation summarised by Lord Neuberger in Marley v Rawlings [2015] A.C. 129 at 144 and also by the Supreme Court in Rainy Sky v Kookmin Bank [2011] 1 W.L.R. 2900 before opining that:

    a) *"the term 'deposit' has a specific meaning in law, which carries with it certain legal consequences and which is its ordinary and natural meaning"; and*

    b) *"although the term 'deposit' has an ordinary and natural meaning, the parties are free to alter that meaning and the legal consequences that follow from it".*

13. In order to determine the meaning of the term 'deposit' and in determining whether the parties[had altered its meaning from the ordinary and natural meaning in the context of the Agreements, Mr Lewison cited a number of decisions of the English courts and followed the decision of Andrew Sutcliffe QC, sitting as a Deputy High Court Judge in Amble Assets LLP (In Administration) [2011] EWHC 3774 (Ch) who had declined to follow the Privy Council on appeal from Jamaica in Workers Trust & Merchant Bank v Dojap Investments [1993] A.C. 573.

14. Mr Lewision reached the following conclusions as to the ordinary and natural meaning of the term 'deposit':

    a. *"A deposit is a sum of money paid as an earnest for the due performance of the contract: Howe v Smith (1884) 27 Ch. D. 89.*

b. *Money will be paid as an earnest, rather than as a potential penalty, where it is 10% of the purchase price, unless a special reason is shown for departing from that proportion: Workers Trust & Merchant Bank v Dojap Investments [1993]A.C. 573.*

c. *A deposit is repayable to the payer on termination of the contract either by the payer or the payee, provided that the payer of the deposit is not in breach of the contract: Whitbread & Co v Watt [1902] 1 Ch. 835.*

d. *Where the deposit is in excess of 10%, the court has an equitable jurisdiction to order the repayment of the deposit, or part of it: Amble Assets (In Administration) [2011] EWHC 3774 (Ch)."*

15. On the second of the issues identified by Mr Lewison, he sought to construe the express terms of the Agreements, in particular, clause 21.2. His opinion was that it would be unfair if the Company could forfeit a Room Buyer's Deposit due to the Company suffering an Insolvency Event. Clear terms would be required before the courts of England and Wales would reach such a conclusion. The most likely meaning was that on the occurrence of an Insolvency Event, each party would be able to terminate the Agreement but the Company would have the right to forfeit a Deposit only on the insolvency of a Room Buyer. On the insolvency of the Company, either party could terminate an Agreement but the Room Buyer's ordinary rights in respect of a deposit would be preserved.

16. The Court of Appeal in Whitbread & Co v Watt approved a statement from an earlier decision, Wythes v Lee (1855) 3 Drew 396, in which it was held that, as a matter of principle, where a contract to purchase land goes off, whether by reason of the default of the vendor or without any default on the part of the purchaser, the purchaser has a lien on the estate for the recovery of his deposit. In the present case, the question for counsel was the nature of the Room Buyers' right to recover their deposits and whether they were secured or unsecured creditors of the Company.

17. To answer that question, Mr Lewison relied upon the decision of Arnold J. in Eason v Wong [2017] EWHC 209 (Ch). The circumstances in Eason were very similar to the present case:

"a. The company was developing a site as student accommodation;

b. The company entered into contracts for the sale of 999-year leases of individual student suites to investors;

c. Investors paid deposits of 50% of the purchase price of each suite.

d. Each contract of sale provided for the grant of a long lease in the form annexed to the contract, and each of those lease included a floor plan showing the suite to which the contracts related."

18. Arnold J agreed with an Irish case, Re Barrett Apartments Ltd [1985] IR 350, by holding that it did not matter that the leases had not come into existence. He held that it was sufficient that the legal estate the vendor had contracted to create was identifiable as part of a legal estate which did exist; in effect, the lien attached to the airspace. Further, because each of the several liens attached to the airspace where each suite of accommodation was supposed to be, the purchasers' liens did not compete with each other. Arnold J then conducted an apportionment exercise to work out the respective interests of the purchasers and the vendor's interest in the unsold suites. He ordered that the purchasers' portion of the sale proceeds was to be distributed between them *pari passu*.

19. In the present case, the Company had a legal estate in the site of the proposed hotel and although the legal estates that were to be sold to the Room Buyers had not come into existence, they were ascertainable by reference to the plans. Mr Lewison advised that each of the Room Buyers became entitled to a lien over the part of the site, whether built or un-built, representing their individual room or rooms. Those liens operated under English law as security for the Deposits paid by the Room Buyers and they attached to the proceeds of sale when the premises were sold by the Liquidators. He added that, under English law, the Liquidators did not hold the proceeds of sale on trust; the reason being that the lien is an equitable security, not a beneficial interest.

20. In conclusion, Mr Lewison's opinion was that the Room Buyers would be regarded, under English law, as secured creditors by virtue of the liens that they hold in respect of their Deposits. They would be entitled to be paid *pari passu* out of the proceeds of sale representing the rooms that they agreed to purchase.

Mr Titmuss' Opinion

21. Jonathan A Titmuss, of Hardwicke Chambers provided a legal Opinion on English law on the instructions of Mr Davis as the Representative of the Room Buyers. He had available to him the opinion I have summarised above from Mr Lewison. He first of all raised a technical point on the timing of the notices served by the Pre-Insolvency Room Buyers. They were served on 16 January 2017 which is before the appointment of the Liquidators as administrators of the Company and, as a consequence, they were outside any of the timescales envisaged in Clause 21.1(a) of the Agreements. He suggested that the Liquidators issue termination notices in order to remedy the issue even though they have not so far taken issue with the efficacy of the notices served in January 2017.

22. Mr Titmuss considered whether there was any conflict between the position of the Pre-Insolvency Room Buyers and the Post-Insolvency Room Buyers and concluded that there was not on the basis that they all had a secured interest under the equitable liens arising under English law.

23. Mr Titmuss carefully considered whether it could be said that the Room Buyers had a beneficial interest in the proceeds of sale of the property; in other words, whether the Liquidators held the proceeds of sale on trust. By applying well established principles, he concluded that there was neither an express trust nor a resulting trust in their favour. There could be no common intention constructive trust because there was no element of detrimental reliance on the part of the Room Buyers nor an unconscionable denial of their interest. Interestingly, he suggested that the English courts might have been persuaded that an equitable interest arises in a property owned by one person where that property has been constructed with funds advanced by another if the alternative remedy of an equitable lien had not been recognised. He accepted that the present state of the law is as decided in Eason v Wong.

24. Mr Titmuss agreed with Mr Lewison that Clause 21 of the Agreements is somewhat muddled and also agreed with the latter's conclusion as to how it is to be interpreted although the same conclusion could have been reached through a somewhat different analysis. His opinion was that the Pre-Insolvency Room Buyers have an equitable lien over the proceeds of sale because, on a plain reading of Clause 21.1 (assuming the notices are effective) they are entitled to the return of their deposits and on the authority of Eason v Wong an equitable lien arises in their favour. Similarly, on the true interpretation of Clause 21.1, the Post-Insolvency Room Buyers are entitled to the return of their Deposits and, on the same authority, they have the benefit of a secured lien.

The Addendum to the Opinion of Mr Lewison

25. Mr Lewison issued an Addendum to his Opinion to address an issue I had raised as to whether the existence of the equitable liens had any bearing on the Liquidators' right to sell the premises. He concluded that as the registered proprietor of the Property, the Company was permitted to sell it and the existence of the Room Buyers' equitable lien did not affect its ability to do so.

Collas Crill's Opinion as to Guernsey Law

26. So far I have concentrated on the legal position under English law. It was a necessary preliminary step to establish the precise nature of the Room Buyers' rights under English law being the jurisdiction where the Property was situated and also the governing law of the Agreements they entered into with the Company. However, the Company was registered in Guernsey; the liquidation is being conducted under the provisions of the Companies (Guernsey) Law, 2008 ("the Companies Law"); and the proceeds of sale of the property are now located in Guernsey. So the questions of (i) whether the Room Buyers are to be treated as creditors of the Company, (ii) if so, whether they are secured or unsecured creditors; and (iii) what priority, if any, should be attached to their claims all fall to be decided under Guernsey law.

27. Advocate Ian Kirk of Collas Crill provided an Opinion to the Liquidators that was exhibited to the first Affidavit of Benjamin Alexander Rhodes, one of the Liquidators. His view was summarised in paragraphs 20 and 21 of a letter dated 14 November 2018 addressed to the Liquidators:

"20. In our view:

a. The Room Buyers' claims are likely to be ranked as unsecured creditors within a Guernsey liquidation. We take this view on the basis, assuming that Guernsey law would apply English conflict of laws principles, that the following apply:

i. the Sale Proceeds are an asset of the Company, and fall to be dealt with as party of the Company's estate;

ii. Guernsey law rules relating to distribution of an insolvent Company's estate will apply;

iii. The distribution waterfall within a Guernsey liquidation is governed by section 419 of the Companies (Guernsey) Law 2008 ("the Companies Law");

iv. An equitable lien over the proceeds of sale is not a preferential claim, within the meaning of section 419 (1)(a) of the Companies Law because, ultimately, an equitable lien is not a secured interest within the meaning of the Secured Interest (Guernsey) Law 1993 ("the SIL"), or otherwise has any preferential status; and

v. Therefore the Room Buyers will not be recognised as secured creditors as a matter of Guernsey Law.

b. Further, even if the Room Buyers' lien was recognised as granting some form of priority interest, the Liquidators should have a statutory (pursuant to section 418 of the Companies Law) super-priority in respect of their fees and

costs of the liquidation. Alternatively, the Joint Liquidators will be entitled to a potentially more restricted right to recover the costs of realising and administering the fund constituted by the proceeds of sale.

21. The Room Buyers' claims will rank pari passu with the other creditors, on the basis that the Room Buyers' security will not be recognised in Guernsey. Accordingly, the creditors of the Company will simply take the proceeds pari passu amongst themselves, net of the costs of the liquidation."

The issues before me

28. Collas Crill summarised the position in a letter dated 4 April 2019 to HM Greffier:

> *"Pursuant to paragraph 4 of the Act of Court [of 17 January 2019] Mr Davis has obtained second opinion of English counsel and Ogier have provided him with a Guernsey law opinion.*
>
> *It is agreed by Mr Davis and the Joint Liquidators that:*
>
> *1. An equitable lien arose in favour of the Room Buyers under English law (Lewison para 52; Titmuss para 43);*
>
> *2. The parties agree that an English law equitable lien would not give the Room Buyers priority as a secured creditor in a Guernsey insolvency under section 419(1)(a) of the Companies (Guernsey) Law, 2008, having regard to the Securities Interest (Guernsey) Law, 1993. (Collas Crill letter dated 21 November 2018 para 20(a)(iv); Ogier letter dated 15 February 2019, penultimate para);*
>
> *3. The Parties agree that no trust relationship was created under English Law (Lewison Opinion para 53; Titmuss paras 24 and 26);*
>
> *4. To the extent necessary, the Parties agree that the Berkley Applegate principle will apply in Guernsey to permit the Joint Liquidators to recover costs associated with realisation and administration (Collas Crill para 48; Ogier para 2.1(l)).*
>
> *Therefore we understand that the only issue that Mr Davis considers remains to be determined by the Court is whether a Guernsey law trust was created when the Room Buyers paid their deposits to the Company. The Joint Liquidators submit that no such Trust has been created in the circumstances."*

29. In Court, Mr Davis indicated that, whilst he accepted the legal advice he had received, he was not a lawyer and he wanted me to decide whether it was correct to proceed on the second of those assumptions. Even if Mr Davis had not asked me to do so, I consider that it would have been appropriate for me to review the assumptions made. A compulsory liquidation is initiated by the Court and conducted under the ultimate supervision of the Court, and for those reasons, it is different from other, more normal, inter-party litigation. In the latter, the parties may agree the assumptions they want the Court to make and request only that the Court determine the facts and issues that they have not been able to agree. Insolvency is different.

30. Collas Crill's letter of 4 April amounted to a statement that Mr Davis had agreed that the Room Buyers' claims rank equally with other unsecured claims against the Company. Section 419(1)(b) of the Companies (Guernsey) Law, 2008 provides that:

"419 (1) Subject to the provisions of –

(a) …

(b) any agreement between the company and any creditor thereof as to the subordination of the debts due to that creditor to the debts due to the company's other creditors, and

(c) …

the company's assets in a winding up shall be realised and shall be applied in satisfaction of the company's debts and liabilities pari passu."

31. In his capacity as Representative of the class of Room Buyers as a whole, Mr Davis was entitled to ask whether the assumptions he was being asked to make were reasonable. I anticipate that at the conclusion of the liquidation, when the Joint Liquidators appear before a Commissioner appointed by the Court to examine and verify their accounts and to fix a date for distribution of the Company's assets, the Commissioner will wish to know what assumptions have been made. Equally, creditors, specifically Room Buyers who will have lost a substantial investment, will take comfort from having confirmation that the legal assumptions underpinning the distribution were correct.

Discussion

32. I will approach the issues I must decide in the following order:

    a) Do the Room Buyers have any ownership rights in respect of the proceeds of sale or any beneficial rights in the proceeds of sale?

    b) If not, does Guernsey law recognise the Room Buyers as having an equitable lien over the proceeds of sale?

    c) Do the Room Buyers have any priority over other, unsecured, creditors in the distribution of the proceeds of sale?

    d) How are the proceeds of sale to be distributed as between the Room Buyers?

    e) What priority, if any, do the Liquidators have for the payment of the costs of the administration and subsequent liquidation of the Company?

33. I respectfully agree with Advocate Kirk that the Guernsey rules governing the distribution of the assets of an insolvent company are to be applied. The Company is a Guernsey company; the Liquidators were appointed by the Royal Court under the provisions of the Companies Law; and the distribution of the assets of the insolvent company is governed by section 419 of the Companies Law. Furthermore, the net sale proceeds were transferred to a bank account in Guernsey on 13 September 2017.

Do the Room Buyers have ownership rights or a beneficial interest in the sale proceeds?

34. I have set out above, in some detail, the expert evidence of the two English barristers, Mr Lewison and Mr Titmuss, on the issues of English law. They are agreed that under English law the Room Buyers had no beneficial interest in the proceeds of sale of the development project. I accept their evidence for the reasons they gave. I am satisfied that position did not change when the net proceeds of sale were deposited into a Guernsey bank account. Section 1 of The Trusts (Guernsey) Law, 2007 (as amended) provides that:

"1. A trust exists if a person (a "trustee") holds or has vested in him, or is deemed to hold or have vested in him, property which does not form or which has ceased to form part of his own estate –

(a) for the benefit of another person (a "beneficiary"), whether or not yet ascertained or in existence, and/or

(b) for any purpose, other than a purpose for the benefit only of the trustee."

35. Prior to transferring the net proceeds of sale to Guernsey, they were an asset of the Company as the sole owner thereof. The act of transferring them from one bank account to another did not create and could not have created any beneficial interest or title for the account of anyone else. They were the assets of the Company and they remained the assets of the Company after the transfer. No Guernsey trust could have come into existence at that time and nothing has happened subsequently to change that state of affairs. Mr Titmuss suggested that if English law had not created the remedy of an equitable lien, the English courts might have sought to impose a trust but he recognised that is not the current state of the English law. I must accept English law as being what it is, not what it might have been if it had developed differently.

Does Guernsey law recognise the Room Buyers as having an equitable lien over the proceeds of sale?

36. Mr Lewison illustrated the difference between an equitable lien and a beneficial interest. The former may be discharged by paying the sum secured; its value is unaffected by fluctuations in the value of the asset. On the other hand, a beneficial interest under a trust will normally be a share of the trust property, the value of which will fluctuate with the value of the underlying asset. Another distinction is the nature of the remedies available. An equitable lien is enforced under English law by the appointment by the court of a receiver and a judicial order for sale. On the other hand, a fixed interest in a trust may be enforced through an action for an account or by requiring the trustee to deliver or convey the trust property to the beneficiary.

37. Advocate Kirk applied conflict of law principles to identify whether a Guernsey court will generally recognise an equitable lien that existed under English law. He stressed that he was applying English conflict of law principles. I accept that it was reasonable to do so as those principles would be persuasive under Guernsey law and would be applied by a Guernsey court. I do not need to consider that issue any further, not because it was uncontested but because the conclusion I ultimately reach would have been unaffected if I had concluded that the Guernsey court would apply different principles of conflict of laws.

38. Advocate Kirk therefore concluded that the Guernsey court will generally recognise an English equitable lien subject to any overriding rule of Guernsey law granting title to someone else. I accept his conclusion and note that the overriding rule has no application in the present case.

39. Advocate Kirk wrote that *"In so far as it is relevant, it is unclear whether or not the concept of an equitable charge is known to Guernsey law, and if so, whether or not it would be created in these circumstances."* I agree that the issue may not be relevant and I very much doubt that Guernsey law would recognise the concept of an equitable charge in these circumstances. I know of no instance under the customary law (about which I say more later) where the Guernsey court has imposed or recognised an equitable charge. Now that there has been statutory intervention with the enactment of legislation such as the Secured Interest

(Guernsey) Law, 1993 it is difficult to see any scope for further development of the customary law in this area.

40. I note that, in Guernsey, where premises have been sold "off plan", the legal structure of the transaction has been different from that in the present case. The practice has been to pay the total cost in instalments, starting with the conveyance of the property to the purchaser at a price that reflects its current value, including building works completed to the date of purchase, and with further stage payments due as and when building works have been certified as complete. The principal motivation may have been to minimise the ad valorem duties payable on the conveyance of the property (document duty and the former feudal dues, treizième) as well as providing security for the purchaser. However it illustrates the way that Guernsey custom has developed and contrasts with the situation in the present case where a lease was not to be granted until after completion of the property.

Do the Room Buyers have any priority over other, unsecured, creditors in the distribution of the proceeds of sale?

41. Accepting that the Guernsey court will recognise an equitable lien over the proceeds of sale which arose under English law, the next question is whether that lien affords a Room Buyer priority over other creditors in the distribution of the assets of the insolvent company.

42. The starting point is sections 418 and 419 of the Companies Law. A liquidator's remuneration is paid first in priority to all other claims. The second priority is "preferential payments":

> *"418. All costs, charges and expenses properly incurred in the compulsory winding up of a company, including the remuneration of the liquidator, are payable from the company's assets in priority to all other claims.*
>
> *419. (1) Subject to the provisions of –*
>
> *(a) this Law and any rule of law as to preferential payments,*
>
> *(b) any agreement between the company and any creditor thereof as to the subordination of the debts due to that creditor to the debts due to the company's other creditors, and*
>
> *(c) any agreement between the company and any creditor thereof as to set-off,*
>
> *the company's assets in a winding up shall be realised and shall be applied in satisfaction of the company's debts and liabilities pari passu.*
>
> *(2) Any surplus shall thereafter be distributed (unless the memorandum or articles provide otherwise) among the members according to their respective rights and interests in the company.*
>
> *(3) For the avoidance of doubt the distribution of any surplus under subsection (2) is not a distribution within the meaning of section 301 or for the purposes of section 303."*

43. The reference in section 419(1)(a) to any rule of law as to preferential payments is a reference to section 1(7) of the Preferred Debts (Guernsey) Law 1983 which provides that: *"Where any property of [a company which is insolvent] is subject to a security interest within the meaning of the Security Interests (Guernsey) Law, 1993 the proceeds of its sale or application are to be applied in the manner provided by section 7(5) and (6) of that Law".* The effect of those

provisions in the present circumstances would require any security interest to be discharged before paying any other liabilities of the Company.

44. In his opinion letter, Advocate Kirk addressed the question of whether the equitable lien under English law amounts to a security interest under the 1993 Law. Section 1 of the 1993 Law establishes a number of different ways in which a security interest may be created in respect of intangible moveable property. A common factor is that they require a written security agreement between the secured party and the debtor. In the present case, the equitable liens arose by operation of English law. There is no written security agreement. For that reason, I agree with Advocate Kirk that there is no security interest within the meaning of the 1993 Law.

45. For completeness, I add that section 10 of the 1993 Law envisages that a Guernsey company has the capacity to give security governed by foreign law over property situated outside Guernsey even where Guernsey law does not permit security to be given by the method or in the circumstances permitted by that foreign law. As Advocate Kirk said, that section only confirms that a Guernsey company has the capacity to do so, it does not provide for the enforcement of the security through the Guernsey courts.

46. Aside from statutory law, Advocate Kirk considered the principles that governed the giving of security over moveable property under Guernsey customary law. He cited an article written by Advocate Nigel Carey entitled Security Interests in Personalty under Guernsey Law which he described as the most authoritative modern statement of the customary law position on security interests. Advocate Carey described in his article a general rule that had evolved and had become accepted by members of the Guernsey Bar that, with the exception of pledge in respect of chattels, no form of security interest is capable of being created under the customary law in moveable property. He recognised that the customary law may evolve in certain circumstances including where there has been long usage. However, mere long non-usage of a custom would not be sufficient by itself to alter the custom.

47. Advocate Carey summarised the position at page 24 of the article:

> *"(a) There was no overriding principle that a valid security interest in personalty could not in any circumstances be created.*
>
> *(b) A security interest could be validly created in respect of tangible moveable property provided that the property concerned was delivered to the pledgee. Pawnbroking seems to have been quite common in Guernsey in the nineteenth century and goods therefore would have been routinely pledged. It would appear that the strict requirement of the Customary Law that pledges had to be consented to before the Court and registered was ignored.*
>
> *(c) A security interest could be validly created in respect of intangible moveable property provided that dominion over the property concerned was taken entirely out of the hands of the debtor and placed in the hands of the creditor. On the face of it completion before the Court and registration were necessary for all such transactions before 1979 and continued to be necessary for such transactions to which the 1979 Law did not apply.*
>
> *(d) Despite the widely held view that personalty could not be hypothecated, i.e. appropriated to a creditor by way of security but left in the possession and control of the debtor there seems to have been no reason in principle why this should not have been effective. In this case again completion before the Court and registration would be necessary to ensure validity."*

48. In summary, applying Advocate Carey's analysis to the present case, if the customary law recognised security in the net proceeds of sale of the Property, the interest would have had to be registered before the Court and that has not happened. Alternatively, the customary law might have evolved to such an extent that it did not recognise any security over personalty, whether registered or not.

49. I respectfully agree with Advocate Carey's analysis because it reflects my understanding of the customary law.

50. In the passage I quoted above, Advocate Carey referred to a Law of 1979. That is the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979. It was enacted to remove doubts which had emerged and had become significant as Guernsey evolved as a financial services centre providing banking and other services to the international community. Those doubts were in relation to the right of set-off and the enforceability of legal remedies under an assignment of a debt or other thing in action. None of the remedies under the 1979 Law apply on the facts of the present case.
51. In conclusion on this question, I find that Guernsey law does not offer any remedy which would give the Room Buyers any right to claim a secured interest or any priority over unsecured creditors in the distribution of the assets of the Company.

How are the proceeds of sale to be distributed as between the Room Buyers?

52. In the absence of any priority interest in the net proceeds of sale, section 419 of the Companies Law provides that the Company's assets are to be applied in satisfaction of the Company's debts and liabilities *pari passu.* In other words all creditors, including the Room Buyers, will recover only a proportion of the debt they are owed and they will all receive the same proportion, expressed as a number of pence in the pound. There will be no funds to distribute to the members of the Company.

What priority, if any, do the Liquidators have for the payment of the costs of the administration and subsequent liquidation of the Company?

53. Section 418 of the Companies Law applies: *"All costs, charges and expenses properly incurred in the compulsory winding up of a company, including the remuneration of the liquidator, are payable from the company's assets in priority to all other claims".*

54. As for the earlier costs incurred by the Liquidators when they were Joint Administrators of the Company, the position is that the costs, charges and expenses are payable in priority to all other claims and that the Administrators' fees are fixed by the Court as provided in section 383 of the Companies Law:

> *"383. (1) The administrator's remuneration, and any costs, charges and expenses properly incurred in the administration, are payable from the company's assets (or cellular assets attributable to the cell in respect of which the administrator was appointed, as the case may be), in priority to all other claims.*
>
> *(2) The administrator's fees shall be fixed by the Court.*
>
> *(3) An administrator shall be sworn before the Court when the Court makes the administration order or at any other time directed by the Court."*

Decision

55. For the reasons I have given, I make the Orders sought in paragraphs 1 and 2 of the Application:

1. I direct that persons who entered into contracts with the Company and paid a deposit for the construction and lease of hotel rooms in the property proposed to be developed by the Company at 228 Tunnel Avenue, North Greenwich, London shall be entitled to be admitted as creditors of the Company and if so shall rank as unsecured creditors of the Company in the distribution of the Company's assets in the respective amounts paid to the Company by each of them, subject to any accrued rights the Company may have to terminate those contracts and or set off any such claim in individual cases; and

2. The costs of the Application shall be paid from the assets of the Company.