IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-002282
[2023] NZHC 494

UNDER	Part 19 of the High Court Rules 2016 and s 284(1)(a) of the Companies Act 1993
IN THE MATTER	of an application pursuant to s 284(1)(a) of the Companies Act 1993 for directions in relation to the liquidation of Tiny Town Projects Limited (in liquidation)
BETWEEN	TONY LEONARD MAGINNESS and JARED WAIATA BOOTH as liquidators of Tiny Town Projects Limited (in liquidation) Applicants
AND	TINY TOWN PROJECTS LIMITED (in liquidation) Respondent

Hearing: 20 February 2023

Appearances: E C Gellert and Z Zhao for Applicants
A S Butler KC and J L Bates for Tiny Town purchasers
R B Hucker and M C Swan for Sescape
A H Hong for Warmerdams

Judgment: 14 March 2023

JUDGMENT OF VENNING J

This judgment was delivered by me on 14 March 2023 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: Lowndes Jordan, Auckland
Brown & Bates, Napier
McCaw Lewis, Hamilton
Molloy Hucker, Auckland

Counsel: A S Butler KC, Wellington
R B Hucker, Auckland

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[1] Tiny Town Projects Limited (in liquidation) (the company) was placed into liquidation on 15 November 2022. At the time it had partially completed construction of six tiny homes. Following the company's liquidation an issue has arisen as to the ownership of the partly constructed tiny homes and the nature of their purchasers' interests in them, if any.

Background

[2] The company operated from leased premises at Moturoa, New Plymouth. Its business was the construction and sale of custom-built "tiny homes". It offered studio, one-bedroom and two-bedroom customisable options, with a starting price of $155,990.

[3] The tiny homes were generally three metres in width, with variable lengths depending on whether they were studio, one-bedroom or two-bedroom. Each tiny home was constructed to suit the requirements of a particular customer (for example

the purchaser was able to choose fittings from a restricted number of options). The tiny homes took approximately four to six months to build. They were built on a steel trailer and had a steel frame. The company obtained a Code Compliance Certificate (CCC) from the New Plymouth District Council for each tiny home before delivery. The tiny homes were transportable. On completion each tiny home was transported on a low deck truck to the delivery site specified by the purchaser.

[4] The basis of the agreement between the company and purchasers was a standard agreement for sale and purchase of a tiny home. The standard agreement provided for the purchasers to pay the purchase price in instalments. The company used those funds to pay for the building materials, labour, and other expenses required to construct the tiny home. The funds received by the company were applied in the ordinary course of business. They were not held in a separate bank account or applied to particular tiny homes.

[5] From time to time during the construction process the company provided email updates to the purchasers as to the status of the construction. Once the company obtained a CCC for the tiny home it would inform the purchaser that completion was achieved. It was for the purchaser to ensure a delivery site was ready for installation of the tiny home and to confirm that to the company. The tiny home was available for inspection before delivery. The company would only transport the home to the purchaser's delivery site once all outstanding amounts had been paid.

[6] The six tiny homes at issue are the principal assets in the company's liquidation. They are currently stored and insured by the liquidators.

[7] The six purchasers are:

(a) David and Donna Craft (the Crafts);

(b) Rebecca and Brendon Gorringe (the Gorringes);

(c) Hannah Elizabeth Terry (Ms Terry);

(d) Gregor and Kelly Vallely (the Vallelys);

(e) Bernardus and Lydie Warmerdam (the Warmerdams); and

(f) Carol Anne Wright (Ms Wright).

[8] The Gorringes, Vallelys, and Ms Wright, (collectively the fully paid purchasers) have paid the entire purchase price. The liquidators' assessment, based on the company records, discloses that the tiny homes being built for the fully paid purchasers are 95 per cent complete, although certain work is still required on each of the tiny homes before the Council could inspect and issue the CCC in relation to them.

[9] In the case of the Crafts, Ms Terry, and the Warmerdams, (collectively the partially paid purchasers) the tiny homes are 40 to 50 per cent complete.

[10] In the case of the Warmerdams there is a further complication. The company was placed into liquidation by resolution of its shareholders at 9.30 am on 15 November 2022. On the same day, but after the liquidators' appointment, the Warmerdams made a further instalment payment of $46,430 to the company's bank account (the Warmerdam payment). The Warmerdam payment is claimed by Sescape (2010) Limited (Sescape) as a purchase money security interest (PMSI) creditor. In addition to the other relief sought by the purchasers the Warmerdams seek return of the $46,430.

[11] Mr Maginness, one of the liquidators, has sworn an affidavit for the purposes of the proceedings. On the basis of the financial information in that affidavit the prospect of any recovery to creditors, including general and secured creditors appears slim. There may be insufficient moneys for the payment of preferential creditors. The company has very limited assets (apart from the potential partially completed tiny homes at issue in this proceeding). The liquidators are concerned at the ongoing costs associated with the storage and insurance of the tiny homes. As noted, the company operated from leased premises. Counsel advised that, while the landlord has agreed to a reduced rental that agreement comes to an end on 28 February and the lease itself expires at the end of March. Further, the director of the company and its sole shareholder, James Cameron, has been declared bankrupt.

[12] Following an exchange of correspondence with solicitors representing the tiny homes purchasers, the liquidators brought these proceedings seeking directions from the Court under s 284 of the Companies Act 1993. It has been agreed that Mr Butler KC will represent the interests of the purchasers. Mr Hong represents the Warmerdams. Mr Hucker represents Sescape. The Court granted Sescape leave to intervene and be heard on the matter of interest to it.

Parties' positions

[13] Ms Gellert advanced submissions on behalf of the general body of creditors in the liquidation. She argued that the company retained ownership of the partially completed tiny homes. The tiny homes were not in a deliverable state. It follows that property in the tiny homes had not passed to the tiny home purchasers so that they remained a company asset.

[14] Further, Ms Gellert submitted that the agreement between the company and the tiny home purchasers had not become a sale and therefore s 53 of the Personal Property Securities Act 1999 (PPSA) had no application.

[15] Ms Gellert also submitted there was no basis for an equitable purchaser's lien nor for an institutional or remedial constructive trust to be imposed in the circumstances of this case.

[16] Mr Butler presented argument on behalf of the purchasers of the six partially completed tiny homes. He argued that on full payment of the purchase price, property in the tiny homes passed to the fully paid purchasers and they were not therefore an asset of the company liquidation. Alternatively, even if property in the tiny homes had not passed to them, they were still ordinary course buyers of goods sold under s 53 of the PPSA and took the goods free of any security interest, and they hold an equitable purchasers' lien over the tiny homes. As a further fallback position, they argue the tiny homes should be the subject of an institutional constructive trust in their favour.

[17] Mr Butler confirmed that the part-paid class accept property in the partially completed homes has not passed to them. However, they argue that they are still ordinary course buyers for the purposes of s 53 of the PPSA and have an equitable lien

over the partially completed tiny homes and/or a constructive trust should be declared in their favour.

[18] Mr Hucker accepted that Sescape has no interest in the tiny homes given the security interest held by Kiwibank and the limited assets in the liquidation but submitted Sescape was entitled to the $46,430 currently held by the liquidators as it had acquired the accounts receivable of the company.

[19] Mr Hong presented argument on behalf of the Warmerdams. While adopting Mr Butler's submissions he also argued in the alternative that the $46,430 had been paid by mistake and should be repaid.

[20] There is no appearance by or on behalf of other secured creditors, presumably because of the limited financial position of the company.

The declarations

[21] The liquidators seek the following directions from the Court:

(a) For the purposes of section 53 of the PPSA, whether the purchasers of tiny homes as described in the standard form Agreement for Sale and Purchase of a Tiny Home (Tiny Homes) (Tiny Home Purchasers) (Agreement) have acquired the Tiny Homes prior to liquidation free of any security interest;

(b) If the Tiny Home Purchasers did not acquire the Tiny Homes prior to liquidation, whether there is an equitable lien in relation to any or each respective Tiny Home in favour of the Tiny Home Purchaser for payments made to the Company by the Tiny Home Purchaser;

(c) If the Tiny Home Purchasers did not acquire the Tiny Homes prior to liquidation, whether any or all of the Tiny Homes are held on trust for any of the respective Tiny Home Purchasers (whether by way of implied, resulting, constructive, or otherwise);

(d) If the answer to (c) is yes then:

(i) When did each trust come into existence?

(ii) What are the terms of each trust (including as to the beneficiaries)?

(e) Whether the sum of $46,430 paid by Bernardus and Lydie Warmerdam to the Company on 15 October 2022 (the Warmerdam Payment) is to be returned to the payers or transferred to Fundtap Sescape (2010) Limited trading as Fundtap (Fundtap).

Issues

[22] The following issues arise from the declarations and the parties' arguments:

(a) whether property in the tiny homes has passed to the fully paid purchasers or remains with the company;

(b) the effect of s 53 of the PPSA on the parties' rights in this case;

(c) whether the purchasers of the tiny homes are entitled to an equitable lien over them, and if so, whether the lien is subject to the provisions of the PPSA;

(d) whether the purchasers can establish a trust interest against the tiny homes, and if so, whether the trust is subject to the provisions of the PPSA; and

(e) the status of the $46,430 paid by the Warmerdams and whether it is to be returned to them or is secured to Sescape.

The conditions of contract

[23] Before considering the competing arguments on the issues raised it is necessary to consider the provisions of the standard form agreement. Importantly, the following definitions apply:

> *Completion* means the point at which the Tiny Home has been constructed and fitted out for delivery at the Vendor's factory and is ready for delivery, and the Code Compliance Certificate – Building has been issued in respect of the Tiny Home.
>
> *Completion Notification Date* means the date on which the Vendor advises the Purchaser Completion has been achieved.
>
> *Purchaser's Delivery Notice* means the notice given by the Purchaser to the Vendor that the Site is completed, that the balance of the Purchase Price has been paid and that the Purchaser is ready to accept delivery of the Tiny Home.
>
> *Site* means the site at the Delivery Address where the Tiny Home is to be placed and includes all foundations of any kind required for that purpose.
>
> *Tiny Home* means the tiny home being bought and sold pursuant to this Agreement.

[24] Next, the following are the relevant operative provisions of the standard form agreement:

> **2. Purchase Price and Deposit**
>
> 2.1 The Purchaser agrees to purchase the Tiny Home as specified and described in the Schedule for the Purchase Price set out in the Schedule.
>
> 2.2 The Purchaser shall pay a deposit equal to … % of the Purchase Price to the Vendor immediately upon signing of this Agreement. The deposit is in part payment of the Purchase Price and shall be paid in cleared funds to the Vendor's bank account.
>
> 2.3 If the deposit is not paid within the timeframe specified, the Vendor may cancel this Agreement after giving the Purchaser five Working Days' notice in writing to pay the deposit.
>
> 2.4 The Purchaser shall pay the remaining balance of the Purchase Price and the Delivery Fee to the Vendor's bank account in cleared funds on the Balance Payment Date as set out in the Schedule.
>
> …
>
> 2.6 If the Purchaser does not pay the remaining balance of the Purchase Price due within 20 Working Days after the due date for payment, the vendor may cancel this Agreement after giving the Purchaser 10

Working Days' notice. For the avoidance of doubt, the Purchaser may rectify the default during that notice period by paying to the Vendor the remaining balance of the Purchase Price together with all other monies owing. If the Vendor cancels this Agreement under this clause, clause 8.1 shall apply.

3. **Delivery**

…

3.2 If, on or after the Estimated Delivery Date, the Vendor has advised the Purchaser that the Tiny Home is ready to be delivered but the Purchaser has not given the Purchaser's Delivery Notice, the Purchaser shall pay to the Vendor storage costs of $100 per day plus GST for every day in the period from the later of the Estimated Delivery Date and the fifth working day after the Completion Notification Date until the date that the Tiny Home is delivered to the Purchaser.

3.3 If the Purchaser has not given the Purchaser's Delivery Notice within 20 Working Days after the later of the Estimated Delivery Date and the Completion Notification Date, the Vendor may cancel this Agreement after giving the Purchaser 10 Working Days' notice. For the avoidance of doubt, the Purchaser may rectify the default during that notice period by giving the Purchaser's Delivery Notice and paying to the Vendor all monies owing by the Purchaser to the Vendor. If the Vendor cancels this Agreement under this clause, clause 8.1 shall apply.

3.4 The Vendor shall deliver the Tiny Home to the Delivery Address on a date specified by the Vendor once:

a) Completion is achieved; and

b) the Purchaser has paid the balance of the Purchase Price together with the Delivery Fee and all other monies owing; and

c) the Purchaser has given the Vendor the Purchaser's Delivery Notice.

…

3.7 If the delivery is a Standard Delivery, delivery shall be completed at the point at which the Vendor has removed the Tiny Home from the delivery vehicle and placed the Tiny Home on the Site.

…

3.10 The Purchaser acknowledges that the Estimated Delivery Date set out in the Schedule is an estimate only. The Vendor shall use its reasonable endeavours (subject to the Purchaser complying with its obligations) to complete delivery within that timeframe but shall have no liability to the Purchaser if it is unable to do so.

4. **Risk**

4.1 The parties agree that risk in the Tiny Home will pass to the Purchaser upon completion of delivery as defined in clause 3.7 (in case of a Standard Delivery) or 3.8 (in case of a Non-Standard Delivery) as applicable.

…

8. **Default**

8.1 In the event that the Vendor cancels the Agreement under clause 2.6 or clause 3.3, the Vendor shall endeavour to re-sell the Tiny Home. On settlement of such re-sale, the Vendor shall refund to the Purchaser the lesser of:

a) the Deposit less the sum of $20,000; and

b) the Deposit less:

i) accrued interest at the Default Interest Rate from the due payment for payment until the date payment is received by the Vendor on re-sale of the Tiny Home; and

ii) all costs reasonably incurred by the Vendor in re-selling the Tiny Home; and

iii) any loss incurred by the Vendor on re-sale of the Tiny Home.

Has property in the tiny homes passed to the fully paid purchasers?

Counsels' submissions

[25] The fully paid purchasers argue that, having paid the purchase price and delivery fee instalments in full, property in the tiny homes has passed to them in accordance with the terms of the contract. They argue that intention to pass property upon payment of the purchase price in full is clear from the wording of the agreement. As a result, the default rules as to passing of property under s 146 of the Contract and Commercial Law Act 2017 (CCLA) have no application as a different intention appears from the wording of the contract, the structure of the agreement and the surrounding circumstances.[1]

[1] Contract and Commercial Law Act, s 145.

[26] Mr Butler submitted that, objectively considered, the wording of cl 2.1 of the agreement "purchase the Tiny Home … for the Purchase Price" makes it clear that each purchase was completed on full payment of the purchase price. That was consistent with cl 4 which confirmed risk passed with delivery. Even though property passed on full payment, risk remained with the company pending delivery.

[27] Mr Butler submitted it was relevant that the purchaser was bound to make the purchase payments on certain specific dates, regardless of whether or not a CCC was available. He submitted that the presence or absence of a CCC had no bearing on whether the tiny home was in a deliverable state as the provision of a CCC was a separate obligation on the vendor.

[28] Mr Butler sought to test the position with the following example. If the application for the CCC failed prior to delivery and the tiny home required remedial work to obtain the CCC, he argued the parties could not sensibly have intended the company would retain ownership of the tiny home leaving it subject to a third party's security interest. The parties clearly intended to have property and title transfer upon full payment of the purchase price.

[29] Even if the default rules applied, Mr Butler noted there was a distinction under the agreement between the various times when the company was bound to deliver, when a tiny home was ready for delivery, and when the purchaser was bound to accept delivery. The obligation of the company to deliver was not necessarily coincidental with the purchaser's obligation to accept delivery. The company could specify a delivery date once a tiny home had been completed, even if a CCC was still pending. He noted the reference to an estimated delivery date in the schedule to the agreements.

[30] Next, Mr Butler submitted that Mr Maginness had accepted in his evidence that delivery would only occur once full payment was made, not when the CCC was available. Mr Butler also noted that in the case of the Gorringe home the liquidator had initially accepted (before taking legal advice) that the tiny home was ready for delivery or pick-up.

[31] Mr Butler referred to *Re Stapylton Fletcher Limited* to support his submissions for the purchasers.[2] In that case a wine merchant stored stock which had been paid for (but not collected) by customers (who in some cases planned to on-sell the wine). The merchant's own stock was separated from the customer's stock, but one customer's stock was not separated from another's. The specific entitlement of each customer was known, just not which case was theirs. Judge Paul Baker resolved the issue of whether property had passed by an appraisal of the parties' common intention rather than pursuant to the default rules, emphasising that:[3]

> Where the price has been paid in full, there would appear to be nothing to embarrass the ordinary operations of buying and selling goods, and the banking operations which attend them.

The result was that each customer became a tenant in common in the wine stock in the proportion that their goods brought to the entire stock.

[32] Mr Butler argued that, similarly, the common intention of the parties in the present case discharged the default rules. The parties intended that following payment of the deposit the build would commence, and the tiny homes would become ascertained and separately identified for each customer who would then receive email updates and photographs showing the progress. The completion of the build was coincidental or approximate to final payment obligations. The common intent was to tie property passing with the time the goods were ascertained, separately identified, and paid for in full. He submitted that the default rules under s 146 have no application because a different intention appears.[4]

Analysis — when does property pass?

[33] The parties agree that the contract for purchase of the tiny homes is a contract for the sale of goods. The provisions of the CCLA apply to it. Sections 120 and 123 provide:

> **120 Contract of sale of goods**

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2 *Re Stapylton Fletcher Limited* [1994] 1 WLR 1181 (Ch).
3 At 1200.
4 Contract and Commercial Law Act, s 146.

> A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration (the **price**).
>
> **123 Sale and agreement to sell**
>
> (1) A contract of sale is a sale if, under the contract, the property in the goods is transferred from the seller to the buyer.
>
> (2) A contract of sale is an agreement to sell if the transfer of the property in the goods is to take place at a future time or subject to a condition or conditions to be fulfilled at a future time.
>
> (3) An agreement to sell becomes a sale when the time for the transfer of the property to take place elapses or the condition or conditions of the transfer of the property are fulfilled.

[34] Section 123 confirms the distinction between a sale and agreement to sell. In the present case the contracts of sale for the tiny homes were agreements to sell. The transfer of property in the tiny homes was to take place at a future time. It was a contract of sale for goods to be manufactured by the company after the contract of sale was made (future goods).[5] On Ms Gellert's submission, the transfer of the property took place when the CCC was obtained. On Mr Butler's submission it occurred on payment of the final instalment of the purchase price.

[35] Subpart 2 of Part 3 of the CCLA (ss 143 to 148) provides for the transfer of property between seller and buyer. The goods must be ascertained for property to pass.[6] In the case of specific or ascertained goods property is transferred when the parties intend it to pass.[7]

[36] Section 144(2) confirms that:

> For the purpose of ascertaining the intention of the parties, regard must be had to—
>
> (a) the terms of the contract; and
>
> (b) the conduct of the parties; and
>
> (c) the circumstances of the case.

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5 Contract and Commercial Law Act, s 126.
6 Section 143.
7 Section 144(1).

[37] Relevantly s 145 provides:

> **Ascertaining parties' intention**
>
> Unless a different intention appears, the rules in section 146 are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

[38] Section 146, r 5 provides:

> *Rule 5*
>
> (6) Subsection (7) applies if there is a contract of sale for unascertained or future goods by description.
>
> (7) The property in the goods passes to the buyer when goods of that description that are in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller.

[39] Deliverable state is defined in s 119(4) as:

> Goods are in a **deliverable state** within the meaning of this Part if—
>
> (a) the goods are in a particular state; and
>
> (b) the buyer is bound under the contract to take delivery of the goods when they are in that state.

[40] Ms Gellert accepted that for the purposes of r 5 cl (7), the goods could be said to have been appropriated to the contract but argued they were not in a deliverable state until the CCC was issued, as, until the CCC was issued the purchasers were not bound to take delivery of the tiny home.

[41] I am unable to accept Mr Butler's submission that the terms of the contract are so clear that s 145 applied and there was no need to have reference to the default rules under s 146.

[42] Clause 2 simply confirms that the purchaser agrees to buy the tiny home for the purchase price set out in the agreement, confirms the obligations to pay it by instalments and provides for consequences if it is not paid. The clause does not expressly say nor support the conclusion that property will pass on payment of the

final instalment of the purchase price. The passing of property is not linked to payment in full under the contract.

[43] The agreement to sell the tiny homes will "ripen" into a sale only when the goods are ascertained, are unconditionally appropriated to the contract and are in a deliverable state.

[44] While Mr Maginness confirmed that the tiny home would not be delivered until payment in full was received, that is, with respect, understandable from a commercial point of view. In fact he said:

> The Company did not deliver a tiny home to a purchaser until all amounts had been paid under the Agreement. This included all amounts which were due in relation to the completed tiny home, which might have altered because the purchaser changed their mind regarding the specifications of the tiny home, or had additional changes required for the building consent for the specific location for the tiny home. It also included the payment for delivery of the tiny home.

Read in context, Mr Maginness' evidence does not support the fully paid purchasers' argument that property has passed. Payment was just one of a number of matters to be satisfied before delivery would take place. In fact, requiring payment before delivery supports the view that property did not pass until delivery. The scheme of the contract is that delivery follows completion, which is defined to include when the CCC has been issued by the Council.

[45] Clause 8.1, which was engaged by cl 2.6 in the event of non-payment was no more than an express recognition of the company's obligation to take steps to mitigate its potential loss.

[46] Nor does the case of *Re Stapylton Fletcher Ltd* assist the purchasers.[8] In that case the goods (wine) were in existence and had been paid for. The individual purchaser's wine was just not able to be identified. In the present case, the tiny homes had not been completed. A condition of the contract was the provision of a CCC. Completion under the contract was tied to a CCC having been obtained. As at the date

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8 *Re Stapylton Fletcher Limited*, above n 2.

of liquidation, further work by the company and further inspection(s) by the Council was required to obtain the CCC.

[47] The present case can be contrasted with *In Re Blyth Shipbuilding and Dry Docks Co*.[9] The contract in that case involved a contract for the construction of a ship. At first instance (confirmed on appeal) Romer J held that the terms of the contract could lead to property passing in the uncompleted ship. However, in the course of his judgment, Romer J cited with approval from the following passage in *Sir James Laing & Sons v Barclay, Curle & Co* in which Lord Halsbury stated the law as:[10]

> … the contract is not in strictness merely a contract for the sale of a complete ship. It is in truth a contract for the sale from time to time of a ship in its various stages of construction or of materials to be used in the construction of a ship, the seller, however, being under an obligation of working up the things sold into a complete ship for the purpose of putting them into a deliverable state. It is therefore a contract for the sale of unascertained goods which by appropriation with consent are from time to time ascertained, and there is nothing in s 16 to prevent the property from thereupon passing. They are not, however, in a deliverable state. Until they are, the property will not, therefore, pass, having regard to the terms of s 18, unless a different intention appears. Such an intention may be expressed or it may be inferred.

[48] Romer J found that the particular clauses of the contract indicated an intention that the property in the uncompleted vessel should pass before construction was completed. He considered that to be the case from the natural meaning of the words used. Clause 6 of the agreement provided:

> From and after the payment by the purchasers to the builders of the first instalment on account of the purchase price the vessel and all materials and things appropriated for her shall thenceforth, subject to the lien of the builders for unpaid purchase money including extras, become and remain the absolute property of the purchasers.

[49] And cl 8 of the agreement provided:

> In the event of any instalment of the purchase price remaining unpaid for fourteen days after the same is due the builders shall be entitled to interest thereon … and shall be at liberty by notice in writing to be given to the purchasers or sent to them … to rescind this agreement, in which case the purchasers shall thereupon cease to have any interest or property in the vessel,

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9 *In Re Blyth Shipbuilding and Dry Docks Co, Forster v Blyth Shipbuilding and Dry Docks Co Ltd* [1926] Ch 494 (CA).

10 *Re Blyth Shipbuilding and Dry Docks Co*, above n 9, citing Lord Halsbury in *Sir James Laing & Sons Ltd v Barclay, Curle & Co Ltd* [1908] AC 35 (HL) at 43.

> and the same shall become and be the sole property of the builders, free from any claim on the part of the purchasers …

[50] There is nothing like those clauses in the present case. Nor can an intention to pass property before the tiny homes were in a deliverable state be inferred.

[51] Reference can also be made to *Clarke v Spence*.[11] Williams J noted the established principle that in general under a contract for the building of a vessel or making any other thing not existing in specie at the time of the contract, no property vests in the purchaser during the progress of the work, nor until the vessel or thing was finished and delivered or at least ready for delivery and approved by the purchaser. That was the case even where the contract contained a specification of dimensions and other particulars of the vessel or thing and fixed the precise mode in time of payment by months and days.

[52] Again, in *Clarke v Spence* the provisions of the contract went further than in the present case and indicated an intention that property would pass before completion. They provided for the ship to be built under the supervision of a superintendent appointed by the purchaser. The builder could not compel the purchaser to accept any vessel or ship not constructed of materials approved by the superintendent and nor could the purchaser refuse any vessel which had been so approved. The Court considered that, in that case, as soon as any materials had been approved by the superintendent and used in the progress of the work the fabric consisting of the materials was appropriated to the purchaser. The appointment of a superintendent on behalf of the purchaser to approve stages of the build was of considerable importance. Further, in that case the payments under the contract were made according to the progress of the work and were tied to that. They could be more readily considered as a payment for the specific components of which the ship was made.

[53] There was no such overview or supervision of the contract by the purchasers in the present case. While they received updates (including photographs) the various stages of construction were not subject to their approval. Also, relevantly in the present case, the instalment payments were required to be made on particular dates,

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[11] *Clarke v Spence* 4 AD & E 448.

rather than upon the completion of certain particular stages of the construction process. They were not tied to or related to the build process.

[54] The express provisions in the *In Re Blyth Shipbuilding* and *Clarke v Spence* cases can be contrasted with another shipbuilding case, *Laidler v Burlinson*.[12] In that case the plaintiff paid his share of the purchase price, but before the ship was completed the shipbuilder was adjudicated bankrupt. The Court held the contract was for a completed ship, so property did not pass until the ship was finished.

[55] Two other cases Mr Butler referred to on the issue of deliverable state do not particularly assist. In *Baroni Foods Ltd v P K Wholesale Supplies Ltd*, the issue involved a claim by the vendor for an unpaid seller's lien.[13] The goods were, as a matter of fact, accepted by the Judge to be in a deliverable state when they were separated in a warehouse and available for delivery. Nothing more was required to be done to them. In *MJN McNaughton Ltd v Thode* (a decision on the papers) Duffy J accepted that joinery which was to be manufactured, had been manufactured, and was ready to be delivered.[14] In the present case none of the tiny homes have been completed and relevantly none of them have obtained a CCC. Completion, as defined in the parties' contract of sale, has not occurred.

[56] A feature of the present case is Ms Gellert's concession that the partly built tiny homes have been unconditionally appropriated to the contract. That is understandable given that the tiny homes in issue are identifiable as the tiny homes intended to be delivered to the individually named purchasers according to their specifications, but usually future goods which are to be manufactured are not generally unconditionally appropriated to the contract until they are physically delivered.

[57] Default rules (7) and (8)(b)(i) and (ii) state:

> (7) The property in the goods passes to the buyer when goods of that description that are in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller.

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12 *Laidler v Burlinson* (1837) 2 M & W 602; 150 ER 898 (Exch).
13 *Baroni Foods Ltd v P K Wholesale Supplies Ltd* [2017] NZHC 335.
14 *MJN McNaughton Ltd v Thode* [2012] NZHC 982.

> (8) For the purposes of subsection (7),—
>
> …
>
> (b) the seller must be treated as having unconditionally appropriated the goods to the contract if,—
>
> (i) in performing the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer; and
>
> (ii) the seller does not reserve the right of disposal.

[58] However, as Lord Halsbury's passage from *Sir James Laing & Sons* confirms, even where goods are unconditionally appropriated to the contract, property in them will not pass until the goods are in a deliverable state.[15]

[59] In the present case the default rules apply. Property will only pass when the tiny homes are in a deliverable state. That means when the purchasers are bound to take delivery. In my judgment, until the company was able to provide a CCC, the purchasers were not bound to take delivery.

[60] While, as Mr Butler noted, there are various steps involved in the delivery process, completion is defined in the agreement as when the tiny home is finished, ready for delivery and, importantly, a CCC has been issued.

[61] The company's obligation to obtain a CCC was an important feature of the contract. The evidence is that the CCC was a distinguishing feature of the tiny homes constructed by the company. Read as a whole, the contractual arrangements reinforced the importance of the CCC. On completion (when the tiny home was constructed, fitted out, ready for delivery, and had a CCC) the company would issue a completion notification date. A plain reading of the contract supports the view that the completion notice would not be issued until the CCC was available.

[62] The tiny home would then be delivered (in accordance with cl 3.4) provided the purchaser had paid the purchase price, delivery fee, and had given the company a purchaser's delivery notice.

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15 *Sir James Laing & Sons v Barclay, Curle & Co*, above n 10.

[63] The purchaser's delivery notice could have been given prior to the completion date (indeed it would be given at any time after the purchaser had paid the purchase price in full and had readied the site for delivery), but it has nothing to do with the passing of property.

[64] Importantly, the tiny home would not be delivered by the company and the purchaser would not be bound to accept delivery of the tiny home until completion which, by definition, included obtaining a CCC. The purchasers were apparently entitled to inspect the homes before delivery. If the CCC was not available, under the terms of the contract completion had not occurred. The purchasers would not be bound to take delivery.

[65] For the above reasons I conclude that property in the tiny homes had not passed to the fully paid purchasers as at the date of liquidation. Property in the tiny homes remained with the company at that date.

Section 53 of the PPSA

Counsels' submissions

[66] In relation to s 53 of the PPSA, Mr Butler argued on behalf of both the fully paid purchasers and partly paid purchasers that, even though property may not have passed, they were buyers under a sale for the purposes of s 53 and had an interest in the tiny homes (be it an equitable lien or via a constructive trust). As s 53 applied to their interest, the tiny homes were not collateral against which other security holders could have exercised rights prior to liquidation and nor could they exercise any such rights in the course of the liquidation.

[67] Section 53 of the PPSA provides:

> **Buyer or lessee of goods sold or leased in ordinary course of business takes goods free of certain security interests**
>
> (1) A buyer of goods sold in the ordinary course of business of the seller, and a lessee of goods leased in the ordinary course of business of the lessor, takes the goods free of a security interest that is given by the seller or lessor or that arises under section 45, unless the buyer or lessee knows that the sale or the lease constitutes a breach of the security agreement under which the security interest was created.

> (2) This section prevails over sections 153, 154, and 297 to 300 of the Contract and Commercial Law Act 2017 where this section applies and any of those sections apply.[16]

[68] Mr Butler noted the purpose of s 53 was to allow ordinary course buyers to buy without needing to search the register to discover whether perfected security interests covered the goods and if so, to negotiate a release over the goods.

[69] Mr Butler argued a broad interpretation should be applied to s 53 and referred to the following passage from *Tubbs v Ruby 2005 Ltd*:[17]

> [59] The Act does not define "sale". M Gedye et al, *Personal Property Securities in New Zealand (2002)* states:
>
> > The transaction will meet the definition of a 'sale' even if the buyer has paid half or all of the price through a trade-in or other exchange of property. Also, there is no requirement that the buyer must have paid for the goods, the section will protect a buyer on credit.
>
> This supports Mr Lester's proposition that the word "sale" should be given a liberal interpretation in recognition of the multiple ways in which commerce is transacted. I accept that proposition. Any other interpretation is likely to undermine the purpose of s 53.

[70] Mr Butler then went on to discuss the Canadian cases of *Royal Bank of Canada v 216200 Alberta Limited*, *Spittlehouse v North Shore Machine Inc*, and *Calidon Financial Services Inc – Calidon Equipment Leasing v Magnes*.[18]

[71] Mr Butler also relied on the following passage from the authors of *Personal Property Securities in New Zealand*:[19]

> ... it should not be necessary that title has passed under the Sale of Goods Act before a buyer is protected by s 53. If it were otherwise, a buyer under a true hire purchase agreement could claim the protection of s 53 as a lessee but a buyer under a conditional sale would not be protected. This would be contrary to the Act's scheme to abolish distinctions based on legal form. It would also be contrary to the thrust of the Act to do away with reliance on the location of title. As stated in *Daniel vs Bank of Haywood*: "The drafters of the UCC tend to avoid giving technical rules of title a central role ... [We] conclude that

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16 The sections referred to in s 53(2) have no application in this case.

17 *Tubbs v Ruby 2005 Ltd* [2011] 3 NZLR 551 at [59] (footnote omitted).

18 *Royal Bank of Canada v 216200 Alberta Limited* (1986) 51 SaskR 146 (CA); *Spittlehouse v North Shore Machine Inc* [1994] 18 OR (3d) 60 (CA); and *Calidon Financial Services Inc – Calidon Equipment Leasing v Magnes* 2021 SKCA 106.

19 Michael Gedye, Ronald Cuming and Roderick Wood *Personal Property Securities in New Zealand* (Thomson Brookers, Wellington, 2002) at 230.

> reliance on title to interpret [the UCC equivalent of s 53] is an unduly narrow and technical interpretation."…
>
> Where a buyer is entitled to the protection of s 53 under the above analysis but the goods are still in the seller's possession, the buyer will be entitled to take possession on payment of the balance, if any, of the purchase price. Where partly finished purpose built goods are involved, such as a pleasure craft being built by a boatbuilder, and the seller is unable or unwilling to complete manufacture, it may be necessary to value the goods to determine how much the buyer should pay.
>
> It should be noted that in some circumstances the PPSA has improved a buyer's position where a seller becomes insolvent. If the goods being bought have been appropriated to the contract but the seller has reserved title, the buyer will have priority over a liquidator or the Official Assignee. Under prior law, the buyer, in the absence of circumstances entitling the buyer to claim an equitable interest in the goods or a trust for any deposit paid, would have been treated as an unsecured creditor. For PPSA purposes, the reservation of title by the seller is merely a security interest. The buyer is considered to be the owner of the goods and the seller a holder of a security interest. Through this reconceptualisation of the buyer-seller relationship, the buyer has a sufficient interest in the goods to take priority over a liquidator or the Official Assignee.

[72] There is no reservation of title clause in the present case. Mr Butler submitted that, even if property had not passed, the liberal construction of buyer and seller, as evidenced in *Spittlehouse* and endorsed by the above passage (and consistent with the High Court in *Tubbs v Ruby 2005 Ltd*) supported the conclusion that the fully paid purchasers should take the goods free of any other security interest and their interest in the goods survives the seller's insolvency.[20]

[73] Mr Butler also referred to the further Canadian authority of *Camco Inc v Frances Olson Realty, (1979) Limited* as additional support for the proposition that the ordinary course buyer rules should be given broad interpretation to give maximum protection to buyers.[21]

[74] Mr Butler submitted that the Court should take a purposive approach to the issue of whether the agreement to purchase the tiny homes was a sale. The actual time of transfer of legal title to the property was irrelevant to the question of whether the tiny homes have been sold to the purchasers. He argued that as the purchasers had

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20 *Tubbs v Ruby 2005 Ltd*, above n 17.

21 *Camco Inc v Frances Olson Realty, (1979) Limited* [1986] 50 SaskR 161 (CA).

paid for the tiny homes (either in full or in part) they had become buyers under the sale for the purpose of the PPSA.

Analysis

[75] Section 53 of the PPSA protects buyers (and lessors) from the effect of a security interest to which they are not a party. One obvious example is when the seller sells goods to a buyer where the seller's interest in the goods is limited by a reservation of title clause imposed by its supplier. The buyer will take the goods free of that security interest.

[76] The difficulty with Mr Butler's argument based on s 53 is that, having found that the contract was an agreement to sell, and property had not passed to the tiny home purchasers, the starting point must be that the contract has not yet become a sale. It would only become a sale for the purposes of the CCLA when the property passed (or the time for it to pass had elapsed).

[77] Despite Mr Butler's submissions to the contrary, I consider the provisions of the CCLA are relevant to the determination of whether s 53 applies in this case. As Hansen J observed in *Orix New Zealand v Milne*:[22]

> Neither of the terms "seller" or "sale" are defined in the PPSA. As s 53 is concerned with goods (and none of the other species of personal property defined in the PPSA), it is logical to look to the Sale of Goods Act 1908 for guidance.

[78] The plain meaning of "sold" and the tense used in s 53 requires completion or perfection of the sale for the section to apply. I do not consider the case of *Tubbs v Ruby (2005) Ltd* assists Mr Butler's argument.[23] While Chisholm J was prepared to acknowledge there could be different types of transactions which could be construed as sales, he was not required to consider when the sale took place or was completed.

[79] The interpretation of sections equivalent to s 53 of the PPSA has been considered in the three Canadian cases referred to by counsel.[24]

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22 *Orix New Zealand v Milne* [2007] 3 NZLR 637 at [49].
23 *Tubbs v Ruby 2005 Ltd*, above n 17.
24 The PPSA draws from the Saskatchewan Personal Property Security Act 1973.

[80] In *Royal Bank of Canada,* the Court of Appeal was concerned with the interpretation of a clause in the then Personal Property Security Act 1979-80 which was in very similar language to s 53.[25] It provided:[26]

> A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest therein given by or reserved against the seller or lessor … whether or not the buyer or lessee knows of it, unless the secured party proves that the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement.

[81] The Court considered that, before a buyer could rely on the section, he had to establish that there had been a sale and that he was a buyer in the ordinary course of business. Whether a set of circumstances constituted a "sale" was to be determined by reference to the relevant provisions of the Sale of Goods Act. The Court held that those buyers who had paid the full or part of the purchase price for furniture **not** in the seller's possession could not rely on the PPSA section. But where the goods were ascertained and in a deliverable state, the section applied to protect their position.

[82] The subsequent decision of *Spittlehouse* dealt with the conditional sale of a boat.[27] The terms of the contract of sale provided possession and title were to be retained by the seller until the purchase price had been paid in full. The Court of Appeal for Ontario rejected the approach taken by the Court of Appeal for Saskatchewan in *Royal Bank* that the Sale of Goods Act applied to the question of what constitutes a sale in the ordinary course of business. Grange J held:[28]

> In my opinion, the Sale of Goods Act is not relevant or material to the resolution of our problem. Here, there was a sale with a seller and a purchaser who between them agreed that title in the goods would not pass until all purchase money was paid. The agreement between them states "the dealer agrees to sell and the buyer agrees to purchase" and refers "to the equipment being purchased" and that such equipment "is being sold". It cannot be regarded as anything but a sale. The Sale of Goods Act may affect the time when property in the goods passes but it cannot change what is clearly a sale in another Act into something it is not.

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25 *Royal Bank of Canada v 216200 Alberta Limited*, above n 18.
26 At 4.
27 *Spittlehouse v North Shore Machine Inc*, above n 18.
28 Above n 18.

[83] In that case the relevant Ontario legislation was in slightly different terms to s 53.[29] It provided:

> 28(1) A buyer of goods from a seller who sells the goods in the ordinary course of business takes them free from any security interest therein given by the seller even though it is perfected and the buyer knows of it, unless the buyer also knew that the sale constituted a breach of the security agreement.[30]

[84] The focus of the Court was on whether there was a buyer and seller. In Grange J's assessment, the only possible problems were whether the plaintiffs were buyers of the boat and Northshore was the seller. In his opinion they indubitably were.

[85] The Court of Appeal for Saskatchewan revisited the matter in the case of *Calidon Financial Services Inc*, noting the divergent views in the *Royal Bank* and *Spittlehouse* cases and the academic commentary on them.[31] The Court also noted that s 20 of the Sale of Goods Act had been amended to provide expressly for an equitable interest:[32]

> … If there is a contract to sell unascertained or future goods, the buyer who has paid all or substantially all of the contract price of the goods acquires an equitable interest in goods falling within the description of the goods in the contract immediately on the seller acquiring goods or a right to goods of that description.

[86] However, the Amendment Act came into effect after the transaction in issue before the Court in *Calidon.* In *Calidon*, Ryan-Froslie JA cited with approval the following academic discussion of the cases by Richard McLaren:[33]

> The decision in *Spittlehouse* has been academically criticized and judicially distinguished. The crux of the criticism is that the Court could have arrived at the same outcome without rejecting the reasoning in *Royal Bank* and the role of the Sale of Goods Act in determining whether a transaction is a sale, and whether a party is a buyer, for the purposes of s. 28(1) of the Act. As it was a specific good, the boat was identified in the contract of sale and the buyer acquired title in the boat upon execution of the contract. The title retention clause rendered the contract a conditional sale agreement which pursuant to s. 2 of the Act, is a security agreement. Upon execution of the contract, the buyer obtained title under the Sale of Goods Act and gave the seller a security

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29 Personal Property Security Act 1989, s 28(1).

30 The wording is different to the wording of s 53.

31 *Calidon Financial Services Inc – Calidon Equipment Leasing v Magnes*, above n 18.

32 Above n 18, at [51].

33 Above n 18, at [57], citing Richard McLaren in *Secured Transactions in Personal Property in Canada*, loose-leaf (Rel 2021-6) 3d ed (Toronto: Thomson Reuters, 2013) (WL) at para 7.05.

> interest in the goods. As this transaction was a sale in the ordinary course of the seller's business, the buyer was protected by s. 28(1) as against security interests given by the seller in the boat, presuming of course that the buyer did not know that the sale constitutes a breach of the security agreement.

[87] Ultimately, in *Calidon* the Court held that both *Royal Bank* and *Spittlehouse* were distinguishable. *Royal Bank* did not deal with a conditional sale agreement and in *Spittlehouse* the dealer had directly financed the purchase price. However, for present purposes it is relevant that the Court accepted that it made good sense, absent legislation to the contrary, that the Court should attribute similar or consistent means to common commercial terms such as buyer, seller, and sale of goods, when interpreting both the PPSA and the Sale of Goods Act.[34]

[88] Consistent with the approach of Hansen J in *Orix*, I consider that the provisions of the CCLA assist the interpretation of s 53 of the PPSA.[35] Applying those provisions to the contracts in this case, the agreements for sale of the tiny homes only became sales when a condition for the transfer of the property, in this case, the CCCs were issued. It was at that time the tiny homes were completed and property passed. At that time the tiny homes could be said to have been sold to the purchasers. However, until that time the tiny homes were not "sold" as that term is used in s 53 of the PPSA.

[89] For the above reasons I do not consider that s 53 of the PPSA can do the job that Mr Butler seeks to have it do in this case. It does not apply to the contracts of sale relating to the tiny homes.

Equitable lien

Counsels' submissions

[90] Mr Butler next submitted that both the fully paid purchasers and partly paid purchasers of the tiny homes have an equitable lien over the tiny homes to the extent of the money paid by them. Counsel relied on the Australian High Court case of *Hewett v Court*, which he submitted was a remarkably similar case.[36]

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34 At [56].
35 *Orix New Zealand v Milne*, above n 22.
36 *Hewett v Court* (1983) 149 CLR 639 (HCA).

[91] *Hewett v Court* involved a contract providing for instalment payments for the construction of a transportable home. The purchasers had paid the deposit and the first instalment. When the house was nearing completion and had been appropriated to the contract, it appeared the company was insolvent. The company and the purchasers then varied their original agreement. The purchasers uplifted the house and paid the balance of the contract price subject to an adjustment to allow for the uncompleted work. Shortly thereafter liquidators were appointed. They sought to set aside the variation to the agreement on the basis it was a preference. The purchasers defended the liquidators' claim on the basis they were entitled to an equitable lien upon the home. A majority of the High Court accepted that the purchasers had an equitable lien on the home for the amounts paid (by way of deposit and further part payment) and that would extend to any further payments made by them.

[92] However, in that case, the Court accepted that the contract was for materials and work rather than for the sale of goods. The case left open or undecided whether an equitable lien could be applied in the context of a sale of goods.

[93] In their dissenting judgment Wilson and Dawson JJ noted that the principal authority cited for the existence of an equitable lien in these circumstances was *Swainston v Clay*.[37] They considered that case did not decide that a lien arose by operation of equity out of an agreement, without more, to provide work, labour and materials in the further construction of the vessel. The dissenting Judges also noted that in the case before them, at the time the deposit was paid there was nothing to which a lien could attach. Further, as no property had passed to the appellants there was no obligation on the part of the company to transfer any particular house to them. Finally, the insolvency of the company was no reason of itself to place the appellants in a secured position so as to achieve an advantage over other creditors. The imposition of an equitable lien would, in their view, introduce unnecessary complexity into the ascertainment of rights of parties that would be destructive of the certainty which is the basis of sound commercial practice.

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[37] *Swainston v Clay* (1863) 46 ER 752.

[94] Notwithstanding that dissenting view, the majority accepted that an equitable lien existed. As noted, however, the Court dealt with the matter on the basis it was dealing with a contract for supply of labour and materials as opposed to the sale of goods.

[95] Mr Butler also referred to the case of *Re Alpha Student (Nottingham) Ltd (in liq)*.[38] In that case a number of investors had entered contracts to purchase student suites in a development. The development failed and the developer was placed in liquidation. While it was conceded the purchasers had an equitable lien over the base property on which the suites were to be built, the issue was the enforceability of the lien. Mr Butler noted Arnold J had stated the following in that case:[39]

> … Whatever the position may be where there is no contract in existence, it seems to me clear that where there is a contract in existence, the payment by the purchaser of part of the purchase price entitles him to a lien on the property in respect of the money so paid. There may be many reasons why a purchaser who has paid part of the purchase price may be precluded from specifically enforcing the contract in circumstances which are no fault of his; and his right to recover the purchase money actually paid by him, and the existence of an equitable lien to secure the payment, cannot depend on the availability to him of such a remedy. This is clear from the decision of the House of Lords in *Rose v. Watson* (1864) 10 H.L.C. 672, the principles laid down in which were applied by the majority of the Supreme Court in *Tempany v. Hynes* [1976] I.R. 101."

[96] And later:[40]

> 43. Counsel for the Liquidators submitted that, although the liens arose, they were unenforceable because the leases had never come into existence as the Suites had not been built and thus there could be no sale of the property. He also submitted that enforcement would give rise to practical difficulties.
>
> 44. As counsel for the Purchasers submitted, the first argument is essentially the same as the conceptual argument which was rejected in *Chattey v Farndale*. As the Court of Appeal held in that case, and as the High Court of Australia held in [*Hewitt*] *v Court,* there is no requirement that the purchaser should be entitled to specific performance. It follows that it is not necessary for the legal estate in question to exist. It is sufficient that the vendor has contracted to create the legal estate in question out of another legal estate which does exist and that the legal estate which is to be created is identifiable. It is immaterial whether the legal estate in question does not exist because construction of the building has not been completed or because construction has not been commenced. Accordingly, I agree with the conclusion reached

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38 *Re Alpha Student (Nottingham) Ltd (In liq)* [2017] EWHC 209 Ch, also cited as *Eason v Wong*.
39 At 31.
40 At 43–44.

> by Keane J in *Barrett Apartments*. For the reasons explained above, I do not regard *Hewitt v Court* as supporting the contrary conclusion.

[97] Mr Butler next referred the Court to an article by I J Hardingham of the University of Melbourne: *Equitable Liens for the Recovery of Purchase Money*.[41] In that article the author opined that when future goods the subject of a contract of sale become ascertained, then if the purchase money has been paid the purchaser will have a lien over the goods on the same basis as a simple contract for the sale of ascertained goods. The author noted Gibbs CJ's comment in *Hewett v Court*:[42]

> The fact that there is no authority precisely in point does not mean that in the present circumstances no lien can arise. The rules of equity are not so rigid and inflexible that it is necessary to discover precise authority in favour of the existence of a lien before one can be held to have been created.

[98] The author considered that any arbitrariness involved in the application of the principle could be explained on the basis that a lien can arise only when a subject matter exists to which it can attach.

[99] Mr Butler argued there was no reason the approach of the Court in *Hewett v Court* should not also apply to contracts for the sale of goods. He noted that in *Thomas Borthwick and Sons (Australasia) Limited v South Otago Freezing Co Limited* the Court of Appeal rejected the proposition that equity had never played a role in relation to contracts for the sale of goods, noting the jurisdiction to grant injunctive relief.[43]

[100] Mr Butler argued that while in *Toll Logistics (NZ) Limited v McKay*, the Court had acknowledged the cautious approach taken to the recognition of common law liens, in the present case there was no need to be cautious about the imposition or recognition of an equitable lien in respect of payments for the purchase price for goods that had been specifically manufactured for the purchasers.[44] Finally Mr Butler argued that recognition of an equitable lien for the tiny home purchasers was a just result as recognised by the High Court in *Hewett v Court*.[45]

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41 I J Hardingham "Equitable Liens for the Recovery of Purchase Money" (1985) 15 Melb Univ Law Rev 65.

42 *Hewett v Court*, above n 36, at p 93.

43 *Thomas Borthwick and Sons (Australasia) Limited v South Otago Freezing Co Limited* [1978] 1 NZLR 538. See also *Graham v Freer* [1980] 91 LSJS 125.

44 *Toll Logistics (NZ) Limited v McKay & Anor* [2011] NZCA 188.

45 *Hewett v Court*, above n 36.

[101] Mr Butler noted that an equitable lien would sit outside the PPSA, referring to s 23(b) of the PPSA. He emphasised that the tiny homes were each ascertained and identifiable and plainly earmarked for the purchasers so that, at the least, they had become ascertainable and identifiable. On that basis, he argued that the purchasers' equitable lien confirmed their in rem rights in the tiny homes that trumped any competing claim in the liquidation.

[102] Ms Gellert submitted that it would be conceptually flawed to treat a purchaser's lien in relation to land as analogous to the present case. She noted that the case of *Re Alpha Student (Nottingham) Ltd (in liq)*[46] involved a claim against real property which she submitted was a quite different situation to the present claim in relation to goods.

[103] Ms Gellert also referred and relied on to the Court of Appeal case of *Toll Logistics (NZ) Ltd v McKay*.[47] She noted the Court held no general packer's lien arose in the absence of proof of custom and went further, noting that even if a lien was established in proof of custom the Court would have hesitated before finding it applied, because the commercial relationship between the parties had changed since the lien had first been recognised. Further, the Court noted that a cautious approach was traditionally taken to the recognition of common law liens and that an expansive approach to the recognition of liens would be inconsistent with Parliament's intention in enacting the PPSA.

[104] Ms Gellert also referred to the case of *Re Wait* in which Atkin LJ found the sale of goods legislation constitutes an exclusive code.[48] Atkin LJ stated:[49]

> A seller or a purchaser may create any equity he pleases by way of charge, equitable assignment, or any other dealing with or disposition of goods, the subject-matter of sale; and he may create such an equity as one of the terms expressed in the contract of sale. But the mere sale or agreement to sell or the acts in pursuance of such a contract mentioned in the Act will only produce the legal effects which the Act states.

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46 *Re Alpha Student (Nottingham) Ltd (In liq)*, above n 38.
47 *Toll Logistics (NZ) Ltd v McKay*, above n 44.
48 *Re Wait* [1926] All ER Rep 433.
49 At 446.

[105] Ms Gellert submitted the decision of *Hewett v Court* could be distinguished as it was a contract for work and labour (not for the sale of goods) and it had no application to the current facts and the New Zealand statutory context.

[106] Finally, Ms Gellert submitted that, even if a lien was established, as it would operate as a charge, it would be subject to s 66 of the PPSA. Section 66 (with the examples deleted) provides:

> **Priority of security interests in same collateral when Act provides no other way of determining priority**
>
> If this Act provides no other way of determining priority between security interests in the same collateral,—
>
> (a) a perfected security interest has priority over an unperfected security interest in the same collateral:
>
> (b) priority between perfected security interests in the same collateral (where perfection has been continuous) is to be determined by the order of whichever of the following first occurs in relation to a particular security interest:
>
> (i) the registration of a financing statement:
>
> (ii) the secured party, or another person on the secured party's behalf, taking possession of the collateral (except where possession is a result of seizure or repossession):
>
> (iii) the temporary perfection of the security interest in accordance with this Act:
>
> (c) priority between unperfected security interests in the same collateral is to be determined by the order of attachment of the security interests.

Analysis

[107] An equitable lien is an equitable right conferred by law upon the plaintiff to have resort to a specific asset to secure the discharge of a liability owed by the owner of the asset to the plaintiff.[50] An equitable lien arises as a matter of law in respect of claims "which equity considers the other party is in conscience bound to perform in order to do justice between the parties".[51] It survives the intervening insolvency of

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50 Peter Blanchard (ed) *Civil Remedies in New* Zealand (2nd ed, Thomson Reuters, New Zealand, 2012) at 440.

51 At 441.

the owner of the property.[52] The equitable lien holder is deemed to have acquired property rights in the assets subject to the obligation to transfer the property. In the case of a purchaser's lien, once the purchaser has paid the purchase price the defendant's obligation to transfer becomes unconditional and equity will regard the transfer as having taken place at the moment of payment.[53] A person entitled to an equitable lien is regarded by equity as a secured creditor.[54]

[108] The issue raised by the facts of this case is a difficult one. There is force in the observations of the dissenting judgments in *Hewett v Court* that *Swainston v Clay* is not authority for the imposition of an equitable lien.[55] The first agreement in *Swainston v Clay* referred to and created a common law lien. The second agreement which replaced it specifically provided for the broker to enter the shipbuilder's yard and complete the ship using the builder's material and tools. The observation in that case relied on to support an equitable lien:

> … it does not follow that because no property passed at law in the ship to be built there might not be a perfectly good and valid contract affecting it in equity. …

appears to have been in relation to the first contract which, as noted, was a common law lien.[56] There is also force in the observation of Atkin LJ in *Re Wait*.

[109] However, on balance I agree with Mr Butler's submission that the application of the developing principles of equity and a liberal approach to the application of s 201 of the CCLA enable and support the imposition of an equitable lien in the present case. As Gibbs CJ noted in *Hewett v Court* the rules of equity are not so rigid and inflexible that it is necessary to discover precise authority to support the existence of an equitable lien. Section 60 of the former Sale of Goods Act 1908 and s 201 of the CCLA preserve the rules of common law (except to the extent that they are inconsistent with the express provisions of the relevant parts of the Act) and they continue to apply to contracts for the sale of goods.

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52 *Hewett v Court*, above n 36.
53 Blanchard et al, above n 37, at 442.
54 *Hewett v Court*, above n 36.
55 *Hewett v Court*, above n 36 and *Swainston v Clay*, above n 37.
56 Above n 42, at 757.

[110] In the present case, an important feature is that the partly constructed tiny homes are readily identifiable as having been applied to the separate contracts with the individual purchasers they relate to. While they remain the property of the company, in the normal course of its business and absent default by the purchasers, the company could not, in any sensible commercial sense, have sold the tiny homes to anyone other than the identified purchasers. The individual purchasers, both fully paid and partly paid, have paid moneys towards the purchase of those specific and identifiable (but not yet completed) tiny homes. There exists readily identifiable subject matter to which the liens can attach. In those circumstances I consider equity's response should be to support an equitable lien over the partly completed homes in favour of the purchasers to the extent of the value of the purchase moneys paid by the individual purchasers.

[111] The important features of the present case are the ability to precisely identify the tiny homes and that they have been appropriated to the contract. In *Palette Shoes Pty Ltd v Krohn* the High Court of Australia (Dixon J) held:[57]

> … Because value has been given on the one side, the conscience of the other party is bound when the subject comes into existence, that is, when, as is generally the case, the legal property vests in him. Because his conscience is bound in respect of a subject of property, equity fastens upon the property itself and makes him a trustee of the legal rights or ownership for the assignee. But, although the matter rests primarily in contract, the prospective right in property which the assignee obtains "is a higher right than the right to have specific performance of a contract," and it may survive the assignor's bankruptcy because it attaches without more *eo instanti* when the property arises and gives the assignee an equitable interest therein (In re Lind; Industrials Finance Syndicate Ltd. v. Lind1). In that case *Swinfen Eady* L.J. describes the effect of the decisions thus:—"It is clear from these authorities that an assignment for value of future property actually binds the property itself directly it is acquired—automatically on the happening of the event, and without any further act on the part of the assignor—and does not merely rest in, and amount to, a right in contract, giving rise to an action. The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for".

[112] Further, as Gibbs CJ noted in *Hewett v Court*:[58]

> "The contract required the appellants to pay all but $1,000 of the price of $34,116 before obtaining property in the home. The payment (other than the

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57 *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 (footnotes omitted).

58 *Hewett v Court*, above n 36, at 648.

> deposit) was to be made in respect of an identified building which the company was bound to complete and set up on the appellants' land. The contract impliedly recognised that if the appellants terminated the contract they should be entitled to the product of the work for which they were required to pay. In these circumstances it seems to me that the appellants were entitled to a lien for the amount of the purchase money paid when the contract could not be completed through no fault of theirs. The case is so closely analogous to that of a sale that the principles which entitle the purchaser to a lien are in my opinion applicable. No doubt if the construction of the building had never been commenced there could have been no lien for the deposit, but it does not follow that once the construction had been commenced to the stage of pitching the roof there could be no lien in respect of all moneys paid, including the deposit."

[113] As noted, an equitable lienholder is regarded by equity as a secured creditor. Prima facie, the equitable liens would meet the broad definition of a security interest under s 17 of the PPSA:

> **Meaning of security interest**
>
> (1) In this Act, unless the context otherwise requires, the term security interest—
>
> (a) means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to—
>
> (i) the form of the transaction; and
>
> (ii) the identity of the person who has title to the collateral; and
>
> (b) includes an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, and a commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation).
>
> …
>
> (3) Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.

[114] Mr Butler sought to avoid the application of the PPSA in two ways. First, he submitted that, in the event the Court declared or found the tiny home purchasers to be secured creditors, then because of s 53 of the PPSA they would be entitled to exercise their rights as charge holders over the specific tiny homes built for them in

their present state. There would be no competing secured creditor claims that might otherwise have arisen, as had occurred in *New Zealand Associated Refrigerated Food Distributors Limited v Simpson*.[59] I am not, however, able to accept that submission. As noted, and for the above reasons, s 53 does not apply.

[115] However, Mr Butler also relied on the exclusion referred to in s 23(b) of the PPSA. I agree that the purchasers' interest as equitable lien holders is excluded from the provisions of the PPSA by s 23(b) of the PPSA:

> **When Act does not apply**
>
> This Act does not apply to—
>
> …
>
> (b) a lien (except as provided in Part 8), charge, or other interest in personal property created by any other Act (other than section 169 of the Tax Administration Act 1994 and sections 169 and 184 of the Child Support Act 1991) or by operation of any rule of law:
>
> …

[116] Security interests under the PPSA are premised on security agreements, in other words, consensual agreements. As the liens in the present case are equitable in nature and arise by operation of law they are not consensual. Section 23(b) applies to exclude such an equitable lien. The purchaser's equitable liens are outside the provisions of the PPSA.

[117] Section 23(b) provides for exceptions to the exclusion from the Act, including some liens. Section 93 deals expressly with the situation of a lien arising out of materials or services provided in respect of goods subject to a security interest. While liens of that nature come within the ambit of the PPSA, provided the requirements in s 93 are met, the lien will have priority over other security interests under the Act.

[118] The equitable liens in the present case are in some ways, the other side of the same coin of the lien for materials or services provided in respect of goods which s 93 relates to. The purchasers have supplied money to the company in the ordinary course of the company's business. There is no evidence they were aware of any security

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[59] *New Zealand Associated Refrigerated Food Distributors Limited v Simpson* [2008] NZHC 951.

interest provided by the company. The tiny homes the money was provided for have either been largely, or at least partially, completed and in all cases can be identified as having been appropriated to the respective contracts. While the equitable liens fall outside the process of the PPSA by reason of s 23(b), and to that extent could be said to have priority over security interests under the PPSA, any such priority is consistent with or analogous to the priority provided the other types of non-consensual lien by s 93.

[119] I conclude that the individual purchasers are entitled to equitable liens for the extent of the value of the purchase moneys paid by them and that their equitable liens sit outside and are not affected by the provisions of the PPSA.

Institutional constructive trust

Counsels' submissions

[120] For completeness, although not strictly necessary, I deal with the last submission for the purchasers. Mr Butler argued for the imposition of an institutional constructive trust which would sit outside the ambit of the liquidation. Mr Butler submitted that, particularly in relation to the fully paid purchasers, even if property had not passed, once the CCC was available the contracts would effectively be specifically performable, and under settled New Zealand law the purchaser is to be treated in equity as the owner of the property, and the vendor as constructive trustee.[60] He argued that in the case of the fully paid purchasers they could waive the need for a CCC (which was entirely for their benefit). The contract would at that stage be specifically performable. In the case of the partly paid purchasers, an equitable interest could pass under a conditional contract even if specific performance of the contract in the strict sense was not available.

[121] Mr Butler noted that in *Bevin v Smith*, the Court of Appeal had held that the equitable estate passes when equity will, by injunction or otherwise, prevent the vendor from dealing with the property inconsistently with a contract of sale, that is inconsistently with the purchaser's contingent ownership rights.[61] Mr Butler also

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60 *Bevin v Smith* [1994] 3 NZLR 648 (CA) at 659.
61 *Bevin v Smith*, above n 60.

referred to the cases of *Crouch v Abell [Application of Crouch]* and *Vostok Shipping Co Ltd v Confederation Ltd*.[62]

[122] Mr Butler referred to *306440 Ontario Limited v 782127 Ontario Limited* which involved litigation over the distribution of bankrupt's estate, in which the Court of Appeal for Ontario discussed the "swollen asset" theory.[63]

[123] Mr Butler submitted there was an element of the "swollen asset" theory present in this case, as the company has retained both the purchase price and the partly constructed homes. The purchase price paid by the purchasers provided working capital to sustain the business for the benefit of other creditors, such as the company's bank. He submitted in the circumstances it was unconscionable for the tiny home purchasers to be denied the proprietary remedy of a constructive trust.

Analysis

[124] A constructive trust attaches by law to specific property that is not expressly subject to a trust but which is held by a person (in this case the company) in circumstances where it would be inequitable to allow the company to assert full beneficial ownership of the property. A constructive trust may arise by operation of law independently of the intention of the parties.

[125] In *Re Webb,* the Court discussed the factors necessary for the imposition of an institutional constructive trust.[64] The Court referred to *Angove's Pty Ltd v Bailey* in which case the United Kingdom Supreme Court considered the circumstances in which an institutional constructive trust might be imposed.[65] The Supreme Court disapproved the earlier decisions in *Neste Oy v Lloyd's Bank Plc* and *In Re Japan Leasing (Europe) plc* which had held or commented that liquidators held funds on trust for particular creditors.[66] Lord Sumption noted that an institutional constructive trust

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62 *Crouch v Abell [Application of Crouch]* [2005] NSWSC 1308; and *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37 (CA). See also *Re Alpha Student (Nottingham) Ltd (in liq)*, above n 43.

63 *306440 Ontario Limited v 782127 Ontario Limited* [2014] 324 O.A.C. 21 (CA).

64 *Re Webb* [2022] NZHC 1398.

65 *Re Webb*, citing *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179.

66 *Neste Oy v Lloyd's Bank Plc, The Tiiskeri, Nestegas and Enskeri* [1983] 2 Lloyd's Rep 658 (QBD); and *In Re Japan Leasing (Europe) plc* [1999] BPIR 911 (Ch).

arises by operation of law and is declared, but not discretionary. He then went on to say:[67]

> Bingham J's point of departure in Neste Oy was that the recipient of money may be liable to account for it as a constructive trustee if he cannot in good conscience assert his own beneficial interest in the money as against some other person of whose rights he is aware. As a general proposition this is plainly right. But it is not a sufficient statement of the test, because it begs the question what good conscience requires. Property rights are fixed and ascertainable rights. Whether they exist in a given case depends on settled principles, even in equity. Good conscience therefore involves more than a judgment of the relative moral merits of the parties. For that reason it seems to me, with respect, that Bingham J's observation in Neste Oy that any reasonable and honest director would have returned the sixth payment upon its receipt begs the essential question whether he should have returned it. It cannot be a sufficient answer to that question to say that it would be "contrary to any ordinary notion of fairness" for the general creditors to benefit by the payment. Reasoning of this kind might be relevant to the existence of a remedial constructive trust, but not an institutional one. The observation of the editors of Bowstead and Reynolds and of Nicholas Warren QC in Japan Leasing that a proprietary claim should be recognised whenever the claim is "sufficiently strong and differentiable from other claims" to warrant giving it priority over other claims in an insolvency, seems to me to be open to the same objection.

[126] In the *306440 Ontario* case, the Court ultimately only imposed a constructive trust over funds held by the receiver which related to containers sold by the insolvent company in breach of the existing contractual arrangements between the insolvent company and the creditor.[68] The reasoning in that case and the "swollen asset" theory do not support the imposition of an institutional constructive trust in the present case. The Court noted:[69]

> The comment in *Michelin Tires*, at para. 19, is particularly apropos to the circumstances of this case:
>
> > In particular, a constructive trust will not be imposed unless the plaintiff can point to property in the hands of the defendant that is identifiable as the property, or its proceeds, that was transferred by or obtained from the plaintiff without a juristic reason, or that the defendant could not otherwise retain in good conscience. That is, the constructive trust attaches to specific assets of the defendant that represent the enrichment; it is not a charge on the defendant's general assets for the amount of the plaintiff's claim.

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67 *Re Webb*, above n 64, at [52].

68 *306440 Ontario Limited v 782127 Ontario Limited*, above n 63.

69 *306440 Ontario Limited v 782127 Ontario Limited*, citing *Michelin Tires (Canada) Ltd v Canada* 2001 FCA 145, [2001] 3 FC.

[127] As Ms Gellert noted, in this case the purchasers entered contractual arrangements for the manufacture and build of a tiny home. The funds they paid were paid pursuant to that agreement, the "juristic reason" to use the words from the *306440 Ontario* case. The funds have in fact been dispersed in accordance with the business of the company and entirely consistent with and permitted by the general provisions of the contracts the parties made.

[128] The purchasers' reliance on *Bevin v Smith* does not assist them on this issue. That case related to agreements for the sale and purchase of land where the existence of a constructive trust is well established. The law in relation to sale of goods is more complex. In *Vostok Shipping Co Ltd v Confederation Ltd*, the Court did acknowledge that in the case of goods with an element of uniqueness, specific performance may be available.[70] That was, however, an Admiralty case involving in rem proceedings.

[129] In the present case the payments made by the purchasers were in accordance with their contractual obligations. Save for the last payment by the Warmerdams the payments were not made by mistake. The company was entitled to receive the payments in accordance with the terms of the contract. There is no suggestion that by receiving and applying the moneys in the course of its business the company acted in breach of trust. The subsequent liquidation of the company cannot alter that position.

[130] I conclude there would be no basis to impose an institutional constructive trust on the facts of this case.

The Warmerdams' final payment

[131] Mr Butler submitted, supported by Mr Hong, that there was clear authority the liquidator should return payments made post liquidation as the liquidators were obliged to act in a manner consistent with highest principles. In *Heath and Whale on Insolvency,* the learned authors state:[71]

> Even where a company in liquidation has received a payment, liquidators may be obliged to return the payment under the rule in *Re Condon* (1874) LR 9 Ch

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70 *Vostok Shipping Co Ltd v Confederation Ltd*, above n 62.

71 Paul Heath and Michael Whale (eds) *Heath and Whale on Insolvency* (online ed, LexisNexis) at [20.35(b)].

> App 609 (CA) (*Re Condon*). This is to the effect that liquidators, as officers of the Court who are obliged to act in a manner consistent with the highest principles, cannot take advantage of the strict legal rights available to them if to do so would mean that they were acting unjustly, inequitably, or unfairly. The rule has been applied to require liquidators to refund payments mistakenly made into the company's bank account after liquidation.

[132] Counsel also referred to the case of *Strategic Finance Ltd (in rec & in Liq) (Strategic) v Bridgman*.[72] In that case the Inland Revenue Department had incorrectly paid a GST refund to Takapuna Procurement Ltd (Takapuna) after the liquidation. Strategic claimed a general security over Takapuna's assets saying the GST refund should not be repaid. Both the High Court and Court of Appeal held it would be unfair and unconscionable for the GST refund to be retained by the liquidators. The payment was effectively a mistake made as to the status of the company.

[133] Against that, Mr Hucker argued the late payment was made in satisfaction of the full purchase price under the relevant contract. The contracts had not been cancelled. The purchasers were still obliged to complete. The liquidators had not disclaimed the contract.[73] On that basis, while the Warmerdams should effectively be treated as part of the fully paid class of home owners, the payment of $46,430 was caught by Sescape's security. The payment was made pursuant to the contract.

Analysis

[134] The Warmerdams' final payment of $46,430 was made before it was due and following advice from the company about the stage of construction. The payment would not have been made had the Warmerdams been aware the company had been placed in liquidation.

[135] As in *Strategic Finance Ltd*, I do not consider the rule in *Condon* to be restricted to the position of the liquidators.[74] Plainly the Warmerdams would not have paid the further $46,430 if they knew the company was already in liquidation. The payment was a mistake. It was not due under the terms of their contract so the fact the contract was not cancelled does not assist Mr Hucker's client.

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72 *Strategic Finance Ltd (in rec & in Liq) (Strategic) v Bridgman* [2013] NZCA 357.
73 Companies Act 1993, s 269.
74 *Re Condon* (1874) LR 9 Ch App 609 (CA).

[136] I conclude that the liquidators are required to return the post-liquidation payment of $46,430 to the Warmerdams.

Summary/Result

[137] It follows from the above that the findings of the Court are:

(a) property in the partly completed tiny homes has not passed;

(b) s 53 of the PPSA does not apply to the contracts of sale in this case;

(c) the individual tiny home purchasers, both fully paid and partly paid, are entitled to an equitable lien against the partly constructed tiny homes which relate to their contracts to the extent of the purchase moneys paid by them;[75]

(d) the equitable lien is excluded from the operation of the PPSA and the security interests under that Act;

(e) there is no constructive trust over the property in favour of the purchasers; and

(f) the $46,430 held by the liquidators is to be returned to the Warmerdams.

Declarations

[138] As to the formal declarations sought, the Court declares that:

(a) s 53 of the PPSA does not apply to the contracts of sale in this case;

(b) the tiny home purchasers, both fully paid and partly paid, are entitled to an equitable lien over the partly constructed tiny homes which relate to their contracts to the extent of the purchase money paid by them;

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[75] In the case of the Warmerdams, that will be the total amount paid less the $46,430 to be repaid to them.

(c) the purchasers' equitable liens are excluded from the operation of the PPSA which does not apply to them;

(d) the tiny homes are not held on trust for the respective purchasers;

(e) the sum of $46,430 paid by the Warmerdams and held in escrow by the liquidators is to be returned to the Warmerdams.

Costs

[139] At the request of the parties costs are reserved. In the event counsel are not able to agree on the issue of costs any party seeking costs can file their memorandum within 15 working days. Any party opposing costs can file a response within five working days.

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Venning J