IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND
CONSTRUCTION COURT
[2018] EWHC 3886 (TCC)

No. HT-2017-000360

Rolls House
7 Rolls Buildings
London
EC4A 1NL

Wednesday, 21 November 2018

Before:

MR. JUSTICE WAKSMAN

B E T W E E N :

CLAREMONT GROUP INTERIORS — Applicant

- and -

BOULTBEE (MARLYBONE) LIMITED — Respondent

MR. A. HICKLEY QC (instructed by Eversheds Sutherland) appeared on behalf of the Claimant.

MR. P. BUCKINGHAM (instructed by Clarke Wilmott) appeared on behalf of the Defendant.

J U D G M E N T

MR. JUSTICE WAKSMAN:

1 I have before me an application to continue a freezing injunction which was granted last week on 1 November by O'Farrell J on a without notice basis. Today is the return date of the hearing of that injunction.

2 The claimant, Claremont Group Interiors, was the contractor in relation to the development of three high-value residential properties at 29-31 Earlbury Place. The defendant is the owner of those properties. It is the SPV created to deal with that particular development which is the usual way in which the group of company headed by Mr. Brooks operates.

3 There is nothing particularly unusual or suspicious in creating a separate corporate vehicle in respect of each development. What normally happens is that once the development has been completed and paid for so that there is nothing left for the SPV to do, it is placed into solvent liquidation and the profits distributed.

4 The main corporate vehicle for the activities of Mr. Brooks in this regard is another company to which I shall refer simply "Boultbee Capital". The underlying claim has arisen here because Claremont has or it says will have a number of substantial claims for the work which it did in constructing the properties which are, admittedly, unpaid by the defendant.

5 The defendant for its part argues that the claims are not going to succeed, if at all, in anything like the amounts claimed because various problems concerned with delays and defective workmanship and the like. It is not necessary for me to go into the ins and outs of those disputes now.

6 The first claim made by the claimant is one which was made pursuant to interim payment application number twelve for around £884,000. At an adjudication it was held that there was a valid payless notice served by the defendant and no award was made by the adjudicator at that stage. That particular claim is shortly to be litigated and the trial takes place in just literally a few weeks' time on, I think, 10 December.

7 There is a further claim which would incorporate the sum claimed in application twelve being application thirteen, although it is said that there, there has already been a valid payless notice served and so, the money has not already fallen due. There would then be a further sum or a further accumulative sum due next year, practical completion having taken place in April of 2017.

8 I have considered that for present purposes the only claim that I shall be concerned with is that for the £884,000, that being the one which will be litigated in a few weeks' time.

9 At the time of practical completion, the development was being funded by a separate lender called, "Titlestone". The defendant had also received a substantial injection of funds said to amount to something over £7 million by Boultbee Capital. The reason for that injection, it is said, is because of a change in market conditions which meant that the properties would not be sold as quickly or for as much as had been anticipated and the very delays to the project which the defendant lays at the door of the claimant.

10 In December 2017, Coulson J granted *ex parte*, a freezing injunction over the remaining property which is number thirty. That freezing injunction never came back on a contested

basis but, instead, the parties agreed that in the event that the defendant was going to sell number thirty, it being the only unsold property, it should give fourteen days' notice to the claimant which would then have the opportunity of either negotiating some security for itself or make some other arrangement which would give it comfort or, alternatively, make an application to the court. It is, of course, in the nature of the defendant that it has no assets other than this property.

11 In September 2017, the position so far as indebtedness changed somewhat. The evidence of the defendants through Mr. Da Costa, a solicitor and Mr. Hosking a director was that Titlestone were not prepared to wait much longer for the repayment of their debt which was already overdue. The upshot was that the defendant was able to find a new funder called, "Interbay" but Interbay required some additional security other than a first charge mainly to replace that which had been held by Titlestone, namely, first of all, a charge over another property which was an office which was owned by Capital and secondly, Capital itself would have to agree to subordinate its loan to run behind that of Interbay. In addition to that, Capital had to provide a parent company guarantee up to the value of £3.3 million.

12 All of those transactions were executed but in addition to that, first of all, Capital agreed to write off £2.517 million off the £7.51 million then said to be owing, so that there would be a new loan or a rolled-over loan of £5 million. In addition to that, and it is said by reason of the measures which Capital had to take at the instance of Interbay, the defendant agreed to grant to Capital a debenture which would take effect as a second charge over the property where Capital had had no security for its loan previously. It has the status and effect of that debenture which lies at the heart of the current dispute.

13 Moving on to 2018, the defendant gave notice to the claimant that it was going to sell the property and that was by letter dated 18 September. At that stage, it was said that the property was going to be sold for £5.5 million and that that offer had been accepted. The letter asked as a matter of urgency to ask the claimant as to whether it had any objections to that sale going forward. I should add that the solicitors who wrote that letter on behalf of the defendant, Clarke Wilmott who represented today, are not the solicitors dealing with the conveyancing which is a firm called Sherrards which is where Mr. Da Costa is a solicitor.

14 There was a chaser from Clarke Wilmott on 20 September and then a letter on 21 September by which time the claimant had agreed to provide a substantive response by the following Monday, 24 September. This is an important letter and said this:

> "If your client provides its unqualified consent to our client accepting the offer and proceeding and agrees not to take any further injunctive or other action which may affect the progress of the sale, our client is prepared to provide yours with an undertaking to put the balance of the proceeds as to sale into our client account and leave those funds there pending the outcome of the trial listed for 10-12 December. We are instructed that if the sale goes ahead at the price of £5.5 million, the surplus after the discharge of the secured loans debts will be £784,000 but there will be interest."

15 On the following page and in order to persuade the claimant to go along with this, Clarke Willmott say they were instructed that the only offer was £4.5 million and, "As such, our client does not want to lose this opportunity to sell the property at a profit". That is because on the implicit representation that the secured loan was about £4.7 million, it would be selling at a loss if it sells it for £4.5 but not for £5.5 million.

16 What is plain from that letter are several things. First of all, the only secured loan that is being said to exist is one which would leave a surplus of £784,000. Secondly, that subject to any undertaking of the £784,000 there would be a profit available to the defendant and thirdly, there was no problem with that offer being made which would suggest there is no other party, in particular, no other secured creditor which could get hold of it.

17 A substantive response was received on 24 September. There is a passage in Mr. Hosking's witness statement suggesting that no objection was received. That is simply wrong, there was an objection and it was set out at some length on 24 December. The offer was not accepted because they wanted £1.481 million to be set aside and that is because at that stage, Claremont was looking to its application thirteen claim as being the relevant one. To cut a long story short, the parties did not reach agreement about that.

18 There was further correspondence and on 12 October, Clarke Wilmott said?

> "There has now been an increased offer in the sum of £5.7 million. As you're aware, the period under the notice had passed and our client intends to accept and proceed with the sale."

19 That is true in the sense that there was nothing to stop the defendant going ahead with the sale. They merely had to give fourteen days' notice. By 12 November, the position appeared to be that the defendant was now reverting to the original offer of £5.5 million. It also transpired by that stage, and it had not been revealed before, that contracts had actually been exchanged and, indeed, I am told that completion is set for the 26 November.

20 It is said by Mr. Hosking and Mr. Da Costa, however, there is no documentary evidence to support it, that first of all, the indebtedness to Interbay is now £4.7 million. That would at least be consistent with what was said in the letter of 21 September, but secondly it is said that there is over £3 million still owing on the debenture. So far as that is concerned, I have no documents either.

21 The position now reached in my judgment is as follows. First of all, in order to obtain a freezing injunction, the claimant must show a good arguable case. That was shown to the satisfaction of O'Farrell J and it is shown to my satisfaction here. The fact that there is going to be a contested or heavily contested trial does not mean that for present purposes, there cannot be a good arguable case and the same is true, notwithstanding the fact that the arbitrator declined to award the same some time ago. In reality, there is going to be a serious dispute between the parties but I am not in a position to go into that in any great detail. It seems to me that the burden of showing a good arguable case here is satisfied.

22 That then leads me to consider whether there is a real risk of dissipation. The law is clear, the fact that absent an injunction the relevant assets may be dissipated is not sufficient. There has to be a real risk, first of all, of a dissipation but secondly, a real risk of an unjustifiable dissipation. That comes from the dicta of Gloster LJ in the *Candy & Others v Holyoake* [2017] EWCA Civ 92 case and she said at p.34:

> "There must be a real risk judged objectively where the future judgment would not be met because of justifiable dissipation of assets, but it's not every risk of a judgment being unsatisfied which can justify freezing order relief."

23 That is obvious. An asset may be wholly dissipated in the ordinary course of business, but the mere fact that that happens, does not mean that there is a sufficient risk for the purpose of granting a freezing injunction. As she said, "Solid evidence will be required to support a conclusion that relief is justified although precisely what this entails in any given case will necessarily vary."

24 There may be various kinds of transactions which would not classify as unjustifiable dissipation. The most obvious, as I say, is where the dissipation or removal of the asset is done in the ordinary course of business and therefore, for example, the mere fact that off-shore companies are used or the mere fact that SPVs are used does not necessarily mean that any dissipation is unjustifiable. That is because it may be a perfectly legitimate way of doing business and that is made plain that that is what she was dealing with, because in the present case she said there was only minimal evidence of a risk of dissipation. There was nothing about the corporate structure or the corporate re-organisation to suggest a risk of dissipation. What she must mean there is a risk of an unjustifiable dissipation.

25 The claimant, of course, bears the burden of proof in that regard. Mr. Hickey for the claimant does not say now that the fact that the group of companies headed by Capital, which has been in existence for twenty years, operates by using SPVs as the corporate vehicle for each separate development can itself give rise to solid evidence of a risk of unjustifiable dissipation. However, the does take issue with the debenture which was made in September 2017. He makes the following points –

1. First of all, there never was security for Capital before and after all, they are all part of the same group of companies with the same beneficial owner.
2. This was an agreement for the debenture which was made several months after practical completion and by the time that the claimant had clearly intimated its claims. He also points to the fact that within the underlying loan deed, it says that the loan must be repaid by the earlier of two things, either practical completion or receipt of all the proceeds of sale. But that does not make any sense at all, since practical completion had already passed and on that analysis, the money was already due.

26 In response to that, the evidence through Mr. Hosking and Mr. Da Costa, though there are no underlying documents apart from the contractual documents and the debentures themselves, is that this was entirely legitimate because Capital was entitled to and did extract a price for the support it gave to the defendant in regard to the further finance now from Interpay and the price extracted was that Capital should be secured as to its own loan.

27 I see the force of the points being made, although it is right to say that I have no underlying documents showing how that was negotiated and, in particular, I have no documents passing between the defendant on the one hand and Capital on the other as to how it came about that Capital required this to be done.

28 There are some further oddities in my judgment which are significant. First of all, as I have indicated, as at 21 September, the solicitors instructed by the defendant were able to state categorically that they could provide £784,000 from the proceeds of sale. If there was a second debenture, on the face of it that money would not be the defendant to disperse in that way. Not only that, but as I have indicated, the letter effectively states that the totality of the secured loans was £4.7 million, but that would reflect only the loan to Interbay and not any further loan. Finally, the letter states that there would be a profit of £784,000 unless it is

subject of an undertaking. However, that does not work either as far as the debenture is concerned.

29 There is a further point which is that according to the claimants having gone through the evidence, when the earlier properties were sold, the debt of Interbay was not fully paid which is what the subordination agreement provided for. That can only be because Interbay consented but it is not clear why Interbay consented and there is no documents about it.

30 The points that arise from all of this are really two-fold; first, on the face of the solicitor's letter, the defendant is in fact free to do what it wishes with the net proceeds of sale having taken into account one charge only. That gives rise to a question as to whether the debenture is ever intended to be enforced at all. Secondly, that then gives rise to a serious question mark about why the debenture was given in the first place, was it in truth the *quid pro quo* for the assistance of Capital or was it because it was a way of extracting the residual profit from the development but without paying all the debts, if debts there be, owed to the claimant.

31 If that is the case, then not only would the making of the charge itself be potentially exposed to a claim under the Insolvency Act, either s.423 or 238 (depending on whether the company was insolvent) as to whether it entered into a transaction which would have the effect of prejudicing the interest of creditors, namely the claimant, but in addition, it gives rise to the fact that if there were to be a dissipation of the asset now (and it is the present position that is relevant), then the dissipation can be said to be unjustified; this is because it can hardly be in the ordinary course of its business to pay off the undoubted security from Interbay but also to pay off in preference to the creditor, another creditor or a supposed creditor which is Capital by reason of a charge which appears to be able to be avoided willy-nilly depending on the circumstances. That is what makes this case different and that, in my judgment, is what makes the prospective dissipation here unjustifiable and takes it out of what might otherwise be regarded as the ordinary course of business.

32 For those reasons, I agree with O'Farrell J that there is a real risk of unjustified dissipation. Once this property is sold, if the residual proceeds after paying the first charge are taken off, that is the £784,000, pursuant to this charge which at the moment has a somewhat questionable status in my judgment, then that is it because there is no other asset against which the creditor can enforce.

33 I take the point that Mr. Buckingham says that all of this is just a disguised attempt to obtain security for the claimant when it never extracted security like a parent company guarantee to begin with, and that the statements by Mr. Da Costa who is a solicitor and Mr. Hosking must be afforded great weight if taken at face value. But the reality is that they actually say very little about the key question which is what are the underlying negotiations and why it was really necessary to give the debenture in 2017. The difficulty so far as Mr. Hosking is concerned, is that if what he says there is right, then that conflicts with what has been represented by his own solicitors.

34 Therefore, in my judgment, there is a real risk of an unjustified dissipation of the asset. That being said, the question is what to do about it? The residual proceeds, if it is true that the debt to Interbay is £4.7 million is about £800,000, probably less now with the accrual of interest and the payment of necessary legal costs. I cannot tell what the precise figures are because somewhat surprisingly, while the defendant has said that completion is imminent, I do not have before me the usual completion statement from the solicitors.

35 However, assuming that figure is about right, there is £784,000 in play. In my judgment, the proper way to give effect to the application for the freezing order is to order not that the property cannot be sold, because that is in no one's interest, but that the residual proceeds of sale by which I mean the proceeds that are left after (a) paying off Interbay and (b) paying all the necessary other fees and disbursements from the solicitors should either be paid into court or be paid into a dedicated account to be held by the conveyancing solicitors pending, in the first instance, until after judgment has been given in the trial which is going to take place in a few weeks' time.

36 I do not consider that there is any real prejudice to the defendant in that. First of all, the period is a relatively short one, a few weeks, and secondly, the only alternative would have been that the £784,000 goes to Capital which is simply the head company in the group of companies of which the defendant is a part and so, all that is happening is the money is moving from one company to another associated company. Whilst evidence has been put in as to the serious consequences of preventing a sale, there is no evidence to suggest that holding proceeds for this short period of time would cause any real difficulty. Moreover, one can test that.

37 When the 21 September letter was written, the solicitors made an open offer to do precisely what I am requiring should be done, ergo, that was something which they could do without any real difficulty or prejudice; so, all I am doing, in effect, is replicating the offer which was made on 21 September which was rejected, it has to be said, by the claimant and which was then withdrawn by the defendant.

38 The injunction will be until judgment in the litigation or further order. The reason why I am not making the order to go any further is because if, for example, the claimant loses his claim, then that claim will disappear. The claimant might say that there are other claims in the pipeline, but all that can be dealt with by the trial judge who will decide what to do about whether the injunction should continue.

39 If the claimant wins so that it then becomes a judgment creditor for the £884,000 then in that respect, the claimant's position will become stronger. However, the claimant will still have to take proceedings to set aside the debenture because if it does not do so, then Capital will have priority by dint of having a security and it will be a matter for the claimant at trial to say how it intends to proceed. The judge at that stage might decide that the claimant has said enough or shown enough to extend that injunction for a limited period or she or he may take a different view. That will be for that period.

40 What I will do in the meantime, in addition, is to order that the defendant should provide within seven days –

1. Documentary evidence from Interbay as to the amount outstanding. Documentary evidence from Capital as to the amount it says is outstanding and a copy of the solicitors' completion statement.
2. As far as Interbay and the solicitors' completion statement is concerned, that will at least then crystallise precisely what the net proceeds of sale are likely to be.
3. As far as the documentary evidence from Capital is concerned, that is then the beginnings of evidence about the proprietary or otherwise of the charge.

41 I will propose, unless I am persuaded otherwise, to reserve the question of costs, not least because it is now 4.35pm and I have to rise in a few minutes, but also because it seems to

me that the utility or otherwise of this injunction and whether it is properly granted by me can only be fully decided once the merits of the underlying claim have been determined by the court and when there is further information obtained about the making of the debenture.

42 That is, therefore, in principle what I am prepared to order.

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This transcript has been approved by the Judge