Neutral Citation Number: [2025] EWHC 105 (TCC)

Case No: HT-2022-000254

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 23rd January 2025

Before :

MRS JUSTICE JEFFORD

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Between :

(1) CLICK ABOVE CORBEN MEWS LIMITED (COMPANY REGISTRATION NO. 11102451) (ACTING BY ITS FIXED CHARGE RECEIVERS VICTORIA LIDDELL, ALEXANDRA WARD AND TAMMY WILKINS
(2) VICTORIA CAPITAL TRUST **Applicants**

- and -

(1) 381 SOUTHWARK PARK ROAD RTM COMPANY LIMITED
(2) SOPHIA ELIZABETH SMITH
(3) ARMAND JUNIOR FRANCOIS SABLON
(4) PIZARRAS Y BALDOSAS SA
(5) LAURA JANE MACKIE
(6) CHARLES WILLIAM GEORGE FRY and EDWARD CHRISTOPHER MURRAY FRY
(7) GLORIA NOK TUNG CHAN
(8) PROPERTIES (RESIDENTIAL 2) LIMITED
(9) SALIM LALANI and ROZMIN LALANI
(10) KAMALA NADIR KYZY BUCHHOLZ
(11) LUKE EDWARD PRICE

Respondents

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Francis Moraes (instructed TWM Solicitors LLP) for the Applicants
Michael Levenstein (instructed by Adam Benedict Ltd.) for the Respondents

Hearing dates: 3 July 2024

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Judgment Approved by the court for handing down.

This judgment was handed down remotely at 10.30am on Thursday 23rd January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MRS JUSTICE JEFFORD:

Background

1. The background to this matter is events which took place from July 2021 at 381 Southwark Park Road and that are now the subject of this Court's judgment at [2024] EWHC 3179 (TCC).

2. In very short summary, Click St Andrews Ltd was the freehold owner of 381 Southwark Park Road. The first claimant in that action, 381 Southwark Park Road RTM Company Ltd. ("RTM"), was incorporated for the purposes of acquiring the freehold. On 26 February 2020, RTM, Click St Andrews Ltd. and Click Group Holdings Ltd. entered into an Agreement, referred to as the Freehold Purchase Agreement ("the FPA"). Under the FPA, Click St Andrews was to develop the property by removing the existing pitched roof and erecting an additional storey of three pre-fabricated modular units. RTM would then purchase the freehold and grant leases of the new flats to Click St Andrews which would then be sold. Click Group Holdings guaranteed the obligations of Click St Andrews under the FPA.

3. In July 2021, when these works were being carried out, the existing roof was removed for the new units to be lifted into place during a period when heavy rainfall had been forecast. There was such rainfall and severe water ingress to the property. During subsequent inspections of the damage caused, other defects in the works were identified. In the meantime, the purchase of the freehold did not proceed and it was not until 2024 that RTM became the freehold owner.

4. On 29 July 2022, on an application made without notice by 381 Southwark Park Road RTM Company Ltd. and 10 leaseholders, Waksman J made an interim freezing injunction against Click St Andrews Ltd., Click Group Holdings Ltd. and Click Above Ltd. The application was made against the background of anticipated proceedings in respect of the damage and defects and in circumstances where the potential claimants feared the dissipation of Click St Andrews' assets, including the proceeds of the sale of the new flats. The freezing injunction prohibited the disposal or diminution of each of the respondents' assets up to a value of £1,250,000. That provision was expressed to apply to assets:

   "….whether or not they are in the Respondent's own name and whether they are solely or jointly owned. For the purpose of this order, each Respondent's assets include any asset which that Respondent has the power, directly or indirectly, to dispose of or deal with as if it were its own. Each Respondent is to be regarded as having such power if a third party holds or control the asset in accordance with his direct or indirect instructions."

5. The injunction also required the provision to the applicants for the injunction, by the respondents to that application, of information as to all of their assets, exceeding £1,000 in value, which fell within the above definition. That information was to be provided by 2 August 2022.

6. The injunction came back before Mrs Justice O'Farrell on 15 August 2022. A retrospective extension of time was given for compliance with the directions for provision of information as to assets. For the reasons that she gave, she discharged the

injunction against Click Group Holdings and Click Above and the injunction continued only against Click St Andrews.

7. On 4 November 2022, Eyre J ordered that by 4.00pm on 11 November 2022, Click St Andrews and Click Group Holdings were to file and serve a witness statement setting out "with particularity" how the information already provided was sufficient to constitute compliance with the Order of Waksman J (if that was what they contended) and, alternatively, setting out any additional information required to comply with that Order and an explanation for the failure to provide it previously. Eyre J's Order included an express warning that failure to comply with those orders might amount to a contempt of court. A statement was served setting out the case that the Click companies had complied with Waksman J's Order and relying on the fact that O'Farrell J had dismissed the applications for further disclosure. On 28 February 2023, however, Mr Recorder Singer KC made a further Order for disclosure of information, specifically in respect of bank accounts. On 2 May 2023, Constable J made yet further orders for the disclosure of QuickBooks records and monthly management accounts showing the income statement and balance sheets for 2021. Click St Andrews entered into liquidation shortly after and this last order was not complied with at all. The respondents to this application, RTM and the leaseholders, have never accepted that full and proper information was provided in compliance with any of these Orders.

8. On 19 May 2023, Click St Andrews entered into voluntary liquidation.

The application

9. The present application is made by the Fixed Charge Receivers ("the Receivers") of another "Click" company, Click Above Corben Mews Ltd. ("Mews Ltd.") to enable the sale of two leasehold properties known as 17 and 18 Corben Mews, 46-48 Clyston Street, London SW8 (registered with title numbers TGL605915 and TGL62885 respectively) to realise security in favour of Victoria Capital Trust ("VCT"). For the avoidance of doubt, references in this judgment to the property or the properties, without more, are references to these flats. The respondents' position is that any such disposal would, or at least could, be in breach of the terms of the freezing injunction.

10. The applicants seek a declaration that any dealing or disposal of these properties by the Receivers (including the management, leasing and sale of the properties) does not fall within the terms of the freezing injunction. In the alternative, and taking these in the order they appear in the draft Order, they seek the discharge of the freezing injunction in its entirety. In the further alternative, they seek a variation of the freezing injunction to allow such dealing and to use the proceedings to repay the debt secured by the Charge. In the further alternative, they seek an undertaking in damages from the respondents.

11. The evidence of Mr Hitchcock referred to below is that the value of the properties is between £1.05 and £1.15 million. With interest that has accrued on the secured loan, there is likely in any event to be a shortfall in recovering the secured debt from the proceeds of sale. The Receivers also say that the fact that they cannot dispose of the flats has inhibited the enfranchisement of Corben Mews and prevented them obtaining the enhanced value that that would bring.

Evidence

12. In support of the application, I had the evidence in two witness statements of David Hitchcock, a partner of the applicants' solicitors (TWM Solicitors LLP), and a statement of Adam Creasey, managing director of the respondents' solicitors (Adam Benedict Ltd.) to which I have already referred.

13. Following the conclusion of the hearing, Mr Creasey obtained a number of documents, as I understand it from the Land Registry and publicly available, which related to the facts of this application but had not previously been exhibited or included in the application bundle. On 1 August 2024, he wrote to Mr Hitchcock at TWM for the purpose of expanding upon issues raised at the hearing and inviting the applicants to reconsider their position. This appears to have been after he obtained the further documents. TWM responded on 8 August stating that all the matters expanded upon had already been fully ventilated in the hearing before me and, in any event, that the letter demonstrated a fundamental misunderstanding of the legal issues. TWM said that there was no basis on which these matters should be referred to the court again and that, if the respondents sought to do so, TWM would object in the strongest terms.

14. Because of the court vacation, there was no correspondence with the court until 4 October 2024. At that point, Adam Benedict Ltd. wrote to the court (by two e-mails and filing on CE-file) attaching the correspondence in August and a number of documents including title documents and the lease of 17 Corben Mews. TWM repeated their objection to these documents being put before the court and/or considered. The obvious difficulty with this sort of argument in inter-solicitor correspondence is that it is impossible for the court to know whether there is anything that could or should be had regard to without reading the correspondence. I have, therefore, done so. I accept TWM's position that the correspondence restates, perhaps in slightly different terms, submissions that had already been made and developed before me. In that sense, it adds nothing for me to consider. The documentation fleshes out the evidence but no more than that and, to the extent that it is helpful in completing the factual picture, I refer to it below.

The facts

15. On 10 September 2004, the then owners transferred to Reydene Ltd. title to the property at 46-48 Clyston Street (with title no. TGL249752). On 9 February 2018, Reydene Ltd. granted Mews Ltd. a lease of the airspace above the building ("the Airspace Lease") with title no. TGL494495. On 28 June 2019, Reydene's title was transferred to Assethold Ltd. On 12 November 2019, construction of flats 17 and 18 was completed in the airspace demised by the Airspace Lease pursuant to the terms of that lease.

16. On 28 June 2021, Mews Ltd. entered into a Facility Agreement with CPF One Ltd. On the same day:
    (i) The indebtedness of Mews Ltd. to CPF One Ltd., including under the Facility Agreement, was secured by a legal charge over the properties ("the Charge").
    (ii) CPF One Ltd. assigned to VCT all rights, titles, interest and benefits in and relating to the Facility Agreement and the Charge with effect from 28 June 2021.

17. The Charge dated 28 June 2021 between Mews Ltd. as Borrower and CPF One Ltd. as Lender describes, in the Particulars, the Property as "17 & 18 Corben Mews, London SW8 4TA registered at the Land Registry with Title No. TGL 494495". That is the title number of the Airspace Lease although by the time the Charge was executed the flats had been constructed in the airspace. The definition of Real Property in clause 1 includes "(a) all or any of the freehold and/or leasehold properties specified in the Particulars" and "(b) any buildings, fixtures, fittings, fixed plant or machinery from time to time situated on or forming part of any of such properties".

18. The Charge provided at clause 3:
"3.1 The Borrower with full title guarantee charges by way of legal mortgage, in favour of the Lender, all of the Real Property as security for the payment and discharge of the Secured Obligations.
…
3.3 This Deed shall remain in full force and effect as a continuing security unless and until the Lender discharges it."

19. The Charge was assigned to VCT and, on 23 July 2021, the Charge in favour of VCT was registered against the title of the Airspace Lease. No other charges are registered.

20. On 22 December 2022, the leases of flats 17 and 18 were granted by Assethold Ltd. and the Deeds of Substituted Security executed. The lease of flat 17 was registered on 8 August 2023 with title no. TGL605915 and VCT's Charge dated 22 December 2022 was registered with a note that the Principal Deed had formerly been registered against title no. TGL 494495. There were no other charges or interests registered. The lease of flat 18 was registered on 26 May 2023 with title no. TGL602885 and with the same registration of VCT's Charge. In both cases, these are registered as 125 year leases. The respondents have pointed out that the lease, in fact, appears to grant a term of 999 years but nothing turns on this.

21. On the same day, two supplemental deeds of substituted security were made between Mews Ltd. and VCT confirming that the properties were the sole security under the Charge. The supplemental deeds, incorporating the Charge, were registered against the registered titles of flats 17 and 18.

22. On 6 November 2023, VCT appointed the Receivers and the fixed charge received over each of the properties.

23. So far as the financial relationship between Click St Andrews Ltd. and Mews Ltd. is concerned, both companies are subsidiaries of Click Above Ltd. which is itself a subsidiary of Click Group Holdings Ltd. The corporate structure is set out in the judgment of O'Farrell J on the freezing injunction and in the expert accountant's report from Brendan Weekes dated 25 April 2023 which, amongst other things addressed the cash pooling arrangements within the Click group of companies. The respondents also rely on a bank statement analysis carried out by Luke Price.

24. On the basis of that analysis, Mr Creasey states that a sum of £52,680 may have been transferred to Mews Ltd. in which Click St Andrews maintains a beneficial interest. The bank statements show transfers of funds between 25 August 2021 and 29 June 2022

from Click Above Ltd. to Mews Ltd. and one transfer of £5,000 from Click St Andrews Ltd. 1 October 2020.

25. In his statement, Mr Creasey then said that his understanding of paragraph 1.2.6 of Mr Weekes report is that Click Above was the recipient of funds from Click St Andrews in the sum of £216,000 and that these transactions took place before December 2021. He then inferred that where Click Above had transferred sums that it owed to Click St Andrews to Mews Ltd. these potentially amounted to a liquid cash asset of St Andrews that could be caught by the freezing injunction. That inference cannot, however, be drawn as it follows from a mis-reading of Mr Weekes' report. As Mr Moraes pointed out, the relevant paragraph of Mr Weekes' report shows Click St Andrews as a debtor to Click Above in the sum of £216,000.

The parties' cases in summary

26. The applicants' arguments in summary are:
    (i) The properties are not the subject of the freezing injunction as there is no evidence that Click St Andrews has any interest in the Corben Mews properties.
    (ii) In any event, there is no one that has an interest that has priority to the Charge granted to VCT and VCT, in its capacity as mortgagee/charge, is consequently entitled to transfer the properties free of all estates and interests in property pursuant to section 104 of the Law of Property Act 1925.
    (iii) In the alternative, the purpose of the freezing injunction was to prevent the dissipation of assets and not to provide security for unsecured creditors. Click St Andrews is now controlled by liquidators so that risk of dissipation no longer exists.

27. The respondents' arguments were in summary as follows:
    (i) The discharge of the freezing injunction in its entirety is disproportionate.
    (ii) The application to vary the freezing injunction displays the applicants' "tenuous position" because it presupposes that the properties were the subject of the freezing injunction in the first place – there is then no good reason to vary the injunction and the respondents are not to blame for the need to make this application.
    (iii) If it is, in fact, unclear whether the properties fall within the injunction then it would be premature to discharge the injunction or vary it so that it does not apply to these properties.
    (iv) The applicants ought to have pursued alternatives to making this application including proceeding with the sale; seeking further information from the liquidators of Click St Andrews or other Click Group Companies; seeking to enforce a personal guarantee of Aaron Emmett and Anita Emmett (now Bandak) in respect of the CPF One charge; and giving greater notice of the application to the respondents.
    (v) There is evidence of the transfer of funds from Click St Andrews to Mews Ltd. which may give rise to a beneficial interest in the properties. These payments were made before the grant of the leasehold interests over which VCT has a Charge and, therefore, the Charge does not have priority.
    (vi) Further or alternatively, the Charge was not for valuable consideration and, therefore, took effect only as an equitable charge.

The conduct of the application

28. I deal first with some of the respondents' more general arguments about the timing and strength of the application.

29. Mr Levenstein argues on behalf of the respondents that if the applicants had the courage of their convictions that the properties were not caught by the freezing injunction, they would have proceeded to sell the properties. He submits that the fact that they have not is a strong indicator that they appreciate a real risk that the properties are caught. This is in the same vein as the contention that the applicants' tenuous position is evidenced by the application to vary the injunction.

30. I do not consider the making of the application a strong indicator of a real risk or possibility that the properties are within the terms of the freezing order. The respondents' solicitors have asserted in correspondence that they may be and that their sale may be a contempt of court. Faced with such assertions, the applicants cannot be criticised for seeking the sanction of the court for their actions and doing so displays no weakness in their convictions.

31. Further the inference sought to be drawn from the application to vary the injunction – namely that it displays the tenuous nature of the applicants' case - seems to me to misunderstand the applicants' position. Their primary case is that the properties are <u>not</u> within the freezing injunction. Their alternative case is that the Charge takes priority so that, even if the properties are or may be within the terms of the freezing injunction, it makes no difference to the respondents whether the properties are sold or not. It is in those circumstances that a variation to the injunction would be appropriate. It could be varied to make it clear that the properties are not to be treated as subject to the injunction. That alternative case does not weaken the primary case.

32. The submission that the application is premature also does not offer a good reason not to deal with the application on its merits. In essence, the respondents' argument is that the applicants' ought to have made further inquiries to seek to ascertain the true position in terms of Click St Andrews' interests before making the application. It is the case that in these proceedings for injunctive relief, Click St Andrews has failed to comply with the court's orders for disclosure and it is improbable that the applicants would have fared better. The respondents ought not to be prejudiced by that and it is right that I should take account, in assessing the evidence, of the fact that the respondents may be hampered in establishing any proprietary interests of Click St Andrews by that company's own failures. However, as I shall come to, the only evidence is of a small payment from Click St Andrews' funds to Mews Ltd. and, even if that could lead to the establishment of some beneficial interest, it would have no relevance to the argument as to priority of the Charge.

33. The other side of the coin is that Mr Creasey, on behalf of the respondents, has made clear that they do not stand in the way of the sale of the properties but cannot consent to what may be a breach of the freezing injunction.

The issue of priority

34. The most significant aspect of the applicants' case, and the matter that Mr Moraes started with in his submissions, is the priority of VCT's Charge. If the applicants are right on this case, it, so to speak, trumps any other arguments.

35. Section 28 of the Land Registration Act 2002 provides:

"(1)Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge.
(2) It makes no difference for the purposes of this section whether the interest or disposition is registered."

36. Section 30 (Effect of registered dispositions: charges) provides:

"(1) If a registrable disposition of a registered charge is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under disposition any interest affecting the charge immediately before the disposition whose priority is not protected at the time of registration.
(2) For the purposes of subsection (1), the priority of an interest is protected –
(a) in any case, if the interest –
(i) is a registered charge or the subject of a notice on the register,
(ii) falls within any of the paragraphs of Schedule 3, or
(iii) appears from the register to be excepted from the effect of registration, and
(b) in the case of a disposition of a charge which relates to leasehold estate, if the burden of the interest is incident to the estate.
(3) Subsection (2)(a)(ii) does not apply to an interest which has been the subject of a notice in the register at any time since the coming into force of this section."

37. The effect of these sections is that, on the registration of the charge, any interest is postponed in the sense that it is subordinated unless it is protected in one of the ways set out in subsection 30(2). Mr Moraes submitted, therefore, that even if Click St Andrews had any interest in the properties at the time the Charge was registered, it was not protected and the Charge has priority. Any interest would not fall within any of the provisions of subsection 30(2). The only issue could be whether the Charge was for valuable consideration but the applicants say that it clearly was and so no issue arises.

38. Section 104 of the Law of Property Act 1925 then provides:

"(1) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as he is by this Act authorised to sell or convey or may be subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interest, and rights which have priority to the mortgage.

....

(3) A conveyance on sale by a mortgagee, made after the commencement of this Act, shall be deemed to have been made in the exercise of the power of sale conferred by this Act unless the contrary intention appears."

39. The applicants' case, therefore, is that since the Charge has priority, the Receivers can exercise the powers of sale that they have under the Charge and do so free of any interests which do not have priority over the Charge.

40. The submission that followed from that was that the disposal of the properties by the Receivers could not be in breach of the freezing injunction since any interest that Click St Andrews might have was subordinated to the Charge. In the alternative, there was an unanswerable reason to vary the injunction because, even if Click St Andrews had any interest, it could not benefit from it – see *Capital Cameras Ltd. v Harold Lines Ltd* [1991] 1 WLR 54 at 56E – 57F.

41. In the respondents' written submissions, they relied on the fact that the VCT Charge is over only the later December 2022 leases which are all later than any transfers between St Andrews and Corben Mews. The nature of the respondents' case is, or was, that Mews Ltd. received funds from Click St Andrews which may have contributed to the purchase of the properties and, on this basis, that there may be some beneficial interest of Click St Andrews by way of resulting trust or constructive trust. Two payments were identified: (i) £5,000 on 1 October 2020 and (ii) £47,680 paid between July 2021 and July 2022. As I have already said, the larger of these amounts was transferred from Click Above to Mews Ltd. and there is no basis to draw the inference that the source of these funds was Click St Andrews.

42. The applicants submit that there is no evidence of any intention to create a trust and that the movement of cash between companies is simply a commercial cash-pooling arrangement. All the payments relied upon were made after the purchase of the Airspace Lease and the construction of the properties so that there is even less reason to infer any intention to create a trust giving rise to an interest in the properties. Leaving aside any factual or legal arguments as to whether this scenario could give rise to some form of trust, it is, in my view, inherently improbable that a payment of £5,000 after the purchase and construction could give rise to an interest in the properties.

43. The respondents make the contrary submission that since the VCT charges post-date these payments, the applicants cannot assert with any confidence – and certainly not with sufficient confidence for the court to accept – that the VCT Charge overreaches any beneficial interest, especially as concerns monies which may have been used to pay down the VCT Charges. The reliance on paying down the VCT Charge was a further or alternative matter relied on as potentially creating some beneficial interest in the properties.

44. That submission appears to proceed on the basis that if funds passed from Click St Andrews to Mews Ltd. creating in some way a beneficial interest in the properties, and the Charge was registered later, the putative interest would have priority. That could only be the case if the charge were equitable and not legal. In any case, the only sum to which that argument could apply is £5,000. That amount was transferred after the acquisition of the Airspace Lease and the construction of the flats, and approximately 9 months before the VCT Charge. It is possible but improbable that that small sum was transferred and held to pay down that Charge.

45. In relation to the probability of the transfer of funds having created a beneficial interest, Mr Levenstein placed some reliance on the decision of O'Farrell J in *Nicholas James*

Care Homes Ltd. v Liberty Homes (Kent) Ltd. [2022] EWHC 1203 (TCC). The matter before O'Farrell J was the continuation of a freezing injunction and particularly submissions that had been made as to the risk of dissipation of assets. The judge recited a number of transfers of real property which appeared to have been made for no consideration and were said by the defendant to have been made as dividends in specie. At [42], she said that if the transfers were for no consideration or not valid dividends, Liberty Homes would retain a beneficial interest in these properties or be entitled to unwind the transactions pursuant to section 423 of the Insolvency Act 1986. Mr Levenstein submitted that the judge was, therefore, giving the claimant in that case the benefit of the assumption that an unexplained asset transfer for no consideration gave rise to a beneficial interest. The judge was, of course, concerned with the transfer of title to real property for no consideration so that the interests transferred were the legal and beneficial interests in that property. There is little or no similarity between that position and the present case where there has been no transfer of property owned by Click St Andrews but some small transfer of funds from Click St Andrews to Mews Ltd. It is a wholly different proposition to say that the provision of funds creates a beneficial interest in property acquired, constructed or financed by those funds. No other authority was cited to the court for that far reaching proposition.

46. Even if I am wrong about Click St Andrews' beneficial interest, the answer, on the applicants' case, is that the VCT Charge is a legal charge for valuable consideration which takes priority. In argument before me, that became the primary battle ground between the parties. Mr Levenstein developed a submission that the Charge did not fall within these statutory provisions because it had <u>not</u> been effected by a registrable disposition of a registrable charge "made for valuable consideration" so that it was only an equitable charge and did not take priority. The basis for that submission was the terms of the deeds of substituted security.

47. Each of the deeds recited that it was supplemental to a mortgage dated 28 June 2021 between the Borrower (Mews Ltd.) and the Lender (VCT) by which property described in the First Schedule to the deed ("the Released Property") was charged by way of legal mortgage ("the Principal Deed") to secure payment to the lender.

48. Each deed then provided:

> *"1. In consideration of the legal charge created by this Deed the Lender as mortgagee releases to the Borrower the Released Property free from the principle (sic) money and interest secured by and from all claims under or in relation to the Principal Deed.*
> *2. In consideration of the release contained above the Borrower with full title guarantee hereby charges by way of legal mortgage* ***ALL THAT*** *the property described in the Second Schedule to this Deed ("the Substituted Property") with payment of all monies and liabilities set out therein.*
> *3. The Borrower declares that except insofar as varied by the substitution of the Substituted Property for the Released Property the Principal Deed shall remain in full force and effect between the parties to this Deed and shall in future be read and construed as if the Substituted Property had been the property included in the Principal Deed."*

49. The First Schedule identified that Released Property as the leasehold property registered under title number TGL494495 known as airspace and parking spaces at

Corben Mews demised under a 999 year lease dated 9 February 2018 between Reydene Ltd. and Mews Ltd. The Second Schedule identified the Substituted Property in the respective deeds as flat 17 and flat 18. This was identified as leasehold property demised under a 125 year lease dated 22 December 2022 between Assethold Ltd. and Mews Ltd.

50. Mr Levenstein argued that there was no valuable consideration because there was simply a swap of the flats 17 and 18 for what was previously the subject of a charge which was also flats 17 and 18. It is fair to say that there was some shift in each party's position on this issue. Mr Hitchcock in his first statement referred to the security for the CPF One Charge being the flats. Mr Levenstein in his skeleton argument submitted that the security for the CPF One Charge and the Deed of Substituted Security was different and that the first mention of VCT's Charge over flat 17 was not until 22 December 2022. These shifts are at best indicative that there are competing arguments and the true position has to be considered by reference to the secured proprietary interests.

51. As I have set out, the Charge dated 28 June 2021 referred to the Property as 17 and 18 Corben Mews and the Charge was over the Real Property as defined. The respondents, therefore, now submit that the Charge was one over the flats which had by that time been built. However, the Charge clearly refers to the Property as 17 and 18 Corben Mews registered with title no. TGL495495. That is the title number of the Airspace Lease. The fact that the flats are built in the airspace does not change that. The relevant property remains that lease.

52. That point is not answered by the definition of Real Property in the Charge extending at sub-paragraph (b) to "any buildings, fixtures, fitting fixed plant or machinery from time to time situated on or forming part of" any freehold or leasehold properties specified in the Particulars. The wording is apt to capture a building built on freehold land (in respect of which there is no distinct legal interest such as a leasehold) but not a building built in an airspace. Nor does the building form part of the airspace. That that is the case and that the Charge is not to be construed otherwise is demonstrated by the fact that, if this definition had the effect of extending the Charge to the flats, there would be a charge over the property of Assethold Ltd. who in due course granted leasehold interests in the flats to Mews Ltd. But Assethold Ltd. were not party to and had nothing to do with the Charge.

53. The form TR4 which records the transfer of the CPF One Ltd. Charge to VCT describes the property charged in a slightly different manner from the Charge itself and in a manner that Mr Levenstein submits supports his case. That description is "Airspace and parking spaces Corben Mews, London SW8 4TA otherwise known as 17 &18 Corben Mews, London SW8 4TA". However the title number is still that of the Airspace Lease.

54. Mr Levenstein's alternative submission was that the June 2021 charge dealt with everything within the Airspace Lease which necessarily included the flats and that a charge over the flats changed and/or added nothing.

55. As I have said, the respondents' case was than that the substituted deed did not confer any valuable consideration and amounted only to an equitable charge. The respondents

relied on *Hughmans Solicitors v Central Stream Services Ltd.* [2012] EWHC 1222 (Ch). The *Hughmans* case concerned a claim for payment out of proceeds of sale of a property over which the claimants had the benefit of a charging order protected by notice on the register. Central Stream Services Ltd (in liquidation) and its liquidator claimed a prior secured right by virtue of the terms of the schedule to a Tomlin Order. Briggs J concluded that the schedule conferred a beneficial interest by way of a trust. At [20] he said:

"The common feature of Sections 29 and 30 [of the Land Registration Act 2002], (which are identified as the only exceptions to the basic rule in Section 28(1)), is that priority for a later interest over an earlier interest is conferred by registration (including by way of notice) if, but only if, the later interest is a disposition made for valuable consideration. If it is, then the earlier interest loses its priority if not protected on the register. If it is not, then the priority of the two competing interests continues to be governed by the order of their creation."

That is entirely consistent with the submissions made to me.

56. The judge then agreed with the analysis in *United Bank of Kuwait plc v Sahib* [1997] Ch 107 that a debtor to a charging order received no consideration from the judgment creditor so that the charge took effect as an equitable charge. As I understand it, the respondents draw an analogy between the present case and the position in which a judgment debt is due to the creditor and the charging order provides a means of obtaining payment of the debt but there is no further consideration for it beyond the debt already due. The respondents submit that here the substituted security is the leasehold interest in the flats which is no different from or adds nothing to the security over the flats within the airspace demised by the Airspace Lease.

57. All these arguments advanced by the respondents, in my judgment, cannot succeed because the property charged is clearly identified by the title numbers and the titles to the Airspace Lease and the titles to the flats are not the same proprietary interest. As Mr Moraes put it, what is charged is the proprietary interest and not the building. The flats existed at the time of the original security but the proprietary interest conferred by leases of the flats did not. The Deeds of Substituted Security released the Charge over the Airspace Lease and substituted the security of the leases of the flats with their discrete registrations and title numbers.

The alternative cases

58. As Mr Moraes made clear, the applicants' primary case is that the properties are simply not within the terms of the freezing injunction. He submits that it is for the respondents, if they assert that Click St Andrews has some interest in the properties, to make out that case; further that the Receivers have no power or control over the books or records of the Borrower; and that the burden does not lie with the Receivers to investigate. For the last of those propositions, the Receivers rely on the decision in *Z Ltd. v A-Z* [1982] 1 QB 558 at 575D-H. There, in the context of an innocent third party given notice of a *Mareva* injunction, Lord Denning said that the third party should be told with as much certainty as possible what he was to do or not do and what assets were affected and that the applicant for the injunction could ask the third party to conduct a search to see whether it held any assets. It seems to me that that submission goes a little too far in the circumstances of this case. This is not a case in which the respondents have done

nothing – they have repeatedly attempted to obtain information to enable them to identify Click St Andrews' assets. In addition, they have made proposals to the Receivers as to steps that they could take, including a further application for disclosure, to obtain such information.

59. In all these circumstances, I cannot see that it would be right for the court to say that, because the respondents cannot at present prove that the sale of the properties would involve the disposal of an asset of Click St Andrews, that is a reason to now declare that it does not do so because there is no such interest. As the respondents have consistently said, they do not know. That said, I have already observed that, on the available facts as to the transfer of funds from Click St Andrews to Mews Ltd., it seems improbable that any beneficial interest in the properties would arise.

60. Given my decision in relation to the priority issue, it is, however, not necessary to determine this issue or make the declaration that the Receivers seek. The making of a declaration is always a matter for the court and usually sought pursuant to Part 8 proceedings. In this case, I would not exercise my discretion to make the declaration. I bear in mind that there is a continuing issue as to the adequacy of disclosure in accordance with the terms of the freezing injunction and subsequent orders and that the liquidators of Click St Andrews have played no part in this application.

61. The alternative, and rather further reaching, submission that the injunction should be discharged in its entirety was advanced on two grounds. One was that Click St Andrews was now in insolvent liquidation and the liquidators had control of its assets so that there was no longer any risk of dissipation. The applicants referred to the decision in *Eco Quest plc v GFI Consultants Ltd. and others* [2014] EWHC 4329 (QB). In that case, the Deputy High Court Judge, accepted that the statement in Gee on Commercial Injunctions was a correct statement of the law, namely that a freezing injunction could be continued after a winding up order had been made, provided its purposes is to preserve the assets held by or for the defendant for the creditors as a whole. The rationale for that proposition is that the liquidators' obligations are to realise the assets for the benefit of all creditors and the liquidators ought to be able to deal with the assets of the company in accordance with the liquidation rather than with certain assets preserved for the benefit of one or more unsecured creditors.

62. There is considerable force in that submission but it seems to me that that is a matter for the liquidators. It is not Click St Andrews and its liquidators who seek to discharge the injunction and the injunction has, in fact, remained in effect since 2022 and for well over a year since the winding up. It would be unusual to discharge an injunction on the application of a third party and, in particular, one whose primary position is that the injunction does not apply to any property held by that third party.

63. A further argument was made against the background of correspondence from the respondents' solicitors which, put at its lowest, raised the possibility that the disposal of the properties would amount to a contempt of court.

64. From the correspondence before the court, it is apparent that Adam Benedict Ltd. wrote to the Receivers by e-mail dated 13 December 2023 stating that the respondents had obtained a freezing injunction against Click Group Holdings and that the properties, being property of Mews Ltd., was subject to the injunction. I would assume that

statement was made because Click Group Holdings was and is the holding company for the Click group of companies. A copy of the interim injunction made by Waksman J was provided. By that time, the further hearing before O'Farrell J had already taken place, over a year earlier, and the freezing injunction against Click Group Holdings had been discharged. That error is accepted and was quickly corrected and a copy of the judgment of O'Farrell J and further orders were provided on 15 December 2023.

65. I do not set out in full the inter-solicitor correspondence that ensued on 14 and 15 December. However, TWM first pointed out that Mews Ltd. was not party to the injunction. The response to that was that the injunction attached to Click St Andrews and that it was conceivable that monies transferred to Click St Andrews had been used to acquire assets of Mews Ltd., although the respondents did not know that. It was also said that the respondents suspected that Click St Andrews' assets had been intermingled with those of Mews Ltd. In an e-mail sent on 15 December 2023, Mr Creasey said that it was for the "third party creditor" to satisfy itself that it was not assisting a breach of the terms of the injunction once it was known about and "[o]therwise the third party may itself be liable for contempt as an accessory to breach of the freezing order". TWM responded on 18 December setting out the factual background to the leases and the security of VCT and asserting that Mews Ltd. could not have used any of Click St Andrews' funds for the purchase of the properties or the works.

66. In the course of January and February 2024 there was further correspondence. I would summarise the position adopted by the respondents as being that they did not know whether Click St Andrews had any interest in the properties and they were not seeking to prevent the sale but it was for the Receivers to decide whether or not to dispose of the properties and, expressly or by implication, whether or not to take the risk that that would be in breach of the freezing injunction. A consent order in effect permitting the sale was proposed by the applicants and the respondents made a proposal to ringfence the proceeds of sale to the extent of the sums identified as transferred from Click St Andrews to Mews Ltd. In April 2024, TWM sought a more concrete response and indicated again the possibility that they would have to make an application. In the absence of any further substantive response, the Receivers made this application.

67. Mr Moraes submitted that the effect of this correspondence was that the freezing injunction was, and/or the respondents asserted that the freezing injunction was, so uncertain that an innocent third party given notice of the injunction could not know its terms and, on the respondents' case, then bore the burden of interpreting the injunction. He submitted that that demonstrated that the injunction lacked the clarity required of a freezing injunction and ought to be discharged. I do not accept that submission. The injunction was made by Waksman J without notice but clearly with due consideration of its terms and with provision for the disclosure of information which would enable the assets to which it applied to be identified. It was continued by O'Farrell J on similar terms and following the disclosure of information even if the respondents remain dissatisfied with that disclosure. At the hearing before her, all parties were represented by counsel and the Order was no doubt drawn up and agreed by counsel, in light of the judgment, for approval by the court. It would be remarkable if this court, nearly two years later, were to determine that the injunction were so unclear that it ought never to have been made in the terms that it was.

68. The further alternative relief sought was an undertaking as to damages. The injunction contained no undertaking as to damages to a third party. Paragraph 5.2 of PD 25A provides that, when the court makes an order for an injunction, it should consider whether to require an undertaking by the applicant to pay damages suffered by a party other than the respondent as a result of the injunction. The transcript of the hearing before Waksman J demonstrated that the issue had been raised by the judge but no undertaking required. The applicants seek to infer that that was because the court had never been told that notice of the injunction would be given to third parties.

69. There is only a portion of the transcript of that hearing before me but I am not satisfied that that is an inference that can be drawn. Counsel's exchange with the judge is one in which the judge observed that there was no undertaking as to damages at all in the draft Order and asked whether that had been left out deliberately. Counsel replied that it had been omitted deliberately and referred to two sentences in the standard form, the first being the undertaking to the respondents to that application and the second being the undertaking to third parties. The judge responded that the second one was fine by which he clearly meant that the omission of the second one was fine. There was no further discussion of the reasons for its omission but it is something of a leap to infer that the judge considered that "fine" because he had not been told of an intention to notify on any third party. Indeed, as Mr Levenstein pointed out, very shortly after, the judge commented that the applicants would obviously give notice of the injunction to whoever they thought appropriate. In circumstances where RTM and the leaseholders were saying and continued to say that they did not know whether assets of the Click companies against whom the injunction application was made had been transferred to others so as to give rise to beneficial interest, the inference is even harder to draw.

70. In any event, Mr Moraes submitted, the decision in *Z Ltd. v A-Z* was authority for the proposition that, once notice was given, there was an implied undertaking:

> *"… when the plaintiff give notice of the injunction to the bank or innocent third party, he impliedly requests them to freeze the account or otherwise do whatever is necessary or reasonable to secure the observance of the injunction. This implied request gives rise to an implied promise to recoup any expense and to indemnity and to indemnify against any liability. … In addition, in support of this implied promise, so as to ease the mind of the third party, the judge, when he grants the injunction, may require the plaintiff to give an undertaking in such terms as to secure that the bank or other innocent third party does not suffer in any way by having to assist and support the course of justice prescribed by the injunction…. "* (at 575A-D).

71. Whilst an implied undertaking may have been the common position, the court is now required by the Practice Direction to consider whether to require such an undertaking – which was not the case at the time of the decision in *Z v AZ* - and it is not coherent to find an implied undertaking when the court has given that consideration, however briefly, and agreed to that undertaking not being included in the Order.

72. The applicants asked that, if the court did not permit them to deal with the properties at this stage, the draft Order should provide an express cross-undertaking to pay the reasonable costs of the Receivers and/or VCT which have been incurred as a result of the freezing injunction, including the costs of finding out whether they hold any of Click St Andrews' assets. The terms of the cross-undertaking were at least capable of

being construed as a retrospective undertaking in respect of losses already incurred. The difficulty with that is the applicants' primary case, namely that the properties are not the subject of the injunction. It is fair to say that the respondents have flagged the risk that disposing of the properties would be in breach of the injunction but, if that has caused the Receivers not to dispose of the properties and as a result they have suffered loss, it is that and not the injunction itself that has caused any loss.

73. Mr Levenstein, in any event, relied on the decision of Lewison J in *SmithKline Beecham v Apotex Europe* [2005] EWHC 1655 as authority for the proposition that a cross-undertaking should not be imposed retrospectively, going so far as to submit that the court has no jurisdiction to do so. In that case, which was not concerned with a freezing order, Lewison J charted the history of cross-undertakings in damages to third parties. At [56] and drawing the threads together, he said that, as at 2022, cross-undertakings for the benefit of third parties were routinely required in freezing order cases but not in other cases; if not given, such a cross-undertaking should not be imposed and certainly not retrospectively; but a third party adversely affected by the injunction could apply for the injunction to be discharged unless the cross-undertaking was extended for its benefit. The decision was the subject of an appeal which varied the first instance decision to some extent but did not cast doubt on Lewison J's summary.

74. Lewison J's observations are a clear steer that the court should not require an undertaking with retrospective effect. I do not conclude that it cannot be done but it would require very clear facts for the court to consider that an appropriate course, all the more so when the issue had been considered and no undertaking required. However, the position in relation to a prospective undertaking is different and, had I reached a different decision, I would have considered it open to me to require such an undertaking. As it is, that issue does not arise.

Conclusions

75. Far ranging though the parties' cases on the alternative relief were, it is not, in my judgment, necessary or appropriate to take any of these courses. Whether or not Click St Andrews has any beneficial interest in the properties – which for the reasons I have given I very much doubt – the VCT Charge takes priority. It follows that even if the properties fell within the scope of the freezing injunction that would be no benefit to the respondents. I therefore consider it appropriate that the injunction should be varied to clarify that the Receivers are permitted to deal with and dispose of the properties.

76. Submissions on costs were made in writing but not orally. The Order to be made in consequence of this judgment has been considered by the parties since the provision of a draft judgment and consequential matters including costs will be the subject matter of that Order.