

Laurence Page successful in *Nicholas James Care Homes Ltd v Liberty Homes (Kent) Limited*

Introduction

In *Nicholas James Care Homes Ltd v Liberty Homes (Kent) Limited* [2022] EWHC 1203 (TCC), the Technology and Construction Court granted a freezing injunction to a claimant in underlying adjudication enforcement proceedings for what is believed to be the first time. [Laurence Page](#) acted for the successful applicant.

The background

Liberty Homes was contracted to NJCH to carry out works in respect of a number of care home developments. The former is ultimately beneficially owned by Mr and Ms Caulfield, and the latter is beneficially owned by Mr Rajakanthan.

In March 2020, a dispute arose between Mr Rajakanthan and Mr and Mrs Caulfield in respect of sums allegedly overpaid (then estimated to be around £1 million) by NJCH to Liberty Homes as interim payments on account.

In November 2020, Liberty Homes obtained a ‘smash and grab’ adjudication award against NJCH in respect of £274,698.04 said to be owed in respect of unpaid sums under interim applications for payment. NJCH subsequently paid the sum.

On 18 February 2022, NJCH obtained its own ‘true value’ adjudication award for £2,589,737.76 (plus interest and adjudicator’s fees) in respect of the sums allegedly overpaid to Liberty Homes. NJCH commenced enforcement proceedings to recover that sum, the hearing for which is listed for 15 June 2022. That sum remains outstanding.

On 22 April 2022, NJCH obtained an interim freezing injunction against Liberty Homes in support of the enforcement proceedings following a without notice application (see [2022] EWHC 1071 (TCC)).

On the return date, NJCH submitted in a hearing before O’Farrell J that there was evidence that Liberty Homes had taken and would continue to take steps to dissipate its assets that will prevent satisfaction of judgment in the enforcement proceedings. NJCH argued, in essence, that Liberty Homes had from August 2020, when it knew that NJCH sought to recover substantial sums from it, transferred most of its assets to related third party corporate entities. Further, those transfers were not made in the proper and ordinary course of business.

Liberty Homes submitted that the freezing order should not have been made and should not be continued. The transfers were executed as part of a HMRC-approved intra-group restructure for the purpose of retirement and succession planning by Mr and Mrs Caulfield. As such, the freezing injunction cannot be continued without unwinding a legitimate corporate restructure and an order to continue it would serve no purpose and be oppressive. It was also submitted that NJCH had delayed inordinately in applying for the freezing order (having done so long after the dispute arose in around mid-2020) and its cross-undertaking in damages was inadequate.

The court’s decision

The relevant test

To satisfy the court that it is just and convenient to grant a freezing injunction pursuant to section 37 of the Senior Courts Act 1981, the applicant must satisfy the three-stage test in *Broad Idea International Limited v Convoy Collateral Ltd* [2021] UKPC 24 at [101] by establishing that:

- (i) It has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the court process;
- (ii) The respondent holds assets (or is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and
- (iii) There is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of those assets is impaired and the judgment is left unsatisfied.

NJCH's alleged delay and the adequacy of its undertaking

O'Farrell J dealt relatively briefly with the issues of delay by NJCH in making the application and the adequacy of its undertaking.

In relation to delay, it was found that, although Mr Rajakanthan and NJCH knew or ought to have known about the restructure of the Liberty Group in 2020, Mr Rajakanthan only knew that assets had been transferred to the holding company Liberty Holdings (Kent) Limited in March and April 2022.

Broad Idea International Limited v Convoy Collateral Ltd per Lord Leggatt at [10] and *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm) per Popplewell J at [86] suggest that the mere fact of a complex corporate restructure is not sufficient evidence of unjustifiable dissipation of assets. O'Farrell J was therefore satisfied that, as evidence which could support the application was available to the applicant for the first time only shortly before the application was made, there was no inordinate delay on NJCH's part.

In respect of NJCH's undertaking, O'Farrell J did not accept Liberty Homes' submission that continuation of the freezing injunction would stifle its ability to pursue its final account litigation against NJCH and other defendants. There was no such risk as the enforcement hearing was due to be heard in just under a month from the date of the application hearing.

Good arguable claim

O'Farrell J decided that NJCH had a good arguable case in relation to the substantive adjudication enforcement claim. It had the benefit of a 'true value' adjudication decision in its favour for a substantial sum. Further, despite advancing witness evidence which alleged, among other matters, procedural impropriety in the adjudicator requesting his fees as a pre-condition to issuing the adjudication decision and failures by the adjudicator to consider evidence in its favour, Liberty Homes had not identified the sort of "knock-out blow" to the claim which is necessary if a respondent is to succeed on this aspect of the test. The court will not, as is well-known, conduct a mini-trial of the underlying claim.

Risk of dissipation of assets

It was common ground that Liberty Homes had transferred assets with a total value of £6 million to related third party entities for no stated consideration in November 2020, despite knowing then that NJCH claimed an entitlement of over £1 million at least for overpaid sums.

Liberty Homes' evidence was that the property it transferred to related third parties was paid for by the distribution of dividends in specie. It submitted that as the transfers were valid, the freezing order could not be continued without unwinding a legitimate corporate restructure which would serve no useful purpose and be oppressive.

That argument was rejected. Accepting NJCH's submission on this point, O'Farrell J decided that it was possible that on a true analysis the transfers were not valid distributions of dividends in specie (following *BAT Industries plc v Sequana SA* [2019] EWCA Civ 112) and, since the assets may also have not in fact been transferred for consideration, there is a risk that Liberty Homes have retained a beneficial interest in them or will be entitled to unwind the transactions under section 423 of the Insolvency Act 1986. The continuation of the freezing injunction therefore served a useful purpose (by preventing potentially unjustified dissipation) and would not be oppressive.

O'Farrell J also concluded that Liberty Homes had dealt with its assets in a manner other than in the usual or ordinary course of business such that there was a real risk that enforcement would be more difficult or impossible as a result. That followed from the fact that Liberty Homes had not sought to justify its divestment of a substantial value of assets within an existing pattern of dealing or as part of its usual business at all.

Conclusion

Since *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWHC 227 (TCC), a stay to adjudication enforcement claims has been available to a defendant who could show (by analogy to freezing injunction principles) that there is a real risk that any judgment would go unsatisfied by reason of the claimant dissipating or disposing of the adjudication sum so that it would not be available to be repaid. *Nicholas James Care Homes Ltd v Liberty Homes (Kent) Limited* is now precedent for a claimant protecting itself against a defendant while adjudication enforcement proceedings are ongoing by squarely obtaining a freezing injunction.

O'Farrell J's judgment suggests that the TCC's "robust" approach to the enforcement of adjudication awards may make it easier to satisfy the good arguable claim aspect of the freezing injunction test in this context.

Parties who are engaged in adjudication disputes (whether they are the referring or the responding party) should be careful to examine corporate restructurings and significant transactions by the other party, and be alert to any real risk of unjustified dissipation of assets which might prevent satisfaction of judgment in the underlying proceedings.

Case details

- Court: High Court of Justice, Business and Property Courts, Technology and Construction Court (QBD)
- Judge: Mrs Justice O'Farrell DBE
- Date of judgment: 19 May 2022