Neutral Citation Number: [2023] EWHC 2231 (TCC)

Case No: HT-2022-000419

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: 8 September 2023

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

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Between :

JOHN E. GRIGGS & SONS LIMITED **Claimant**

- and -

HIGH FIRS PENTHOUSES LIMITED **Defendant**

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Mathias Cheung (instructed by **Joelson LLP**) for the **Claimant**
No appearance for the **Defendant**

Hearing date: 7 September 2023

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Approved Judgment

This judgment was handed down remotely on 8 September 2023
by circulation to the parties and by release to the National Archives.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. By this application, John E. Griggs & Sons Limited seeks a freezing order over the assets of High Firs Penthouses Limited up to the value of £175,000 in order to aid the execution of a High Court judgment in its favour. In particular, Griggs seeks an order that High Firs should

not "grant a leasehold interest by way of sale or disposal" in respect of a development at High Firs, Gills Hill, Radlett in Hertfordshire. The application has been made without notice to High Firs.

THE FACTS

2. On 10 January 2019, Griggs entered into a construction contract with High Firs in respect of the development. When High Firs failed to pay Griggs' August 2022 application for an interim payment, Griggs referred the dispute to adjudication. By a decision issued on 3 November 2022, the adjudicator found that payment was due and ordered High Firs to pay £122,893.80 together with interest, costs, and his own fees. When High Firs failed to make payment, Griggs brought these proceedings to enforce the adjudicator's decision.

3. The enforcement proceedings were transferred to Central London County Court. Shortly before the hearing of Griggs' summary judgment application, High Firs consented to judgment being entered together with the further costs of £9,150 of the enforcement proceedings. By a consent order made on 6 June 2023, High Firs was ordered to pay the judgment sum and costs, which together totalled £140,275.87, within 14 days. High Firs has failed to make any payment.

4. By its solicitor's letter dated 20 June 2023, High Firs gave notice of its own intended claim in respect of alleged snagging and defective works in the total sum of £443,805.08. Two passages are now relied upon:

   4.1 First, High Firs conceded that it had no defence to the adjudication enforcement proceedings and that it had therefore consented to the entry of judgment. Asserting High Firs' own larger cross-claim, the solicitors then expressly stated that High Firs had no intention of paying the judgment sum. The relevant passage read:

   > "Accordingly, whilst [High Firs] will give credit for the total sum of £140,275.87 payable under the consent order, there remains a very substantial balance due to [High Firs], as detailed in this letter, and [High Firs] will make no payment to [Griggs] in relation to the consent order."

   The solicitors then warned that should Griggs seek to enforce the judgment debt by presenting a winding-up petition, High Firs would immediately seek an injunction to restrain advertisement on the grounds that any such petition would be an abuse of process in view of the substantial cross-claim advanced in the letter.

   4.2 Secondly, High Firs indicated that it was seeking to sell penthouse 3. Such indication was given in the context of reserving the right to pursue a further claim for loss arising from High Firs' delayed ability to sell the flat.

5. The application for a freezing order is supported by the affidavit of Ross Griggs, a director of Griggs, sworn on 23 August 2023 and the witness statement of the company's solicitor, Myles Levy, made on 24 August 2023. Mr Griggs refers to High Firs' accounts to 31 December 2021 which show total net assets of £411,822. Of that sum, £104,475 was held in cash. He expresses concern as to whether High Firs will have sufficient disposable assets to pay the judgment debt.

6. Mr Griggs asserts that High Firs' most substantial asset comprises its long leasehold interest in the development at High Firs. He says that he believes that penthouse 3 is the only unsold unit. Searches carried out in the week before his affidavit was sworn indicated that no new leasehold interest or transfer had been registered.

7. Mr Griggs asserts that there is a real risk that the intended sale of penthouse 3 will dissipate the remaining value of High Firs' interest in the development. He claims that such sale would be with the object of dissipating the company's assets and avoiding payment of the judgment sum. In support of that proposition, Mr Griggs refers to the history of the adjudication proceedings. He asserts that High Firs has breached the court's order and demonstrated a persistent pattern of avoiding making payment to Griggs.

8. Mr Griggs then sets out briefly the actions that his company has taken since receipt of the June letter:

   8.1 First, he says that Griggs has provided detailed instructions responding to High Firs' claims and defending the lawfulness of its suspension of work on the grounds of non-payment.

   8.2 Secondly, he says that Griggs has applied to the High Court for a charge to be registered against High Firs' interest in the development. He adds:

   > "Griggs and our solicitors have not to date received confirmation of such an order being granted to enable us to register a charge for the judgment debt against [High Firs'] leasehold interest at the Land Registry. Griggs has been advised that this may not in all eventualities be effective by way of security in relation to the judgment debt, and we are concerned that any further delay would simply increase the risk of [High Firs] dissipating its remaining assets."

9. While much of Mr Levy's statement is devoted to argument, he also gives evidence of his belief that penthouse 3 is High Firs' one remaining property asset. Such belief is supported by his searches of HM Land Registry. Mr Levy says that he believes that High Firs is a property investment and development company without any other business or source of revenue.

10. Citing the June letter, Mr Levy adds that he believes that there is a real risk that the intended sale of penthouse 3 will serve to dissipate the remaining value of the company's sole asset "by way of the proceeds of sale being thereafter transferred away from [High Firs] and dissipated." He adds:

> "I am particularly concerned that the potential sale of penthouse 3 was mentioned in the context of [High Firs'] attempt to dispute the outstanding sums awarded by the adjudicator's decision based on purported cross-claims, and my impression is that the timing of the sale is related to the parties' dispute and the outstanding sums which [High Firs] knows are payable to [Griggs]."

THE ARGUMENT

11. Mathias Cheung, who appears for Griggs, argues that this application is properly made without notice because it is urgent and, in any event, because there is a real risk that, if notice were given, High Firs would take steps to frustrate the application by procuring or accelerating the dissipation of its assets. Anticipating that the court might be concerned by the delay in this case, Mr Cheung explains that since receipt of the letter of 20 June, Griggs has had to respond to the letter of claim, investigate High Firs' financial position and assets, and take legal advice.

12. Turning to the grounds for the grant of a freezing injunction, Mr Cheung makes the following submissions:

12.1 First, that Griggs plainly has a good arguable case given that it has a judgment in its favour.

12.2 Secondly, that there is on the evidence a very real risk of dissipation of High Firs' only valuable asset. He argues that the intended sale of penthouse 3 will frustrate the ongoing application for a charging order and that there is a very real risk that High Firs would then transfer away or otherwise dissipate the sale proceeds in order to avoid enforcement of the judgment. In making that submission, Mr Cheung relies on the letter of 20 June; High Firs' history of non-payment of interim payments and sums ordered by adjudicators; and its modest balance sheet and cash position.

12.3 Thirdly, he argues that if a freezing order is made, it would not be appropriate to include an exception permitting High Firs to deal with or dispose of its assets in the ordinary course of business given that this injunction is sought post judgment. In support of this submission, Mr Cheung relies on dicta of Gross LJ in Emmott v. Michael Wilson & Partners Ltd [2019[EWCA Civ 219, [2019] 4 W.L.R. 53, at [53]-[57], and Tomlinson LJ in Mobile Telesystems Finance SA v. Nomihold Securities Inc. [2011] EWCA Civ 1050, [2012] 1 Lloyd's Rep. 6, at [33]. Further, he relies on the consistent policy of the courts to enforce adjudication awards.

12.4 Fourthly, he argues that it would be just and convenient to grant relief since the order will not cause any disruption to High Firs.

DISCUSSION

GOOD REASONS FOR NOT GIVING NOTICE

13. I do not accept that urgency is, on the facts of this case, a proper basis for proceeding without notice to High Firs. The application is based squarely upon the position adopted by High Firs in its solicitor's letter of 20 June 2023 and yet the application was not filed until 25 August. Even then, a skeleton argument was not lodged until 5 September 2023. While generally it can be properly said upon applications for freezing orders that giving notice might frustrate the purpose of the application, the position is less obvious where the primary target of the application is not cash in a bank account but an interest in land. Nevertheless, I accept that the order sought is not limited to real property and, with some misgivings, I accept that there were good reasons for applying without notice.

FORM OF THE EVIDENCE

14. Mr Levy's evidence should have been given by affidavit as required by paragraph 1.4(2) of Practice Direction 32 to the Civil Procedure Rules 1998. Nevertheless, I have considered his evidence on the basis that it was made by a solicitor and confirmed by a statement of truth and upon Griggs' undertaking though counsel to swear and refile that evidence. Likewise, two key documents, namely the letter of 20 June 2023 and High Firs' accounts, were bizarrely not exhibited to either the affidavit or the witness statement but provided to me as attachments to counsel's skeleton argument. Again, I have considered this material upon Griggs' further undertaking to exhibit the documents attached to Mr Cheung's skeleton argument to an affidavit.

DELAY

15. Injunctive relief is of course a discretionary remedy. One ground on which the court can decline to give relief is where the applicant has delayed in making the application. I accept that some modest delay was inevitable in this case while Griggs absorbed the detailed letter of 20 June, investigated High Firs' assets, sought legal advice, and prepared the application. As to the investigation of assets, I note that the copy of the register of title at HM Land Registry was

obtained as early as 28 June 2023. In my judgment, I would have expected this application to have been made in early July and not September.

16. Accordingly, the delay in the present case since receipt of the letter at the end of June is quite remarkable and of itself gives rise to a real risk that it might yet transpire that this application has been made too late. While I take such delay into account in exercising my discretion, I am, however, persuaded that the application should not be dismissed solely on the grounds of delay:

    16.1 First, Griggs does not just have a good arguable claim but it has a judgment in its favour.

    16.2 Secondly, there is no evidence that High Firs has been prejudiced by the delay in seeking relief.

THE APPLICATION

17. The principles for the grant of a freezing order are well known and uncontroversial. The applicant must show a good arguable case, that the respondent owns or has some interest in assets, that there is a real risk that any judgment will not be satisfied because of an unjustified dissipation of such assets, and that it is just and convenient in all the circumstances to grant relief.

18. Here, Griggs plainly has an unanswerable claim in that it already has judgment in its favour. Further, there is clear evidence before the court that High Firs has a long leasehold interest in the development. Steven Gee KC observes at para. 12-034 of Commercial Injunctions (7th Edition) that having an unanswerable claim may be a "powerful factor" in favour of the grant of a freezing order but cannot of itself be decisive. The real issues on this application are therefore whether there is a real risk of an unjustified dissipation of assets and whether it is in all the circumstances just and convenient to grant the relief sought.

The risk of dissipation

19. In Fundo Soberano de Angola v. dos Santos [2018] EWHC 2199 (Comm), at [86], Popplewell J, as he then was, set out the applicable principles in respect of the risk of dissipation. His summary was approved and adopted by Haddon-Cave LJ in Lakatamia Shipping Co. Ltd v. Toshiko Morimoto [2019] EWCA Civ 2203, at [34], with one modest amendment in the following terms:

    "(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.

    (2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.

    (3) The risk of dissipation must be established separately against each respondent.

    (4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets may be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.

    (5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore

structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.

(6) What must be threatened is unjustified dissipation. The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A WFO is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the WFO jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

(7) Each case is fact specific and relevant factors must be looked at cumulatively."

20. While freezing orders were originally conceived as an interim remedy granted pre-judgment to prevent the injustice of a defendant dissipating assets to avoid the risk of having to satisfy a future judgment, the current application is of course made post judgment. Freezing orders are granted post judgment where necessary to prevent the removal or dissipation of assets before the process of execution can realise the value of the asset for the benefit of the judgment creditor: per Phillips LJ, as he then was, in <u>Camdex International Ltd v. Bank of Zambia (No.2)</u> [1997] 1 W.L.R. 632, CA.

21. In <u>Emmott</u>, Gross LJ observed, at [44], after considering the decision in <u>Camdex</u>:

> "Accordingly, the mere fact that a <u>Mareva</u> is sought post judgment does not mean that the court is relieved from considering whether the application accords with the purpose underlying the grant of such relief. That said, there can be no doubt that the fact of an unsatisfied judgment debt – as contrasted with a pre-judgment claim for unliquidated damages – does make a difference. Given the policy of the law weighing heavily in favour of the enforcement of judgments, it would be surprising if it did not."

22. The main point in <u>Emmott</u> was whether the judge at first instance had been right to vary a freezing order after the entry of judgment to remove a so-called <u>Angel Bell</u> exception allowing the respondent to pay expenses in the ordinary course of business. Approving the reasoning of Tomlinson LJ in <u>Nomihold</u>, Gross LJ said, at [53]-[57]:

> "53. … First, post-judgment <u>Mareva</u> injunctions are granted to facilitate execution, by guarding against a risk of dissipation over the period between judgment and the process of execution taking effect, where the judgment would remain unsatisfied if injunctive relief was refused: <u>Masri v. Consolidated Contractors (UK) Ltd</u> [2008] EWHC 2492 (Comm), at [34]. With respect to the dicta in <u>Camdex</u>, post-judgment <u>Mareva</u> injunctions can no longer be described as rare: <u>Nomihold</u>, at [32]. Whether pre-or post-judgment, a <u>Mareva</u> injunction is not intended to confer a preference in insolvency (<u>Camdex</u>, at p.638) and does not form a part of execution itself.
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> 54. Secondly, by reason of its nature and as a matter of realism, a post-judgment <u>Mareva</u> will increase the pressure on a defendant to honour the judgment debt. The

> mere increase in such pressure does not make it illegitimate or 'in terrorem'. The facts in Camdex were extreme, concerning as they did the Central Bank of a friendly foreign State and the freezing of an asset of no value in the process of execution.
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> 55. Thirdly, in the light of Tomlinson LJ's further reflections in Nomihold, it cannot be said that, without more, the (Angel Bell) exception would be inappropriate in a post-judgment Mareva ….
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> 56. Fourthly, it can be said, however, on the basis of Nomihold (at [33]), that 'it will sometimes and perhaps usually be inappropriate' to include the exception in a post-judgment Mareva injunction. Given the policy of the law strongly in favour of the enforcement of judgments, as already remarked, it would indeed be curious were the position otherwise – leaving the judgment debtor free to carry on business and ignore the outstanding judgment. The context is that a risk of dissipation must already have been demonstrated, as otherwise no Mareva injunction (with or without the exception) would have been granted at all. Accordingly, over the period between judgment and execution taking effect, a Mareva, without the exception, serves to hold the ring …
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> 57. Fifthly, I would prefer not to characterise refusal of the exception in a post-judgment Mareva as either a 'starting point' or a presumption. For that matter, I would be equally reluctant to pigeon-hole refusal of the exception as a remedy of last resort; there is no warrant for so confining such a decision, save that the more draconian the relief, the greater the need for its justification. Instead and while it strikes me as an obvious matter to consider when granting a post-judgment Mareva, the appropriateness or otherwise of the exception in such a Mareva should be treated as a question turning on all the facts in the individual case. In addressing this question, Tomlinson LJ's test in Nomihold, at [33] ('it will sometimes and perhaps usually be inappropriate' to include the exception in a post-judgment Mareva), furnishes helpful and appropriately nuanced general guidance. Thus analysed, the decision by a judge to permit or refuse its inclusion is a discretionary decision reached on a fact specific basis, with which this court will be slow to interfere …"

23. There are two separate issues here that are at risk of being conflated. First, the court must determine whether to grant a freezing order. There is nothing in Emmott to suggest that it is not necessary in a post-judgment case to establish a real risk of an unjustified dissipation of assets. Indeed, Gross LJ made clear at [56] that consideration of the Angel Bell exception only arose once the court was satisfied that it should grant a freezing order. Secondly, there is the issue as to the terms of the order. It was that issue which was the focus of the appeals in Nomihold and Emmott.

24. While this is a post-judgment application, it is therefore still necessary to consider whether there is a real risk of the judgment not being satisfied because of an unjustified dissipation of High Firs' assets. Gee observes, at para. 12-040, that what might have been justifiable before judgment might become unjustifiable once there is a judgment and the judgment creditor is entitled to be paid. Thus the hurdle remains even if it is more easily overcome.

25. There is clear evidence before the court that High Firs intends to sell a long leasehold interest in penthouse 3. That of itself is not surprising. The company was incorporated for the sole purpose of developing and then selling the various units at High Firs. Indeed, unless it sells the flat then

it would appear from its accounts that it might well not have the necessary cash to pay the judgment debt.

26. There is no evidence that Griggs has investigated the marketing of the flat. One would expect that it would only have taken a few minutes online for Griggs to confirm either that the flat is being marketed openly and at what price, or to assert that, despite exhaustive internet searches and checking all of the obvious and well-known websites, there is no evidence that the flat is being marketed publicly. Further, in so far as its research identified a marketing price, one would expect Griggs either to accept that such price broadly reflects market value or, if it suspects foul play, to put evidence before the court of its own valuation of the flat and the reasons why it believes that the flat is not being sold for value and at arm's length.

27. In the absence of any attempt to investigate these issues, I assume in High Firs' favour at this without-notice hearing that the company is openly marketing the penthouse for sale and that it seeks full value. Further, I assume that its primary purpose is to realise its investment in this development and not to defeat Griggs' claim or to evade any other creditors. In my judgment, there is accordingly no evidence before me to establish that the sale and grant of a leasehold interest in penthouse 3 would amount to an unjustified dissipation of High Firs' assets. Accordingly, there are no proper grounds for restraining the marketing, sale or grant of such leasehold interest.

28. A more realistic application might have been to freeze the net proceeds of sale. Indeed, this was Mr Cheung's fallback position in the course of his submissions. As to that, High Firs' interest appears to be subject to a charge in favour of Neil and Ruth Brown but since there is no evidence before me as to the likely sale price of the flat (save that it appeared to have a book value in High Firs' accounts for the year ended 31 December 2021 of around £1.5 million) or as to the debt that is secured by that charge, it is not possible on the evidence before me to reach any conclusions as to the likely net proceeds of sale. Assuming for current purposes that the sale will generate some cash, I accept that the net proceeds of sale could be more easily dissipated than the company's leasehold interest.

29. There is, however, no evidence as to High Firs' intended use of any funds generated from the sale save that it does not intend to satisfy the judgment sum. There is, in particular, no evidence that it will engage in the unjustified dissipation of such funds.

30. Accordingly, while the existence of a judgment in Griggs' favour and High Firs' stated intention not to pay the judgment sum but rather to seek to set-off such admitted liability against its own cross-claims are powerful factors in favour of relief, I conclude that this application fails for want of proof of a real risk that the judgment will remain unsatisfied by reason of an unjustified dissipation of High Firs' assets.

Just and convenient

31. In any event it is neither just nor convenient to interfere in what, I must assume for present purposes, is the bona fide sale for value of penthouse 3. I reject the submission that to do so would not cause any disruption to High Firs. On the contrary, it could lead it to lose a sale.

32. In preparing for this hearing I was interested to read that Griggs has applied for a charging order but that its application remains outstanding. Recognising the potential difficulties with the present application, I gave some thought as to whether I might expedite consideration of the outstanding application. I therefore searched CE-file for the application but no such application has been filed at this court whether under the present case number or any other case. I raised the issue in argument with Mr Cheung and was told that an application had been made to the High Court but was rejected. On further investigation, I was told that no claim number had been put on the written application. Further, there was some uncertainty as to whether the application had been made to the TCC or some other part of the High Court. It was perhaps not therefore surprising that an application that was neither an originating process nor lodged as an application in a pending case was not processed further. I am told that the application has now been made to the Central London County Court and remains outstanding. Mr Cheung conceded that the application for a freezing order was in part made because Griggs had been unable to progress its application for a charging order.

33. It is here that I come back to the delay in progressing this case. Lest I am otherwise wrong to decline relief in this case, I have in any event concluded that it is neither just nor convenient to grant a freezing order in circumstances where there has been ample time to obtain less draconian and more focused relief by applying for a charging order over High Firs' leasehold interest in the development.

OUTCOME

34. I therefore dismiss the application for a freezing order. Further, I direct pursuant to r.23.9 that Griggs must serve its application, its evidence in support, Mr Cheung's skeleton argument, the bundles of documents and authorities, its solicitor's note of this hearing and this judgment upon High Firs by 4pm on 16 September 2023. As I observed at the conclusion of the hearing, that leaves a short window in which Griggs might yet seek to protect its position by pursuing its application for an interim charging order.