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IN THE HIGH COURT OF JUSTICE

HT-2020-000355

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY & CONSTRUCTION COURT (QBD)

[2020] EWHC 2865 (TCC)

The Rolls Building  
7 Rolls Buildings  
Fetter Lane  
Holborn  
London, EC4A 1NL

Wednesday, 7 October 2020

Before:

MRS JUSTICE O'FARRELL DBE

B E T W E E N :

DELUXE PROPERTY HOLDINGS LIMITED  
(a company registered under the laws of the British Virgin Islands) Claimant

- and -

(1) SCL CONSTRUCTION LIMITED  
(2) HMRC Defendants

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MR S. ORAM (instructed by DAC Beachcroft LLP) appeared on behalf of the Claimant.

THE FIRST DEFENDANT was not present and was not represented.

THE SECOND DEFENDANT was not present and was not represented.

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# **JUDGMENT**

MRS JUSTICE O'FARRELL:

1 I will give a short *extempore* judgment. This is the claimant's application for interim relief in support of a Part 8 claim for declarations and other relief. The application has been made today on an urgent *ex parte* basis. However, informal notice has been given to the first defendant, who has not attended but has sent a letter and some accompanying documents to the court, which the court has seen and which the claimant has had an opportunity to consider.

2 The claimant is Deluxe Property Holdings Limited, a property development company. In March and April of 2019, Deluxe entered into two contracts with the first defendant, SCL Construction Limited, to undertake construction works at property known as Cedars Hall in Tooting, London. Deluxe is the freehold owner of the property, which is a residential block providing student accommodation. The first contract, dated 14 March 2019, was for the underpinning of the existing building. The second contract, dated 5 April 2019, is for the construction of additional storeys over part of the property, that is a two-storey vertical extension.

3 Each of the contracts provided for the payment of VAT as follows:

"The contract sum is exclusive of VAT, and in relation to any payment to the contractor under this contract, the employer shall in addition pay the amount of any VAT properly chargeable in respect of it."

4 The issue that has arisen in this case concerns VAT payments in respect of the works. Both parties appear to have been under the misapprehension that these works attracted VAT at the standard rate of 20 per cent. Accordingly, when submitting interim valuations, and invoicing Deluxe for the works that had been carried out, SCL added VAT to those invoices

at the rate of 20 per cent. In total, Deluxe paid some £2.286 million plus VAT of £457,364.73 in respect of the two contracts. SCL paid or accounted for the relevant VAT as output tax to HMRC.

- 5 Subsequently, Deluxe obtained advice which indicated that most of the works were zero rated for VAT purposes. The statutory scheme for VAT repayment claims is contained in section 80 of the VAT Act 1994 and the VAT Regulations 1995. Following discussion between the parties, on about 14 April 2020, a section 80 claim was prepared and submitted by SCL to HMRC setting out the mistake that the parties claim had been made in respect of VAT and the calculation of the VAT repayments that were due in the sum of £449,454.07. The section 80 claim documents included an undertaking signed by SCL's director, Michael Lee, in the following terms:

"I, the undersigned, can identify the names and addresses of consumers whom I intend to reimburse. I will reimburse those persons in cash or by cheque all of the amount credited by HMRC under section 81 or 81A of the VAT Act 1994 together with any associated interest, without any deduction, for whatever purpose, within ninety days of receiving the credit, and I understand that I cannot use the credit for any other purpose. Furthermore, where some or all of the credited amount to be reimbursed has been paid or repaid to me, and I have not reimbursed some or all of it to consumers, I will without reminder notify HMRC and return the balance, together with any associated interest, to HMRC within fourteen days of the ninety days expiring. Where the credited amount has been paid or repaid to me, and I have not reimbursed some or all of it to the consumers, I will notify HMRC of that amount of credit and associated interest I have not reimbursed to consumers within fourteen days of the ninety days expiring. I will keep the necessary records, as set out in the Regulations, and I will comply with any notice given to me by HMRC about producing the records I am required to keep."

- 6 The parties fell into dispute shortly after the VAT claim was made and on about 30 April 2020 Deluxe terminated SCL's employment under both contracts. Deluxe then sought SCL's consent to an assignment of the outstanding VAT claim. Initially, SCL indicated that it would assign the claim to Deluxe but subsequently stated in an email dated 24 April 2020

that whilst it would sign the deed of assignment, it would require an additional clause that SCL would finish the project, that the final account sum would be £2.9 million, and that no liquidated damages would be levied. That set of conditions was not acceptable to Deluxe, and no assignment has in fact been made in respect of the VAT claim.

- 7 On 24 July 2020 Deluxe sent a letter to SCL stating its intention to commence court proceedings against SCL in respect of the claim made to HMRC for the repayment of VAT wrongly paid in respect of the building project, i.e. the section 80 claim. In the letter Deluxe claims that no VAT was due and Deluxe is entitled to repayment from SCL of the VAT mistakenly paid, either expressly under the contract, because the VAT was never properly chargeable; alternatively, under an implied term that SCL would repay the sums demanded for VAT that were later discovered not to be due. Further, Deluxe claims that it has a non-contractual claim in unjust enrichment, and a direct proprietary right to the benefit of the section 80 claim, as a resulting or constructive trust. The effect of SCL's undertaking, made as part of the section 80 claim, is that SCL must hold the proceeds of the section 80 claim, as soon as they are paid, on a Quistclose trust, restricting their application for any purpose other than for repayment to Deluxe as the consumer identified in the claim.
- 8 The claimant invited the defendant to formally assign the section 80 claim to Deluxe in order to avoid proceedings and attached the relevant calculation of the section 80 claim, a further copy of the undertaking and the proposed assignment for SCL's consideration.
- 9 SCL did not engage with the claimant in respect of the substance of its claims.
- 10 Mr Sydney Fulda of DAC Beachcroft LLP, the claimant's solicitor, has produced a witness statement dated 30 September 2020 in support of the application before the court today.

11 Mr Fulda contacted HMRC in order to ascertain the status of the section 80 claim and / or any payments that had been or would be made in respect of it. By telephone, he was informed that the section 80 claim had been received by HMRC. He was also told that the system showed that the claim had been approved for payment to SCL on 1 June, but that HMRC could not confirm whether the payment had in fact been made. In a second exchange, HMRC explained that the system at HMRC showed that a representative of SCL, a Mr Julian Potts, had written to HMRC on 14 August 2020 to withdraw the section 80 claim, and to inform them that SCL would instead address this in its VAT returns, presumably by way of claiming a credit against future liabilities for VAT.

12 On the basis of those enquiries, Mr Fulda states at paragraph 37 of his statement:

"At the moment I have been unable to determine whether the section 80 claim has been paid to SCL or what has happened to it. The information received from HMRC in those telephone calls, and the refusal of SCL to assign the section 80 claim since April 2020, caused me concern that it does not intend to reimburse the monies to Deluxe."

He then goes on to state his fear that the monies will be dissipated.

13 On 30 September 2020 these proceedings were issued by Deluxe. The substantive relief claimed is a declaration that SCL holds on trust for Deluxe:

- (i) a cause of action consisting of a claim made by SCL to HMRC under section 80 of the VAT Act 1994 on or around 14 April 2020, for repayment or credit of VAT of £449,454.07 or thereabouts, paid by mistake by Deluxe to SCL under the contracts;
- (ii) any monies already paid out by HMRC to SCL in respect of the VAT claim or may be so paid out in the future are also held on trust for Deluxe.

- 14 There is a claim made against HMRC as second defendant, but Mr Oram, counsel for Deluxe, has explained that this is simply so that HMRC will be bound in respect of any orders made by the court regarding the status of the claim and / or any monies paid to be paid in respect of it.
- 15 On 30 September 2020 Deluxe issued this application for interim relief.
- 16 Although the interim relief was initially sought as against both SCL and HMRC, and HMRC is aware of today's hearing, the application against HMRC is not pursued and therefore HMRC has not attended today.
- 17 The application made against SCL is for an order that SCL should pay either to Deluxe's solicitors or into court any monies that have been paid to SCL by HMRC in respect of the section 80 claim, and for any further monies received from HMRC in respect of the VAT claim to be paid to the claimant's solicitors or into court. Further, Deluxe seeks an order for SCL to provide information regarding the VAT claim, namely, any monies received, any tax credits that have been given or applied for in respect of the claim and, if and insofar as monies have been received by SCL and paid out, details of those payments.
- 18 The basis on which the application is made before me today is set out in the witness statement of Mr Fulda, dated 30 September 2020, together with the exhibits to that statement, to which I have already made reference.
- 19 The arguments relied on by Deluxe are set out in the skeleton of Mr Oram, counsel for the claimant. He submits that Deluxe is entitled to a declaration that SCL holds any sums paid or to be paid, or any credit, on trust for Deluxe, and that SCL is also a trustee under a

resulting or constructive trust of the chose in action represented by the section 80 claim itself.

- 20 The basis for that submission is the decision in *Madoff Securities v Raven* [2012] 2 All ER 634; [2011] EWHC 3102 (Comm). In that case Flaux J, as he then was, set out at [127] the grounds on which a proprietary injunction will be granted by the court:

"MSIL seeks a proprietary injunction against the Kohn defendants. It is essentially common ground that there are three elements which the claimant has to demonstrate for the grant of a proprietary injunction, following the approach prescribed by *American Cyanamid v Ethicon* [1975] AC 396: (1) that the claimant has shown that there is a serious issue to be tried on the merits; (2) that the balance of convenience is in favour of granting an injunction and (3) that it is just and convenient to grant the injunction."

At [128] the learned judge stated:

"In other words, both the basis for a proprietary injunction and the circumstances in which it will be granted are different from the case of a freezing injunction: see *Polly Peck International v Nadir (No. 2)* [1992] 4 All ER 767 at 787 per Lord Donaldson MR. In particular, unlike in the case of a freezing injunction, it is not necessary to show any risk of dissipation of assets and, even if there has been delay in making an application which might lead to refusal of a freezing injunction, a proprietary injunction may nonetheless be granted: see *Cherney v Neuman* [2009] EWHC 1743 (Ch) per HHJ Waksman QC sitting as a Judge of the High Court at [101]-[102]."

- 21 In support of the submission that an injunction will more readily be granted to support an arguable proprietary claim, Mr Oram relies on the reference in *Madoff* to the judgment of Staughton LJ in *Republic of Haiti v Duvalier* [1990] 1 All ER 456 at 465, by Flaux J at [131]:

"It may be that the powers of the court are wider, and certainly discretion is more readily exercised, if a plaintiff's claim is what is called a tracing claim. For my part, I think that the true distinction lies between a proprietary claim on the one hand, and a claim which seeks only a money judgment on the



other. A proprietary claim is one by which the plaintiff seeks the return of chattels or land which are his property, or claims that a specified debt is owed by a third party to him and not to the defendant.

Thus far there is no difficulty. A plaintiff who seeks to enforce a claim of that kind will more readily be afforded interim remedies, in order to preserve the asset which he is seeking to recover, than one who merely seeks a judgment for debt or damages."

At [140] of the *Madoff* judgment, Flaux J stated:

"In my judgment, once the position has been reached, as it has in the present case, that the claimant shows a sufficiently arguable case for a proprietary remedy, then, as Staughton LJ stated in the *Duvalier* case, the court will more readily afford that claimant with interim remedies by way of injunction and disclosure orders. Not to do so might well, as Lord Hoffmann put it in *Olint* cause irredeemable prejudice to the claimant. As I said during the course of argument, given a sufficiently arguable case that the Kohn defendants have had MSIL's money, arguments by Mrs Kohn along the lines of: 'it would be frightfully inconvenient to tell you what I've done with your money or to be prevented from continuing to use it' when, on this hypothesis she should not have had the money in the first place, do not cut much ice."

And at [141]:

"Furthermore, I agree with Mr Weekes that, once the court has decided that the balance of convenience favours the granting of the proprietary injunction, as I have in the present case, although the question whether it is just and convenient to do so is a separate question, it is extremely unlikely that the court would say it was not just and convenient, having decided the balance of convenience in favour of the claimant. To the extent that it is necessary to make a separate finding, I find that it is just and convenient to grant an injunction."

- 22 I turn to consider the relevant parts of the test with those authorities in mind.
- 23 First of all, in considering whether there is a serious issue to be tried, as to Deluxe's entitlement to the section 80 claim and / or any payments and / or credits in relation to that claim, I am satisfied on the papers before the court, and in line with Mr Oram's careful and

thorough submissions, that there is a serious issue to be tried. The claimant relies upon a constructive or Quistclose trust arising from the circumstances in which SCL acquired the section 80 claim rights. Reference has been made to *Goff & Jones*, 9th edn, *The Law of Unjust Enrichment*, paragraph 32-08, and the case of *Freeman v HM Commissioners & Customs* [2005] BCC 506 (Ch) at [16] onwards.

- 24 I am satisfied that the evidence indicates that the parties paid VAT, Deluxe making the payments to SCL, and SCL passing those payments on to HMRC, on the understanding that such VAT was properly chargeable in respect of all work done under the contracts. I am satisfied that there is an argument, although it is not for this court to determine, that the VAT in fact was not properly chargeable because the bulk of the work could in fact be zero rated.
- 25 Regardless of that argument, the parties agreed a form of a section 80 claim to be made by SCL, in SCL's name, to HMRC, but subject to the undertaking that I have referred to earlier, that any sums that were paid by HMRC or credited in respect of the section 80 claim would be paid without deduction for any purpose to the relevant consumer, in this case Deluxe. In those circumstances, I am satisfied that there is a good arguable case that a constructive or Quistclose trust has arisen that applies to the section 80 claim and / or the payments or credits made in respect thereof.
- 26 Turning then to the issue of whether damages would be an adequate remedy for Deluxe, on the information before the court, which I stress is relatively sparse, it would appear that SCL may be in financial difficulties. On that basis, I am satisfied that it is arguable that damages might not be an adequate remedy for the claimant in these circumstances.

- 27 As to whether damages would be an adequate remedy for SCL if the claim were later determined against Deluxe, Deluxe has offered an undertaking in damages and has provided evidence that it would be able to meet any adverse costs or other order made by the court. The accounts have been provided as part of the evidence put forward by Mr Fulda. They show that the main asset of Deluxe is the student accommodation property that is the subject of the contracts, and therefore also the subject of the dispute between the parties. The accounts indicate that the property has substantial value and Deluxe would have sufficient assets, in its agent account or in the property itself, so as to satisfy its undertaking in damages. On that basis, it is likely that damages would be an adequate remedy for SCL.
- 28 Having accepted that there is a good arguable case that there is a proprietary interest in respect of which the claimant would be entitled to seek interim relief, I go on to consider the balance of convenience and whether it is just and convenient to grant the injunction, as did Flaux J, as he then was, in the *Madoff* claim. In that regard the interim relief that is sought is no more than the parties have already agreed, namely that SCL would make the section 80 claim in its name, and that any sums received would be paid to Deluxe.
- 29 I take into account the fact that SCL has sent a letter to the court making a number of points, including that very little notice was given of the hearing, and that SCL does not yet have legal representation. Deluxe sent its claim letter on 24 July 2020, setting out its intention to apply to the court for relief in the event that the section 80 claim was not assigned. I am therefore satisfied that there was adequate notice that these proceedings might be issued. Although SCL has not had a substantial amount of time to respond to this particular application, it was informed, at least yesterday if not before, of this hearing. It could, if it had chosen, have decided to attend the hearing, which is being held remotely. It has chosen not to do so.

- 30 The issue raised by SCL in its correspondence is that the section 80 claim has been withdrawn and the matter is therefore closed with HMRC as far as it is concerned. However, what it does not do is to address the substance of any of Deluxe's arguments relating to its entitlement to the benefit of the claim or the proceeds. Further, it does not address the key issue as to whether any sums have been paid or any credits allowed in respect of the claim before it was withdrawn. Nor does it deal with SCL's intention to claim any credit against future VAT liability in respect of the section 80, as originally claimed.
- 31 I therefore take into account that, although this is a without notice application, SCL has had an opportunity to respond but has chosen not to explain to the court the full position.
- 32 Mr Oram properly has drawn my attention to potential defences at sections 37 and 38 of his skeleton argument, including the fact that SCL has asserted, as against any trust fund, a right of set-off. But as Mr Oram rightly points out, given the terms of the undertaking in this case, SCL would have no right of set-off in respect of the section 80 claim or any proceeds paid in respect of such claim.
- 33 Taking all of those matters into account, I am satisfied that the balance of convenience lies in granting the relief sought by Deluxe today, on an interim basis.
- 34 Turning then to the substance of the order, I have already made the point to Mr Oram that the title page needs to contain the notice to the first defendant in much larger font and in capitals, so that its attention is properly drawn to it. I will grant the relief sought in paragraph 1, that the monies be paid to the claimant's solicitors on of course the basis that the solicitors undertake to keep any such monies in a separate account, and pending any

further order by this court or agreement by the parties. As to paragraph 2, again I will grant the relief in the terms sought, namely that the further information set out in subparagraphs 1 through to 4 should be provided by SCL by-- it says, "4.30 pm on the day after service of this order"; is that going to be realistic, Mr Oram?

MR ORAM: I would have thought it would. At this stage it is not a witness statement, it is simply the information.

MRS JUSTICE O'FARRELL: Yes.

MR ORAM: We would ask for it sooner rather than later. Perhaps if we say until 5 o'clock on a Friday.

MRS JUSTICE O'FARRELL: Yes.

MR ORAM: That would give a little bit more time.

MRS JUSTICE O'FARRELL: Yes.

35 I will say 5 o'clock on Friday. Just given the time today, by the time everything gets served, given that the defendant, for whatever reason, does not appear to have legal representation, and given the importance of providing information pursuant to an interim injunction in these terms, I am concerned that the defendant should have a proper opportunity to provide adequate information.

36 Paragraph 3 is in usual terms to enable the defendant not to incriminate itself.

37 The affidavit providing the information will then be provided within seven working days after the order.

38 Paragraph 5, "No further steps should be taken in the VAT claim": I am not sure that that is necessarily absolutely required, given that it would appear that HMRC has already been

informed that the claim has been withdrawn, but I am content for it to remain in the interim order at the moment.

39 Paragraph 6 must go. That is the draft in respect of the second defendant.

40 As to paragraph 7, the costs are to be reserved to be dealt with on the return date and / or by the judge who tries the claim.

41 And then, the ability to apply to vary or discharge the order, it probably only applies to the first defendant, but properly it is any defendant.

42 I will order the return date to be two weeks from today, so that the injunction will apply until the return date of 21 October 2020 or further order of the court. Could you please incorporate that into the order.

MR ORAM: Yes, my Lady.

MRS JUSTICE O'FARRELL: Yes, so thank you for your patience, Mr Oram. I was struggling to find the relevant pages in the electronic version of the authorities, despite the care with which they have clearly been applied. So, is there anything else, first of all, that you needed to tell the court in relation to this application?

MR ORAM: No, my Lady.

MRS JUSTICE O'FARRELL: No. Your solicitors should make sure that that they provide a copy of an attendance note to the defendant, so that the defendant is aware of what has taken place today; and obviously the order and any accompanying documents should be served on the defendant as soon as possible.

MR ORAM: Yes, thank you, my Lady.

MRS JUSTICE O'FARRELL: Yes. Is there anything else that you want the court to deal with?

MR ORAM: No, thank you.

MRS JUSTICE O'FARRELL: Well, thank you very much for your very clear submissions.

MR ORAM: And thank you for your time, my Lady.

MRS JUSTICE O'FARRELL: That is fine. So, if you would draw up the order and send it into the court in the usual way, that can be dealt with, well, as soon as you are ready. So, you just need to make the adjustments to the order.

MR ORAM: Yes, thank you.

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**CERTIFICATE**

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**This transcript** has been approved by the Judge