



Neutral Citation Number: [2022] EWHC 2244 (TCC)

Case No: HT-2022-000254

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

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

Date: 26/08/2022

Before:

MRS JUSTICE O'FARRELL

Between:

**381 SOUTHWARK PARK ROAD RTM
COMPANY LIMITED & Others**

Applicants

- and -

**(1) CLICK ST ANDREWS LIMITED
(2) CLICK GROUP HOLDINGS
LIMITED
(3) CLICK ABOVE LIMITED**

Respondents

Mr Michael Levenstein (instructed by **SO Legal Limited**) appeared for the **Applicants**

Mr Michael Wheeler (instructed by **Anchor LLP**) appeared for the **Respondents**

Hearing date: 15th August 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 26 August 2022 at 10.30am

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MRS JUSTICE O'FARRELL DBE

MRS JUSTICE O'FARRELL:

1. On 29 July 2022, on an application without notice brought by the first applicant (“RTM”) and ten applicant leasehold owners of flats at St Andrews House, Bermondsey, London (“the Property”), the court ordered an interim freezing injunction against the respondent property developers, Click St Andrews Limited (“Click St Andrews”), Click Group Holdings Limited (“Click Holdings”) and Click Above Limited (“Click Above”).
2. This is the return date hearing, at which all parties are represented. The applicants seek to continue the interim freezing injunction pending a trial to determine the claims.
3. The applicants’ position is that they have a good arguable case that they are entitled to substantial damages against the respondents for water damage to the Property. There is evidence that the respondents have dissipated the proceeds of sale of two of the flats and there is a real risk of further dissipation which would involve a risk that any judgment would remain unsatisfied. The order made by Waksman J on 29 July 2022 has not been complied with: disclosure by the respondents was late, there is no proper application for relief from sanctions and in any event it is made after the deadline.
4. The respondents seek discharge of the order on the basis that it should not have been made. The applicants’ case at the without notice hearing was that Click St Andrews had received the proceeds of sale from new-build flats at the Property but asserted that it had received no funds. However, the applicants failed to disclose to the Court that there was secured lending against those assets which needed to be discharged. This was a material fact militating against the grant of a freezing order and provided a legitimate explanation for disposal of the proceeds of sale, namely, to repay secured borrowing. Further, there is no arguable case against Click Above, the respondents do not hold meaningful assets against which judgment could be enforced, there is insufficient evidence of any risk of dissipation and the order, if continued, would have a devastating effect on the Click group of companies.

Background

5. Click St Andrews is a special purpose vehicle incorporated to acquire the Property and carry out development of the Property. In November 2018 Click St Andrews purchased the freehold and headlease of the Property. The development comprised removal of the existing roof structure of the Property and replacing it with three modular apartments now known as, Flats 15, 16 and 17, which were constructed off-site and craned into position.
6. Between 2019 and February 2020, the leaseholders of the flats in the Property, including the second to eleventh applicants, sought to enfranchise and purchase the freehold and headlease, using a ‘right to manage’ company established for that purpose, RTM.
7. By an agreement dated 26 February 2020 (“the Agreement for Sale”), entered into by Click St Andrews (‘the Seller’), RTM (‘the Buyer’) and Click Holdings (‘the Guarantor’), it was agreed that (i) Click St Andrews would carry out the development works, (ii) on completion of the works, Click St Andrews would sell the freehold and

headlease to RTM and (iii) RTM would lease-back the new rooftop flats to Click St Andrews on 999 year leases to enable them to be sold.

8. The Agreement for Sale included the following terms and conditions:

i) Clause 5.2

“The Seller shall use all reasonable endeavours to procure that the Works are carried out:

- (a) with due diligence and in a good and workmanlike manner;
- (b) using only good quality materials and well-maintained plant and equipment;
- (c) in accordance with this agreement, the Planning Permission, and the requisite consents in respect of the Works;
- (d) in accordance with all statutory or other legal requirements and the recommendations or requirements of the local authority or statutory undertakings;
- (e) in compliance with all relevant British Standards, codes of practice and good building practice;

...

- (h) and making good any damage caused to the Property to the reasonable satisfaction of the Buyer...”

ii) Clause 6.1:

“From the date of this Agreement until the Completion Date, the Seller shall insure the Works and all plant and unfixated materials and goods delivered to or placed on or adjacent to the Property and intended for incorporation in the Works against all perils resulting in loss or damage thereto on customary contractors’ all risks terms for not less than their full reinstatement value (taking into account the progress of the Works) together with all site clearance and professional fees incurred in connection with such reinstatement.”

iii) Clause 6.2:

“In the event of any loss or damage occurring before the Completion Date to the Works, plant, materials or goods so insured, the Seller shall procure that their reinstatement or replacement is carried out diligently and with all reasonable speed. The Seller shall apply the proceeds of the insurance toward such reinstatement or replacement and shall make good any deficiency out of the Seller’s own funds.”

- iv) Clause 6.4:

“The Seller will not do or permit anything to be done that may render any insurance policy void or voidable.”
- v) Clause 13.1:

“This Agreement is conditional on the Seller completing the Works in accordance with the terms of this Agreement.”
- vi) Clause 13.3:

“This Agreement shall become unconditional immediately on receipt by the Buyer’s Solicitor of the Completion Notice.”
- vii) Clause 13.5:

“If the Seller has not served the Completion Notice on the Buyer’s Solicitor in accordance with this clause 13 by the Initial Long Stop Date [26 February 2021] then the Initial Longstop Date shall be extended for a further year (“Extended Long Stop Date”)...”
- viii) Clause 13.6:

“If the Seller has not provided the Completion Notice by the Extended Long Stop Date either party may at any time afterwards but before receipt by the Buyer’s Solicitor of the Completion Notice serve written notice on the other rescinding this agreement and neither party shall have any claim against the other in respect of this Agreement ...”
- ix) Clause 17.1:

“The Guarantor guarantees the due and punctual performance by the Seller of all the Seller's duties and obligations under the Agreement.”
- x) Clause 17.2:

“If the Seller fails to observe or perform any of its duties or obligations under this Agreement ... the Guarantor (as a separate and independent obligation and liability from its obligations and liabilities under clause 17.1) shall indemnify the Buyer against all loss, debt, damage, interest, payments, charges, cost and expense incurred by the Buyer by reason of such failure or non-payment and shall, on first written demand, pay to the Buyer, without any deduction or set-off, the amount of that loss, debt, damage, interest, payment, charges, cost and expense.”

9. As the works were to be carried out above the existing top floor flats, party wall awards were made between Click St Andrews and the leasehold owners/occupants of Flats 11, 12, 13 and 14.
10. Commencement of the works was delayed by the COVID-19 pandemic until 2021. The pitched roof of the Property was removed and a supporting steel frame was installed, ready to receive the pre-fabricated modular units, with internal first-fix electrical and plumbing works completed, which would be craned into place. During the modification and preparation works, a temporary, corrugated ('top hat') tin roof was erected at roof level to provide cover.
11. The planned delivery date for the pre-fabricated rooftop units was 25 July 2021. During the week of 19 July 2021, the 'top hat' roof was removed and the supporting steel was dismantled down to roof level to facilitate the lifting operation. A sacrificial visqueen waterproofing membrane was applied to the exposed roof structure.
12. Unfortunately, on 25 July 2021 there was very heavy rainfall, resulting in substantial water ingress into the Property and extensive damage to the flats.
13. Click St Andrews engaged Project Chartered Surveyors to inspect the damage. The surveyors prepared a report dated 26 August 2021, identifying the damage caused by the water ingress as staining to ceilings, walls, isolated floor areas and cracking to joinery in the flats, the worst damage occurring to the upper floor flats. The remedial works required were plaster repairs to the ceilings and walls in various rooms, full ceiling replacement to isolated flats, redecoration to ceilings and walls, joinery repairs, full floor replacement to isolated flats, and easing and adjusting of internal doors. Recommendations included:
 - i) undertake a refurbishment and demolition survey before undertaking any works;
 - ii) internal works should be undertaken once the building is watertight, and all areas have dried out entirely;
 - iii) consideration should be given to relocating residents during the works;
 - iv) a specialist drying contractor should be instructed to recommend further strip out works required to confirm a drying programme and ultimately to provide a drying certificate for each residential unit;
 - v) insulation should be replaced where affected by the ingress.
14. The rooftop works were completed and the roof was made watertight by about October 2021. The drying out process of the flats was carried out and drying certificates issued by Restorations UK. However, remedial works have not been completed and are the subject of disputes between the parties.
15. On 21 December 2021, Mr John Rivett MRICS prepared a report for the applicants, following inspection of the Property on 17 August 2021 from which schedules of condition and remedial works were produced. Mr Rivett's opinion was that the water damage was the result of Click St Andrews' failure to plan for and provide adequate temporary waterproof protection to the building during the works and that the water

ingress was avoidable. He recommended further investigations to establish the full extent of the embedded water within the structure of the building and raised concerns regarding structural stability and fire protection matters.

16. Also on 21 December 2021, Mr Philip Ebbatson, civil and structural engineer, carried out a limited visual inspection of the Property and expressed a preliminary opinion that the design and construction detail of the rooftop extension did not appear to comply with requirements of the relevant Building Regulations for disproportionate collapse and spread of fire.
17. Between December 2021 and February 2022, addendum party wall awards were entered into in respect of the remedial works to be carried out to Flats 11, 12, 13 and 14 as a result of the water ingress.
18. Click St Andrews and the applicants have notified insurers of the claims and the current position is as follows:
 - i) Tokio Marine HCC Ltd (“Tokio”), who provided Contractors All Risk (CAR) insurance under a contractor’s combined policy, has confirmed cover for any damage to the rooftop works but this does not extend to cover in respect of the building or the flats.
 - ii) Tokio also provided Public Liability insurance under the same policy and has confirmed cover in respect of the tenants’ fixtures and fittings but has declined cover in respect of damage to the internal and external building structure. This position has been disputed by the applicants.
 - iii) Giant Risk Solutions, the buildings insurers, have declined cover, relying on an exclusion in relation to damage as a result of a failure to maintain wind and watertightness during the contractor’s works. This position has been disputed by the applicants and Click St Andrews.
 - iv) Click St Andrews has professional indemnity insurance with Prosure Solutions. Prosure is aware of a potential claim against Click St Andrews but no detailed claim has yet been made.
19. By letter dated 25 February 2022, the applicants (through SO Legal) invited Click St Andrews and Click Holdings to extend the Extended Longstop Date under the Agreement for Sale by three months. By a further letter dated 25 February 2022, the applicants notified Click St Andrews and Click Holdings that they intended to make a claim under the guarantee and indemnity provisions of the Agreement for Sale.
20. Click St Andrews refused to extend the Extended Longstop Date and, by letters dated 27 February 2022 and 2 March 2022, gave notice that it rescinded the Agreement for Sale. By letter dated 25 March 2022, the applicants disputed the entitlement of Click St Andrews to serve such notice, stating that Click St Andrews was in repudiatory breach and that they accepted such repudiatory breach.
21. By email dated 29 April 2022 to Mr Creasey, Mr Mubarak stated:

“... we have not once stated we wouldn't pay your clients their reasonable, qualified and due demands, we have simply been trying to extract the money from the insurers in order to pay your clients. This has taken much longer than anticipated and we wholeheartedly share your clients frustrations on this. However, we would like to make it known we have sales pending on each of our 3 properties and they will all complete by Mid-June 2022 latest. This will release the funds for us to clear the reasonable, qualified and due demands of your clients.”

22. The rooftop flats were completed in about April 2022 and have been sold as follows:
 - i) Flat 16 was sold to Mr Pyatov on 20 June 2022 for the sum of £660,000.
 - ii) Flat 15 was sold to Mr Adelman on 13 July 2020 for the sum of £640,000.
 - iii) Click St Andrews has accepted an offer to purchase Flat 17 for the sum of £600,000. Exchange was due to take place on 5 August 2022, followed by completion on 12 August 2022, but the sale has been suspended as a result of the freezing injunction.
23. By letter dated 20 June 2022 to the respondents, the applicants raised concerns that there was a risk of dissipation of the proceeds of sale of the rooftop flats by the respondents and requested further information in respect of the same.
24. By letter dated 1 July 2022, the applicants requested an undertaking from the respondents that they would not dissipate any funds and ensure that such funds were ring-fenced for the purpose of instructing a third-party contractor to carry out the necessary remedial works and compensate the applicants for their losses, including alternative accommodation costs and loss of income.
25. On 6 July 2022 Mr Mubarak responded, stating:

“Click has not received any money from the sale of any units at the property. Click agrees that it will use the funds it receives from the sales of the units at St Andrews house to reimburse your clients their reasonable, qualified and due costs that also have to be agreed by both parties prior to payment... We are not dissipating funds...”
26. In about mid-July 2022, Mr Pyatov, the leasehold owner of Flat 16, became very concerned when he learned that there was an outstanding dispute between Click St Andrews and the applicants concerning the works to the rooftop flats. His evidence is that he was not informed about this dispute when he purchased his flat; on the contrary, he was misled into making a quick purchase and has since discovered snagging and other defects in the flat.
27. On 27 July 2022, Mr Creasey was alerted by the Land Registry of an application affecting the freehold and the headlease, which, together with the respondents' refusal to provide details of the sales of the rooftop flats or receipt of the proceeds of sale,

aroused suspicion that the respondents were attempting to sell the freehold and headlease.

The applications

28. On 27 July 2022 the applicants issued this application for a freezing injunction without notice. On 29 July 2022 the application was heard before Waksman J and an order was made that until after the return date or further order of the court, each respondent must not remove from England and Wales or in any way dispose of, deal with or diminish the value of any of its assets which are in England and Wales up to the value of £1,250,000 (“the Order”).
29. This hearing is the return date at which the applicants seek to continue the interim freezing injunction, until after the determination of the underlying claim against the respondents.
30. There are further applications as follows:
 - i) the respondents’ application dated 5 August 2022 to vary the Order of 29 July 2022, so that their affidavits could be served on 10 August 2022 (in fact served 11 August 2022) and for an order permitting the respondents to pay out of the bank accounts detailed in the Schedule of Assets the sum of £25,000 plus VAT for legal fees – this has since been revised to cover five specific categories of payment in respect of outstanding liabilities;
 - ii) the applicants’ application dated 5 August 2022 that the respondents should be refused permission for the release of funds requested by their solicitors, then acting, on 2 August 2022. The Applicants made a further application dated 19 August 2022 that the Respondents be refused permission for the further payments referred to in paragraph 30(i) above.
 - iii) the applicants’ application dated 12 August 2022 for an order pursuant to CPR 70.2A that they be permitted to inspect the Respondents’ bank records and corporate offices, and to examine the Respondents’ accounts to ascertain the assets held by the Respondents’ or third parties on behalf of the Respondents’ and the location of such assets;
 - iv) the applicants’ application dated 12 August 2022 for an order, extending the disclosure order made by Waksman J to additional fourth to twelfth respondents.
31. The court has the benefit of evidence from the following individuals:
 - i) Mr Alexander Pyatov, the purchaser and occupier of Flat 16 at the Property – affidavit dated 25 July 2022;
 - ii) Mr Adam Creasey, solicitor of SO Legal Limited – affidavit dated 27 July 2022, first witness statement dated 2 August 2022, second witness statement dated 5 August 2022 and third witness statement dated 12 August 2022;
 - iii) Mr Aaron Emmett, managing director of Click St Andrews and Click Holdings – first witness statement dated 11 August 2022 and second witness statement dated 14 August 2022;

- iv) Mr Laith Mubarak, acquisitions director of Click Above – witness statement dated 11 August 2022;
- v) Mr Alex Renny, financial director of Click Holdings – affidavit dated 11 August 2022 and witness statement dated 14 August 2022;
- vi) Mr Luke Price, the eleventh applicant – witness statement dated 12 August 2022 but served on Sunday 14 August 2022;
- vii) Mr Andrew Rush, solicitor of Anchor LLP – witness statement dated 14 August 2022.

The applicable test

32. Section 37 of the Senior Courts Act 1981 provides:

“(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.”

33. Although the court has inherent jurisdiction to make a freezing injunction, section 37(3) of the Senior Courts Act 1981 clarifies that:

“The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.”

34. The test that the court must apply when an application for a freezing injunction is made is well-established:

- i) The applicants must show that they have a good arguable case against the respondents; it is not necessary for the applicants to demonstrate that they will obtain judgment but simply that they have a real prospect of success: *The Niedersachsen* [1983] 1 WLR 1412 per Kerr LJ at p.1417.
- ii) The applicants must show that the respondents hold assets within the jurisdiction against which any judgment could be enforced.
- iii) The applicants must show that there is a real risk that, unless the injunction is granted, the respondents 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. It is not necessary to establish the respondents’ intention to dissipate assets; the test is an objective one.

- iv) The court must be satisfied that it is just and convenient to grant injunctive relief on the facts of the case.
35. A useful summary of some of the key principles applicable to the question of risk of dissipation was set out in *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) per Males J (as he then was):
- “[69] As has been said many times, the purpose of a freezing order is not to provide the claimant with security but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business in a way which will have the effect of making itself judgment proof. It is that concept which is referred to by the label “risk of dissipation”. I was referred to a number of statements of principle to this effect, including *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272 at [21] and [28] ...”
- “[70] Based on these authorities, the defendants advance seven propositions which the bank does not dispute and which I accept. They were as follows:
- a. The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets.
 - b. That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient.
 - c. It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.
 - d. The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.
 - e. The nature, location and liquidity of the defendant's assets are important considerations.
 - f. Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.
 - g. So too is the defendant's behaviour in response to the claim or anticipated claim.”
36. Where an application is made without notice, it is the duty of an applicant and his representatives to make full and frank disclosure of all matters of fact or law which are

or may be adverse to his position. The principles were helpfully summarised by Cooke J in *Alliance Bank JSC v Zhunus* [2015] EWHC 714 (Comm):

“[65] The test of materiality of a matter not disclosed is whether it would be relevant to the exercise of the court’s discretion. A fact is material if it would have influenced the judge when deciding whether to make the order or deciding upon the terms upon which it should be made. The question of materiality is a matter for the court and not the subjective judgment of the applicant or his lawyers.

[66] There is a high duty on the applicant which can be summarised as follows, by reference to CPR 25.3.5 and authorities there referred to:

- (1) The duty on the applicant in such circumstances goes beyond merely identifying points of defence which might be taken against him, important though that is.
- (2) The applicant has to show the utmost good faith, identifying the crucial points for and against the application and not rely on general statements and the mere exhibiting of numerous documents.
- (3) The applicant has to investigate the nature of the claim asserted and the facts relied on before applying, and has to identify any likely defences. He has to disclose all facts which reasonably could or would be taken into account by the Court. The duty is not restricted to matters of fact but extends to matters of law.
- (4) The applicant also has a duty to investigate the facts and fairly to present the evidence.
- (5) There is a high duty to draw the Court's attention to significant factual, legal and procedural aspects of the case.
- (6) Full disclosure has to be linked with fair presentation. The judge has to have complete confidence in the thoroughness and the objectivity of those presenting the case for the applicant.
- (7) It is the undoubted duty of counsel to draw to the judge's attention weaknesses in his case and to make sure the judge understands what might be said on the other side even if the judge says he has read the papers.”

Structure and funding of the Click Group

37. The structure of the Click Group is explained in the affidavit of Mr Renny, the financial director. Click Holdings is the holding company for the group. Click Holdings was incorporated in 2016 following a management buy-out of another development company, Timeless Property Services Limited. Investors provide funds by way of loans to Click Holdings and this equity funding is, in turn, lent to the relevant SPV created for each project. The equity funding is not sufficient to complete the works on each development. Usually the equity funding is used to acquire sites and to obtain planning permission. The majority of construction work is funded by way of development finance taken out by each individual SPV in respect of the particular development, charged against the property and assets of the SPV.
38. Click Holdings owns 100% of the shareholding in Click Above. Click Above is the operating company for the group; it employs the staff, holds the lease on the group offices and administers general group overheads. Click Above owns the individual SPVs that are incorporated to acquire and develop particular sites, including Click St Andrews.
39. Click St Andrews was incorporated to carry out the purchase and development of the Property. In order to fund the development, Click St Andrews obtained development finance, secured against the company assets, the freehold and the headlease, from Omni Property Finance Ltd (“Omni”). Including accrued interest, the total amount of funding under the Omni facility was £1,379,791.65. The proceeds of sale in respect of Flat 16 (£658,000) and Flat 15 (£638,000) were paid to Omni in partial redemption, leaving a residual sum outstanding of £83,791.65, as shown in the Omni loan statement dated 15 July 2022.
40. By a facility agreement dated 15 July 2022, the loans were re-financed with B.I.G. Finance Limited (“BIG”). Currently a sum of £267,000 is secured against the assets of Click St Andrews, the freehold and Flat 17.

Material Non-Disclosure

41. Mr Wheeler, counsel for the respondents, submits that the applicants did not comply with their obligation to make full and frank disclosure when the interim freezing order was obtained and, for that reason alone, the order should be set aside. He submits that the manner in which the applicants produced their evidence did not amount to a fair presentation of the facts in two material respects.
42. First, Mr Wheeler submits that the existence of the charges over Click St Andrews’ assets ought to have been obvious to the applicants and drawn to the attention of the court. The existence of the Omni charge would have been disclosed on the office copy entries for the freehold and leasehold at the Land Registry. A search of the Charges Register would have disclosed the existence of the Omni charge and informed the applicants that it had been satisfied and replaced with the B.I.G. charge after the sale of Flats 15 and 16. The existence of security over the respondents’ assets is a material factor to be taken into account in any freezing order application; a freezing order can attach only to assets against which judgment can be executed and a freezing order cannot put the applicants in a better position than legitimate secured creditors with a right to the proceeds of sale. Further, the existence of security provides a clear, obvious and legitimate explanation for Mr Mubarak’s statement that the respondents had not received any money following the sale of Flats 15 and 16.

43. Second, Mr Wheeler submits that the applicants should have investigated a Land Registry alert received on 27 July 2022, which Mr Creasey feared indicated a real and urgent risk of dissipation of the freehold and headlease. Investigation would have shown that the application was by a lender to remove RTM's unilateral notice ('UN1'), a notice that was applied to the title when the applicants intended to enfranchise the freehold. As the application related to RTM's UN1, RTM must have been aware of it and Mr Creasey knew that the BIG facility was charged against the assets of Click St Andrews. Therefore, the alert could not be understood as evidence that the respondents were attempting to sell the freehold and headlease.
44. Mr Levenstein, counsel for the applicants, submits that the above matters made no difference to the strength of the without notice application. In his third witness statement, Mr Creasey disputes the accuracy of the respondents' statement that they did not receive any funds in respect of the sales of Flats 15 and 16; the funds were received but were applied to reduce the development borrowing. He states that the RTM did not receive notice of the application in respect of the UN1 and the respondents should have notified the applicants of any matters affecting title to the Property.
45. The starting point is that the purpose of a freezing injunction is not to provide security for the applicants so that funds will be available to satisfy any judgment in favour of the applicants but, rather, to restrain a respondent from disposing of assets otherwise than in the ordinary course of business so as to make itself judgment proof. The fact that assets were secured by legal charge and the proceeds of sale of Flats 15 and 16 were paid in partial redemption of the loan facility was capable of explaining those disposals as part of the respondents' ordinary course of business. Therefore, it was material to the applicants' entitlement to injunctive relief and the court's exercise of discretion at the without notice hearing.
46. In my judgment the applicants were too quick to conclude that any and every step by the respondents, or every transaction concerning the Property, must indicate dissipation of their assets, without properly investigating or considering the available evidence. Mr Creasey was aware, when making his affidavit on 27 July 2022, that BIG had provided financing in respect of the project and should have investigated the possibility that the proceeds of sale from the rooftop flats would be used, at least in part, to discharge outstanding loans.
47. However, when Mr Creasey asked the respondents for information about the ongoing sales of the rooftop flats and any funds received, Mr Emmett refused to provide any information and Mr Mubarak simply responded that "Click has not received any money from the sale of any units at the property." This was disingenuous. Click St Andrews did receive the proceeds of sale from Flats 15 and 16; Mr Pyatov's evidence is that the purchase price for Flat 16 was paid to Ashfords LLP, conveyancing solicitors acting for Click St Andrews, and the documents show that the sale proceeds were used to repay part of the outstanding loan secured against the Property. It would have been very easy for the respondents to explain this when asked directly by Mr Creasey. In the absence of any explanation, it is not surprising that the applicants concluded that the respondents were attempting to conceal the sales and/or move their assets beyond the reach of the applicants to defeat any judgment.
48. In my judgment, Mr Creasey should have made inquiries as to the nature of the Land Registry notification, before relying on it as indicating "a real and urgent risk of

dissipation". However, he was careful to clarify in his affidavit that he did not know on whose behalf the application had been filed or to what it related, thereby drawing to the court's attention the possibility that there could be an innocent explanation. Therefore, I do not consider that the applicants were in breach of their duty to give full and frank disclosure on this issue. In any event, it did not form a material part of the court's determination at the without notice hearing, based on the note of judgment.

49. Of greater significance were the transactions in relation to the rooftop flats and movement of the proceeds of sale outside the assets of Click St Andrews. I find that the applicants did not satisfy their obligation of full and frank disclosure in respect of that matter; they should have drawn to the court's attention the real possibility that there was a justifiable explanation for disposal of the funds, namely repayment of the borrowing secured against the Property. However, their failure was not deliberate and their confusion was caused in very large part by the respondents' obfuscation when asked to provide details of the sales of the flats and position regarding the proceeds of sale.
50. Having identified the above failure of disclosure, the overriding consideration in deciding whether to continue the injunction, or discharge the injunction but impose a fresh injunction in its place, must be the interests of justice. Having regard to the nature and extent of the failure, the reason for it and the contribution by the respondents to the applicants' confusion, I do not consider that this is an appropriate case in which to set aside the order obtained. The court will go on to consider whether, on the material that is now before it, any injunction should be continued and, if so, on what terms.

Good arguable claim

51. The respondents dispute all liability but accept that, for the purposes of this application:
 - i) RTM has a good arguable claim against Click St Andrews, the contractor, in contract, and against Click Holdings, as guarantor and/or by way of indemnity; and
 - ii) the other applicants have a good arguable claim against Click St Andrews in negligence and/or nuisance, and where applicable, arising out of the party wall awards.
52. The applicants maintain that they have an arguable case against Click Above but have struggled to identify any cause of action, save for a suggestion in the letter of claim dated 23 December 2021 that it could have acted as the developer and contractor for the works. The court has not been assisted by the absence of any claim form in this case, in breach of the undertaking set out in the Order made on 29 July 2022, the absence of any draft pleading, or any analysis as to a potential basis of claim against Click Above. This is very unsatisfactory on the return date for an application to continue a freezing injunction.
53. The respondents' position is that there is no evidential basis for the applicants' speculation that Click Above was a contractor in respect of the development works at the Property. Mr Wheeler draws attention to disclosed bank statements that demonstrate Click St Andrews paid the trade contractors and suppliers during the works, using the drawdown facilities under the Omni funding.

54. The applicants draw attention to the presence of a 'Click Above' hoarding at the Property during the works. That was sufficient to raise a question as to the involvement of Click Above in the development but Mr Emmett's evidence is that the brand 'Click Above' is used to represent the business of extensions at rooftop level. That is borne out by the 'Click Above' marketing brochure, which contains the 'Click Above' logo but also identifies the individual SPVs in respect of each development. Absent any evidence that Click Above acted in the role of contractor on the works, the applicants have not shown a good arguable case against this respondent.

Assets of the respondents

55. The order made on 29 July 2022 included a requirement for the respondents to provide information as to their assets as follows:

“10(1) Unless paragraph (2) applies [right to apply to set aside or vary the order], each Respondent must by 4.30pm on Tuesday, 2 August 2022 and to the best of its ability inform the Applicants' solicitors of all its assets in England and Wales exceeding £1,000 in value whether in its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets. Such information is to include any and all assets over which such Respondent has the power, directly or indirectly, to dispose of or deal with as if they were its own. This includes assets held or controlled by a third party acting in accordance with that Respondent's direct or indirect instructions.

10(2) If the provision of any of this information is likely to incriminate any Respondent, it may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render that Respondent liable to be imprisoned, fined or have its assets seized.

11. By 4pm on Friday 5 August 2022, each Respondent must swear and serve on the Applicants' solicitors an affidavit setting out the above information.”

56. On 5 August 2022 the respondents served on the applicants a schedule of their assets. Further details of the respondents' assets are now set out in the affidavit of Mr. Renny sworn on 11 August 2022 and in the revised schedule of assets attached to the affidavit.
57. The evidence of the respondents' assets was served late. On 5 August 2022 the respondents issued an application, seeking an extension of time for service of the affidavit evidence, on the grounds that they were not instructed until 4 August 2022, in place of Cripps, solicitors previously acting for the respondents.
58. The delay in providing the information ordered and serving the affidavit evidence is unsatisfactory but it was of short duration and the application to extend time was issued

promptly once the new solicitors were instructed. No prejudice has been suffered by the applicants, who have had an opportunity to review the additional evidence and respond to it. Having considered the evidence on a '*de bene esse*' basis, the court is prepared to grant extensions of time for both the schedule of assets and the affidavit evidence to 5 August 2022 and 11 August 2022 respectively.

59. The applicants raised a further concern that only one affidavit was served in respect of the three respondents, whereas the Order of 29 July 2022 stipulated that each respondent must swear an affidavit setting out the required information as to its assets. That complaint is rejected. Mr Renny, as financial director and company secretary for Click Holdings, was a suitable officer to give evidence as to the financial dealings of all respondents in the Click Group. No purpose would be served in forcing him to swear three separate affidavits. Indeed, as one of the concerns raised by the applicants is the inter-group loans and movement of funds, it was appropriate that Mr Renny should provide a full explanation in respect of the respondents' dealings as part of the Click Group.
60. The assets of Click St Andrews, an SPV, comprise Flat 17, together with the freehold and leasehold of the Property. Pending sale of Flat 17, its source of income is limited to ground rent and service charges. It holds four bank accounts of which one has a positive balance of £14,000 approximately and another has a positive balance of £8.75. There is also a Covid-19 bounce-back loan account with a negative balance of £41,239.00.
61. As set out above, a sale of Flat 17 has been agreed in the sum of £600,000 but is suspended pursuant to the freezing injunction. The Property is secured by the BIG charge and the outstanding balance under the facility is £267,000. If the order is discharged or varied so as to permit the sale to go ahead and re-payment of the loan, there will be net proceeds of sale of around £333,000, subject to the costs associated with the sale.
62. In his witness statement dated 14 August 2022, Mr Renny accepts that he made a mistake in the first schedule of assets served, in failing to include three Metro Bank accounts in the name of Click St Andrews. Bank statements for those accounts have now been provided, indicating relatively small sums, less than £1,000, in the accounts.
63. Click Holdings is the group holding company for beneficial shareholding and investor loans. It has two bank accounts with a current positive balance of £49.81 and US\$14.09 respectively. Its other assets are intra-group loans and its shareholdings in Click Above Ltd.
64. Mr Renny states that the last confirmed position is that Click Holdings had intra-group debtors of £6,550,177, by way of sums owed by the SPVs and Click Above to Click Holdings. It is anticipated that this figure has increased by a further sum of £500,000 approximately. The intra-group debtors include Click St Andrews in the (revised) sum of £195,750, stated to be the purchase cost of the freehold, planning, legal and other costs. Click Holdings has liabilities of £10,436,017 in respect of loans and other debt instruments that it has with external investors and shareholders.
65. Click Above is the operational "overheads" company for the group, responsible for staff wages, bills and paying rent on its office space. It has no physical assets other than a

company car with a value of £5,000 and low value office equipment. It holds three bank accounts with current cash balances of £12,023.72, £2.29 and US\$0.00 respectively. Click Above's main assets are its shareholdings over the SPVs, together with intra-company loans. The SPVs have little value unless and until developments are complete and the dwellings sold. Click Above's assets are secured by way of floating charges in favour of Crestline Direct Finance Ltd ("Crestline").

66. Mr Renny states that the last confirmed position is that Click Above had intra group debtors of £1,341,478 (as at 10 August 2022 £1,512,966.75), said to be loans made through Click Above to Click Holdings. The intra-group debtors include Click St Andrews in the (revised) sum of £216,000. Click Above has liabilities of £1,579,955, including a debt of £950,689.55 owed to Click Holdings.

Risk of dissipation of assets

67. The applicants rely on a number of factors that, on analysis do not amount to solid evidence of past, or future risk of, dissipation of assets. Mr Pyatov's affidavit demonstrates that he is very unhappy with the approach taken by the respondents to the purchase of his flat. He contends that he was pressured into a swift sale, there was a lack of transparency as to the ongoing dispute with the applicants and there are unresolved snagging items. Mr Pyatov's complaints are not accepted by the respondents and the court is not in a position to determine the dispute, particularly as Mr Pyatov is not a party to the proposed proceedings. This is not evidence of a risk of dissipation of assets.
68. The applicants' expert reports indicate that there may be more serious defects in the Property but Mr Ebbatson's report is in very cautious terms, pending a full inspection of the Property. Complaint is made that the respondents have been very slow to address the issues raised by the applicants or to pay their incurred accommodation costs. That may prove to be correct, although Mr Mubarak repeatedly asked for substantiation of the sums incurred by the leaseholders so that they could be verified and paid. Clearly these issues are matters in dispute that need to be resolved but none of it evidences a risk of dissipation of assets on the part of the respondents.
69. A more serious allegation has been made that Mr Emmett is engaged in "phoenixing" but this is simply speculation based on uncorroborated press reports and the removal of the site office at the Property. It does not amount to solid evidence of a risk of dissipation of assets.
70. Contrary to the assertions by the applicants, there is no evidence of unjustified dissipation of the proceeds of sale of Flats 15 and 16. The evidence produced by the respondents demonstrates that the sums received were used in part redemption of the loan facility provided by Omni to fund the development. Those were dispositions that were justified and formed part of the ordinary course of business of Click St Andrews.
71. There is much more substance in the concerns raised by the applicants in respect of the movement of funds between the various corporate entities within the Click Group and the absence of any disclosed accounts or other records explaining the transactions. There is nothing improper or unusual in the organisation of the Click Group, using a holding company, operational company and individual SPVs for each development. Likewise, there is nothing improper or unusual in intra-group loans and payments,

through the cycle of development pending sale of the completed properties. The difficulty is the opacity of the Click Group dealings. Mr Renny states in his affidavit that there are no formal loan notes in respect of the loans between the various companies in the group. Even if there are no formal loan notes, one would expect there to be some record of the position for the purpose of ensuring control over the business dealings and costs incurred by each company. It is a matter of concern that the numerous movements of sums within the Click Group appear not to be recorded or explained, at least in the material before the court.

72. Mr Price makes a number of observations on the disclosed accounts and bank statements produced by the respondents that suggest a lack of transparency in the Click Group accounts. When considered against the other evidence before the court, the following matters are of greatest concern:

- i) There is a material discrepancy between the presentation of creditors in the 2019 and 2020 accounting periods for the Click St Andrews statutory accounts. In the 2019 accounts, the sum of £199,040 is shown as falling due within one year, of which £171,255 is amounts owed to group undertakings. However, in the 2020 statutory accounts, the 2019 creditors due within one year are shown in the reduced sum of £26,149 with £171,256 shown as amounts falling due after more than one year. No explanation is given in the accounts for the revisions to the figures.
- ii) The funding facilities provided by Omni and BIG are in the total sum of £1.4 million, which is much higher than the base cost estimate calculated by Mr Price based on a newspaper article from 2018 in which Mr Emmett opined that the average cost of modular development was £2,400 per square metre. Although extension interest and default interest payments potentially associated with delay to completion of the project amount for £130,000 approximately, and it is possible that some unforeseen additional costs could have arisen, there is no explanation for either a substantial increase in the development cost or the disappearance of residual cash that should be available.
- iii) In his affidavit, Mr Renny states:

“In order to pay off the residual sum (£83,791.65) owed to Omni Property Finance Limited, Click St Andrews Limited took out a new loan with B.I.G. Finance Limited to allow the £85,000 to be redeemed under the Omni Property Finance Limited development loan, allow working capital to complete Flat 17 and pay trade creditors.”
- iv) However, in his witness statement Mr Renny offers a different explanation, stating that part of the BIG facility was used to pay the outstanding redemption charge of £85,000 due to Omni and trade creditors but also that £134,000 was paid to Click Herschel, the SPV for a separate development in Slough. The BIG financing agreement is dated 15 July 2022 and stated to be re-financing of the Property; indeed, the security for the facility is a legal charge over the Property. This indicates that the Property is being used to raise funds for other developments, thereby depleting the funds available to satisfy any claims by the applicants.

- v) Mr Renny's explanation that the payment to Click Herschel was simply direct payment of money otherwise due to Click Above is not convincing; it is contrary to the explanation given in his affidavit, namely, that an SPV is set up for each development and Click Above maintains accounts that track the flow of funds from entity to entity. It is also contrary to the explanation given by Mr Rush, who states that the Click Herschel development is subject to development finance provided by Crestline and subject to a payment application process. Therefore, Mr Rush states, funding for Click Herschel did not need to come from any accounts held by the respondents.
- vi) More generally, the HSBC account no.82572788 in the name of Click St Andrews shows constant movements of funds between different Click entities and different accounts, including a number of transfers to and from Click Herschel. By way of example, on 12 May 2022 Click St Andrews transferred £10,000 to Click Herschel, on 10 June 2022 Click Herschel transferred £4,000 to Click St Andrews and, on 14 July 2022 Click Herschel transferred £5,000 to Click St Andrews. Likewise, there is a constant movement of funds to and from the Click St Andrews Metro Bank account 38245538, the Click St Andrews HSBC account and Click Above, without any explanation for the same.
73. The applicants do not have to establish any impropriety on the part of the respondents. The intra-group accounting arrangements may be honest and rational but the respondents have failed to produce any internal accounts or reconciliation records showing the costs expended on the development of the Property together with the funds received, whether as group loans or external financing. The lack of transparency surrounding the movement of funds between accounts raises a real risk that the assets of Click St Andrews will be dissipated to avoid satisfaction of any judgment against it.
74. In conclusion, in my judgment the applicants have established a real risk that a judgment against Click St Andrews may not be satisfied as a result of unjustified dealing with its assets.

Exercise of discretion

75. During the hearing, the respondents indicated that they would be prepared to give an undertaking that the net proceeds of the sale of Flat 17 would be kept within Click St Andrews. This does not provide sufficient protection for the applicants because there is no agreement as to what constitutes the net proceeds of that sale. In the absence of a freezing order, there is a real risk that funds would be disposed of by transfer to Click Above, Click Herschel or other group entities by way of purported re-payment of sums advanced during the development.
76. The evidence establishes that Click Holdings has no assets against which meaningful relief can be granted. It is the conduit for accepting payments from investors and distributing them to other SPVs within the Click Group who are not parties to this action and who are engaged in the construction of separate developments. I accept the evidence of Mr Renny that if the assets of Click Holdings are frozen, those developments would be likely to fail. In those circumstances, it would not be in the interests of justice to continue the freezing order against Click Holdings.

77. As set out above, the applicants have not established that there is an arguable claim against Click Above that has any prospect of success. Freezing orders can be made against non-parties against whom a claimant has no substantive cause of action where there is good reason to suppose that their assets may in truth be the assets of the defendant against whom a cause of action is asserted: *TSB v Chabra* [1991] 1 WLR 231; *Lakatamia Shipping Co Ltd v Su* [2014] EWCA Civ 636 per Tomlinson LJ at [32].
78. In this case, I am not satisfied that the evidence is sufficiently strong to establish that the assets of Click Above would be amenable to execution of a judgment obtained against the other respondents. The lack of transparency in the movement of funds within the Click Group raises a real risk of dissipation of the assets of Click St Andrews in the absence of a freezing order. But Click Above is a pre-existing entity that was incorporated to act as the operating company for the Click Group. There is no evidence casting doubt on its legitimate function within the overall business. Moreover, there is evidence that the impact on the business of the Click Group as a result of this Order have already been significant. It has had its accounts frozen and Click Above currently is unable to pay staff wages, company bills or the rent on the company offices. In those circumstances, the balance of convenience lies in allowing Click Above and the other companies within the Group against whom there is no claim to continue operating without restraint.

Terms of the order

79. The quantum of the potential claim by Mr Creasey is broad brush and appears high but there is supporting evidence for the estimate of remedial works, the claims by the applicants and legal fees. On that basis, it is accepted that the appropriate value for the purpose of the freezing order is £1,250,000.
80. The respondents seek permission to make the following specific disposals of the assets of Click St Andrews, for which permission is given:
- i) Click St Andrews is permitted to pay from the HSBC bank account 82572788 the sum of £4,732.43 to Tradition Property Services Limited, in settlement of a claim for cleaning services.
 - ii) Click St Andrews is permitted to pay from the HSBC bank account 82572788 the sum of £14,182.34 as a contribution to its legal defence costs, to be released to Anchor LLP Client Account 41586613.
 - iii) Click St Andrews is permitted to proceed with the sale of Flat 17, provided that the proceeds of sale are paid into the HSBC bank account 82572788.
 - iv) In relation to the sale of Flat 17, Click St Andrews' conveyancing solicitors, Ashfords LLP, shall be entitled to release from the HSBC bank account 82572788 all necessary funds required to enable the exchange and completion of the flat to take place, including:
 - a) redemption of the B.I.G loan secured against the Property, including Flat 17;
 - b) payment of fees of Ashfords LLP associated with the sale of Flat 17;

- c) payment of Kalmars fees in respect of Flat 17 in the sum of £7,200 (including VAT);
 - d) payment of Rightnow Residential fees in the sum of £11,520 (including VAT);
 - e) payment of Kalmars Fees in respect of Flat 16 in the sum of £7,920 (including VAT);
 - f) payment of Kalmars Fees in respect of Flat 15 in the sum of £11,520 (including VAT).
- v) Click St Andrews is permitted to pay from the HSBC bank account 82572788 the following sums to Howdens for kitchens to be installed in the following flats:
- a) Flat 11 - £8,987.31;
 - b) Flat 12 - £,790.28;
 - c) Flat 13 - £8,614.50.
81. The applicants must issue the claim form by 4pm on 26 August 2022 and serve particulars of claim by 4pm on 9 September 2022.
82. The general order when granting interim injunctive relief is that the applicant should give a cross-undertaking in damages. The respondents accept that the court has discretion to dispense with an undertaking if the same would prevent an impecunious applicant from being granted justified relief but the burden is on the applicants to establish that they do not have the means to provide an undertaking in damages: *JSC Mezhdunarodiny Promyshlenny Bank & Anor v Pugachev* [2016] 1 WLR 160 (CA) per Lewison LJ at [77]-[86].
83. There is sparse evidence as to the means of the applicants in this case. Mr Creasey states that they have limited spare means due to the disruption the works have caused, the costs of prospective litigation and the failure of the respondents to compensate them for their interim losses to date. That assertion is not sufficient to persuade the court that the cross-undertaking should be dispensed with or limited as the price of continuing the injunction.
84. As set out in the Order of 29 July 2022, the applicants have given an unlimited undertaking to comply with any order the court may make if it decides subsequently that the respondents should be compensated for any loss caused by the Order. Further, the sum of £20,000 has been paid into their solicitors' client account as security for the cross-undertaking. The security reflects the fact that restricting the business dealings of Click St Andrews is likely to have some adverse consequences on its profitability. The conditions are reasonable and will be included in the continued freezing order.

Further applications by the applicants

85. The applicants have not made out a case for joining additional respondents for the purpose of disclosure, particularly as they have failed to date to issue proceedings or serve particulars of claim.

86. The applicants are not entitled to an order pursuant to CPR 70.2A that they be entitled to inspect the respondents' bank records and corporate offices, and to examine the respondents' accounts to ascertain the assets held by the respondents' or third parties on behalf of the respondents and the location of such assets. Although the respondents' evidence was filed late, as set out above, the delay was explained by the change in legal representation, was of limited duration and did not cause any prejudice to the applicants.

Conclusion

87. By reason of the matters set out above, the court is satisfied that there is sufficient evidence of a real risk of dissipation so as to satisfy the court that it would be just and convenient in all the circumstances for the court to grant the relief sought, albeit in modified form.
88. Accordingly, the freezing injunction ordered by the court on 29 July 2022 will be continued against the first respondent until the trial, or further order.
89. Costs will be reserved to the trial judge.
90. The court will give the parties an opportunity to make submissions on any outstanding matters that arise out of this judgment, if not agreed.