

Reports from the courts

In our latest update on the court decisions of most interest to construction [Andrew Croft](#) and [Ben Spannuth](#) of [Beale & Company Solicitors LLP](#) examine a case that underlines the importance of objectively clear and unambiguous Pay Less notices; and one that summarises the test that the court will consider when determining applications for freezing injunctions.

Advance JV v Enisca Limited

[2022] EWHC 1152 (TCC); Smith J

Advance JV (Advance) was engaged to design and construct a water treatment works/hydro-electric power generation facility in Cumbria (the Project). Advance engaged Enisca Limited (Enisca) to design, supply, and install the LV electrical installation pursuant to an amended NEC3 Engineering and Construction Subcontract April 2013 including Option A dated 21 October 2019 (the Subcontract).

Pursuant to the Subcontract:

- (i) Enisca was entitled to make a payment application on or before the assessment date;
- (ii) Advance was required to assess the amount due for payment at each assessment date and certify a payment by issuing a payment certificate within three weeks of the assessment date;
- (iii) payment became due 21 days after the assessment date; and
- (iv) where it intended to pay less than the notified sum, Advance was to notify the other party within the contractual window, i.e. not later than 7 days before the final date for payment.

On 22 October 2021, Enisca submitted Application 24 seeking a net payment of c.£2.7m. It was common ground that: (i) Advance's payment certificate was due by 12 November 2021; (ii) Advance's pay less notice was due by 26 November 2021; and (iii) the final date for payment was 3 December 2021.

On 19 November 2021, Enisca submitted Application 25 seeking a net payment of c.£2.8m.

On 25 November 2021, Advance submitted a 'Certification of payment assessment' expressly said to be for the assessment date of 19 November 2021, i.e. for Application 25, and a negative payment value. Advance's enclosed pay less notice expressly

referred to 'application No. 25' or 'AFP25' and the sum considered to be due was calculated by reference to the information in Application 25 (the Pay Less Notice).

In January 2022, Enisca commenced adjudication proceedings for payment of sums applied for in Application 24. Enisca's claim was premised on the alleged absence of either a payment notice or a pay less notice from Advance in response to Application 24 rather than a substantive entitlement to sums claimed in the adjudication.

Advance argued that the Pay Less Notice was a valid notice in response to Application 24, the contractual requirements for timing and content were satisfied, and the terms of the Pay Less Notice would have indicated to the reasonable recipient that Advance did not intend to make further payment in respect of either Application 24 or Application 25.

The adjudicator decided that the Pay Less Notice was against Application 25 and Advance did not issue an effective pay less notice against Application 24. Advance was ordered to pay £2,717,992.88 to Enisca within 7 days.

On 25 January 2022, Advance commenced Part 8 proceedings seeking a declaration as to the validity of the Pay Less Notice.

Decision

Smith J dismissed Advance's Part 8 claim.

Smith J noted that that 'the construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices'. Smith J held that, viewed objectively, the reasonable recipient in Enisca's shoes would not have understood that the Pay Less Notice was intended to respond to Application 24 – the references to 'Application No. 25' and 'AFP25' pointed clearly to an intention that the Pay Less Notice was related to Application 25.

Smith J further considered whether the Pay

Less Notice was ‘free from ambiguity’ per *Henia Investments Ltd v Beck Interiors Ltd [2015] BLR 704* and held that, even if the Pay Less Notice had been intended to respond to Application 24, it was neither clear nor unambiguous in that intention.

Comment

This case underlines the importance of objectively clear and unambiguous notices. It demonstrates the court’s stance in respect of technical breaches of the payment regime and the need to uphold the ‘pay now, argue later’ principle and is a reminder that notices must be issued on time and specific reference should be made to the relevant application and notified sum.

Nicholas James Care Homes Ltd v Liberty Homes (Kent) Ltd

[2022] EWHC 1203 (TCC); O’Farrell J

Nicholas James Care Homes Ltd (NJCH), a developer in respect of several care homes, engaged Liberty Homes (Kent) Ltd (Liberty), a contractor, in respect of several projects, including a care home, Beacon Hill Lodge, in Herne Bay.

In July 2020, NJCH sent Liberty a spreadsheet detailing its understanding of the interim on account payments made in respect of Beacon Hill Lodge and indicating an overpayment of c.£1.4m.

On 30 July 2020, Liberty’s quantity surveyors sent NJCH a schedule setting out valuations and payments in respect of various projects, including Beacon Hill Lodge, indicating an outstanding sum due to Liberty of £617,201.

On 14 July 2021, pursuant to a pre-action letter of claim, Liberty alleged that £1,151,082 was due and owing to Liberty in respect of various projects, including Beacon Hill Lodge. On 20 August 2021, in response, NJCH asserted an entitlement to recover overpayments, including in respect of Beacon Hill Lodge, of £2,642,587.85.

On 21 October 2021, NJCH commenced a ‘true value’ adjudication in respect of the value of work carried out at Beacon Hill Lodge as at the date of Interim Application 24 and seeking repayment of £2,387,005 plus interest.

On 18 February 2022, the adjudicator decided that the true value of Interim Application 24 was £2,584,685 and that the total amounts on account paid by NJCH to Liberty were £5,174,423 such that the sum due and owing to NJCH was £2,580,737.76.

This sum was not paid by Liberty. On 29 March 2022, NJCH issued enforcement proceedings and an application for summary judgment.

On 21 April 2022, NJCH obtained a freezing injunction without notice to the effect that, until after the return date or further order of the court, Liberty must not remove from England and Wales or in any way dispose of, deal with, or diminish the value of its assets in England and Wales up to the value of £2,903,755.70.

The present hearing was the return date at which NJCH sought to continue the interim freezing injunction pending determination of the enforcement proceedings. NJCH submitted, with reference to Liberty’s audited accounts, that there was evidence that Liberty had taken and would continue to take, unless restrained by a court order, steps to dissipate its assets that would prevent satisfaction of a judgment. Liberty argued that the transfers of assets identified by NJCH formed part of an intra-group restructure and was for the purpose of succession planning and not to frustrate enforcement of any judgment.

Decision

O’Farrell J ordered the continuation of the freezing injunction. O’Farrell J noted that there was sufficient evidence of a real risk of dissipation such that it would be just and convenient in all the circumstances to grant the relief sought.

O’Farrell considered each limb of the test set out in *Broad Idea International Limited v Convoy Collateral Ltd [2021] UKPC 24* and held that: (i) NJCH did not delay in making the application, having only found out about the asset transfers in March and April 2022; (ii) there was a good arguable case that NJCH would succeed on its enforcement claim; (iii) there was evidence that Liberty had divested a substantial value of assets with the risk that it would be unable to satisfy any judgment against it and such dissipation was unjustified; and (iv) NJCH’s cross-undertaking in damages was acceptable and NJCH’s accounts demonstrated that it had sufficient assets.

Comment

This case summarises the test that the court will consider when determining applications for freezing injunctions. It is a helpful reminder that parties in litigation should act promptly in circumstances where there is a risk that an opposing party will dissipate assets. **CL**