Notification Injunction: Belgravia, Boats and Bootstraps

by **Jane Colston** and **Roger Kennell**

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Roger Kennell has acted for individuals and business in a variety of business disputes, both in litigation and arbitration and frequently with a link to the Middle East and North Africa. Roger was involved in the *Masri v CCIC* litigation, which involved numerous freezing orders, receivership orders and other injunctions, as well as applications to commit for contempt of court, and has also acted in cases where freezing orders were granted over a yacht owned by Bernard Madoff and a Lamborghini Aventador over which Tamara Ecclestone at one point asserted ownership. Roger is a partner in the litigation team which is described by Legal 500 2016 as *"responsive and highly creative*".

Introduction

In ***Holyoake v Candy* [2016] EWHC 970 (Ch)**[1] the Chancery Division granted a "notification injunction" requiring subsequent disclosure of the disposal of property assets rather than a full freezing order preventing their disposal in the first place. The decision raises interesting questions about what must be shown by a claimant to get such an injunction, whether risk of dissipation should be proven to a lower standard for the lesser remedy, and whether fortification of the undertaking in damages by the claimant is required. In some respects the judgment is also open to the objection that it has permitted the application for an injunction to pull itself up by its own bootstraps in terms of relying on unproven allegations. It remains to be seen whether the judgment will survive an appeal. But if it does, then notification injunctions may well prove to be a popular remedy for claimants as they can seemingly be obtained more easily and at a lesser price.

The facts

This dispute relates to a loan which the claimant, Mark Holyoake, a property developer, took from CPC Group Ltd (CPC), the company controlled by the well-known Candy brothers, Nicholas and Christian. The loan for £12 million was taken by Holyoake to help complete the purchase of property for development in Grosvenor Gardens, Belgravia in London. Holyoake expected to make a profit of more than £100 million.

Holyoake alleged that thereafter he was subjected to what was described in a previous judgment in this matter as a "*long-running, highly unpleasant and vitriolic campaign of threats, abuse, intimidation and coercion directed at himself and his family by the defendants"* and that he was *"bullied and coerced"* into entering into a long series of further agreements with CPC which were highly disadvantageous to him. Holyoake alleged that he was eventually forced to sell the property in question at a loss and to pay over £37 million to CPC for the initial loan of £12 million. Holyoake pleaded various causes of action, including conspiracy, duress, misrepresentation unlawful interference, extortion and blackmail.

The Candy brothers denied the allegations, saying that Holyoake had defaulted on the loan from the outset and that the further agreements extending the loan and providing security were to enable him to stave off enforcement proceedings and to continue to pursue the huge profits which he anticipated making from the development. The Candy brothers also alleged that the complaints against CPC, originally made over three years ago, were settled in October 2013.

[1] Reported at [2016] 3 WLR 357

The application for a notification injunction

Holyoake was concerned that the Candy brothers would make it difficult or impossible for him to enforce a judgment against them by disposing of their assets. However, he did not apply for a full freezing injunction preventing the disposal of assets outright. This might have been difficult, given that the Candy brothers' whole business relates to buying and selling property. Instead, Holyoake applied for a notification injunction. The reason for making this application was stated to be that this was no more than was necessary to protect his position. If Holyoake considered that a particular transaction was harmful to his position he could then apply to the court for a freezing injunction or take other steps to protect himself.

The injunction originally sought was to restrain the Candy brothers from disposing, dealing or otherwise engaging in transactions with their assets to the value of more than £1 million without first giving Holyoake's solicitors 7 days' advance notice in writing. This was to apply to all assets. However, at the hearing, when the judge, Nugee J, queried how inconvenient this would be to the Candy brothers, Holyoake modified the injunction sought in respect of UK residential and commercial property (which represented the majority of CPC's property transactions) so as to require subsequent notification within 3 days.

The Candy brothers disputed the court's jurisdiction to grant a notification injunction. The judge held that there was jurisdiction to grant a notification injunction and indeed stated that he had personal experience of such injunctions being granted and strongly suspected that this was routinely the case.

Risk of dissipation: the standard of proof

The judge was adamant that even though Holyoake was not applying for a full freezing order, but rather the less remedy of a notification injunction, he still had to satisfy the requirements for a freezing order in that:

a. He had to prove a risk of dissipation of assets, given that it was not alleged that the dissipation of assets itself infringed a substantive right of Holyoake's. At paragraph 8(6) of the judgment the judge stated that if a claimant could satisfy the court that there was a risk of dissipation *"such as would justify a freezing injunction"* then the court could grant a notification injunction. However, the judge then seemed to contradict this statement at paragraph 47 of the judgment when he stated that the fact that the proposed notification was less intrusive than a freezing order was relevant to *"the degree of risk which needs to be shown before the Court can be persuaded to intervene"*. This indicates that the judge in fact applied a less stringent test than he would have if Holyoake had applied for a freezing order. In other words the standard of proof was lower for the lesser remedy.

b. He had to show a "good arguable case" (the test for a freezing order, as set out in The Niedersachsen [1983] 1 WLR 1412) as opposed to the lower threshold of a "serious issue to be tried" (the test for an ordinary injunction, as set out in American Cyanamid v Ethicon [1975] AC 396). The judge did make clear it that this did not mean that Holyoake had to show that he had "much the better of the argument". Under the test laid down by Mustill J in *The Niedersachsen* a claimant needs to show a case which is more than barely capable of serious argument but is not necessarily one which the judge believes to have a better than 50% chance of success. The judge considered it "wholly invidious" and indeed "wholly inappropriate" in cases of this type, which are likely to turn on the credibility of the principals on each side and on their recollections of oral conversations, for a judge to have to form a view about which side has the better of the argument.

Risk of dissipation: the proof

In relation to the dissipation of assets, Holyoake relied on various matters to prove the risk, including the following in particular: (i) the defendants' corporate structure and, in particular, the use of offshore structures, (ii) the fact that many of the defendants' assets were in real property which can be disposed of easily, (iii) the purchase of a yacht by Nicholas Candy for his wife, the actress and former *Neighbours* star, Holly Valance; and (iv) the nature of the allegations made.

i) Corporate structure (paragraphs 23-27)

In relation to the corporate structure and the use of offshore structures, the judge said that the mere fact that assets or businesses are held through offshore structures is not in itself evidence of a risk of dissipation of assets and that those who use such structures may do so for entirely proper and bona fide reasons.

However, the judge also said that the experience of the Courts was that such structures do lend themselves to being abused as detailed financial reporting is not required and fiduciaries and nominees can be used which enables beneficial ownership of assets to be switched easily and without visibility. The judge therefore held that the corporate structure (which he considered to be unusually complex) was a factor which could legitimately be taken into account. Although it was not in itself a ground for inferring a risk of dissipation, it was capable of being regarded as contributing to the risk if there is other material from which to infer such a risk.

ii) Real property (paragraphs 31-34)

As regards the fact that many of the assets were in real property, the judge did not accept that real property could not be disposed of quickly. The judge noted that the defendants operated in a very fast-moving environment, the high-end market, in which seven days is a long time. He also observed that it was simple for shares in a corporate vehicle holding real property to be transferred and that it was easy and quick to charge real property or, where it is already subject to a charge, to draw down on a financing facility. The judge said there was no evidence of unencumbered real property assets.

Holyoake also relied on an explained transfer of property by Christian Candy to his wife in 2015. This transfer remained unexplained and the judge accepted that in those circumstances the transfer was prima facie evidence of an act that could be characterised as dissipation and that the effect, even if not the intention, was to dispose of what might have been a valuable asset for execution purposes.

iii) The yacht purchase (paragraphs 35-39)

In relation to the purchase of a yacht for £26 million, Holyoake relied on the fact that the annual running costs of a yacht can be significant and yet it was impossible to discern from publicly available information how Nicholas Candy would be able to afford to lead what the judge said could aptly be described a "billionaire lifestyle". Holyoake alleged that Nicholas Candy was in truth a 50% beneficial owner of CPC, which was strongly denied by the Candy brothers, or else there was a discrepancy between, on the one hand, how he lives and what he spends, and, on the other hand, the available information as to his source of wealth. Holyoake submitted this discrepancy should give rise to suspicion. The judge accepted this submission, on the basis that the public position which the Candy brothers have put forward may not tell the whole truth, stating (at paragraph 38 of the judgment):

> *"A person who publicly flaunts his wealth, but whose declared holdings in his corporate interests do not begin to justify the wealth which he displays, is open to the charge that he is willing to say one thing and do something else. Those are precisely the sort of circumstances which give rise to a risk that a person who is prepared to do that might also be prepared, if judgment on a very large claim is given against him, to say that despite his apparent wealth he in truth has no assets against which execution could be levied."*

The judge made clear that he was not concluding that Nicholas Candy had done anything improper but stated that he was concerned to balance the risk and accepted that the matters raised gave rise to a "more than negligible risk" that Nicholas Candy was prepared to be unforthcoming about his assets, which in turn gave rise to a real risk that were he to face judgment, Holyoake

iv) The nature of the allegations against the defendant (paragraphs 39-43)

Holyoake also alleged that, in assessing the risk of dissipation, regard should be had to nature of the allegations made against the defendants, and in particular the threats made to Holyoake, which included threats to take a wrecking ball to his assets, to ruin his life and destroy his world.

The Candy brothers said that these allegations were hotly contested and were irrelevant to the risk of dissipation. The judge agreed with Holyoake. Whilst he accepted that the allegations were just allegations at this stage, he considered that if Holyoake obtained a judgment it would be because he had established that the defendants engaged in "the most appalling conduct" and that it was not unrealistic to suppose that if the defendants were prepared to act in a way that was "commercially and legally unjustifiable and morally reprehensible" then they might well be the sort of persons who would equally seek to defy judgments and seek to bring about a situation in which judgments would remain unsatisfied:

> *"…those who are prepared, as it is alleged that the Defendants were prepared, to use the techniques which they are said to have used to obtain very substantial financial advantages at the expense of the Claimants might in my judgment realistically be thought to be prepared also to ensure that they did not see any benefit from suing them. I do not think that the requirement that any dishonesty be proximate means that it is only the fraudulent hiding of assets which counts; a contempt for due processes of law and ordinary standards of commercial morality can in appropriate cases amount to material from which a Court may infer a risk that defendants may take illegitimate steps to avoid the obligations of a judgment."*

Comment

The judgment in ***Holyoake v Candy*** gives rise to a number of interesting issues which raise a broader question as to the relationship between a notification injunction and full freezing order.

It is hard not to get the impression that Holyoake would could not have obtained or afforded a full freezing order if he had applied for one. A freezing order would have been hard to apply to defendants whose very business consists in the buying and selling of significant real property assets. The judge noted the inconvenience that could be caused if prior notification of dissipation had been required. Holyoake therefore went for a lesser remedy, possibly more by way of nuisance value and also to avoid fortification of the undertaking in damages which a claimant who gets a freezing order must provide to a defendant. It is not clear from the judgment whether Holyoake had to provide any fortification of the undertaking in damages which would likely have been given in return for the notification injunction. As long as the Candy brothers notified the transactions then they would have been allowed to proceed with them. In essence therefore their destiny was in their own hands.

Fortification of the undertaking in damages requires a claimant to either show that he has sufficient funds to compensate any likely damage or to provide a suitable guarantee, either from a parent company or a bank. This can be expensive for a claimant and if it cannot be provided then the injunction will not be given. Given the nature of the Candy brothers' business, any damages from an injunction being wrongly granted could potentially have been very significant. Yet from the facts of the case it seems unlikely that Holyoake was in a position to provide any kind of guarantee for payment of a 7-, 8- or even 9-figure sum.

If a notification injunction can be required without fortification then from a claimant's perspective this is a very attractive feature.

The judge plainly took the view that the order he was granting was not objectionable in that he was simply granting a lesser remedy, a notification injunction, instead of a full freezing order where there was a proven risk of dissipation. However, the judgment is open to criticism on several grounds.

First, there is the suggestion (at paragraph 47) that the judge applied a lower threshold for the risk of dissipation of assets than would have been the case if a full freezing order had been sought. If a claimant cannot surmount the threshold for a freezing order then that threshold should arguably not be lowered so as to grant a lesser remedy.

Unlike in civil law countries, such as France, where a *saisie conservatoire* can be obtained as a matter of course without proof of a risk of dissipation of assets, in England and other common law jurisdictions the default position is that orders of this nature are not made unless risk of dissipation of assets is proven to a high standard. This justifies the interference with a defendants' right to dispose of his assets as he wishes.

Freezing orders (and the associated ancillary provisions) and notification injunctions are a draconian remedy. They have been considered by the courts on many occasions over the past 40 years and been reviewed by high court judges who have drafted standard form freezing orders. In order to strike a balance and protect the respective interests of claimants and defendants, safeguards have been put in place, such as requiring risk of dissipation to be proven to a high standard on the basis of solid evidence, as well as fortification of the undertaking in damages. Whilst there is a superficial logic in lowering the standard of proof for the lower remedy, to permit a lesser remedy to be granted on the basis of a lower standard of proof of risk of dissipation, where the court is satisfied that a defendant merely *might* dissipate his assets or that the risk of his so doing is more than negligible, and without necessarily requiring fortification of the undertaking in damages, risks upsetting that balance.

These remedies are exceptional and should arguably only granted where there is a real risk of dissipation proven to a high standard based on solid evidence. However, given the apparent contradiction between paragraph 47 and paragraph 8(6) it is not clear whether the judge did in fact intend to apply a lower standard.

Second, in relation to the actual dissipation of assets, Holyoake relied on a lot of circumstantial or indirect evidence to show that the defendants were in effect the sort of people who might dissipate their assets. In various respects the matters relied on by Holyoake and the reasoning of the judge smack of bootstrap reasoning:

i) Holyoake relied on the nature of the allegations made against the Candy brothers to show that they would be prepared to make sure any judgment went unsatisfied. In the context of whether there was a good arguable case, the judge had said that it would be inappropriate for him to make any kind of finding in relation to the factual allegations made, including the threats. That is entirely proper and uncontroversial but if that is the case then a claimant should not be able to rely on those same allegations in relation to the separate question of whether there is a risk of dissipation of assets. Risk of dissipation should be based on solid evidence. It should not be enough simply to rely on alleged matters (such as threats) which cannot be proven because the court cannot at an interim stage conduct a fact-finding exercise to determine the very matters at the heart of a dispute that will be the subject of the trial.

ii) In a similar vein the judge also seems to have put the onus on the Candy brothers to explain their corporate structure and asset/income position and to have relied on their failure to do so as evidence of risk of dissipation. However, the judge also made clear that that a claimant is not obliged to keep his assets intact to meet a possible claim by a claimant and can continue to spend them in the ordinary course of business or on his ordinary living expenses. Similarly, a defendant has no obligation to explain his asset position to a claimant unless and until there is a freezing order, the standard form of which requires disclosure of assets. To rely on a lack of explanation as to assets and income when a claimant has no right to know of such matters, as evidencing a risk of dissipation, such as to justify an order (which is likely to include an order for disclosure of assets and income), again seems somewhat circular reasoning.

Third, it is not clear what the point of the notification judgment granted was. At the hearing, the judge appeared to consider that the inconvenience which would be caused by the injunction sought, requiring 7 days' notice *before* any disposition, disinclined him from granting such an injunction.

Holyoake reacted and narrowed the order sought to require that the defendants give notice within 3 days *after* disposition. It is hard to see how this would have prevented dissipation of assets given that a freezing order cannot be used to undo a deal with an independent third party, especially when, as the judge accepted, a week can be a long time in the property market, in which companies owning real property can be sold very quickly.

The real value of a notification injunction may well have be as a deterrent to a defendant from dissipating his assets illegitimately so as to evade judgment. A defendant will know that one illegitimate disposition of assets could then be used to obtain a more onerous full freezing order and found contempt proceedings.

It is understood that the defendants have appealed against the judgment of Nugee J. If the judge's approach is upheld on appeal then notification injunctions may well prove to be popular with claimants given the lower standard for proof of risk of dissipation and also the possible lack of an obligation to provide fortification of the undertaking in damages.