JUDGMENT : HIS HONOUR JUDGE THORNTON QC: TCC : 22nd July 2005

1. Before the court is a without notice application for a freezing order in relation to assets that it is anticipated will come into the hands of the defendant in the near future. The claimant, Pynes Three Limited, formerly Blue Group Limited by a change of name, is the subsidiary of Connaught Plc and it undertakes a substantial business including repair, maintenance and renovation work, including, as in this case, substantial refurbishment works.

2. The subject matter of the dispute is the extensive refurbishment of a large warehouse building in Bournemouth involving the conversion of that building into 27 high quality residential apartments. The defendant is the developer. The defendant is thought to be an SPV (a special project vehicle), which is, as this court is well familiar with, the accepted means for the undertaking of a large number of such conversion or construction projects. But, and this is material for the application, a consequence of the use of an SPV is that the financial life of the company does not extend beyond the lifetime of the single project that the vehicle has been established to undertake.

3. In summary, the applicant has extensive claims arising out of the work that it carried out which is nearing completion. It intends in the near future to serve a notice of adjudication in relation to those claims but has good reason to believe that the relatively limited remaining assets that will be available to the respondent will be dissipated or charged so as to ensure, and certainly with the effect that, there will be no reasonable prospect of recovery from any decision of the adjudicator in circumstances where there is a reasonable prospect of success and a good arguable case, where there has been a substantial previous course of dealing in relation to reasonable attempts by the claimant to obtain its entitlement by negotiation, agreement and compromise without success, where there are grounds for contending for the defendant's conduct through the course of the contract has unconscionably increased the cost to the applicant of completing the work, such additional cost forming part of its substantial claim, and where the balance of convenience, proportionality and fairness all point to the claimant's entitlement to have secured at least part of its substantial claims before it embarks on a process of dispute resolution to recover those claims.

4. The application without notice has been prepared with commendable speed and in considerable detail, with, I am satisfied having considered it with some care, the appropriate candour of disclosure required for applications for such relief without notice by Mr M Stephenson, counsel instructed by Mr Elvis Nwachukwu of Mayfair Chamberlain Solicitors, who have both appeared to present the application in court. It is in form an application for injunctive relief under Section 37 of the Supreme Court Act, and particular attention has been drawn to the principles set out in CPR 25 and the notes, particularly those at CPR 25.1.3, 25.1.9, 25.1.23, 25.2.4, 25.3 and 25.3.3.

5. Reference has been made to Gee on Injunctions and to the reference in that work to **Ninemia Maritime Corporation,** both the decision at first instance of Mustill J and in the Court of Appeal, and to the wellknown **Mercedes Benz** authority from the House of Lords. From those authorities I derive a number of principles which I have in mind in considering the evidence.

6. (i) That the court has the jurisdiction in an appropriate case to grant an interim remedy or freezing injunction to restrain a party from dealing with any assets, even where the subject matter of the dispute, the assets themselves, and any process to obtain relief in relation to those assets are all situated within the jurisdiction (see CPR 25.1(1)(f)).

7. (ii) That jurisdiction may be exercised where it is just and convenient and in the interests of justice, not only to preserve assets where a party would otherwise lose control of the assets on grounds of an insolvency or other financial difficulty, but also both cumulatively and separately where the interests of justice show that a freezing order before proceedings is appropriate.

8. (iii)The application may be made to support and in anticipation not only of litigation but also arbitration or, in this case, adjudication. In the case of adjudication, both because it is a process provided for by statute and because it is a process which the parties have agreed govern their contract involving the rapid interim resolution disputes and the immediate payment of any sums

decided upon, a process which the courts have consistently maintained should be supported by all appropriate means of enforcement and support.

9. (iv)That the order should be sought at the earliest reasonable opportunity, that may be sought without notice in cases of urgency and/or where the interests of justice require it to be sought in that way.

10. I am satisfied from the material that I have seen and the submissions that I have heard based on that material that this is an unusual case in the sense that the applicant has made out a particularly high standard of reasonableness for it to be afforded without notice freezing order relief. This is an interim application and the matter, unless there is agreement, will return to the court in the near future for an on notice hearing attended by both parties. I therefore do not propose to do more than provide a thumbnail sketch of my conclusions on the evidence that I have seen as to why I am satisfied that the exceptional course of directing a freezing order without notice should be taken.

11. The particular features of the dispute that I take account of are:
(i) this is an SPV project heavily reliant upon outside financing by way of loan at an overall cost of approximately £5 million to £6 million, the success of which is very heavily dependent upon the claimant who has provided a design/build package to enable the project to be implemented.

12. (ii) The claimant came into the project after a predecessor design/build contractor who had embarked upon the work had gone into liquidation with a substantial payment of about £500,000 having been made to that insolvent company in circumstances in which, in effect, the claimant had to take on financial responsibility for any deficiencies in the design or construction work previously carried out by virtue of the terms of the JCT contract the applicant signed and the design obligations that it undertook for the project as a whole.

13. (iii) The very serious difficulties encountered by the claimant for which there is very good evidence that a substantial part of those difficulties were caused by the respondent or its professional team and which the claimant was prepared to work around so as to ensure completion of the building project. In particular, there were problems arising out of a party wall dispute with an adjoining owner which the defendant or its professional team did not secure resolution of until a date well into the building project. There were undoubted delays resulting from that dispute and such delays can be identified as relating to the failure to sort out the party wall questions before work started. It would appear therefore, that there are facts that the claimant has a very strong case for contending are delays for which the claimant is entitled to additional financial recovery.

14. (iv) There have been two adjudications during the course of the work as claims built up, the second of which was a substantial adjudication initiated by the respondent in relation to issues arising under the final account and in particular as to whether a provisional sum capping provision limiting the cost of the work but not limiting the remuneration for variations, was applicable.

15. The effect of the adjudicator's decision is difficult to ascertain at first glance and much of it may remain disputed, but I am satisfied that the claimant is to be regarded as having had a considerable measure of success which should reflect in a substantial further entitlement to payment and that that success was not achieved due to the respondent's continuing disinclination to meet its financial obligations under the contract.

16. (v) There is evidence that I was shown that, from an early stage in the work, those responsible for providing funds were placing pressure on the respondent to place pressure upon the contract administrator (responsible for valuing both the monetary claims and the time entitlement under the contract) to exercise his powers to the detriment of the claimant and without adopting the required impartial approach required by contract to be exercised fairly towards both parties to the contract.

17. (vi) There is good evidence that the parties arrived at an overall agreement as to the total cost of the work. The agreement was not evidenced in writing and the respondent was not prepared to acknowledge the agreement but appears to have acted on the basis that there was an agreement because it subsequently indicated that it was rescinding the agreement as a result of purported

further delay and the provision of defective work and a growing entitlement to liquidated damages.

18. That preparedness to negotiate, to act as if there were an agreement and then, on not very substantial evidence to contend for repudiatory breach on the part of the claimant, is indicative, as I see it, of a course of conduct by the defendant that is aimed at achieving the completion of the project by the claimant in a manner that will enable the respondent to realise the fruits of that project for it and its funders and so as to leave the claimant, who has provided the means of the project being completed, very substantially out of pocket. Its current claims, without a number of claims yet being put forward, exceed £1.8 million in addition to the contract sum, which is admittedly a provisional sum, of £3.2 million approximately.

19. (vii) The conduct of the respondent recently, culminating in a further attempt to negotiate a settlement when the first agreement or apparent agreement had been repudiated by the defendant in its suggested withdrawal of its involvement in the earlier agreement. This is a meeting which was held in March. As the evidence of Mr Bray indicates, Mr Reikman, the Chairman of Reikman Properties, stated that he was speaking on behalf of and with full authority of the respondent, that what was then being proposed was effectively to require the claimant to simply wait and see what, if anything, the respondent would be prepared to offer after what was described as a yet further full review of the whole contract. A threat was offered to the effect that Transco would be put into administration, leaving the claimant with nothing in terms of further recovery if this was not accepted.

20. (viii) The evidence that is available as to the assets and structure of the respondent suggests that it has not filed annual returns since September 2002, that its structure is such that a ready declaration of dividends to remove liquid assets from the company to family members, who are the shareholders or principal shareholders, is in place and that there does appear to be a reasonable prospect of there being assets available from the sale of the flats once the indebtedness from the funders has been discharged.

21. (ix) There remain for sale four of the 27 flats, capable of realising up to £1.2 million, and there is evidence that at least two of those flats are currently being marketed by agents on the basis that a forced sale figure will be accepted if a prospective purchaser is able to complete rapidly with cash.

22. In the light of that evidence I am satisfied that this is a case in which the claimant faces extensive costs in preparing for an adjudication in the near future. It has already incurred considerable costs in obtaining in a short space of time the advice of its legal team and of two claims consultants, the first Mr Bordelli, who has prepared an extension of time assessment capable of being formulated as a claim, the second a quantity surveying assessment of the costs claim, which if it is related to the extension of time assessment, I am told, would suggest a figure of about £1.8 million is being claimed.

23. There are further claims arising out of the final account, all these claims being maintainable because the claimant now accepts what it sees as the repudiation by the defendant of the compromise agreement and is therefore free, as the defendant appears to feel itself free, to proceed on the basis that no such agreement had ever been made.

24. I am also satisfied that there appears to be a course of conduct which aims to realise the remaining assets of the development and to dissipate them, either by their being charged or removed from the SPV, following a course of conduct in which the claimant has been induced to continue and complete the contract, notwithstanding a growing entitlement to unpaid sums which appears to have been withheld by a process of refusal to pay, by the creation of cross claims which have much less value than the claimant's financial entitlement, by recourse to adjudication and then by not complying with the consequences of adjudication and by the creation of every possible practical difficulty to prevent commercial and speedy negotiation and resolution of the growing financial dispute.

25. The claimant is willing and has offered a cross undertaking as to damages, which I accept, but that undertaking is in the form of the offer to provide a written guarantee, and I am satisfied that the claimant with the support of its holding company has the means of providing that guarantee and

honouring its cross undertaking as to damages. It is appropriate that the terms of the guarantee and of any other cross undertaking should be identified in any order resulting from the inter partes hearing and that in the meantime the undertaking itself is a sufficient security for the granting of without notice relief.

26. The terms of the draft order, as is required, have been made available to the court and, subject to discussion with counsel as to any modification of those terms, the order as sought will be granted by the court and I will fix a return date and any consequential directions for service after discussion with counsel.

MR M STEPHENSON (instructed by Messrs Mayfair Chamberlain) appeared on behalf of the CLAIMANT
THE DEFENDANT did not appear and was not represented