Daniel Churcher successful in Nicholas James Care Homes Ltd v Liberty Homes (Kent) Ltd [2023] EWCH 360 (TCC)

This was an adjudication enforcement matter relating to an adjudication decision dated 18 February 2022 ("**the Decision**"). At a without notice hearing on 21 April 2022 the Claimant ("**NJCH**") obtained a freezing injunction over the Defendant's ("**Liberty's**") assets on the basis that Liberty had transferred certain properties to related companies for no consideration, leaving it with insufficient assets to pay the sums due to NJCH under the Decision. NJCH said that it had only discovered these transfers after the Decision was issued, when its lawyers investigated Liberty's ability to pay. That injunction was continued following a return date hearing on 9 May 2022.

The substantive adjudication enforcement issues were set to be dealt with a hearing on 9 June 2022. However, shortly before that hearing Liberty raised allegations that NJCH had breached its duty of full and frank disclosure in relation to the freezing injunction proceedings. Specifically Liberty alleged that NJCH had failed to disclose the existence of a search against the title of one of the properties carried out in late 2019. Liberty said that the existence of this search, and the fact that the title recorded an "application pending", meant that NJCH had knowledge of the asset transfers sooner than it let on. Liberty also highlighted documents which suggested that NJCH knew about the formation of new corporate entities sooner than was disclosed at the without notice hearing. Liberty said that this was material information, in that if NJCH had known about the asset transfers since 2019, there was no justification for having waited until 2022 to make an application for a freezing injunction. Liberty said that the injunction should be discharged, and directions given to enforce NJCH's cross-undertaking in damages.

After further delays the enforcement issues and Liberty's application to discharge the freezing injunction came before Andrew Singer KC, sitting as a judge of the High Court, on 31 January 2023. Daniel Churcher of 4 Pump Court appeared for NJCH. Alexander Nissen KC and Michael Levenstein appeared for Liberty.

The enforcement issues

Although Liberty had originally maintained a long list of grounds for resisting enforcement, by the time of the 31 January 2023 hearing only one ground was maintained. During the course of the adjudication the adjudicator's clerk had asked each party to make payments on account of his fees. Ultimately both parties made the payments but Liberty's share was paid only after delays and chasers from the adjudicator's clerk in somewhat urgent terms: "*If we do not receive the funds by close of business today I will have to take Dr Chern's direction on how he wishes to proceed.*" Notably, both NJCH and the adjudicator had confirmed that they would not regard payment of these payments on account as any kind of submission to the adjudicator's jurisdiction.

Liberty said that these chasers amounted to implied threats by the adjudicator (or on his behalf) to exercise a lien over the Decision pending payment of his fees (i.e. that he would not deliver the Decision unless Liberty paid the sums demanded). It is well-established that an adjudicator is obliged to deliver their decision within the time set by the rules governing the adjudication (or by agreement of the parties) failing which the decision is unenforceable. Any attempt by an adjudicator to hold back their decision pending payment of fees is impermissible and may lead to a finding of breach of natural justice: Mott MacDonald Ltd v. London & Regional Properties Ltd [2007] EWHC 1055 (TCC).

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
www.4pumpcourt.com

Although the adjudicator in this case had not made express threats to withhold his decision, Liberty argued that there was an implicit threat sitting behind the demands, and that in any event the manner in which the adjudicator's clerk demanded fees created the appearance of bias as between the parties. The Court did not accept that submission:

> *"Whilst the emails from Dr Chern's Clerk were certainly tenacious and persistent, it does not seem to me that they at any stage crossed the line into being properly construable by the reasonable observer as improper threats to impose a lien and none of them can properly be described as " extraordinary". It does seem to me highly unlikely that had they been thought at the time as amounting to improper threats that Liberty's solicitors would not have made observations – politely no doubt – if not outright complaints in that regard. I have already noted that they were entirely open in reserving the position as to jurisdiction when making payments in response to what are said now to amount to in effect threats to exercise a lien and/or manifestations of bias. Even if they were loathe to make a complaint, in my judgment one ought to be made if an allegation of bias is to be pursued thereafter.*
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> *The reality is that Dr Chern or his Clerk did not at any time even use the word "lien" let alone threaten to exercise it. There was no submission before me supported by any authority that it is impermissible for an Adjudicator to ask for and indeed to obtain security for fees from both parties during the course of an Adjudication Reference irrespective of whether those are agreed as part of an adjudicator's terms and conditions. As a matter of principle it does not seem to me that that of itself and without more, in particular any attempt to exercise a lien, can be objectionable."*

It seems then that adjudicators are entitled to ask both parties to make payments on account of fees, provided that those requests do not "*cross the line*" into improper threats. Short of expressly threatening to exercise a lien over their decision, it is not clear what would amount to "*crossing the line*", but there is clear direction from the court that if a party thinks it is being subjected to improper demands or threats, it should raise that issue with the adjudicator at the time rather than waiting until the enforcement stage to make a complaint. Although parties might be reluctant to risk the ire of an adjudicator by rejecting or complaining about demands for fees, there is obvious utility in requiring an aggrieved party to raise the issue with the adjudicator, giving the adjudicator the opportunity to withdraw the demands rather than run the risk of an unenforceable decision.

The freezing injunction issues

It was common ground that NJCH's date of knowledge of dissipation of assets by Liberty was in principle a relevant factor in determining whether the freezing injunction should have been issued. If Party A knows about facts which suggest that Party B has or intends to dissipate assets, but sits on that information and does nothing about it, that may suggest that Party A does not really believe that Party B has or will unjustifiably dispose of its assets.

The court approached the issue by asking first whether any non-disclosure was innocent or deliberate. If it was a deliberate non-disclosure, then the strong presumption was that the injunction would be discharged. That reflects the importance the court attaches to the duty of full and frank disclosure: discharge of a freezing injunction for deliberate breach is essentially a penal measure. However, in the case of an innocent non-disclosure "*[t]he court has to engage … in a balancing exercise and consider what impact the particular non-disclosure has and whether it is in the interests of justice that the injunction should be set aside.*" (Aquarius Holding Ltd v. Mr S Barber and Others [2016] EWHC 2806 (Comm)).

Liberty said that NJCH's owner and director had deliberately withheld information from the court as to his date of knowledge of Liberty's restructure, and that he had subsequently lied in his witness evidence seeking to explain the non-disclosure. On that basis, Liberty said that the court should conclude that the non-disclosure was deliberate and

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
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discharge the injunction. The court disagreed. Although it considered the non-disclosed information to be material, there was circumstantial evidence which tended to suggest that NJCH was not actually aware that it held this information (and therefore that the non-disclosure was innocent). In particular, in December 2019 NJCH was on the receiving end of an adverse smash-and-grab adjudication decision. Its then-lawyers had written to Liberty noting that there appeared to be unusual corporate movements, and querying whether Liberty was planning to dissipate assets. NJCH said it would seek a stay of execution in respect of the smash-and-grab decision on that basis (although it later agreed to pay the sums due).

That solicitors' letter had been disclosed at the without notice hearing and NJCH relied on that letter as demonstrating its state of knowledge at the time it was sent. The court agreed that the letter was likely to record NJCH's actual state of knowledge: "*… had this information been in [NJCH's] knowledge by 16th December 2020 it would have been in the letter sent by his then solicitors. Certainly no good reason has been suggested for Mr Rajakanthan/NJCH being aware of a pending transfer in mid-November 2020 and then having forgotten or deliberately chosen not to mention it just over one month thereafter. The suggestion made by Mr Nissen KC in his submissions that Mr Rajakanthan deliberately decided not to deploy an unauthorised search is, in my judgment, simply speculation and is not based on any credible evidential basis.*"

Having found that the non-disclosure was innocent, the court had little difficulty in finding that it was in the interests of justice that the injunction continue: Liberty's "*widespread unjustified dealings*" with its assets were adequate justification to prevent further disposals.

This decision serves as a reminder of the significance that the court places on the duty of full and frank disclosure. Details that seem minor at the time a party is preparing for a without-notice injunction application might take on much greater significance down the line. Although in this case the injunction was continued despite non-disclosure, NJCH was subjected to a costs penalty at a subsequent hearing, and the adjournment of the original enforcement hearing could have been avoided (and the decision enforced much more quickly) if the non-disclosure had not taken place.

Daniel Churcher is ranked in the directories as a construction and engineering specialist. He has particular experience in adjudication and adjudication enforcement matters, as well as disputes concerning large-scale domestic and international construction and infrastructure projects. He regularly appears in the Technology and Construction Court as well as in ICC, LCIA and DIAC arbitrations.

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