JUDGMENT : Mr Justice Ramsey: TCC. 1st November 2006

Introduction

1. This is an application by the Chorus Group Limited ("Chorus") to continue a Freezing Injunction granted on 26 October 2006 by Mr Justice Jackson. They also apply to increase the sum frozen by that injunction and to be granted summary judgment against the two respondents, Berners BVI Limited ("Berners" or "the First Respondent) and JJW Limited ("JJW" or "the Second Respondent") in respect of a cheque.

2. The Respondents in turn apply to discharge the injunction on two grounds. First, they submit that there was non-disclosure on the application made without notice by Chorus and secondly, they say that there is a lack of any evidence that they would be likely to dissipate assets which are within the jurisdiction.

3. The background to these matters is as follows. Chorus is a building contractor and Berners owns and operates a hotel, Berners Hotel, at 69 Berners Street, London, W1. There was a letter of intent dated 15 May 2006 ("the Contract") executed by Chorus and Berners, which incorporated the terms of the JCT WCD 1998 with certain amendments. Under the Contract Berners engaged Chorus to carry out certain works at the hotel for payment of an amount up to a maximum sum of £1.748 million plus VAT. In terms of payments made under the Contract, the first four valuations were certified and then paid by Berners, in the total sum of £484,428.50 plus VAT.

4. There were then further valuations submitted to the quantity surveyors, MDA Consulting Limited, which led to certified sums as follows:
   (1) Valuation number 5 at the end of May 2006 which led to a certified sum of £578,493 plus VAT.
   (2) Valuation number 6 at the end of June 2006 which led to a certified payment of £280,526 plus VAT and
   (3) Valuation number 7 at the end of July 2006 which led to a certified payment of £218,836 plus VAT.

   Those sums were not paid by Berners and as a result an adjudication was started on 17 August 2006. Mr Peter Aeberli was appointed as the Adjudicator and he gave his Decision at the end of September 2006.

5. Because jurisdiction matters had been raised, he phrased his decision in this way: "*Assuming I have jurisdiction to determine all the issues referred to in the Notice of Adjudication*". He then set out that Berners should pay Chorus a sum plus VAT. At paragraph 1.2 of the Decision he decided that, in addition, Berners should pay interest on that sum and continuing interest. There are also other findings on different alternative assumptions.

6. Following that adjudication Decision, the parties entered into a Settlement Agreement. The terms of the Settlement Agreement was dated 11 October 2006 and was drawn up by the solicitors for the two parties. It provided that the proceedings were compromised on the basis of the payment to Chorus of the sum under the Adjudicator's Decision with additional interest. There is also a provision in that Settlement Agreement for interest if the sums are unpaid, together with a provision for Chorus to bear the fees of the adjudicator.

7. Under that Settlement Agreement there should have been a bank transfer of the sums in full by 18 October 2006. That did not happen and, initially, Berners blamed administrative problems for not making the payment on that date. A cheque was then provided. It appears it was dated 18 October 2006 and signed in Paris on 19 October 2006. It was couriered to London. As a result it only arrived at Fenwick Elliott, the solicitors for Chorus, on 24 October 2006. The cheque was presented for special collection but was returned unpaid. Even today, the precise circumstances relating to this payment and why it was not paid are not totally clear. As a result, as had been presaged in various communications between Fenwick Elliot and Cameron McKenna; an application was made to Mr Justice Jackson on 26 October 2006 when he granted the Freezing Injunction.

8. Now on the return date for that Freezing Injunction, I turn to consider the various matters which have been raised by the parties.

Non-Disclosure

9. I deal first with the question of non-disclosure, I have been referred to the decision in ***Brink's Mat v. Elcombe*** [1988] 1 WLR 1350, particularly the judgment of Ralph Gibson LJ where he set out the applicable principles at 1356 as follows:

   "*(1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see* ***Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac*** *[1917] 1 K.B. 486, 514, per Scrutton L.J.*

   (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see ***Rex v. Kensington Income Tax Commissioners****, per Lord Cozens-Hardy M.R., at p. 504, citing* ***Dalglish v. Jarvie*** *(1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in* ***Thermax Ltd. v. Schott Industrial Glass Ltd.*** *[1981] F.S.R. 289, 295.*

   (3) The applicant must make proper inquiries before making the application: see ***Bank Mellat v. Nikpour*** *[1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.*

   (4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an ***Anton Piller*** *order in*

Columbia Picture Industries Inc. v. Robinson *[1987] Ch. 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in* ***Bank Mellat v. Nikpour*** *[1985] F.S.R. 87, 92-93.*

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in ***Bank Mellat v. Nikpour****, at p. 91, citing Warrington L.J. in the* ***Kensington Income Tax Commissioners'*** *case [1917] 1 K.B. 486, 509.*

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:" per Lord Denning M.R. in ***Bank Mellat v. Nikpour*** *[1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms: "when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed": per Glidewell L.J.* ***in Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc.,*** *ante, pp. 134H-1344A."*

10. It is said by the Respondents that there was a failure by Chorus and their solicitors to make full enquiries as to the Respondents' funding position. I do not consider that in this type of case a party or their solicitor, before commencing proceedings for a Freezing Injunction, is under an obligation to make enquiries of the Respondents' banks or of the Respondents themselves as to their funding position. In this case, it is clear that there were no allegations at the time that there were particular funding problems which were causing the failure of payment by the Respondents. Administrative problems were blamed for the non-payment and the hope was that there might be some resolution with the bank. The precise position is not even clear today.

11. It is then said that there was non-disclosure of the availability of funding. The Respondents allege that Chorus should have informed the court that there was in place a funding agreement on the project which depended on a signed building contract and this, it is said, was a material matter which went to the availability of funds by which the first Respondent might pay. The fact that the availability of finance depending on a signed building contract was set out in the witness statement of Mr Brook in the adjudication. It was an issue raised in the adjudication but it was abandoned when it came to the Settlement Agreement, because the parties abandoned all jurisdiction points and agreed to make payment. The funding of the sums which were due from the Respondents under the Settlement Agreement and then the funding of the cheque provided by the First Respondent were, it seems to me, entirely separate matters which were not alleged by the Respondents to depend upon any funding arrangement deriving from a signed building contract. Indeed, it can be seen from the affidavit evidence of the resources of the First and Second Respondents, that there are other issues which are relevant to funding on this particular project. In particular, it can be seen that in one account there is a sum over £6 million, which appears to be on deposit in an account and no reason has been given why that sum has not been used to make the payments. Therefore I do not think there is any material non-disclosure in terms of funding.

12. In terms of notice, the Respondents state that Chorus should not have proceeded with an application without notice. I consider there is strength in this point. The Practice Direction to Part 25 at para 3.4 provides that "*Where an application is made without notice to the respondent, the evidence must also set out why notice was not given*". The evidence in this case does not set out why notice was not given. However, this was not a case where the Respondents were unaware of the possibility of an application being made for a Freezing Injunction without notice. Mr Randle of Fenwick Elliot raised it with Ms Bingham of Cameron McKenna on the 23 October 2006, both when the cheque had not appeared and later on 25 October 2006, when the cheque had been returned unpaid. There was not an immediate reaction from Cameron McKenna that an application without notice was inappropriate. I do not consider though, that there was any burden on Cameron McKenna to raise the point and that this does not excuse the need for an application without notice to be justified in evidence. However, I have come to the conclusion that if this were the sole ground for contending that Chorus did not adopt a proper approach to the application, I would not discharge an injunction which I might otherwise find to be justified, on this ground.

13. The next matter of alleged non-disclosure is a failure to inform the court that there had been high level contact between the parties leading to a possible meeting the 3 November 2006. Mr Randle did refer generally to high level contacts in paragraph 18 of his affidavit. Mr Brook has provided a written statement on behalf of the Respondents in which he refers to these contacts and I have now seen an attendance note taken today by Mr Randle responding to Mr Brook's statement. It seems to me that this attendance note should be incorporated into an affidavit. I consider that Mr Randle made proper disclosure of the fact there had been contact between the parties and the fact that a meeting might possibly take place on 3 November 2006. There does not seem to me to have been any material non-disclosure.

14. The Respondents then submit that there was a failure to provide a Claim Form or Particulars of Claim. I do not consider in this case that there has been a breach of the undertaking. This is not a case where, as is often the case, there is a fixed date stipulated in the Order by which such documents have to be provided. The Claim Form was issued and served on the 30 October 2006 and draft Particulars of Claim have been made available in the bundle today. I accept that the claim as set out in the Particulars of Claim, needed some work to produce it and there has not been any material breach of that undertaking.

15. The next matter of non-disclosure is whether it was made clear that the sum in valuation 9 was not payable. A difference is drawn in Mr Randle's affidavit between certification and valuation at paragraph 21 and it seems to me that there was no non-disclosure in respect of this matter. There is a different question whether the injunction should cover valuation 9, when it has been valued but not certified.

16. Finally I deal with the contention that there was non-disclosure in terms of the Settlement Agreement because the court was not taken to such matters as the payment of the Adjudicator's fees and interest. It seems to me that such matters cannot amount to material non-disclosure.

17. It follows that I do not consider that within the applicable principles, there has been any material non-disclosure which should lead to the discharge of the current injunction.

Real Risk of Dissipation

18. There are however two requirements for a Freezing Injunction. First of all there has to be a good arguable case and secondly there has to be a real risk of dissipation. Here there is no dispute that the claimant has an extremely strong case – there are both the unpaid cheque and the terms of the Settlement Agreement. Realistically, Mr Fraser who appears for the Respondents, cannot oppose the application for Summary Judgment upon the cheque, on the merits.

19. The question which is central in this case is whether the applicant has shown a real risk of dissipation. In ***The Niedersachsen*** [1983] 2 Lloyd's Rep. 600 at 617, Kerr LJ characterised the test in respect of dissipation of assets in this way: "*In our view the test is whether, on the assumption that the plaintiffs have shown at least 'a good arguable case', the court concludes on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied.*"

20. Kerr LJ then cited a number of authorities from which he derived that proposition, including *Third Chandris v. Unimarine* [1979] 2 Lloyd's Rep. 184, in which Lord Denning at 189 referred to difficulties of foreign companies and their incorporation and said: "*In such cases the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or an award is obtained, it may go unsatisfied*…."

21. Kerr L.J. then continued in ***The Niedersachsen*** at 618 to cite from the following cases:

    (1) ***Montecchi v. Shimco (U.K.) Ltd.,*** [1980] 1 Lloyd's Rep. 50; [1979] 1 W.L.R. 1180: "… *the basis of the* ***Mareva*** *injunction is that there has to be a real reason to apprehend that if the injunction is not made, the intending plaintiff in this country may be deprived of a remedy against the foreign defendant whom he seeks to sue*" [per Lord Justice Bridge at pp. 52 and 1183.]

    (2) ***Barclay-Johnson v. Yuill***. [1980] 1 W.L.R. 1259: "… *it must appear that there is a danger of default if the assets are removed from the jurisdiction. Even if the risk of removal is great, no* ***Mareva*** *injunction should be granted unless there is also a danger of default*" [per Sir Robert Megarry, V.C. at p. 1265.]

    (3) ***Rahman v. Abu-Taha***, [1980] 2 Lloyd's Rep. 465; [1980] 1 W.L.R. 1268: "*So I would hold that a* ***Mareva*** *injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied.*"

22. Steven Gee, QC in his book on ***Commercial Injunctions*** (4th Edition) deals with this requirement at paragraph 12-039. He lists nine factors which may be relevant to the question of whether there is a real risk of dissipation. He emphasises that unsupported statements are not enough, but says that if there is a good arguable case and a respondent has acted with an unacceptably low standard of morality, giving rise to a feeling of uneasiness about him, then it is often unnecessary for there to be any further specific evidence on risk of dissipation.

23. In my judgment, in this case, there are the following factors which are relevant:

    (1) The First Respondent is a British Virgin Islands company and the Second Respondent is a Guernsey company and they are therefore based in jurisdictions where disclosure about those companies is less easily obtained. They are obviously based there so as to avoid consequences which would otherwise apply to a company which is within the jurisdiction.

    (2) As Mr Brook accepts, the First Respondent is a single purpose vehicle. Also, as I find, it only has one asset, the Berners Hotel, which has been charged to the Bank of Scotland and has a charge of about £37.7 million against it. I do not accept that the Scottish bank accounts show that there is any asset in Scotland, even if that were within the jurisdiction. The Berners Hotel was bought for £48 million but it is being refurbished. Although it may be worth £73 million if refurbished, it is not in that state now. At most the equity is limited to the value over the £37.7 million charge. Therefore, the only asset is the extent of the equity in excess of that figure. The

Second Respondent is a company which holds shares in other companies and apart from its shareholding in various companies in the UK, does not appear to have assets which are in the jurisdiction.

(3) There are clearly funding difficulties, about which I have little information. These difficulties may or may not be able to be resolved at a meeting with the Bank. It is not entirely clear when these difficulties arose, how they arose or what is the underlying cause of them. Certainly, from the conduct of the Respondents in respect of payment under the Settlement Agreement and of the cheque, there is no indication that these problems of funding were caused by a failure to sign a building contract.

(4) Sums have been certified and not paid. The dispute over those sums then went to adjudication and a decision was obtained. It seems that jurisdiction arguments were raised but there are now no serious grounds of challenge to that adjudication Decision. That Decision then led to a Settlement Agreement which should have achieved payment on 18 October 2006 of sums which were due at the end of May, the end of June and the end of July 2006. It was first said that there were administrative problems and that the payment would not therefore be by bank transfer. It is difficult to see what the administrative problems were or why a bank transfer could not have been made by those who apparently were present in Paris on the 18 October 2006. It does not seem that any serious attempts were made to make that bank transfer. Apparently therefore, "administrative problems" is being used as a cover for the fact that the Respondents were not making payment. A cheque was signed on the 19 October 2006 (dated 18 October 2006) but it only arrived in London on 23 October 2006. It was passed to Chorus on the 24 October 2006 and, as I have said, when presented for special collection, it was returned unpaid. It is now said there are funding difficulties which may be resolved and that if the cheque is re-presented, it may be paid.

I consider that the conduct of the First Respondent, in first suggesting that there were administrative problems and then in producing a cheque which it is apparent from the evidence of Mr Brook would not be paid, is conduct which is sufficient for the court to draw the necessary inferences of an intention to avoid payment of a judgment and falls within the category of conduct which makes it unnecessary for further specific evidence on risk of dissipation.

24. In these circumstances where the First and Second Respondents are companies outside of the jurisdiction; where they have the ability to create complex mechanisms which are not transparent; where they have created this single purpose vehicle specifically to avoid financial exposure; where the only asset is equity in the Berners Hotel and where the Respondents' behaviour in response to the claims by Chorus shows a pattern of evasiveness, I consider it proper to draw the inference that, as was set out in ***The Niedersachsen***, the refusal of an injunction would involve a real risk that a judgment awarded in favour of Chorus would remain unsatisfied.

25. In addition Mr Brooks, in his latest affidavit, has given no proper explanation of the lack of funding, what problems had arisen and precisely how, if at all, the matter is going to be dealt with. It seems to me that this failure can only support that inference.

Conclusion

26. On that basis I am satisfied that Chorus has made out the grounds for a Freezing Injunction. So far as the amount of the freezing injunction is concerned, it seems to me that it is appropriate to take into account the sums which are currently due and payable and I am persuaded by Mr Fraser that the appropriate sum should be £1.4 million and that it should not be increased to £2 million, as sought by Chorus.

Mr James Bowling (instructed by Fenwick Elliot) for the Claimant
Mr Peter Fraser (instructed by CMS Cameron McKenna LLP) for the Defendants