Neutral Citation Number: [2023] EWHC 360 (TCC)

Claim No: HT-2022-000104

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Date: 21st February 2023

B e f o r e:

RECORDER ANDREW SINGER KC
(sitting as a Judge of the Technology and Construction Court)

NICHOLAS JAMES CARE HOMES LIMITED

Claimant

- and -

LIBERTY HOMES (KENT) LIMITED

Defendant

Mr Daniel Churcher
(instructed by Thomson Snell and Passmore LLP) for the Claimant
Mr Alexander Nissen KC and Mr Michael Levenstein
(instructed by Furley Page LLP) for the Defendants

JUDGMENT

Hearing date: 31st January 2023

Handed Down by Email to the Parties 10:00am 21st February 2023.

Introduction

1. There are 3 applications which are the subject of this judgment. The first in time is an application for Part 24 summary enforcement of an Adjudication Decision dated 18th February 2022 by Dr Cyril Chern. After the application was issued, the Claimant ("NJCH") sought

and obtained an ex parte freezing injunction against the Defendant ("Liberty"). That ex parte injunction was continued after an inter-party hearing on 9th May 2022,and a written Judgment was handed down by O'Farrell J on 19th May 2022. In June 2022 before the Part 24 application was to be heard, Liberty sent evidence to NJCH claiming that the injunction had been obtained in breach of NJCH's duty of full and frank disclosure. That evidence led to the adjournment of the June hearing which was re-listed for October. Unfortunately, the October hearing was also adjourned due to the unexpected unavailability of Liberty's Junior Counsel. The hearing before me on 31st January 2023 addressed the issue of the enforceability or otherwise of the Adjudication Decision; the discharge or continuation of the freezing injunction; and whether there should be a stay of execution of enforcement of the Adjudication Decision. Liberty has brought Part 8 proceedings which effectively mirror its objections to enforcement, those proceedings were not the subject of any specific submissions at the hearing. In addition there are other proceedings where Liberty is Claimant and NJCH is one of the Defendants but those proceedings do not directly affect these applications.

2. The disputes which have led to the applications before me arise in respect of a construction contract for works at Beacon Hill Lodge Nursing Home. NJCH was the owner and operator of the care home and the employer under the Contract and Liberty the contractor. The parties had a long history of working together and the principals of the parties and their families were previously on very friendly terms.

3. Further issues as to whether the Court should make an Information Disclosure Order; any variation to the freezing injunction; the costs of the hearing before me and the costs reserved from previous hearings are to be dealt with insofar as necessary and appropriate when this Judgment is handed down.

The Issues to be decided

4. At the conclusion of the hearing before me it was agreed that the following issues arise for determination in this Judgment:

(1) Should the Decision of Dr Chern be enforced summarily?

(2) Should the freezing injunction be discharged or continued?

(3) Should there be a stay of execution of enforcement of the Decision of Dr Chern?

5. In reaching my judgment, I have considered all of the documentation put before me including both parties' extensive written submissions and have taken into account all the oral submissions made at the hearing. I am very grateful to all Counsel involved for the clarity and focus of their written and oral submissions. If I do not expressly address any point made by either party, that should not be taken as meaning that I have failed to take it into account; simply that for the purposes of this Judgment I have set out my views on what I regard as the significant points requiring express discussion and determination.

Issue (1)

6. Until the service of Liberty's Skeleton Argument, there had been a large number of proposed defences to the enforcement of Dr Chern's Decision. All those defences were still being pursued when the June hearing was adjourned. However, in their Skeleton Argument served on 27th January 2023, Liberty confirmed that they were confining their challenge to the enforcement of Dr Chern's Decision in respect of one point described as "the way in which Dr Chern demanded payment for his services in advance of the delivery of the Decision."

7. The background facts to this challenge are found in the contemporaneous email exchanges between Dr Chern's Clerk and the parties and, so far as relevant, are as follows.

8. On 25th October 2021 Dr Cyril Chern was nominated by the RIBA as the Adjudicator of the second Reference to Adjudication between the parties. On 26th October 2021 Dr Chern's Clerk, Christopher Ebdon, emailed the parties attaching a copy of the Adjudicator's Terms and asking for an initial deposit of £10,000 + VAT to be paid by each party to Dr Chern's personal bank account. The parties were also asked to confirm agreement to the terms and effect payment at their earliest convenience.

9. Dr Chern's Terms of Appointment include at Paragraphs 3 and 4

> "Dr Chern shall also be entitled to a sum as and whenever determined by him as Security for the payment of fees and expenses and may request this sum in advance of any invoices and may further request that such sum be replenished on a regularly [sic] basis as and when he deems necessary.
>
> Dr Chern shall submit invoices as necessary for payment of fees and expenses less any advances previously advanced/paid. All invoices shall be accompanied by a brief description of activities performed during the relevant period and shall be addressed to the Referring Party with copy to the Responding Party. The Referring Party shall pay Dr Chern's invoice (and request for Security for fees and expenses) in full

> within 7 calendar days after receiving each invoice and may apply to the Responding Party for reimbursement of one-half of the amounts of these invoices. The ultimate allocation of fees and expenses shall be determined by Dr Chern in the Decision given in this matter. Failure to pay per the terms of this appointment will allow Dr Chern to (i) suspend his services (without notice) until the payment is received; and/or (ii) resign his appointment by giving notice via email to the parties. Additionally, should the parties either jointly or individually fail to co-operate with Dr Chern, he may also resign upon notice via email to the parties."

10. On 28th October 2021 Liberty's solicitors replied to Dr Chern with their timetable proposals:

> "… provided strictly without prejudice to any jurisdictional challenge our client may raise and our client's rights to challenge jurisdiction shall not be affected by our particularisation of the challenges after today …" The Responding Party respectfully maintains that your acceptance of this appointment is not determinative of your jurisdiction, nor can you make a binding decision on your own jurisdiction."

11. On 29th October 2021, Mr Ebdon emailed, asking:

> "Please could the Respondent's representatives confirm by close of business today that payment of the initial deposit is being processed."

12. On 31st October 2021 NJCH's solicitor confirmed in an email to the Adjudicator and Liberty's representatives:

> "My client will not take any point in relation to any purported jurisdiction challenge with regard to the Responding Party now making the required payment on account of your fees."

13. During his oral submissions, Mr Nissen KC stressed that in line with recent authority Liberty was concerned not to waive jurisdictional challenges by making payments of fees to the Adjudicator.

14. On 10th January 2022 Mr Ebdon asked both parties to pay a further deposit of £15,000 + VAT each on the basis that his time had now far exceeded the £10,000 + VAT each party had paid as an initial deposit. It is clear, therefore, that as at that stage Dr Chern had carried out a considerable amount of work in considering the submissions which had been put before him as at that date.

15. On 11th January 2022 NJCH paid its further £15,000 deposit directly. On 17th January 2022 Mr Ebdon chased Liberty for its further deposit. There was another chaser email on 20th January 2022 and on 24th January Mr Ebdon sent an email noting that:

> "…Dr Chern has confirmed that no funds have been received. 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."

16. On 25th January Liberty's solicitor responded to Mr Ebdon apologising for the delay and saying that he had requested funds and was awaiting confirmation as to whether they would be paid to Mr Crofton-Martin's firm to transfer or paid direct from Liberty Homes. He also made the point that any payment was:

> "… strictly without prejudice to my client's jurisdictional challenges as raised and fully particularised in the Response and pleadings in this Adjudication which is hereby reserved in full."

17. A further request for an update was made on 31st January 2022 and on 1st February 2022 Mr Ebdon sent an email which Mr Nissen KC described in his oral submissions to me as "extraordinary":

> "I have spoken with Dr Chern regarding this. The deadline for payment to reach his account is 5 pm today.
>
> There will be no further extension to this before the matter is taken out of my hands."

Liberty did pay the further £15,000, without VAT, on 2nd February 2022, i.e. after 5pm on 1st February and a request was then made on 4th February and again on 10th February for the further £3,000 VAT to be paid. The 10th February request was during the period when Dr Chern was finalising his Decision having closed the evidence in the reference on 8th February 2022.

18. There was a further request for payment on 14th February 2022:

> "The deadline for payment to reach Dr Chern's account is 5 pm today.
>
> There will be no further extension to this before the matter is taken out of my hands."

Payment was made on 15th February and acknowledged on 17th. Dr Chern's Decision was sent to the parties on 18th February 2022.

19. Whilst in response to the requests by Dr. Chern's Clerk for Security for his fees, Liberty's solicitors maintained their reservation of the position so far as making any jurisdictional challenges were concerned and they did not at any time raise concerns or objections to Mr Ebdon's requests for fees. I asked Mr Nissen KC during the hearing why no such requests had been made, and he frankly and properly accepted that that was because to have done so would have been embarrassing and that "These things need to be sensitively handled."

20. In summary, Liberty's submission is that Dr Chern was making demands which amounted to a breach of Paragraph 19 of the Scheme. Although he did not exercise a lien, the (implicit) threat to do so was unlawful and/or contrary to Paragraph 12(a) of the Scheme there was manifest bias and that Dr Chern's conduct should be rejected and his Decision not enforced.

21. Paragraph 12(a) of the Scheme provides that the Adjudicator shall "act impartially in carrying out his duties …" Paragraph 19 provides for the Adjudicator to reach his decision not later than 28 days after receipt of the Referral or 42 days if the Referring Party consents or such period exceeding 28 days as the parties in dispute may after the giving of that notice agree.

22. Sir Peter Coulson in his textbook, ***Construction Adjudication*** **(4th ed) at para.10.45** explains:

> "In adjudication, the courts have indicated firmly that, because of the emphasis on speed in adjudication above all things, the purported exercise of a lien will not be permitted."

23. As I have already identified, Liberty expressly reserved its position and challenged Dr Chern's jurisdiction. It was reluctant to pay fees in the light of the decision of Mr Roger ter Haar KC in ***Platform Interior Solutions v. ISG Construction*** **[2020] EWHC 945 (TCC) at paras.49-50**:

> "There is strong authority that payment of an adjudicator's fees may amount to an election to treat an adjudicator's decision as valid … Payment of an adjudicator's fees may amount to an election to treat an adjudicator's decision as valid …payment"

24. Whether or not Liberty agreed to be bound by Dr Chern's terms of appointment is moot, say Mr Nissen KC and Mr Levenstein because the terms, notably Clauses 3 and 4, do not in any event require payment in advance by the Responding Party but require payment by the Referring Party.

25. In written submissions and orally, Mr Nissen KC referred me to the decision of HHJ Thornton QC in ***Mott MacDonald Ltd v. London & Regional Properties Ltd*** **[2007] EWHC 1055 (TCC)**.

26. In that case the Adjudicator having reached a decision on 8th December 2006 required the Referring Party to pay his fees in full before he released the decision on 13th December 2006. In the ***Mott MacDonald*** case there were both jurisdictional challenges as to the Adjudicator's jurisdiction when appointed and a procedural challenge as to the timing of the delivery of his decision as I have identified above. The Judge held that the Adjudicator was not entitled to be appointed or to enforce or give effect to his contract since the contract was not sufficiently in writing to fall within what was then Section 107(2) of the 1996 Act. Further, at Paragraph 68 the Judge concluded that the adjudication was started with, continued with and decided by an Adjudicator who lacked jurisdiction because the agreement to appoint an Adjudicator was not in writing, evidenced in writing, was not validated by any admission in the pleadings and the agreement was not a construction contract and nor was the Adjudicator given ad hoc jurisdiction to determine the core issue concerned with his jurisdiction.

27. Although the procedural challenges no longer arose, the Judge did determine them on the basis that his findings as to the Adjudicator's jurisdiction might be wrong. The Judge decided that the Adjudicator was not entitled to impose a precondition on the delivery of his decision to the parties that his fees should first be paid by the Referring Party and at Paragraph 77 he stated:

> "Moreover the adjudicator appeared to lack impartiality in making it a condition of his appointment that his fees would first have to be paid by the referring party before he delivered his decision to the parties and by then appearing to enforce that precondition. An adjudicator appointed under a construction contract to which Part II of the HGCRA 1996 is applicable is required to act impartially, particularly as the agreement does not contain an overriding contractual adjudication clause. His appointment is not consensual in the same way as an arbitrator's appointment is consensual and he has a quasi-judicial function since he is imposed unilaterally by the state onto one of the parties to reach a binding albeit temporary decision about their dispute. The adjudicator may not, therefore, be or appear to be financially beholden to one party, particularly the referring party, or place himself in the position in which he might appear to be more partial to one side than the other. The imposition of a lien on his decision which has to be lifted by the referring party in order to obtain his decision gives an appearance of partiality and amounts to a breach of rule 12(a) of the scheme.

> 78. Thus the Adjudicator was in breach of his contractual obligations imposed by rr.12(a) and 19(3) of the Scheme in imposing this condition and, subsequently, in implementing it."

28. I was also referred to the judgment of HHJ Peter Coulson QC (as he then was) in ***Cubitt Building & Interiors Ltd v. Fleetglade Ltd*** **[2006] EWHC 3413 (TCC)**. At Paragraph 77 the Judge notes that:

> "The Adjudicator considered that he was entitled to a lien on his fees as a result of Clauses 4 and 5 of his specific terms of appointment.

At Paragraph 81 the Judge states:

> "Accordingly as a matter of principle I do not accept that this Adjudicator was entitled to exercise a lien in relation to the decision either as a matter of contract or as a matter of law. I note that this was precisely the point that was made to the Adjudicator by the solicitors acting for both parties at the relevant time, namely 23rd to 25th November 2006."

29. It was not disputed before me that the effect of the Scheme and the authorities set out above is that an attempt to exercise a lien over the delivery of a decision within the statutory/agreed time periods is unlawful and that such an attempt may well render the decision once delivered unenforceable.

30. Mr Churcher on behalf of NJCH submitted that there was nothing in the documents which identifies that a lien is being imposed and that the Defendant's submissions amount to an attempt to paint an innocent demand for payment as "threats". He also submits that if there was an issue with anything said by Dr Chern or his Clerk that Liberty's lawyers should have raised it and that any allegation of bias, manifest or apparent, should certainly have been raised at the time. In brief, Mr Churcher submits that what happened in this case is nothing like the facts of ***Mott MacDonald*** and that there is in truth no sustainable objection to the enforcement of Dr Chern's Decision.

Discussion

31. 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.

32. 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.

33. Since it is in my judgment clear on the emails which are set out above despite Liberty's counsels' submissions to the contrary, that there were no improper threats nor was there ever an attempt to rely on a "lien", then this remaining sole ground of challenge to the enforcement of Dr Chern's Decision must fail and judgment should be entered for NJCH in the amount of the Decision, namely £2,589,737.76 plus £291,583.14 interest as at 18th February 2022 and interest thereafter accruing at £361.85 per day.

Issue (2)

34. The background to the application to discharge the freezing injunction is contained in the contemporaneous documentation and is also the subject of affidavits and witness statements. I make the following findings and set out the relevant history on the basis of the documents and/or affidavits and witness statements but without the benefit of having heard from any of the witnesses (which is, of course, by no means unusual in these applications). Liberty accepts that the burden of proving that the freezing injunction should be discharged is on it on the balance of probabilities. I will address the main contentious issues of fact after setting out the background.

35. The parties' previous close relationship had clearly broken down by mid-2020 and on 18th June 2020 Mr Rajakanthan, the controlling mind of NJCH, presented Mr Caulfield, the controlling mind of Liberty, with a spreadsheet showing that NJCH appeared to have overpaid Liberty Homes around £1.5 million (see Mr Rajakanthan's affidavit of 20.04.22 at Paragraph 5.8).

36. On 10th July 2020 Liberty left the Beacon Hill site.

37. Thereafter disputes escalated and on 29th September 2020 Liberty's solicitors sent a letter claiming entitlement to sums unpaid under Payment Applications 23 and 24 and threatening adjudication proceedings. Further correspondence ensued. On 2nd November 2020 Liberty commenced an adjudication claiming entitlement on the basis of lack of Payment Notices (commonly referred to as a "smash and grab" adjudication).

38. After reviewing the letter on 29th September 2020, Mr Rajakanthan says he spoke to his niece, Natalie (Dowding), who worked at Seddons Solicitors in the Property Litigation Department to see if Seddons could assist NJCH in defending Liberty's claims. Mr Rajakanthan says he in fact decided against instructing Seddons because of the close friendship between his family and Mr Caulfield's family and appointed a different firm, Michael Gerrard Solicitors, who did act in the adjudication proceedings being instructed on 10th November 2020.

39. Prior to that instruction, text messages had been sent by Mr Rajakanthan to Mr Caulfield on 4th October 2020 including:

> "We must sort out this between us ASAP as everyone at Beacon Hill Lodge is talking about and monitoring my company moves and your recent reorganisation."

Mr Rajakanthan's explanation of what this text meant has been criticised by Liberty in their submissions.

40. Around this time Mr Rajakantham suffered from a number of personal hardships, including being hospitalised in mid-October with heart problems, losing his mother on 11th November 2020 and dealing with his care homes in the midst of the Covid pandemic. In his witness statement sent pursuant to HHJ Kelly's Order on 14th June he states (at Paragraph 15):

> "… my recollection of events during that period is therefore not as clear as it may be and where my recollection is not precise as it would otherwise be I have explained that below."

41. As it now transpires, on 10th November 2020 Soori Kurukkal , an Accountant at NJCH, sent Mr Rajakanthan an email which identified that a new corporate entity, Liberty Holdings (Kent) Limited, had been incorporated on 28th August 2020 and also referred to the existence of a dormant company, Liberty GB Limited, incorporated on 18th July 2007. That email was not put before the Court in the freezing injunction hearings in April and May 2022.

42. On 12th November 2020 Courtways, which was occupied by Mr and Mrs Caulfield as their home but owned until then by Liberty, was transferred into the ownership of Liberty GB Limited (which had until then been a dormant company as noted above). On the same day, a search of the Land Registry was carried out showing the ownership of Courtways was (still) with Liberty, but on the front page stated:

> "Applications are pending at HM Land Registry which have not been completed against this title."

The existence of this search and its contents were also not put before the Court in April and May. The search was carried out by Mr Rajakanthan's niece, Natalie . Neither she nor Soori Kurukkal have provided witness statements in these proceedings although Mr Rajakanthan's statement does refer to conversations he had with his niece.

43. The first Adjudication Decision in favour of Liberty was issued on 2nd December 2020. On 16h December 2020 NJCH's then solicitors, Michael Gerrard, sent a long letter to Liberty's solicitors. Under heading 3 "Stay of enforcement" at Paragraph 3.4 the letter referred to the incorporation of Liberty Holdings (Kent) Limited and at Paragraph 3.8 the letter stated:

> "Our client Mr Rajakanthan is aware that your client Mr David Caulfield was looking to retire and to wind your client down. He is prepared to sign a witness statement to that effect. This provides further evidence that there is a real risk that your client is intending to dispose of the adjudication sum so that it would not be available to be repaid if our client were to bring substantive proceedings to recover the sums it has overpaid your client."

44. The (short) response to that letter on 22nd December 2020 did not refer at all to those allegations. The 16th December 2020 letter was exhibited to Mr Rajakanthan's affidavit for the ex parte injunction hearing and was referred to at Paragraph 11.5 of his affidavit.

45. In fact, the Decision of the first adjudication was paid by NJCH pursuant to a Part 36 offer accepted by Liberty, so the stay issue was not ventilated in any proceedings.

46. The 16th December 2020 letter did not mention the transfer or pending transfer of Courtways. I will discuss that particular issue further below.

47. After the Decision of Dr Chern there was a lack of substantive involvement from Liberty's solicitors and enforcement proceedings were issued on 29th March 2022 and served on 4th

April. An Acknowledgement of Service was served on 12th April and evidence raising the now largely abandoned jurisdictional challenges was served on 19th April 2022.

48. Prior to that, in March 2022 Mr Rajakanthan was becoming concerned at the lack of engagement by Liberty. In his affidavit at Paragraph 12.2, Mr Rajakanthan said:

> "On 15 March 2022 my solicitors and I reviewed the charges register … and properties I understood were owned by Liberty Homes so that my solicitors could obtain Office Copy Entries from the Land Registry. Those properties were:
>
> 12.2.1. Courtways, Holwood Park Avenue, Orpington, Title Number SGL50772 ('Courtways'), David and Pauline Caulfield's home which I understood was owned by Liberty Homes but leased to them. (Liberty Homes' records at Companies House shows an outstanding charge granted over this property) …
>
> 12.3. I instructed my solicitors to obtain Office Copy Entries from the Land Registry for these properties. Copies are attached as Exhibit 'KR1' pages 415-429. To my considerable surprise these revealed:
>
> 12.3.1. Courtways' registered proprietor with effect from 12 November 2020 was Liberty GB Ltd. Its value was stated at that date to be £1,663,000"…..

49. As well as the transfer of Courtways, Mr Rajakanthan and his solicitors discovered the transfer of other properties and in early April that those transfers were not for any monetary value. Further enquiries revealed that yet further transfers had occurred and further corporate vehicles had been incorporated in February 2022.

50. On 20th April 2022 an ex parte application was made for a freezing injunction which was granted by O'Farrell J. An inter-partes hearing was held on 9th May and in her written Judgment dated 19th May 2022 O'Farrell J continued the injunction. That judgment has not been appealed and its findings are of course binding on the parties.

51. Both parties have stressed the contents of Paragraph 34 of the 19th May 2022 Judgment which I will set out in full:

> "Although Mr Rajakanthan and NJCH knew or should have known about the formation of the holding company and/or restructure of the Liberty Group in 2020, there is no evidence that they knew or should have known that in November 2020 Liberty Homes divested itself of most of its assets,. By letter dated 16 December 2020 NJCH's solicitors raised concerns about Liberty Homes' intention to transfer assets to the holding

> company having identified the formation of Liberty Holdings (Kent) Limited in August 2020 but no details were forthcoming from Liberty Homes or its solicitors. Knowledge of the asset transfers was only acquired in March and April 2022 following investigations by NJCH's solicitors as explained by Mr Rajakanthan in his affidavit. In those circumstances the Court is satisfied that the application should not be dismissed for delay on the part of NJCH."

52. That paragraph was dealing with an issue raised by Mr Levenstein, Liberty's Junior Counsel, that the injunction should not have been granted because of delay in bringing the application in the light of Mr Rajakanthan/NJCH's knowledge of Liberty/Mr Caulfield's restructuring plans in late 2020.

53. The Judge also held at Paragraph 47:

> "The evidence has established that Liberty Homes has divested itself of a substantial value of assets with the effect that there is a very real risk that it would be unable to satisfy any judgment against it. It has not sought to justify the dealings with its assets as part of an existing pattern of dealing or as part of its usual business. Therefore the Court concludes that such dissipation of assets is unjustified."

54. On Sunday 12th June 2022, just before the enforcement hearing was to be heard, Liberty's solicitors served a further witness statement. At Paragraph 7 that statement says:

> "Central to the granting of the injunction was NJCH's assertion that it did not learn of the transfers of these properties until mid-March/April 2022 and that it did not make enquiries or investigations at that time and that it was unaware of the existence of certain newly incorporated companies until mid-March/April 2022. It is now known that NJCH did make enquiries and had knowledge of matters as early as November 2020 yet failed to bring this to the Court's attention in breach of its duty of full and frank disclosure."

55. Paragraph 24 of the statement provides:

> "In Paragraph 11 of the first affidavit of NJCH's Mr Rajakanthan sworn on 20 April 2022, NJCH attests that it became aware of the incorporation of Liberty Holdings (Kent) Limited after the Decision in a prior adjudication between the parties on the same project dated 2 December 2020 (notwithstanding that its incorporation was actually referenced in the Adjudication Notice served on 30 October 2020) and that although NJCH's Mr Rajakanthan attested that the timing and incorporation of new entities 'identified a possible inference that their creation was a preparatory exercise to dissipate assets from Liberty Homes so as to frustrate and claim against it by NJCH' Mr Rajakanthan 'did not investigate this issue any further for some time.'

> 25. That as it turns out was false."

56. Paragraph 30 and following identify that:

> "…it now transpires that NJCH did investigate asset transfers in November 2020 and was aware of the transfer of at least one of the Properties and the restructure."

The one property referred to is Courtways.

57. Mention is also made in the witness statement of a letter from NJCH's solicitors on 9th June 2022:

> "The letter is clear that the search was provided to NJCH's solicitors by Mr Rajakanthan himself, not by Seddons. The letter is clear that Mr Rajakanthan initially had 'no recollection that Seddons had carried out a search' but following the letter from my Firm 'He has reviewed his computer and identified a saved file which shows an office copy entry search carried out on 20 November 2020."

> "45. NJCH's solicitors therefore make clear in this letter that Mr Rajakanthan had failed to disclose this information both during the without notice hearing on 21 April 2022 and the return date hearing on 9 May 2022. A duty of full and frank disclosure extends not only to disclosure of the search and enquiries made in November 2020 but also to making proper enquiries of all relevant parties who may have information which could assist including NJCH's previous professional advisors."

58. Mr Rajakanthan served a witness statement responding to those allegations pursuant to HHJ Kelly's Order when adjourning the enforcement hearing in June 2022. I have already referred to some of the personal hardships which Mr Rajakanthan was dealing with in the autumn of 2020 and the first adjudication proceedings. I have also summarised Mr Rajakanthan's explanation of the involvement of his niece and Seddons. At Paragraph 27 and following Mr Rajakanthan states:

> "As set out above Seddons were not instructed at any time to carry out any work in relation to our dispute with Liberty.
>
> I have no recollection at all of asking them to carry out any searches or taking any other steps beyond confirming whether they had someone who could help us with the matter and giving us an indication of their charges. Nor do I have any recollection at all of being told that they had carried out a search or its results or their potential significance.

Since Liberty raised their accusations relating to the search Natalie has told me that she may have carried out the search in preparation for her firm's file opening procedures because it is her firm's normal procedure and practice to carry out a search when starting a matter such as this. She would have been fully aware of the Courtways address given her friendship with the Caulfields, Courtways being their home address. It appears that the search was requested from the Land Registry by Seddons on 12 November 2020 (so I believe just before I told her that we had appointed another firm) and the search result was not issued by the Land Registry until 20 November 2020 (by which time Seddons knew they were not going to be instructed to take the matter further) … I can confirm for the avoidance of doubt that I knew nothing at all about the transfer of Courtways at the time which (I note, in any event, was on 10 November according to the date of the copy of the TR1 my solicitors obtained from the Land Registry…)

When Liberty raised their accusations in the letter of 8 June 2022 I had absolutely no recollection of any search having been carried out by Seddons. Whilst we had already searched my email records I asked my secretary to search NJCH's computer system to see if she could find any record of that search and my secretary located the PDF document in a desktop folder … as enclosed to our solicitors' letter of 9 June 2022…"

We have carefully searched our emails from that time and can find no record of the PDF file being received by email, either from Natalie's personal email address or from her or a colleague at Seddons.

As mentioned above, at the time the family were working together to collate photographs of my mother so that copies could be shared with family and friends. I do recall Natalie passing me at least one memory stick with photographs on it. I'm not good with computers so my secretary was helping me by copying and sorting the photographs for which she used NJCH's computer system. The files sizes [sic] were very large which is why we were using memory sticks.

I can therefore only assume that the search must have been included on a memory stick and that is how the PDF ended up on our computer system, but neither I nor my secretary have any recollection of this. Nor does Natalie have any recollection of the search or how she passed it to me.

When we found the search after Liberty raised their accusations last month, I viewed the search. My reading of it was very simple,- that it showed that Courtways was owned by Liberty Homes (Kent) Ltd and the price that was stated to have been paid for it on 5 February 2010 was £2,225,000.

Strictly without prejudice to the litigation advice which extends to communications between me and my solicitors, it was only when I had forwarded the search results to my solicitors for review that they drew my attention to the 'small print' on the covering page of the search result and the wording that

> applications were pending at the Land Registry and that this could relate (amongst other things) to a transfer of ownership of the property being in the course of being registered as at the date of the search result.
>
> I am entirely confident that if Seddons had brought this to my attention and explained the potential implications I would certainly recall this and would have immediately brought it to Michael Gerrard Solicitors' attention. Without prejudice to the litigation advice privilege that applies generally to communications between the client and its legal representatives, Michael Gerrard Solicitors have checked their records and confirm that they were never forwarded or made aware of the Seddons search and nor did they carry out any Land Registry searches …"
>
> Whilst I have no recollection of receiving the search from Seddons in November 2020, I am sure that if I did glance at the search result my understanding of it would have been the same as it was when I located the search last month."

59. In the concluding section of his statement, Mr Rajakanthan entirely refutes Liberty's accusations that he failed to comply with his duties of full and frank disclosure, that he had knowledge only of the formation of the holding company resulting in the letter of 16th December 2020 setting out concerns as to whether Liberty was contemplating transferring its assets into the new company, that he had no knowledge of the transfer of Courtways to Liberty GB or any of the other property transfers until March 2022 as the circumstances surrounding the Seddons search clearly demonstrate and at no time was his attention drawn to the applications pending note on that search or its implications and he has no recollection of even seeing that search at the time. Given that he did not instruct Seddons or Michael Gerrard to carry out any searches against Liberty property, it follows that he says he can see no basis on which he was under an obligation to make enquiries of them prior to the injunction and application being made.

60. Mr Caulfield served a witness statement as a response to Mr Rajakanthan's statement. He comments on the search carried out by Natalie,but does not of course have any personal knowledge of this matter.

Duty of Full and Frank Disclosure

61. It is accepted that in bringing an application for an ex parte freezing injunction NJCH was obliged to comply with its duty of full and frank disclosure. It is also agreed that the duty of

full and frank disclosure extends to a duty to make a reasonable search for documents which might undermine the basis of the application.

62. Carr J (as she then was) provided the summary of the approach to be taken when an allegation of non-disclosure is made in ***Tugashev v. Orlov*** **[2019] EWHC 2031 (Comm)** which I gratefully adopt (Paragraph 7):

> "The law is non-contentious. The following general principles can be distilled from the relevant authorities by way of summary as follows:
>
> (i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;
>
> (ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, the basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make ..
>
> (iv) An application must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addresses any likely defences. The duty extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of the particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on …
>
> (vi) Where facts are material in the broad sense there will be degrees of relevance and a due sense of proportion must be kept … The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect …
>
> (ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;
>
> (x) Whether or not the non-disclosure was innocent is an important consideration but not necessarily decisive. Immediate discharge

> (without renewal) is likely to be the court's starting point at least when the failure is substantial or deliberate. It has been said on more than one occasion it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;
>
> (xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so by way of deterrent to ensure that applicants in future abide by their duties;
>
> (xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice."

63. It is also common ground that the non-disclosure relied upon, if made out, must be "material". ***Gee* at para.9-003** provides a useful summary of the aspects of the test of materiality:

> "The applicant is permitted to apply without notice only on the basis that he has complied with his duty which has been described as being governed by the same principles which require an applicant for insurance to act in the utmost degree of good faith …
>
> The test as to materiality is an objective one and it is not for the applicant or his advisers to decide the question; hence it is no excuse for the applicant subsequently to say that he was genuinely unaware or did not believe that the facts were relevant or important. All matters which are relevant to the 'weighing operation' that the court has to make in deciding whether or not to grant the order must be disclosed."

64. I also bear in mind the comments of Slade LJ in ***Brinks Matt v. Elcombe* [1988] 1 WLR 1350 at 1360H**. In addition, I note the Court's observations in ***Aquarius Holding Ltd v. Mr S Barber and Others* [2016] EWHC 2806 (Comm)** that even if the disclosure was material:

> "The court has to engage other than in where there is deliberate non-disclosure .. 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."

65. I of course accept that those latter comments only arise if the non-disclosure is not deliberate.

Discussion

66. There were two matters relied upon at the hearing and said to amount to material non-disclosure. First, the email of 10th November 2020 from Soori Kurukkal and second, and

more significantly in Liberty's submissions, the search carried out by Seddons . I will consider each allegation in turn. Other points were made in Liberty's skeleton argument but they do not in my judgment add any separate and sustainable allegations.

67. The email from Soori Kurukkal did tell Mr Rajakantham/NJCH in November 2020 that there was a new corporate vehicle, Liberty Holdings (Kent) Limited which had been incorporated on 25th August 2020. That particular source and date of knowledge was not disclosed by NJCH in Mr Rajakanthan's affidavit for the ex parte freezing injunction application. However, the affidavit did identify that Mr Rajakanthan's then solicitors discovered the incorporation of Liberty Holdings (Kent) Limited after 2nd December 2020 and referred to the letter of 16th December 2020 which identified that new corporate body. It follows that any non-disclosure would be as to the existence of knowledge of incorporation of the new corporate vehicle some four weeks before the Court was told it was discovered. It does not seem to me considering the matter objectively that this non-disclosure can be regarded as material. I also note that in the inter partes hearing in May 2022 the Court was told by Liberty's Junior Counsel that incorporation of Liberty Holdings (Kent) Limited had been known as early as 30th October 2020 through reference in the adjudication, but the Learned Judge did not regard that as significant (May Judgment, Paragraphs 33-34).

68. Even if it was material, there is no evidence that the non-disclosure was deliberate and the tangential extent of this additional information means that in my judgment that the interests of justice would be very strongly in favour of continuing the freezing injunction if, contrary to my view, this was a material non-disclosure.

69. The existence and contents of the search carried out by Seddons was also not disclosed to the Court in the injunction hearings. That search disclosed that there were pending applications as at 12th November 2020 in relation to Courtways.

70. In her judgment in the injunction proceedings, the Learned Judge referred to the "recent" transfer of Courtways (Judgement 1, Paragraph 16(ii)). She also referred to two other recent transfers of other properties and four other properties transferred to third party entities. It follows that Courtways was one of seven properties found to have been transferred out of Liberty. At Paragraph 25 of her April Judgment, the Judge stated:

> "Although it had knowledge of the formation of one company back in early 2021 at the stage when the first adjudication decision was being fought by the respondent, at that stage it did not have the wider knowledge that it now has of the apparent systematic stripping of assets

> from the respondent company. In those circumstances, it was justified in considering it did not have sufficient grounds for seeking a stay of execution of the first adjudication decision."

71. In fact, the reference to early 2021 was an error since the knowledge in question was accepted to have arisen in late 2020.

72. The more significant factor, in my judgment, is that the Judge made it clear that the Respondent's lack of knowledge as to systematic stripping of assets had not been acquired until shortly before April 2022. Even with the knowledge of the pending application in November 2020 in relation to Courtways, the Respondent's understanding whilst marginally better certainly did not amount to knowledge of anything like a systematic stripping of assets.

73. In Paragraph 34 of her May judgment as set out above, the Judge did refer to there being no evidence that NJCH "knew or should have known that in November 2020 Liberty Homes divested itself of most of its assets."

74. As I have already noted, that would still be the case even if the Courtways pending transfer in November 2020 had been or should have been known by NJCH at that time.

75. In my judgment, looking objectively at the existence of non-disclosed information which is that NJCH/ Mr Rajakanthan knew or ought to have known that Courtways was being transferred out of Liberty's ownership in November, that information was material, albeit not significantly material. I bear in mind that Mr Rajakanthan/NJCH's position is that had that information been in their knowledge as at 16th December 2020 it would have been shared with his then solicitors and by implication included in the letter of that date. That point, in my judgment, confirms that this information was material in the sense of being objectively relevant to the "weighing operation".

76. Although I have accepted that this non-disclosed information was material, I have also come to the view that it is not of the first importance and should be seen in the wider context of concerning one out of seven properties considered by the Judge in her judgments.

77. The key issue of fact which must be determined in this case is whether there has been a material non-disclosure in which the non-disclosure was deliberate.

78. In my judgment, Liberty has not demonstrated that Mr Rajakanthan/NJCH was deliberately misleading the Court in the April/May hearings.

79. First, I agree with Mr Churcher's submission that had this information been in Mr Rajakanthan'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.

80. In his forensic examination of the timeline of the search carried out by Seddons, Mr Nissen KC submitted that Rajakanthan/NJCH's answers to the complaints made in 2022 are incredible, as is the supposed lack of understanding of the annotation in the search by Seddons. The circumstances in which the search was carried out had been unreliably explained, the downloading of the search and it being found on Mr Rajakanthan's computer are said to have been incredible and his explanations illogical and inconsistent.

81. In his reply submissions Mr Churcher points out, as I have noted above, that the letter dated 16th December 2020 would have included the transfer of Courtways or the pending application had Mr Rajakanthan/NJCH known about it in November 2020. There is no sense at all for him not to have told his then solicitors. In the light of the purpose of the 16th December letter in respect of a potential stay of the enforcement of the first adjudication decision there was every reason to tell them and indeed to carry out further searches. No further searches were carried out after November 2020 until 2022 by Mr Rajakanthan/NJCH. I accept those submissions as supporting the position, when combined with Mr Rajakanthan's statement, that there was no deliberate dishonesty on his/NJCH's part.

82. In addition, I have already set out all the personal hardships which Mr Rajakanthan had been dealing with in November 2020 and set out his explanation of how the searches could have been found on his laptop. In my judgment the submissions made by the Defendant's Counsel, although forcefully and persuasively put, do not prove that Mr Rajakanthan/NJCH were being dishonest/deliberately failing to disclose the Seddons search and any failure to disclose the existence of the search is, in my judgment properly explained as an innocent mistake. In short I accept Mr Rajakanthan's explanations are correct.

83. In these circumstances, the Court must consider the interests of justice and in my judgment the minor innocent non-disclosure cannot overcome the justice of the injunction being in

place in the wider context of the overall widespread unjustified dealings with properties identified by O'Farrell J.

84. It follows that the application to discharge/set aside the freezing injunction fails.

Issue 3

85. Since the stay of enforcement of the Decision was predicated on the Court being persuaded that the freezing injunction should be discharged because of deliberate dishonesty on the part of Mr Rajakanthan/NJCH and that argument has been rejected, the basis for any stay of execution of Dr Chern's Decision has fallen away and enforcement of the Decision will not be stayed.

86. The further issues between the parties including the disposal of the Part 8 claim and costs will be addressed in the hearing on 21st February 2023.