



LEGAL BRIEFING

Shepherd Construction Ltd v (1) Berners (BVI) Ltd and (2) JJW Ltd

[2010] EWHC 763 (TCC)

The Facts

A freezing order had been made against the Defendants' assets to a value of £1.75m. This meant that they could not sell or dissipate those assets until the order was released. In this case, the Defendants were seeking to discharge the order.

The real dispute related to work carried out by the Claimant at the Berners Hotel in London. Berners failed to pay interim applications and the Claimant suspended work. An adjudication commenced, but Berners then delivered a cheque for £1.15m. The cheque was dishonoured by the bank, as were the cheques in respect of applications 11 and 12. The adjudicator ordered Berners to pay just over £1m, but Berners failed to pay.

Court proceedings were issued and Judgment entered against Berners. Winding up proceedings against the company commenced, resulting in a settlement agreement to make payment in three instalments. The first was made but the second and third were not. Discussions continued between the parties in respect of payment, and the Claimant protected its position by obtaining a freezing order in respect of property owned by the Defendants.

The Issues

Should the Judge discharge the order or was there "a good and arguable case for a risk of dissipation" of the assets such that the freezing order should remain?

In addition, an interesting question also arose in respect of the label "without prejudice". This label had been used by the Defendants in their final discussions about non-payment. The Claimant maintained that the label was irrelevant and that the Judge should consider those exchanges between the parties. The Defendant's position was that a without prejudice label was covering negotiations between the parties and therefore it was inappropriate for the Judge to consider those exchanges.

The Decision

Mr Justice Coulson noted that all of the emails between the parties were labelled "without prejudice". In his view, those labels were in this particular case meaningless because the exchanges did not relate to negotiations. Negotiations take place when there is something to bargain over. In this case, the Defendant was simply not paying amounts that were agreed and were overdue. The Claimant asked when the amount was to be paid and promises of payment were being made in response. The "without prejudice" label quite clearly did not attach to that type of communication. The Judge therefore took into account those communications and could see that the Defendant's repeated promises of payment were not being honoured.

As a result, the Defendant fell foul of all of the guidelines relating to freezing orders. Accordingly, the freezing order was to remain in place.

Comment

There are two interesting aspects about this case. First, a reminder that the “without prejudice” label is only to be used where negotiations are really taking place. A Judge would not normally take into account negotiations between parties, but in this instance, communications simply related to the timing of a payment. The amount of the payment had already been clearly agreed.

Second, it reminds all of us that a classic failure to pay, such as a dishonoured cheque in respect of a favourable adjudicator’s decision, does not necessarily mean that money will immediately be paid. Nonetheless, a freezing order can be used to stop an organisation dissipating assets, which may assist the claimant to obtain payment.

Nicholas Gould
June 2010
