Legal Briefing

Lanes Group Plc v Galliford Try Infrastructure Ltd

[2011] EWHC 1679 (TCC), [Judge Waksman QC]

The Facts

Galliford Try Infrastructure Ltd ("GTI") engaged Lanes Group Plc ("Lanes") as its subcontractor to re-roof the Network Rail Traction Maintenance Depot in Inverness. It did so pursuant to an order dated May 2008 made under the Civil Engineering Contractor's Association Subcontract (Blue Form) terms and conditions. Ultimately, on 28 April 2009 GTI terminated Lane's employment and/or claimed to have accepted its repudiatory breach and sought damages.

Lanes originally commenced an adjudication in December 2009 and brought court proceedings in November 2010. These proceedings have now been stayed, subject to an arbitration before Mr Justice Ramsey in January 2012.

In March 2011 GTI then commenced an adjudication. Eventually, following two other applications to Technology & Construction Court ("TCC"), the second adjudicator appointed to deal with the dispute decided that Lanes should pay GTI £1.36million.

During the course of the adjudication, the adjudicator issued a document entitled "Preliminary Views and Findings of Fact". This 35-page document was issued before Lanes had served its Response and the date for the decision had still not been agreed.

Lanes then issued Part 8 proceedings in the TCC challenging this decision, seeking declarations that:

(i) The adjudicator had no jurisdiction because GTI had previously commenced, but not pursued, an adjudication on the same point before a different adjudicator, and was therefore not entitled to start again; and

(ii) The adjudicator's decision was the product of apparent bias.

GTI brought a separate claim to enforce the decision.

The Issues

(i) Was the Referring Party, GTI, entitled to start the adjudication again, before another adjudicator, where it had failed to pursue the adjudication the first time around?

(ii) Was there apparent bias?

The Decision

Judge Waksman QC held that there was no implied, absolute or qualified bar preventing a party from starting an adjudication again, in situations where no decision resulted. He first referred to the case of *Hart Investments v Fidler* where Judge Coulson QC (as he then was) found that it was open the relevant party to start again in circumstances where the Referral was not served first time round. In addition, he referred to the decision of Jackson J (as he then was) in *Midland Expressway v Carillion* in which it was held that a party could withdraw its claim which had been inadequately formulated and which could not succeed as it presently stood and that there was nothing in the Act or the Scheme to suggest otherwise.

If there was an intention to restrict a party which had commenced an adjudication, but a decision had not been reached, Judge Waksman QC held that the parties could have expressly said so.

As to whether or not there was apparent bias, Lanes alleged that the Preliminary Views Document looked and read like a decision, and suggested that the adjudicator had already made up his mind. Lanes, quoting Dyson LJ in *Amec Capital Projects Ltd v Whitefriars City Estates Ltd*, submitted that:

> *"a fair-minded and informed observer, having considered all the circumstances which have a bearing on the suggestion that the decision-maker was biased, would conclude that there was a real possibility that he was biased."*

The Judge agreed and considered that the Preliminary Views Document:

> *"reads like a judgment and one that must have taken some days to prepare. It is obviously intended to be a judgment at some point because of the preamble, background facts, recital of adjudication and so on, along with the list of issues which as a list was complete. Given that on is face it looked like a draft judgment, and one made before any Response from the other party, it does indeed appear as if the author has made up his mind."*

He did note that there were words of qualification on the face of the document; however, his overriding impression was that the adjudicator had already made up his mind at a time when the timetable was still being discussed and Lanes had not even served its Response.

Judge Waksman QC did not enforce the adjudicator's decision and the summary judgment application was dismissed.

Comment

In light of this case, those adjudicators whose practice it is to issue a "preliminary views" document may wish to revisit and carefully consider either its wording and/or its intention.

As Judge Waksman QC stated:

> *"…in the normal run of an adjudication I would not have thought that documents expressing provisional views on which parties were then invited to comment were likely to be helpful or appropriate. They may be, where the parties expressly ask the adjudicator to do just that although it is not clear that this will always assist in a process which is meant to be concluded in a narrow time frame and confined in scope. Of course, where the adjudicator considers that there might be another basis for one or other party's claim, which had not been addressed by either, it is obviously incumbent upon him to put this to the parties for their comment… But that is an entirely different situation."*

Stacy Sinclair
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