

Legal Briefing

Having abandoned the first adjudication was the Referring Party acting unreasonably and oppressively in seeking to bring similar claims in a second adjudication?

Jacobs UK Ltd v Skanska Construction UK Ltd [2017] EWHC 2395

Before Mrs Justice O'Farrell DBE

In the Technology and Construction Court

Opinion delivered 29 September 2017

The facts

During 2011 Skanska entered into a contract with Jacobs for the provision of design services for a street lighting project in Lewisham and Croydon. Skanska subsequently claimed to have suffered loss and damage as a result of delays in the production of the design and the poor quality of the design. Skanska commenced adjudication on 8 February 2017 and on 13 February agreed with Jacobs that the Scheme would apply but with an extended timetable. The Referral and the Response were served on time but when counsel became unavailable Skanska was unable to complete its Reply. Jacobs did not agree to extend the time for the Reply and the adjudicator refused to grant an extension without both parties' consent. On 7 April Skanska withdrew the reference to adjudication and on 11 April the adjudicator resigned.

On 21 June 2017 Skanska commenced a second adjudication in which it repeated all but one of the claims set out in the first adjudication and included a revised calculation of damages. On 4 July 2017 Jacobs issued a Part 8 application seeking declarations/orders that: in commencing the second adjudication Skanska had acted unlawfully; that Skanska ought to be restrained from taking any further steps in the second adjudication; that the second adjudication ought to be withdrawn; and, that Skanska should pay Jacobs' wasted costs in the first adjudication.

Jacobs submitted that the dispute should be conducted in accordance with the agreed timetable and that the process must be fair without conferring on the Referring Party an

advantage, beyond that implicit in the rough and ready nature of adjudication. Skanska denied that the concept of abuse of process applied in adjudication and contended that where a party can start adjudication at any time, it had an unrestricted right to start, abandon and pursue adjudications in respect of the same dispute.

The issue

Should Jacobs be granted an injunction to prevent Skanska from pursuing the second adjudication?

The decision

The Judge identified the relevant legal principles: there was no express or implied restriction in the HGCRA or the Scheme that prevented a party from withdrawing a referral to adjudication before the decision was issued; once a claim is referred and then withdrawn that does not necessarily prevent the party from pursuing the claim in a later adjudication; and, the concept of abuse of process does not apply to adjudication. Nevertheless, section 37 of the Senior Courts Act 1981 gave the court jurisdiction to grant an injunction restraining a party from continuing or starting an adjudication that was unreasonable and oppressive.

The judge decided that Skanska's withdrawal from the adjudication due to the unavailability of counsel was unreasonable. However, where the second adjudication Referral was broadly the same as the first, meaning that Jacobs could re-use its submissions from the first adjudication, the judge concluded that the inconvenience and additional costs Jacobs would suffer in connection with the second adjudication were not so severe or exceptional as to make the process oppressive and thereby justify intervention by the court.

The judge considered that the 13 February agreement imposed obligations on the parties that went beyond mere agreement as to the timetable. Where Skanska had failed to serve its Reply or continue with the first adjudication that amounted to a breach of the agreement entitling Jacobs to recover as damages any wasted or additional costs. Alternatively, the 13 February agreement was subject to a reasonable and necessary implied term that if one party decided to ignore the agreement it would be required to pay the wasted costs of the other.

Commentary

Whether or not a party has acted unreasonably and oppressively will depend on the facts of each case. The

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judgment includes some examples of what could amount to oppressive behaviour in the context of adjudication, for example where the Referring Party had failed to pay awards or costs from earlier adjudications or where the second adjudication is vexatious. However, it will usually not be oppressive if the Referring Party decides to abandon an adjudication because it anticipates better prospects for success in a second adjudication.

Large value complex adjudications are often conducted under standalone agreements and the judge's comments regarding wasted costs being recoverable as damages may make parties think twice about casually disregarding such agreements. As was the case here, recoverable damages will be limited to the wasted or additional costs incurred in consequence any failure to comply with the agreed procedure.

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