LEGAL BRIEFING

Makers UK Ltd v The Mayor and Burgesses of the London Borough of Camden

[2008] EWHC 1836 (TCC), Mr Justice Akenhead

The Facts

Camden engaged Makers UK Limited ("Makers") under a 1998 JCT Intermediate Form of Building Contract to carry out refurbishment works at Wittington Estate in Highgate, London. Issues arose between the parties over variations and delays. Camden issued a "Default Notice" alleging that Makers was in default of their contractual obligation to proceed regularly and diligently. Camden later issued a "Determination Notice" purporting to determine Makers' employment under the contract as the default had continued for 14 days from the receipt of the Default Notice. Makers subsequently commenced an adjudication.

The parties, under Clause 9A.2 of the contract, had agreed that the adjudicator nominating body was to be the President or a Vice-President of the RIBA. Accordingly, the solicitor for Makers phoned a particular adjudicator on the RIBA panel to check his availability, as he was legally qualified and likely to be appropriate for a dispute regarding issues of repudiatory breach and failure to proceed regularly and diligently. Makers' solicitor then wrote to the RIBA requesting a nomination, and suggested that this adjudicator be appointed. Once the appointment was made and the Referral was served, Camden reserved their position that the adjudicator had no jurisdiction to decide the dispute as he had not been validly appointed.

The adjudicator found in favour of Makers, and accordingly they commenced proceedings for summary judgment following default on the sum due. Camden argued that there was an implied term of the contract whereby "neither party may seek to influence unilaterally the nominator's determination regarding the identity of an adjudicator…" and as such the appointment was null and void. It also argued that apparent bias arose when Makers' solicitor contacted the adjudicator prior to his appointment.

The Issues

The issues in this case were:

(i) whether or not there was an implied term in the contract which prohibited either party from unilaterally influencing the choice of the adjudicator; and

(ii) had apparent bias arisen as a result of Makers' solicitor's contact with the adjudicator prior to his appointment?

The Decision

Mr Justice Akenhead held, referring to the principles set out in *BP Refinery (Westernpoint) Pty Ltd v Shire of Hasings (1979)* ALJR 20, that the implied term neither could not, nor should not, be implied as there is nothing in Clause 9A.2 which expressly bars a party from making representations to the RIBA, and there had been no suggestion that the RIBA, an independent and respected

institution, would be in breach of its own rules if it listened to and even acted upon representations made to it. The Judge, referring to *AMEC Capital Projects Ltd v Whitefriars City Estated Ltd [2004]* EWCA Civ 1418, also accepted that *"it is at least not uncommon for parties seeking a nomination to suggest either a particular individual or that whoever is nominated should have particular attributes or experience."*

In respect of the alleged apparent bias, Mr Justice Akenhead held that there was no apparent bias in this case:

> *"One must judge apparent bias objectively, by the standards of the "fair-minded and informed observer" referred to in Porter v Magill. The fact that individuals within Camden are subjectively concerned or distressed by what has happened is not in itself material. Parties to adjudications must avoid making mountains out of molehills even where something happens which is outside their immediate experience."*

He concluded by giving judgment in favour of Makers.

Comment

This decision is a reminder that whilst the court in this particular instance did not find evidence of apparent bias, parties should exercise caution when contacting a potential adjudicator prior to their appointment. Mr Justice Akenhead set out three general observations which parties would be well-advised to keep in mind:

> *"(1) It is better for all concerned if parties limit their unilateral contacts with adjudicators both before, during and after an adjudication; the same goes for adjudicators having unilateral contact with individual parties. It can be misconstrued by the losing party, even if entirely innocent.*
>
> *(2) If any such contact, it is felt, has to be made, it is better if done in writing so that there is a full record of the communication.*
>
> *(3) Nominating institutions might sensibly consider their rules as to nominations and as to whether they do or do not welcome or accept suggestions from one or more parties as to the attributes or even identities of the person to be nominated by the institutions. If it is to be permitted in any given circumstances, the institutions might wish to consider whether notice of the suggestions must be given to the other party."*

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