



Neutral Citation Number: [2015] EWCA Civ 668

Case No: B2/2014/0677

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
HIS HONOUR JUDGE MOLONEY
2QT62026

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2015

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE JACKSON
and
THE HONOURABLE MR JUSTICE HILDYARD

Between:

CARBON SMART LIMITED
- and -
PREVISTA LIMITED

Appellant

Respondent

Mr Andrew Butler (instructed by Pinney Talfourd LLP) for the Appellant
Mr Edward Bennion-Pedley (instructed by DWFM Beckman) for the Respondent

Hearing date: 18th June 2015

Approved Judgment

Lord Justice Longmore:

Introduction

1. This is an appeal from the dismissal by HHJ Moloney of a debt claim where the principal sum at stake is £33,448.51, plus interest. The defendant is a general management and business consultancy company (“Prevista”). The claimant is an environmental consultancy business (“Carbon Smart”).
2. The dispute between the parties arises out of work undertaken by Carbon Smart on the Inspire South Project (“the Project”) pursuant to a contract between it and Prevista in 2011 for the provision of environmental training to small and medium sized enterprises (“SMEs”). The Project was led by Croydon Council and participated in by five other London boroughs. The Project was part-funded (50%) by the European Regional Development Fund (“ERDF”). The ERDF’s funding was only provided on proof of actual expenditure by the funding recipient. The source of the other 50% of the Project’s funding is not clear.
3. The purpose of the Project was to encourage SMEs to perform in a more environmentally friendly way and to reduce their carbon footprint.
4. Prevista was responsible for the delivery of the Project pursuant to a contract between it and Croydon Council. In early 2011 it was falling behind in meeting its targets. It approached Carbon Smart, with which it had a previous working relationship, to see whether Carbon Smart could help it to increase the number of companies it was assisting and to meet its targets. In particular, Carbon Smart’s role would be to conduct site audits and workshops at which SMEs would receive training in environmental matters.
5. After some initial discussions by email in January and early February 2011, a meeting took place between Prevista and Carbon Smart on 16th February 2011. On 23rd February 2011 “registration documents” were sent to Carbon Smart and a further meeting took place on 1st March 2011. This was attended by Ben Murray (the Managing Director of Carbon Smart), Salim Sharif (Project Manager, Prevista) and Donna Waters (Programme Delivery Director, Prevista).
6. On 2nd March 2011 a draft of a Service Level Agreement (“SLA”) was emailed to Mr Murray. A version of this agreement was ultimately signed by Mr Murray on behalf of Carbon Smart (but not by anyone on behalf of Prevista) and sent to Prevista on 3rd October 2011. Appendix 1 of the agreement contained a number of “evidence requirements”, i.e. evidence that Carbon Smart was required to provide to Prevista of the work that it had carried out.
7. At 12:05 on 9th March 2011 Mr Sharif sent an email to Louise Quarrell (a director of Carbon Smart) in which he responded to some questions from Ms Quarrell about the “evidence requirements”.
8. Carbon Smart started work on the Project on or shortly after 1st March 2011 (the “First Tranche” of work). On 6th June 2011 it submitted an invoice for £18,948 plus VAT. It was also asked to undertake further work on the Project by Donna Waters by

email dated 27th May 2011 and it submitted an invoice for £7,348 plus VAT in respect of that work (the “Second Tranche” of work) on 10th August 2011.

9. Prevista has refused to pay those invoices. Carbon Smart issued proceedings for the total of the invoices (£31,555.20), plus interest and costs. Prevista’s principal defences at the conclusion of the trial were that Carbon Smart had not complied with two supposed contractual requirements and it was therefore not entitled to payment. The first requirement was only to deliver training to SMEs within the six participating London boroughs during the First Tranche of work (the “Area Requirement”). The second requirement was to provide to Prevista evidence of the contents of its workshops in accordance with Appendix 1 of the SLA.
10. The judge held that the Area Requirement was no part of the contract and nothing arises about that on this appeal. He held secondly that it was a requirement of the contract that sufficient evidence be provided of the actual content of the workshop and that that evidence had not been provided; in particular, no workshop or presentation slides had been produced when they could and should have been. He seems to have considered that it was part of the contract that they should be produced because he held that Mr Sharif of Prevista had “amplified” the content of the workshop requirement by referring in the email of 9th March to “presentation slides”. This holding of the judge was the main subject of argument before us and it will therefore be necessary to determine the precise terms of the contract between the parties.

The terms of the contract

11. The most important initial meeting took place on 16th February 2011 between Mr Murray of Carbon Smart on the one hand and Mr Sharif and Ms Waters of Prevista on the other. Ms Waters had provided a document showing how far Prevista had fallen down on its targets; on another more extensive such document probably produced at the meeting there are handwritten notes describing the contents of the service Carbon Smart was able to provide. The fourth such service was headed

“w/shop”

and in a rectangular box underneath one sees

“Report

Env. [or perhaps EW] policy

A.P.” a reference to [Action Plan].

12. On 22nd February 2011 Mr Murray emailed that he could do 27 SMEs for a price of £20,000 and this appeared to be acceptable to Prevista who then sent to Mr Murray a registration pack including draft terms of a contract to become an “Associate” of Prevista and a confidentiality agreement which Prevista required Carbon Smart to agree for the purpose of their continuing negotiations. Mr Murray responded with a query about excluding Carbon Smart’s own existing material from the intellectual property clause and said that he awaited the SLA. On 1st March Mr Murray emailed

his own staff saying that he had almost concluded negotiations with Prevista for visiting and workshoping 25 businesses by the end of April. He said:-

“We will be paid on provision of a number of forms, these are the evidence that businesses have benefited from our intervention. I will brief you once we have received the full set, but we need to be careful to complete these correctly.”

He ended by reminding his workforce of the tightness of the timetable and signed off “bon courage mes amis!”

13. On 2nd March Mr Sharif emailed a “DRAFT” version of the SLA which was said not yet to have amended the Intellectual Property Rights Clause of the previous draft. In fact the draft SLA contained no intellectual property clause and was substantially different in format from the “Associate” contract form sent previously. I will return to the terms of the draft shortly but, to complete this short history of the matter, on 4th March Mr Sharif emailed various Prevista forms which the SMEs and Carbon Smart were required to fill in, including a Client Support Record. On 7th March Mr Sharif sent to Louise Quarrell of Carbon Smart a further document headed “Evidence Requirement” repeating some of the requirements contained in Appendix 1 of the SLA. This resulted in a number of queries from Ms Quarrell including

“A section of our workshop deals with writing an environmental policy and participants draft one there and then. Usually we ask them to take this away, write it up and submit it to us before we deliver the certification. However, as time is tight would a hand written one suffice?”

Mr Sharif responded:-

“An attendance register will have to be signed by all participants at the workshop (I’ve attached a template to use) and workshop contents will have to be provided (i.e. presentation slides etc.) In fact the lead partners would like to see the typed and printed version of the environmental Policy signed by the clients. Also please note that an action plan will have to be attached with the policy, to demonstrate that when and how the policy and its components are going to be implemented. Action plan also need to be signed by the clients. I’ve attached a template for action plan. However, you may use any format as long as ERDF logo is on.”

This is the first reference to “presentation slides” and is in the context of “workshop contents” having to be provided. As we will see both an environmental policy and an action plan were provided. The question is whether it was a term of the contract that presentation slides must be presented as well, as the judge seems to have thought.

14. The final matters to note are that workshops took place, ERDF forms and reports were provided to Prevista on 20th April 2011 with a following invoice on 31st May 2011, further reports were provided on 21st July 2011 and a further invoice dated on 30th July 2011. The invoices were not paid, apparently because Croydon Council queried

services being provided to out of area clients. In the course of ensuing discussions Mr Sharif asked Mr Murray to sign two original versions of the SLA which Mr Sharif did on 3rd October 2011. Payment was still not received. Eventually, Prevista sent a letter on 30th April 2012 setting out three sets of evidence that Prevista suggested had not been provided including

“”Workshop contents/presentation slides.”

Litigation ensued.

15. On any sensible view of the matter, the agreement between Carbon Smart and Prevista is contained in or evidenced by (at least in part) the draft SLA sent by Mr Sharif to Mr Murray on 2nd March 2011. To that I therefore turn. It is dated 2nd March 2011 and consists of 16 pages. Clause 1 provides:-

“Commencement, Duration and Fee

- 1.1 For the purpose of this agreement Prevista Ltd, whose registered office is at United House North Road, London, N7 9DP will be known as “the contractor”.

Carbon Smart Limited, whose address is at “52 Lant Street, London SE1 1RB”, will be known as “the Associate Delivery Partner”.

- 1.2 This agreement sets out the basis upon which the Associate Delivery Partner will deliver a proportion of the Contract held by the Contractor and will cover all allocated areas of work within the Contract as detailed further in Appendix 1 (Service Specification).

The basis of forming a contractual arrangement to deliver part of the Contract is that it will:

- ❖ Complement the existing work of the Associate Delivery Partner
- ❖ Avoid duplicating activity already carried out by the Associate Delivery Partner
- ❖ Ensure synergy with Contractor’s existing range of support projects, adding value to the Associate Delivery Partners’ services and the Contract’s aim and purpose.

- 1.3 The parties are not in partnership with each other except under the terms of this agreement, nor are they agents of each other and neither Party will expressly or impliedly hold out that a Partnership outside of the terms of this Agreement or agency relationship exists.”

Clause 3 provides (inter alia):-

“Outputs, Invoicing and evidence submission”

....

“3.6 Each set of evidence must be accompanied by an Evidence Cover Sheet (see Appendix 4). This cover sheet is essential for our claims process and any claim not accompanied by this sheet will be returned to the Associate Delivery Partner. This cover sheet will be used by Prevista to verify the validity of each output. Any queries will be communicated via email to the Associate Delivery Partners appointed project manager. It is the Associate Delivery Partner’s responsibility to ensure that all submitted evidence meets all contract requirements.

3.7 The Associate Delivery Partner is required to issue an invoice every calendar month that will include all accepted outputs. Any evidence that has been communicated to the Associate Delivery Partner as unacceptable or any output with an evidence query not resolved by the invoice date of 10th of the month, unless otherwise stated, cannot be included in said invoice. The Associate Delivery Partner can request from Prevista, at anytime, a complete list of outputs verified as acceptable, unacceptable with a statement as to why and those still under query, again with a statement as to why.

3.8 Each project engagement will generate a separate invoice, setting out the details shown in the attached sample (Appendix 5). The items in red are the parts that you will need to change. Any invoices which do not comply with our information requirements will be returned and this will impact on payment dates.

3.9 Any failure to meet the above requirements will result in the Associate Delivery Partner’s outputs not being included in any claim from Prevista to the Sponsor. This will result in the Associate Delivery Partner’s evidence not being processed until the next claim date, usually 30 days after the previous claim.

3.10 In the case of failure to address underperformance against profiled targets to the satisfaction of Prevista within 30 days of notification in writing of such concerns, we may terminate the contract immediately.

3.11 Prevista will endeavour to pay invoices within 10 working days of receipt of payment from the project funder or within 45 days of receipt of a correct invoice accompanied by an Evidence Cover Sheet.”

16. The relevant part of the Service Specification contained in Appendix 1 is headed “Outputs”. The first part deals with SMEs which have been assisted and provides:-

“Hours of Support: Minimum 12 hours

These 12 hours excludes travel time but can include time for preparation and debriefing but evidence must be provided to support the work you have done.

The support can take the form of one-to-one and/or one-to-many consultancy advice, diagnostic and brokerage. The assistance can be face-to-face, over the telephone or a web-based dialogue.

Evidence Requirements:

- ❖ Registration & De minimis forms
- ❖ Meeting notes – Please see below for additional information
- ❖ Workshop Attendance Register – Please see below for additional information
- ❖ Client Support Record form

Meeting Notes –

Meeting Notes are a crucial part of the evidence required to support your work with the client. They must be submitted as evidence for each 1-2-1 meeting with the client and signed and dated by both you and the client.

They must be legible as they will be read by Lead Partners & Funders to check that the content matches the project’s aims.

Content of Meeting Notes –

Notes from first 1-2-1 Meeting –

With the above Results in mind your first set of Meeting Notes must clearly show why the business has been identified as one that will benefit from the funded support offered under this project. Therefore your notes must indicate the Results you are aiming for and how you will achieve them.

Notes from Final Meeting –

Your final meeting with the client must be supported by notes that state the outcome of the 12 hours of support and if the Results outlined in your initial meeting have been met and if not your suggested course of action.

Workshops –

The evidence required to support workshop activity must clearly show the benefit to the client which in turn will highlight why it is a suitable workshop for SMEs supported on this particular project.

The above should be achieved by providing the following evidence –

Agenda

Signed Attendance Register

Any handouts given to the client

Any other notes or documents that give details of the content of the workshop

Client Support Record –

All kinds of interventions must be listed in this form by date and time/hour along with signature by clients and the advisor in appropriate sections.

Results –

Is the ERDF reference for the following indicators, all of which should be recorded on the Results Outcome Form.”

It is the last line under workshops which is relied on by Prevista as justifying the non-payment of Carbon Smart’s invoices.

17. Appendix 4, entitled Evidence Cover Sheet, provides:-

“The Associate Delivery Partner is required to send their completed paperwork by the 7th of each month. If it falls on the weekend, paperwork is to be sent on the Friday.

The Associate Delivery Partner must ensure that their final paperwork accompanied by the claim summary for the month is sent to Salim Sharif (salims@prevista.co.uk). Any claims that are not received by the date stated will not be processed until the following month resulting in delayed authorisation and payment.

Where the Associate Delivery Partner is not submitting any evidence please inform the Project Manager via email.

All paperwork must meet all eligibility criteria stated in the project fact sheet.

Paperwork must be completed sufficiently and accompanied by the correct documentation. The Project Manger will email

partners who submit information that is incomplete outlining gaps which need to be completed. Paperwork must be returned within a week of this request.

An electronic copy of the Beneficiary tracking database must be sent to Prevista when submitting each claim. Please note that only the Beneficiary tracking database template sent to you by Prevista will be accepted and all fields must be completed.

Only agreed forms should be used by you.”

18. It can be seen that the contractual requirements are of considerable complexity. In my view, they should be interpreted with some degree of flexibility always bearing in mind (1) the judge’s observation, recorded in para 2 of the note of his judgment that

“The funders are concerned to avoid fraud and manipulation and therefore have strict evidence requirements that first money paid out has to be proved and secondly what work has been done for that money proved and only once satisfied money was paid out will ERDF pay”

and (2) that the essential argument at trial was about the non-provision of presentation slides prepared by Carbon Smart for the workshop which they provided for the SMEs.

Compliance with the contract

19. We were taken through the evidence in fact provided by Carbon Smart to Prevista in relation to one of the SMEs which they had assisted, Upper Street Events in Islington. The Evidence Cover Sheet set out the categories of evidence provided including Site Survey Report, Client Support record, Output form, Business support evaluation form, Job safeguarded form, Action plan, Environmental Policy and Carbon Smart Certificates. The Carbon Smart Certification is a 31 page document including on the third page an agenda for the workshop requiring Upper Street Events to identify carbon reduction actions, produce an action plan and develop (and update) an environmental policy. On the eighth page there are Site Observations and pages 11-27 identify potential carbon reduction savings. That is followed by a Registration Form on a Prevista/Croydon/ERDF template about Upper Street Events signed on its behalf by Sarah Lefley and a Client Support Record (on a similar template) itemising relevant activities conducted before during and after the workshop. Importantly there is an Action Plan which is partly pro forma identifying 4 possible courses of action for 10 carbon reduction headings. That is then filled in, in manuscript, during the workshop identifying which of the possible course of actions will be pursued together with notes of explanation.
20. If one stands back from all this and asks whether the material provided complied with the workshop requirements of Appendix 1 to the SLA

“any other note or documents that give details of the contents of the workshop”

the only possible answer is that it did, unless either the requirement is to be interpreted as “every other document produced during the workshop which could be said to give details of the contents of the workshop” or there was some further contractual requirement for “presentation slides”.

21. As to the first of those suggestions, that does not seem to me to be the correct interpretation of the requirement. “Any” is not the same as “every”. It is, moreover, not easy to see how pre-prepared slides are of much assistance in determining the contents of the workshop save to say that they were shown to the client. What Prevista, Croydon and ERDF really need to know is what plan of action is proposed at the workshop and what arrangements are made to pursue that action plan. That is all included in the material provided to Prevista; slides themselves could not add much (if anything) to that.

22. The judge said (para 38) that Carbon Smart’s argument that slides did not need to be produced was unsatisfactory because:-

“We are dealing with a bureaucratic and suspicious funder. It is insistent on being given details of workshop content. It is asking too much for them to “infer” what happened based on what happened before the workshop and after the workshop. I refer to the clear provision on “slides etc”.”

23. There are two strands to this reasoning. First that there was no sufficient evidence of workshop content and that Prevista and the funders were left to “infer” it. In the light of the details provided by Carbon Smart as I have set them out, I cannot accept that the contents of the workshop were left to “inference”. It may well be that this court was taken through the evidence in rather more detail than the judge was.

24. The second strand of the reasoning is the “clear provision” on “slides etc”. If the judge is intending to say that there was a contractual obligation to provide slides, I can only say that I disagree. It is true that they were mentioned in the email response of Mr Sharif to one of the queries raised by Ms Quarrell in relation to a document called “Evidence Requirement” which was not itself a contractual document, since it was not part of the draft SLA sent to Mr Murray for his agreement. I do not read that email however as introducing a separate term of the contract between the parties any more than the matters discussed on 16th February 2011 (recording in handwriting the requirements of “environmental policy” and “action plan”) could be said to be, by themselves, terms of the contract. The parties in my view intended their relationship to be governed by the draft SLA not by additional matters incidentally mentioned in discussions or emails before the contract was concluded. There may well have been no binding contract in law until Carbon Smart began their work with the SMEs but, if so, that contract cannot have been on any terms additional to those contained in the draft that had been sent to Mr Murray (and indeed in due course signed by him much later in October of that year).

25. Moreover the email of 9th March, with its suggestion that “presentation slides etc” are to be provided, has the aura of an informal recommendation rather than a prescription, it is not couched in the form of a contractual obligation as the word “etc”, confirms. The phrase simply identifies, in informal terms, an example of the sort of evidence

that might be provided as a means of satisfying the requirement to give details of the content of the workshop.

26. For these reasons I would allow this appeal and it is unnecessary to consider other wide ranging submissions about entire contracts, substantial performance, severability of parts of the contract or the Unfair Contract Terms Act; I prefer not to do so.

Lord Justice Jackson:

27. I agree.

Mr Justice Hildyard:

28. I also agree.