

Identifying the ‘primary activity’ on-site - Engie Fabricom UK Ltd v MW High Tech Projects UK Ltd [2019] EWHC 1876 (TCC)

Published 25 August 2019

Executive Summary

In *Engie Fabricom UK Ltd v MW High Tech Projects UK Ltd*, the Court refused to enforce an adjudicator’s decision because it found that the Defendant had reasonable prospects of showing that the primary activity of the site in question was power generation, and consequently that the parties’ sub-contract fell within the section 105(2) exclusions in the Housing Grants Construction and Regeneration Act 1996 (“the Act”).

Background

The Defendant was the main contractor appointed to construct a fluidised bed gasification power plant in Hull. The Defendant appointed the Claimant under a sub-contract to perform the works.

A dispute arose between the parties in relation to payments under the sub-contract. There was an issue before the adjudicator as to whether she had jurisdiction to determine the dispute. The adjudicator’s non-binding decision was that the sub-contract was a construction contract as defined in the Act, and consequently she had jurisdiction to determine the dispute. The adjudicator ordered that the Defendant pay the Claimant the sum of £27,062.25 plus interest and VAT, and that the Defendant pay her fees and expenses and the fixed charge in respect of her appointment.

The Claimant sought to enforce the adjudication decision before the TCC by way of summary judgment application. The Defendant resisted the Claimant’s application on the basis that: a) the adjudicator’s decision was wrong; b) alternatively, that it had a real prospect of success of establishing that the decision was wrong; c) alternatively, that there was some other compelling reason for trial of the issues.

Issues in dispute

It was common ground between the parties that, if the primary activity of the site was power generation, then, pursuant to section 105(2)(c)(ii) of the Act, the works were not “construction operations” and there was no legal right or entitlement to adjudicate, so that the adjudicator’s decision was without jurisdiction and unenforceable.

The Court reviewed the legal principles relating to determination of the primary activity on site. In summary:

1. There is a distinction between the primary purpose and the primary activity on site. While the former is a relevant consideration, it may be the primary activity of a site is different (for example, because of the scale or output of the activity);
2. The exclusions in s 105(2) of the Act should be construed narrowly.
3. The meaning of “the site” is determined by the overall impression rather than a detailed examination of particular documents or obligations.

The Claimant contended that the primary activity on site was the disposal and thermal treatment of waste by incineration/gasification as an alternative to landfill, and that power generation was merely a secondary activity. It relied on documents prepared for the Employer for the purposes of attracting investment for the project, which explained that the driver of the project was the high rate of waste generated in England and stringent EU requirements to reduce the amount of waste going to landfill. The Claimant also relied on EU legislation, as well as the terms of the permit which was granted by the Environment Agency, to show that the primary activity was thermal treatment of waste. The Claimant also submitted that only a small amount of energy was generated by the plant.

The Defendant argued that it was necessary to look at the nature and purpose of the whole site. It relied on a number of factors to argue that the primary activity was power generation, including that planning permission for the site referred to

power generation, that the wording of the main contract and subcontract was consistent with power generation, and that the site generated electricity for export to the National Grid (not just for the plant itself). The Defendant also argued that it was wrong in principle for the Claimant to look to EU legislation concerned with the protection of the environment and public health in order to construe domestic UK construction legislation.

The Decision

The Court was “entirely satisfied” that the Defendant had shown it had a real prospect of successfully demonstrating that the primary activity on site was power generation. Interestingly, the Court also agreed with the Defendant that there was a reasonable prospect that the Claimant’s emphasis on EU legislation was irrelevant to the construction of the sub-contract in the context of the Act. In any event, the Court was satisfied that more documentary evidence and expert evidence was required to assist the Court to determine the issue.

Lessons for the industry

The matter will now proceed to a trial on the issue of the primary activity on site and, while the sums in dispute in this proceeding may be considered modest, it is likely that the ultimate decision will have implications for more significant disputes on the same types of project.

More broadly the decision illustrates the difficulties with interpreting the exclusions under s 105(2) of the Act, and shows why the exclusions have been the subject of confusion and criticism in the past. It remains to be seen whether there will be any reform in this area. The proposed amendments to the Construction Act did consider removing this exclusion.

Authors



Mark Roach

London - Walbrook

+44 (0)20 7894 6314

mroach@dacbeachcroft.com