

Construction Law Update

Adjudication where some of the Contract is for “Excluded Operations”

Contracts which involve some activities falling within the provisions of the Housing Grants, Construction and Regeneration Act 1996, as amended (the “Act”) and some activities which are excluded by the Act have posed difficult questions in relation to the jurisdiction of adjudicators. The issues concerning such hybrid contracts arose in the recent case of *Equitix ESI CHP (Wrexham) Limited v Bester Generacion UK Limited*, where Bester sought to resist enforcement of an adjudicator’s decision on the basis that the contract included works which were excluded operations under the Act.

Background

In April 2016, Equitix, a special purpose vehicle, engaged Bester to design and build the Wrexham Biomass Fired Energy Generating Plant.

In July 2017, Equitix terminated the contract and notified Bester that they had elected not to continue with the project. Equitix issued an interim account under the contract requiring Bester to pay almost £11.6 million. Equitix subsequently started an adjudication over the validity of the termination and the basis of the interim account. The adjudicator found in Equitix’s favour and ordered Bester to pay Equitix around £9.8 million. Equitix sought to enforce that decision.

Were the works excluded operations?

Section 104(1) of the Act defines a “construction contract” as an agreement for the carrying out of “construction operations”. Section 104(5) provides that where a contract relates to construction operations and other operations, the Act applies only so far as the contract relates to construction operations.

Section 105(1) of the Act specifies a list of operations which are not “construction operations” (i.e. they are excluded operations). Section 105(2)(c)(i) provides that the assembly, installation or demolition of plant or

machinery, or the erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is power generation, are not construction operations.

Bester argued that the figure in the interim account had to have included or allowed for at least some excluded operations and therefore the adjudicator had no jurisdiction.

The court observed that Bester’s argument focused on the scope of the overall contract, not the dispute which had been referred to adjudication. Bester had not carried out any excluded operations before the contract was terminated. The works which Bester had completed at the point of termination were the preparation of bonds and a business plan, placing a steam turbine order, preparation of drawings and calculations and completing the site compound. These were all preparatory steps to the project and therefore fell within the scope of construction operations as set out in section 105(1)(e) of the Act (i.e. operations which form an integral part of, or are preparatory to, construction operations).

The court stated “*what matters for the purposes of jurisdiction is whether or not some part of the dispute referred to the adjudicator related to or arose out of excluded operations, narrowly defined. If it did not, no jurisdiction issue can arise*”. Given the point at which termination occurred, the adjudication couldn’t possibly have related to excluded operations and there was no question that any of the payments which Equitix sought to recover following termination related to excluded operations. As such, the adjudicator had jurisdiction to reach his decision.

Stay of execution

Bester argued that if the adjudicator’s decision was enforceable (as the court found), the court should order a stay of execution, temporarily suspending the requirement for Bester to pay the amount due to

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Equitix. Bester argued that because Equitix was a special purpose vehicle, there was a real risk that the company would be wound up before Bester had an opportunity to properly challenge the interim account.

The court considered the principles relating to stays of execution which were established in the case of *Wimbledon Construction Co 2000 Limited v Vago* (2005). These include that:

- adjudication is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute;
- adjudicator's decisions are enforced summarily and the claimant should not generally be kept out of its money; and
- the probable inability of the claimant to repay the judgment sum at the end of a substantive trial may constitute special circumstances making it appropriate to grant a stay.

Although Bester were aware that Equitix was a special purpose vehicle when they entered into the contract, the decision not to see the project through to completion meant that Equitix no longer had any purpose. There was no incentive for the company to remain in existence once it had paid its debts to its parent and it would be wound up sooner rather than later. The court found that there was a very real risk of Bester overpaying and never being repaid which Bester could not have predicted when entering into the contract. The court noted that this case was similar to that of *Galliford Try v Estura* (2015), in that there was "a large disputed claim on an interim application and a final account off in the future, and no opportunity to redress the balance before then".

Accordingly, whilst the court granted summary judgment in favour of Equitix for a sum of over £9.8 million plus interest, Bester was only required to pay £4.5 million to Equitix and to pay a further £1 million into court. A general stay of execution was granted in relation to the remaining sums.

Analysis

This case confirms the courts' approach to the definition of construction operations under the Act. The term "construction operations", as defined in section 105(1), is to be interpreted broadly, whilst the exceptions set out under section 105(2) are to be interpreted narrowly. However, the decision in this case opens the possibility that, where a contract is for works which would be excluded operations and not subject to the adjudication provisions of the Act, the preparatory works relating to that contract, be they physical on site preparations or the provision of drawings and calculations, may be subject to the adjudication provisions of the Act.

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