Neutral Citation Number: [2019] EWHC 1876 (TCC)

Case No: HT-2019-000149

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2019

Before :

MR JONATHAN ACTON DAVIS QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

ENGIE FABRICOM UK LIMITED	**Claimant**
- and -	
MW HIGH TECH PROJECTS UK LIMITED	**Defendant**

- -
- -

Ms Lynne McCafferty QC (instructed by **Freeths LLP**) for the **Claimant**
Mr Simon Hargreaves QC and Mr Tom Owen (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing date: 27th June 2019
Judgment available to the parties 10th July 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JONATHAN ACTON DAVIS QC

THE DEPUTY HIGH COURT JUDGE:

1. By an adjudication decision dated 11 April 2019 the Adjudicator ordered that the Defendant should pay the Claimant the sum of £27,062.25 with interest and Value Added Tax. The Adjudicator also ordered the Defendant to pay her fees and expenses and the fixed charge in respect of her appointment. The Defendant failed to pay any of those sums. The Claimant therefore paid the Adjudicator's fees. On 29th April 2019 the Claimant issued and served the present proceedings and an application for summary judgment. The Defendant served an acknowledgement of service indicating its intention to defend the claim on 17 May 2019. The application for summary judgment is to enforce the Adjudicator's decision and to pay the sums due under it. At the date of the hearing the total sums due to Fabricom amounted to £41,766.30.

2. The issue is jurisdiction. That point was taken before the adjudicator and she issued a decision on jurisdiction on 15th March 2019. She agreed with the Claimant that the Sub-contract was a construction contract as defined in the Housing Grants Construction and Regeneration Act 1996 ("the Construction Act") and therefore that she had jurisdiction to determine the dispute. It is agreed that the Adjudicator's decision was a non-binding determination. The Claimant says that the decision was correct. The Defendant says that the decision was wrong. Alternatively, that it has a real prospect of establishing that the decision was wrong alternatively that there is some other compelling reason for trial as provided for in CPR Part 24.2 (a) and (b).

3. The Defendant was the main contractor on a project known as Energy Works Hull. The Defendant was engaged by Energy Works (Hull) Limited (The Employer) under an EPC contract dated 20th November 2015 to construct a "fluidised bed gasification power plant at Cleveland Street, Kingston upon Hull".

4. The Defendant engaged the Claimant under a Sub-Contract which bears the date of 31st March 2017. The Sub-contract comprised a signed Sub-Contract agreement which incorporated:

   (i) The Institute of Chemical Engineers former Sub-contract (the Yellow Book) 4th Edition 2013 referred to in the Sub-contract and in this judgment as "the General Conditions";

   (ii) The Special Conditions which comprised a list of bespoke amendments to the General conditions plus two additional Conditions;

   (iii) Specifications A to D; and

   (iv) Schedules 1 to 21.

5. The contractual right to adjudicate was provided in Clause 47 of the General Conditions. As originally drafted, Clause 47.1 of the General Conditions provided that:

   > **"This Clause 47 shall only apply to disputes arising under construction contract as defined in the Housing Grants Construction and Regeneration Act 1996, or any amendment or re-enactment thereof".**

6. However, Clause 47.1 was deleted by the Special Conditions and replaced in its entirety with the following provision

> **"This Clause 47 applies only to the extent (if any) required by the Construction Act 1996, as amended".**

7. Whatever is the meaning of that amendment the parties agree that the Sub-contract includes a right to adjudicate to the extent permitted by and consistent with the provisions of the Construction Act.

8. The rights and obligations imposed by the Construction Act apply only to "construction contracts" defined in the Act to include "agreements for the carrying out of construction operations and for arranging the carrying out of construction operations by others, whether under Sub-contract to him or otherwise". The central issue in this case is whether the works in question are excluded "construction operations" as defined by section 105(2)(c) (i) and (ii) of the Act. Section 105 (ii)(c) provides

> **"The following operations are not construction operations within the meaning of this part –**

…

> **(c) Assembly, installation or demolition of plant or machinery, or erection or demolition of steel work for the purposed of supporting or providing access to plant or machinery, on a site where the primary activity is**
>
> **(i) nuclear processing, power generation or water or effluent treatment, or**
>
> **(2) the production transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink."**

9. The Defendant contends that it is arguable that the primary activity at Energy Works Hull is power generation. It is common ground that if the primary activity of the site is power generation, the works are not "construction operations" under the Act and there is no legal right or entitlement to adjudicate so that the decision is without jurisdiction and unenforceable.

10. The main contract is

> **"For the construction of a fluidised bed gasification power plant at Cleveland Street, Kingston upon Hull…"**

11. The Sub-contract is

> **"For the construction of a fluidised bed gasification power plant at Cleveland Street, Kingston upon Hull.."**

Thus, the Defendant engaged the Claimant for the "Sub-contract works" namely the design, engineering, manufacture, delivery to the site, construction, execution and completion of the "Sub-contract Plant", which was the gasification plant system. Fabricom accepts that the only issue is the narrow issue concerning the primary activity on the site. Fabricom say that the "primary activity" of site is the disposal and thermal treatment of waste (by incineration and/or gasification) hence the exclusion does not apply and the construction is a construction contract as defined in the Construction Act. It is said by Ms McCafferty QC that the primary activity on the site is the disposal and thermal treatment (by incineration/gasification) of waste. Power generation is merely a secondary activity, and the production of gas is merely an ancillary activity.

12. The operation of section 105 of the Construction Act and the exclusion in section 105 (2)(c) have been considered in a number of cases.

13. In **Conor Engineering Limited v Les Constructions Industrielles Mediterranee SA** [2004] BLR 212 the relevant site housed a new plant which was constructed both for waste incineration and generation of electricity. The issue was whether the primary activity on site was power generation under section 105(2)(c)(i) of the Construction Act.

14. Mr Recorder David Blunt QC held that what the primary activity is at a particular site is a question of fact. He held that whilst the "primary purpose" of the site will always be a relevant consideration in deciding what is its primary activity nevertheless "it is possible to image situations which could give rise to an argument that an activity embarked upon for only secondary reasons is in fact e.g. because of its scale or output, etc.) the primary activity". Hence says the Claimant, the importance of distinction between the primary activity and the primary purpose.

15. The Recorder noted that the plant was built as part of an integrated waste management strategy. He considered the evidence in detail and concluded at [33]:

> **"On the basis of the information contained in the extracts from this website and the contract to which I have referred, I am satisfied and find as a fact that:**
>
> **the prime purpose of the plant built at Chineham was the incineration of waste; and**
>
> **that the principal physical activity at the site was also the incineration of waste.**
>
> **I am quite satisfied that the plant was developed principally as a means of finding alternatives to landfill sites for the purpose of disposing of waste. I am impressed by the sheer volume of waste incinerated annually at the Chineham site as contrasted with the modes output of electricity which it generates. I accept Mr Cox's assertion that the generation of electricity was simply "a spin off" from the incineration process. It may be appropriate to refer to the plant as an "Energy Recovery Incinerator", but this does not lead to the conclusion that the principal purpose was power generation. Accordingly I am satisfied and find as a fact that power generation was and is not the "primary activity" on the site within the meaning of Section 105(2)(c)(i) of the Act".**

16. The commentary on the judgment in the Building Law Reports suggests that the following 4 factors are material in determining what the primary activity is or will be:

> **"(i) What the parties describe contractually or otherwise as being the primary activity of the site is relevant but not determinative"**
>
> **(ii) One must first determine what the site is, for instance, is there a site within a site;**
>
> **(iii) There can only be one primary activity on a site; and**
>
> **(iv) One can have regard to all relevant published material relating to the user of the site and the site itself"**

17. In **North Midland Construction PLC v. Lentjes UK Limited** [2009] BLR 574, it was common ground that the primary activity on the site was power generation. The issue was whether the Sub-contract works came within the description of "assembly, installation or demolition of plant or machinery, or erection or demolition of steel work for the purposes of supporting or providing access to plant or machinery": That is the inverse of the present situation.

18. Ramsey J held that a "narrow construction" of section 105(2) was to be preferred, following:

    (a) a close analysis of the statutory language

    (b) a detailed review of several previous decisions on section 105(2); and

    (c) a careful consideration of extracts from Hansard relating to the exclusion.

19. Applying a narrow construction, Ramsey J held that the exclusion in section 105(2)(c) did not capture all of the structural steelwork on the whole site, just the steelwork which formed an integral part of the machinery and which was directly and necessarily connected to the plant.

20. In **Laker Vent Engineering Limited v. Jacobs** [2014] EWHC 1058 (TCC) the issue was the definition of "the site" for the purposes of section 105(2)(c). However the judgment contains some guidance about the construction and application of section 105(2) generally.

21. **Laker Vent** related to Sub-contract under which the Sub-contractor (Laker) agreed to supply, fabricate and install pipework at a Biomass Combined Heat and Power ("CHP") plant. The CHP plant was constructed by the main contractor (Jacobs) for the employer (RWE) in order to provide electricity and steam for a paper mill owned by Tullis Russell. Jacobs argued that "the site" was limited to the land leased by the paper mill owner to RWE for the purpose of constructing the CHP plant; and therefore the primary activity on the site was power generation. Laker argued that the site was the whole of the land owned by Tullis Russell and therefore the primary activity was paper production.

22. Ramsey J upheld Laker's argument, holding that the whole site, including the land leased by Tullis Russell to RWE and the whole paper mill complex was to be considered as the relevant "site". In reaching that conclusion he relied on amongst other things the fact that:

(a) The CHP plant was providing steam and electricity to serve the paper mill;

(b) The CHP plant occupied an area of only 10% of the total paper mill site; and

(c) The CHP plant was "not an independent power station but one which depends on the relationship with Tullis Russell".

23. Drawing upon the judgment of HHJ Bowsher QC in **ABB Zantingh Ltd v Zedal** [2001] BLR 66 Ramsey J held that

> **"The site" must be "considered as one of the overall impression rather than detailed examination of particular documents or obligations which would not have been known to the parties when the entered into the Sub-contract."**

The Claimant argues that whilst generation of electricity from waste is one of the purposes of the site and one of the activities on site it is clear from the "overall impression" of the evidence about the site and the plant installed on the site that power generation is not the underlying primary activity on site. The Claimant says also that power generation is not the primary purpose of the site although accepts that that factor is of lesser importance. It is said that power generation is merely a secondary activity and as in **Conor Engineering** the primary activity is the thermal treatment of waste as an alternative to landfill for the purpose of disposing of waste.

24. In order to make good that submission Ms McCafferty took me to a range of documents which I must set out.

25. In an Information Memorandum dated April 2014 prepared by C Spencer Limited for the Employer for the purposes of attracting investment for this project the project is described as an "energy recovery facility" that will generate 28 MW of electricity from waste, but states that "using fluidised bed gasification technology the facility will deliver a renewable and sustainable solution for 192,000 tonnes of waste".

26. That memorandum explains that the driver of this project is the high rate of waste generated in England and the stringent requirements of the EU landfill directive to reduce the amount of waste going to landfill, the solution to which is the construction of "alterative disposal facilities based on incineration of waste with EfW ("Energy from Waste"). Ms McCafferty says that the background to the project is that as in **Conor Engineering** an integrated waste management strategy was developed for the Hull area by Hull City Council and the East Riding of Yorkshire Council, referred to as the Joint Sustainable Waste Strategy Review which made express reference to the "waste hierarchy" implemented in the EU Waste Framework Directive 2008 (2008/98 EC). That Review states that: -

> **"The key target proposed for energy recovery combines the need to direct residual waste from landfill through waste treatment facilities that comply with the waste hierarchy definition of recovery. This will ensure that the use of landfill is significantly reduced and energy is generated from the residual waste"**

27. That Review also states that:

> **"A key element of the original Strategy was to develop and Energy from Waste (EfW) facility to manage the waste left over after recycling and composting… The Council's plan to commence the procurement process for new waste contracts in 2012. This is to ensure that facilities are provided to process the various waste streams and that alternative treatment facilities are in place to reduce reliance on landfill".**

28. Ms McCafferty says that the primary purpose of the Council's "key target" was to reduce reliance on landfill for waste disposal, and as is clear from the Review the recovery of energy from that waste is a secondary purpose and a secondary activity.

29. The EU Directive requires the development of alternatives to traditional disposal of waste including "other recovery e.g. energy recovery" see Article 4.1. Article 23.1 of the EU Directive requires Member States to require any establishment or undertaking intending to carry out waste treatment to obtain a permit from the competent authority. In the UK that authority is the Environment Agency. Article 23.4 requires that:

> **"It shall be a condition of any permit covering incineration or co-incineration with energy recovery that the recovery of energy take place with a high level of energy efficiency".**

30. The permit which was granted to the Employer by the Environment Agency for this site is a permit for incineration as opposed to co-incineration. The Permit described the permitted activity on site as follows: -

> **"This permit controls the operation of a waste incineration plant. The relevant listed activity is section 5.1 (i) (b). The incineration of non-hazardous waste in a waste incineration plant with a capacity exceeding three tonnes per hour….**
>
> **The main features of the permit are as follows:**
>
> **The installation is designed for the thermal treatment of waste derived fuels, by incineration. Energy will be recovered from the installation in the form of electricity, principally for export to the National Grid…"**

31. Ms McCafferty concludes that it is clear from that extract that the primary activity is thermal treatment of waste, recovery of energy from that treatment is a secondary activity.

32. Ms McCafferty also draws my attention to the comments from the Environment Agency on the employer's application for the Permit.

> **"The applicant has described the facility as Energy Recovery, our view is that for the purposes of IED (the EU industrial emissions directive 2010/75/EU)… the installation is a waste incineration plant because:**
>
> - **Notwithstanding the fact that energy will be recovery from the process; the process is nevertheless "incineration" because it is considered that its main purpose is the thermal treatment of waste; and**
> - **The plant only produces electricity and heat but no material output;**
> - **The waste is the principal source of fuel;**
> - **The waste being burned is mixed waste comprising different materials; and**
> - **The waste has not been treated to improve its quality to a relevant standard."**

33. Article 3 of the IED describes a "waste incineration plant" as a plant "dedicated to the thermal treatment of waste, with or without recovery of the combustion heat generated, through the incineration by oxidation of waste as well as other thermal treatment processes, such as aspirolysis, gasification…"

34. Ms McCafferty emphasises that a relatively small amount of energy is generated by the plant which is similar to the rate in **Conor Engineering**.

35. In their written Skeleton Argument Mr Hargreaves QC and Mr Owen say that it can be clearly demonstrated that the primary activity on site is power generation. They argue that it is necessary to look at the nature and purpose of the whole site not just the area in which the Claimant's operations were performed. Here, the entire site, they say its processes and purpose are primarily for power generation. The site is located where it is because it was acquired with planning permission and dedicated change of use specifically for power generation close to the neighbouring National Grid Sub-station. Third it is said that the plant is a purpose-built independent power station and thus is to be contrasted with the plant in **Laker Vent** which was located in order to provide power to the pre-existing onsite paper mill for the production of paper that being the primary activity. Fourth, by reference to **Zedal and Conor Engineering**, electricity is generated for export to the National Grid not simply or principally for the purpose of powering the activities of the site itself. Fifth the nature of the power generation activity is gasification not incineration because gasification does not burn waste. It is a process which converts refined fuels into combustible gas which is then combusted to generate electricity. Processing of the refined fuel does not occur on site at Hull. The sixth factor relied upon by the Defendant is that Fabricom itself describes the project as "the £200m Energy Works EfW Plant… which will power up to 43,000 homes". The seventh factor (taken from **Laker Vent**) is that it is set out in the planning documents that approval was obtained in Hull for energy works to produce sustainable electricity through gasification. The eighth factor (from **Laker Vent**) is the percentage area of the site occupied by power generating plant/machinery compared with other plant: the Defendant relies upon the absence of shared activity and says that the power generation

process is intrinsically linked to all plant on site. Ninth, in reliance on **ABB**, the Defendant says the purpose and objects of the company for whose benefits the works are executed on site and the financial model for the site is a factor to be taken into account. EWHL who are owner/operator of the site describes itself at Companies House as having "production of electricity" as its nature of business.

36. During the course of oral submissions for the Defendant, Mr Hargreaves QC and Mr Owen helpfully submitted a document which they called an aide-memoire which is a series of bullet points summarising and expanding upon the argument in their skeleton to the effect that it can be clearly demonstrated that the primary activity on site is power generation. In the light of the view which I have formed I need not expand on the various points made, save for one of them.

37. Mr Hargreaves emphasised the difference of approach between the Construction Act which as he said was an Act concerned to improve cash flow in the domestic construction industry and the approach taken in EU directive which was concerned with the protection of the environment and public health by generation of waste. Mr Hargreaves said that it would be wrong in principle to examine a European directive concerned with the protection of the environment and public health by generation of waste, in order to look for the answer to whether a particular site is within or without an exception in an Act of Parliament concerned with cash flow in the UK construction industry.

38. The time estimate for the hearing was half a day. That was insufficient for counsel to develop their arguments. I allowed both parties to submit further submissions after the end of the hearing.

39. In the post hearing submissions submitted by Mr Hargreaves and Mr Owen they also argued that a question should not be determined summarily because more documentary evidence is required as identified by Mr O'Brien in his witness statement dated 31 May 2019 at paragraph 69 namely further investment information, funding agreements with third parties such as the European Regional Development Fund, power generation agreements with third parties and heads of terms and final contracts from fuel suppliers in the information memorandum as to the location, source and particulars of the fuel.

40. Mr Hargreaves also identified (at paragraph 8 of that submission) 4 areas where there could be independent technical expert evidence.

41. Last, at paragraphs 10-12 of that note Mr Hargreaves argued that there is some other compelling reason for trial in that there are numerous such facilities throughout the country and a full trial and full judgement would help the industry.

42. Ms McCafferty's Additional Submissions covered a query I had posed during the course of the hearing. They were helpful but on the view which I have formed I do not need to consider them in this Judgment.

43. In **Conor Engineering Limited** judgment was given after a trial under part 8 of the CPR. Here, I am dealing with a claim for summary judgment under part 24.

44. I take the following guidance from the notes in the CPR (Part 24.2.3).

> **"In order to defeat the application for summary judgment it is sufficient for the Respondent to show some "prospect" i.e. some chance of success. The prospect must be "real" i.e. the Court will disregard prospects which are false, fanciful or imaginary…. The hearing of an application for summary judgment is not a summary trial. The Court at the summary judgment application will consider the merit of the Respondent's case only to the extent necessary to determine whether it has sufficient merit to proceed to trial. The proper disposal of an issue under PT24 does not involve the Court conducting a mini-trial… At the trial, the criteria to be applied by the Court is probability: victory goes to the party whose case is the more probable "taking into account the burden of proof". This is not true of a summary judgment application. "The Criteria on which the judge has to have applied under CPR part 24 is not one of probability; it is absence of reality" (Lord Hobhouse of Woodborough in Three Rivers DC v. Bank of England {No 3) [2001] 2 ALL ER 513….**

> **"Where a summary judgment application gives rise to a short point of law or construction, the Court should decide that point if it has before it all the evidence necessary for a proper determination and it is satisfied that the parties have had an adequate opportunity to address the point in argument… Conversely an application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issue having regard to all of the evidence…**

45. I would not have refused the application for summary judgment because of the importance of the issue to the industry as set out at paragraph 41 above. In my judgment that is not a compelling reason for trial if the issue is otherwise clear.

46. The Claimant chose to achieve resolution of the dispute through an application for summary judgment under part 24 not by a part 8 claim form. In order to defeat that application the Defendant does not have to show that its arguments are correct. It faces a lower hurdle. The Defendant needs to show only that it has a real prospect of success that is to say prospects which are neither false, fanciful nor imaginary. I am entirely satisfied that Mr Hargreaves can show that. The wording of the EPC contract and Sub-contract is consistent only with power generation. And there is a real prospect that the Claimant's emphasis on the European Directives, permits and determination are irrelevant to the construction of this Sub-contract in the context of the Construction Act.

47. In any event, in my judgment the Court does not have before it all the evidence necessary for a proper determination of the issues. I am not satisfied that the parties have had an adequate opportunity to address the point in argument. I agree with Mr Hargreaves that more documentary evidence is required as summarised at paragraph 39 above. I also agree that there may be areas in which independent technical expert evidence would assist the Court in the determination of the issue.

48. Mr Hargreaves offered to bring into Court the entirety of the sum claimed as a condition of the application for summary judgment being refused. I accept that offer.

49. For the reasons given I refuse the application for summary judgment, conditional upon the Defendant paying into Court the sum of £41,766.30 within 21 days. I invite counsel to prepare an Order which reflects that conclusion and gives directions for trial. If that Order and the issue of costs are agreed before hand down of this judgment there will be no need for Counsel to attend hand down. If matters are not agreed, I will give directions and deal with costs at hand down of this judgment.