



LEGAL BRIEFING

North Midland Construction Plc v A E & E Lentjes UK Ltd

[2009] EWHC 1371 (TCC), Mr. Justice Ramsey

The Facts

North Midland sought a Part 8 Declaration as to whether the Housing Grants, Construction and Regeneration Act 1996 (“HGCRA”) applied to the contracts between them and Lentjes. They also sought a declaration in relation to design rights, but that was rejected by the Judge.

Lentjes entered into four agreements with North Midlands. One was for enabling works and the other for civil engineering works, in respect of 2 coal fired power stations (Fiddler’s Ferry, Cheshire and Ferrybridge, West Yorkshire). The contracts contained four purchase orders.

The Issue

Did the HGCRA apply to the contracts or was it excluded? It would be excluded if it came within the exception in Section 105(2)(c)(i) excluding construction operation for the

“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, on a site where the primary activity is –

(i) Nuclear processing, power generation or ...”

The Decision

The enabling works and civil engineering works clearly were within the definition of “construction operations” in Section 105(1) of the HGCRA. The question was whether they were excluded as “assembly, installation or demolition” of “plant or machinery” where the primary purpose of the site was power generation.

Mr Justice Ramsey held that the intention of the HGCRA was to capture a wide range of work carried out in the construction industry, but with some limited specific exclusions. The power station exclusion had been considered in a number of previous cases, and a different approach has been adopted in two previous decisions. In *Palmers v ABB* the scope of Section 105(2) was construed narrowly such that building or civil engineering works were not necessarily excluded. However, in *ABB v Norwest Holst* Section 105(2) was construed broadly such that similar construction operations that were necessary to achieve the overall construction of a power station were exempt. The distinction to this broader approach was made by reference to the operation or engineering works themselves. Ramsey J concluded that the narrower approach would be more appropriate. He did not believe the intention of Parliament was to exclude all construction operations on a site where the primary activity was power generation. In addition, this narrow approach would mean that construction and civil engineering sub-contractors within the supply chain would benefit from the rapid dispute resolution process of adjudication implied by the HGCRA.

Nonetheless, cases with similar facts to those of *Homer Burgess*, *ABB v Norwest Holst* and *ABB v Zedal* (dealing with pipe work, installation and electrical wiring) would come within the exclusion of Section 105(2)(c) of the HGCRA even when construing the HGCRA narrowly. In this case the works concern general civil engineering works and Mr Ramsey concluded that those works were construction operations which were not excluded. This was because those works were not “assembly” or “installation” of “plant

or machinery” under Section 105(2)(c), which was required by the exclusion.

As a result the contracts were for the carrying out of construction operations as defined in Section 105(1) and so the HGCRA applied. Payment provisions would be applicable and adjudication could be used.

Comment

There have been a number of cases dealing with the complex definition of a “construction contract” set out in the HGCRA. If a construction contract is caught by that definition then adjudication will be implied into the contract. There are however a number of exclusions, one of which is power generation. It is not necessarily the case that all work being carried out at a power station is excluded from the HGCRA. The exclusion is not easy to interpret, and Judges have adopted a broad or a narrow approach. In this case Mr Ramsey adopted a narrow approach preferring to include the works within the scope of the HGCRA rather than exclude them.

Nicholas Gould
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