The thin blue line

Examining new case law, Ian Pease analyses the interpretation of construction operations under the Housing Grants, Construction and Regeneration Act 1996

Ian Pease is a practising solicitor

The Housing Grants, Construction and Regeneration Act 1996 is a unique piece of legislation. It is aimed at regulating a specific industry, and as such has to draw a line between what is and what is not 'construction'. Like any dividing line it is often a source of conflict. *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] is but the latest example.

This far and no further

The 1996 Act has two levels of exclusion.

An entire contract may be excluded under the Construction Contracts (England and Wales) Exclusion Order 1998. This covers contracts entered into under the private finance initiative and, among others, agreements under s106 of the Town and Country Planning Act 1990.

However, this level of exclusion has not been where the disputes have arisen. Rather more contentiously, the 1996 Act spells out what are and what are not 'construction operations' in s105. Section 105(1) contains an extensive list of operations (including construction, alteration, repair, maintenance, extension, demolition and dismantling) that are said to be construction operations. Section 105(2) then gives specific examples of exclusions from this definition, including:

- drilling for or extraction of oil or gas;
- extraction of minerals;
- nuclear processing, power generation, or water or effluent treatment; and
- production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink (105(2)(c)(ii)).

This last point is of particular relevance to *Cleveland Bridge*. Section 104(5) states:

> Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations.

Facts in *Cleveland Bridge*

In February 2006 the Whessoe-Volker Stevin Joint Venture (the JV) engaged Cleveland Bridge (CB) to carry out works at the Dragon Liquefied Natural Gas (LNG) terminal at Milford Haven. There were considerable variations to the work to be carried out. In March 2009 the JV agreed CB's final account for the work in the sum of £4,687,500. £317,500 plus VAT remained due to CB. On 13 March 2009 CB invoiced the JV for this sum, but it was not paid. The JV contended that no further sum was due.

CB commenced adjudication and an adjudicator was appointed. The JV challenged her jurisdiction on the basis that the subcontract was not a construction contract, contending that certain operations fell within the exception in s105(2)(c). The adjudicator decided that the JV's claim failed and that the JV should pay CB the £317,500 plus VAT. That sum was not paid and CB commenced enforcement proceedings under Part 24 before Ramsey J. He set out in logical steps what had to be determined:

(1) Whether under s105(1) the relevant work carried out by CB comes within the definition of construction operations.

(2) Whether any part of the work and, if so, what part comes within the exclusion provisions of s105(2).

(3) To the extent that there are construction operations and excluded works, the effect of this on the jurisdiction of the adjudicator and on the enforceability of her decision.

The first question

The court had to make a strategic decision about how it would undertake its analysis of the factual question in (1) above. It could take one of two courses: either embark on a minute analysis of the scope of works in the subcontract, or take a broad approach to the work adjudicated on. The court's inclination was to do the latter.

Quoting from HHJ Bowsher QC in *ABB Zantingh Ltd v Zedal Building Services Ltd* [2001] Ramsey J stated that:

> ... one cannot make sense of the Act by a minute analysis of the work to see what was plant and what was not. One must look at the nature of the work broadly.

Ramsey J concluded:

> What is therefore required is for the relevant works to be looked at broadly to see whether or not they come within the exception in s105(2). In addition, the question must be a matter of fact and degree where inevitably there will be grey areas.

CB's counsel argued that such an exercise should lead the court to conclude that the allegedly excluded work (to the pipe racks and pipe bridges) was such a small proportion (about 18%, he said) of the overall scope of work that, as a matter of fact and degree, all the works should be treated as construction operations.

The court rejected this submission, considering that the allegedly excluded works were sufficiently significant and substantial to fall within the exception.

The second question: interpreting the statute

How was s105(2) to be interpreted? The parties agreed that the primary activity on-site was the production, transmission, processing or bulk storage of gas (see s105(2)(c)(ii) above). The disagreement was whether the element of subcontract work in the excluded operations should be all the work to the 'steelwork for the purposes of supporting or providing access to plant or machinery' or whether it was limited to the 'erection' element of that steelwork. How widely was the section to be construed? CB said 'erection of steelwork' should be construed narrowly; the JV, meanwhile, enjoined the court to use a 'commonsense construction' to include supply as well.

Quoting Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* [2009], the court agreed with the JV that the basis of construing the Act should be the:

> ... meaning which the instrument would convey to a reasonable person having all the background knowledge that would reasonably be available to the audience to whom the instrument is addressed.

Hence, following his own judgment in *North Midland Construction plc v AE&E Lentjes UK Ltd* [2009], Ramsey J found that s105(1) contained a wide definition of construction operations and s105(2) contained specific exclusions. In those circumstances, where 105(2) had intentionally been drafted in terms of specific limited exclusions, a narrower approach to its construction would generally be appropriate. Applying this, 'erection' meant solely the operation of lifting the steelwork into position and connecting it together. It did not include making fabrication drawings or the purchase, painting and delivery of structural steelwork.

In the final analysis, therefore, the court concluded:

> ... that in relation to the Services under the Subcontract in this case, the only operation which is excluded from being a construction operation by section 105(2)(c)(ii) is the erection of the steel work for the pipe racks and pipe bridges and not the prior activities of fabrication drawings, off-site fabrication or delivery to site of the fabricated steelwork.

The third question: the 'blue pencil exercise'

Section 104(5) of the Act contemplates a position where one agreement relates to construction operations under s105(1) as well as operations excluded by s105(2).

Was the decision severable?

A related question was, if the adjudicator had got it wrong and had accidentally adjudicated on an element of the works that was not a construction operation, whether that part of the decision could be excised from the 'good' part. In other words, was the decision itself severable?

Akenhead J summarised the position in *Cantillon Ltd v Urvasco Ltd* [2008], at paragraph 65:

'(a) The first step must be to ascertain what dispute or disputes has or have been referred to adjudication. One needs to see whether in fact or in effect there is in substance only one dispute or two and what any such dispute comprises.

[…]

(c) If the decision properly addresses more than one dispute or difference, a successful jurisdictional challenge on that part of the decision which deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).

[…]

(e) There is a proviso to (c)… above which is that, if the decision as drafted is simply not severable in practice, for instance on the wording, or if the breach of the rules of natural justice is so severe or all-pervading that the remainder of the decision is tainted, the decision will not be enforced.

(f) In all cases where there is a decision on one dispute or difference, and the adjudicator acts, materially, in excess of jurisdiction or in breach of the rules of natural justice, the decision will not be enforced by the court.'

As to the availability of adjudication in such a 'mixed' position, the court's starting point was that it was not available. Indeed, that had been Ramsey J's position in *North Midland Construction*, where he stated:

> A narrow construction... will mean that the other parts of the work consisting of civil works would not fall within the exclusion. That this might happen is envisaged by s104(5) of the Act.
>
> 51. In such circumstances unless any dispute is limited to civil works, rather than being a more general dispute as to payment, delay or disruption of the works overall, *it will be impossible to apply, for instance, the adjudication provisions of the Act to only part of the dispute.* [Emphasis added.]

However, CB disagreed, contending that either the last sentence quoted from paragraph 51 was not correct, or, alternatively, it should be read as being consistent with s104(5), hence as not preventing the adjudication provisions from applying to the agreement in so far as it related to construction operations. CB referred to what HHJ Anthony Thornton QC called a 'statutory blue pencil exercise' in *Palmers Ltd v ABB Power Construction Ltd* [1999], ie making a division between what was and was not adjudicatable. A similar exercise was found to be permissible by Lord MacFadyen in *Homer Burgess Ltd v Chirex (Annan) Ltd* [1999].

Fence Gate Ltd v James R Knowles Ltd [2002] was another instance where the court held that s104(5) permitted adjudication in relation to construction operations. Further, in *Construction Adjudication* (OUP, 2007) Sir Peter Coulson refers to *Fence Gate* and Judge Gilliland's interpretation of s104(5) and comments:

> ... this seems a sensible and practicable interpretation of the Act and would appear to be the only way in which real effect can be given to section 104(5).

Given the above, Ramsey J concluded that it was Parliament's intention that a party could refer a dispute arising under the agreement, in so far as it related to construction operations. However, the court held that s104(5) did not permit the whole of a 'mixed' dispute to be referred.

Outcome

Having considered the facts of the case, Ramsey J concluded that there had been only one dispute referred to adjudication. He continued:

> I consider that the effect of section 104(5) was that the Adjudicator did not have jurisdiction to deal with the whole of the dispute referred to her but did have jurisdiction in relation to that part of the dispute which related to construction operations under the Subcontract.

And concluded that:

> It is necessary to consider the obligation of the parties in relation to a decision of an adjudicator. As set out in paragraph 23(2) of Part I of the [Scheme for Construction Contracts], the implied term which applies in respect of the decision of an adjudicator is as follows:
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> 'The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.'
>
> As a matter of interpretation of that statutory implied term I do not consider that, as suggested by [Peter Sheridan and Dominic Helps in 'Severability of adjudicators' decisions' [2004] 20 *Construction Law Journal* 71], that provision imposes an obligation on the parties to comply with the part of any decision, which was within the adjudicator's jurisdiction where part is made without jurisdiction. Neither do I consider that there can be a further implied term that the parties will comply with that part of a decision.
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> ... The whole of the decision is not enforceable and the contractual agreement to be bound by that decision does not apply. I do not think that in the context of the agreement to be bound by a temporary decision, the decision can be dissected to impose a separate and severable obligation to be bound by the adjudicator's decision on each of the component issues on which the adjudicator based that decision. Otherwise, the process of adjudication enforcement could be diverted into satellite litigation.

Hence the adjudicator's decision was not to be enforced.

Learning curve

The first lesson from this case relates to the narrow construction given to the exclusions from construction operations. If the employer is seeking to minimise the elements of the works (or at least the cost of those elements) that are subject to the Act, they could consider instructing the contractor, in the bills, to allocate more of its costs to those excluded operations.

However, although lumping sums together in this way may stymie the contractor, it has distinct disadvantages for the employer in analysing the tenders, so it may not be commercially viable.

Second, the referring party must consider the drafting of the adjudication notice carefully where there is a possibility that some of the contract may not qualify as construction operations. If the dispute referred to adjudication is limited to the part for which the adjudicator has jurisdiction there will be a valid adjudication and a valid decision. However, where there is a single but mixed dispute, the adjudication provisions cannot be applied to only part of that overall dispute. If that single but mixed dispute is adjudicated on (as here), then it will be irredeemably tainted and will not be able to be enforced in part. ■

ABB Zantingh Ltd v Zedal Building Services Ltd [2000] EWHC Technology 40

Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10

Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC)

Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture [2010] EWHC 1076 (TCC)

Fence Gate Ltd v James R Knowles Ltd (2002) 84 Con LR 206

Homer Burgess Ltd v Chirex (Annan) Ltd [1999] ScotCS 264

North Midland Construction plc v AE&E Lentjes UK Ltd [2009] EWHC 1371 (TCC)

Palmers Ltd v ABB Power Construction Ltd [1999] BLR 426