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CONSTRUCTION OPERATIONS

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INTRODUCTION

Under the HGCR Act, the payment and adjudication provisions, which are the usual subject matter of the Construction Act Review, are applicable to construction contracts, as defined in section 104. "Construction contract" is defined by reference to "construction operations", the subject of this edition of CAR.

Section 104

Section 104(1) of the HGCR Act provides that a construction contract means an agreement with a person for any of the following:

> "(a) the carrying out of construction operations;
>
> (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
>
> (c) providing his own labour, or the labour of others, for the carrying out of construction operations."

What are and what are not construction operations is governed by section 105, considered below.

An example of an agreement for arranging for the carrying out of construction operations by others would be an appointment of a consultant whose task it is to procure works. In *Gillies Ramsay Diamond,*[1] PJW entered into a standard form minor works building contract and appointed Gillies Ramsay Diamond ("Diamond") as contract administrator. The appointment of Diamond was a construction contract under section 104(1)(b), as it was an agreement under which Diamond would arrange for the carrying out of construction operations by others.

The appointment of Diamond was also an agreement under which Diamond would do surveying work in relation to construction operations, and was a construction contract under section 104(2), which relates to various professional services in connection with construction operations and provides:

> "References in this Part to a construction contract include an agreement-
>
> (a) to do architectural, design or surveying work, or
> (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,

[1] *Gillies Ramsay Diamond v PJW Enterprises Ltd* [2002] C.I.L.L. 1901–1903, OH.

> in relation to construction operations."

An appointment under which a consultant provided evidence of fact as a witness and assistance, as an architect or engineer, in the conduct of an arbitration, was not a contract for construction operations nor for work in connection with construction operations; it was a contract for work in connection with an arbitration.[2]

It is now well established that an adjudicator does not have jurisdiction over a dispute arising under an agreement or contract which is not a construction contract within the meaning of section 104(1) of the HGCR Act. As stated by Dyson J:

> "In that event, there is no right to refer the dispute for adjudication under section 108(1), since it is not a dispute falling within the scope of that sub-section. It is only a party to a construction contract who has the right to refer a dispute under the contract for adjudication. It is only such a contract that is required by sub-section (3) to provide that the decision of the adjudicator is binding until the dispute is finally determined."[3]

It remains possible, however, that the parties will incorporate adjudication or HGCR Act-based payment terms into contracts which are not construction contracts as defined under the HGCR Act, in which the terms apply as a matter of contract but not statute. This often happens, for example where a main contractor engages different sub-contractors, some for construction contracts as defined under the HGCR Act and some for other activities, on the same set of HGCR Act-compliant terms; or where a home owner engages a contractor on a JCT Minor Works form.[4]

It is possible for a contract to apply both to construction operations and to matters which are not construction operations. In that event, the HGCR Act applies only to that part of the contract which relates to construction operations.[5] There is no principle that a contract will be either entirely subject to the HGCR Act or not subject to it. Similarly, there is no principle that each contract in a chain of contracts will be uniformly subject to or not subject to the HGCR Act.[6]

In *Earls Terrace Properties Ltd v Waterloo Investments Ltd*, a construction contract, which was not subject to the HGCR Act, because it was made before the HGCR Act came into force, was varied by deed after the HGCR Act came into force. The later deed was not a construction contract; its only purpose was to vary the terms as to the fees payable to Waterloo for undertaking the services under the contract. The earlier

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[2] *Fence Gate Ltd v James R Knowles Ltd* [2001] C.I.L.L. 1757–1759; TCC 25/01 SF102200, TCC.

[3] *Project Consultancy Group v The Trustees of the Gray Trust* [1999] B.L.R. 377; (1999) 65 Con. L.R. 146; [1999] C.I.L.L. 1531–1534; [2000] 2 T.C.L.R 72, QBD (TCC), at para 6.

[4] The adjudication and payment provisions of the HGCR Act do not apply to a construction contract with a residential occupier: s. 106(1) of the HGCR Act.

[5] S.104(5) of the HGCR Act. Examples are provided by the *Comsite* and *Gibson Lea* cases considered below.

[6] See *e.g. Palmers Ltd v ABB Power Construction Ltd* [1999] B.L.R. 426; (1999) 68 Con. L.R. 52; [1999] C.I.L.L.1543–1546, TCC., discussed further below.

contract did not somehow become a construction contract which was subject to the HGCR Act by reason of the later deed.

Section 105

Whether a contract is or is not a construction contract is dealt with in section 105 of the HGCR Act and has, not surprisingly, given rise to a body of case law, usually where a party seeks to show that its contract is not for construction operations, in order to avoid the effects of an adjudicator's decision or purported decision. Before turning to a discussion of the structure and meaning of section 105 and the case law, the writer sets out below in full the statutory provision in section 105. It will be useful when considering the cases below to refer back to the wording of the statute.

THE STATUTORY DEFINITION

Section 105 of the HGCR Act is as follows.

> "105. (1) In this Part "construction operations" means, subject as follows, operations of any of the following descriptions
>
> (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
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> (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadways, power-lines, telecommunication apparatus, aircraft runways docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
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> (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation,[7] power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
>
> (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
>
> (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site

[7] For example, a sub-contract for mechanical and air conditioning works is a contract for construction operations: *William Oakley v Airclean Environmental Ltd* [2002] C.I.L.L. 1824-1827.

clearance, earthmoving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;

(f) painting or decorating the internal or external surfaces of any building or structure

(2) The following operations are not construction operations within the meaning of this Part –

(a) drilling for, or extraction of, oil or natural gas;

(b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose.

(c) assembly, installation or demolition of plant or machinery, or 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 –

(i) nuclear processing, power generation, or water or effluent treatment, or

(ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;

(d) manufacture or delivery to site of -

(i) building or engineering components or equipment

(ii) materials, plant or machinery, or

(iii) components for systems of heating, lightning, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems;

except under a contract which also provides for their installation;

(e) the making, installation, and repair of artistic works, being sculptures**,** murals and other works which are wholly artistic in nature.

(3) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1) or (2) as to the operations and work to be treated as construction operations for the purposes of this Part.

(4) No such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament."

The scheme of section 105

The scheme of this provision is to set out at section 105(1) operations which are construction operations, and then to set out at section 105(2) operations which are not construction operations. Often the operations described in section 105(2) would also come within section 105(1), which sets out some very broad descriptions. The overall effect is that section 105(2) is overriding, because of the "subject as follows" wording near the beginning of section 105(1). Judge Thornton has stated:

> "In considering the somewhat convoluted section 105 of the HGCRA, it is helpful first to notice one of its most important features. This is that there are some operations which fall within the definition, provided by section 105(1), and would therefore appear to be construction operations and yet are not such operations as a result of section 105(2) of the Act. This is because subsection 105(1) states, somewhat inelegantly, that subsection (1) applies "subject as follows", which, in its context, means that subsection (1) is to apply unless subsection (2) also applies. If subsection (2) applies, subsection (1) is not to apply. The inapplicability of subsection 105(1) arises in any particular case even though most, if not all, of the relevant operations described in subsection (2) also fall within one of the descriptions of relevant operations set out in subsection (1)."[8]

Judge Thornton also gave the following reasons for the scope of the excluded activities, such as the installation of power generation plant, at section 105(2):

> "…it is generally known that a limited number of contracting organisations representing specific sections of the construction and engineering industry persuaded the Government to exclude the contracts of their members from the ambit of the HGCRA. This was because these sections of the construction and engineering industry were already operating satisfactory contractual arrangements concerned with payment. This is the explanation for section 105(2) of the Act."[9]

WORKS FORMING PART OF THE LAND

In section 105(1)(a) and (b) there is reference to buildings, structures or works forming, or to form, part of the land and in section 105(1) (c) there is reference to fittings forming part of the land.

Fittings forming part of the land

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[8] *Palmers Ltd v ABB Power Construction Ltd*, above.

[9] *Palmers Ltd v ABB Power Construction Ltd*, above, at para 29.

Fittings forming part of the land were considered in *Gibson Lea Retail Interiors Ltd v Makro Self Service Wholesalers Ltd*.[10] Makro employed Gibson Lea to undertake the supply and installation of shop fittings in four stores (pursuant to separate contracts). Disputes arose which Gibson Lea referred to adjudication. Makro took the point that the works were not construction operations for the purposes of the HGCR Act; Gibson Lea sought a declaration that they were and summary judgment in respect of such declaration. The issue was whether Gibson Lea's works were installation of fittings forming part of the land; if so, they were construction operations as provided in section 105(1)(c). It was clear that some of Gibson Lea's works were the installation of fittings and the issue in respect of those was whether they formed part of the land; some of the items for supply were plainly chattels which were not intended to be fixed to anything, *e.g.* stools and mobile bread and cake stands and they clearly were not construction operations.

Judge Seymour found, quite correctly, it is submitted, that the intention of Parliament was to introduce into the HGCR Act the existing law as to fixtures, that the wording was not ambiguous or obscure and that it was accordingly not permissible to seek assistance from Hansard as to Parliament's intention. Judge Seymour held that "fittings forming part of the land" meant fixtures. He seemed to accept Makro's counsel's submissions of the meaning of fixtures, which were as follows:

(1) in the law of real property it is not enough to constitute a chattel a fixture that it is secured to the structure of a building, *e.g.* carpets are not fixtures;[11]

(2) the test of whether a chattel had become a fixture or not was in part the degree of annexation so that, for example, an article which rested on its own weight was not normally considered to be a fixture, but principally the purpose of any annexation which had taken place;

(3) if the purpose of any annexation was the better use or enjoyment of the chattel as a chattel, it was not normally to be considered as a fixture.

On the evidence as to the facts before him, the judge found that none of the items supplied by Gibson Lea were, as and in so far as installed, fixtures. It followed that the works done by Gibson Lea were not "construction operations" and the relevant contracts were not "construction contracts".

The judge further stated that Gibson Lea would have failed to obtain the declaration sought even if he had decided that some of the works under the contracts were construction operations and others were not. Under section 104(5), where an agreement relates to construction operations and other matters, the HGCR Act applies to the agreement only so far as it relates to construction operations. The declaration sought was in terms that the works forming the subject of the contracts were construction operations and was therefore in terms that were too broad to be

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[10] *Gibson Lea Retail Interiors Ltd v Makro Self Service Wholesalers Ltd* [2001] B.L.R. 407, QBD (TCC).

[11] *Lyon v London City and Midland Bank* [1903] 2 K.B. 135, CA; *Horwich v Symond* (1915) 84 LJKB 1083, CA.

granted even if the judge had found, which he did not, that some of the works were construction operations.

The writer has not gone into the facts of the case, which are not of general interest. The test for fittings forming part of the land will have to be applied to the facts of each case individually to yield the correct answer.

Systems installed in buildings

Agreements for not only the installation but also the maintenance and servicing of systems in a building such as heating, ventilation and air conditioning are agreements for construction operations. In *Nottingham Community Housing Association Ltd v Powerminster Ltd*,[12] Nottingham engaged Powerminster under a one-year contract, which provided that Powerminster would carry out an annual service on each gas appliance in Nottingham's properties, and supply a responsive repair and breakdown service. The gas appliances to be serviced and maintained comprised gas central heating systems, gas fires and gas cookers. Powerminster gave notice of adjudication in respect of non-payment of invoices; Nottingham sought a declaration that the contract was not a "construction contract" within the meaning of the HGCR Act.

Dyson J found that the maintenance and repair of heating systems that have been installed in a building are operations falling within section 105(1)(a), *i.e.* the contract was for maintenance or repair of buildings or structures forming, or forming part of, the land. Heating systems, like any other part of a building, once installed, become part of the building and part of the land. An argument on behalf of Nottingham, that section 105(1)(c) indicated that it is only the installation (not repair or maintenance) of heating systems that are construction operations, was rejected. It was clear from section 105(1)(a) that the operations in question were construction operations; there was no need to look to section105(1)(c) to shed light on what was meant by section 105(1)(a). The argument that on this view section 105(1)(c) was redundant did not assist Nottingham: arguments based on redundancy are seldom secure, as recently counselled by Lord Hoffman in at least two cases.[13]

Works founded in sea bed

Staveley Industries plc v Odebrecht Oil & Gas Services Ltd[14]related to works including installation in a structure founded in the sea bed rather than on *terra firma*. These works were held not to be construction operations under section 105(1) of the HGCR Act.

Odebrecht was sub-contractor to Staveley under four sub-contracts providing for the design, engineering, procurement, supply, delivery to site, installation, testing and commissioning of instrumentation, fire and gas, electrical and telecommunications equipment. The equipment was for installation in steel structures, called modules,

[12] [2000] B.L.R 759; (2000) 16 Const. L.J. 499, QBD (TCC).
[13] *Walker (Inspector of Taxes) v Centaur Clothes Group Ltd* [2000] 2 All E.R. 689; *Beaufort Developments Ltd v Gilbert-Ash Ltd* [1999] A.C. 266, HL.
[14] *Staveley Industries Plc v Odebrecht Oil & Gas Services Ltd* (2001) 98(10) L.S.G. 46, TCC.

constructed in a yard adjacent to the river Tees. The modules were to be towed on barges to the Gulf of Mexico, where they would form living quarters at an oil or gas rig, after being welded onto platforms supported by legs founded in the sea bed.

The issue was whether the sub-contracts fell within section 105(1)(a) or section 105(1)(c), or whether neither applied. The answer to this question turned on the meaning of "forming part of the land", which appears in both sub-sections. The judge accepted that the inclusion of an operation within one sub-paragraph did not preclude its inclusion in the other. He was not satisfied that the sub-contract works in question fell within section 105(1)(a).

It was common ground that the works were of a kind described in section 105(1)(c), but the question was whether they formed part of the land. The judge found that they did not, the *ratio* apparently being the following passage:

> "In support of his third point, Mr Furst relied on the case of *Argyll & Bute D.C. v Secretary of State for Scotland*,[15] a decision of the Second Division of the Court of Session. That case involved the construction of the Town and Country Planning (Scotland) Act 1972. "Land" was defined in section 275 of that Act, and the relevant part of the definition was that "land" included land covered with water. The relevant part of that definition contained in the Interpretation Act 1978 is the same, and applies to the Act unless the contrary intention appears. Counsel in *Argyll* argued that the sea bed was not land. Lord Wheatley, with whom Lord Leechman and Lord Thomson concurred, accepted the argument of counsel, observing that the basic distinction between land and sea still existed, and the inclusion of land covered with water in the definition of "land" was habile to include the seashore which, according to the tides, might or might not be covered by water. But that area was confined to tidal land.
>
> None of the foregoing arguments in my judgment are conclusive. I have to consider them in the light of such intention of Parliament as may be deduced from the provisions of the Act and the mischiefs against which the Act was directed was the inclusion of 'pay when paid' clauses in subcontracts. The subcontracts in question contained such clauses. In my judgment, that submission carries the matter no further. The relevant provisions of the Act are undoubtedly confined to construction contracts as defined. It is perfectly clear that they do not extend to shipbuilding. If the platforms were to be floating platforms, the Act would certainly not apply. The distinction between a floating platform and a platform founded in the sea bed appears to be irrelevant to any intention of Parliament, and any differential application of the Act arising out of it would appear to be accidental. Moreover, it is common ground that the provisions of section 105(1) are derived from section 567(2) of the Income and Corporation Taxes Act 1988. The provision corresponding to section 105(1)(a) of the Act is section 567(2)(a). Where section 567(2)(a) has "structures (whether permanent or not), including offshore installations section 105(1)(a) has "structures forming, or to form, part of the land (whether permanent or not)". That suggests an intention to exclude offshore

[15] [1976] S.C. 248.

> installations from the ambit of the Act, or at least the absence of any intention to include them.
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> In the light of those considerations, I conclude that the structures which are, or are to be, founded in the sea bed below low water mark are not structures forming, or to form, part of the land.
>
> Accordingly, I declare that the Act does not apply to the subcontracts in question."

Thus, an offshore structure, founded in the sea bed, does not form part of the land. Different considerations will apply, it is submitted, where the works are not offshore but are built from and/or abutting the shoreline, or linked to it. It is clear from section 105(1)(b) that docks, harbours and coastal protection works may normally form part of the land and the same will apply, it is submitted, to piers, jetties, mooring or berthing dolphins and other like structures which abut and/or are linked to the shoreline.

SUPPLY OF GOODS

A contract for the supply of goods only is not a construction contract within the meaning of the HGCR Act, even if the goods are building or engineering components delivered to a site where construction operations are being undertaken. A contract for the supply of such goods and for the installation of the goods is a construction contract.[16] As stated by Dyson J:

> "The purpose of section 105(2)(d) is to exclude from "construction operations" the simple manufacture of components, except under a contract which also provides for their installation. This is necessary because the Act is aimed at construction operations, and not mere contracts for the supply of goods."[17]

In *Millers Specialist Joinery*,[18] the claimant provided goods and joinery services to the defendant. Judge Gilliland found that the works agreed to be carried out were works of repair and/or alteration and/or decoration. The claimant was not only supplying materials but was also installing the joinery items. Accordingly the exception in section 105(2)(d) did not apply.

PLANT/MACHINERY: PROCESS AND POWER CONTRACTS

There has been considerable litigation in relation to section 105(2)(c), under which various operations, including for example installation of process plant, are not construction operations.

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[16] S. 105(2)(d) of the HGCR Act.
[17] *Nottingham Community Housing Association Ltd v Powerminster Ltd*, above, at para 20.

[18] *Millers Specialist Joinery Co Ltd v Nobles Construction* [2001] C.I.L.L. 1770–1773; No.103553, Salford CC (TCC) 64/00.

Meaning of "plant"

Pipework linking pieces of machinery and equipment forming plant, to enable the plant to operate, is itself part of the plant; a contract for installation of such pipework to plant which is itself covered by section 105(2)(c) is accordingly not a contract for construction operations.[19] The same principle applies to cabling linking pieces of machinery or worked into a piece of plant.[20] Similarly, installation of cladding insulation to plant, where the cladding is necessary for the plant to continue to operate, is installation of plant; again, a contract for such installation will not be a contract for construction operations, if the installation of the plant itself is not a construction operation.[21]

Homer Burgess Ltd v Chirex (Annan) Ltd

Homer Burgess entered into a contract with and undertook work for Chirex. A dispute arose, which Homer Burgess referred to adjudication; an adjudicator made a decision in Homer Burgess's favour, which it sought to enforce. The issue was whether the adjudicator had jurisdiction, which turned on whether the works were within the exception in section 105(2)(c)(ii) and were accordingly not construction operations.

The adjudicator had found that the works were construction operations. The practical issue before him was whether "plant" in section 105(2)(c) included or did not include pipework linking various pieces of equipment; he found that it did not. In an exemplary judgment, Lord Macfadyen found that it did and accordingly the adjudicator did not have jurisdiction.

The adjudicator had made a number of errors, including disregarding the authorities referred to him on the meaning of "plant", which he considered irrelevant because they were tax cases and were decided before the HGCR Act. Lord Macfadyen stated:

> "What he failed to recognise, however, was that the authorities cited to him were not concerned with giving "plant" some special meaning applicable in the esoteric context of tax law, but were concerned to identify and explain the ordinary meaning of the word. That the cases are concerned with the ordinary meaning of the word is expressly stated by Lord Reid in *Hinton v Maden and Ireland Ltd*[22] at 889. The other ground on which the adjudicator declined to rely on the authorities, namely that they were decided before the 1996 Act was enacted, is also in my view misconceived. On the contrary, the fact that the word had been authoritatively construed in a long line of cases before the 1996 Act was passed yields an inference, in my view, that in using

[19] *Homer Burgess Ltd v Chirex (Annan) Ltd* [2000] B.L.R. 124; (2000) 71 Con. L.R. 245; (2000) 16 Const. L.J. 242; [2000] C.I.L.L. 1580–1583, OH.
[20] *ABB Zantingh Ltd v Zedal Building Services Ltd* [2001] B.L.R. 66; (2001) 17 Const. L.J. 255, HC (TCC).
[21] *ABB Power Construction Ltd v Norwest Holst Engineering Ltd* [2000] T.C.L.R. 831; (2001) 17 Const. L.J. 246, QBD (TCC).
[22] [1959] 1 W.L.R. 875, HL.

> the same language in that Act without giving the word any special definition, Parliament intended that it should be given its established meaning."

The judge also stated (quite correctly, it is respectfully submitted) that the meaning of "plant" in section 105(2)(c) is not ambiguous or obscure and, on the *Pepper v Hart* principles, it is not permissible to have regard to Hansard (as the adjudicator had done). The adjudicator had also had recourse to his own experience, but may have treated "plant or machinery" as if the two words were synonymous. Lord Macfadyen stated:

> "Having regard to the general description of the pipework in question as forming the links between various pieces of machinery or equipment, by which ingredients and pharmaceuticals in process of manufacture are conveyed from one stage of the manufacturing process to another, I am of opinion that the pipework was clearly part of the plant being assembled or installed on the defenders' site. Without such pipework, the individual pieces of machinery or equipment would be unable to operate. The pipework is in a real sense part of the apparatus which, once it was installed, the defenders were going to use in order to carry on their business of manufacturing pharmaceuticals. The installation of the pipework was in my opinion an operation which fell within the scope of the exception in section 105(2)(c)(ii), and was accordingly not a construction operation. The disputes relating to that work were therefore not disputes on which the adjudicator had power to make a decision."

ABB Zantingh Ltd v Zedal Building Services Ltd

A similar approach was taken on the meaning of "plant" to that in the *Homer Burgess* case.

Mirror Colour Print Group (MCP) operated a printing business at two sites and decided to build on the two sites two electricity generation stations to provide standby power if needed. MCP contracted with Scottish and Southern Energy plc (SSE) for the construction of the generation sites; SSE sub-contracted to ABB the design, build and maintenance of the power generation sites; ABB entered into a sub-sub-contract with Zedal for the supply, installation, labelling, termination and testing of all field wiring including the supply and installation of certain metal containment systems and secondary steel support.

The issue was again whether the sub-contract came within section 105(2)(c), with ABB again arguing that an adjudicator (appointed at Zedal's instigation) did not have jurisdiction, on the basis that the sub-sub-contract was for "assembly [or] installation…of plant…on a site where the primary activity is…power generation". The adjudicator had sensibly adjourned the adjudication pending the decision of the court on the declaration sought by ABB.

Judge Bowsher found that the sub-sub-contract was for installation of plant, stating:

> "Mr Malcolm Evans in his witness statement on behalf of Zedal said that cables, cable trays and cable ladders are not referred to as plant within the

> electricity construction industry. Clearly, one does not want to have lawyers' language about these things that differs from the language of the man on the shop floor. But there is a difference between a drum of cable on the floor and the same cable worked into a piece of plant, or even joining one piece of plant with another. The drum of cable on the floor is just a piece of material. When the cable is worked into the plant or even joins two pieces of plant it becomes part of the plant and is properly referred to as plant. Similarly, a screw is just a screw when it is in the engineer's pocket, but it becomes part of the plant when he screws it into the generator. In keeping with the sense of the earlier authorities to which I have referred, it seems to me 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. Adjudication cannot be divided in its jurisdiction between minute parts of a sub-contractor's work. Looking at the work overall, and regardless of any disputes about the ambit or nature of that work, I have no doubt that Zedal were employed to install plant. The exception provided by section 105(2)(d) itself suggests that cables, cable trays and cable ladders may become plant when installed. The manufacture and delivery to site of such items for power supply are excepted from the operation of the Act "except under a contract which also provides for their installation". In conformity with the decisions in *Homer Burgess v Chirex* and *ABB Power v Norwest Holst* (paragraph 15) and for the reasons there stated, I find that the materials used by Zedal became plant."[23]

ABB Power Construction Ltd v Norwest Holst Engineering Ltd [24]

ABB had been engaged to build three heat recovery steam generators as part of a project to extend an existing power station. ABB placed an order with Norwest Holst for the fabrication and delivery of cladding material, and for installation of the material as insulation for pipework and other parts of the plant.

A dispute arose, which was referred to adjudication by Norwest Holst; ABB challenged the jurisdiction of the adjudicator. The issue was whether the contract between ABB and Norwest Holst was for construction operations; ABB's case was that it was not and accordingly the adjudicator did not have jurisdiction. The parties came before the court on a consensual basis to have the jurisdictional issue decided finally and correctly by way of a declaration, rather than Norwest Holst first proceeding with the adjudication.

Judge Lloyd held that the contract between ABB and Norwest Holst came within section 105(2)(c). Section 105(2) sets out operations which are not construction operations under the HGCR Act, so the decision was that the ABB/ Norwest Holst was not a construction contract for the purposes of the HGCR Act and the adjudicator did not have jurisdiction.

The judge also considered the possibility that there were two contracts between ABB and Norwest Holst, one for fabrication and delivery and the other for installation. If there were a separate fabrication and delivery contract, it was not a construction

[23] *ABB* Zantingh, above, at para 27.
[24]

contract either, as it fell within section 105(2(d)(i) or (ii); the insulation or cladding was an "engineering component" and was certainly "materials".

Primary activity of the site

The ABB cases already mentioned above dealt with the section 105(2)(c) reference to operations "on a site where the primary activity is" the matters set out at section 105(2)(c)(i) - (ii). In *Palmers Ltd v ABB Power Construction Ltd*,[25] ABB was sub-sub-contractor to Stork. ABB's works were the assembly and erection of a heat recovery steam generator boiler and fell within the ambit of section 105(2)(c), since the boiler was for use on a site whose primary activity was power generation.

In *ABB Zantingh*,[26] the central issue was whether the installation of plant was on a site where the primary activity was power generation. Judge Bowsher found that the site meant the whole area occupied by MCP, not an area within that site where there was a generator surrounded by a security fence.[27] The primary activity on the wider site was printing, not power generation. The adjudicator accordingly had jurisdiction and ABB did not succeed in obtaining a declaration to the contrary. If the site had the narrow meaning contended for by ABB, then any generator surrounded by a security fence on any site would be a site in its own right and *ex hypothesi* the only activity of such a site would be power generation. Such a narrow meaning was clearly not what Parliament intended when referring to the site's primary purpose.

In *ABB/Norwest Holst*, it was held on the facts that a contract for installation of cladding to plant was a contract for "assembly [or] installation…of plant" under section 105(2)(c), "on a site where the primary activity is…power generation". The reason that installation of cladding insulation to plant was equated with installation of plant itself was that the insulation was necessary for the plant to continue to operate and for the process to be safe, workable and efficient.

It was argued that it could not be said that the primary activity "is" power generation at the time of the installation; power generation would in the future become the primary activity. This argument was rejected; the word "is" did not indicate that the site had a primary activity other than power generation during the course of the construction works. This approach was endorsed in the *Conor* case, in which Judge Blunt stated that "is" in this provision means "is, or will be".[28]

In *Mitsui Babcock Energy Services Ltd*,[29] Mitsui Babcock contracted for works involving assembly on site of equipment and piping into two mechanically complete boiler plants within a partially completed structure, which would be completed by others after Mitsui Babcock's works. The boilers were to be located on two vacant

[25] Above; also discussed in more detail below.
[26] Above.
[27] This approach was also taken in the *Conor* case, considered below.

[28] *Conor Engineering Ltd v Les Constructions Industrielles de la Méditerranée SA* [2004] B.L.R. 212.

[29] *Mitsui Babcock Energy Services Ltd v Foster Wheeler Energier OY* 2001 S.L.T. 1158; P780/0, OH.

pieces of land within a petrochemical complex. The issue was whether the assembly and installation of the boilers were on a site where the primary activity was the production or processing of chemicals, pharmaceuticals, oil or gas. If so, Mitsui Babcock's works would fall within section 105(2)(c) and would accordingly not be construction operations. An adjudicator had declined adjudication on the grounds that section 105(2)(c) was indeed applicable.

Section 105(2)(c) uses the expression "where the primary activity is", in the present tense. Solicitors for Mitsui Babcock argued that it is irrelevant to consider the ultimate use of the site, apparently on the basis that the use of the present tense indicates that regard is to be had to the use of the site at present and not in the future. Counsel for Mitsui Babcock conceded the solicitors' opinion was no longer tenable in the light of *ABB Power Construction Ltd v Norwest Holst Engineering Ltd*.[30] Lord Hardie stated the concession was properly made and that he would have reached the same conclusion as Judge Lloyd for the reasons given by him.[31]

Lord Hardie also agreed with Judge Lloyd's approach in respect of section 105(2)(c), citing with approval the following statements:

> "Mr Blackburn submitted that section 105(2) should be read as a whole. I agree. It must also be read in the context of sections 104 and 105(1). In my judgment section 105(2) when compared with section 105(1) therefore shows that it was the intention of Parliament that exemption should be given by applying an additional and different test: was the object of the 'construction operation' to further the activities described in section 105(2)(c)…since in those industries or commercial activities it was not thought necessary that at any level there need be a right to adjudicate or to payment as provided by the Act."[32]

> "The object of this subsection [section 105(2)] is therefore that all the construction operations necessary to achieve the aims or purposes of the owner or of the principal contractors, as described in it, would be exempt. If these approaches are correct then an interpretation should be given to section 105(2) which would further and not thwart them."[33]

Adopting that approach to the facts, Lord Hardie found it clear that the installation of the boilers was to further the primary activity of the processing of chemicals and oil on the petrochemical complex. The adjudicator had been correct to decline jurisdiction.

In the *Conor* case, the issue was whether operations being undertaken by Conor's sub-contractor were being carried out on a site where the primary activity was power generation. Judge Blunt stated that what is the primary activity at a particular site is a question of fact. The sub-contractor was undertaking boiler and pipe works in connection with Conor's main contract obligations to design, build and deliver a plant for the incineration of waste and the generation of activity. The judge found on the facts that the prime purpose of the plant was the incineration of waste and that was

[30] Above.
[31] See above.
[32] *ABB Power Construction Ltd v Norwest Holst Engineering Ltd*, above, at para 13.
[33] *ABB Power Construction Ltd v Norwest Holst Engineering Ltd*, above, at para 14.

the principal physical activity at the site. The plant had been developed principally as a means of finding alternatives to landfill sites and the generation of electricity was simply a spin-off from the incineration process.

CHAIN OF CONTRACTS

In *Palmers Ltd v ABB Power Construction Ltd*, ABB was, as noted above, sub-sub-contractor to Stork for the assembly and erection of a heat recovery steam generator boiler, part of the plant on a power generation project. In common with other contractors on the project, ABB was required to and did engage Palmers, as its sub-sub-sub-contractor, for all of its scaffolding needs. Disputes arose between Palmers and ABB and the issue arose whether Palmers was entitled to seek statutory adjudication. It was accordingly in issue whether the sub-sub-sub-contract was a construction contract, for construction operations, as defined by the HGCR Act.

It was clear and it was common ground that ABB's own sub-sub-contract works for Stork, the assembly and erection of a heat recovery steam generator boiler, fell within the ambit of section 105(2)(c), since the boiler was for use on a site whose primary activity was power generation. That sub-sub-contract was accordingly not a construction contract as defined in the HGCR Act. However, it remained open to the judge to find, as he did, that ABB's sub-sub-sub-contract with Palmers was a construction contract within the meaning of the HGCR Act. He specifically rejected the notion that the position had to be the same for both contracts in the sub-contract chain.[34]

The judge's analysis included a consideration of the words in section 105(1)(e): "operations which form an integral part of, or are preparatory to, or are for rendering compete, such operations as are previously described in this subsection…" The judge found that ABB's work was encompassed by section 105(1)(b); but also, as stated and in accordance with the overriding effect of section 105(2) as explained above, he found that it fell within section 105(2) and so, more importantly, it was not a construction operation.

Palmers' scaffolding work was preparatory to ABB's work and accordingly it would seem would clearly come within section 105(1) and be subject to the provisions of the HGCR Act. But ABB argued:

> "that "previously described in this subsection" is a reference to those operations previously described which are not, additionally, included in subsection (2) since, so it was argued, such operations are not "previously described in this subsection". Instead, they are operations which are subsequently described in subsection (2)."

This seemingly hopeless argument was carefully considered by the judge before being rejected; the judge followed two alternative routes. His first route was to consider the statutory context of the wording. One aspect of this was the intention to speed up cash flow and to curb unnecessary set-offs; a second was the removal from the ambit of the HGCR Act certain activities, as noted above. On the wording

[34] *Palmers Ltd v ABB Power Construction Ltd*, above, at para 29.

itself, the judge found that the more natural meaning of the relevant words is that section 105(1)(e) is not incorporating the exclusions provided by sub-section 105(2).

The judge's second route was that there was some ambiguity in the wording of section 105(1)(e). In considering the principles of *Pepper v Hart*,[35] the judge found that the test was that he should exclude parliamentary materials only if he was sure there was no ambiguity. The judge accordingly had regard to passages in Hansard, which he concluded also led to the same conclusion, *i.e.* that Palmers' scaffolding work was a construction operation and subject to the provisions of the HGCR Act.[36]

SOME OPERATIONS CONSTRUCTION OPERATIONS, SOME NOT

In *Comsite Projects Ltd*,[37] Comsite was sub-contractor to the defendant, AAG. AAG was itself a sub-contractor, whose own works were the installation of dryer plant and building services to the dryer building at a waste water treatment works and sewage sludge recycling centre. Waste water sludge could be dried and sold as fertiliser. AAG placed two packages of work with Comsite, by two sub-contracts. The first was for electrical works related to the dryer plant but it was only the second of these sub-contracts that concerned the court. That second sub-contract was for the installation of building services to the dryer building.

The dryer building was a large building housing the dryer plant. The building services sub-contract included the installation by Comsite of lighting, emergency lighting, small power distribution, power to roller doors, containment, fire and gas alarm systems, heating and ventilation and the building management system.

Comsite sought a declaration that its sub-contract works fell within the definition of "construction operations" set out in section 105(1) of the HGCR Act. AAG's case was that the works fell within section 105(2)(c)(i) and were accordingly not "construction operations".

Judge Kirkham summarised the parties' positions as follows:

> "Comsite's case is that the work…did not amount to installation of plant, within section 105, because the installation of the services to be undertaken pursuant to that sub-contract was not connected with the dryer plant but was related to the building. AAG's case essentially is that the work was integral to the plant by reason of the unchallenged evidence of Herr Umdasch that, without the lighting and the fire and gas alarms, the dryer plant could not be run because Southern Water would be prohibited by statute from running it."[38]

The judge found that the drawings showed that the electrical services related to the building and not to the plant, and that the services Comsite were to install were physically integral to the building but not integral to the plant. There was no reason to suppose that the dryer plant was not capable of operating without any of the services to be installed by Comsite. On this site, where work to the plant and to the

[35] [1993] A.C. 593.
[36] *Palmers Ltd v ABB Power Construction Ltd*, above, at paras 40-42.
[37] *Comsite Projects Ltd v Andritz AG* [2003] EWHC 958 (TCC).
[38] *Comsite Projects Ltd v Andritz AG*, above, at para 29.

building were both to be undertaken, some operations would be construction operations and some would not. Comsite's works to the building were construction operations.

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