Gibson Lea Retail Interiors Ltd v Makro Ltd [2001]Adj.L.R. 07/24

JUDGMENT : His Honour Judge Richard Seymour Q.C. : 24th July 2001 TCC.

1. **Introduction :** The Claimant, Gibson Lea Retail Interiors Ltd. ("Gibson Lea"), carries on business as a supplier and installer of shopfittings. The Defendant, Makro Self Service Wholesalers Ltd. ("Makro"), carries on business as a cash and carry wholesaler, operating some 27 stores in various parts of the United Kingdom.

2. Makro employed Gibson Lea to undertake the supply and installation of shopfittings in four stores. The work in connection with each store was the subject of a separate contract. The contract in each case was formed by the acceptance by Makro by an order dated 15 January 2001 of a quotation dated 11 January 2001 submitted by Gibson Lea. The acceptances, said in a witness statement of Mr. Keith Wells, on behalf of Gibson Lea, to have been sent under cover of a facsimile transmission dated 15 January 2001, were not put in evidence by him, but were exhibited to the witness statement of Mr. John Murphy made on behalf of Makro. The four quotations each dated 11 January 2001 were exhibited to Mr. Wells' first witness statement. Each quotation contained a description of the items to which it related. The items to be provided at Makro's Enfield and Leicester stores were of the same kinds, although the precise numbers and sizes of the items were different. The items to be provided at Makro's Cardiff and Croydon stores were of the same kinds, those being items included in the types of items to be provided at the Enfield and Leicester stores, but some sorts of items required for the Enfield and Leicester stores were not required at the Cardiff and Croydon stores. As between the numbers and sizes of items to be provided at the Cardiff and Croydon stores there was some variation. For the purposes of this judgment it is sufficient to set out the descriptions of items listed in the quotation relating to Makro's Enfield store and then to indicate which kinds of item required for Enfield were not required for Cardiff or Croydon.

3. The items to be supplied at the Enfield store were described in Gibson Lea's quotation numbered 010006 dated 11 January 2001 as follows:-

"1.01 Storebest [which, according to the witness statement of Mr. Murphy, is the name of the German manufacturer of the equipment] wall sales bay components to make up difference between proposed and reusable existing equipment.

1.02 Storebest outrigger components to make up difference between proposed and reusable existing equipment, including gondola within.

1.03 Corner and column boxings, linings to wall sales areas, electrics cupboards and all site fixings.

1.04 1 No. New jewellery island complex.

1.05 Low level outrigger pallet plinths 42 No. bays all new equipment.

1.06 6 No. Adjacent changing cubicles built as 1 No. run.

1.07 Business to Business counter refurbishment only,..

1.08 6 No. stools + mirrors

1.09 Main full height double sided fashion gondolas 276 No. bays including pelmet, lighting and top hanging. Inclusive of 23 No. half gondola ends.

1.10 Extra items to the above fashion gondolas –

140 No. Corner protectors (4 per run).

46 No. Graphic end frames.

320 No. footwear shelves.

1.11 1 No. 5 bay cycle display.

1.12 Accessories Provisional Sum, actual quantities unknown, none allowed for existing GWS equipment.

1.13 2 No. Book plinths.

1.14 2 No. 5 Bay book gondolas to latest legend detail.

1.15 19 No. Mobile bread + cakes stands.

1.16 1 No. 9 Bay static bread + cakes stand.

1.17 3 No. 7 bay double sided fruit and vegetable gondolas, including 18 No. wall signs.

1.18 1 No. Hortico island Provisional Sum actual bay types and quantities unknown.

1.19 2 No. sets of white goods ends including central panels.

1.20 Items treated as variations on previous contracts, now understood to be standard and allowed in main quotation. Items include –

1 No. Spice Unit. 3 No. Freezer Bag Stands. 1 No. Temporary Checkout.

2 No. 2 Mtr. Egg Units. 1 No. Camera Display.

1.21 1 No. 7 Bay luggage plinth.

1.22 Storebest gondola base + 4 28 bays of food racking for Toiletries and reverse run.

1.23 Skips on site for clearance items. Deliveries to site. Trailers on site for storage. Pallets for site installation…

1.24 Contingency sum for Storebest back panels and shelving to replace any damaged existing equipment. "

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Items of the type described at 1.04, 1.06, 1.08, 1.09, 1.10, 1.11 and 1.21 were not required at the Cardiff or Croydon stores.

4. The description of items in the various quotations dated 11 January 2001 is to a degree self-explanatory. However, Mr. Wells did, in his first witness statement, provide some elaboration. Again, I can treat the elaboration in relation to the items for Enfield as typical, although the explanation did vary a little as between the different stores. About the Enfield items Mr. Wells said:-

*"**Paragraphs 1.01 and 1.03** These paragraphs refer to the supply by Gibson Lea of store best equipment/materials as wall sales. The wall equipment/gondolas were fixed by screws to timber fixing plates that were themselves either wall bolted or screw fixed to the structure/interior walls of the building.*

Gibson Lea also manufactured, supplied and installed corner boxing and column cladding which were fixed by screw fixings directly to timber framing which was itself fixed directly to the structure…

***Paragraphs [sic] 1.09** This paragraph refers to the supply and installation by Gibson Lea of numerous fashion double sided gondolas. These are of a different design from the general outrigger equipment used and require protecting from trolleys, etc. The gondolas are fixed to the floor by the fixing of corner protectors after they are positioned in the correct location.*

The gondolas numbered 22 to 65 inclusive on Gibson Lea's drawing dated 13th December 2001 [sic] …were of a light weight construction. Gibson Lea was therefore required to install/fix them to the floor area by surrounding them with corner protection plates made with 3 mm steel and secured to the floor with 2 mm diameter bolts. To move the gondolas numbered 22 to 65 inclusive, it was necessary to remove the screws and cover plates from the floor.

These gondolas were also fitted with illuminated pelmets that were wired by Gibson Lea into the main electrical circuits of the building.

***Paragraphs 1.04 and 1.07** These paragraphs refer to the manufacture, supply and installation by Gibson Lea of new jewellery and business to business counter islands… Gibson Lea was required to pre-wire the counters and to plug them together. Once they were installed, the counter islands could not be removed without disconnecting and reconnecting the electrics..*

***Paragraph 1.17** The nature of the design and weight of these gondolas meant that it was necessary for Gibson Lea to bolt them to the floor by a base plate to ensure they did not move. The gondolas comprised of 3 frames with canopies into and out of which the pallets could be rolled…*

Gibson Lea was also required to manufacture, supply and install various single sided gondolas described on its drawing dated 13th December 2000 as Sports Equipment/Storage/Film/Blank Tape. By the nature of the design of these gondolas and the weight of the equipment, it was necessary for Gibson Lea to bolt them to the floor by base plates. "

Mr. Wells also explained that variations to the works at Enfield included a requirement that Gibson Lea demolish a tobacco kiosk.

5. Mr. Murphy in his witness statement emphasized that equipment manufactured by Storebest

"is of modular design, which can be moved very easily and quickly."

At paragraph 5 of his witness statement he said:-

"..it is often necessary to change the layouts of our stores to respond to the needs of our customers and also to implement strategic changes in our business. In this context I wish to stress the moveable nature of the equipment supplied by Gibson Lea. It is an important characteristic of the product itself. The location in which each piece of equipment is first positioned is merely that which is suitable at that moment in time when the supply is made. As goods come and go and seasons change, the layout of the equipment can be and is altered. In altering the layout of the equipment, the equipment has in the past simply been moved on some occasions and on other occasions the equipment has been dismantled and moved."

Mr. Wells made a second witness statement in which he commented upon some of the matters put forward by Mr. Murphy in his witness statement, but Mr. Wells did not comment upon what Mr. Murphy said in the passage quoted above in this paragraph.

6. At paragraph 7 of his witness statement Mr.Murphy said:-
"Gondolas are fixed to walls only to ensure that they are stable and not to ensure that they cannot be removed. It might be that a decision is made to remove a row of wall gondolas to store major items such as garden furniture in its place. Gondolas are simply the L-shaped racking structures with the short part of the L being located on the ground. Each bay is a separate gondola…If gondolas are to be placed in the middle of the store and not next to a wall, the gondolas are placed back to back and by the use of supports between the gondolas themselves, the gondolas support each other. Gondolas which are placed back to back are not fixed in any way to the floor. They simply stand on the floor just as a desk or a free standing cupboard would do. ..Gondolas have base feet…The feet just sit on the ground."

   Mr. Wells did comment on that paragraph in his second witness statement. What he said was:- "Mr. Murphy states in paragraph 7 that gondolas are fixed to walls to ensure that they are stable, and not to ensure that they cannot be removed. In the event that Makro decided to remove or re-site the wall sales, the operatives would first have to dismantle the gondolas to expose the wall columns. To remove the wall columns they would have to be unscrewed from the wall plate. To further remove the wall plate would require removing raw bolts and then making good the structure of the building."

   Thus Mr. Wells did not dispute that the purpose of fixing gondolas, or wall sales, as one-sided gondolas seem sometimes to be called, to walls was simply to ensure that they were stable.

7. Commenting on the elaboration by Mr. Wells of the equipment supplied to the Enfield store, Mr. Murphy accepted the accuracy of what was said about paragraphs 1.01 and 1.03, about paragraphs 1.04 and 1.07, and about paragraph 1.17 insofar as it related to fruit and vegetable gondolas, although he did point out that the jewellery island and the business to business counter islands, which he explained were used for small, high value items, were free-standing and not fixed to the floor or to walls. Mr. Murphy disputed what Mr. Wells said about fashion gondolas. According to Mr. Murphy, fashion gondolas were not in any sense fixed by corner protectors. He said:- "The corner protectors (which are some 18" high) are fixed to the floor. They are not provided along the length of the run of gondolas but only at the four corners of the entire run. The four corners of the gondola runs are placed against the corner protectors to ensure that the gondolas cannot be jogged and to protect the gondolas from trolleys. It is important to appreciate therefore that the run of double-sided gondolas are not fixed either to the floor or to the plinth or to the corner protector. The purpose of the corner protectors is not to ensure that the gondolas cannot be relocated elsewhere as required. They are to be regarded like book-ends. Indeed, the gondolas on the ends of gondola runs have been moved by simply lifting the end gondolas over the corner protector. It is not correct to say that the whole run of gondolas numbered 22 to 65 could only be moved once the corner protection plates had been removed. "

   Mr. Murphy said that he doubted that the single-sided gondolas used for sports equipment and the like were bolted to the floor by base plates. Mr. Wells' comment in his second witness statement on the passage just quoted was:- *"Mr. Murphy's statement is that to relay or re-arrange this fashion equipment it would not be necessary to unfix the corner protectors. My response to this is as follows. If a department was to be relayed in a different format, ie (smaller or longer gondola runs, or adjustment of the aisle width) then the corner protectors would have to be removed and the floor would have to be made good."*

   Mr. Wells thus seems to accept the point made by Mr. Murphy.

8. Gibson Lea contends that it carried out the work for Makro at the stores at Enfield, Leicester, Cardiff and Croydon which it had agreed to undertake. It has rendered various invoices to Makro in respect of that work, but Makro has not paid those invoices. Gibson Lea, acting, no doubt, on the advice of its solicitors, Messrs. Browne Jacobson, took the view that the way forward was to seek to take advantage of the provisions of Part II of Housing Grants, Construction and Regeneration Act 1996 ("the Act") as to adjudication. To that end a notice of adjudication dated 15 June 2001 was served by Messrs. Browne Jacobson on behalf of Gibson Lea on Makro in relation to the work performed at Makro's Enfield store. In response Messrs. Addleshaw Booth & Co., solicitors acting on behalf of Makro, indicated in a letter dated 15 June 2001 that Makro's position was that Gibson Lea was not able to avail itself of the provisions of the

Act because:- *"the works which are the subject matter of the adjudication are not construction operations for the purposes of the Housing Grants, Construction and Regeneration Act 1996."*

9. Against that background, in this action Gibson Lea seeks a declaration that:- "the works forming the subject of contracts entered into by the Claimant and the Defendant in respect of the Defendant's stores in Enfield, Leicester, Cardiff and Croydon are construction operations for the purposes of Part II of the 1996 Act and that as a consequence, the Claimant is entitled to refer disputes arising under any one or more of these contracts to adjudication in accordance with the Scheme for Construction Contracts (England and Wales) Regulations 1998;" Gibson Lea has sought summary judgment for such declaration.

The relevant provisions of the Act

10. By s108(1) of the Act it is provided that:- *"A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose "dispute" includes any difference."*

    As appears from the terms of s108(1), the right conferred by the sub-section is conferred upon parties to *"a construction contract"*. An issue in the present case is whether the contracts made between Gibson Lea and Makro in relation to work to be done at Makro's stores at Enfield, Leicester, Cardiff and Croydon were *"construction contracts"*, although the issue raised by the claim form is not that as such, but rather whether the works which formed the subject matter of the four contracts to which I have referred were "construction operations".

11. The expression *"construction contract"* is defined in s104(1) of the Act. That sub-section is in the following terms:- *"In this Part 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."
    By section 104(5) it is provided that "Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations."

12. What are *"construction operations"* for the purposes of Part II of the Act is dealt with in s105(1) of the Act. That sub-section provides as follows:-
    "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);
    (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, roadworks, 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;
    (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, 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 clearance, earth-moving, 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. "

13. By s105(2) of the Act it is provided, so far as is presently material, that:- *"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;..
    (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, lighting, 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."

By s106(1) of the Act Part II does not apply to a contract with a residential occupier.

14. Where Part II of the Act does apply the consequences are significant. For the present it is enough to notice the provisions of section 108(2), (3) and (5):-

"(2) The contract shall –

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

(e) impose a duty on the adjudicator to act impartially;

(f) enable the adjudicator to take the initiative in ascertaining the facts and law;

(3) The contract shall provide that the decision of the adjudicator is binding 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…

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."

The ***"Scheme for Construction Contracts"*** is that set out in the Schedule to The Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998 No. 649.

Preliminary thoughts

15. It is, I think, clear that shopfitting does not amount to "construction operations" unless it is "construction…of…structures forming, or to form, part of the land (whether permanent or not)" or "installation in any building or structure of fittings forming part of the land". What might be involved in a structure or fittings "forming part of the land" is not something which is addressed in the Act. However, in the context of the law of real property the concept of a fixture is well-established, and it seems to me that that to which the parts of the definition of "construction operations" in section 105(1) of the Act which I have just set out is directed is whether the particular structure or fittings will, when completed, amount to a fixture or fixtures. In the law of real property one of the factors which is relevant to a determination of whether a chattel attached to a building is a fixture or not is whether the attachment is intended to be permanent – see, for example, **Billing v. Pill** [1954] 1 QB 70.

16. Another question which arises in the present case is whether, in the light of the provisions of section 104(5) of the Act, and assuming that some part, at least, of the works for which each of the contracts between Gibson Lea and Makro provided could properly be characterised as *"construction operations"*, Gibson Lea is entitled to refer to adjudication all of its claims under the relevant contract. That question arises in the present case because some, at least, of the items for the supply of which each of the relevant contracts provided were plainly chattels which were not intended to be fixed to anything. An obvious, if small, example is the stools and mirrors at item 1.08 of the quotation relating to the Enfield store. Another is the mobile bread and cake stands at item 1.15 of that quotation. In fact I have the impression that Mr. Wells in his first witness statement sought specifically to identify anything which could arguably be said to be fixed in any way to the structure of a store. If that is correct, it seems to follow that a significant part of each of the relevant contracts was concerned with the supply of items which were not even arguably attached to the structure of the store to which they were supplied. Mr. Murphy in his witness statement confirmed this impression and provided a breakdown in terms of value of the various items included in each of the relevant contracts which Mr. Wells did not specifically mention in his first witness statement. Mr. Murphy also attached to his witness statement comments on those items.

The submissions of the parties

17. Mr. Alexander Nissen, who appeared on behalf of Makro, submitted that in fact none of the items supplied by Gibson Lea to any of the relevant Makro stores formed, or was intended to form, *"part of the land"*. He drew to my attention the decisions of the Court of Appeal in **Lyon v. London City and Midland Bank** [1903] 2 KB 135 and **Horwich v. Symond** (1915) 84 LJKB 1083 in support of a submission that in the law of real property it was not enough to constitute a chattel a fixture that it was secured to the structure of a building. In the first of the two cases to which Mr. Nissen referred chairs screwed to the floor were held not to be fixtures. In the second case the items in question were various fittings in a chemist's shop, specifically a counter and showcase, a bottle rack, a cupboard and something described as *"13 ft chemist fittings etc*.". Each of these items was held in position either by two nails or by a single screw. Buckley LJ, giving the leading judgment, said at page 1087:-

    "The question whether these articles were so fixed that they ought to be treated as annexed to the freehold, or were merely chattels, is, as I have said, a pure question of fact. The mere fact of some annexation to the freehold is not enough to convert a chattel into realty. That is shewn by the case of carpets, which are certainly not fixtures; and the same principle seems to apply to a shop counter which stands on the floor not as a fixture, but as a chattel with a certain amount of fixing to keep it steady."

    Mr. Nissen submitted that 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. 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. In the present case, Mr.Nissen submitted, any fixing of gondolas to walls or floors was, on the uncontradicted evidence of Mr. Murphy, simply to keep units which could have been free-standing more stable.

18. Miss Delia Dumaresq, who appeared on behalf of Gibson Lea, did not really dispute Mr. Nissen's submissions as to the test of what constituted a fixture in the law of real property, although she did submit at one point that the slightest degree of attachment to a structure was sufficient to render a chattel a fixture. The main thrust of her argument, however, was that I should adopt a purposive approach to the construction of the Act. A purposive approach, in Miss Dumaresq's submission, involved, in effect, so construing the definition of "construction operations" as to include everything which arguably fell within it which was not specifically excluded by s105(2) of the Act. She went so far as to submit that it was appropriate to have regard to the terms of s105(2) as indicating that which would fall within the definition of *"construction operations"* but for its express exclusion by that sub-section. In her skeleton argument at para 23 Miss Dumaresq submitted:- "*The intention is that any contract which includes "installation" (unless, possibly de minimis) is brought back into S105(1) by the proviso to S105(2)(d)."*

19. Miss Dumaresq relied upon the approach apparently adopted by the Inland Revenue to the construction of the expression "construction operations" in s567(2) of Income and Corporation Taxes Act 1988 as including shopfitting. However, in my judgment she derived little assistance from the views of the Inland Revenue, not least because in s567(2) of Income and Corporation Taxes Act 1988 the words *"forming part of the land"* do not appear in those paragraphs of the subsection which in some ways look like the inspiration for s105(1)(a) and(c) of the Act.

20. Miss Dumaresq also sought to rely upon what was said by Lord Lucas in the House of Lords on 22 April 1996 when the words *"fittings forming part of the land"* were introduced into the Act whilst it was still a Bill. What Lord Lucas was recorded by Hansard as saying was:- *"…the general rule is that whatever becomes attached to the land becomes part of it. An object which is attached to the land or which is attached to something else which is itself attached to the land would be covered by the provisions. It does not matter whether it is easy to remove, such as something merely screwed to the wall, or whether the attachment is more substantial. Examples of such fittings "forming part of the land" would include a fireplace, panelling, a conservatory on a brick foundation or radiators bracketed to a wall. The dividing line between things which are fixed and not fixed might be the telephone on one's desk which is not fixed to the land and the socket in the wall which is… "*

    It is apparent, in the light of the authorities to which I have already referred, upon which Mr. Nissen relied, that, if intended as a brief summary of the law relating to fixtures, what Lord Lucas said is inaccurate.

Nonetheless it does appear that the intention of Parliament was to introduce into the Act by means of the words "forming part of the land" the existing law as to fixtures. There is no other "general rule of law" dealing with the effect of attaching chattels to real property. Miss Dumaresq submitted that I should construe the Act, as she put it at paragraph 19 of her skeleton argument, *"sui generis, with such assistance from the parliamentary debates as may be permissible."* She did, however, accept that the effect of the decision of the House of Lords in **Pepper v. Hart** [1993] AC 593 was that regard could only be had to Parliamentary material, as Lord Browne-Wilkinson put it at page 634, *"…as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria."*

21. Mr. Nissen submitted that, even if some of the works undertaken by Gibson Lea could be regarded as "construction operations" it was plain that other items were not within that description, so that, at best, the Act only applied to some of the items supplied under the contracts with which I am concerned. He submitted that such was the effect of section 104(5) of the Act. He further submitted that it followed from this circumstance alone that Gibson Lea was not entitled to the declaration which it seeks. Miss Dumaresq did not really have an answer to that point save to assert that it could not have been the intention of Parliament that a party to a contract part of which related to *"construction operations"* should have the rights conferred by Part II of the Act in relation to those items or activities which related to *"construction operations"*, but not in relation to the performance of the other obligations for which the contract provided. She emphasised the potential practical difficulties which that approach would involve.

Conclusions

22. I am satisfied that the proper construction of section 105(1)(a) of the Act is that the words *"construction…of… structures forming, or to form, part of the land (whether permanent or not)"* is clear and not ambiguous. Although Miss Dumaresq submitted that the words *"(whether permanent or not)"* indicated that the formation of part of the land need not be permanent, so that temporary attachment was sufficient, in my judgment Mr. Nissen was correct in his submission that the word *"permanent"*, being an adjective, and not an adverb, must qualify a noun and so could not qualify the temporal connotations of *"forming, or to form, part of the land"*. It seems to me that it is the structures which need not be permanent. I have already indicated my view that the effect of referring to "forming, or to form, part of the land" is to import into section 105(1)(a) of the Act the concepts and tests of the law relating to fixtures. I cannot see to what else it could refer. In the circumstances it is not necessary or appropriate to consider what Lord Lucas said in the House of Lords in moving the amendment to include the relevant words in the Act while it was still a Bill. If it had been appropriate to refer to what Lord Lucas said as an aid to construction, I should not have been assisted by such reference because it is unclear whether it was the intention of Parliament to incorporate, as I hold it in fact did, the law relating to fixtures, whatever it might be, or the law relating to fixtures as explained by Lord Lucas. In my judgment it is clear that the words in section 105(3) of the Act "fittings forming part of the land" is a reference to fixtures.

23. On the evidence put before me, and in particular in the light of the evidence of Mr. Murphy insofar as not challenged in the second witness statement of Mr. Wells, it seems to me that none of the items supplied by Gibson Lea to Makro were, as and insofar as installed, fixtures. It follows that the works done by Gibson Lea for Makro were not *"construction operations"* and that the relevant contracts were not "construction contracts". Not only does the application for summary judgment fail, but the action as a whole cannot succeed. I therefore dismiss the application for summary judgment and give judgment for Makro in the action.

24. I accept Mr. Nissen's submission as to the effect of section 104(5) of the Act and, had it been necessary to do so, I should have found that, as the works which Gibson Lea agreed to undertake for Makro under each of the four contracts with which I have been concerned included works which were undoubtedly not "construction operations", the application for summary judgment and the action failed for that reason.

Delia Dumaresq (instructed by Browne Jacobson for the Claimant)
Alexander Nissen (instructed by Addleshaw Booth & Co. for the Defendant)

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