

Judicial Review of a decision by Janey L. Milligan :

OPINION OF The Lord Hardie : Outer House Court of Session : 13th June 2001

Introduction :

- [1] This application for judicial review came before me for a first hearing. The petitioner is Mitsui Babcock Energy Services Limited. The first respondent is Foster Wheeler Energia OY, a company registered in Finland and having a place of business at Bo'ness Road, Grangemouth. The second respondent is Janey L Milligan, a director of JLM Construction Dispute Resolution Limited.
- [2] In September 1999 the petitioner and the first respondent entered into a contract, in terms of which the first respondent was required to deliver to the site equipment and piping which had been prefabricated elsewhere. The scope of the petitioner's contract works involved assembling on site the equipment and piping into two mechanically complete boiler plants, namely the Heat Recovery Steam Generating Boiler (hereinafter referred to as "HRSGB") and the Additional Boiler (hereinafter referred to as "AB"). Prior to the commencement of the petitioner's contract works, concrete foundations with walls up to 1 metre high had been erected for the boiler plants by other sub-contractors and after the completion of the petitioner's works other sub-contractors were to complete the construction of the buildings within which the boilers were to be housed.
- [3] HRSGB & AB were to be located on two vacant pieces of land within the petrochemical complex at Grangemouth operated by a company within the BP group of companies. HRSGB & AB were to be constructed on behalf of and operated by Grangemouth CHP Limited (hereinafter referred to as "CHP") which leased the land from BP Exploration Operating Company Limited. On 26.11.1998 CHP entered into an agreement with BP Oil Grangemouth Refinery Limited, the owners of the land. (6/7 of process). The said agreement referred to a Steam Supply Agreement relating to the purchase of steam from CHP by BP Oil Grangemouth Refinery Limited. The steam was to be generated by HRSGB and AB. The boundaries of the land leased to accommodate the HRSGB and the AB are shown on the plan (6/5 of process).
- [4] The contract between the petitioner and the first respondent (6/6/1 of process) was in fulfilment of the first respondent's obligation to CHP plant for the provision of the HRSGB and the AB. In terms of the contract "Boiler Plant" and "Plant" are defined as "the two boiler plants for which the work and undertakings referred to in this contract shall be delivered or performed by the Contractor". "Site" is defined in the contract as "the site for the Boiler Plant located in Grangemouth, United Kingdom".
- [5] On or about 19 July 2000 the petitioner issued a Notice of Adjudication to the first respondent in terms of the Housing Grants, Construction and Regeneration Act 1996 (hereinafter referred to as the "1996 Act"). The Notice was issued under the contract between the petitioner and the first respondent and the dispute between the parties related to the alleged failure by the first respondent to make payment of sums due by the first respondent under the contract in respect of an invoice issued by the petitioners on 4 April 2000.
- [6] On or about 21 July 2000 the second respondent was appointed by the Royal Institution of Chartered Surveyors in Scotland to act as an Adjudicator in the dispute between the parties. On or about 25 July 2000 solicitors for the first respondent wrote to the second respondent calling upon her to decline jurisdiction on the basis that the contract works were excluded from the scope of the 1996 Act by virtue of the provisions of section 105(2)(c).
- [7] On 27 July 2000 the second respondent advised the petitioner and the first respondent that she did not have jurisdiction to adjudicate on the matter in dispute because in her opinion the works which were the subject of a dispute fell within the exclusion contained in s105(2)(c), which provides *inter alia*:-
"The following operations are not construction operations within the meaning of this Part -
(c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is -
(ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink".

- [8] **Issue** : The issue for determination in this case is whether the assembly and installation of the HRSGB and AB were on a site where the primary activity is the production or processing of chemicals, pharmaceuticals, oil or gas.
- [9] **Submissions of Parties** : In the course of his submissions Mr Currie, senior counsel for the petitioner, departed from the view expressed by the solicitors for the petitioner in their letter dated 27 July 2000 to the second respondent (6/3 of process) to the effect that it is "irrelevant when looking at this section to consider the ultimate use of the site".
- [10] Mr Currie submitted that as Parliament had not defined what it meant by the site, in determining what constituted the site for the purposes of the exemption under s105(2)(c) substantial weight should be attached to the definition of the site in the contractual documents. In addition he emphasised the fact that CHP was not only the employer for the purposes of the construction contract but was also tenant of the land on which HRSGB and AB were to be installed. Moreover the commodity produced by both boilers was steam which would be sold by CHP to the operator of the petrochemical complex. There was no basis in fact for taking any alternative site such as the larger petrochemical site in this case. Counsel also referred to answers by a reporter to questions posed by parties (6/10 and 6/12 of process). In particular he relied upon answer 4 in which the reporter stated that the HRSGB and AB "are two independent steam generating plants that are linked only by virtue of their common product delivery pipeline". In summary counsel relied upon the fact that the site was defined in the construction contract, that the sites were identifiable physical areas and that the boilers were to be operated by CHP who were tenants of the land and who had a contractual relationship with BP. Significance should be attached to the fact that an identifiable commodity was being produced by a separate enterprise and delivered to the petrochemical complex, which was located outwith the boundaries of the construction sites. It was legally and contractually possible to distinguish between the construction sites and the site of the petrochemical complex.
- [11] For the respondents Mr Brodie submitted that the site should be construed as being the whole petrochemical complex. The proper approach was to identify the primary activity which the construction operations were intended to further. If that is the correct approach, counsel submitted that the purpose of erecting and installing the HRSGB and AB was to provide steam to the petrochemical complex and it is not in dispute that the ultimate process at the petrochemical complex relates to chemicals and oil and as such falls within the processes specified in section 105(2)(c)(ii) of the 1996 Act. Counsel also relied upon the answers by the reporter to the questions posed by parties, particularly answer 1 which states *inter alia* that the "steam from both boilers is used in its entirety to supply BP's steam distribution system, which is, in turn, used both for the generation of electricity via BP's existing power plant and for the supply of steam for chemical processes at the BP complex".
- [12] In the course of submissions, reference was made to **Palmers Limited v ABB Power Construction Limited** (1999) 68 Con.L.R. 52; **Homer Burgess Limited v Chirex (Annan) Limited** 2000 S.L.T.277; **ABB Power Construction Limited v Norwest Holst Engineering Limited**, High Court of Justice, Technology and Construction Court, 1 August 2000; **ABB Zantingh Limited v Zedal Building Services Limited**, High Court of Justice Technology and Construction Court 12 December 2000.
- [13] **Decision** : Before dealing with the competing submissions of counsel, I wish to comment on the concession made by Mr Currie and recorded at the beginning of the paragraph dealing with the submissions of parties. The basis for the solicitors' opinion in their letter (6/3 of process) that it was irrelevant to consider the ultimate use of the site seems to have been the use by the Parliamentary draftsman of the present tense as opposed to the future tense in section 105(2)(c) of the 1996 Act. Senior counsel's concession that the solicitors' opinion was no longer tenable was made in the light of the decision in **ABB Power Construction Limited v Norwest Holst Engineering Limited**. I wish to record that I consider that the concession was very properly made. Had there not been such a concession I would have reached the same conclusion as Judge Humphrey Lloyd in that case for the reasons given by him.

- [14] I have considered the submissions by counsel, the answers by the reporter to the various questions posed to him by the parties and the other productions in the case, particularly the plan (No.6/5 of process) and the Grangemouth CHP Plant Area Regulations (Pre-operational) Document (6/6/7 of process). The significance of the last mentioned document is that it assists in identifying the relationship between the construction site and the BP Grangemouth complex. In the introduction at page 4 it states:- "It is a fundamental requirement when undertaking any new works on the BP Grangemouth complex to conduct all aspects of these works in accordance with a set of BP-approved regulations". In the last paragraph of the introduction it is recognised that such a project is the "development of the new CHP plant on the complex, comprising an open cycle gas turbine, heat recovery steam generator and associated auxiliaries, and an additional boiler". The project details at page 5 recognise that the Grangemouth CHP project is a development **on the BP Site** (my emphasis) being carried out by a joint venture and that a separate company, Grangemouth CHP Limited, has been set up to build, own and operate the plant. The CHP project consists of three packages, namely:-
- i. The CHP plant. This comprises a 133Mwe open cycle gas turbine and heat recovery steam generator which will supply electricity to BP and to Scottish Power as well as process steam to various production modules within the BP complex via high pressure steam headers. The CHP site is to be fenced during construction and will have independently controlled access from the public road.
 - ii. AB. This is to be constructed in an area located within the BP Grangemouth Refinery complex and access to this site will be through the BP Refinery.
 - iii. The offsite boundary limits works These comprise the construction works complementary to the CHP plant and AB works and include various drainage, pipe and other connections, the most significant of which for the purposes of this case are steam connections. It is clear from this document that although the CHP plant and AB plant are being set up as completely independent construction sites and the CHP plant is to be operated by an independent company, they are located on land owned by BP as part of the petrochemical complex. The land is leased to CHP for the purposes of erecting and operating the CHP plant and erecting AB as well as making the necessary connections from the construction site to the petrochemical complex operated by BP. The most significant connections for the purposes of this case, in my view, are the steam connections to enable the steam to be delivered to various production modules within the BP complex.
- [15] I also note from answer 1 by the reporter that the steam from both boilers is used in its entirety to supply BP's steam distribution system which is used both for the generation of electricity via BP's existing power plant and for the supply of steam for chemical processes at the BP complex. Answer 5a is also significant in respect that on completion HRSGB will only form part of the combined heat and power plant as is apparent from the project details and from the plan (6/5 of process).
- [16] I have considered the submissions of counsel for the petitioner that although he was not maintaining that the definition of the site in the contract between the petitioner and the first respondent should be determinative of the issue in this case, that definition should be given significant weight; and that thereafter other adminicles such as the existence of the lease and the separate contractual arrangements between CHP and BP whereby CHP owned and operated the plant and sold the steam to BP confirmed that the construction site in this case should be treated as a separate entity from the petrochemical complex for the purposes of s105(2)(c). I have concluded that while there is a certain attractiveness to this approach by Mr Currie, the correct approach is that adopted by Judge Lloyd in **ABB Power Construction Limited v Norwest Holst Engineering Limited**. At para.13 of his Opinion, Judge Lloyd states:-
- "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 judgement 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".*

At para.14 of his Opinion Judge Lloyd states, under reference to section 105(2):- "The object of this subsection 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".

I respectfully agree with the views expressed by Judge Lloyd. If that approach is adopted to the factual situation in the present case, it is clear that the installation of HRSGB and AB was to further the primary activity of the processing of chemicals and oil on the petrochemical complex. That purpose is illustrated by the fact that the CHP plant is described as a development on the BP site and that when constructed it will be linked to the main complex by various connections, including steam connections. I also consider it significant that the steam generated by HRSGB and AB will be supplied exclusively to the BP complex, that on completion the HRSGB will form part of the CHP plant and that although the HRSGB and AB are two independent steam generating plants they are linked by virtue of their common product delivery pipeline. I do not consider that it is relevant that a separate company was established to construct, own and operate the CHP plant or that the construction site was leased by the owners of the petrochemical complex to the owners and operators of the CHP plant. The exemption in section 105(2)(c) is directed to the primary activity on a site. The legislation is silent about the question of ownership or occupation of the site. The reasons for such silence are obvious when one considers that a site, where the primary activity is the processing of chemicals, may involve separate processes by different companies each contributing to the primary activity of the processing of chemicals. The fact that each of these companies owns or occupies their own discrete area of the petrochemical site is irrelevant to the primary activity on that site.

- [17] In all the circumstances of this case, I am satisfied that the operations undertaken by the petitioner were exempt operations within the meaning of section 105(2)(c)(ii) of the 1996 Act and that the second respondent did not err in declining jurisdiction in this case. Accordingly I shall dismiss the petition.

Petitioners: Currie, Q.C., Di Emidio, Advocate, DLA
Respondents: Brodie, Q.C., Simpson & Marwick, W.S.