

JUDGMENT : His Honour Judge Richard Havery Q.C. 28th February 2001. TCC.

1. I have before me an application made under the Civil Procedure Rules, Part 8, for a declaration that four contracts between the claimant and the defendant are construction contracts as defined by the Housing Grants Construction and Regeneration Act 1996 and are subject to the provisions of that Act. The specific provisions in question are those providing for adjudication of disputes arising under the contracts.
2. The contracts are subcontracts. The claimant is the subcontractor and the defendant is the main contractor. The subcontracts provide for the design, engineering, procurement, supply, delivery to site, installation, testing and commissioning of instrumentation, fire and gas, electrical and telecommunications equipment. There is no distinction, material for present purposes, between the subcontracts. The equipment was for installation in steel structures, called modules, constructed in a yard adjacent to the River Tees pursuant to the corresponding main contracts. The modules are intended as living quarters for operatives at an oil or gas rig in the Bay of Campeche in the Gulf of Mexico. They are three storeys high, 70 feet wide, 63 feet high and 145 feet long. They have been, or will be, placed on barges and towed out to the Gulf of Mexico where they will be welded on to platforms supported by legs founded in the bed of the sea. The platforms are several tens of metres above the sea bed.
3. The Act that I have mentioned, which I shall call 'the Act', relates in Part II to construction contracts. Its material provisions are as follows:

104-(1) *In this Part a "construction contract" means an agreement with a person for any of the following (a) the carrying out of construction operations;*

(2) *References in this Part to a construction contract include an agreement (a) to do design.... work in relation to construction operations.*

(6) *This Part applies only to construction contracts which -*

(b) *relate to the carrying out of construction operations in England, Wales or Scotland.*

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);*

(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, pipelines, 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;*

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

(ii) *manufacture or delivery to site of*

(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;*
4. Mr. Marc Rowlands, counsel for the claimant, submitted that the modules formed part of the land when standing in the yard at Tees?side. I reject that submission. While construction was taking place the modules were placed on stands approximately two metres above ground level. The stands were either steel frames or concrete blocks. The modules were, of course, movable and intended to be moved, albeit that moving them involved a considerable engineering operation. They were not intended to be used at that location. It is clear that moving the modules did not, or at any rate was not expected to, damage the modules or the land.
5. Mr. Rowlands submitted that the subcontract work fell within both paragraph (a) and paragraph (c) of section 105(1) of the Act. There was, in my judgment rightly, no dispute that the inclusion of an operation within one of those paragraphs does not preclude it from inclusion in the other. Mr. Stephen Furst Q.C., counsel for the defendant, submitted that the subcontract work did not fall within paragraph (a) or paragraph (c). As to paragraph (a), Mr. Furst submitted that the installation of

fittings, as opposed to their alteration, repair etc., did not fall within paragraph (a) since it was not construction or any of the other things mentioned in that paragraph. Mr. Rowlands relied on the decision of Dyson, J. in **Nottingham Community Housing Association Limited v. Powerminster Limited** [2000] B.L.R. 759. That was a case of repair and maintenance, but Dyson J. said this at p.762:

"..... there is no warrant in paragraph (a) for distinguishing between different types of operations carried out in relation to a building or structure. Take the construction of a building. Paragraph (a) applies as much to the installation of a demountable wall partition as it does to the installation of a central heating, air-conditioning, sanitation system or any of the other fittings mentioned in paragraph (c). There is no distinction in property law: once installed, they all become part of the land. Nor is there any other basis, whether technical or founded on the ordinary use of words, for saying that the installation of a demountable wall partition is, but the installation of heating systems etc. is not, part of the construction of a building. Such systems are often complex, they are usually integrated into the structure of the building; they may be very difficult to disconnect and remove from the building."

6. I am not persuaded that all activities falling within paragraph (c) of section 105(1) necessarily constitute construction so as to fall within paragraph (a). Certainly paragraph (c) is the only paragraph that deals specifically with installation of equipment.

7. It was common ground that the installation work was of a kind described in paragraph (c) of section 105(1). Mr. Furst submitted that for the work to fall within the paragraph the fittings had to form part of the land; it was not sufficient that they could subsequently form part of the land. It is notable that only the present tense "forming part of the land" is used in paragraph (c), whereas in paragraphs (a) and (b) the corresponding expression is "forming, or to form, part of the land". Mr. Rowlands submitted that the distinction was irrelevant. He submitted that the words "forming part of the land" were simply descriptive of the kind of fittings intended to be included in the paragraph. I acceded to his invitation to look at the relevant debates in Parliament concerning the bill that was enacted as the Act. The words in paragraph (c) "fittings forming part of the land, including (without prejudice to the foregoing)" were introduced into the bill in the House of Lords by way of amendment moved by Lord Lucas, the relevant minister, on 22nd April 1996 (Hansard, 22nd April 1996, column 924). The phrase "fittings forming part of the land" was considered by various speakers in the debate including Lord Ezra, who said this (*ib.*, columns 925, 926):

*"My Lords, I share with other noble Lords who have spoken a slight incomprehension as to the meaning of the phrase. I believe that it is intended to generalise that part of the clause. If that is the case, I am very much in favour of it. It has already been made clear that what is stated in clause 103(1) is not exclusive, and the more that that is referred to throughout the clause the better. Clause 103(1) became section 105(1) of the Act. Lord Lucas said this (*ib.*, col.926):*

My Lords, I am delighted to confirm everything that the noble Lord, Lord Ezra, says. The amendment would indeed make the clause general whereas it was not so before. As to the meaning of the phrase, "fittings forming part of the land", the general rule of law is that whatever becomes attached to the land becomes part of it. An object which was attached to the land or which was attached to something which was 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. That is the sort of dividing line I would think of, but of course it is something that would be determined in each individual case."

8. I am satisfied that the intention of the minister in moving the amendment was to generalise the matters included in the paragraph. Whether fittings which would not form part of the land until some time after their installation should be included in the paragraph was not under consideration. In my judgment the debate throws no light on the question whether the expression "forming part of the land" in paragraph (c) should be interpreted as including prospective as well as present attachment to the land. But the expression "forming part of the land" is not, in my judgment, purely descriptive of

the fittings. The language of paragraph (c) requires the fittings to form part of the land at least prospectively, if not immediately upon their installation.

9. The question remains whether the modules were to form part of the land. Mr. Rowlands submitted that they were. The rigs were founded in the sea bed; and the Interpretation Act 1978 defined land as including land covered by water. Mr. Furst submitted (1) that "the land" was not any land, but was the land on which the relevant construction operation was carried out;(2) that the Act applied only to land within England, Wales or Scotland; and (3) that the rigs were not "land".
10. As to point (1), Mr. Furst submitted that in the context and given the use of the definite article, the land must mean the land where the operation was carried out. It is clear that the construction of, or the installation of fittings in, buildings or structures forming (in the present tense) part of land can take place only on the land where the building or structure is situated when built. The use of the definite article does, in my judgment, suggest that the expression "the land" refers to that land. As to point (2), the operations I have just mentioned do not fall within the Act unless they are carried out in England, Wales or Scotland, by virtue of the provision of section 104(6)(b) of the Act. Thus the completed buildings or structures must be in England, Wales or Scotland. That suggests that the same applies to structures that are to form part of the land.
11. Mr. Rowlands submitted that section 105(1)(a) and (c) extended to cases where, installation did not take place on the same land as that of which the structure, was to form part. He relied on the following passage in the judgment of His Honour Judge Thornton Q.C. in **Palmer's Limited v. ABB Power Construction Limited** [1999] B.L.R. 426,432:
"The nature, size and method of fixing into position of the steel structure and the boiler itself clearly have the consequence that the boiler forms part of the land once assembled and fixed into position. Indeed, it would be hard to conceive a more rigid and permanent structure than the steelwork in question. The fact that much of the boiler is assembled on site but away from its permanent resting place and then lifted into position cannot affect the conclusion that a construction activity is involved. Since much industrial plant will be assembled and erected in this way and since such plant is expressly included in the definition of a construction operation, the only reasonable conclusion is that ABB's work is a construction operation."
In my judgment, that passage has no bearing on the point. ABB's contractual work was the assembly and erection of the boiler. It was argued that that did not constitute a construction operation. Judge Thornton was dealing with that argument.
12. In support of his third point Mr. Furst relied on the case of **Argyll & Bute D. C. v. Secretary of State for Scotland** [1976] S.C. 248, 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 the 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.
13. 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 it was directed. Mr. Rowlands submitted that one of 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 installations from the ambit of the Act, or at least the absence of any intention to include them.

14. In the light of those considerations, I conclude that 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.
15. Accordingly, I declare that the Act does not apply to the subcontracts in question.

Marc Rowland (instructed by Hammnd Suddards Edge for the Claimant)

Stephen Furst Q.C. (instructed by Masons for the Defendant)