

JUDGMENT : HER HONOUR JUDGE FRANCES KIRKHAM : TCC : 30th April 2003

1. The Claimant ("Comsite") applies, pursuant to CPR Part 8, for declarations in relation to the application of the Housing Grant Construction & Regeneration Act 1996 ("the Act") to a sub-contract between Comsite and the defendant ("AAG"). Briefly, they seek a declaration that their work under the subcontract falls within the definition of "construction operations" and that the sub-contract constitutes a "construction contract", as defined in the Act.
2. AAG is registered in Graz, Austria. AAG applies for the Part 8 claim to be dismissed on the ground that the court has no jurisdiction to hear the claim. AAG also contend that the Part 8 procedure is inappropriate.

Background

3. Southern Water Services Ltd contracted with Sandown Joint Venture ("SJV") for the construction of a new waste water treatment works and sewage sludge recycling centre at Sandown, Isle of Wight. Waste water is collected and treated. The sludge is processed. It can be dried and sold as fertiliser, or the dewatered sludge can be used as landfill without being dried. The waste water treatment plant cannot be operated without dewatering the sludge. I am told that SJV sub-contracted part of the work to Andritz Limited who in turn sub-contracted to AAG, though evidence as to those contractual relationships has not yet been adduced. It appears that AAG assumed an obligation to install the dryer plant and all building services to the dryer building. AAG in turn, by two sub-contracts, sub-contracted two packages of work to Comsite.
4. The first package was for the installation of electrical power wiring and control wiring, low voltage control wiring and containment to the dryer plant itself, as well as installation and wiring (including containment) to the control panel for the plant. Most of the work in that first sub-contract between Comsite and AAG was carried out between September 2001 and January 2002. The second sub-contract for the second package of work was let by AAG's purchase order K3-04822/02 dated 20 February 2002. It was described as a contract for the supply of building services. It related to the installation of building services to the dryer building. We are concerned only with the second sub-contract in these applications. I shall refer to it as the "Building Services sub-contract."
5. Mr Phillips, Contracts Engineer for Comsite, explained in a detailed statement the scope and nature of the work involved. Save as I refer to later, Mr Phillips' statement has not been challenged by AAG. Mr Phillips explains that the dryer building houses the dryer plant which bakes sewage sludge into pellets. The building itself is large, approximately 37 metres by 20 metres, and 16 metres high. 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.
6. The dryer building is divided into three main sections. In the centre of the building is the dryer hall, which houses the dryer plant. The dryer hall takes up approximately two thirds of the building and extends up to roof level. At one end of the building is what Mr Phillips describes as an "office" area. This includes a workshop, compressor room, store room, control room and a further room for housing air-handling equipment for the building services. These areas are spread over three floor levels. At the other end of the building are the bagging room and polymer room. The office area is separated from the dryer hall by solid brickwork up to first floor level and metal cladding to the areas on the first and second floors.
7. Mr Phillips gives details of the lighting, power and ventilation which was within the scope of the Building Services sub-contract. Comsite carried out work to the ground, first and second floors. Their work on the ground floor was to include installation of lighting to all areas with associated switching; installation of the main electrical distribution cupboard to supply power for all lighting and small power outlets; installation of electric power outlets to the workshop, store and compressor room; installation of fire and gas alarm systems to all areas; preliminary work in connection with an intruder alarm system; installation of heating and cooling to the workshop and store areas; installation of control wiring for the building management system. Likewise, work on the first and second floors and to the stairwell included installation of lighting, including emergency lighting, installation of electric

sockets, installation of fire and gas alarm systems and installation of heating and ventilation. So far as the bagging and polymer rooms are concerned, Comsite installed lighting and switching, emergency lighting, small power, fire and gas alarms, power to the roller door, an extract duct and an in-line heater. Comsite also carried out some exterior work including external lighting.

8. Witness statements were prepared by Herr Umdasch of AAG and Herr Winter, Process and Commissioning Engineer, of AAG. Neither Herr Umdasch nor Herr Winter challenged the content of Mr Phillips' statement, save by inference as follows. Herr Winter states: "By reason of the concept of the waste water treatment plant, the dewatering and dryer building inevitably forms an integral part of the overall installation. This concept was used in a number of projects carried out by AAG in which Southern Water was the end user." Herr Umdasch refers to a number of as-built drawings showing the detailed electrical services layout for the dewatering and dryer building. He goes on to say: "These drawings show that the electrical services provided by Comsite were fully integrated into the dewatering and drying plant. According to the applicable Health & Safety Regulations, Southern Water is not permitted to operate the dewatering and dryer building without lighting, or fire and gas alarm systems." Both Herr Umdasch and Herr Winter conclude: "The lighting and gas alarm systems form an integral part of the dewatering and drying plant. The dewatering and drying plant forms an integral part of the overall installation of the waste water treatment plant and cannot be said to be otherwise." I deal in more detail later with the conclusion which Herr Umdasch and Herr Winter seek to draw.
9. Comsite do not challenge AAG's statement that Southern Water is not permitted, by statute, to operate the dryer building without lighting or fire and gas alarm systems.
10. It appears that a dispute has, or disputes have, or may have arisen in connection with the Building Services sub-contract, though I have no information concerning these.
11. A term of the Building Services sub-contract, at Clause 20, is as follows:
"Settlement of disputes
All disputes arising in interpretation or execution of the present contract, its annexes or in connection with documents issued by both parties to the contract, including additional agreements concerning modifications to the contract, will be settled amicably.
If no agreement can be reached or if such agreement is not observed voluntarily by one of the parties, the jurisdiction in the event of a dispute will be in Austria, Graz. Austrian law will be applied..."
12. On 30 January 2003 AAG began proceedings in the Provincial Civil Court in Graz arising out of Clause 20 and Article 23 of EC Council Regulation No: 44/2001. AAG refer to Comsite's threat to issue proceedings in this court. They contend that all claims should be settled by an Austrian court applying Austrian law. AAG seek relief in the Austrian proceedings preventing Comsite from pursuing claims under the Building Services sub-contract except in the Austrian court. I am told (though there is as yet no filed evidence of this) that Comsite have taken steps to defend the Austrian proceedings and that a hearing will take place next month at which Comsite will contest the jurisdiction of the court in Graz.
13. On 26 February 2003, Comsite issued these Part 8 proceedings.
14. During the hearing, Mr Burr for AAG suggested that AAG had had very little time to prepare for the hearing. That is puzzling, given that these proceedings were served on AAG in late February. AAG did not apply to adjourn these applications nor have they identified any particular further information which, with more time, they might be able to adduce and which might assist.

Does the court have jurisdiction to deal with the Part 8 claim?

15. AAG contend that, by reason of Clause 20 and of Article 23 of EC Council Regulation No: 44/2001, this court does not have jurisdiction to deal with the Part 8 claim.

Article 23 states:

"If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

16. Comsite's case is that all disputes between the parties must be referred to the court in Graz; the matters the subject of these proceedings fall within the scope of disputes which the parties agreed be referred to the court in Graz.
17. In these proceedings, Comsite seek a declaration that their work falls within the definition of "construction operations" set out in Section 105 of the Act. Clause 20 in the Building Services sub-contract defines and limits the dispute which the parties have agreed be settled by the Austrian court, for the purposes of Article 23. I conclude that the present dispute between Comsite and AAG, whether Comsite are entitled to the declarations they seek, does not fall within the scope of Clause 20: it is not a dispute about interpretation or execution of the sub-contract or annexes, nor a dispute in connection with documents issued by the parties, nor yet about additional agreements concerning modifications to the contract. Clause 20 does not apply to the matters the subject of these proceedings. The dispute in these proceedings arises from the application of the 1996 Act and whether, by statutory implication, the statutory Scheme for construction contracts is applicable. It is thus not a dispute which the parties have agreed to have settled by an Austrian court for the purposes of Article 23. The parties have thus not agreed that the Austrian court have jurisdiction to determine matters the subject of Comsite's Part 8 application.
18. AAG rely on the dispute resolution clause in the contract between SJV and Andritz Ltd, namely:
"The Subcontractor and the Contractor agree that if the services of an Adjudicator are required under the Subcontract any one of the persons nominated below (a "Nominated Adjudicator") (who are to be invited to act in the order of precedence in which they are listed), may be appointed to act as Adjudicator if they are ready and willing to act in relation to the difference or dispute to be referred. It shall be the responsibility of the party making the reference to Adjudication under Clause 44 of the Conditions of Subcontract to determine before issuing an Adjudication Notice whether any of the Nominated Adjudicators is willing to act as Adjudicator in the dispute, and if a Nominated Adjudicator agrees to act, the party issuing the Adjudication Notice shall state in such Notice the name of the Adjudicator who has agreed to act. "
The nominated adjudicators are then listed.
19. Mr Burr submits that this clause, in the SJV/Andritz Ltd contract, indicates that the parties put their minds to the scope of the dispute resolution clause included in the Building Services sub-contract. While a bespoke adjudication procedure was agreed for the SJV/Andritz contract, by contrast the parties to the Building Services sub-contract expressly agreed that all disputes be resolved in Austria and subject to Austrian law. Comsite should be kept to that agreement.
20. In the absence of evidence, I decline to draw the inference as to what the various parties had in mind when agreeing terms. In any event, I am not persuaded that that is relevant. The wording of Clause 20 is not in doubt. It is a question of construing it objectively.
21. In case it assists, I deal with Mr Constable's further submission on behalf of Comsite. I accept his submission that, even if the Austrian court did have exclusive jurisdiction, that would not prevent the English court from exercising jurisdiction to enforce the decision of an adjudicator, or to decide matters relating to the enforcement of such a decision, such decisions being of a temporary nature. I found very helpful the strong analogy he drew between the circumstances here and cases where the court has considered the relationship between the Arbitration Act 1996 ("AA96") and enforcement of adjudicators decisions. It appears to be a trite proposition that an application to stay pursuant to section 9 AA96 will not prevent enforcement of the decision of an adjudicator even though arbitration is the contractually agreed method of dispute resolution. If support is needed for that proposition, it can be found in *Absolute Rentals Ltd -v- Gencor Enterprises Ltd* 17 Con LJ 322, *The Construction Group Centre -v- Highland Council* [2002] CILL 1906 and *Macob -v- Morrison* [1999] BLR 93. Indeed, AAG did not challenge the proposition that, notwithstanding the existence of an arbitration agreement and the provisions of section 9 AA96, the English court nevertheless is able to enforce adjudication decisions, which are temporary in nature. Ultimately, a dispute might be determined by an arbitration, but that does not prevent enforcement of the temporary decision of an adjudicator. I accept that, so here, whilst ultimately the Austrian court may be the appropriate forum in which the substantive dispute or disputes between Comsite and AAG should be settled (to adopt the wording of

Article 23), that does not prevent the English court enforcing the temporary decision of an adjudicator properly made in relation to the Building Services sub-contract. The agreement that the Austrian court have jurisdiction is not undermined or ignored by the conclusion that the interim decision of an adjudicator can be enforced by an English court. Enforcement of such a decision is without prejudice to the final merits and determination by the Austrian court. The agreement that the Austrian court have jurisdiction does not prevent this court considering this Part 8 application by Comsite.

22. Support for Mr Constable's submission is to be found in the inclusion in Article 23 of the word "*settle*". That must refer to a final resolution of a dispute. The decision of an adjudicator is not such a final resolution, neither is enforcement of such a decision by the English court.
23. I conclude that this court has jurisdiction to determine the Part 8 claim and make declarations of the nature of those which Comsite seeks.

Is the Part 8 procedure appropriate?

24. AAG's case is that Part 8 is a wholly inappropriate procedure for determining whether the work the subject of the Building Services sub-contract falls within the definition of construction operations or whether the sub-contract constitutes a construction contract as defined in the Act: factual evidence is needed and should be tested by the court.
25. AAG have not suggested in any detail what further information could, or should, be made available. It was loosely suggested on behalf of AAG that expert evidence is needed to determine these issues, but it has not been made clear what issues an expert might address. Mr Phillips, Herr Umdasch and Herr Winter have made statements which give adequate description of the plant and building to enable the court to understand the component features and elements of work to be undertaken under the Building Services sub-contract. The factual issues are very straightforward, and AAG have not seriously suggested otherwise. I do not consider that further factual or expert evidence is needed to determine whether or not the work fell within the definition of construction operations within the Act.
26. Comsite's application is not for enforcement of an adjudicator's decision. The outcome of the Part 8 application will, however, help the parties and any adjudicator to understand whether the latter would have jurisdiction to decide a dispute referred to him or her. I consider the route which Comsite have adopted to be sensible and pragmatic, and one which has the effect of helping the parties save unnecessary expenditure on costs.

Does the work fall within the definition of construction operations and is the Building Services sub-contract a construction contract?

27. AAG's case is that the work the subject of the Building Services sub-contract falls within section 105(2)(c)(i). They no longer rely on the provisions of Section 105 (2)(d)(iii).
28. Relevant sections of the 1996 Act are:
"104 Construction contracts
1. In this Part a "construction contract" means an agreement with a person for any of the following -
b. the carrying out of construction operations"
"105 Meaning of "construction operations"
3. 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 -
4. nuclear processing, power generation, or water or effluent treatment,..."
29. Comsite's case is that the work the scope of the Building Services subcontract 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.
30. To support his point, Herr Umdasch refers to as-built drawings for the electrical services for the various floors in the building. I cannot accept the conclusion which Herr Umdasch reaches, namely that the electrical services provided by Comsite were "*fully integrated into the dewatering and drying*

plant." The drawings show that the electrical services related to the building and not to the plant. The electrical services in question appear to be those needed to run the lighting and power for the building, not the plant. They are not physically connected to the plant. There is no suggestion by AAG that any other services (eg ventilation, gas or fire alarms or heating) installed under the Building Services sub-contract related to the plant.

31. I conclude that the services which Comsite were to install under the Building Services sub-contract were physically integral to the building but not integral to the plant. There is no reason to suppose that the dryer plant is not capable of operating without any of the services to be installed pursuant to the Building Services sub-contract.
32. For the purposes of this application, I assume that AAG are correct in saying that, in the absence of lighting and gas and fire alarms, Southern Water may not operate the plant. AAG rely principally on the proposition that, by reason of relevant health and safety regulations, Southern Water is not permitted to operate the building without lighting or alarms. In other words, the services installed by Comsite pursuant to the Building Services sub-contract were operationally integral to the plant.
33. In *Homer Burgess Ltd -v- Chirex (Annan) Ltd* [2000] BLR 124 Lord MacFadyen concluded that pipework linking pieces of equipment used for processing of pharmaceuticals was clearly part of the plant. He said "*I am of the opinion that the pipework was clearly part of the plant being assembled 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.*" I find that approach helpful. Here, unlike the circumstances in *Homer Burgess*, it appears that the dryer plant could work physically without the services. The services were in no real sense part of the apparatus comprising the plant.
34. HHJ Lloyd QC considered section 105 of the Act in *ABB Power Construction Limited -v- Norwest Hoist Engineering Ltd* (2001) 17 Const U 246. He concluded that the test was whether the object of the "construction operation" was to further the activities described in section 105(2). Any work which would be a construction operation which was necessary for the full and proper assembly or installation of plant so that it would fulfil the purpose or purposes for which it was intended is exempt from the provisions of the Act, assuming that the condition relating to the site is also satisfied. Mr Burr submits that the court should adopt that purposive construction here. This, he submits, requires consideration of what Southern Water were trying to achieve, namely a sludge drying plant. Mr Burr's approach, in my judgment, is too broad. Section 105 refers to assembly and installation of plant and machinery, in the context of a site where water treatment is the primary activity. Here, while the primary activity within the building is water treatment, the plant (to which the section applies) is a distinct element within the building. The fact that water treatment is the primary activity within the building does not have the consequence that all work within or related to the building housing the plant falls within the definition of plant. The building services were not necessary for the full and proper assembly or installation of the dryer. The dryer was capable of fulfilling the purpose for which it was intended without the building services.
35. Mr Burr relies on paragraph 14 of the judgment in *ABB v Norwest Hoist* in which HHJ Lloyd QC suggested that it would be invidious if the regimes under the 1996 Act applied to some but not all construction contracts on a site, and went on to refer to the desirability of establishing and maintaining harmonious working relationships and the concept of teamwork on site. On this site, however, where work to the building and to install the plant were both to be undertaken, some operations would fall within and some outwith the scope of Section 105(2)(c)(i). The existence of any anomaly such as that referred to by His Honour Judge Lloyd QC therefore does not assist me here.
36. In *ABB Power Construction Limited -v- Norwest Hoist*, H HJ Lloyd QC said "*The Act calls for distinctions which are based on operational or engineering considerations. Plant and machinery can readily be distinguished from factory roads, administrative offices etc; steelwork is exempt only if required for the purposes of supporting or providing access to plant or machinery.*" In my judgment, a broad categorisation of that sort does not assist AAG. If it be appropriate to consider whether the services are required for

operational purposes for the dewatering and drying plant, then that must in my judgment refer to something more than being able lawfully to operate the plant. There would have to be sufficient operational or engineering nexus that the plant would not be capable of operating without the services. That is not the case here. It is relevant to look for the physical connection found in *Homer Burgess*, ie those elements needed to enable the plant physically to function, not those elements without which an operator may not lawfully operate the plant.

37. In *ABB Zantingh Ltd -v- Zedal Building Services Ltd* [2001] BLR 66, HH] Bowsher QC concluded that cable, cable trays and the like became plant when installed. The cable, when worked into the plant or if it joined two pieces of plant, became part of the plant. He commented that one could not "*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.*" I find that approach helpful. No minute analysis is required here. In this case, none of the services supplied under the Building Services sub-contract was connected to the plant or used to enable the plant physically to be operated. Their purpose and function were simply related to the building, which housed not only the plant but also other areas of activity, including the workshop, compressor room, store room, control room, bagging and polymer rooms. 38.AAG had let two sub-contracts. The first sub-contract between Comsite and AAG was concerned with the supply of electrical services to the plant and compressor. The Building Services sub-contract related to electrical and mechanical services to the building. A distinction was made between the two sub-contracts, one for services which were directly integral to the plant and the other for services to the building. While installation of electrics and so on which were an integral part of the dryer plant would fall within section 105(2)(c)(i), in my judgment the services to the building the subject of the Building Services sub-contract (ie the lighting, power sockets, alarms, heating and ventilation to be installed within the building) and which were not to be connected into the plant, are not plant of their own right. They are not integrated into the plant and so do not fall within the definition of plant by virtue of such integration. It cannot be said that in any "real sense" the building services were part of the plant. As Mr Constable submits, buildings in other contexts may not be permitted to operate without adequate lighting or functioning alarms, and yet one cannot define these services as "*operational*". The fact that Southern Water may not operate without some of the services does not, in my judgment, have the consequence that the building services are integral to the plant so as to fall within the definition of plant in Section 105.
39. I conclude that the work the subject of the Building Services sub-contract falls within the definition of "*construction operations*" set out in Section 105 of the Act and the Building Services sub-contract constitutes a construction contract as defined by section 104 of the Act.

Conclusion

40. It follows that Comsite are entitled to declarations that Comsite's works under the Building Services sub-contract fall within the definition of "*construction operations*" set out in Section 105 of the Housing Grants, Construction and Regeneration Act 1996, and accordingly: the Building Services sub-contract constitutes a "*construction contract*" as defined in Section 104 of that Act; and Part II of that Act applies to the Building Services sub-contract; and both Comsite and AAG have the right to refer a dispute arising under the Building Services sub-contract for adjudication under a procedure complying with Section 108 of that Act.

Mr Adam Constable of Counsel (instructed by Hammonds) for the Claimant

Mr Andrew Burr of Counsel (instructed by Shepherd & Wedderburn) for the Defendant