

**JUDGMENT : HIS HONOUR JUDGE THORTON : 6<sup>th</sup> August 1999**

**1. Introduction**

1. The claimant ("Palmers") is a nationally operating scaffolding contractor with a number of branches in both England and Scotland. Palmers supplies, erects, adapts and dismantles scaffolding for construction and engineering contractors which it both owns and supplies. The defendant ("ABB") is a specialist in the assembly of, and the mechanical engineering work associated with, heavy plant such as turbines, boilers and generators. The dispute that has arisen concerns ABB's entitlement to withhold interim payments for work under Palmer's contract with ABB to undertake scaffolding services in connection with ABB's contract at the Esso Fawley Cogeneration Project at Fawley, near Southampton, Hants. The Project is owned by Esso but is being operated by National Power pursuant to a ten-year operating licence. ABB's work involves the assembly and erection of a part of the cogeneration plant being provided at that Project, namely a heat recovery steam generator ("HRSG") boiler. ABB is under contract for this work to the designers and manufacturers of the HRSG boiler, Stork Energy Ltd. ("Stork") who, in turn, are under contract to Fluor Daniel Ltd. ("Fluor"), the principal contractor to National Power for the Project. Thus, Palmers are scaffolding sub-sub-sub-contractors for part of a huge project involving the provision of complex industrial plant to be used for power generation.
2. The Project would obviously require much scaffolding and several different sub-contractors and sub-sub-contractors would have requirements for this facility. To ensure efficient, safe and economic provision of scaffolding for the whole project, Fluor Daniel Ltd. evolved a scheme whereby Palmers was to provide all scaffolding for any party involved with the Project who needed scaffolding. This was done by Fluor agreeing a rate for the provision of temporary scaffolding access which would be available for all parties requiring this. This led to a Memorandum of Understanding being signed by Fluor and Palmers which provided for the nomination of Palmers for this purpose and model terms under which any scaffolding would be supplied to each party requiring it. Fluor then required every sub-contractor, and any contracting party further down each sub-contract chain, to obtain its scaffolding services from Palmers. On 19 January 1999, ABB and Palmers concluded a sub-sub-sub-contract for scaffolding services which incorporated the Memorandum of Understanding.
3. The scaffolding is being used by ABB to enable it to erect the specialist HRSG boiler and associated pipework at the Project. ABB's work includes the erection of a huge structural steelwork frame which supports and provides access to the boiler and associated pipework. The frame comprises square box section beams and trusses and which, as erected, stands about 30 metres high and 10 metres wide. Within this frame is suspended the boiler which consists of 16 boiler modules; high and low pressure drums and a declaration vessel; inlet ducts, casing, main and bypass stacks; integral and external pipework; and insulation works. 4 levels of galleries and an access stairway are being constructed around the structural frame.
4. Palmers' services are to provide the temporary scaffolding around and above the structural frame to enable the erection of the boiler to take place. The work essentially consists of the initial erection of the scaffolding lattice and, thereafter, its almost constant adaptation to facilitate and provide for ABB's on-going erection work. Parsons started work in January 1999 and the striking and removal of scaffolding is currently planned for September 1999. A dispute has arisen between ABB and Palmers. ABB contends that Palmers have, in breach of the scaffolding contract, failed to supply an adequate number of appropriately qualified personnel leading, by early July 1999, to an alleged delay quantified as being 180-man days in length. ABB alleges that this delay has, in turn, delayed the erection programme and has led Stork to intimate that liquidated damages for delay will be deducted from ABB's contractual remuneration. ABB has, in consequence, purported to operate the set-off clause of the contract and the statutory notice provisions of the Housing Grants Construction Regeneration Act 1996 ("HGCRA") against sums Palmers claim as being entitled to. There are four separate sums, arising from claims for payment in April, May, June and July 1999. These total £604,593.19. A further sum, for which an application was submitted by Palmers on or about 26 July 1999, is also to be subject to this claimed set-off by ABB.
5. Following this purported set-off, and the earlier non-payment of interim payments allegedly due, Palmers purported, on 15 July 1999, to serve a notice stating its intention to exercise its statutory entitlement to suspend performance of its obligations under the scaffolding contract with ABB. Palmers also served a notice

on 15 July 1999 seeking adjudication of all five claims for interim payment pursuant to s108 of the HGCRA. Palmers also contends that it is now entitled, pursuant to s112 of the HGCRA, to suspend its performance of its obligations.

6. ABB, on receipt of Palmers' adjudication with a letter dated 20 July 1999, which contends that the scaffolding sub-sub-sub-contract "operation" is not a "construction operations" nor a "construction contract" and that, in consequence, Parsons has no HGCRA right to seek statutory adjudication and any adjudicator who might purport to act pursuant to Parsons notice dated 15 July 1999 would lack jurisdiction to act.
7. Palmers immediately issued, on 26 July 1999, a claim seeking the answers to 6 questions of law, essentially as to whether an adjudicator would have jurisdiction to deal with its monetary claim; and as to whether Parsons are now entitled to suspend performance of its work. It also claims payment of the earliest of the five interim payments in dispute, on the grounds that the 60-day contractual period of grace following receipt by ABB of an appropriate invoice, has now passed and ABB has no current valid defence to payment. These proceedings have been expedited with commendable speed and efficiency by the solicitors and counsel acting for both parties such that I heard the argument arising out of these questions on 30 July 1999, only 4 days after the claim was issued and 10 days after the validity of the potential adjudication was first challenged by ABB. I have felt it necessary to reserve judgment and a hearing was convened on 5 August 1999 to hand down the draft judgment that had been previously sent to the parties 13 days after the dispute in question first arose.
8. At the first hearing on 30 July, a question arose as to the potential admissibility of statements made during the Parliamentary stages of the enactment of section 105 the HGCRA, since the relevant words appeared to be ambiguous. As a result, both counsel undertook a search on the internet for Parliamentary materials of the debates of the relevant stages of the enactment of s105 of the HGCRA. Some of the relevant materials were placed before the court when the court reconvened on 5 August 1999 to hand down the draft judgment that had already been made available to the parties. On that second occasion, Palmers was represented by different counsel, Mr Jonathan Lee, since Mr Richard Harding, counsel previously appearing, was professionally engaged elsewhere. ABB sought to persuade me to admit these materials and to use them to reconsider my draft judgment. Palmers sought to persuade me that the materials were inadmissible. Following this further argument, I announced that I had decided that the materials were inadmissible and that I would hand down to the parties a judgment which would provide my reasons and make various other changes to the existing draft judgment to accommodate other matters discussed at this second hearing. This judgment is the result of that series of revisions and is the final judgment in this application.

**2. The Contract and Statutory Framework**

9. ABB submitted an order to Palmers dated 6 January 1999. This order sought to incorporate ABB's standard terms and conditions but these were withdrawn by ABB and the sub-sub-sub-contract incorporated Palmers' Memorandum of Understanding reached with Fluor. Three further sets of documents which defined the work to be carried out by ABB, being a technical specification, three attachments to the order and the tender document, were also incorporated. The Memorandum of Understanding contains detailed conditions of contract, rates and a definition of the general scope of Palmers' work to be undertaken in connection with the Project at Fawley. The sub-sub-sub-contract took effect as a result of Palmers' letter to ABB dated 19 January 1999.
10. The general scope of work to be carried out by Palmers is defined in the Scope of Work document incorporated into the Memorandum of Understanding as follows:  
*All services, materials and items of expense necessary to perform ... the following: Scaffolding ... in connection with the Esso Fawley Cogeneration Project.*  
*In respect of the Works which are detailed herein, [Parsons] is responsible for the supply of all Staff, Labour, Plant, Equipment, Tools, Transport, Safety Equipment and everything of a temporary nature required to complete the works ... The purpose of this Work is to provide scaffolding services in support of the contractors executing other works on the Cogeneration Plant. Refer to Appendix 1 - Information Drawings for an overview of the site layout and typical pipetrack elevations.*  
*Appendix 1 referred to two drawings: A Plot Plan and a North-South Pipetrack Steelwork Plans and Elevations.*

11. The General Terms, also incorporated into the Memorandum of Understanding, contains Article 38 which is entitled Right to Set-Off and which reads as follows:
  - 38.1 [ABB] without waiver or limitation of any rights or remedies of [ABB] shall be entitled from time to time to deduct from any amount due or owing by [ABB] to [Palmers] in connection with this Contract any and all amounts owed by [Palmers] to [ABB] in connection with this Contract.
  - 38.2 [ABB] shall be entitled to set-off against any money (including retention money) otherwise due under this Contract the amount of any claim for loss and/or expense which has actually been incurred by [ABB], or which it may reasonably be expected to incur, by reason of any breach of, or failure to observe the provisions of this Contract.
  - 38.3 Any amount of set-off under the provisions of Section 28.2 above is without prejudice to the rights of [ABB] or [Palmers] in any subsequent negotiations, proceedings or litigation to seek and vary the amount claimed and set-off by [ABB] under Section 38.2 above.
12. The actual scaffolding work is not detailed in any drawings. The requirements for the precise location of scaffolding, access and working areas to be provided were made known as erection proceeded and the adaptations that were required were described in Scaffold Request Forms. A typical such instruction was provided at the hearing. It is dated 18 February 1999 and reads as follows:

*Description of Scaffold Required: Access scaffold at Elevation 16.500 3.5m x 2.0m. Access scaffold at Elevation 16.500 East/West L-Shape 7m x 5m x 1.5m.*
13. The scaffolding was priced by applying unit rates set out in the Memorandum of Understanding. These, essentially, provide rates per cubic metre for General Scaffolding and Decking with particular rates for such items as freestanding barriers; corrugated sheeting; and brickguards.
14. The documents detailing ABB's work and the sub-sub-contract between ABB and Stork were not put in evidence but the general description of ABB's work that I have already summarised was taken from the witness statements of Palmers' Industrial Services Manager, Mr Andrew O'Connor, and ABB's Regional Manager, Mr David Billington. Neither of these statements were challenged by the other party to these proceedings. A colour photograph of the structure that houses the HRSG boiler and pipework, which showed with much detail one side of the boiler and associated plant, was also put in evidence.
15. The relevant sections of Part II of the HGCRA read as follows:

104(1) ... a "construction contract" means an agreement with a person for any of the following

  - (a) the carrying out of construction operations;

(5) Where an agreement relates to construction operations and other matters, the Part applies to it only so far as it relates to construction operations.

An Agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2).

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, 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, telecommunications apparatus, aircraft runway, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for the purposes of land drainage, coast protection or defence;
  - (c) installations 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 cladding 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, earthmoving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;
  - (f) painting or decorating the internal or external surfaces of any building or structure.

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

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

- (b) *extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;*
- (c) *assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is*
  - (i) *nuclear processing, power generation, or water or effluent treatment;*
  - (ii) *the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;*
- (d) *manufacture or delivery to site of*
  - (i) *building or engineering components or equipment;*
  - (ii) *materials, plant or machinery;*
  - (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.*

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

107(1) *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.*

16. No adjudication procedure was specified in the sub-sub-subcontract, no doubt because ABB believed that the contract was not a construction contract. Thus, if the disputes in question may be referred to adjudication because the sub-sub-sub-contract is in fact a construction contract, the adjudication provisions of the Scheme for Construction Contracts applies. The relevant Scheme, set out in SI 1998 No 649: "The Scheme for Construction Contracts (England and Wales) Regulations 1998, provides that any party to a construction contract may give written notice of his intention to refer any dispute arising under the contract to adjudication. The Regulations then provide in detail how an adjudicator is to be appointed, what his powers are and how and when his decision should be arrived at. There is no provision which allows the adjudicator, when appointed to, examine his own jurisdiction or to make a decision as to whether he has jurisdiction to act in the dispute.

#### **4. The Issues**

17. The parties accepted that 6 questions have been referred to me for answering. To these questions, I have added two further questions, numbered 3 and 8 below. The questions are:
- 1. Is the contract between ABB and Palmers an agreement for the carrying out of the construction operations described in section 105(1)(e) of the HGCRA?
  - 2. Is the contract a construction contract for the purposes of Part II of the HGCRA?
  - 3. (Added by the judge since the question was argued by both parties) If Part II of the HGCRA is applicable, may Palmers refer to adjudication pursuant to section 108(1) of the Act the whole of each dispute referred to in its notice dated 15 July 1999?
  - 4. If Part II of the HGCRA is applicable to the contract, do either of the 2 letters relied on by ABB as providing an effective notice of intention to withhold payment pursuant to the requirements of section 111 of the Act, constitute an effective notice for that purpose?
  - 5. Is Palmers, letter dated 15 July 1999 an effective notice of an intention to suspend performance of its obligations under the contract pursuant to section 112 (2) of the Act?
  - 6. Does Palmers have the right forthwith to suspend performance of its obligations under the contract pursuant to section 112(1) of the Act?
  - 7. Is Palmers entitled to immediate payment of a sum of E172,572.25?
  - 8. (Added by the judge) Should the court exercise its discretion to decline to answer any or all of these questions given the existence of the statutory adjudication scheme provided for by the Act and Regulations made thereunder?
18. Essentially, there are four questions to be determined: (1) whether the sub-sub-sub-contract is a "construction contract" (2) whether Palmers may now suspend performance of its obligations under the contract; (3) whether Palmers is currently entitled to immediate payment of a sum of E172,572.25; and (4) whether the

court should answer the first three questions at all. The question going to the court's discretion to answer these questions should logically be addressed first. However, since I have decided that it is appropriate to answer the first and third of these questions, I will give my reasons as to why I should exercise my discretion to answer these two questions by granting appropriate declarations at the end of this judgment.

**5. Construction Contract**

19. Three questions arise in relation to whether Palmers' work under its sub-sub-sub-contract is a construction operation and, hence gives rise to a construction contract. The first question is whether ABB's work and its sub-sub-contract with Stork are, respectively, a construction operation and a construction contract. This question arises because, if they are not, Palmers' associated scaffolding work cannot give rise to either a construction operation or to a construction contract. The second question only arises if Palmers' scaffolding work is wholly or in part properly described as a construction operation. The second question is whether section 105(2) is applicable, nonetheless, to take Palmers' sub-sub-sub-contract outside Part II of the HGCRA. The third question must consider the possibility that, even if Palmers' work is capable of being a construction operation, whether only part of that work is in fact a construction operation.

**5.1. Construction operation**

20. ABB argued that its boiler assembly work was not a construction operation as described in section 105(1). Much weight was placed on the views of Mr Billington in his witness statement where he stated:  
*ABB was not constructing anything and were definitely not constructing industrial plant. The height and size of the HRSG structure makes it clearly defined from the other areas of the Project. The HRSG is housed within a steel frame. The HRSG is not enclosed by a building.*
21. ABB's argument was that the process of erecting the steelwork and assembling and erecting the boiler and its associated pipework and ancillary materials cannot, in the light of this evidence, be described as the construction of any of the operations whose construction is described in section 105(1) as being a "construction operation". Moreover, the boiler, its supporting structures and associated pipework are not "works forming part of the land", "industrial plant" nor either "power supply" or "water supply" as described in sections 105(1)(b) or (c) of the HGCRA.
22. Mr Billington's views as to whether a construction process is being carried out by ABB is not determinative of that question which is one of mixed law and fact. The ultimate conclusion as to whether the assembly process involved is to be considered as "construction" is a question of law. Although, in popular speech, the word "construction" is usually used in connection with building operations as opposed to engineering operations, the word clearly has a wider connotation when used in connection with many of the operations described in section 105(1). Thus, structures and works forming part of the land (which are not confined to buildings but are clearly intended to refer to all structures and works of whatever type) are linked with this word. Moreover, power-lines, telecommunications apparatus and industrial plant are expressly included within the definition of "works" forming part of the land. Thus, it is clearly envisaged that the assembly and fixing to the land of industrial plant and similar features are included within the definition of construction operations and are also included in the definition of "construction".
23. 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 the 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.

**5.2. Is Palmers' sub-sub-sub-contract outside section 105(1) of the HGCRA?**

24. In considering the somewhat convoluted section 105 of the HGCRA, it is helpful first to notice one of its most important features. This is that there are some operations which fall within the definition, provided by section 105(1), and would therefore appear to be construction operations and yet are not such operations as a result of section 105(2) of the Act. This is because subsection 105(1) states, somewhat inelegantly, that subsection (1) applies "subject as follows" which, in its context, means that subsection (1) is to apply unless subsection (2) also applies. If subsection (2) applies, subsection (1) is not to apply. The inapplicability of subsection 105(1)

arises in any particular case even though most, if not all, of the relevant operations described in subsection (2) also fall within one of the descriptions of relevant operations set out in subsection (1).

25. The question as to whether Palmers' scaffolding work comes within subsection 105(2) and, in consequence, falls outside the ambit of subsection 105(1) arises because of the wording of subsection 105(1) (e) which includes the phrase: "scaffolding [which] is preparatory to such operations as are previously described in this subsection" (emphasis added). Since ABB's work is, as I have already found, encompassed by subsection 105 (1) (b), it might be thought that there was no question but that the scaffolding work was preparatory to one of the operations "previously described". However, the operation of assembling and erecting the HRSG boiler by ABB also clearly falls within the ambit subsection 105 (2) (c) since the boiler is for use on a site whose primary activity is power generation. Both parties accepted that ABB's sub-sub- contract work for Stork falls outside Part II of the Act since it falls within the exclusions provided for in subsection 105(2) and is not, in consequence, a construction operation.
26. The structure of section 105 led ABB to argue that "*previously described in this subsection*" is a reference to those operations previously described which are not, additionally, included in subsection (2) since, so it was argued, such operations are not "previously described in this subsection". Instead, they are operations which are subsequently described in subsection (2).
27. The meaning of the critical phrase "such operations as are previously described in this subsection" is not wholly free from ambiguity. The phrase could be referring to any operation which falls within the description provided by the words set out in section 105(1) even if the operation is taken outside the ambit of subsection (1) by subsection (2) or it could be referring only to those operations that are also construction operations. In order to determine which of these two possible meanings the words are intended to convey, it is first necessary to examine the statutory context in which they appear.
28. Section 105 is contained within Part II of the HGCRA which introduces a statutory adjudication scheme, to be operated in conditions of speed, that is linked to a statutory limitation on a paying party's power to impose set-offs on a receiving party. It also renders ineffective the operation of pay-when-paid provisions in construction contracts which are situated below the main contract in a contractual chain. These measures are intended to speed up cash flow and to curb the prevalence of unnecessary and unfair set-offs being imposed on sub-contractors and on contracting parties even lower down the contractual chain.
29. However, it is generally known that a limited number of contracting organisations representing specific sections of the construction and engineering industry persuaded the Government to exclude the contracts of their members from the ambit of the HGCRA. This was because these sections of the construction and engineering industry were already operating satisfactory contractual arrangements concerned with payment. This is the explanation for section 105(2) of the Act.
30. The principal operations which would, or might, be construction operations had they not been taken out of the ambit of Part II of the Act are: drilling; mineral extraction and associated work; the assembly of power generation plant and its associated steelwork; the manufacture of building materials, and the making of artistic works.
31. Not all processes involved in the construction or erection of power generation plant are excluded from the ambit of subsection 105(1) by subsection 105(2). Clearly the erection of supporting steelwork is excluded. However, the construction of buildings and concrete foundations for use with the plant in question do not come within the exclusion provided by subsection 105(2) nor does any painting of the internal or external surfaces of that plant.
32. Thus, it is perfectly possible, and within the statutory scheme, for a contractor's operations to fall outside the definition of a construction operation yet for a sub-contractor providing building, foundation or painting services for that contractor's work to come within the definition. This means that some sub-contractors are able to seek an adjudication and rely on the HGCRA's statutory restrictions on a contractor's powers of set-off whereas the same contractor is not able to seek adjudication under the relevant main contract next up the contractual chain nor to require the employer to use the HGCRA set-off procedures. This consideration counters ABB's argument that it would be unfortunate and contrary to the statutory scheme if ABB could be the subject of a set-off imposed by Stork and could not require an adjudication of any dispute with Stork as to

the validity of that set-off whereas ABB might be unable to levy the same set-off against Palmers, because of the operation of Part II of the HGCRA, and could be the subject of an adjudication about that set-off at the behest of Palmers, despite Palmers being below ABB in the contractual chain.

33. This background to the Act shows that the language of the subsections in question need not, where two different meanings of the subsections are possible, necessarily suggest a meaning which leads to a contractor being treated in the same way vis-avis his employer as a sub-contractor is to be treated by that contractor.
34. I now turn to the language of subsections 105(1) and (2). The more natural of the two possible meanings of the relevant words suggests that sub-subsection 105(1)(e) is not incorporating the exclusions provided by subsection 105(2). If the words had been intended to exclude from subsection 105(1)(e) preparatory operations for those operations which, although apparently within the ambit of subsection 105(1), are not to be treated as being so because they are also within the definition of excluded construction operations that are set out in subsection 105(2), it would have been a more natural use of language to use these words: "such construction operations as are previously defined by this subsection" rather than the words actually used: "such operations as are previously described in this subsection". By widening the relevant reference from: "*construction operations*" to: "*operations*" and by referring to operations that are: "*described in this subsection*" rather than to operations that are: "*defined by this subsection*", the draftsman of the HGCRA appears to be pointing to operations which fit the words of subsection (1) even if they fall outside its ambit by virtue of subsection (2). In other words, scaffolding which is preparatory to an excluded construction operation may, nonetheless, itself be a construction operation.
35. Thus, the apparent meaning of the words in question, given their context and natural meaning, is that Palmers' operations are construction operations and that its sub-sub-sub-contract is a construction contract. However, ABB sought to introduce certain passages from speeches delivered during the debates in the House of Lords during four different stages of the Parliamentary passage of the Housing Grants, Construction and Regeneration Bill to show that that initial view of the meaning of section 105(1) should be replaced by the narrower meaning of the words which would take Palmers' scaffolding work outside the ambit of the adjudication provisions of the HGCRA.
36. Until 1993, courts could not examine the Parliamentary debates concerned with the enactment of a statutory provision. However, the House of Lords, in *Pepper v Hart* (1993) A.C. 593, a decision regarded by many lawyers as seismic in its effect, introduced into English procedure the principle that, in appropriate cases, Parliamentary materials may be cited to a court to aid in the construction of a statutory provision. The occasions on which this may be done are those where the relevant provision is, in the opinion of the court, ambiguous or obscure or where its literal meaning would lead to an absurdity. ABB suggests that the meaning of the critical words in subsection 105(1)(e) are ambiguous and that, in consequence, I am entitled to read what the Parliamentary promoters of the HGCRA said as to the intended ambit of that provision when taken in conjunction with subsection 105(2).
37. I was faced with two initial difficulties in dealing with this submission. The first is that time had not allowed counsel to check all stages of the passage of the Bill through Parliament. Section 105 was introduced as an amendment during the Committee stage of the Bill in the House of Lords. Passages of the debate on that stage and on the two succeeding stages in the House of Lords, being Report and Third Reading, were produced in court. A further passage from the final stage, the consideration by the House of Lords of Commons amendments, was also introduced. However, time did not allow counsel to consult the Hansard reports of the intervening stages in the House of Commons, when the House of Lords' amendments were considered and further amended. Given the urgency of the matter, it was unthinkable to consider a further adjournment. It was suggested that I should exclude the Hansard references on the short ground that unless the debates of all relevant stages had been consulted, no reference should be considered. However, a court must proceed as best it can and it is not permissible to exclude admissible and relevant materials merely because there might be yet further materials which are not available which might colour or gloss the admitted materials.
38. A second difficulty is in determining whether the question of admissibility should be considered before or after a consideration of the relevant materials. In other words, should the court first decide whether there exists an ambiguity before considering the materials and only consider them if the initial view is that there is an ambiguity or should the court consider any materials which might be relevant in order to decide not only

what the appropriate meaning is that should be given to a potentially ambiguous phrase but also whether the words are potentially susceptible to more than one meaning at all. In this latter case, the judge might find that words whose meaning appears to him to be clear are, on a consideration of the words used by the promoter of the legislation, not as clear as they first appeared to be.

39. When this second question was raised in argument, I was persuaded by Palmers counsel that the words were not sufficiently ambiguous to entitle me to examine Hansard at all. My view was that, in the light of the more natural of the two meanings contended for and in the light of the statutory context in which they are set, both of which I have already dealt with at length, the meaning of the words was clear and the need to have recourse to Hansard was not made out. However, since giving that extempore ruling, I have re-read the speeches in *Pepper v Hart* and the lengthy extract from *Statutory Interpretation* by the renowned constitutional lawyer Mr Francis Bennion<sup>1</sup> concerned with the principles to be derived from that case. This has persuaded me that I should only exclude Parliamentary materials if I am sure that there is no ambiguity.
40. I have therefore, since the conclusion of the argument, reread the extracts from Hansard which were provided, having read them prior to the hearing since they were attached to counsel's skeleton arguments lodged with the court prior to that hearing. I found that nothing assisted in the task of interpreting section 105 save for three passages from two speeches of Lord Lucas, the minister leading for the Government during the relevant debates in the House of Lords. In connection with subsection 105(2), Lord Lucas stated as follows:  
*"To reiterate and summarise our position, it is not, an never has been, our intention to exclude from the Bill all construction work on a process engineering site. We wish to exclude work only on plant and machinery. Ordinary civil and building work would not be excluded."*  
*"... since it is only work on plant, machinery and connected steelwork that will be excluded from the Bill ..."* (*Debate on Third Reading: Hansard, 29 April 1996, columns 1439 and 1440*)  
*"... Me undertook to amend Clause 104(2)(c) [now section 105(2)(c)] to achieve two particular effects. The first of these was to ensure that the exclusion of work on plant and machinery on a process plant site should extend only to steelwork that was necessarily connected to it in some way, and that all other steelwork on such a site - in common with all other construction work - should be subject to the Bill's provisions."* (*Debate on Commons Amendments: Hansard, 23 July 1996, column 1333*)
41. These passages support the restrictive construction of section 105(2), and hence the expanded construction of section 105(1), that I have already provisionally concluded is appropriate. If, as Lord Lucas stated, section 105(2) was only intended by the promoters of the HGCRA to refer to work on plant and machinery on connected steelwork and if ordinary construction work was intended to be excluded from the ambit of subsection (2), it must follow that the scaffolding operations referred to in subsection 105(1) would also clearly fall within Part II of the Act and outside the ambit of subsection (2). The intention of the promoters of the HGCRA is given effect to by adopting the wider of the two possible meanings attributable to subsection 105(1)(e) which I favour. That intention is not given effect to if the second and narrower of those two meanings, which ABB favours, is adopted.
42. Thus, whether by the process of contextual interpretation, by the application of the natural meaning of the words in question or by recourse to the intention of the promoters of the Act as expressed in Parliamentary debate, Palmers is entitled by the provisions of the HGCRA to call for a statutory adjudication of the dispute as to payment of the claimed sums since the scaffolding work being undertaken is a construction operation and the sub-sub-sub-contract with ABB is a construction contract.

### 5.3. Is the whole of Palmers, work a construction operation?

43. This leaves the question of whether the whole of ABB's activities are construction operations or whether at least some of them are not, thereby requiring the statutory blue pencil exercise to be performed with regard to Palmers' work that is provided for by section 104(5) of the Act. If only some of ABB's work falls within the description of construction operations, only the scaffolding services provided for that part of ABB's work could qualify as construction operations. In view of the broad definition of what is involved in a construction operation however, it is clear that all the activities that are being performed by ABB fall within that description and that there is no scope for a blue pencil exercise.

<sup>1</sup> *Statutory Interpretation - A Code*, by F.A.R. Bennion, third edition (1997), published by Butterworths, in section 217, at pages 472 - 487, especially at pages 473 - 476.



## 6. Palmers' Section 112(2) Notice

44. Section 112 of the HGCRA defines the circumstances when a contractor in Palmers' position may suspend the performance of its contractual obligations. These occur when a sum due for payment has not been paid in full by the final date for payment and no effective statutory notice has been given by the paying party of its intention to withhold payment. These two conditions have been fulfilled so far as the first of the disputed payments is concerned. This is for a sum of £146,870 plus VAT which was claimed by Palmers in its invoice dated, on its face, 30 April 1999. This invoice followed soon after ABB's certificate for payment of this sum. The Memorandum of Understanding provides that payment must be made within 60 days of the receipt of an invoice by ABB. The relevant payment date was, therefore, on or before 29 June 1999. However, it is possible that the relevant date should be taken to be 11 May 1999 and, if so, the relevant payment would have had to have been made by 10 July 1999. No effect statutory notice was given by ABB on or before either of these potential final payment dates.
45. However, the statutory right to suspend performance must be preceded by a notice from Palmers warning ABB of its intention to suspend performance. The relevant provisions of the HGCRA read as follows:  
*112(2) The right [to suspend performance] may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.*  
*(3) The right to suspend performance ceases when the party in default makes payment in full of the amount due.*
46. Palmers gave a notice purportedly under this section of the HGCRA, in a letter dated 15 July 1999. The relevant parts of this letter read as follows:  
*... Pursuant to Article 35.1 of the sub-contract and your certificate ... agreed as being treated as dated 30 April 1999, we submitted to you an invoice ... dated 30 April 1999, in the sum of £146,870 plus VAT. Pursuant to Article 35.4 of the sub-contract, the final date for making payment in respect of this invoice was 29 June 1999. The sum invoiced has not yet been paid in full or in part.*
- By this letter Palmers Limited give to ABB Power Construction Limited notice, pursuant to section 112(2) of the Act, of Palmers Limited's intention to suspend performance of its obligations under the sub-contract 7 days after the date of this letter. The grounds relied upon for this suspension are set out above in this letter.
47. The relevant parts of Article 35 read:  
*35.1 ... Progress payments shall be based on the portions of the Work agreed between [Palmers] and [ABB] to have been completed in accordance with and as described in Part 11 hereof. After agreement between [Palmers] and [ABB], [Palmers] shall submit an invoice based on such agreement. ...*  
*35.4 [ABB] shall make payment within sixty (60) calendar days from receipt by [ABB] of an invoice presented in accordance with the requirements of this Contract.*
48. Although the notice states that the invoice was presented on 30 April 1999 to ABB, Palmers' evidence, in the form of Mr O'Connor's witness statement reads:  
*... on 11 May 1999 invoice number 1620036 [the invoice relied on in the notice] was raised by Palmers against [ABB's earlier] certificate. Although the date on the invoice was 30 April 1999 in accordance with an agreement on site and confirmed in writing to ABB the actual date of submission was 11 May 1999.*
49. This statement is ambiguous. Its meaning differs depending upon whether it is read as if a comma is placed between "30 April 1999" and "in accordance with" or between "to ABB" and "the actual date of submission". A second witness statement was submitted by Mr O'Connor which suggested that the statement intended to state that the agreement was that the date of submission should be taken as if it had been 30 April 1999. However, this statement was only submitted after Palmers had seen my draft judgment which had been based on the alternative reading of Mr O'Connor's evidence, that its date should be taken to be 11 May 1999. ABB objected to the introduction of the additional evidence at such a late stage, particularly since its relevant witness who could deal with this point was on holiday.
50. I decided that, since there was a potential difference which would involve calling evidence and which could not be resolved at the hearing, I would not determine the issues arising out of the service by Palmers of a suggested section 112 notice. The dispute as to whether Palmers has complied with the statutory precondition to a lawful suspension of work will fall within the jurisdiction of the adjudicator when appointed and it is more appropriate for Palmers, in the first instance, to have recourse to that dispute resolution procedure.

### 7. Palmers' entitlement to be paid £172,572.25

51. On any view, the sum of £172,572.25 should have been paid by 10 July 1999. ABB's intimations of a set-off were made by letters of 5 and 8 July 1999. However, the provisions of section 111 of the HGCRA must be complied with if those letters are to entitle a set-off to be asserted by ABB. These read:

*111(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice to withhold payment ...*

*(2) To be effective such a notice must specify -*

*(a) the amount proposed to be withheld and the ground for withholding payment, or*

*(b) if there is more than one ground, each ground and the amount attributable to it,*

*and must be given not later than the prescribed period before the final date for payment.*

52. The notices served by ABB cannot constitute effective notices since neither identifies any amount which it is proposed will be withheld. Thus, since the final date for payment has now passed and since no effective notice of withholding may now be served, the sum of £172,572.25 is now due and owing to Palmers and may not now be the subject of any set-off by ABB.

53. Palmers applied at the hearing for permission to amend so as to add a claim for this monetary sum and a claim for judgment for this sum. I declined this application. However, I indicated that I would give Palmers liberty to apply so that if, following a period of 14 days from the hearing on 5 August 1999, the money had not been paid, Palmers can forthwith apply to the court for permission to amend and, at the same time, for immediate judgment for that sum. It is doubtful whether ABB would have any basis for resisting those applications if Palmers, in fact, had to make them.

### 8. The Discretion to Grant Declarations of Law

54. The court has a discretion as to whether to grant or withhold a declaration, even if it is declaring a party's legal rights. Here, it might well be considered that since the HGCRA provides a statutory adjudication scheme that covers all disputes, it is more appropriate to allow the adjudicator to deal with these disputes first before any consideration is given to them by the court.

55. However, the adjudication scheme provided for by Part II of the HGCRA can only apply to disputes arising under a construction contract. Here, the principal dispute is one of jurisdiction, being one as to whether there is in being such a contract at all. It is clearly appropriate for the court to intervene since only when it has declared that the relevant contract is a construction contract will an effective adjudication be possible. This is particularly so given that there is no statutory power given to an adjudicator, if appointed, to resolve disputes about his jurisdiction.

56. Since the parties are entitled to have resolved the dispute as to whether an adjudicator may be appointed and as to the potential jurisdiction of the adjudicator and since the dispute as to Palmers' entitlement to payment gives rise, in effect, to a short point of law arising out of a suggested section 111 notice, it is appropriate to deal with that dispute as well even though an adjudicator would have the power and jurisdiction to have it referred to him.

### 9. Overall Conclusion

57. Palmers are entitled to appropriate declarations that its sub-sub-sub-contract is a construction contract and that it is entitled to immediate payment of £172,572.25.

58. The parties have agreed the form of the appropriate declarations which are as follows:

1. The contract between ABB and Palmers is an agreement for the carrying out of the construction operations described in section 105(1)(e) of the HGCRA.

2. The contract is a construction contract for the purpose of Part II of the HGCRA.

3. Neither the defendant's letter to the claimant of 5 July 1999 nor that dated 8 July 1999 provides effective notice of an intention to withhold payment pursuant to the requirements of section 111 of the HGCRA.

4. The sum of £172,572.25, as set out in the defendant's sub-contract payment certificate no. PCFA000164 and the claimant's invoice no. 172 0036, is due under the contract and has not been paid in full by the final date for payment.