JUDGMENT : HIS HONOUR JUDGE BOWSHER QC : TCC. 12th December 2000

Introduction :

1. The claimant (ABB) applies for an order that certain contracts between the claimant and the defendant (Zedal) are not construction contracts as defined by the Housing Grants Construction and Regeneration Act, 1996 (the Act). The object of the application is to secure a finding the effect of which will be to determine whether an Adjudicator appointed under the Act has jurisdiction.

History :

2. The parties were concerned with works done for the benefit of two companies in the Mirror Colour Print Group (MCP) at sites at Oldham and Watford. MCP operate very substantial businesses printing high value quantities of colour magazines.

3. MCP are supplied with electricity by Scottish and Southern Energy plc (SSE). SSE supply the electricity via the National Grid and it is then delivered to the sites by regional electricity companies (REC).

4. At a time when there was considerable concern about computers over the New Year 1999/2000 due to "the millennium bug" the RECs advised MCP that they could not guarantee supplies over the New Year.

5. After discussions, MCP decided to build on their own land on the two sites in question two diesel powered electricity generation stations. Those generators would be able to provide standby power if necessary over the New Year. On behalf of the claimants it is suggested that one purpose of the expensive construction was to sell electricity to the National Grid. It is said that the two generation sites together have a combined outage of 15.4 mega watts, enough, when combined together, to satisfy the daytime off-peak needs of Cheltenham. In order to make this vivid comparison, it is necessary to combine the output of the two sites together and compare them with the needs of Cheltenham at its lowest point of demand. In considering that comparison, it needs to be remembered that the printing works concerned make high demands on power supply and have high peaks, particularly on start-up.

6. MCP contracted with SSE for the construction of the generating sites. SSE entered into a sub-contract with ABB for the design, build and maintenance of the power generation sites. ABB entered into a sub-sub-contract with Zedal for the supply, installation, labelling, termination and testing of all field wiring including the supply and installation of certain metal containment systems and secondary steel support.

7. ABB installed three power generators in Oldham and four in Watford. SSE leased the generators to MCP. MCP was free to control the power output and destination of electricity from the generators that were on its land.

8. The terms of the sub-contract between ABB and Zedal may become a matter of controversy so I shall say as little about it as possible. Zedal's contentions are set out in it's Notice of Referral to Adjudication dated 7 August, 2000 sent on its behalf by James R. Knowles. There the sub-contract is said to have been made by various letters and faxes in late 1999. In one of the faxes ABB promised an official order on ABB's standard sub-contract MF/1 but, as is not uncommon, no such official order was given. For present purposes, the most important thing about that sub-contract is that there was no express agreement for adjudication. Zedal's contention is that the agreement was a construction contract within the meaning of the Act and for that reason the statutory Scheme for adjudication applies.

9. Disputes having arisen between the parties, on 1 August, 2000, James R. Knowles applied to the Institution of Electrical Engineers on behalf of Zedal for the appointment of an adjudicator. It was not alleged that the contract expressly provided for adjudication and the application was made under the Act.

10. By letter dated 9 August, 2000, DLA (initials sadly adopted by a firm of solicitors to replace their former great name) on behalf of ABB wrote to Mr. Hanlon, appointed as adjudicator by the Institution of Electrical Engineers. In that letter, DLA challenged the jurisdiction of the adjudicator, alleging that construction operations of the type carried out by Zedal were excluded from the Act by section 105(2)(c) of the Act.

11. In response, James R. Knowles contended that the adjudicator did have jurisdiction. By letter dated 11 August, 2000 James R. Knowles wrote:
"Zedal's work under this contract was the supply, installation and testing of HV and LV electrical works to a colour printing facility. The primary activity of the site is that it is a printing works, which does not fall under any of the exemptions under section 105(2)(c) of the Housing Grants Construction and Regeneration Act, 1996".

12. That statement of Zedal's case directs attention to the principal point at issue in this case. What is the site? Is the site the whole of the printing works, or is it limited to the enclosure within that larger site in which the generating equipment was erected?

13. As a result of an agreement between the parties, on 30 October, 2000, Mr. Hanlon adjourned all proceedings in the adjudication pending resolution by the court of the matter of his jurisdiction. That was one of the courses stated in **ABB v. Norwest Holst** (unreported) 1 August, 2000, Internet, to be a proper course in such proceedings. In the circumstances of this case, I agree that it is an entirely proper course. Since some members of the industry are inclined to read more into decisions of this court than the court has decided, I stress the words, "In the circumstances of this case". In the circumstances of this case, it is clear that, firstly the costs of determining the issue in the manner chosen by the parties is high, and secondly, if the matter had been left to the adjudicator to consider, whatever his views, the matter would have come to this court and possibly also to the Court of Appeal. Accordingly, it was an economy of cost to start the argument in this court.

The evidence :

14. The evidence before me is voluminous and on many points conflicting. For the purpose of deciding this case, it is unnecessary to resolve the conflicts or, in the main, even to refer to them. To review the whole of the evidence would be a lengthy, tedious, and unnecessary task and I shall not undertake it. Counsel for both parties have very sensibly concentrated largely on what is agreed between the parties.

15. Mr. Simon Lofthouse on behalf of Zedal has most helpfully summarised some central matters not in dispute:
"i. The Mirror Colour Print Sites include the land upon which the standby generators are located (Brown 1 para 2.1 [File 2/p393]/ Hayton 1 para 11 [File 1/p8])
ii. The standby generators are owned by MCP under a lease from SSE (Hayton 1 para 10[File 1/p8])
iii. The generators would provide standby power for Mirror Colour Print (Hayton 1 para 6 [File 1/p7]). There is a dispute as to whether this was the sole purpose
iv. MCP themselves describe the generator at Watford as a "temporary measure" in relation to the millennium bug [File 2/p389]. As such no planning permission was required [p390].
v. Similarly at the Oldham Site, limited planning permission for temporary siting of standby generators was granted to 30.6.00 [p391].
vi. Mirror Colour Print are not a power generating company [Brown 1 para 2.3 [File 2/p393]). Their principal activity is contract newspaper printing primarily for fellow subsidiary undertakings [File 2 p414 and 427].

(In the light of the above it is, perhaps, unsurprising that there is no evidence of any arrangement for the supply of electricity by MCP back to the National Grid."

16. With regard to the issue whether the supply of standby power for MCP was the sole purpose of the generators, Zedal submit that the independent evidence on this point from Mr. Malcolm Evans ([File 2 Div 8 and statement in response dated 29.11.2000) is conclusive in that the generators are of a type used for standby and that it would be "most unusual" to use diesel generators to supply electricity to the grid and there is no evidence of any such arrangement. Indeed, the design of the generators with a limited fuel tank would preclude any continuous exporting to the national grid. There is evidence that

the technical arrangement would have made it possible for MCP to sell surplus power through the National Grid. The standby generators were linked to MCP's main switchboards. The main switchboards were linked to the National Grid for the purpose of receiving power and the direction of power could be reversed so that power was sent to rather than received from the National Grid. But before that could be done, MCP would need a special licence and there is no evidence that such a licence was obtained or even applied for. Even if MCP did have such a licence, I would certainly not infer that the primary activity of MCP was power generation. The primary activity of MCP as stated in the accounts of the company and in the report of the directors is "contract newspaper printing primarily for fellow subsidiary undertakings. The company is a member of the Mirror Group plc". I have not received any evidence on the point, but I would be amazed if the generation of electricity were expressly mentioned as powers of the company in the memorandum and articles of MCP. But I also have no doubt that there are some general words which would authorise the company to generate electric power as ancillary to the main objects. If it is within the objects of a company to have standby power, it is likely to be also within the objects to sell surplus power in order to help pay for the standby facility. But in those circumstances, (if they existed, and there is no direct evidence that they do), the sale of power would still not be the primary activity of MCP. A great deal of evidence has been written about whether generation of electricity for sale might be a possible activity of MCP. Whether or not it is possible is beside the point. There is absolutely no question of it being the primary activity of MCP. Their primary activity is printing magazines. But when I now turn to examine the law, it will be evident that what has to be examined is not the primary activity of MCP but the primary activity of "a site". That may be the same thing, or it may not.

The Law :

17. Part II of the Act applies to "construction contracts". S104 of the Act provides that a *"construction contract"* means an agreement with a person for any of three functions including *"the carrying out of construction operations."*

18. Construction operations are defined by section 105 in the following terms:

"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;

(d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;

(e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, 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.

105(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, or

(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, or

(iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems,

except under a contract which also provides for their installation;

(e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature."

19. In a note to s105 of the Act in Halsbury's Statutes, sub-section 2(c) is described as "an illogical exception" achieved through persistent lobbying by a pressure group known as Process Industries Latham Group. I am told by counsel that there is no guidance to be found in Hansard as to the purpose of Parliament in granting that exception, so far as it relates to the present case, save that the lobby group pressed a case that arrangements within their sections of the industry were so satisfactory as to require no further regulation. In **Palmers Limited v. ABB Power Construction Limited** 68 CLR 52;[1999] BLR 426 @ 434 Judge Thornton Q.C. cited some short extracts from Hansard that are not helpful in the circumstances of this case. I therefore do not need to consider the admissibility of extracts from Hansard.

20. In two previous cases, ABB have argued that work comes within the exception provided by section 105(2). I have already cited **Palmers Limited v. ABB Power Construction Limited**. The other case was **ABB v. Norwest Holst**, which also I have cited. Both those cases concerned massive power generation projects. **Palmers Limited** concerned the Esso Fawley Cogeneration Plant. **ABB v. Norwest Holst** concerned a project to extend an existing power station at Peterhead in Aberdeen. Both cases concerned what might be described as ancillary work to work on large power generation plant. In the one case Judge Thornton Q.C. and in the other case Judge Humphrey Lloyd Q.C. made general observations about the approach to the interpretation of the Act. I adopt their approach but I will not repeat their words here.

21. In **Homer Burgess Limited v. Chirex (Annan) Limited** [2000] BLR 124, Lord MacFadyen in the Outer House of the Court of Session considered work done at a building site intended for the production, processing or bulk storage of pharmaceuticals. The court considered whether pipework ancillary to manufacturing equipment was plant and decided that in the circumstances of that case it was.

22. In the case before me, ABB argue that the exception provided by sub-section 105(2)(c)(i) applies not merely to massive power station projects but also to much smaller power generation projects like the ones in issue in this action. Counsel for ABB helpfully submits that the relevant words in Section 105(2) are: "The following operations are not construction operations ... installation ...of plant... on a site where the primary activity is ... power generation." In the present case (though not necessarily in others) the most important word there is "site". How is "site" to be defined in the circumstances of this case? Counsel for the claimant helpfully divided his submissions into consideration of the words: "Installation : Plant : Site : Power generation." Power generation is not in issue. I shall consider the other three topics suggested by counsel.

Installation.:

23. Zedal accept that they installed (1) neutral earthing contactors and resisters; (2) the switch gear cabling and marshalling boxes; (3) the LV distribution boards. Zedal do not appear to contest their involvement in the control cables for the computer management system and the measuring and management system. There are issues about other work alleged to have been done by Zedal. I cannot resolve those issues on the evidence before me, and I do not think it important that I should try to do so. On the contrary, I think it important that I should not comment on those issues since they may be the subject of later dispute in arbitration or litigation. Zedal's contract was for a relatively small amount of work that was increased by variations. Both the making and the execution of the variations may be matters of dispute later. It is clear that there was some "installation" by Zedal. The extent and value of that installation is irrelevant for present purposes.

Plant.:

24. Mr. Malcolm Evans in his witness statement on behalf of Zedal said that cables, cable trays and cable ladders are not referred to as plant within the electricity construction industry. Clearly, one does not want to have lawyers' language about these things that differs from the language of the man on the shop floor. But there is a difference between a drum of cable on the floor and the same cable worked into a piece of plant, or even joining one piece of plant with another. The drum of cable on the floor is just a piece of material. When the cable is worked into the plant or even joins two pieces of plant it becomes part of the plant and is properly referred to as plant. Similarly, a screw is just a screw when it is in the engineer's pocket, but it becomes part of the plant when he screws it into the generator. In keeping with the sense of the earlier authorities to which I have referred, it seems to me that one cannot 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. Adjudication cannot be divided in its jurisdiction between minute parts of a sub-contractor's work. Looking at the work overall, and regardless of any disputes about the ambit or nature of that work, I have no doubt that Zedal were employed to install plant. The exception provided by section 105(2)(d) itself suggests that cables, cable trays and cable ladders may become plant when installed. The manufacture and delivery to site of such items for power supply are excepted from the operation of the Act "except under a contract which also provides for their installation". In conformity with the decisions in **Homer Burgess v. Chirex** and **ABB Power v. Norwest Holst** (paragraph 15) and for the reasons there stated, I find that the materials used by Zedal became plant.

Site :

25. It seems to me that this is the central issue between the parties. If the site is defined as the small areas on which the generators stood in Oldham and Watford, surrounded by a security fence, then the primary activity of the sites must be power generation, because the only activity of those sites is power generation. That must be so even though the activity (as shown by the planning applications) was intended to be merely temporary. If the site is defined as the whole areas occupied by MCP at Oldham and Watford, then it cannot conceivably be said that the primary activity of those sites is power generation. Taking those sites as a whole, power generation can only be regarded as ancillary to the primary activity of printing colour magazines whether or not excess power might be sold to others.

26. If one excludes mobile generators of the sort that might be used by householders or farmers, almost any secondary power source is likely to be surrounded by a security fence and might for that reason be regarded as a "site". If one regards any generator surrounded by a security fence as a "site" (which is what I believe ABB really want me to do) then every such generator must be an exception to the Act because regarded on its own it must have a "primary activity" of power generation because regarded on its own it has no other activity. But to agree with that view would deprive some important words of the Act of meaning. The Act makes its exception only in relation to sites where the primary activity is power generation. Clearly there is no statutory exception in relation to sites where the secondary or tertiary activity is power generation. So any construction of the Act that excludes the possibility of secondary or tertiary activities seems to be contrary to the intention of Parliament, though I do understand that it would make it a great deal easier to apply the Act if one did not explore this problem. If one accepts the submissions made on behalf of ABB, then it would follow that if the MCP works at Watford were being built from scratch with ancillary power generators in a secluded corner, the part of the work on which ancillary power generators were being built would be one site excluded from the Act and the rest of the work would be another site to which the Act did apply. Companies and men working on the generators would be working on different terms from those working on the remainder of the site. Even more remarkable, if Zedal were employed both to work on the generators and to do work related to the main switchboard in or near the main printing works, they would be subject to the Act in one part of their works and not in another. Of course, that is not this case, but it does seem that ABB would like to have a decision that led to that result. On the other hand, it might be extremely inconvenient if the relationship between sub-contractor and sub-sub-contractor fell to be determined by an analysis of the primary activity of a company not a party to the contract. However,

this latter inconvenience should not be exaggerated. It is not difficult to determine whether a proposed workplace is to be a power station or a printing works.

27. In addition to working within the strict confines of the generators, Zedal also laid cable to connect the generators to the printing works. The value of the work done outside the bounded area of the generators at Oldham was about 1% of the total value of the work and at Watford much less than 1%. Mr. Raeside on behalf of ABB submits that that work is de minimis and ought to be disregarded. I do disregard that small amount of work for the purpose of this judgment.

28. Mr. Raeside tells me that since the Act came into force, a new class of power generators has come into existence and there is a question whether those generators come within the exception from the Act provided by section 105(2). The Electricity Act, 1989 section 4(1) made it an offence for anyone to generate or supply electricity for any premises without a licence. The same Act gave the Secretary of State power to grant exemptions from that Act. By the Electricity (Class Exemptions from the Requirement for a Licence) Order 1997, the Secretary of State gave exemptions including exemptions for persons providing not more than 10 megawatts power from any one generating station. That exemption covers the activities at both Oldham and Watford. I am not greatly influenced by that class exemption granted by Statutory Instrument. It may be that the general exemption has increased the number of small generating stations. But the possibility of small generating stations existed at the time that the Act was passed because the Electricity Act 1989 provided for the possibility of a licence for such small generating stations. Having regard to the enormous amount of discussion and lobbying before the passing of the Act, I think it unlikely that the possibility of small generating stations being built under licence and later under a general exemption was overlooked by Parliament when passing the Act.

29. The main contract between MCP and SSE for Oldham refers to the site as Mirror Colour Print (Oldham) Ltd, Hollingwood Avenue, Oldham. Mr. Raeside submits that that is not a definition of "the site" but is merely "an address". The main contract with SSE incorporated the standard terms of MF/1 (rev 3) including:
"'Site' means the actual place or places, provided or made available by the purchaser, to which plant is to be delivered or at which work is to be done by the contractor, together with so much of the area surrounding the same as the contractor shall with the consent of the purchaser actually use in connection with the works otherwise than merely for the purposes of access."

30. That definition, made in a contract to which neither Zedal nor ABB were party, might be thought to support the case presented by ABB. However, I do not accept that what some other parties defined as the site is the same as what was envisaged by Parliament for different purposes particularly when in the same contract they refer to the site in more general terms.

31. When Parliament refers in section 105(2) to "a site where the primary activity is..." the reference must be to a place broader than a generator surrounded by a security fence. To make any sense of the Act, one has to look to the nature of the whole site and ask what is the primary purpose of the whole site. Is the primary purpose power generation, or, in this case, printing?

Conclusion :

32. I find that the work the subject of this action does not fall within any exception provided by s105(2) of the Act.

I refuse to make the declaration requested by ABB.

The action is dismissed with the defendant's costs to be paid by the claimant.

The claimant does not ask for leave to appeal.

For the claimant: Mark Raeside (DLA, solicitors)
For the defendant: Simon Lofthouse (Eversheds, solicitors)