JUDGMENT : HIS HONOUR JUDGE DYSON : TCC. 30th June 2000

1. **The Issue** The issue before me is whether the contract entered into between Nottingham Community Housing Association ("Nottingham") and Powerminster Limited ("Powerminster") was a construction contract within the meaning of section 104(1)(a) of the Housing Grants, Construction and Regeneration Act 1996. The answer to that question depends on whether the work to be carried out under the contract constituted "construction operations" within the meaning of section 105 of the Act.

2. **The relevant statutory provisions** So far as material, section 105 of the Act provides:

"(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, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;

(c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;

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

(a) 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 communication systems,

except under a contract which also provides for their installation;"

3. **The facts** Nottingham is incorporated as an Industrial and Provident Society, whose main purpose is the provision of community housing. It owns a large number of tenanted properties in the East Midlands. Powerminster is a company whose business includes the servicing and maintenance of gas appliances, heating, plumbing and electrical work.

4. The contract in question is dated 5 March 1999. It provided that from 1 April 1999 until 31 March 2000, Powerminster would carry out an annual service on each gas appliance in Nottingham's properties, and supply a responsive repair and breakdown service. The gas appliances to be serviced and maintained comprised gas central heating systems, gas fires and gas cookers.

5. The contract contained a description of the Works in these terms:

" 1. To inspect and service on an annual basis all heating appliances and all associated fitting in NCHA owned and managed properties.

2. To provide a breakdown service as detailed within the specification.

3. To provide a 24 hour breakdown service for out of hours repairs.

4. To provide a void and relet service as and when required. ...

5. To provide Temporary Heating when required to do so.

6. To prepare and maintain a comprehensive computerised record system for all dwellings. ....

7. To provide a modem link to NCHA Maintenance Office with daily updates."

6. The contract price of £210,783 was based on *"one annual service visit/safety check and all anticipated tenant requested responsive repairs and a 24 hour breakdown service for the year 1999-2000"*.

7. There were detailed conditions in relation to such matters as guarantee and maintenance, the standard of materials and workmanship, the time for commencement and completion of the work.

8. Powerminster has rendered to Nottingham various invoices for work done in the total sum of £59,805 inclusive of VAT. Nottingham contends that it is entitled to a substantial counterclaim, on the strength of which it has not paid the invoices. On 19 April, Powerminster purported to give notice of adjudication under the Act in respect of the non-payment of the invoices. Nottingham contends that

the contract is not a *"construction contract*" within the meaning of section 105 of the Act, and seeks a declaration to that effect.

9. **The arguments** On behalf of Powerminster, Mr Dennys QC submits that the operations undertaken by Powerminster pursuant to the contract of 5 March 1999 were for the repair and maintenance of buildings or structures forming part of the land within the meaning of s105(1)(a) of the Act. He contends that the Act should be given what he calls a "liberal" interpretation in order to promote its plain objective. The mischief at which it was aimed was identified in the report of Sir Michael Latham dated July 1994 and entitled "Constructing the Team". The aim of the Act was, inter alia, to remedy the mischief of those undertaking construction contracts not being paid on time, and to avoid spurious set-offs being raised to postpone payment.

10. He contends as follows. First, the operations mentioned in paragraph (a) are the construction, alteration, repair, maintenance etc. of the whole or part of buildings or structures forming, or to form, part of the land. Secondly, heating systems like any other part of a building, once installed, become part of the building and part of the land. Thirdly, there is no sensible basis for distinguishing between one part of a building, e.g. roof joists, and another part of a building, e.g. a heating system: they are both parts of a building within the meaning of paragraph (a). Fourthly, paragraph (c) is redundant, since the installation of fittings forming part of the land is part of "construction" within the meaning of paragraph (a). It was probably inserted because section 105(2) (d) excludes the manufacture or delivery of components for heating systems etc. except under a contract which also provides for their installation. Even if that is wrong, once it is accepted that the maintenance and repair of heating systems fall within paragraph (a), paragraph (c) is irrelevant.

11. On behalf of Nottingham, Mr Harding accepts that the contract dated 5 March 1999 was for the maintenance and repair of domestic gas appliances. He also accepts that paragraph (a) applies to construction, alteration, repair, maintenance etc. of the whole or part of a building or structure. He contends that domestic gas appliances do not fall within paragraph (a), since they are not part of "buildings" or "structures". He relies heavily on paragraph (c). It is in paragraph (c) that the draftsman makes clear the extent to which activities concerning heating, air-conditioning and ventilation systems etc. forming part of the land are to be regarded as construction operations within the meaning of the Act. Paragraph (c) could easily have included "installation, repair and maintenance". Since the paragraph deals only with the installation of such fittings, it was clearly the intention of Parliament that the maintenance and repair of such fittings should not be included in the definition of "construction operations". Mr Harding also relies on the fact that on Mr Dennys' interpretation, paragraph (c) is redundant.

12. **Conclusion** The issue raised by this application is a short point of statutory construction. Mr Dennys relied on certain passages in Hansard in his skeleton argument. In his oral submissions, however, he conceded that, even if it was legitimate to have recourse to Hansard, the passages did not shed light on the question that has been debated before me. He also referred me to section 567(2)(a) and (b) of the Income and Corporation Taxes Act 1988, which clearly was the source from which much of the drafting of section 105 of the 1996 Act derived. But that Act was concerned with the problem of tax evasion by labour only subcontractors in the construction industry. In my view, it does not provide any clue to the answer to the question before me.

13. I shall start by considering whether, if paragraph (c) were not present, the maintenance and repair of heating systems that have been installed in a building would be operations falling within paragraph (a). I have no doubt that they would. It is common ground that paragraph (a) applies to operations in relation to part as well as the whole of a building. It applies as much to the subcontractor who constructs the roof joists, as it does to the main contractor builder who builds an entire house for his client.

14. In my judgment, still leaving paragraph (c) on one side, there is no warrant in paragraph (a) for distinguishing between different type of operations carried out in relation to a building or structure. Take the construction of a building. Paragraph (a) applies as much to the installation of a demountable

wall partition as it does to the installation of a central heating, air-conditioning, sanitation system or any other of the fittings mentioned in paragraph (c). There is no distinction in property law: once installed, they all become part of the land. Nor is there any other basis, whether technical or founded on the ordinary use of words, for saying that the installation of a demountable wall partition is, but the installation of heating systems etc. is not, part of the construction of a building. Such systems are often complex; they are usually integrated into the structure of the building; they may be very difficult to disconnect and remove from the building. It may be far easier to remove and replace, say, a demountable wall partition or cladding panels that have been fixed to the exterior of a building, than to remove one of the systems described in paragraph (c). The same applies to the other operations mentioned in paragraph (a). There is no justification for distinguishing between the repair and maintenance of the roof or cladding panels of a building and the repair and maintenance of the various systems described in paragraph (c). They are all part of a building. It is not a misuse of language to say that the maintenance of a building includes the maintenance of the various items mentioned in paragraph (c). It is worth emphasising the scope of those items. They include not only heating and air-conditioning systems, but also lighting, power supply, drainage, sanitation and water supply. These are all vital parts of a building, whose proper functioning is required if a building is to be fit for habitation.

15. I conclude, therefore, that, on the basis of a consideration of paragraph (a) alone, the maintenance and repair of heating systems etc. which have been installed in a building are operations within paragraph (a). It would be surprising if it were otherwise. On Mr Harding's argument, it is only the installation of heating systems etc. that are construction operations. If that is right, Parliament has excluded from the ambit of "construction operations" not only the repair and maintenance of all paragraph (c) systems, but also the *"alteration, extension, demolition or dismantling*" of them too. It follows that if a heating or mechanical contractor were engaged to carry out substantial alterations to the heating or air-conditioning system of a large building, or to dismantle or demolish the systems in all the units on, say, a large housing estate, these operations would not be the subject of the Act. In the light of the plain mischief at which the Act was aimed, it is very difficult to see on what rational basis Parliament could have intended to include the installation of such systems, but exclude their alteration or demolition. The work of altering or dismantling heating and other systems that have been installed in a building is every bit as much a "construction" activity as the work of altering the walls or roof of a building. Why should Parliament have intended to exclude the former but include the latter. The same question arises in relation to the repair and maintenance of heating and other systems that have been installed in a building.

16. It is time to turn to consider the significance of para(c). I accept that one must read s105 as a whole. For example, if it were unclear whether heating systems etc. that have been installed in a building were included in paragraph (a), then paragraph (c) would shed a great deal of light on the point. If it were unclear whether heating systems etc. were included in paragraph (a), then it seems to me that Mr Harding's argument would prevail. On that hypothesis, the doubts raised by paragraph (a) would be resolved by paragraph (c): it would be clear that Parliament intended the question of heating systems etc. to be governed exclusively by paragraph (c), and the only construction operation was that of installation. Of course, if it were clear that heating systems etc. were not caught by paragraph (a), then Mr Dennys would have to concede that the maintenance and repair of such systems is not a construction operation within the meaning of the Act.

17. I do not consider the meaning of paragraph (a) is unclear. For the reasons that I have attempted to explain, it seems to me that the installation, alteration, repair and maintenance of heating systems etc. in buildings do fall within paragraph (a). But what about paragraph (c)? Mr Dennys accepts that paragraph (c) is redundant. Mr Harding seizes on this. On his interpretation, paragraph (c) is not redundant, and serves an important purpose. Surely, he submits, this shows that his construction must be preferred.

18. Lord Hoffmann has recently on at least two occasions counselled caution in relation to arguments based on redundancy. In **Walker (Inspector of Taxes) v Centaur Clothes Group Ltd** [2000] 2 AER 589,

595H, he said: *"I seldom think that an argument from redundancy carries great weight, even in a Finance Act."*

19. In the different context of construing a standard form of contract, in **Beaufort Developments Ltd v Gilbert-Ash Ltd** [1999] AC 266, 274A, he said: "I think my Lords that the argument from redundancy is seldom an entirely secure one. The fact is that even in legal documents (or, some might say, especially in legal documents) people often use superfluous words. Sometimes the drafting is clumsy; more often the clause is a lawyers' desire to be certain that every conceivable point has been covered".

20. I am not persuaded by the redundancy argument. It may be, as Mr Dennys suggests, that para (c) was inserted because it was thought sensible to do so in view of s105(2)(d). The purpose of s105(2)(d) is to exclude from "construction operations" the simple manufacture of components, except under a contract which also provides for their installation. This is necessary because the Act is aimed at construction operations, and not mere contracts for the supply of goods. The fragility of an argument based on redundancy is demonstrated by s105 itself. On any view, it is difficult to see why the draftsman thought it necessary to insert s105(2)(d) at all. I suggest that no-one reading s105(1) could think that the manufacture and delivery of components etc. other than under a contract which also provides for their installation falls within s105(1). There are provisions similar to s105(1)(a) to (c) and 105(2)(d) in s567(2)(a) to (c) and 567(3)(c) and (d) of ICTA 1988. The draftsman appears to have carried these provisions into the later Act, with modest amendments.

21. Whatever the reason for including para (c), I am not persuaded that its inclusion should lead me not to give para (a) what I consider to be its clear and true meaning. Accordingly, I grant Powerminster the declaration that it seeks in para 11 of Mr Dennys' skeleton argument.

Mr Richard Harding of Counsel for the Claimant (instructed by Messrs Actons of Nottingham)
Mr Nicholas Dennys QC for the Defendant (instructed by Messrs Garretts of Manchester)