Neutral Citation Number: [2009] EWHC 1371 (TCC)

Case No: HT 09 134

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2009

Before :

THE HON.MR.JUSTICE RAMSEY

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Between :

NORTH MIDLAND CONSTRUCTION PLC	**Claimant**
- and -	
A E & E LENTJES UK LIMITED (FORMERLY LENTJES UK LIMITED FORMERLY LURGI (UK) LIMITED)	**Defendant**

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Simon Lofthouse QC & Peter Land (instructed by **Browne Jacobson LLP**) for the **Claimant**
Stephen Furst QC (instructed by **Pinsent Masons**) for the **Defendant**

Hearing date: 18 May 2009

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Judgment

The Hon. Mr. Justice Ramsey:

Introduction

1. In these proceedings under CPR Part 8 the Claimant, North Midland Construction plc ("NMC") seeks declarations against AE&E Lentjes UK Limited ("AEE") in respect of the application of the Housing Grants Construction and Regeneration Act 1996 ("the Act") to certain contracts and also declarations in relation to NMC's rights and obligations in respect of earth bonding under those contracts.

Background

2. On or about 11 August 2006, AEE entered into four agreements with NMC. There was a contract for enabling works ("the Enabling Works Contract") and a contract for civil engineering works ("the Civil Works Contract") at each of two coal fired power stations: one at Fiddler's Ferry, Cheshire and one at Ferrybridge, West Yorkshire. These contracts were in similar terms for each of the power stations.

3. The two power stations are owned by Scottish and Southern Energy plc and operated by Keadby Generation Limited. They fall under the requirements of the Large Combustion Plant Directive ("LCPD") which establishes stringent emission levels to be achieved if the power stations are to "opt in" and be allowed to be used in an unrestricted way.

4. In order to meet the emission limits for sulphur dioxide set in the LCPD it was necessary to provide flue gas desulphurisation ("FGD") units to each of the power stations. AEE was appointed as the turnkey contractor for the work and AEE then sub-contracted parts of the work to sub-contractors.

5. The work to provide the FGD units required enabling works and civil works before the FGD units and other associated parts of the system could be installed or completed. The FGD units are placed in the flue gas stream between the existing flue stack and the existing electrostatic precipitator. FGD units remove sulphur dioxide by using a mixture of limestone and water which absorbs the sulphur dioxide in the flue gases and thereby creates a gypsum slurry. That slurry is dried and used as a product in the building industry. The waste water from the slurry then passes to a waste water treatment plant.

6. Each of the four contracts was in materially the same form consisting of a purchase order agreement which incorporated conditions of contract which were materially the same: the overriding conditions of purchase ("the Overriding Conditions") and AEE's Fiddler's Ferry and Ferrybridge FGD Plants Erection Services Conditions of Purchase May 2006 ("the Conditions"). Each contract also incorporated various specifications, bills of quantities, schedules, drawings and other documents.

7. The scope of the enabling works was set out in paragraph 6.1 of the Technical Specification for each of the power stations as follows:

> "*1) Temporary Fencing and Gates to secure the site.*

2) Temporary wheel wash plant.
3) Construction of temporary roads, hard standings and footways.
4) Construction of a car park adjacent the site huts to serve site personnel.
5) Installation of temporary services to site accommodation.
6) Construction of foundations and ancillaries for AE&E site offices.
7) Construction of temporary site drainage.
8) Demolition of existing concrete surface /(crush/re-use).
9) Contractors Preliminaries.
10) Risk assessment/Method Statement."

8. In addition at paragraph 6.1 of the Technical Specification for Ferrybridge the following additional enabling works were included:

> "*8) Existing earth mound needs to be removed and shall be placed near the existing fence, designed as final noise protection embankment.*
> *9) Demolition of existing small Buildings.*
> *10) Demolition of existing Workshop Buildings.*"

9. The scope of the civil works was set out in paragraph 6.1 of the Technical Specification for each of the power stations as follows:

> "*Site Mobilisation*
> *Demolition*
> *Excavation and Earthwork*
> *Piling Works*
> *Piling Load Testing*
> *Foundation Earthing*
> *Concrete and Reinforcement Work*
> *Grouting of Embedded (sic)*
> *Cleaning of construction site*
> *Detail Engineering*
> *Measuring of Anchor Positions and Buildings.*"

10. In paragraph 17 of his witness statement Mr Michael Wilkins, the managing director of AEE summaries the civil works which NMC were to carry out as comprising "*the construction of foundations for components of the plant. Those components include, amongst others, the tanks, the booster fans, the gas heater, the absorbers, the bleed pump drain pits, the main pumphouses, the ball mill and gypsum dewatering building, the electrical oxiblower and compressor and waste water treatment buildings, the limestone and gypsum silos and the underground limestone unloading structure. These are all necessary parts of the FGD process. In addition, the foundations under the civil works also support structural steel work which in turn supports components of the plant. These components include the clarifiers, the lime powder silo, the pipe rack, limestone and gypsum pipe belt conveyor and the gas pipes. The steelwork also provides access to the plant."*

11. Disputes have arisen between the parties in relation to the final account and on 8 April 2009 NMC issued a Part 8 claim in which they sought the following

declarations at paragraphs 8(a) and 8(b) in relation to both the enabling works and the civil works:

> "*that the works carried out by NMC at Ferrybridge and Fiddler's Ferry*
> *(a) do not fall within the definition at s.105(2)(c) of the Act, namely: the 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;*
> *(b) are "construction operations" as defined at s 105 of the Act notwithstanding that the aforesaid work may be carried out on a site where the primary activity is power generation.*"

12. In summary, NMC seeks a finding that the provisions of the Act apply so that the four agreements are construction contracts within the Act, giving rise, in particular, to a right to adjudicate under s.108 of the Act. AEE contends that the works are not construction operations within the Act so that the agreements are not construction contracts and the Act does not apply.

13. In addition, in relation to the civil works, NMC seeks the following declarations in paragraphs 9(a) and 9(b):

> "*that upon the true construction of each of the Agreements for civil works that:*
> *(a) NMC was not responsible for the design of the foundation earth bonding;*
> *(b) AEE instructed a change to the works when issuing its for construction Concrete Form Work plans giving details of the foundation earth bonding.*"

14. AEE contends that the dispute to which those declarations relate is not a suitable matter for Part 8 proceedings but should proceed by way of Part 7 proceedings because there are disputes of fact and expert evidence is also required.

15. I now turn to consider the first set of declarations concerning the applicability of the Act.

<u>The applicability of the Act</u>

16. The rights and obligations imposed by the Act apply only to construction contracts, defined in the Act to include agreements for the carrying out of construction operations and for arranging the carrying out of construction operations by others, whether under sub-contract to him or otherwise.

17. The central issue is whether the works in this case are excluded "construction operations" as defined by s.105(2)(c)(i) of the Act. S.105 operates by saying in s.105(1) that "*"construction operations" means, subject as follows, operations of the following descriptions*" which it then describes in s.105(1)(a) to (f). S.105(2) then states that "*The following operations are not construction operations*" and defines these in s.105(2)(a) to (e).

18. The Act deals at s.104(5) with the position where an agreement relates to construction operations and other matters which are not construction operations and provides that: "*this part applies to it only so far as it relates to construction operations.*"

19. It is not in issue that the enabling works and the civil works at the two power stations would come within s.105(1). In particular they come within the description of "construction, demolition or dismantling of buildings, structures or any works in s.105(1)(a) and (b) and the general provisions of s.105(1)(e) which includes: "*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, earth-moving, 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.*"

20. The important question is whether the works also came within the exception in s.105(2)(c)(i) which provides that the following operations are not construction operations:

> "*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….*"

21. As it is not in dispute that the relevant works were being carried out on a site where the primary activity is power generation, the question can be summarised as this: did the enabling works and the civil works come within the description of 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?

General observations

22. As a matter of first impression, the description "*assembly, installation or demolition of plant or machinery*" would not seem apt for the enabling and civil works which I have set out above. However further consideration indicates that the application of s.105(2)(c) is not straightforward.

23. Before I turn to the decisions in which this sub-section has been considered, I shall deal with some general observations. First, as I have indicated above, the operations described in s.105(2) can generally be brought within the description of operations in s.105(1) so that the intention was to exclude a specific operation from the more general description of operations. For example, "*drilling for…oil and natural gas*", excluded by s.105(2)(a), would be "*construction …of any works…including wells*" within s.105(1)(b) and also "*operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations.. including excavation, tunnelling and boring*" within s.105(1)(e).

24. Equally *"manufacture or delivery to site of...components…except under a contract which also permits for their installation"* in s.105(2)(d) would be "*operations preparatory to*" operations under s.105(1)(a), (b) or (c) and within s.105(1)(e).

25. Secondly, the purpose of the Act was evidently to make improvements in the construction industry by providing both a rapid dispute resolution method and also more certain payment provisions for the construction industry. The provisions which have the effect of excluding particular operations from those provisions necessarily prevent those improvements applying to certain operations. It is to be expected that they do so for particular reasons which apply to those specific operations.

26. Thirdly, the provisions of s.105(2)(a) to (c) are aimed at excluding certain particular operations in specific industries: oil, gas, mineral extraction, nuclear processing, power generation, water or effluent treatment, chemicals, pharmaceuticals, steel, food and drink. Instead of saying that all operations which would otherwise be construction operations are excluded on sites where the primary activity is one of those industries, the exclusion is limited to particular operations.

27. Fourthly, the definition of operations in s.105(2) has not been broadened by the use of such words as "operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations", as has been done in s.105(1)(e).

28. Fifthly, the focus of s.105(2)(c) is "plant or machinery". In my judgment, there are some indications in s.105(2) as to the meaning of "plant or machinery". There are two other references to that phrase in that sub-section. In s.105(2)(d) there is a reference to the manufacture or delivery to site of materials, plant or machinery. Particularly when read with the references to components in s.105(2)(d)(i) and (iii), this suggests that the plant is capable of manufacture and delivery to site and is more in the form of components or items of plant than the whole industrial plant. This is reinforced by the reference in s.105(2)(c) to "steelwork for the purposes of supplying or providing access to plant or machinery". Again this is more consistent with plant and machinery being components or items of plant rather than the whole industrial plant.

29. In addition, when appropriate the legislation has referred to "industrial plant" as in s.105(1)(b). Equally if the reference to plant and machinery in s.105(2)(c) were intended to refer to a wider meaning of an industrial plant then the added reference to "erection or demolition of steelwork for the purposes of supplying or providing access to plant or machinery" would have been unnecessary as it would be part of the industrial plant. There is no word such as "including" to show that the additional operations were included in the previous description. Rather, in my judgment, it is a reference to additional operations of a narrow and specific type.

Previous decisions on s.105(2)(c)

30. I have been referred to five previous decisions which have considered the application of the provision. In each case the issue was whether the particular works came within the description of "assembly, installation or demolition of plant or machinery".

31. The first decision was that of His Honour Judge Thornton QC in Palmers Ltd v ABB Power Construction Ltd [1999] BLR 426. In that case ABB, who were sub-sub-contractors for the supply and installation of a boiler at a power plant, entered into a further sub-contract for the supply of scaffolding to provide temporary access and support to the structural frame within which the boiler and associated pipework were supported during the process of erection. Judge Thornton held that the scaffolding was within the definition of preparatory works in s.105(1)(e) which includes "erection, maintenance or dismantling of scaffolding". He held that as ABB's work would fall within s.105(1)(b) had it not, as he found, been excluded by s.105(2)(c)(i), the scaffolding was still a construction operation within s.105(1)(e).

32. In Homer Burgess Ltd v Chirex (Annan) Ltd [2000] BLR 124, Homer Burgess carried out the assembly and installation of pipework which formed the link between various pieces of machinery or equipment. Lord Macfadyen held that the pipework formed part of the plant for the purpose of s.105(2)(c)(ii). He said at 135:

> "*In these circumstances I am of the opinion that the adjudicator did fall into error in his construction of the word "plant". Having regard to the general description of the pipework in question as forming the links between various pieces of machinery or equipment, by which ingredients and pharmaceuticals in process of manufacture are conveyed from one stage of the manufacturing process to another, I am of the opinion that the pipework was clearly part of the plant being assembled or installed on the defenders' site. Without such pipework, the individual pieces of the machinery or equipment would be unable to operate. The pipework is in a real sense part of the apparatus which, once installed, the defenders were going to use in order to carry on their business of manufacturing pharmaceuticals* ."

33. In ABB Power Construction Limited v Norwest Holst Engineering Ltd (2000) 77 Con LR 20 ABB were engaged to install boilers as part of an extension to a power station. They engaged Norwest Holt to install insulation supplied by ABB to clad pipework, drums and various parts of the equipment. His Honour Judge Humphrey LLoyd QC in agreeing with the approach of Lord Macfadyen said this at paragraph 15:

> *"...the evidence is that the provision of insulation is an integral part of the construction of pipework, boilers and the like which are required so that power may be generated. Hence if the test were: Does the installation of insulation perform a plant-like function? then the answer is undoubtedly: Yes. Without insulation the pipework, boilers etc would not function as*

they are designed to perform, nor could the plant be operated safely and efficiently. I entirely agree with Lord Macfadyen's approach. In my judgment any work that would be a construction operation within section 105(1) which is necessary for the full and proper assembly or installation of plant so that it will fulfil the purpose or purposes for which it is intended is exempt by reason of section 105(2)(c) (assuming that the condition relating to the site is also satisfied)."

34. In ABB Zantingh Ltd v Zedal Building Services Ltd [2001] BLR 66 His Honour Judge Peter Bowsher QC dealt with a case where ABB were employed for the construction of two diesel powered generation stations to supply power to printing plants. ABB sub-contracted 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, at the two sites. Although Judge Bowsher QC held that the primary activity at the site was not power generation and so s.105(2)(c)(i) did not apply, he also held at 72:

> "*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 an 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 subcontractor'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.* "

35. Finally in Comsite Project Ltd v AAG [2003]EWHC 958 (TCC) Her Honour Judge Kirkham had to deal with a case where AAG entered into a sub-contract for the installation of a dryer plant and building services to a dryer building, as part of a sewage sludge recycling centre at a waste water treatment works. AAG then sub-contracted the work in two packages to Comsite: one concerned the electrical power and control wiring to the dryer plant itself and a second one concerned the installation of lighting, small power distribution, containment, fire and gas alarm systems, heating and ventilation and building management systems for the dryer building.

36. The issue was whether the second contract related to construction operations or whether it came within "assembly, installation or demolition of plant or machinery" in s 105(2)(c), the primary activity on the site being water effluent treatment.

37. At paragraph 29 of her judgment Judge Kirkham summarised the contentions of the parties as follows:

> "*Comsite's case is that the work scope of the Building Services sub-contract did not amount to installation of plant, within s.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."

38. On the evidence she found at paragraphs 30 and 31 that:

> "*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.*
>
> *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.*"

39. Judge Kirkham was referred to the previous decisions and said at paragraph 36:

> "*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.*"

The broad or narrow approach

Previous decisions

40. It is evident that these decisions were based on the particular facts of whether the works came within the exception is s.105(2)(c) because they were "assembly, installation … of plant or machinery".

41. However in coming to the conclusions on the particular facts of each case a difference of approach is apparent, at least in two of the decisions. In Palmers v ABB at paragraphs 31 and 32 Judge Thornton QC said this:

> "*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 for that contractor's work to come within the definition."

42. On the other hand the approach of Judge LLoyd QC in ABB v Norwest Holt was different. At paragraph 14 he said:

"*Similarly it is in my judgment clear from the language used in section 105(2) that it was intended that, if the regimes were not to apply, it would be invidious if they applied to some but not all construction contracts on a site or for a project. Defining the exempt construction operations by reference to the nature of the project or by reference to a site should minimise the possibility that, for example, one contractor or subcontractor would think that it was better or worse off than another working alongside it, or preceding or following it. That would not be conducive to the purpose of the legislation and would be inimical to the establishment or maintenance of harmonious working relationships and the concept of teamwork. Section 105(2) plainly reflects the fact that the majority of construction work done for the purposes set in paragraphs (a) to (d) is carried out by contractors responsible for design or performance and for owners or employers most of whom take an active interest in seeing that every aspect of the project should properly be planned and co-ordinated. Such involvement minimises the incidence of disputes at every level or tier. The object of this sub-section is therefore that all the construction operations necessary to achieve the aims or purposes of the owner or of the principal contractors (as described in it) would be exempt. If these approaches are correct then an interpretation should be given to section 105(2) which would further and not thwart them.*"

43. He then said this at paragraph 15:

"*It would not in my view make sense if, for example, a sub-contractor providing paint systems or cathodic protection systems necessary to protect plant against erosion or corrosion, to take two instances, were not exempt whereas only the basic installation (whatever that might mean) of the plant itself were exempt. Where would the line be drawn? The Act has to be applied by people within the construction industry. It should be read and construed on the assumption that the answer is clear to a layman. In addition as I have already set out, to make fine distinctions of this kind would be likely to inhibit the uniform management of contractors working alongside each other on the same site or for the same project and would not be consistent with the overall purpose of the exemptions in section 105(2) which are defined by reference to the nature or aims of those responsible for promoting or implementing the scheme, project or activity, rather than by reference to the many individual construction operations required for the drilling for or extraction of oil: for the extraction of minerals; for the assembly or installation of plant (eg tracks, foundations and other preparatory operations for assembly or installation of plant or*

machinery, cranage, staging, control systems and accommodation for controllers, testing and commissioning and the like). 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."

44. In summary, in Palmers v ABB the scope of s.105(2) was construed narrowly so that construction of buildings and concrete foundations for use with the plant would not come within the exclusion nor would any painting of the internal or external surfaces to the plant. In ABB v Norwest Holt the scope of s.105(2) was construed broadly so that all the construction operations necessary to achieve the aims and purposes of the owner or of the principal contractors would be exempt so that a sub-contractor providing paint systems or cathodic protection systems necessary to protect plant against corrosion or erosion would be exempt. On this basis, the exclusion in s.105(2) would be defined by reference to the nature or aims of those responsible for promoting or implementing the scheme, project or activity, rather than by reference to the individual construction operations for the assembly or installation of plant. However, distinctions were made based on operations 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."

45. I was referred to a passage in Keating on Construction Contracts (8th Edition) at paragraph 17-009 and footnote 52 where the following observation is made in relation to the exclusions in s.105(2):

> "*This can give rise to difficulty where the main contractor's work may fall within one of the exclusions in s105(2) of the Act whereas a subcontractor, being only concerned with a small part of the overall works, may be carrying out a construction operation within s.105(1) of the Act: Compare the approach in Palmers Ltd v ABB Power Construction Ltd (1999) 68 Con.L.R. 52 with the approach in ABB Power Construction Ltd v Norwest Holst Engineering [2001] T.C.L.R. 831. In the first case, H.H.J. Thornton Q.C. held that it was possible for a contractor's operations to fall outside the Act but for his sub-contractor's operations to fall within the Act. In the second, H.H.J. LLoyd Q.C. held that the object of s.105(2)(a)-(d) is "that all the construction operations necessary to achieve the aims or purposes of the owner or of the principal contractors (as described therein) would be exempt", including subcontractors.*"

46. Essentially, in this case, I have to resolve this difference of approach. Simon Lofthouse QC and Peter Land for NMC seek to support their submission by reference to Palmers v ABB. Stephen Furst QC for AEE seeks to support his submission by relying on ABB v Norwest Holst.

47. In arriving at their conclusions both Judge Thornton QC and Judge LLoyd QC relied on similar background material in relation to the Latham report and the

industry lobbying which, in the end, gave rise to exceptions in the Act. At paragraph 29 of Palmer v ABB Judge Thornton QC said this:

> "*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 [Act]. 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.*"

48. Judge LLoyd said this at paragraph 12 of ABB v Norwest Holst:

> "*Accordingly not only must it be assumed that the Act was carefully drawn up but it is also plain that great care was taken in selecting the construction operations that were to be exempt and in defining the circumstances where they might be found. Parliament and the Ministers responsible were informed by the discussions prior to the relevant sections (or clauses) being presented to Parliament, by consultations within the industry, sections of which must have had compelling arguments for exemption, and above all, no doubt, by the enquiries and soundings by the Department of the Environment (as it then was known) which had unrivalled knowledge of the construction industry. A most thorough investigation was evidently carried out for otherwise the Government and Parliament could not have been convinced that certain sectors of the construction industry were already so well organised that no regulation of any of their contracts or sub-contracts (at whatever level or tier) was needed. Indeed one cannot but be impressed by the detail of the work done, presumably by officials by the DOE: drilling for oil and gas is excluded but drilling for water (even if it is ultimately to be treated) is not; a project for tunnelling to lay a sewer (even if it is going to a sewage works) or to construct a railway has to be regulated but not a project requiring a tunnel for minerals; installing plant for nuclear processing, and power generation, or for water and effluent treatment is excluded but not plant for an incinerator. The wide immunity given to work in, for example, the water, oil and gas industries must be seen as a tribute to them (and for all who carry out construction work for them) either for the absence of malaises which had been found to bedevil others, such as the prelevance of disputes and the presence of "pay when paid" clauses, or for the fact that the reforms required by the Act were not needed or had been carried out as Judge Thornton recorded in paragraph 29 of his judgement in ABB V Palmer* ."

Discussion

49. As I have observed, the Scheme in s.105 is that s.105(1) contains a very wide definition of construction operations and s.105(2), as drafted, contains specific exclusions. In these circumstances where s.105(2) has intentionally been drafted in terms of specific limited exclusions, I consider that a narrower approach to the construction of s.105(2) would generally be appropriate. As I have observed, if the intention had been to exclude all construction operations on a site where the

primary activity was power generation then that could easily have been done or if it had been intended to exclude all preparatory activities, then a sub-section similar to s.105(1)(e) could have been added.

50. It is also necessary to consider what the practical effect is of construing s.105(2) narrowly or more broadly. Take the present case. On any view the main contract with AEE includes a significant amount of work which can plainly be described as "assembly, installation… of plant or machinery". A narrow construction of that phrase will mean that the other parts of the work consisting of civil works would not fall within the exclusion. That this might happen is envisaged by s.104(5) of the Act.

51. In such circumstances, unless any dispute is limited to civil works, rather than being a more general dispute as to payment, delay or disruption of the works overall, it will be impossible to apply, for instance, the adjudication provisions of the Act to only part of the dispute. Whilst a broader construction would exempt the whole of such operations, the practical effect is likely to be much the same for both a narrow and broad construction: the provisions of the Act would not be applied. However the Act would apply, on a narrow construction, where particular construction operations fell outside the exclusion.

52. When considering the position of sub-contractors in the chain below AEE, then where a sub-sub-contractor to a civil works sub-contractor is carrying out construction operations in the form of, say, site clearance preparatory to the placing of concrete, that would clearly come within the description of site operations under s.105(1) and be difficult to bring within the description of assembly or installation of plant or machinery. A narrow construction of s.105 (2) would recognise this and would mean that the provisions of the Act would apply whereas a broad construction would mean that the Act would not apply.

53. In general I consider that the intent of the Act was that it should generally apply to construction operations within s.105(1). The broad construction would deprive the Act of effect in many cases and would lead to a strained construction of the words "assembly, installation…of plant or machinery." On the other hand, the narrow construction would give effect to the Act by applying it only in cases where the work was assembly or installation of plant or machinery. On that basis I consider that the narrow construction is to be preferred.

54. I have reached this conclusion without considering any Parliamentary material. At the hearing neither party relied on any such material and I note that the approach of the courts has varied on whether such material should be considered. In Palmers v ABB Parliamentary material was referred to at paragraph 40. At paragraph 41 Judge Thornton said that this material supported the restrictive construction of s.105(2). In Homer Burgess at page 132 Lord Macfadyen had referred to the reliance by the adjudicator on Hansard in relation to the meaning of "plant" in s.105(2)(c). He said that reliance on Hansard was inappropriate and: "*The conditions for resort to Hansard laid down in Pepper v Hart [1993] AC 593 were not satisfied. The legislation was not ambiguous or obscure, and its literal meaning did not lead to absurdity. On the contrary, the word "plant" had a well established meaning settled by authority before it was used in the 1996 Act.*"

55. At the end of the hearing and having heard argument, it became evident that in deciding on the narrower or broader construction of s.105(2)(c) the added words "erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery" potentially gave rise to an ambiguity or were obscure. Mr Furst submitted in argument and I accept that the addition of those words in s.105(2)(c) is curious and odd. I therefore invited the parties to provide submissions on whether I should look at any Parliamentary material on that provision and, if so, to provide it.

56. As a result, NMC made written submissions to the effect that Parliamentary material consisting of extracts from Hansard should be admitted and those extracts provided strong support for NMC's contention that s.105(2) should be narrowly construed. AEE submitted that none of the material was admissible under Pepper v Hart or as a matter of discretion and, in response to NMC's submissions, submitted that the Parliamentary material, at most, showed that the relevant part of s.105(2)(c) was intended to confine the steelwork provision to steelwork directly and necessarily connected with the plant and machinery but did not touch upon the rationale for excluding steelwork as a separate specified activity. In relation to NMC's submission that s.105(2)(c) was not intended to cover the type of concrete buildings and concrete structures identified in the Schedule of Civil Works, AEE submitted that there were a number of ambiguous statements and, if anything, a wider interpretation of "plant" was intended. Further, AEE did not accept that the court should admit this material under Pepper v Hart or under any wider discretionary principle.

57. The relevant extracts from Hansard are the House of Lords committee stage on 28 March 1996; the Third Reading in the House of Lords on 29 April 1996; the House of Common committee stage on 13 June 1996 and the Commons Amendment stage in the House of Lords on 23 July 1996.

58. On 28 March 1996 Earl Ferrers, the Minister of State, Department of the Environment who introduced the Bill said (Hansard HL Deb Cols 1847 and 1848):

> "*My noble friend Lord Ullswater is right to say that process engineering is totally different from construction. Process engineering is industrial work involving certain types of chemical, physical or biological processes. Examples include refining oil, generating electricity, and making chocolate. This clearly involves a great deal of heavy plant and machinery, with complicated steelwork to hold it all in place. It is only the construction of such plant, machinery and steelwork which the Bill excludes. The construction of buildings on the same site would be covered by the Bill."*
>
> ....
>
> *I re-emphasise that the exemption here would apply only to work on plant, machinery or steelwork, and not to site work or building. So much of the construction sector's interest in process engineering would be covered by the new provisions.*"

59. On 29 April 1996 Lord Lucas, on behalf of the Government, said (Hansard HL Deb Cols 1439):

> "*At Report stage I said that we were looking again at the introduction of Clause 104 (2)(c) to make sure that the right line was drawn between process engineering and other types of construction activity. Although that process will not be complete until we are in a position to lay amendments in another place, I am now able to give the House some clear assurances. In view of the amount of time that your Lordships have spent on this in debate, I should like to spend a few moments explaining our intentions.*
> *First, on steelwork, which is the subject of Amendments Nos. 8 and 9, the arguments of noble Lords opposite have not convinced us that all steelwork on a process engineering site should be subject to the provisions of the Bill. However, we believe it is possible to distinguish between steelwork which is directly and necessarily connected to plant and machinery--steelwork, which forms, if you like, an integral part of the machinery--and other steelwork on the same site. We intend to bring forward an amendment which places integral steelwork squarely within the process engineering exclusion, but which would leave the remainder subject to Part II. Steelwork in a factory roof, a canteen or a visitor centre--just to take a few examples--would then be covered by the main provisions of the Bill.*
> *...*
>
> *To reiterate and summarise our position, it is not, and 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, machinery and such steelwork as is necessarily connected to plant and machinery. Ordinary civil and building work would not be excluded.*"

60. On 13 June 1996 during the committee stage in the House of Commons the Minister for Construction, Planning and Energy Efficiency, Mr Robert Jones, said (Hansard SC Deb Col 301):

> "*The amendment is designed to remove any confusion that may have arisen from the existing wording of subsection (2)(c). I want to make it clear that we do not intend all work on a process engineering site to be excluded from fair contracts provision. We want to exclude only work on the machinery and plant that is highly specific to the process industry, together with work on steel work that is so intimately associated with that plant and machinery that it could not possibly be reasonably considered apart. To that end, we have made it clear that the steel work mentioned in the exclusion is only that which relates to support and access. We have also removed the word "construction" in association with plant and machinery because we found that it caused much confusion. Instead, we have decided to use the word "assembly". Both those changes were suggested in another place and we have been happy to take them forward. I repeat that all normal construction activities on a process engineering site will be subject to the provisions of the Bill. That includes building roads, erecting fences, laying foundations, and building offices or factories*

— even if they are made of steel. Amendment No. 127 makes that absolutely clear."

61. On 23 July 1996 during the Commons Amendment stage in the House of Lords, Lord Lucas said (Hansard HL Deb Col 1335):

> "*Amendment No. 71 is another old favourite… let me just remind the House that, at the end of our consideration we undertook to amend Clause 104(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. The second was to remove the word "construction" from the beginning of the paragraph and to replace it with something less likely to cause confusion. I hope the House will agree that both those ends have been served by Amendment No. 71.*"

62. I consider that this is a case where the court can properly consult Parliamentary material in accordance with the decision in Pepper v Hart as helpfully explained in Bennion on Statutory Interpretation at section 217. As set out above there is an ambiguity in the form of the difference between the broad and narrow construction to s.105(2)(c) and, in this context, the reference to steelwork in s.105(2)(c) is obscure, curious and odd. I consider that the above statements in Hansard made by or on behalf of the Minster disclose the legislative intent underlying the wording of s.105(2)(c) and are clear.

63. The passages show that the intention was to exclude steelwork which formed an integral part of the machinery and which was directly and necessarily connected to the plant and that other steelwork would come within construction operations to which the Bill applied. The reference to steelwork was therefore intended to be a narrow exclusion and s.105(2)(c) was not intended to exclude all structural steelwork or other building or civil engineering work on the site. I consider that this supports the narrow construction.

64. I do not gain any assistance from the passages identified by Mr Furst in relation to storage. His reference to amendment 134 debated on 28 March 1996 is a reference to the wording of what is now s.105(2)(c)(ii) and the distinction there between bulk storage and warehousing. I do not consider that it assists on the intention in relation to s.105(2)(c)(i).

65. To the extent that the matters referred to by way of background in paragraph 49 of Palmers v ABB and paragraph 12 of ABB v Norwest are admissible in construing the statute then, in my judgment, they do not suggest that s.105(2) was intended to apply a general exclusion from the operation of the Act at the sites where particular processes were being carried out. Rather the particular operations were excluded because the specialist process engineering industry was perceived to be so well organised or regulated or otherwise did not need protection. This does not point to an intention that building, civil engineering and other construction sub-

contractors down the contractual chain, who are not specialists, should be excluded. Indeed quite the opposite would seem to be the position.

66. For those reasons and also the reasons set out in my initial observations I have come to the conclusion that the narrow construction adopted by Judge Thornton in Palmers v ABB is to be preferred.

67. In doing so I respectfully adopt the approach of Judge Kirkham in Comsite where she rejected submissions based on ABB v Norwest Holst on the grounds that they were too broad. She said:

> "*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.*"

68. It seems to me that, on the facts in Homer Burgess, ABB v Norwest Holst and ABB v Zedal, the pipework, insulation and electrical wiring would come within the wording of the exclusions in s.105(2)(c) of the Act, even construing those provisions narrowly. Each case is obviously dependent on the particular work being considered and, in the end, whether the operations are found to be "assembly, installation … of plant and machinery" will be a matter of fact and degree.

69. On this basis, I now turn to the facts of this case.

The Enabling Works

70. From the descriptions to which I have referred, the enabling works are evidently works which are preparatory to carrying out work at the site. They consist of temporary roads, foundations for temporary site offices, temporary services, and demolition of buildings. They would generally be covered b s.105(1)(a), (b) and (e) but there may also be operations within s.105(1) (c) and (f).

71. In my judgment on a narrow construction of s.105(2)(c)(i), it is not possible for the enabling works to be described as "assembly, installation or demolition of plant or machinery". They could only come within that description if the overall works as a whole on the project are very broadly defined rather than just considering the operations which are the subject of the Enabling Works Contract between AEE and NMC. As I have said, I do not consider that s.105(2)(c) can be construed so broadly.

72. I therefore find that the enabling works are construction operations within s.105(1) and are not excluded operations under s.105(2). As a result the provisions of the Act apply to the Enabling Works Contracts.

The Civil Works

73. I have already referred to the main provisions of the Civil Works Contracts which contain a definition of the civil works.

74. There are also some other descriptions in paragraph 3 of the Technical Specification, with exclusions from supply in paragraph 6.5 of that document. Paragraph 3 provides

> "*The Scope of civil works is described in the following and will include all manufacturing, delivery, construction and installation of the below mentioned buildings and structures.*
> *In general there will be built all constructions that are necessary for the installation of the equipment of the new FGD.*
> *The main part of the civil construction are the concrete/reinforced concrete works including the associated earth-works and piling works where necessary. The structural steel work is not part of the civil works and will be tendered separately.*"

75. Paragraph 6.5 provides that the following works are the subject of a separate tender: "*Steel Structures and Erection; Roofing, Cladding, Furnishings; Inside Building Service; Outside Building Services; Road Works; Landscaping; Rail Works; Lighting, HVAC, Fire Fighting.*"

76. Mr Furst also referred to a document "Schedule of Constructural (sic) Elements for Civil Works" ("Schedule of Civil Works") which was divided into three sections: Foundations, Concrete Buildings and Concrete Structures. The Foundations part sets out 10 headings and states, for instance, that the scope of the Civil Work is RC (Reinforced Concrete) Foundations, Piling or Soil Improvement and that the relevant "building" is, for example, Steel Tank directly on Foundation or Raised Steel Tank on Steel Columns or Steel Structure. The Concrete Buildings part has 3 headings with building descriptions of "Concrete Building with Cladding" and the Scope of the Civil Works is "RC-Building, Cladding, Roof, Finish. The Concrete Structure part has four headings, two are concrete silo structures for limestone and gypsum silos and the scope of civil works is "RC-Structure on Piling, Sliding Formwork." I was also shown a layout of the Power Station which indicated where each of the foundations, concrete buildings or concrete structures was placed.

77. Mr Furst submitted, in particular, that the reinforced concrete silos were essentially pieces of plant which, like the pipework to which Lord Macfadyen referred to in Homer Burgess at 135, were "part of the plant being assembled or installed" and that without such silos "the individual pieces of machinery or equipment would be unable to operate". He submitted that the silos were "in a real sense part of the apparatus which, once it was installed" would be used to carry out the business of power generation.

78. Mr Lofthouse submitted that these works were foundations, buildings and structures as they were described in the schedule and could not be described as

plant or machinery and that the construction of a reinforced concrete silo could not come within "assembly[or] installation of plant".

79. Whilst there is some force in Mr Furst's submissions, as I observed above, the reference to plant or machinery is more consistent to components or items of plant. I had no specific evidence in relation to the silo structures explaining, for instance, what further work is required to the silos to make them usable as silos, although some drawings indicate roof and hopper structures supported by the concrete silo. The evidence would not suggest that the concrete structures could be said to be plant which was assembled or installed by NMC.

80. There will obviously be certain aspects of every contract which at the boundaries may either be argued to be construction operations or be argued to be within the exclusion. I respectfully agree with Judge Bowsher QC in ABB v Zedal at paragraph 27, cited with approval in paragraph 37 of Comsite, 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 work broadly*." That is not the same as giving the words of s.105(2) a broad or narrow meaning. What is required is for the works overall to be looked at broadly to see whether they came within s.105(2) exception.

81. The issue is a matter of fact and degree and inevitably there will be grey areas. I do not consider that it was the intention of the Act for there to be a minute analysis to find an item which arguably was a construction operation or was within the exclusion, so as to defeat the purpose of giving or excluding the rights of the Act to what on a straightforward and commonsense analysis is a contract for construction operations within s.105(1) or excluded operations under s.101(2).

82. I therefore conclude that even if there are arguable areas of work such as the concrete silos, the works under the Civil Works Contracts are construction operations which are not excluded as they are not assembly or installation of plant or machinery under s105(2)(c).

The earth bonding declaration

83. As I have already said, AEE submits that this aspect of the Part 8 claim is not suitable for the Part 8 procedure. NMC says that it is.

84. As set out in CPR 8.1(2), Part 8 applies "where a party seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact." As the notes to the Civil Procedure 2009 say at 8.0.2 and 8.1.1 Part 8 claims essentially relate to the construction of documents or questions of fact where pleadings are not necessary.

85. The declarations sought at paragraphs 9(a) and 9(b) of the Details of claim, on their face, relate to the construction of documents. In the first declaration NMC seeks a declaration that under the Civil Works Contract NMC was not responsible for the design of the foundation earth bonding.

86. In his witness statement on behalf of NMC Mr. Westlake points to various references in the Civil Works Contracts which set out requirements relating to earthing. He says that the documents did not require any particular method of installation of the earth bonding and that NMC based their price on an installation compliant with a British Standard referred to in the Civil Works Contracts. Mr Westlake says at paragraph 24 of his witness statement that the prices were based on an installation "*comprising the laying of a grid of copper earthing rods in trenches at a minimum depth of 600mm which would then be backfilled*". He refers to paragraph 7.3.2 of BS 7314: 1990 dealing with Earth Electrodes and says that this system complies with that paragraph.

87. After referring at paragraph 25 to drawings issued by AEE and various other documents he says at paragraph 29 : "*NMC understands that it is not in issue that what was required by AEE as set out in paragraph 25 above differed from the requirements set out at paragraph 24 above. What is in issue is whether the responsibility for design in this regard lay with AEE or NMC. NMC's case is that, on a true construction of the contracts, this design responsibility lay with AEE with the result that AEE instructed a change to the works when issuing its for construction Concrete Form Work plans giving details of the foundation earth bonding.*"

88. He then refers to various provisions in the Civil Works Contracts which relate to design and seeks a declaration that NMC was not responsible for the design of the foundation earth bonding.

89. In response to that witness statement, AEE rely on the witness statement of Peter Cassidy in which he says that there are substantial issues of fact and raises questions as to NMC's case on this issue. He says that NMC was responsible for the design of the foundation earth bonding and refers to provisions of the Civil Works Contracts. At paragraph 17 of his witness statement Mr. Cassidy says that, notwithstanding the declaration sought, it may be NMC's case that while it was responsible for designing the earth bonding in accordance with certain British Standards, it was required by AEE to adopt a design which fell outside these standards.

90. He also says that AEE's position is that it did not issue a variation when it issued drawings, as such drawings complied with the British Standards. He says that this can only be resolved by hearing factual and expert evidence.

91. In their written submissions Mr Lofthouse and Mr Land referred to the contractual provisions as to design in support of the first declaration. They referred to Clause 14 of the Conditions under which AEE could "alter, add or omit in any manner any part of the Works". They then said that the drawings issued by AEE "clearly state that the earth bonding was to be embedded in and joined to the reinforcement" and that nowhere in the contract documents is there any indication that the earth bonding was to be installed in this manner and the Bills of Quantities item 30.10.100.030 implicitly did not require the earthing rods to be fixed to the reinforcement.

92. In his oral submissions Mr Lofthouse also referred me to the relevant drawings, concrete Formwork Plan FD-151: Absorber Foundation Unit 2 (FF-0130-NU-CF-151-COD) which in the notes referred to Earthing "To be executed in accordance with Technical Specification TT-0126-NU-TS-003-LUK" and states that three items are to be supplied by NMC:

> *(1) Ring Earth embedded in Concrete/Galvanised Steel 40x5mm (>200mm^2)/Meshed Network Connection in Concrete to be attached to Reinforcement every 2 Meters for Connection to Ring Electrode/Earth meshed Network;*
> *(2) Bonding point/ non-ferrous in acc. with BS 6651; figure 7 or equivalent;*
> *(3) Connections inside Concrete by Earth Rod Clamp, Compression Connectors or welded Connections.*

93. Mr Lofthouse relied on the fact that the drawings refer to a new specification and also referred to the requirement for galvanised steel rather than copper, together with the need to attach the earthing to the reinforcement every 2 metres. In paragraphs 26 to 28 of his statement Mr Westlake refers to further matters including a change from galvanised steel to copper tape and a change from 40x5 copper tape to 50x6 copper tape. He also says that, as finally installed, copper tape was attached to the reinforcement in the foundation by drilling the tape and clamping it to the reinforcement with U-bolts. This he says made NMC's work more difficult and caused additional cost.

94. Mr Furst submitted that NMC's case as to the scope of the alleged change is not clear and had developed during the course of the hearing. He submitted that in order to be able to deal with the issues raised by the two declarations it was necessary for there to be pleadings so that the issues were clear. At present he said that there were a number of points of uncertainty in the way in which the case was put in the evidence of Mr Westlake and the submissions. These indicated that there were issues of fact and that expert evidence was necessary.

95. I will consider Mr Furst's objections in the context of the two declarations but essentially I find those objections to be made out.

Design Responsibility

96. The way that the matter was put in the declaration was that NMC was not responsible for the design of the foundation earth bonding.

97. Mr Lofthouse referred to paragraph 3 of the Technical Specification for the Civil Works Contracts which stated that the Purchaser, AEE, "*will be responsible for the design of the civil and structural works for the buildings of the new FGD plant and the unloading area.*" In relation to the Bills of Quantities, he also referred to Item 100.10 which states that general "engineering", which meant design, would be supplied by AEE. He submitted that design obligations therefore lay generally with AEE. He referred to paragraphs 6.2, 6.3.4 and 9 of the Technical Specification where there are references to certain design or engineering being carried out by NMC in relation to piling, sliding formwork and temporary

excavation pit and sheeting whilst AEE was responsible for detailed design for formwork and reinforcement. In the Bills of Quantities he referred to items 20.10.10, 30.10.90 and 30.20.10.050 where design responsibility was indicated by the wording "as contractor's design" for piling, construction joints in concrete and laying concrete blocks.

98. Mr Lofthouse submitted that the absence of "as contractor's design" in respect of foundation earth bonding meant that NMC was not responsible for it and he referred to item 30.10.100.030 which provides "*Supply and Installation of Earthing Rods 40x5mm … Design and fix in accordance with BS 7354, BS 7430, BS 7671, BS 6651, BS 6739 as applicable. Include for fixtures and fittings.*" He says that this only requires NMC to supply and install earthing rods and that the reference to "design and fix" to the British Standards is merely informative.

99. Mr Furst says that the provisions of the Civil Works Contract show that NMC does have design responsibility. He relied on the reference to "design and fix" at item 30.10.100.030 of the Bills of Quantities and submitted that this required NMC to carry out an element of design. He said that it was not clear on NMC's submissions and evidence what part of the design was in issue. In so far as NMC relied on the method of fixing the earthing system to the reinforcement, he said that that the reference to designing and fixing in the item of the Bills of Quantities evidently covered at least that aspect. In relation to Mr Lofthouse's submission that the change was from earthing in the ground to earthing embedded in the concrete, Mr Furst also relied on the fact that item 30.10.100.030 of the Bills of Quantities related to section 30.10, dealing with concrete and reinforced concrete work and, in particular, section 30.10.100 which dealt with embedded items. He submitted that this made it plain that the earthing was to be embedded in the concrete.

100. Mr Furst also referred me to extracts from BS 7430 and BS 6651, which are British Standards mentioned in item 30.10.100.030 and which refer to reinforcement, in particular at power stations, being used to provide an earthing electrode.

101. I have come to the conclusion that on the present state of NMC's evidence and submissions it is not clear what aspect of design is relied on. It is not appropriate in such circumstances for the court to make a declaration in respect of an obligation where the precise issue is not clear. Design obviously covers a wide range of obligations from outline design to detailed design to the choice of a particular fixing. The provisions of the Civil Works Contract relied on by Mr Lofthouse evidently impose general design on AEE but some on NMC. The issue may come down to a determination of whether a particular matter is, for instance, part of the obligation to "design and fix" in item 30.10.100.030 of the Bills of Quantities. That requires the precise element of design to be considered and might also, depending on the allegation, require expert evidence as to the scope and extent of the obligations under the various British Standards.

102. Accordingly, whilst in appropriate cases the existence of design responsibility might be the subject of a declaration, I decline to make such a declaration in relation to the responsibility for the design of the foundation earth bonding in this

case because I do not consider the issue to be sufficiently clear for the court to make such a declaration.

The change

103. From what I have said above, it follows that there is a lack of precision in the nature of the change as described by NMC in the evidence and submissions. I accept Mr Furst's submission that there are a number of aspects raised by NMC. Before a declaration can be made that AEE instructed a change to the works when issuing the plans, it is necessary to identify what was the scope of NMC's original obligation in relation to foundation earth bonding and to what extent there was a variation to that obligation by the issue of the instructed plan.

104. The possible contentions are:

(1) That, as set out in Mr Westlake's witness statement at paragraph 24, NMC's obligations were to supply earth rods in trenches and that the change explained in paragraph 25 was that the reinforcement was to be embedded in concrete and was to be attached to reinforcement every 2 metres;

(2) That there was a change in earthing rods from copper to galvanised steel on the drawing but in discussion it was changed back to copper and then because of non-availability of materials, it was changed to 50x6mm copper tape (paragraph 26 of Mr Westlake's witness statement and exhibit Pf-kW7);

(3) That the copper tape had to be clamped to the reinforcement by drilling the tape and making a U-bolt connection. It was this which is relied on as making NMC's work more difficult and caused additional cost (paragraphs 27 and 28 of Mr Westlake's witness statement);

(4) That, as mentioned in submissions, the plans required compliance with a new specification FF-0126-NU-TS-003-LUK.

105. Those possibilities give rise to the following potential changes: a change from a buried earth system to an embedded concrete system; a new requirement to attach rods to reinforcement every 2 metres; a change in the type of rod; a new requirement or a change in the method of connection of the rod to the reinforcement or changed requirements in the specification. Unless and until the precise change is pleaded the matter cannot be taken any further.

106. In addition, whilst Mr Westlake says that what is in issue is whether the responsibility for design lay with AEE or NMC, Mr Lofthouse accepted that this was not necessarily an issue which would determine whether there had been a change as there could be a change, even if NMC had a design responsibility.

107. In the circumstances, I accept Mr Furst's submissions that it is not appropriate for me to make any declaration in relation to whether AEE instructed a change to the works when issuing plans giving details of the foundation earth bonding.

Summary

108. Subject to further submissions as to the precise terms of the declaration, I find that neither the Enabling Works nor the Civil Works at Ferrybridge or Fiddler's Ferry fell with the definition in s.105(2)(c)(i) but are construction operations as defined in s.105(1) so that the provisions of the Act apply to the Enabling Works Contracts and the Civil Works Contracts.

109. In relation to responsibility for the design of the foundation earth bonding and whether AEE instructed a change to the works when issuing plans giving details of the foundation earth bonding, I decline to give any declaration.

110. I will hear submissions as to the form of declaration and any ancillary matters.