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Guidance Note: Construction Contracts and Construction Operations



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Guidance Notes for Adjudication

The Adjudication Society and Chartered Institute of Arbitrators have worked jointly since 2010 to produce a series of Guidance Notes dealing with Adjudication in England, Wales and Scotland.

The Guidance Notes are to assist not just Adjudicators, but also parties and party representatives in respect of the key issues that they and Adjudicators might encounter when dealing with adjudication under the Housing Grant, Construction and Regeneration 1996, and the subsequent Local Democracy Economic Development and Construction Act 2009. The Guidance will take into account the Scheme, amendments to it and also pertinent case law.

The Guidance Notes do not debate all of the legal issues in an attempt to find a philosophical answer to the many problems that could be encountered.

Instead, the Guidance Notes try to identify a sensible or practical approach to some of the everyday problems encountered in adjudication. It is an attempt to establish current best practice and, to that end, updated guidance notes will be provided from time to time.

The first edition of this Guidance was published on the websites of The Adjudication Society (www.adjudication.org) and the Chartered Institute of Arbitrators (www.ciarb.org) in April 2013. This current edition results from a review by a Working Group set up by the Practice and Standards Committee (PSC) of the Chartered Institute of Arbitrators with assistance from the Adjudication Society.

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I. Construction Contracts

I.1. Part II of the Housing Grants, Construction and Regeneration Act 1996 (“the Act”) only applies to “construction contracts”.

I.2. These are defined in two ways in section 104 of the Act. The first definition can be found in section 104(1). This definition covers contracts for the carrying out of building work and defines “construction contracts” to include agreements for:

I.2.1. The carrying out of construction operations.

I.2.2. Arranging for the carrying out of construction operations by others, whether under sub-contract or otherwise.

I.2.3. Providing labour for the carrying out of construction operations.

I.3. The second definition, which works alongside the first definition, can be found in section 104(2) of the Act and covers contracts with construction professionals. It provides that the following are also “construction contracts”:

I.3.1. Agreements to do architectural, design or surveying work; and

I.3.2. Agreements to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape.

I.4. There are two central aspects to all these definitions:

I.4.1. Firstly, there must be a contract. This is a very broad topic outside the scope of this guidance note. However, it is important to note that the 2011 amendments to the Act deleted section 107 entirely thereby providing henceforth that oral and partly oral construction contracts would be subject to the Act as well as written ones.

I.4.2. Secondly, all the definitions refer to “construction operations”, a phrase which is considered further below.

¹ *Treasure & Son Ltd v Dawes* [2007] EWHC 2420 (TCC); *Ledwood Mechanical Engineering Ltd v Whessoe Oil and Gas Ltd* [2007] EWHC 2743 (TCC).

2. Express Adjudication Clause

2.1. The issue of whether a contract concerns construction operations usually arises if the contract does not contain an express adjudication clause such that a clause has to be implied¹. Care must still be taken, even if the parties have expressly agreed that their contract is governed by adjudication, as occasionally it may still be necessary to consider whether the work which is the subject of an adjudication is an “excluded operation” in accordance with s.105(2) or not².

3. Geographical Scope

3.1. The adjudication provisions of the Act only apply to construction contracts which relate to the carrying out of construction operations in England, Wales and Scotland. It is the geographical location of the construction operations that determines whether the contract is caught by the Act, not the location of the contracting parties or where the particular work is carried out if these are different.

3.1.1. For example, a contract between an English developer and an English architect entered into in London will not attract the adjudication provisions of the HGCRA if the building being designed is to be located in France.

3.1.2. By contrast, a contract between a French developer and a French architect entered into in Paris would theoretically attract the adjudication provisions of the HGCRA if the building being designed is to be built in England, although there may be other legal and practical hurdles to adjudication.

3.2. For any “off-shore” works and works that link off-shore to on-shore facilities the boundaries can become blurred. However, the primary factor determining this issue is the situation of the building or structure once built³. This may be of increasing importance as one looks at modular and off-site construction as well as fabrication for off-shore facilities.

4. Construction Operations – Included And Excluded Activities

4.1. The Act defines “construction operations” in two ways. Firstly, by reference to generally included activities and second by reference to specific excluded activities. The specific exclusions take precedence such that if they apply the operations are not construction operations even if they fall within the general included activities⁴.

4.2. The following activities are defined as construction operations by section 105(1) of the Act:

² In *Engie Fabricom UK Ltd v MW High Tech Projects UK Ltd* [2019] EWHC (TCC), the parties agreed that they had the right to adjudicate “to the extent permitted by and consistent with the provisions of the Construction Act.” Following an adjudication, MW resisted enforcement saying that the primary activity of the site was the generation of power. The Judge found that MW had a “real” prospect of being able to establish that the primary activity was power generation and refused to grant summary enforcement of the adjudication decision.

³ *Staveley Industries PLC v Odebrecht Oil and Gas Services Limited* [2001] 90(10) LSG 46. While this case was primarily looking at the effect of the words “part of the land” in section 105(1) it is equally important here.

⁴ *Palmers Limited v ABB Power Construction Limited* [1999] BLR 426

(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;

(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, earth-moving, excavation, tunneling 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.

4.3. Judicial guidance can be found on the meaning of some of these words in borderline cases. Examples include:

4.3.1. The references to “land” in sub-sections (a), (b) and (c) means that those parts do not apply to offshore installations. So, land does not include the sea bed below low-water mark; rigs in the North Sea are thus excluded.⁵

4.3.2. The installation of materials which are not structures or fittings which will upon completion form part of the land to which they are attached is also not covered by the Act.⁶ A conveyor system attached to a concrete floor slab does form part of the land⁷; but conversely a large woodworking machine attached to the floor by 50 or so threaded rods which could be freed from the machine by removing the nuts did not⁸;

4.3.3. Care should be taken with the word “installation” as a contract with a landlord for the servicing and maintenance of gas appliances was found to be a contract for “construction operations”⁹;

⁵ *Staveley v Odebrecht* (TCC, Judge Harvey), 28 February 2001

⁶ *Gibson Lea Retail Interiors Limited v Makro Self Service Wholesalers Limited* [2001] BLR 407

⁷ *Savoie and Savoie v Spicers Limited* [2014] EWHC 4195 (TCC)

⁸ *Fahstone Limited v Biese Group UK Limited* [2015] EWHC 3650 (TCC).

⁹ *Nottingham Community Housing Association Ltd v Powerminster Limited*, (2000) BLR 308.

4.3.4. Sometimes the sub-sections need to be read together. Whilst a landfill cell is a 'structure' forming or to form part of the land within (a), being formed in the ground from clay and stone which is meant to form a cell to receive the landfill material, the capping layer is not a 'structure' and does not, therefore, fall under (a). A capping layer is a synthetic cover of an existing landfill area and the works involve the construction of the landfill cell, the securing of the boundaries of the landfill, the capping of the existing area and the completion of a treatment process. These are operations which form an integral part of the operations relating to the landfill cell and therefore fall under (e).¹⁰

4.4. The following is a list of excluded activities by virtue of section 105(2) of the Act:

(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.

4.5. Following the case of *North Midland Construction Plc v AE&E Lentjes UK Limited*¹¹, the courts will take a narrow approach to construing what activities fall within this exclusion. Having reviewed the Parliamentary record, Mr Justice Ramsey held that had Parliament wanted all works directly or indirectly limited to the categories listed here – the works in question were enabling and civil works at a power station – then it would have specifically said so.

¹⁰ *Coleraine Skip Hire v Ecomesh Limited* [2008] NIQB 141

¹¹ [2009] EWHC 1371 (TCC)

4.6. Judicial guidance on the meaning of these words in borderline cases includes:

4.6.1. Pipework connecting plant or machinery is generally considered part of that plant or machinery.¹²

4.6.2. By contrast, preparatory work for the construction of plant such as the construction of temporary roads and demolition of pre-existing buildings does not fall within the exceptions.¹³

4.6.3. Similarly, although various on-site steelwork activities are caught by sub-section (c), preparatory activities such as the production of fabrication drawings, off-site fabrication and delivery to site are not caught.¹⁴

4.6.4. However delivery to site (or supply) of building components such as concrete will be caught by sub-section (d).¹⁵

4.6.5. Electrical works were carried out for the process and production on a site for construction of an alcohol distillery fell under the sub-section (c)(ii) food and drink exception.¹⁶

4.6.6. In defining “the site”, in 105(2)(c), the matter has to be considered as “one of overall impression rather than a detailed examination of particular documents or obligations”: that is likely to be the whole of the project site rather than a narrow part of the project site which may be applicable to a subcontract.¹⁷

4.7. Overall however the intention should be that the broad base of what amounts to a construction operation under section 105(1) should not be defeated by giving a wide meaning to the exclusions in section 105(2).¹⁸

5. Other Excluded Matters

5.1. Although outside the scope of this guidance note, it should be remembered that the following contracts are also excluded from the Act even though they relate to construction operations:

5.1.1. Contracts with a residential occupier.¹⁹

¹² *Homer Burgess Ltd v Chirex (Annan) Ltd* [2000] BLR 124

¹³ *North Midland Construction Plc v A&E Lentjes UK Ltd* [2009] EWHC 1371 (TCC)

¹⁴ *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC), *Edenbooth Limited v Cre8 Developments Limited* [2008] EWHC 570 (TCC)

¹⁵ *Universal Sealants (UK) Limited (t/a USL Bridgecare) v Sanders Plant And Waste Management Limited*, [2019] EWHC 2360 (TCC)

Clark Electrical v JMD Developments (UK) Limited [2012] EWHC 2627 (TCC). Strictly this was the view of the adjudicator only. HHJ Behrens did not need to and did not express an opinion either way.

¹⁷ Mr Justice Ramsey in *Laker Vent Engineering Limited v Jacobs E&C Limited* [2014] EWHC 1058. See also *ABB Zantingh Limited v Zedal Building Services Limited* [2000] EWHC 40 (TCC).

¹⁸ *North Midlands Construction PLC v AE & E Lentjes UK Limited* [2009] EWHC 1371 and *Cleveland Bridge (UK) Limited v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076

¹⁹ Section 106 of the Act. This section will also be interpreted narrowly. In *Shaw v Massey Foundation & Pilings* [2009] EWHC 495 (TCC) Mr Justice Coulson said that s.106 refers to a single dwelling house or flat and the specific intention to occupy that dwelling or flat as one's residence. It is further no excuse that a residential occupier might not be aware of the exemption. In *ICCT Ltd v Pinto* [2019] EWHC 2134 (TCC), Mr Pinto participated in an adjudication, without reserving jurisdiction and so found himself bound by the decision. However, many contracts involving residential occupiers are governed by the JCT Agreement for Minor Building Works Form 1998 Edition that incorporates an adjudication provision, thereby getting round the exclusion. See, for example, *Lovell Projects Limited v Legg and Carver* [2003] C.I.L.L. 2019.

5.1.2. Development Agreements as defined in the Construction Contracts (England and Wales) Exclusion Order 1998 (Statutory Instrument 1998 648).²⁰

5.1.3. PFI head contracts as defined in the Construction Contracts (England and Wales) Exclusion Order 1998 (Statutory Instrument 1998 648).²¹

5.1.4. Finance Agreements as defined in the Construction Contracts (England and Wales) Exclusion Order 1998 (Statutory Instrument 1998 648).²²

5.1.5. Certain agreements under statute as defined in the Construction Contracts (England and Wales) Exclusion Order 1998 (Statutory Instrument 1998 648).²³

6. Assessment Based on Specific Contract Works

6.1. Each contract should be assessed by reference to work covered by that particular contract rather than the purpose of the project as a whole.²⁴

6.2. As a result, it is possible to have a single project where:

6.2.1. The main contract relates partly to construction operations and partly to excluded or other matters.

6.2.2. Some sub-contracts relate solely to construction operations.

6.2.3. Some sub-contracts relate solely to excluded or other matters.

7. Contracts Only Partly Relating to Construction Operations

7.1. Where a contract relates partly to construction operations and partly to excluded or other matters, the Act applies in so far as it relates to construction operations.²⁵ This means that adjudication is available provided it is limited to resolving disputes about the construction operations and does not cover excluded matters. If the referred dispute relates partly to matters which are not construction operations and there is no express adjudication clause, the Adjudicator does not have jurisdiction and should refuse to act.²⁶ The referring party will be entitled to refer again, drafting its referral in such a manner that it is strictly limited to construction operations.

²⁰ Section 6

²¹ Section 4

²² Section 5

²³ Section 3

²⁴ *North Midland Construction Plc v A&E Lentjes UK Ltd* [2009] EWHC 1371 (TCC)

²⁵ Section 104(5) of the Act.

²⁶ *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC)



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