

CASE IN BRIEF

Hybrid contracts and the payment provisions of the Construction Act

The Housing Grants, Construction and Regeneration Act 1998 (the Act) applies to "construction operations". Where a contract relates to both "construction operations" and non-construction operations, the question arises of how payment mechanisms apply to construction as opposed to non-construction operations. This case finds that a contract which is compliant with the Act will apply equally to all operations specified in the contract.

The Act

The Housing Grants, Construction and Regeneration Act 1998 (the Act) applies to all "construction operations". Certain activities which are exempt from this criterion are specified at section 105, including 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, on a site where the primary activity is ... power generation"

Certain other engineering projects have also been made exempt, including nuclear processing and sewage treatment plants.

Generally, a very narrow approach has been taken to the exemption; only the particular activities which come under the provision have been exempt and not the whole project to which they belong. Where a single contract involves multiple activities, for instance the installation, design and fabrication of steelwork, the only activity exempt from the Act will be the installation of the steelwork.

C Spencer Limited v MW High Tech Projects UK Limited

MW High Tech Projects Limited (MW) was engaged as the main contractor for a project designing and constructing a Waste-to-Energy power plant in Hull. They appointed C Spencer Limited (CSL) as a sub-contractor to design and construct certain works. The sub-contract for the project involved both activities the Act applies to (construction operations) and activities exempt from the Act (non-construction operations). The contract was compliant with the Act.

In February 2019 CSL issued a payment application which treated payments relating to construction operations and non-construction operations as distinct elements. MW's responding payment notice assimilated the operations and assessed the overall amount due according to one payment scheme as per the contract. CSL brought the dispute challenging the validity of MW's payment notice, based on the claim that the notice failed to identify (a) the amount due in respect of construction operations as opposed to non-construction operations, and (b) on what basis that amount had been calculated.

CSL's claim failed. The court held that where a contract is Act compliant and sets out one payment regime for both construction and non-construction operations, there will be no need for an applicant to specify what amount was claimed in respect of construction operations.



Although parties are bound by the Act when forming a contract insofar as it involves construction operations, this does not preclude them from forming a contract setting out one Act compliant payment scheme which applies to construction and non-construction operations. In such a case, any payment notice consistent with the terms of the contract, would be valid.

In this case, the parties had decided payment terms which could apply equally to all operations in a contract that was Act compliant. The court distinguishes on this basis the earlier case of *Severfield (UK) Ltd v Duo Felguera UK Ltd* (2015). In that case, the contract was not compliant with the Act. Accordingly, it was necessary to distinguish between construction operations and non-construction operation, seeing as the Act implies a compliant payment regime for construction operations but does not have the reach to do so for activities exempt from the Act. The parties then were obligated to operate separate payment regimes for the separate categories.

In a similar line of thinking, the right of adjudication which the Act sets out only applies to construction operations. Therefore, for a hybrid contract where some operations may be exempt from the Act, parties should expressly include a right to refer disputes to adjudication in their contract. This precaution prevents future complexities arising where only parts of the contract are available for adjudication.

Conclusion

A hybrid contract involving a combination of construction and non-construction operations that is not compliant with the Act risks giving rise to separate payment regimes. Therefore, parties to hybrid construction contracts are best advised to ensure their contract is Act compliant and sets out one uniform scheme for all operations. Failing to do so may result in dispute over how payment schemes should operate for those activities bound by the Act, separately from those that are exempt from the Act.

Further, it is important that parties include an express right of adjudication in construction contracts in order to avoid facing parallel dispute resolution procedures.

ABOUT THE AUTHOR



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