

Construction Contract

Construction Law Terms: A to Z

By Huw Wilkins

C is for Construction Contract

What is a Construction Contract and why is it important?

Whilst the term “construction contract” could be used to describe any contract related to construction, it is given specific definition and meaning by UK legislation. Section 104 of the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009 (together referred to in this article as the “Act”), sets out the definition of a construction contract (capitalised in the remainder of this article to distinguish it from the more generic type).

Whether or not a contract is a Construction Contract is important because, under the Act, a Construction Contract must (i) include an adequate mechanism for parties to determine what payment becomes due and (ii) permit parties to refer disputes to adjudication. In the absence of the required contract terms, the statutory provisions to this effect are imposed through the Scheme for Construction Contracts.

A Construction Contract is defined under the Act as an agreement with a person:

- for the carrying out of “*construction operations*”;
- arranging for the carrying out of “*construction operations*” by others, whether under sub-contract to him or otherwise; or
- providing their own labour, or the labour of others, for the carrying out of “*construction operations*”

insofar as the “*construction operations*” are carried out in England, Wales or Scotland.

It also includes an agreement to do “*architectural, design or surveying work*” or to “*provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape*” in relation to “*construction operations*”, thereby including contracts with construction professionals such as architects and engineers.

By virtue of section 106 of the Act, a contract with a residential occupier (i.e. a contract that principally related to “*construction operations*” on a dwelling that one of the parties to the contract occupies, or intends to occupy, as their residence) is not a Construction Contract.

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If an agreement relates to “*construction operations*” and “*other matters*”, then the Act will apply only to those parts of the contract that relate to construction operations.

What are “*construction operations*”?

“*Construction operations*” are at the heart of a Construction Contract. It is, therefore, important to understand what the Act means when it refers to “*construction operations*”.

“*Construction operations*” are defined in section 105 of the Act using the following mechanism:

- Section 105(1) identifies what falls into the meaning of “*construction operations*”; and
- Section 105(2) identifies certain exclusions.

Section 105(1) covers a broad range of activities and states that “*construction operations*” are:

- The construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
- The 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, electronic communications 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;
- The 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;
- External or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
- 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; and
- Painting or decorating the internal or external surfaces of any building or structure.

Section 105(2) then lists certain types of work that are not “*construction operations*”. These include, for example, (i) drilling for, or extracting, oil or natural gas and (ii) extracting minerals, tunnelling or boring or constructing underground works for that purpose.

There have been a number of cases on how to interpret sections 105(1) and 105(2) of the Act, particularly in cases where works are being carried out on process engineering sites. The section 105(2) exclusions have been interpreted narrowly by the courts. In the case of *North Midland Construction Plc -v- AE&E Lentjes UK Ltd*,¹ Ramsey J stated that as section 105(2) had “*intentionally been drafted in terms of specific limited exclusions ... a narrower approach to the construction of s105(2) would generally be appropriate.*”

Must a Construction Contract always be in writing?

When the Act was first introduced, in order to qualify as a Construction Contract, the contract had to be in writing or evidenced in writing. That requirement was repealed in 2009 so that (provided the other requirements of the Act are met) a contract will be a Construction Contract (for the purposes of the Act) whether it is wholly in writing, partly in writing or wholly oral.

1. [2009] EWHC 1371 (TCC)

However, as with all contracts, a written contract is preferable. In the course of setting out the terms in writing, parties may realise they are at cross-purposes and will be able to agree how to resolve the issue. Further, having the contract terms set out in writing limits parties' abilities to dispute those terms later on (although, obviously, disputes can, and do, arise where a contract is made in writing).

Case law

Inevitably, the statutory provisions setting out the definition of a Construction Contract have been subject to a significant amount of caselaw over the last 25 years. Some noteworthy cases are:

- In *Cleveland Bridge (UK) Ltd -v- Whessoe-Volker Stevin Joint Venture*,² the Court was asked to consider whether "preparatory works" in section 105(1) included the preparation of fabrication drawings, off-site fabrication and delivery to site (it did).
- In *Palmers Ltd -v- ABB Power Construction Ltd*,³ the Court was asked to consider whether fabricating a plant on one site, before transporting it to another, was a "construction operation" because the plant was "to form" part of the land on the second site (it did).
- In *Shaw -v- Massey Foundation & Pilings Ltd*,⁴ the Court was asked whether an unoccupied gate keeper's lodge located a quarter of a mile away from the main house on a Country Estate was a "dwelling" (it wasn't).

Conclusions

When considering whether a contract is a Construction Contract for the purposes of the Act, the answer may be more complex than first contemplated, particularly if the project includes a mix of works, not all of which fall within the definition of "construction operations". In those cases, the starting point will always be the underlying legislation, but it will generally be necessary to also delve into the case law through which the courts have added clarification.

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2. [2010] EWHC 1076 (TCC)
3. [1999] BLR 426
4. [2009] EWHC 493 (TCC)