Construction A-Z – Housing Grants, Construction and Regeneration Act 1996

Professionals in the construction industry will undoubtedly have heard of the Housing Grants, Construction and Regeneration Act 1996, better known as the Construction Act ("the Act"), but few know their rights under it. In this blog, we will examine the key provisions of the Act whilst focusing on practical tips.

Background

During the period before the Act was introduced, the construction industry was characterised by inefficiencies, disputes and high levels of insolvency amongst contractors and sub-contractors. The Act was created with the aim of creating a more efficient system, where disputes would be resolved quickly and cheaply, and payment mechanisms would be shaped in such a way that better protected contractors' and sub-contractors' cashflow.

When does the Act apply and why does it matter?

Contracts for most building work are covered by the Act, with some notable exceptions. In particular, the Act applies to contracts which are deemed to constitute "construction contracts". For the purposes of the Act, this generally means:

- The contract must be for the carrying out of construction operations, arranging for construction operations to be carried out by others, and/or the supply of labour for construction operations, or for the provision of architectural services, design services and surveying services, and/or advice on building, engineering, interior or exterior decoration or the laying out of landscape.
- The construction operations must take place in England, Wales, or Scotland.
- The construction operations must relate to buildings, structures, works and installations 'forming, or to form, part of the land'.

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Determining whether a contract falls under the Act is quite significant as, if it does, the parties will benefit from certain statutory rights which are automatically granted, even if such rights are not expressly covered in the provisions of the contract. These rights are explored in more detail below.

To find out whether collateral warranties are considered "construction contracts" for the purposes of the Act, please check out our blog, Construction A-Z: Understanding Collateral Warranties.

The headline provisions of the Act include:

- The right to be paid in interim, periodic or stage payments.
- The right to be informed of the amount due, or any amounts to be withheld.
- The right to suspend performance for non-payment.
- The right to adjudication at any time.
- Disallowing "pay when paid" clauses.

Payment provisions

The Act requires construction contracts to contain certain payment provisions set out in the statute. If the payment terms do not comply with the requirements of the Act, then the provisions of the Scheme for Construction Contracts ("the Scheme") will automatically apply. This was initially introduced to ensure that all construction contracts contain an adequate payment mechanism, with the intention to improve cash flow at all levels of the construction industry and reduce contractor (and sub-contractor) insolvency.

If a construction contract's payment provisions do not comply with the Scheme or omit certain key payment provisions, the non-compliant or missing provisions will automatically be replaced by the provisions of the Scheme, which will be deemed incorporated into the contract.

In short, the Scheme provides for the following payment regime:

If the works are to last 45 days or more:

- The payee is entitled to payment by instalments, stage payments or other periodic payments (if not specified, the Scheme allows a payee to apply for payment every 28 days).

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- The contract must contain an adequate mechanism for determining what (and when) payments become "due", and must contain a final date for payment. Under the Scheme, if a construction contract fails to provide an adequate mechanism for determining when a payment becomes due, the payment shall become due (i.e. payable on)_the later of 7 days after the assessment date or the making of a claim by the payee). The final date for payment is 17 days after the date that payment became due.

- The contract must provide for a payment notice to be submitted by the payer after the due date. If no period is specified, the Scheme provides for payment notices to be served not later than 5 days after the due date.

- If the payer fails to serve a payment notice on time, the payee can issue a default notice, and the sum which becomes due is the amount stated on the payee's application for payment (or otherwise due in the agreed instalments).

- The payer must pay the notified sum in the payment notice, unless it serves a pay less notice within the prescribed period before the final date for payment. The Scheme provides for any pay less notice to be issued no later than 7 days before the final date for payment, and the final date for payment is 17 days from the due date.

If the works are to last less than 45 days, the payment period is 30 days from completion.

Right to suspend works

The Act also provides for a payee (such as a contractor or a consultant) who has not received payment in accordance with the terms of its contract (including where the full notified sum is not paid before the final date for payment) to have the right to suspend "any or all" of its contractual obligations. This may include the suspension of construction (or consultancy) works, but not necessarily – for example, the payee may choose to only suspend its reporting requirements or insurance policy obligations.

That said, the contractor/consultant must be careful not to breach any statutory duties, such as:

- its ongoing obligation to maintain employer's liability insurance;

- its obligations under the Construction, Design and Management Regulations 2015; and/or

- Dutyholder obligations under Part 2A of the Building Regulations 2010 as inserted by the Building Regulations etc. (Amendment) (England) Regulations 2023 SI 2023/911, regulation 6

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Further, the party intending to suspend must first give at least seven days' notice to the other party, stating the ground(s) upon which it intends to suspend performance. It is very important that the contractor/consultant does not suspend until the notice period is up or it will be in breach of contract. The right to suspend ceases when the payer makes payment in full.

Adjudication

The parties to a construction contract benefit from the right to refer any dispute to adjudication "at any time", even if such right is not expressly included in the contract. Adjudication is a much more accessible, cheaper, and quicker way of resolving disputes within the construction industry to avoid delaying ongoing projects.

Tip – The importance of expressly incorporating HGCRA rights in your contract

In some projects, determining whether a contract constitutes a "construction contract" for the purposes of the Act can be difficult and is not always as straightforward as anticipated. For example, recent case law has shown that where a party to a hybrid contract (i.e. a contract which covers both construction operations and non-construction operations) relies on its statutory right to adjudicate, an adjudicator's decision which encompasses both included and excluded operations will be unenforceable. It is therefore always sensible for parties to include express provisions in relation to adjudication, the right to suspend for non-payment, and payment provisions which comply with the Act, so as to avoid unnecessary cost and delay in determining and disputing the application of the Act at a later stage.

If you would like advice on inserting express provisions covering the rights granted under the Act in your contract, or help with relying on one of these statutory rights, please get in touch with our construction team.

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