When is a Construction Contract not a Construction Contract?

At a glance, what may appear to be a construction contract may not actually be one, yes really…

Specific contracts under the Housing Grants, Construction and Regeneration Act 1996 (as amended) (the "Act") are excluded.

Whilst the act doesn't define what a construction contract **IS,** it does state what **ISN'T** a construction contract.

One of these exclusions applies to contracts of supply where there is no element of installation.

An interesting case that recently caught our attention was that of Universal Sealants (UK) Ltd (t/a USL Bridgecare) v Sanders Plant and Waste Management Ltd.

In this case, the High Court had to determine whether a contract for the supply and pour of concrete was a construction contract as defined by s.104-105 of the Act.

The court found that pouring pre-mixed concrete from a concrete wagon on a construction site is indeed excluded from the Act pursuant to s.105(2)(d)(ii).

Further, the delivery to site of materials is not a construction operation unless the contract "**also**" provides for distinct installation works.

The word "**also**" implies that there must be additional work done to constitute installation.

Since the delivery and pouring of wet concrete amounted to the same thing, pouring concrete was not held to constitute a construction operation and therefore was excluded accordingly.

The background

The case related to a project at Bladon Haugh viaduct, which in 2016 USL (the claimant) was contracted to remove and replace bridge expansion joints.

In 2017, USL contracted and subsequently issued Sanders a purchase order for the concrete. The concrete required was graded as M50 High-Grade concrete.

Sanders claimed that in previous telephone calls, USL agreed for them to deliver ST5 graded concrete, the strongest available from Sanders. The contract by which both parties were bound, did not provide for adjudication should a dispute arise.

The concrete was delivered and poured by an operative from Sanders under supervision from USL.

The concrete was poured into the designated place and after pouring, no other evidence is apparent of any further installation works carried out by Sanders.

Subsequently, USL objected to the installation of the concrete, stating the ST5 concrete was not fit for purpose and that M50 was contracted for and that is what they required.

The ST5 was broken out and removed and USL launched an adjudication case for damages in April 2019, to which they were awarded damages of £52,259.

Sanders objected that the Adjudicator had no jurisdiction as the contract contained no provisions for Adjudication, further, the delivery of the concrete did not constitute operations for the purposes of s.105 of the Act.

In May 2019 USL applied to the High Court for summary judgement thereby enforcing the Adjudicator's decision, Sander still maintained its objection on jurisdictional grounds and the application was set to be heard on 8th August 2019.

The court accepted the plea by USL that in Sanders delivery of the concrete, it was acceptance of the purchase order and that in itself had formed a contract and as such, they were bound by the terms of that order.

The question that remained however, was whether the contract was for construction operations for the purpose of s.104 of the Act, and if it did, should adjudication provisions be implied into the contract? If not, there was no right to adjudicate and as such, the adjudicator's decision could not be enforced.

Sanders further argued that the concrete delivery fell within the exclusion provided by s.105(2)(d)(ii)

> *"(2) – The following operations are not construction operations within the meaning of this part…… –*
>
> > *(d) manufacture or delivery to site of……*
> >
> > *(ii) materials, plant or machinery -Except under a contract which also provides for their installations"*

The Court determined the supply of the concrete to site was within the exclusion, unless the exception applies, it is simply the delivery of materials. Further indicated is the word "***also***", which the Court said should be something other than delivery.

In examining the terms of the contract, it was noted by the court that no reference was made to installation and that no rate of price was specified, although it wasn't required for the specific word '*installation'* to be included in the contract, the absence of any reference was indicative of the nature of the contract.

It was further found by the Court, that due to the nature of the product, in this instance wet cement, it meant that delivery and installation were not able to be separate, as if left, the wet concrete would set. The Court concluded that the act of delivering and pouring was commonly the same thing, as it would be if the concrete was supplied from off-site. In addition, there was lack of evidence that after the pouring, no work had been done by Sanders on site thereafter.

Outcome

The Court declined to grant summary judgement in favour of USL and found instead that Sanders argument as to the jurisdiction of the Adjudicator had merit.

This case draws attention to the importance of ensuring that when engaging any sub-contractor to carry out similar works to pouring concrete or works that may fall within the scope of s.105(2)(d)(ii), that the terms of engagement must be explicitly clear the terms on which the main contractor wishes to rely on for the purpose of the Act.

It should also be considered if it is the intention to engage the payment and adjudication provision under the Act, it should be explicitly clear to remove any uncertainty.