

Guidance for ADCAS members not receiving payment for works undertaken

Business failures through 2024 and the demise of ISG brought the law regarding payment under a construction contract into sharp focus. Many association members will have been directly or indirectly affected. Following a number of calls for clarification ADCAS provides the following guidance.

Rights to payment in the event a party to a construction contract becomes insolvent OR any other person payment by whom, is, under the contract (directly or indirectly) a condition of payment by that third person.

First and foremost, before any member seeks to take a position it is fundamental to understand the specific terms under which any business relationship is or was operating. The guidance here is given freely by other members to assist and prompt further investigation by the affected party by way of independent legal advice.

For any member engaged in construction operations it is likely that the contract under which they are engaged will be within the scope of the Housing Grants Construction and Regeneration Act 1996 (HGCRA) as amended by the Local Democracy, Economic Development and Construction Act 2009. (LDEDCA). That is to say that regardless of any terms agreed between two parties if that agreement falls within the scope of the Acts of parliament the terms agreed must remain compliant or they can be challenged and ruled as ineffective whether in part or in whole.

Sections 104-107 of the HGCRA define the scope of a construction contract and section 105 (2) defines what are not considered to be “**construction operations**”. See *Appendix A*

ADCAS would particularly highlight to associate members of the organisation the provisions of clause (d) “**Exclusions from Construction Operations**”. “Supply only contracts” do not fall within the scope of the Act. Such business to business relationships would be subject to different legislation, examples would be, The Sale of Goods act 1979 and/or The Consumer Rights Act 2015.

If or where any member is or has been engaged in “Construction Operations” that fall within the scope of the HGCRA as subsequently amended by the LDEDCA and have been denied a payment for services on the grounds that the paying party themselves have not received payment, known as “*pay when paid or pay if paid clauses*” then,

Section 113 of the Act would apply. See *appendix B*. All such conditional payment provisions are legally ineffective UNLESS “*that third person OR any other person payment by whom is, under the contract (directly or indirectly) a condition of payment by that third person, is insolvent*”

Any affected member is actively encouraged to seek independent legal advice as they may be on the wrong side of unscrupulous behaviour. As a minimum it is incumbent upon any non-paying party to demonstrate they have the legal right to withhold payment and that they themselves can demonstrate they have not been paid. It is not enough to simply say “We will not be paying because our client has become insolvent”.

Appendix A - Scope of the Housing Grants Construction and Regeneration Act 1996

Scope of Act

Sections 104 - 107

◆ Construction Contracts

means an agreement for any of the following

- (a) the carrying out of **construction operations**;
- (b) arranging for the carrying out of construction operations by others, whether under sub contract to him or otherwise;
- (c) providing his own labour, or the labour of others, for the carrying out of construction operations.

"Construction contract" includes agreement to

- ◆ do architectural, design or surveying work
- ◆ provide advice on building, engineering, interior or exterior decoration or on the laying out of landscape

~ in relation to construction operations

"Construction contract" excludes

- ◆ contract of employment

◆ Which Contracts?

The Act applies to construction contracts which

- ◆ are entered into after the commencement of this Part
- ◆ relate to the carrying out of construction contracts in England, Wales or Scotland

~ (whether under English Law or Scottish Law)

◆ Construction Operations

means operations of the following descriptions

- (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
 - ♦ 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
 - ♦ fire protection
 - ♦ security or communications

- (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
 - ♦ earthmoving
 - ♦ excavation
 - ♦ tunnelling and boring
 - ♦ laying of foundations
 - ♦ erection, maintenance or dismantling of scaffolding
 - ♦ site restoration
 - ♦ landscaping
 - ♦ provision of roadways and other access works

- (f) ♦ painting or decorating the internal or external surfaces or any building or structure

◆ Exclusions from Construction Operations

Section 105 (2)

The following operations are **not construction operations** within the meaning of this part :

- (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
 - (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.
(ie supply only contracts excluded from the Act)

- (e) ◆the making, installation and repair of
◆artistic works, being sculptures, murals and other works which
◆are wholly artistic in nature

The scope of construction operations (either what's included or what's excluded) can be **added to, amended or repealed** by the Secretary of State by regulations approved by Parliament. Similarly - Section 106 (1) (b) - any type of construction contract can be excluded

◆ Contracts with Residential Occupiers Excluded

Section 106

This Part (ie the construction contract reforms) does not apply to

- ◆ a construction contract with a **residential occupier**

~ ie a construction contract related principally to operations on a dwelling (dwelling house or self contained flat) which one of the parties to the contract occupies, or intends to occupy, as his residence

Appendix B - Prohibition of conditional payment provisions

Prohibition of conditional payment provisions

Section 113

Pay-when-and-if-paid devices (partly) outlawed

Any provision in a construction contract which

- ◆ makes payment **conditional**
- ◆ on the payer (eg Main Contractor)
- ◆ receiving payment from a third person (eg Employer)

(ie a pay-when-and-if paid provision)

is (legally) **ineffective**

UNLESS

- ◆ that third person
- ◆ OR any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person
ie anyone else who owes money to the third person (in respect of the contract)
- ◆ is insolvent.

Insolvency is defined as

- ◆ administration order
- ◆ administrative receiver, manager or receiver appointed
- ◆ voluntary winding up resolution
- ◆ winding up order
- ◆ similar in other countries
- ◆ equivalent for partnerships or individuals

Where such a conditional payment provision is rendered ineffective :

"the parties are *free to agree* other terms for payment"

In the absence of agreement, the "Scheme for Construction Contracts" will apply.

NB : if the Employer (or a financial institution financing the development, etc, or any other upstream party of funder) becomes insolvent during the project, the "conditional payment provision" **will** be effective and can be used. (So Main Contractors, Trade Contractors etc may be inclined to keep these "pay-when-and-if-paid devices" in their contracts, just in case..... ?)