
IS YOUR DISPUTE SET IN CONCRETE?

ALEX EDWARDS

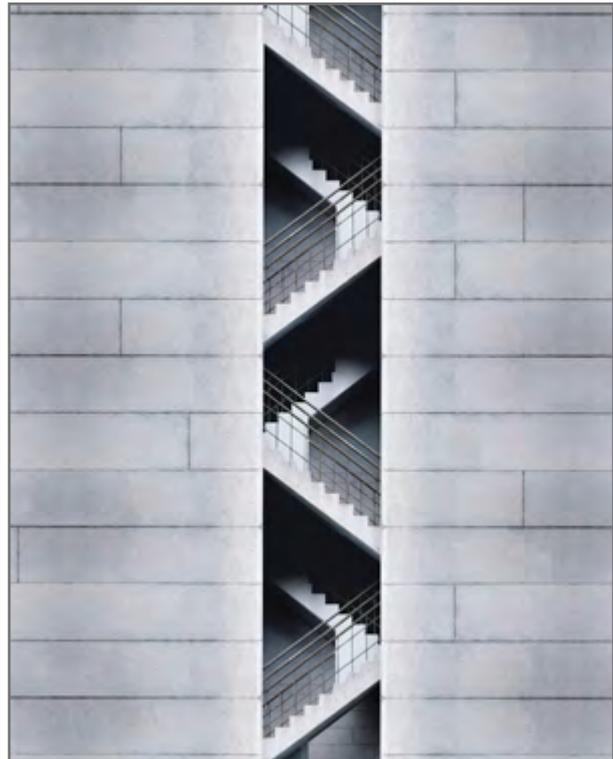
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The Housing Grants, Construction and Regeneration Act 1996 ("The Act"), provides a statutory right to refer a dispute to Adjudication. Notwithstanding the nuances that surround contractual provisions that permit a party to refer a dispute to Adjudication, employers, contractors and sub-contractors alike often assume that, due to its statutory right, it can therefore refer any dispute to adjudication, irrespective of what the dispute regards. This assumption can be fatal to an Adjudication if the referring party does not first ask itself the question, *"is the dispute that is to be referred a construction operation?"*

The Act requires that for a dispute to be referred to Adjudication, it must be a dispute arising from a 'construction contract' for the carrying out of 'construction operations'. The Act defines 'construction operations' at s105(1) and further defines, at s105(2), operations that are not 'construction operations' and which are excluded from being determined in adjudication.

Despite the Act being in force for almost 23 years, the Courts have over recent years, seen several applications to enforce an adjudicator's decision to which the aggrieved party seeks to defend on the premise that the adjudicator did not have jurisdiction because the dispute referred was not a construction operation.

The case of [Universal Sealants \(UK\) Ltd \(t/a USL Bridgecare\) v Sanders Plant And Waste Management Ltd \[2019\] EWHC 2360 \(TCC\)](#) is an example of whether a particular operation fell within 'construction operations' as defined by s105(1) or was specifically excluded by s105(2)(d). This case concerned an operation that is undertaken daily on most construction projects, which is the supply of concrete. The Judge was faced with deciding whether delivering concrete to the site and pouring it into its final location amounted to a construction operation.



THE FACTS

USL was engaged to undertake works on the A1 Viaduct in Gateshead. The works involved the removal of existing bridge expansion joints and the installation of replacement expansion joints. Sanders were engaged by USL, under a sub-contract, to supply the concrete for this part of the works.

The dispute concerned the grade of concrete to be supplied and USL's case was that Sanders ought to have supplied M50 grade concrete but, in fact and in breach of contract, it supplied ST5 grade concrete, which was contrary to the agreement and not fit for purpose. The concrete had to be broken out and replaced.

USL referred the dispute to adjudication where the Adjudicator decided that Sanders was in breach of contract and was liable to pay damages to USL.

Sanders participated in the adjudication having fully reserved its rights regarding the adjudicator's jurisdiction to decide the dispute referred for two reasons:

- (i) The dispute was brought under the wrong contract; and*
- (ii) Delivery and pouring of concrete do not amount to a construction operation and are expressly excluded by the Act.*

THE ISSUES

FORMATION OF THE CONTRACT

In regard to the first issue the Parties had differing arguments as to how the contract was formed.

There had been a series of telephone calls and emails regarding the enquiry and the specification of the concrete that was required; the content of the phone calls was disputed by both Partiesⁱ. Despite what the Parties allege what was said during these phone calls, USL sent its sub-contract order to Sanders via email stating the specification of the concrete and the delivery details; this was coupled with a link contained therein to the terms and conditions of the sub-contract.

USL assert that this was its offer to purchase the M50 grade concrete and that Sanders accepted that offer by conduct, in delivering the concrete on the specified date, albeit it was not M50 grade concrete and was ST5 grade concreteⁱⁱⁱ.

i Universal Sealants (UK) Ltd (t/a USL Bridgecare) v Sanders Plant And Waste Management Ltd [2019] EWHC 2360 (TCC) at para 3

ii Ibid 10 - 12

iii Ibid 14 & 18

Sanders argued that this was not the case as there was no express acceptance of the sub-contract and its terms, rather the contract was concluded by producing a delivery note on the day of delivery, which amounted to a counteroffer and which USL accepted by signing the delivery note^{iv}. This argument sought to circumvent the M50 specification as specified in the sub-contract order, in that the contract was concluded on Sanders' terms and for the specification of concrete that was actually delivered.

The Judge agreed with USL in how the contract was formed and that the production of a delivery note on differing terms was too late to be a counteroffer, particularly since there was no evidence to corroborate that the delivery note was produced before the discharge of the concrete^v. The Judge stated that on this basis, Sanders had no real prospect of successfully defending this issue.

CONSTRUCTION OPERATION

The second issue concerned an interrogation of the delivering and pouring of the concrete and whether this amounts to a construction operation under the Act.

The Act defines a Construction Contract at s104(1) as

1. *In this Part a "construction contract" means an agreement with a person for any of the following—*



iv Ibid 19

v Ibid 20

a) the carrying out of construction operations.

[...]

The Act goes on to define construction operations at s105(1) as:

a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land [...]

b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including [...]

[...]

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, earth-moving, excavation, tunnelling and boring, laying of foundations [...]



The Act then provides specific operations that are not construction operations at s105(2) as follows:

2) The following operations are not construction operations within the meaning of this Part

[...]

d) manufacture or delivery to site of—

(i) building or engineering components or equipment,

(ii) materials, plant, or machinery, or

(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;

[...]

Sanders argued that as the contract was for the supply of materials only, it must fall within the s105(2)(d) exclusions and it could not be captured by the exception because there was no reference to ‘installation’ of the concrete in the sub-contract, nor were there any rates and prices for doing so ^{vi}.

Sanders went on to argue that one would not ‘install’ concrete per se and placed some reliance on the use of the verb ‘to install’^{vii}.



The Judge interrogated Sanders’ submission regarding the use of the verb and said that for this operation to be captured by the s105(2)(d) exception, some work must be done to the materials by the supplier other than delivery thereof ^{viii}.

The Judge went on to say that concrete is an unusual material in that when it is delivered to site it is wet and starts to set, and that it would be unusual for it to be delivered to some sort of holding facility before it was poured into its final destination, resulting in the act of delivery and pouring become one and the same^{ix}.

vi Ibid 24

vii Ibid 30

viii Ibid 30

ix Ibid 31

USL argued that this very notion supports its case in that what was done by Sanders amounted to installation under the contract because delivery and installation are indivisible^x. USL further argued, as the adjudicator found, that the act of pouring the concrete itself was undertaken by a Sanders' operative, i.e., the driver of the concrete wagon^{xi}.

The Judge concluded the points of contention by deciding that the specific characteristics of concrete point in favour of Sanders' arguments, in that the exception contained within s105(2)(d) draws a clear distinction between delivery of materials and a contract that also provides for installation of those materials^{xii}. The Judge decided that pouring the concrete is, in these circumstances, part of the delivery and not an additional act of installation that requires some working on^{xiii}. The Judge went on to say that there was nothing in the contract that provides for installation of the concrete and that to deliver the concrete under the contract, Sanders would deliver the concrete in the normal way by pouring it where it was required^{xiv}.

The application for summary judgement was declined on the premise that there is a real prospect of success as to the adjudicator's jurisdiction because the delivery and pouring of concrete did not amount to a construction operation and fell within the s105(2)(d) exclusions^{xv}.

COMMENTARY

This case identified two key issues that are often overlooked.

Firstly, it is paramount for the Parties to be clear as to the terms of the Contract and understand the obligations to which they are bound. It was seen here that silence, and/or claiming that the terms had not been formally accepted, was not sufficient to persuade the Court to disregard the initial terms and seek to rely upon a last-minute submission of new or preferred terms in a last-shot-fired scenario.

x Ibid 32

xi Ibid 32

xii Ibid 33

xiii Ibid 33

xiv Ibid 33

xv Ibid 34





The second issue that this case grappled with is whether the pouring of concrete amounted to a construction operation under the Act.

Concrete pours are undertaken daily on construction sites and this case gave some useful guidance as to how concrete delivery and pouring is viewed in light of the Act. The Judge in this case highlighted that concrete is distinguished from other material supply contracts, such as bricks, and the Judge decided that this was a matter of contract rather than the act of delivery and pouring of concrete itself, which was said to be indivisible in most instances.

The Judge appeared to be sympathetic to the nature of how concrete is delivered to a construction site and, how this differs from other building materials and in turn, made a very clear distinction between the s105(2)(d) exclusions and the exception to those exclusions, in that the contract must specifically provide for the installation of the materials being delivered for the operation to be captured by the exception provided by s105(2)(d).

This case and others like it, particularly in the energy sector, provide a good example as to what a party looking to refer a dispute to adjudication should consider, chiefly; does the Act apply?

Whether the Act applies is often overlooked by parties and the issue as to whether the dispute is in regards to a construction operation, arises only when the Act applies to the adjudication, whether that be statutory or imposed by the contract.

There are standard forms of contract that incorporate the Act into the adjudication provisions, for example:

- [NEC3/4 - Clause W2 is to be used in the UK where the Act applies insofar as the Employer has inserted in Contract Part One dispute resolution Option W2](#)
- [IChemE - "This clause shall only apply to construction contracts as defined in the Act"](#)

If the Contract is silent, a party wishing to refer a dispute to adjudication can rely upon its statutory right to do so, and therefore the Act will apply. Of course, the statutory right under the Act will only apply to construction contracts for the undertaking of construction operations.

This position can be distinguished from where parties have 'contracted' into adjudication in lieu of the Act, for example:

- JCT - the Scheme shall apply
- Bespoke contracts which includes Adjudication with reference to the Act
- FIDIC contracts which imposes its own adjudication rules and procedure

In a nutshell, it is paramount that a party wishing to refer a dispute to adjudication reverts back to the adjudication provisions in the contract, to determine first whether the Act will apply to the adjudication and, if it does, it must then carefully consider whether the dispute is in regard to a construction operation. If these basic checks are overlooked, it could, as was seen in *USL v Sanders*, be fatal as to the enforceability of a decision made by an adjudicator.

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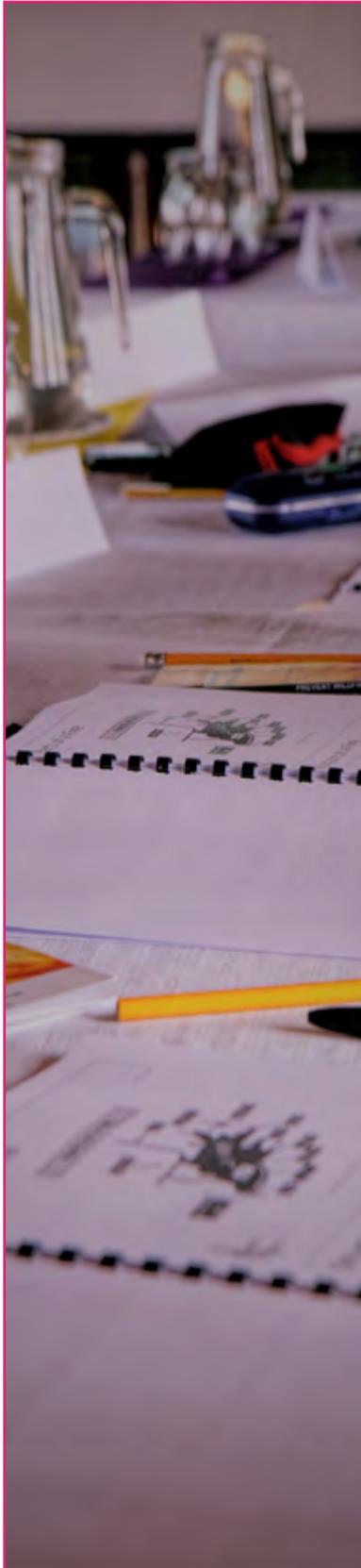
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