

CONSTRUCTION INSIGHT

The Latest News in Construction Contracts

The Return of the Black Death

James Golden's analysis of adjudication - past, present and future.

Cover Feature

So, you think you are Insured?

Edward Quigg highlights how sometimes ignorance and inadequate policy cover provided by insurance companies or brokers can lead to problems.

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The Fuel Crisis

Ruth Farrell looks at the increase in fuel prices and fuel shortages and their effect on the construction industry.

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THE RETURN OF THE BLACK DEATH

by James Golden

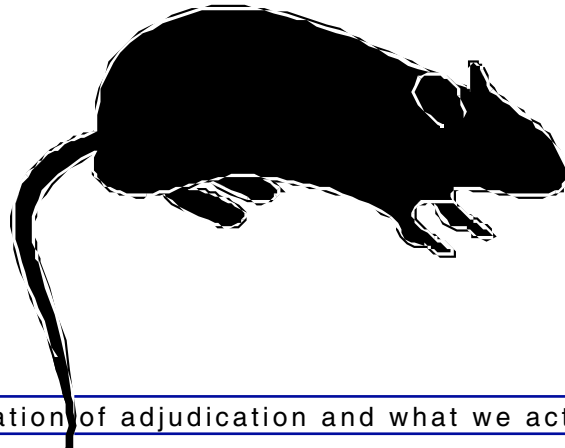
In 1348 the Irish looked across the sea to Britain where the Black Death was at its peak.

Our ancestors who heard the news no doubt feared it would arrive on our shores. There was a similar position in Northern Ireland in 1998. We looked across the Irish Sea to where adjudication had just come into force. It did not arrive here in Northern Ireland until June 1999.

Adjudication was designed to allow a rapid and cost effective solution to disputes and to provide everyone in the construction industry with the right to have their disputes resolved promptly.

Adjudication came with many warts. In England there were tales of how wrong decisions were enforced by the courts and insolvency was rife. Main contractors protested most. Many had, in the past, priced work on the back of sub-contractor cashflows. There are still tales of grossly unfair payment provisions and harsh contractual terms. However, adjudication surely provides a remedy for anyone who is being unfairly kept from their money.

For many the adjudication process has been mis-managed or inappropriately used and has not



The expectation of adjudication and what we actually got

been a benefit, but a source of pain. Adjudication is designed to be used on simple disputes early on in a contract.

There is a temptation to allow disputes to grow and refer complicated issues that the wisdom of Solomon could not resolve in 28 days.

Adjudication is still very much a work in progress. Northern Ireland made a significant contribution to the adjudication process. In the case of *D M Engineering (NI) Ltd -v- R J T Consulting Engineers*, the Court of Appeal dramatically reduced the application of adjudication in terms of what a contract in writing might mean. For many it swept away the most potent elements of the adjudication process. It is possible that these

difficulties are now going to be addressed by Sir Michael Latham in his review of the Construction Act.

So where is the construction industry with five years of adjudication under its belt?

Pay-when-paid clauses are outlawed, but not in the South of Ireland where we see how it still constricts and even corrupts many aspects of the construction industry.

Five years on, adjudication is thoroughly imbedded in the construction industry throughout the UK. In Northern Ireland it is proportionately used less than it is in England.

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So, you think you are Insured?

by Edward Quigg

The last issue of '*Construction Insight*' highlighted the spiraling costs of insurances and the possible impact it could have for the construction industry. The cost of insurance is a serious issue and the lack of necessary insurance is even more so. The difficulty arises due to ignorance or the unavailability of policies.

Such an issue could relate to liability for design by a contractor. When a consultant designs a building for a client or indeed anyone, he warrants that he has used reasonable skill and care in carrying out his duties. What he does not do, is say that the design will be fit for purpose. To protect himself in the event that he has failed in this duty, a designer will take out professional indemnity insurance.

The situation is different if a contractor carries out the design. It is an implied term into every construction contract that a contractor, insofar as he designs whole or part of the works, warrants that the finished building will be fit for purpose. It is this higher warranty which causes the difficulty.

"An unfortunate commercial reality... some insurance companies do not have an appropriate policy..."

Where a contractor does carry out design work, it is likely he will employ a design consultant, architect or structural engineer. If the building turns out not to be fit for purpose, the building owner will sue the contractor for breach of the 'fitness for purpose warranty'. The contractor will in turn sue his designer. However the designer only warranted that he would use reasonable skill and care. Therefore if the designer did use reasonable

skill and care and yet designed a building which was not fit for purpose then the contractor will be liable.

For this reason many standard form design and build contracts contain a clause stating that where the contractor carries out design, he shall have the same liability to the employer as an architect or appropriate professional designer has to the employer - in other words merely a reasonable skill and care warranty. All too often we have come across cases where a contractor has carried out part of the design and has not realised that he alone will be liable if the building is not fit for purpose and yet it was designed with reasonable skill and care. Not only may appropriate insurance not be in place through ignorance, but also through lack of availability of an appropriate policy.

Policies may exist but insurance companies are not prepared to provide a quote for a particular person. This is an unfortunate commercial reality. In addition, some insurance companies simply do not have an appropriate policy which you are required to take out by contract conditions (*although we have noticed a significant turnaround in availability and cost of employers/public liability insurance*). An example of this was when I was carrying out works to my property. The selected contract, a JCT Minor Works, states where works are being carried out to an existing building, the employer is to take



If in doubt, speak with a professional within the industry - see either your Agent or your Broker

out a joint name policy to cover damage to the works and existing structure due to a number of specified perils including fire, flood etc.

"... insurance may not be in place through ignorance... and lack of availability of an appropriate policy"

This is a standard clause in all of the JCT family of contracts. Yet, despite this I was unable to find an insurer on the domestic market providing such a policy and even commercial brokers were unable to find a policy which was appropriate. I was therefore unable to take out an insurance policy which I had promised as a term of the contract to take out. Luckily I was able to agree an alternative

approach with the builder.

It should be noted that this joint name policy is very different to any other policy an employer may have for having work carried out on his premises. What the contract requires is a joint names policy which is entirely different and has very different consequences.

So not only is there a problem in relation to the cost of insurance but also in that appropriate cover is not always taken out.

To check that appropriate cover has been taken out it is necessary to read the contract, speak to competent brokers, and make sure you have sight of the policy before you sign the contract taking the policy out

CCC FORTHCOMING EVENTS

"Construction Review - The Latest Changes to effect Cashflow and Profitability"

Belfast • Thursday 14 October 2004 (evening)
Dundalk • Monday 18 October 2004 (evening)
Galway • Wednesday 27 October 2004 (evening)
Dublin • Thursday 28 October 2004 (evening)
Glasgow • Tuesday 9 November 2004 (evening)

"Profit, Procurement and Partnering"

Dublin • Monday 1 November 2004 (evening)

For further details, please contact Miss Amanda Hannan at your nearest CCC Office

What can be done about either a sharp rise in fuel prices or a shortage of fuel?

T H E F U E L C R I S I S

by Ruth Farrell

Before the start of Gulf War II, there was considerable speculation about the effect the war would have on fuel prices. Since the start of the war peoples fears have been realised.

For a while it seemed prices might stabilise. Yet we have seen further rises which will have an impact on the construction industry. A further problem for the industry would be fuel shortage. The question is, what can be done about either a sharp rise in fuel prices or a shortage of fuel?

Most construction work is carried out under a fixed price. That is, no allowance is made for an increase in costs of labour or materials. If pricing work at the moment you can make allowances for the rise in fuel costs. If you are carrying out work that was priced a number of years ago when fuel was much cheaper, then you will find yourself in a difficult position.

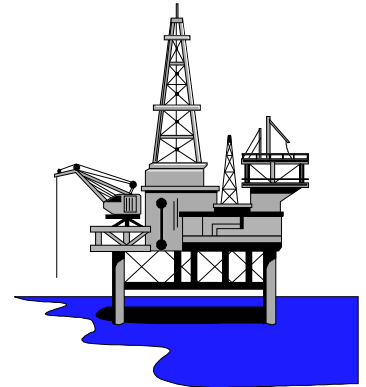
“...what can be done about either a sharp rise in fuel prices or a shortage of fuel?”

The reality is that under normal conditions there is very little that can be done about a rise in fuel costs. However, if you have been delayed on site and are entitled to an extension of time, then the claim for increased costs could form part of the associated loss and expense claim. The argument in this type of scenario is that the fixed price was for the expected contract

period. Once events occurred that force the contractor to work beyond that period, and to purchase goods outside that period, then provided those events allow you to claim loss and expense, the increase in cost could be claimed as loss and expense.

A different situation would arise if there was a fuel shortage due to delays, as in 2000. If claiming an extension of time for such delays, you have to consider what the contract says. Although the rights of a contractor will depend on individual contract terms, the standard forms of contract are a good starting point. If the fuel shortage is caused either by a blockade or an actual problem with supply then a remedy is available under clause 25.4.10 of JCT 98; the unavailability of labour goods or materials. However, in many contracts this clause is frequently deleted.

If the shortage is caused by a blockade it may be possible to claim as a civil commotion, local combination of workmen, strike or lockout affecting any of the trades employed on works or any trades engaged in the preparation, manufacture or transportation of any of the goods or materials required, clause. 25.4.4 of JCT 98. This clause will not cover the situation of an actual fuel shortage. At the time of the 2000 fuel crisis many argued that clause



25.4.4 did not apply because it was intended to cover strike action by site workers. Others argued that clause 25.4.1, Force Majeure did not apply as this is similar to frustration, work must actually be prevented not just delayed. The situation is somewhat different under the ICE conditions of contract. Clause 44 (1) (c) allows for an extension of time for “*other special circumstances of any kind whatsoever which may occur*”. It is likely that this would include for petrol shortages.

It has been suggested that if work is delayed, an extension of time should be granted thereby defeating a claim for liquidated damages. Yet no associated prolongation cost should be allowed. Therefore, the employer and the contractor would share the cost of delays caused by a fuel shortage.

CCC's NEC FORUM

On Thursday 19 August 2004 CCC held a NEC Forum in Spires Conference Centre, Belfast.

The event was attended by representatives of every aspect of the industry - main contractors, sub-contractors, builders, civil engineers and the rail industry.

With an introduction by Ruth Farrell, Contracts and Arbitration Manager, it was explained that the NEC is being used more and more, as an alternative to the standard forms of contract.

Many disputes arise because the contract has not been properly put in place or because one or both of the parties do not know what they have signed up to.

The main speaker James Golden, a Director

with CCC, has a vast amount of experience in the field of dispute resolution and in particular the NEC contract. He is also one of the leading authorities on the NEC contract.

James began by introducing the NEC contract and explained the core clauses.

“...more and more the NEC is being used as an alternative to the more common Standard Forms of Contract...”

A full discussion on the NEC ensued and it was explained that there was no reason why it could not be used on both building and civil engineering projects.

James said that so far the use of the NEC was disappointing. The idea of partnering, as encouraged by Sir Michael Latham was discussed.

At the end of the evening there was a general discussion with those attending, sharing their experience of the NEC. The evening was very successful and it is hoped to have a similar event in the near future.

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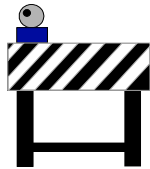
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Your Questions Answered

Question:

Lowest Price, Lowest Reputation?

Despite being the lowest tender by quite a margin for a roads contract the public body re-advertised the work and subsequently offered the job to another contractor. Can they do this?



Answer

There are many changes in the way the public bodies are evaluating tenderers.

The new weighted system not only scrutinises the price but also the company's health, safety and quality records. This has led to many company's who have historically enjoyed the comfort of many public body contracts failing on issues other than price.

The concept that the contracts are awarded not on price alone is radical for government departments. Of course,

the person who understands it least is the company who enters the lowest price.

In order to overcome these difficulties and help develop the new process as efficiently as possible, many public bodies invite tenderers to attend debriefing to discuss where they failed to meet certain criteria.

Question:

Liquidated Damages

As an employer, I am frustrated at the extent of delay on a current project. However I have no liquidated damages clause within the contract. How do I go about recovering my losses?

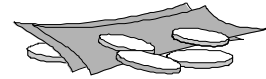
Answer

The topic of liquidated and ascertained damages can be very complicated and will require close examination of the facts surrounding the individual project. However in short if the contractor has caused a delay for which he is liable, then it stands to reason that he will be liable for any monies associated with that delay.

The liquidated damages clauses within

many contracts are designed for a very specific reason. The liquidated damages amount is deemed to be a genuine pre-estimate of any losses the employer may suffer if the works are not substantially completed on time.

The trap that many employers fall into is inserting a figure which is not a genuine estimate.



Where this occurs, the contractor can claim the liquidated damages are in essence a penalty against the contractor as opposed to providing proper damages for the employer.

When this situation arises the liquidated damages clause must be set aside and the employer must establish the true effect of the delay in relation to financial loss.

This situation is similar to when no liquidated damages clause is written into the contract. The employer must establish his actual financial loss and issue the proper withholding notices against the contractor.

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However, that seems to be due to an understanding by main contractors and clients that if they do not deal promptly and swiftly with difficulties in their sub-contracts or main contracts, then adjudication will force them to do so.

Adjudication cannot change either commercial or human nature. Disputes will happen. The idea of partnering as yet, has not taken root in Northern Ireland. We remain a confrontational and contentious construction industry with precious little regard for the interests of those with whom we contract. Perhaps our fears of adjudication were rather overblown now that it is comfortably part of our outlook. A recent report in England found that there was no desire in the construction industry to have the adjudication provisions repealed to any significant degree. Adjudication is here to stay.

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Our courses are approved by the **Construction Industry Training Board** and



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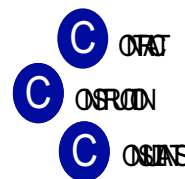
DISCLAIMER

The advice given in this Newsletter is for guidance only • Detailed professional advice should be taken before acting on it

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