

# CONSTRUCTION INSIGHT

The Latest News in Construction Contracts

## ICES LAUNCHED IN NORTHERN IRELAND

As the ICES launch North of the border, we answer some questions asked about its existence and benefits.

See Page 2

## ...but it was HIS fault!

In our second look at insurance, Edward Quigg analyses contractual interpretation of the often contentious issue of liability.

See Page 3

## ALL CHANGE AT CCC

CCC celebrate the opening of its new office in Dublin and its rebranding to Quigg Golden.

See Page 4

## The Standard of Proof and the Burden of Proof in Loss and Expense Claims

by Ruth Farrell

Clause 26 of the JCT 98 provides for the Contractor to recover monies for direct loss and/or expense in carrying out the work. The Contractor should first make application to the Architect, who should consider if any loss and/or expense is due.

If the Architect finds that the direct loss and/or expense has been incurred, or is likely to be incurred then he should ascertain or instruct the Quantity Surveyor to ascertain the amount of such loss.

*'...whether making a claim in arbitration or in the court...he who asserts must prove... this is known as the Burden of Proof.'*

This is provided that:

1. the Contractor's application is made as soon as it has become apparent that the regular progress of the works has been affected; or
2. that the Contractor has submitted in support of his application such information as requested by the Architect to reasonably enable the Architect to form an opinion; or



3. the Contractor has submitted to the Architect or Quantity Surveyor upon request, such details of the loss and/or expense as is reasonable to allow the Architect or Quantity Surveyor to quantify the loss and/or expense.

A common amendment to the JCT 98 is to amend Clauses 26.1.2 and 26.1.3 so that the Contractor must provide the necessary details even if the Architect or Quantity Surveyor have not requested such details.

The usual rule, whether making a claim in arbitration or in the court, is *'he who asserts must prove'*. This is known as the Burden of Proof. In other words it is for the party making the claim to bring evidence to persuade the tribunal of the truth of the facts.

In the case where the Contractor is claiming that he has incurred direct loss and/or expense it is for the Contractor to prove that he had incurred the loss and/or expense as

a result of those matters listed in Clause 26.2 of the Contract and that he has incurred the losses that he has claimed.

The legal profession talks of the *'burden of proof lying with the Claimant'* and *'the Claimant has failed to discharge the burden of proof'*.

*'...what degree does the Contractor have to go to to prove the facts? This is known as the Standard of Proof...'*

A useful definition of the burden of proof is *'the obligation of proving facts'*. Therefore in a claim for loss and expense under JCT 98 it is the Contractor who is obliged to prove the facts.



Continued on Page 2...

## The Institution of Civil Engineering Surveyors sets up in the North

# ICES LAUNCHED IN NORTHERN IRELAND

In November 2004 the Institution of Civil Engineering Surveyors set up a Sub-Committee of the Irish branch to look after Northern Ireland affairs. The Sub-Committee is chaired by James Golden who was recently interviewed by Construction Insight. Here he analyses some questions raised about the ICES in the North.

**What is the ICES and why is it relevant in Northern Ireland?**

The ICES is a niche institution which essentially overlaps the traditional functions of the Institution of Civil Engineers (ICE) and the Royal Institution of Chartered Surveyors (RICS). The ICES incorporates Commercial Managers and Geospatial Surveyors involved in the civil engineering industry.

**Why has there been no presence here until recently?**

The ICES is not a large institution, and while there have been a number of members resident in Northern Ireland, the regional structure has only taken root in Ireland over the past number of years. The tremendous vitality of the ICE and RICS in the Province and the relatively small size of the civil engineering industry in Northern

Ireland perhaps meant that a formal structure has been unnecessary.

**What do you hope to achieve by setting up a sub-region here?**

The ICES regional structure helps to provide a local focus and centre of excellence for ICES members. It is a useful networking tool.

*'...The ICES is a niche institution... it overlaps the traditional functions of the ICE and the RICS...'*

By having a local presence, we hope to develop the local membership, especially amongst graduates and students. Many engineering and surveying graduates find themselves working in a commercial management or Geospatial environment within civil engineering which does not reflect their student affiliation to one or other of the related professional bodies. Therefore CPD becomes difficult for them



and they often drift through their career without formal structure. This is a loss to them personally, but also to the industry in general.

**What are the benefits of ICES membership?**

The ICES does not offer chartered status. However it does offer recognition short of that. This certainly increases credibility. Membership also gives access to the ICES and ICE libraries and various publications including an extremely useful newsletter.

For more information about the ICES, contact their website at [www.ices.org.uk](http://www.ices.org.uk) or email James Golden at [james-golden@contract-consultants.com](mailto:james-golden@contract-consultants.com).

*Continued from front cover...*

The next question to ask is what degree does the Contractor have to go to to prove the facts. This is known as the Standard of Proof. In law there are a number of different standards of proof which must be met.

In a criminal case, for example in a murder trial, the prosecution have to prove *'beyond reasonable doubt that the Defendant is guilty'*.

The case of Miller -v- Minister of Pensions [1947] 2 All ER 372 provides a useful definition of beyond reasonable doubt as:

*'Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt... if the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, of course*

*it is possible but not the least probable the case is proved beyond reasonable doubt'*.

However, making a claim under JCT 98 is not a criminal offence and therefore the standard of proof that must be met is *'on the balance of probabilities'*. That is, the Claimant is entitled to a verdict in his favour if he has established some preponderance of probability in his favour.

Therefore if a Contractor makes a claim under Clause 26 of JCT 98, it is for the Contractor to prove that on the balance of probabilities he is entitled to his loss and expense.

In the next edition of *'Construction Insight'* I will consider the type of evidence required to prove loss and expense.

Contract &  
Construction  
Consultants (NI)



The largest Construction Law specialist in Ireland, providing a wide range of services including representation in arbitration, adjudication, conciliation, mediation, project management and accredited training seminars tailored to suit **YOUR** needs.

For a **FREE** initial consultation or for more info:

[belfast@contract-consultants.com](mailto:belfast@contract-consultants.com) or  
[www.contract-consultants.com](http://www.contract-consultants.com)

# ...but it was HIS fault!

In his follow-up to 'So, you think you are Insured?' in our last edition, Edward Quigg continues with the insurance theme, addressing the issue of liability.

Let me begin by asking a question: *If, when extending an existing thatched building, a Sub-Contractor uses a blow torch and sets fire to the thatch and destroys the building, who would bear the financial consequences?*

Most people would answer that the Employer would sue the Contractor and the Contractor would in turn sue the Sub-Contractor. If you did, you would be wrong. But take comfort from the fact that HHJ Seymour QC of the Technology and Construction Court, London was of a similar view.



Some specified perils within insurance policies include floods

*'...the RIAI Contract is quite clear in relation to responsibility for existing structures and contracts; it shall be at the sole risk of the Employer if loss or damage is caused by a specified peril...'*

Thankfully for the Builder and Sub-Contractor, the Court of Appeal took a different view due to the wording of the insurance provisions of the Contract.

The RIAI Contract is quite clear in relation to responsibility for existing structures and contracts; it shall be at the sole risk of the Employer if loss or damage is caused by a specified peril, such as fire, flood, bursting of pipes. The Clause further provides that the Employer shall take out an insurance policy in relation to this risk, which must contain a waiver on all rights of subrogation against the Contractor

and/or its Sub-Contractors, therefore the Insurer cannot step into the Employer's shoes and sue the Contractor.

Unfortunately Clause 26 then introduces two confusing parts. Firstly it states that where the contents are not the property of the Employer, then the Contractor is to indemnify the Employer in respect of any loss or damage caused to the contents by the negligence, omission or default of the Contractor. Secondly it provides that if the Employer does not take out the insurance required then the Contractor can, and if he does he is responsible for indemnifying the Employer.

However, it would still appear that as the Employer has not taken out the insurance, there is a breach of contract for which the Contractor is entitled to

damages.

The JCT Contract does not deal with the issue quite as clearly, stating that in relation to damage to existing structures by specified perils, the Employer must take out a joint names policy in the name of the Employer, the Contractor and its nominated Sub-Contractors. It does not state expressly that damage shall be at the sole risk of the Employer.

In the case above, *JD Construction (St. Albans) Limited – v – Scottish and Newcastle PLC* CA 22 January 2003, the Court of Appeal stated that because the policy was a joint names policy, the normal liability under the contract was changed. Since the policy would be in joint names it would not be possible for the insured to step into the shoes of the Employer to sue the Contractor. Otherwise it would, in effect, be suing itself. Unfortunately for Scottish and Newcastle they did not take out the policy and were therefore left to bear all of the costs involved itself.

It is therefore essential that before any work commences on site, the Employer and Contractor ensure the necessary insurances are in place. The safest way to do this, is to forward a copy of the contract to a competent broker and instruct him to put the necessary insurances in place. If he then gets it wrong, then there is a route of recovery through him. And one last word of caution – make sure you are fully aware of the specified perils listed in the Contracts and what they mean. For example "flood, bursting and overflowing of water taps, apparatus or pipes" does not cover escape of water from sprinkler systems.

Constructive Training offer a wide range of public and in-house training seminars adopted to suit **YOUR** needs.

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



Registered Training Provider



For full details of up and coming seminars see

[www.contract-consultants.com](http://www.contract-consultants.com)

or for a tailored in-house seminar telephone (028) 9032 1022

# ALL CHANGE AT CCC

CCC has been trading in Northern Ireland for over 20 years, and recently changed its name in the South of Ireland to Quigg Golden.

From 3 May of this year CCC will trade as Quigg Golden in Northern Ireland.

---

*"We see Quigg Golden as the future and are building on the solid base that CCC has provided for many years within dispute resolution."*

---

Quigg Golden celebrated the new name at a launch in Dublin on 9 December 2004.

Speaking on the re-naming of the company, James Golden said *"We see Quigg Golden as the future and are building on the solid base that CCC has provided for many years within the field of dispute resolution."*



Rowenna Mulcahy, Chairperson of the CI Arb Irish Branch congratulates Edward Quigg, Director on the success of Quigg Golden's launch in Dublin

## Quigg Golden

CONTRACT CONSULTANTS

The Arbitration & Contract Dispute Specialists

He went on to say, *"There will be no change to the services that we provide."*

James Golden and Edward Quigg, both Directors of Quigg Golden, are jointly responsible for the offices in Belfast and Dublin, with a team of specialised experts and administrative support providing a quality service.

---

*"Our focus is the same with the only change being to our trading name."*

---

Edward Quigg said *"We remain committed to providing the best possible service to our Clients. The name change will not alter that."*

Edward went onto say, *"We provide a diverse range of services including in-house training, tailored to suit a company's specific needs. Quigg Golden is about more than just dispute resolution"*.

Quigg Golden and CCC continues to grow from strength to strength.

The recent seminar season proved extremely popular and all the seminars were widely attended by a variety of personnel including leading figures from Government Bodies and Main and Sub-Contractors from both the Building and Civil Engineering Industries.

The next seminars will be held in Autumn 2005.

For further information on any of our services, contact Amanda Hannan on (028) 9032 1022.



Some Clients help staff enjoy the Quigg Golden launch in Dublin. Details of the launch in Belfast will be forthcoming.

The past...



From May 2005, CCC will be trading under Quigg Golden Contract Consultants

The Future...



### DISCLAIMER

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

---

Editor • Ruth Farrell BSc (Hons) MCI Arb Dip Arb • Senior Contracts & Arbitration Manager • Edward Quigg BEng LLB MIEI MCI Arb • Director • James Golden BEng LLB CEng FICE MCI Arb FlntCES MRICS • Director

---

Correspondence to:

CCC (NI)/Quigg Golden 1-3 Brunswick Street Belfast BT2 7GE  
Tel (028) 9032 1022 Fax (028) 9032 1023  
E-mail [belfast@contract-consultants.com](mailto:belfast@contract-consultants.com)  
Web Site [www.contract-consultants.com](http://www.contract-consultants.com)

© Contract & Construction Consultants (NI)