

# CONSTRUCTION INSIGHT

## The Latest News in Construction Contracts

### In this Edition...

#### NO AMBIGUITIES IN THE TENDER DOCUMENTS PLEASE!

Here we take a look at the decision in *Gerald Martin Scott & Ors - v - BELB* and the repercussions for procurement in Northern Ireland

*See Page 2*

#### DON'T DELAY

This article highlights the importance of safeguarding your right to a legal remedy by quick thinking and fast action

*See Page 3*

#### A GAME OF CAT AND MOUSE

James Golden looks at the tale of woe between the principle characters in the reconstruction of Wembley Stadium, highlighting lessons learned.

*See Page 4*

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## Football - It's not a Matter of Life and Death...

Bill Shankley, former manager of Liverpool Club, once said:

*"Football is not a matter of life and death, it is much more important than that."*

I would be lying if I said that I empathise with Shankley, but I am certain that there are millions of football fans who do. All of whom will have breathed a recent sigh of relief when Wembley Stadium finally reopened its gates to the beautiful game. The opening of the new stadium did not however mark the end of the dispute between Multiplex Construction (UK) Limited - v - Cleveland Bridge (UK) Limited, which is still ongoing. In this edition of Construction Insight, James Golden discusses the events surrounding the construction of the new Wembley Stadium and the latest round in the Multiplex Construction - v - Cleveland Bridge Case.

When the final whistle goes on the football field the game is over, the score is final. Similar rules apply in law. People who are wronged may be able to look to the law for a remedy, but only within stringent timeframes. Miss the deadline and you lose your right to a remedy. In this edition we look at the *Veolia Order (UK) PSV - v - ORSV County Council* case which reinforces the importance of taking immediate action if you have a right to a remedy.

Also in this edition Edward Quigg provides a Dawn Raid Action Plan. The Office of Fair Trading in recent

times warned of its intention to target anti-competitive practices in the construction market as a matter of priority in 2007. Consequently it is imperative that companies are prepared for dawn raids and are fully versed in the action that they need to take, should they be subjected to an Office of Fair Trading raid. Edward Quigg also brings us up to speed on the progression of procurement rules and regulations, in Northern Ireland. This article follows on from his previous piece entitled *'Tendering - What you can and cannot do'*.

Finally I would like to extend warm congratulations to Mr Derek Waddell of Northstone (NI) Limited who successfully climbed Mount Kilimanjaro, earlier this year in support of Action Cancer. Congratulations Derek!



Derek Waddell on Mount Kilimanjaro

Until next time...

*Caroline Eccles*

Editor



# NO AMBIGUITIES IN THE TENDER DOCUMENTS PLEASE!

In August 2005 a special procurement edition of Construction Insight was published. I wrote an article in that edition entitled *'Tendering – What you Can and Cannot Do'*, in which I made a number of remarkable statements.

I stated that most people in the Construction Industry do not know what the rules are in relation to tendering. I also stated that the Courts here would imply a contract in relation to tendering, the terms of which are, if a contractor submits a tender it will be considered by the Employer.

I even highlighted that in some other common law Jurisdictions the Courts are inclined to imply an obligation to treat a tender in *'good faith'*.

Since the publication of that article there have been further developments in this area. Of particular importance here is the case of Gerald Martin Scott and Others -v- Belfast Education and Library Board which was dealt with in the High Court in Belfast, in June of this year. In his judgement, Weatherup J held not only was there a tendering contract but that the Employer had a duty to consider the tenders *"fairly and in good faith"*.

Generally speaking an obligation to deal in good faith merely indicates that there must be no underhandedness or deceit. However the duty to act fairly can be wider. In this case it was held that the duty to act fairly required *"the absence of any material ambiguity in the tender documents that would significantly affect the tender"*.

This is a significant step forward in this area of law. The contract in question was an ICE contract which provides for what should happen in the case of ambiguities. Yet we have a court stating that, as there was a significant ambiguity in the tender documents the process was unfair and the Employer was in breach.

In my experience it is unusual to find tender documents without any ambiguity and a great many tender documents would have a significant ambiguity within them.

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*"If you are an Employer it is essential that you ... treat all tenders fairly and in good faith."*

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In the instant case an injunction was placed upon the tender process. This prevents an award being made until such times as the Courts properly deal with all the issues. This can significantly affect the timing and process of works. Secondly, a contractor who has had his tender treated unfairly can claim damages for breach of contract.

I expect to see a great deal more cases here, in light of this decision. I am not sure however that it will set a precedent for other jurisdictions, given that it is widely considered to have gone too far.

The lesson is a clear one. If you are



Edward Quigg  
Director

an Employer it is essential that you ensure there are no ambiguities in the tender documents and that you treat all tenders fairly and in good faith. This is applicable to both public bodies and private enterprises, regardless of whether or not they are subject to any European rules.

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# DAWN RAID ACTION PLAN

## What to do if you're subjected to a dawn raid

The Office of Fair Trading (OFT) has warned that it intends to target anti-competitive practices in the construction market as a matter of priority in 2007.

One of the methods in which companies can be targeted is by way of a dawn raid. It can take place on company premises, on other property owned by a company, in company vehicles or sometimes at the homes of company personnel.

*"... the OFT has warned that it intends to target anti-competitive practices in the construction market as a matter of priority..."*

So what should you do if your company is subjected to a dawn raid?

- Get identification from the investigator and carefully read the notice or warrant;
- immediately telephone a senior manager or your legal representative. The OFT will be prepared to wait a short while until senior management

and/or your legal representative are present;

- do not remove or destroy documents or contact third parties as you might be accused of tipping off another company involved;

- be courteous and co-operative;
- co-operate by making copies of documents requested;

- keep a record and make a note of where information came from and why it was requested;

- keep a record of everything that is said, requested or removed; and

- do not produce documents or information that contain irrelevant material. Documentation covered by legal privilege cannot be removed or copied by officials. If you are uncertain as to what falls within this remit, consult your legal advisor.

Information stored in personal organisers, internal memos, emails,

business diaries, brief cases and in trays is not private.

If questions arise, try to ensure that they are put to appropriate senior personnel. At the end of the day, hold an immediate debriefing session involving senior staff and legal advisors in order to consolidate the record of documents taken and questions asked, and plan the company's response.

By Edward Quigg

For further information, contact Edward Quigg or Caroline Eccles on (028) 9032 1022.



## DON'T DELAY

**If you have been wronged, you may look to the law to provide an effective remedy. However, you may lose your right to a remedy if you do not take action within certain time periods.**

For a breach of contract, you must claim within six years of the date of the breach. However, some time limits are much tighter.

For public procurement decisions which are covered by EU legislation, an application for review of a decision to

award the contract is to be at the earliest opportunity.

When does the period start running from? This was answered in a fairly recent decision of the High Court in Dublin, *Veolia Order (UK) Plc and ORSV County Council*. In which Clarke J held that the time begins to run when "any formal adverse consequences crystallised to the extent of a formal step in the process being taken adverse to the interests of the applicant." What is extremely important is that the knowledge of the

applicant is irrelevant.

There is some comfort - lack of knowledge can be taken into account in deciding whether or not an extension of time should be granted. As seen in the *Veolia* case referred to above.

However, each ground for review will be treated separately.

The lesson for us all in relation to this is simple. If you think you have a right to a remedy, you must take action and enforce that right.

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## FORTHCOMING AUTUMN 2007 SEMINARS

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27 September, 6.00pm - 8.00pm  
Engineers Ireland, Dublin

and

3 October 2007, 6.00pm - 8.00pm  
Europa Hotel, Belfast

and

9 October 2007, 6.00pm - 8.00pm  
Silverbirch Hotel, Omagh

### GCCC NEW GOVERNMENT CONTRACTS - A ONE DAY WORKSHOP

17 October 2007, 9.00am - 5.00pm  
Engineers Ireland, Dublin

and

19 October 2007, 9.00am - 5.00pm  
Ardiluan Hotel, Galway

### A MORNING ON NEC POLICIES FOR BUILDERS: A BREAKFAST BRIEFING

25 October 2007, 8.00am - 9.30am  
Reform Club, Belfast

### REVIEW OF THE JCT 05

31 October 2007, 6.00pm - 8.00pm  
Europa Hotel, Belfast

### NEC 3 COMPARED AND CONTRASTED - A ONE DAY WORKSHOP

8 November 2007, 9.00am - 5.00pm  
Ramada Hotel, Belfast

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(all details are correct at the time of  
printing, however subject to change)

# A GAME OF CAT AND MOUSE

Lessons from Multiplex - v - Cleveland Bridge

Wembley Stadium is now all go. However it has been in the news, not because of sport but because of the drama surrounding its reconstruction. The two principal characters in this drama are Multiplex Construction, the Australian Main Contractor, and Cleveland Bridge, the steel erection Sub-Contractor.



An external view of Wembley Stadium, July 2006

Multiplex has been cast as the ruthless Main Contractor, and Cleveland Bridge as the incompetent Sub-Contractor.

The tale of woe between the two has, in its latest round, resulted in a comprehensive judgment from the Technology and Construction Court (TCC) in England. (*Multiplex Construction (UK) Limited - v - Cleveland Bridge (UK) Limited [2006]* EWHC1341 dated 5 June 2006).

*"The most important lesson is that you must take exceptional care in deciding to leave site and repudiate a contract."*

On 2 August 2004 Cleveland Bridge walked off site. The matter is not settled yet, but the first round before the TCC has been in favour of Multiplex.

Multiplex has been vindicated in dramatically reducing its certificates

following a settlement agreement, meaning a substantial reduction in the payments expected by Cleveland Bridge.

### What are the lessons learned?

The most important lesson is that you must take exceptional care in deciding to leave site and repudiate a contract. Multiplex was far from blameless, but it was not enough for Cleveland Bridge to leave site.

However, main contractors should learn the lesson of ruthless conduct, which includes failing to keep sub-contractors on board and ensuring that their interests, insofar as is reasonable, are looked after.



by James Golden



**CONSTRUCTION INSIGHT**  
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