

# CONSTRUCTION INSIGHT

## The Latest News in Construction Contracts

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## EVERY WINNER HAS SCARS

Included in the many gifts that I received for Christmas was a handy little desk calendar for work. Each day of the year has a separate, removable sheet containing not only the date but a fact and quote of the day. Some days the facts are interesting, other days not so much so. Some days the quotes are funny, some days poignant and other days not so relevant.

However today's quote "Every winner has scars" is pretty relevant. This got me thinking about claims and legal actions in the construction industry and how its not always a painless victory for the successful parties. The victories are often good enough to make the scars less poignant, but on occasions a pyrrhic victory or a less than resounding success is accompanied by scars that run deep.

In this edition we look at construction cases that have been recently decided upon and highlight the issues and effects of them. Edward Quigg in particular looks at the many criminal implications for contractors

who do not comply with health and safety legislation who involve themselves in price fixing and so on.

Jarlath Kearney, Senior Contracts & Arbitration Manager with Quigg Golden features in this edition's personal profile section. The profile shows the softer side of this cool and collected professional.

Also, Clare Malone touches on project management issues under the NEC. Now that Public Sector Procurement is largely NEC dominated - what are the pitfalls and problems with managing NEC Contracts?

The Quigg Golden constructive training team are leading experts in the NEC field and are providing seminars on NEC as detailed herein.

Until next time...

*Caroline Eccles*

A handwritten signature in black ink, appearing to read 'Caroline Eccles'.

Editor



## DONT FORGET YOUR TOOTHBRUSH

The Code of Hammurabi (C. 2500 BC) contained the following laws.

If a builder builds a house for some one, and does not construct it properly, and the house which he built falls in and kill its owner, then that builder shall be put to death.

If it kills the son of the owner, the son of that builder shall be put to death.

It may not have escaped your attention that there are more and more possibilities for those involved in construction to fall under criminal penalties. In fact over the last 15 years the government have introduced over 900 new offences.

These include price fixing, including asking a competitor for a cover price,

breaches of health & safety legislation and corporate manslaughter.

You may not be put to death but you may face prison. I leave you with the words of a barrister, when advising his client on the chances of being found guilty and possible sentence:

*"You may be lucky, but I think you should bring your toothbrush."*



Edward Quigg

# PROJECT MANAGEMENT UNDER THE NEC

Time, cost and quality are the three main drivers of the NEC. The jewel in the crown of the NEC is that it uses foresight where issues could or may affect the three main drivers. It is assumed that the three main drivers refer to the success of the Contract. Success is measured on the basis that the project was delivered on time, within budget and to the quality as specified in the Works Information.

Is it reasonable to consider the three drivers when appointing the NEC Project Manager or is it hindsight that we use to plan how we approach the next contract? The Project Manager is often appointed at the feasibility stage of the project and his/her duties include advising on design, procurement, costs, planning and programming matters. It is a requirement to name the Project Manager in the contract documents, prior to signing the Contract. In the context of time, early involvement obviously has an impact on fees and overall costs to the project; another member of the design team on board at the outset requiring fees to be paid.

Quality however presents a different issue. The NEC facilitates implementation of sound project management principles and practices. The Project Manager's role is to manage the contract for the Employer and to achieve the Employer's objectives for the completed project. He/she has a great deal of authority and must be even handed in assessing payment. The Project Manager is the only person who can instruct changes to the Works Information.

Acceptance of any communication (programme, design etc) by the Project Manager does not change the Contractor's responsibility to provide

the works or liability for his design. The Project Manager is not independent but has to administer the Contract in accordance with its provisions.

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*"Acceptance of any communication (programme, design etc) by the Project Manger does not change the Contractor's responsibility to provide the works or liability for his design."*

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The question that must be asked is *"is there a special type of Project Manager who can project manage the legal frameworks of the project management procedure that is the NEC contract and if so are the Employers prepared to finance the higher fees that this NEC Project Manager can command as a result of this specialist technique?"*

After all, the NEC improves upon existing standard contracts in terms of clarity, simplicity and flexibility. It may be a false economy for the Employer to think that staff internally



Clare Malone  
Assistant Contracts & Arbitration Manager

can be delegated to carry out the duties and responsibilities of the NEC Project Manager. Resources, time, training and financial commitments are required not only to manage the contract but to ensure that the Project Manager is carrying out his obligations within the timescale set by the contract.

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Quigg Golden training is also approved by the Construction Industry Training Board (NI) for grant aid purposes.



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## GETTING TO KNOW US....

### This edition's Personal Profile Section features Jarlath Kearney, Senior Contracts & Arbitration Manager, with Quigg Golden.

**CI: Jarlath, you have been with Quigg Golden for a number of years now, how did it all begin?**

JK: "My interest in the legal world began many years ago. I loved watching the greats in action such as Perry Mason, Matlock et al. However the wise head on my shoulders convinced me that construction was the way forward and so I undertook a degree and a career in Quantity Surveying.

I know many a good man who is a Private QS and I take my hat off to those who endure this lifestyle, but the life was not for me.

I happened to be in the right place at the right time when Quigg Golden (then CCC) were recruiting and the rest, as they say, is history...

It is no 'free ride' working with Quigg Golden and there is always the pressure to keep up with an ever changing industry. In order to ensure I could best advise clients I completed a postgraduate in arbitration and have attained fellowship status in the Chartered Institute of Arbitrators."

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*"In Northern Ireland, if the Finance Department in Stormont releases the purse strings a little, the construction industry would see the benefit of the peace process more fully."*

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**CI: How has the industry changed since you started with QG?**

JK: "In Northern Ireland adjudication really has assisted cashflow especially for sub-contractors. I still haven't grasped why the opportunities have been missed to introduce this dispute resolution forum throughout Ireland.

Also during my time with Quigg Golden there has been a massive boom in the construction industry especially in the Republic of Ireland. I hope the slow down that is predicted is not as severe as forecast. In Northern Ireland, if the Finance Department in Stormont releases the purse strings a little, the construction industry would see the benefit of the peace process more fully. However I have no doubt in the coming years that the industry will feel the pinch of tighter margins in tenders."

**CI: How would you describe yourself to someone who has not met you?**

JK: "At work I am a stickler for detail; it bugs me if the effort isn't put into getting things completed properly. I am very much results driven and in this particular business I cannot afford to mess up on the facts.

Away from work I would like to think I am a lot more relaxed in my attitude to life, however my wife might beg to differ. She believes I should have a starring role on the TV series 'Grumpy Old Men'."

**CI: What are the good and bad aspects of your job?**

JK: "I have been involved with Quigg Golden for a number of years, so there must be positives! I enjoy the variety of projects and clients that I meet and working with them through to a successful conclusion. Although mostly office based, I do get some time away from my desk and particularly enjoy networking and socialising with peers.

The most frustrating thing about this job is unwarranted delays. I want to get results for my clients in the most efficient manner and often representatives for another parties employ disruptive, delaying tactics and unfortunately some arbitrators/conciliators allow this."



Jarlath Kearney  
Senior Contracts & Arbitration Manager

**CI: Enough about work, what do you do to relax during your time away from the office?**

JK: "My wife, Carol, is from Moville in Donegal and I always like to get up there for a long weekend, especially if combined with some golf at Ballyliffen.

My first child, Grace, is one year old and when I get home in the evening I enjoy spending time with her and quickly forget about the pressures of my working day. I have a second child due in the summer so I hope he/she is as good a sleeper as Grace.

At the weekends I need my fix of golf and enjoy the craic at Moyola Park, Castledawson, where I have been a member for many a year, but don't have the handicap to show for it.

Much to the frustration of my wife I enjoy all sport on television (poker is a sport!). I follow GAA sports, particularly the fortunes of Derry. I also support my local soccer team, Man United, and attend the odd rugby match albeit mostly enjoying the tented beverage facilities."

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## FORTHCOMING SPRING 2008 SEMINARS

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Tuesday 8 April 2008, 9.00am - 5.00pm  
IMI, Dublin

### GETTING TO YOUR MONEY UNDER THE CONTRACT

Wednesday 9 April 2008, 6.00pm - 8.00pm  
Europa Hotel, Belfast

and

Thursday 17 April 2008, 6.00pm - 8.00pm  
Engineers Ireland, Dublin

### NEC PROGRAMMING IN PRACTICE

Tuesday 15 April 2008, 6.00pm - 8.00pm  
Europa Hotel, Belfast

### NEC COMPENSATION EVENTS IN PRACTICE

Wednesday 23 April 2008, 6.00pm - 8.00pm  
Europa Hotel, Belfast

### INTRODUCTION TO SUB-CONTRACTING UNDER THE NEW GOVERNMENT SUB-CONTRACTS

Thursday 1 May 2008, 6.00pm - 8.00pm  
Engineers Ireland, Dublin

For more info email  
[Christina@QuiggGolden.com](mailto:Christina@QuiggGolden.com) or  
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(all details are correct at the time of  
printing, however are subject to change)

# GOING GLOBAL AGAIN

In *Petromec Inc – v – Petroleo Brasileiro SA* [2007] EWCA Civ 1372, the Court of Appeal in England had the opportunity to look again at global or total cost claims in a new contract. The litigation was to do with a huge semi-submersible all production unit called 'Spirit of Columbus'.

Petromec were retained to change the existing platform so that it was suitable in the first instance for an oil field off the coast of Brazil and then, when there was a change of plan, the more demanding Roncador field. The original changes were significant. The additional changes even more so.

Petromec argued at length that they should be allowed to put their case in a very global way. Much of the argument revolved around the technical wording of clauses in the Contract. However, the principle is very familiar to those of us dealing with claims in the construction industry. When is a claim global and when is it not?

The Court of Appeal emphasised



the requirement for a claim to be particularised enough to provide a proper connection between causes and effects. How far this is to go is a familiar and contentious issue of fact. The key is to balance the extent of proof necessary with the commercial pressures and reality of the situation to an extent that will satisfy the tribunal who has to decide the claim. This is always a tricky issue. Invariably it is also important to get proper and appropriate advice.



By James Golden



## CONSTRUCTION INSIGHT The Latest News in Construction Contracts

### Editorial Team

Editor: Caroline Eccles LLB ACI Arb

Consultants: James Golden BEng LLB CEng FICE MCI Arb FlntCES  
MRICS and Edward Quigg BEng LLB MIEI MCI Arb FlntCES

Content Design: Christina Kerr

### Feedback

Letters and comments to:

The Editor • Construction Insight  
Quigg Golden Limited  
1 - 3 Brunswick Street • Belfast • BT2 7GE

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