

# 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 it is 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*  
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Editor



## WHAT IS MEDIATION?

Mediation is a well established form of dispute resolution, particularly in the area of family law. However, recent years have seen mediation firmly sets itself up as a preferred tool of dispute resolution among those in the construction world.

Mediation is an attempt to reach a solution to a dispute, using the services of a mediator to facilitate. The principle difference from the existing methods of dispute resolution is that the Mediator does not have a deciding role in the process. Unlike conciliation, for example, if a mediation breaks down irretrievably, the Mediator does not issue a recommendation. The process is based on the consent of the parties.

There are several advantages to the use of mediation. Generally, the hearing lasts a single day and the preparation involved is, therefore, less than a conciliation. The Parties themselves retain ownership of the dispute meaning that they can read their own commercial agreement and secure their ongoing relationships. In the past, for example, settlements have

included the promise of future work and a programme to accelerate existing works.

Mediation offers a chance to get an early, commercial and costs effective solution to a dispute, before matters escalate.

Another advantage of mediation is that the process is entirely confidential. The only outsider in the process is the mediator him/herself and no record is kept of the days proceedings. This means that anything said at a mediation cannot be used in subsequent arbitration or litigation proceedings. This allows the participants to get to the real issues at the core of their dispute.

Successful mediation will conclude in a written agreement. The agreement is of the same standing as the original contract. This means that although the process by which the agreement was reached cannot be revealed at any point in the future, the agreement itself is legally binding.

Robert Rooney

# LESSONS FROM LIMERICK

Those seeking a better understanding of the much lamented New Public Works Contracts would do well to read the latest installment in the long running saga between UCL and Limerick County Council on a sewage contract in the city. The Dáil's Public Accounts Committee recently devoted a morning to the topic. The PAC Report makes for interesting reading, as it chronicles not only the detail of this particular case, but also the broader governmental policy in relation to construction contracts. Indeed, it is explicitly noted that this case has a significant bearing on the provisions in the New Public Works Contracts, in particular in relation to termination.

Uniform Construction Limited won the contract for the installation of the North Inceptor Sewer section of an unprecedented Main Drainage Scheme for the integrated collection and treatment of wastes and storm water in Limerick City and environments. The Main Drainage Scheme was anticipated to cost in the region of €130m, with the relevant UCL Contract Sum being just over €9m. Early in the Contract, UCL advised Limerick County Council that various unexpected difficulties had been encountered and that the ground conditions did not match the surveys with which they had been provided. Limerick County Council was concerned at the pace of the Works and believed that UCL did not have the expertise to deal with the problems. After consultation with the Department of the Environment, legal advisors and engineering consultants, Limerick County Council decided to terminate the Contract in the belief that an additional cost of €3.8m over the original contract sum would cover the engagement of a new contractor and

the completion of the Works. Conciliation was not provided as an option within the Contract, but by agreement the Parties referred the matter to a conciliator. He found in favour of UCL and held that the Contractor was not guilty of any failure to make progress on the Works with diligence.

At about this time, Limerick City Council sought tenders for the completion of the outstanding works. They accepted a tender in the amount of €20.3m. This was more than double the original cost of the Contract. It is also worth noting that the new contract overran by some €7m, almost the original price of the first contract.

UCL proposed a settlement for €12.4m. This offer was rejected. The conciliator then found that an arbitrator would be likely to award in the region of €25m to UCL. Limerick County Council, in consultation with the Department and their advisors, rejected this proposal. In the event, the Arbitrator awarded in excess of €30m.



Robert Rooney  
Assistant Contracts & Arbitration Manager

The scale of the Conciliator's initial award in respect of the termination shocked the Council and the Department. They simply did not believe that an arbitrator would award such a large sum. In the event, this was a miscalculation. The lesson is, be very, very certain before you terminate.

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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 party's 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

### A USERS GUIDE TO THE NEW PUBLIC WORKS CONTRACTS - A ONE DAY WORKSHOP

Tuesday 6 May 2008, 9.00am - 5.00pm  
IMI, Dublin

### GETTING TO YOUR MONEY USING 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 PUBLIC WORKS SUB-CONTRACTS

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

For more info email  
Christina@QuiggGolden.ie or  
visit www.QuiggGolden.ie

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

# NOTICE THE CHANGE

## Notices and the Public Works Contract

Most standard forms of main contract and sub-contract require the contractor or sub-contractor to give notice when delays occur to the completion of the works or when loss and expense is suffered. The common question we are asked by our clients is 'Can I still issue a claim if I have not given notice?' The important issue of mitigation aside the answer is normally yes. Arguably one of the most important changes brought in by a New Public Works Contract ('PWC') is that a contractor or sub-contractor\* will automatically lose its entitlement to claim under the PWC if it fails to submit the appropriate notices and details required. Notices are now condition precedent to the right to claim. In layman's terms, no notice - no claim.

Claims and adjustments are dealt with at Clause 10 of the Contract. Clause 10.3.1 states that if a contractor considers there should be an extension of time or adjustment to the Contract Sum the Contractor shall, as soon as practicable and in any event within 20 working days, give notice of this to the Employer's Representative. The Notice must prominently state that it has being given under Sub-clause 10.3 of the Contract. 20 working days after giving notice the Contractor must give details of the following:

- all relevant facts about the claim;
- a detailed calculation of the adjustment to be made to the contract sum; and
- adjustments to be made to the programme.

The requirement on the Contractor to provide this information is a change in itself. For example, under the RIAI the Contractor is only obliged to give notice as there is no requirement for a contractor to actually make a detailed claim for loss and expense or

extension of time. Clause 2, 29(b) and 30 of the RIAI specifically state that it is for the architect to ascertain the extension of time and loss and expense due.

The changes brought in at 10.3.1 of the PWC are entirely sensible in that they reflect the reality of construction claims. Most contractors will be aware that they have very little chance of being successful in pursuing a claim for an extension of time and/or loss and expense if they do not provide supporting backup and details.

The benefit or otherwise of the changes made at 10.3.2 of the Contract is much more open to debate. Clause 10.3.2 states that if the Contractor does not give notice and details in strict accordance with and in the time provided by 10.3 the Contractor shall not be entitled to any increase to the Contract Sum or an extension of time and the Employer shall be released from all liability to the Contractor in connection with the matter.

In simple terms, no notice and/or details - no claim.

It is probable that at some stage in the coming years the enforceability of the clause will be tested through arbitration and possibly even the courts. However until such time as a contractor needs to (and has deep enough pockets to) challenge this clause, the safest option for contractors and sub-contractors is to put strict in house procedures in place to ensure compliance with the new demands of this clause. It will require changes to most contractors' current practices.

\*At the time of writing a draft of the sub-contract has not been issued. However it is likely that any sub-contract will be back to back with the main contract.

Pauric Marray

## 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  
FInstCES MRICS

Edward Quigg BEng LLB MIEI MCI Arb FInstCES

Content Design: Christina Kerr

### Feedback

Letters and comments to:

The Editor • Construction Insight  
Quigg Golden Limited  
Adelaide Chambers • Peter Street • Dublin 8

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advertisements@ConstructionInsight.com or  
dublin@QuiggGolden.ie

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