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## Court Considers Balance of Confidentiality of Tender Documents Against Disclosure

In Croft House Care Ltd. v Durham County Council, [2010] EWHC 909 (TCC), the claimant challenged the award of a contract made under the Public Contracts Regulations 2006. The claimants sought the disclosure of documents in order to prove their case, but the Council argued that they contained confidential third party information and information which would give the claimant an unfair advantage if the tender process had to be re-run. Balancing the claimant's needs in order to bring its case against the confidentiality argument, the court was not convinced that a fresh tender process would be prejudiced. Subject to certain safeguard on the provision

of some restricted documents, the court found that the claimant should be permitted to see the documents it needed.

## Adjudicator Mistakenly Restricted His Own Jurisdiction

In Pilon Ltd. v Breyer Group plc, [2010] EWHC 837 (TCC), the issue was whether an adjudicator had breached the rules of natural justice by ruling that he did not have the jurisdiction to consider an overpayment defence made by the defendant. Although he had correctly taken into account the content of the adjudication notice as setting out the boundaries of his jurisdiction, he had failed to appreciate that Pilon was not only seeking an interim valuation of batches 26-62 of the works, but also an interim payment of any amount deemed owing to them. Although the valuation required him to take into account batches 26-62 only, Pilon's claim for payment necessarily required him to also consider whether it was entitled to a lesser amount because of Breyer's overpayment allegations. It is not uncommon for an adjudicator to derive his jurisdiction purely from the wording of an adjudication notice, but the necessary implication of the words used must also be taken into account. The judge was in no doubt that Pilon had attempted to limit the scope of the adjudicator's jurisdiction so that batches 1-25 would not be taken into account, and had sought a tactical advantage by proposing an erroneous statement of the adjudicator's jurisdiction. The adjudicator had deliberately and mistakenly restricted his own jurisdiction amounting to a breach of natural justice.

## New Editions of Building Regs Approved Documents

New editions of some of the Building Regulations Approved Documents are to be published this year. The following are some of the changes.

Approved Document B has been amended to reflect revisions to the standards issued under the Lifts Directive and Construction Products Directive.

Approved Document F: Ventilation has been revised to maintain indoor air quality and avoid adverse health effects that could otherwise have occurred due to the greater tendency to have more airtight buildings.

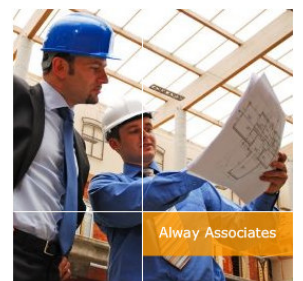
Approved Document G provides guidance on observing the Building Regulations concerned with sanitation, hot water and water efficiency. This edition contains significant changes in legal requirements and technical guidance, making it an essential reference for anyone undertaking building work. The Approved Document came into force on 6 April 2010.

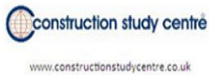
The new Parts L1A, L1B, L2A and L2B, will require a 25% improvement on the 2006 standards for every new home. An aggregate approach for improvements of new non-domestic buildings will deliver an improvement of 25% overall, rather than for each individual building. The changes to Part L will increase the

minimum levels of energy efficiency for building fabric and services, so that CO2 targets cannot be achieved through renewables alone. This reflects the principles of reducing overall demand for energy. The measures will also come into play when people elect to carry out work to existing buildings including extensions and conversions, fabric renovations, replacement windows and boilers.

The other amendments come into force in October 2010.

Full descriptions of these can be viewed at <http://www.blissbooks.co.uk/Building-Regulations/c2604/index.html>. These updates will also be reflected in the relevant courses provided by the Construction Study Centre at <http://www.constructionstudycentre.co.uk/Courses-details.asp?CID=13>





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## South East

### Greener Pastures Ahead?

At a recent networking event aboard the grand Silver Sturgeon yacht moored at the Strand Pier on the Thames, a presentation was given by the office of the Mayor of London, explaining the plans for a Green Enterprise District in London and beyond.

In light of the finite supply and financial risks of over reliance upon fossil fuels, we need to do two things: one, look at alternatives to fossil fuels, and two, waste less energy by making all new buildings and indeed existing buildings across the country, more energy efficient.

To achieve the latter aim, the budget for the Green Enterprise District in London alone, and this is where you sit up and listen, is £200 Billion between now and 2025.

Among the attendees at the buoyant soiree were mostly architects, designers and construction firms, with a sprinkle of lawyers to complete the City ensemble. This cross section of interest says more about the future of green projects than the countless multitude of bamboozling charts and graphs presented ever could.

*"Surely in this market a balance needs to be struck between power efficiency and cost effectiveness", I suggested to the speaker after breakfast, to which he replied "we will soon have no choice but to opt for more efficient designs and materials".*

But can we afford to 'go green' and what are the viable alternatives to fossil fuels? It seems to me that creating more efficient, highly engineered structures is all well and good, but if we don't tackle the disease, the antidote could well prove to be an expensive ideological exercise in futility.

For more information please contact **Ryland Ash** by telephone **01992 576440** or by email [ryland.ash@alway-associates.co.uk](mailto:ryland.ash@alway-associates.co.uk)

## Construction Study Centre

### Invest in Training

Construction Study Centre's new summer term which runs from April through to July 2010, is now underway and brochures have been mailed out across the country, with email versions of these winging their way out as we speak. Some of our courses, namely 'CDM Co-ordinator' and 'NEC Contracts' are subjects already selling out on the early dates.

**Train to succeed** - Success in business means staying ahead of the competition, in order to provide quality work and great customer service, at a good price. To do that a company needs skilled and motivated staff who are full of ideas, know the job they've been set and understand their business direction. To keep those staff means investment in the right training.

To this end The Institute of Directors have found that 80% of their members have maintained or increased their training spend during the recession. A skilled, trained workforce can dramatically improve bottom line performance, adding value to products and services and making it easier to compete internationally. Research shows training plays a key role in increased job satisfaction. Satisfied and motivated workers mean lower staff turnover, lowering the costs of recruitment and retraining. Two-thirds of employees have said they worked harder as a result of learning new skills.

To see what training you can do, please take a look at our website [www.constructionstudycentre.co.uk](http://www.constructionstudycentre.co.uk) which can be searched by course subject, job type, or date, or **call us on 0845 3133 414** to discuss our public and in-house training options, or email [enquiries@constructionstudycentre.co.uk](mailto:enquiries@constructionstudycentre.co.uk).

## Midlands

### New Construction Act

The consultation process in regard to the new **Construction Act** relating to the **Scheme for Construction Contracts (England and Wales) Regulations 1998** (the "Scheme") commenced at the end of March 2010 and the closing deadline for responses to the consultation is 18 June 2010. Following changes introduced at part 8 of the Local Democracy Economic Development and Construction Act 2009 (the 2009 Act) to amend the 1996 Act, this consultation paper sets out the necessary consequential changes to the Scheme that you may wish to comment upon. Details of the consultation paper can be obtained via the following web link: <http://www.bis.gov.uk/Policies/business-sectors/construction/construction-act-review>.

A new article is on our website from **Jaz Bilkhu** entitled **"Implied Obligations in Construction Contracts"**, in which he discusses the many obligations of parties to a construction contract that arise in the absence of express terms. The article can be accessed by clicking this link: <http://www.alway-associates.co.uk/legal-update/article.asp?id=250>.

Our next breakfast seminar sessions are scheduled for 30 June (Knowle, Solihull) and 8 July (West Bromwich). If you are not already registered and would like to receive an invitation you can do so by sending your details to [birmingham@alway-associates.co.uk](mailto:birmingham@alway-associates.co.uk) and we will ensure that you receive an invitation. As well as the free breakfast seminars, Michael and Jaz continue to present both public and in-house seminars for Construction Study Centre on the subject of construction contracts and law. In-house seminars have the advantage of being put together to meet the specific needs of an organisation and should you have any particular requirements then please contact either Michael or Jaz at the Birmingham office or alternatively Construction Study Centre on 0845 313 3414.

For more information please contact **Jaz Bilkhu** or **Michael Rowlinson** by telephone **0121 702 1980** or by email on [jaz.bilkhu@alway-associates.co.uk](mailto:jaz.bilkhu@alway-associates.co.uk) or

## North

### Adjudication costs and insignificant percentage of interest provisions inserted by Contractor are void decides the referee: Sub-contractor 2 - 0 Contractor

The judge in the recent case of **Yuanda (UK) Co. Ltd -v- WW Gear Construction Ltd** [2010] EWHC 720 (TCC) found an adjudication provision making the Referring Party liable for the Parties costs and Adjudicator's fees and expenses is a very real fetter on the Referring Party's ability to refer a dispute to adjudication at any time because there would be no effective remedy until the amount in dispute had become sufficiently large. Consequently, pursuant to s.108(5), that bespoke *Tolent* type provision was ousted along with the remainder of the standard form adjudication provision (JCT Trade Contract) and replaced by all of the adjudication provision under Part 1 of the Scheme.

The Contract also called for interest at 0.5% (in lieu of 5%) over Base Rate. The judge found that provision did not provide a substantial remedy and the defendant could not take advantage of the Claimant's failure to spot the amendment in the rate of interest during pre-contract negotiations. Consequently, the Judge ruled that the amended provision is void and substituted it for the statutory rate of interest. Drafters of bespoke contracts, those that frequently seek to amend standard form contracts and Parties on the receiving end of such terms need to take note.

For assistance with contract drafting or if you are in any doubt whether your terms and conditions (or those imposed on you) comply with the law, please contact **Scott Milner** on **0114 2180668** or [scott.milner@alway-associates.co.uk](mailto:scott.milner@alway-associates.co.uk).

## Wales & South West

### Keeping up to date

It's that time of the year again. The mornings are lighter, the days are longer, the sun is shining and spring has most definitely "sprung"; however, tens of thousands of people across the country are missing all of it, having their head stuck firmly inside a book studying for rapidly approaching examinations.

The staff at Alway's Cardiff office are no exception, proving their commitment to continual learning and development to ensure the best and most up to date service is provided to our Clients.

As well as the more obvious construction related topics such as the Local Democracy, Economic Development and Construction Act 2009 (which forms the topic of an upcoming seminar) and the Procurement Policy Action Note 7/10 issued by the Office of Government Commerce, we also keep up to date with less obvious topics such as the impact of EU Law on the Construction Industry, Employment Law and Company Law.

It is for that reason that we are able to provide a "one stop shop" service for our Clients by offering a range of legal services and training to cover every problem that may be encountered.

In addition, by our staff undertaking continuous learning and development, we remain at the forefront of construction legal advice and training in Wales and the South West of England.

For further information on any of the topics above or any other related matter, please contact **Steven Evans** on **029 2046 4612** or email [steven.evans@alway-associates.co.uk](mailto:steven.evans@alway-associates.co.uk)

## Brunswick

### Good from Bad!

As far as 'bad projects' go this was a belter! The Employer engaged a Contractor (our Client) to carry out civil engineering work on a design and build basis but let on the basis of an amended ICE 7<sup>th</sup> edition re-measurement form of contract. After months of problems being contractual, physical, unforeseen, tidal (yes it was by the sea), interpersonal together with a smidgen of quality issues, the stage was set for a dispute.

**Brunswick** were engaged by the Contractor to assist with preparing their account and having completed the task of providing solid substantiation to the amounts being claimed, they then moved into negotiation mode. Unfortunately the Employer's Representative was not prepared to re-consider his original valuation and so **Brunswick** had no option but to prepare a submission ready for adjudication but still with a view to negotiating a fair and reasonable settlement. The strength of this submission persuaded the Employer to come to the negotiating table!

The negotiations were successful and the Employer agreed to increase the valuation from their initial offer of a 3% increase to a final offer of a 20% increase. This represented a fair commercial settlement and was agreed to be in full and final settlement of the account.

If such a positive result wasn't enough for our Client, things are getting better! The Employer is now looking to our Client to carry out further work and **Brunswick** is again leading the way in providing procurement advice concerning the most appropriate form of contract, and the Employer is now keen to meet with **Brunswick**. It just goes to show that by preparing an account properly not only is this of great benefit to our Clients but it is often also appreciated by the other Party.

For more information please contact **Nigel Clayton** by telephone **01142 180608** or by email on [nigel.clayton@brunswickis.co.uk](mailto:nigel.clayton@brunswickis.co.uk)

## Republic of Ireland

### Moving Forward

The ESRI has predicted that Ireland is moving out of the recession in 2010, with positive growth emerging in 2011. IBEC, the group that represents Irish business, also said that new CSO figures, which record a lift in manufacturing output in the first two months of the year, indicate that Ireland is beginning to emerge from recession. The National Treasury Management Agency has already raised over half its €20bn funding target for the full year. The Ulster Bank Construction PMI reports that PMI still way below 50 level, but March reading of 42.3, the highest since October 2007.

So it would seem that confidence is returning to the market in baby steps. In this cautious atmosphere Alway Associates can present a very competitive option to the construction law industry as we do not have the same overhead costs that big law practices may have to cover and our clients thus benefit from Alway Associates competitiveness while receiving the highest level of service.

Alway Associates continue to receive an increasing number of instructions and a large turnout at our seminars. Our Director Robert Shawyer, presenting in conjunction with the CIOB, received the following accolade in the Construction Manager magazine...*'Robert delivered an illuminating presentation on the key principles of partnering contracts'*. Our next seminar scheduled for 2 June 2010, is again held in conjunction with the CIOB at the Red Cow Inn, Dublin, at 6.30pm on the New Government Contracts.

To support the Irish construction industry a **FREE HELPLINE 1800 28 30 55** is available where experts are available to offer initial advice over the phone on any specific matter at no cost.

For more information contact **Maria Daly** on **01 669 4772** or email [maria.daly@alway-associates.ie](mailto:maria.daly@alway-associates.ie) or **Shane Nash** on **09 177 1578** or email [shane.nash@alway-associates.ie](mailto:shane.nash@alway-associates.ie)

## Northern Ireland

### Compensation

It has been millions of years since Northern Ireland was affected by volcanic activity – but apparently it once saw the same level of activity similar to that in Iceland today. Now that people are returning home after their forced exile and flight schedules are returning to normal talk is turning to compensation. People who wouldn't normally read the small print on their travel documents or insurance policy suddenly have the magnifying glass out to find out if they can recover the cost of those extra nights in a luxury hotel in some exotic location.

The same phenomenon can be seen in a construction project when a Party to a construction project thinks it should be compensated due to some default of the other Party. Although this is not the same as a volcanic eruption it can certainly be of seismic proportions for the Party involved, especially if it turns out that there is no entitlement to compensation.

It is times like that when we all wish we had paid heed to that old adage 'always read the small print'. When contracting – whether for holidays or construction- it is always essential to know what your rights are, and what remedies are available, if things go wrong.

Other familiar words that have been heard over the past number of days are 'reasonable' and 'proof'. Customers are being told that they have to 'prove' what their costs were and they can only recover 'reasonable expenses'. These words often crop up in Construction Claims and can be summarised with "he who asserts must prove".

For more information please contact **Ruth Farrell** on **02890 447180** or email [ruth.farrell@alway-associates.co.uk](mailto:ruth.farrell@alway-associates.co.uk)



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## Legal News

### Be careful what you ask for

In a recent case the Court of Appeal held that a general letter of undertaking or release not to sue its professional advisors in return for assistance in an arbitration precluding the Employer from later suing its advisor in respect of later defects that were subsequently discovered.

The Court found that the Employer had taken a commercial decision based on legal advice to give a widely worded undertaking even though it knew at the time that one of the advisors had been negligent. The Employer tried to argue that the letter of release or undertaking not to sue did not relate to those later discovered defects. However, the wording of the letter included the following:-

*"..... Confirm and undertake that it will not issue proceedings against X in relation to matters arising from X's appointment as surveyors to ....."*

The Court held that the later discovered defects for ones which related to the advisor's work and therefore the undertaking applied. The only reason the Court would have allowed the Appeal would have been if the advisor had taken advantage of the employer's lack of knowledge and thus gained an advantage for itself. The morale must be that when reaching such an agreement, to given some thought as to future issues which could arise relating to that advisors work.

Silver Shemmings LLP is a firm of solicitors who have a close working relationship with the Alway Group.

For more information please contact **Sarah Shemmings** by telephone **020 7799 1259** or by email **sas@shemmingsllp.co.uk**

## Construct Safe

### Potential HSE Review of the CDM Regulations 2007

Following the tabling of an Early Day Motion on 15 March 2007 and after they came into force on 6<sup>th</sup> April 2007 a Parliamentary Debate took place on 10<sup>th</sup> May 2007 where Ministers agreed that the HSE should carry out a review within 3 years on the CDM Regulations 2007.

A Construction Industry Advisory Committee (CONIAC) working group has been established and is called the CDM 2007 Evaluation Working Group (CDM WG). It met for the first time on 26 October 2009 to, among other things, clarify its purposes with regard to its relationship to HSE's formal evaluation of CDM 2007 and discuss its terms of reference.

It is a task and finish group that is due to finally report in November 2010. It is assumed that the CONIAC report will be taken into account in the HSE's formal review. However, there appears to be no indication when the HSE's report on its formal review is to be made.

The CONIAC CDM WG currently consists of representatives from Persimmon, Engineering Construction Industry Association, Association for Project Safety, Scott Brownrigg, ConstructionSkills, Specialist Engineering Contractors Group, Institution of Civil Engineers, UNITE, Construction Confederation, Federation of Master Builders, G&J Seddon, Royal Mail Group and WSP UK.

It has been stated by HSE/CONIAC that it is fundamental that any evaluation by the CONIAC CDM WG is against the former HSC's stated aims for CDM 2007.

The stated aims are associated with simplification, flexibility, planning & management, integration and competence.

The CONIAC CDM WG met again on 29<sup>th</sup> January 2010 during which it signed off its terms of reference.

For more information please contact **Paul Gray** on **0845 313 3414** or by email on **enquiries@constructionstudycentre.co.uk**

## Group News

### Alway Associates to speak at International Legal Research Symposium

Robert Shawyer of Alway Associates is to present a paper on Ethics in the Supply Chain in times of Recession at the COBRA International Legal Research Symposium in Paris later this year.

This prestigious event is a high profile platform for leading legal researchers and commentators from around the World. This year's event in Paris is looking to be one of the best ever with record numbers of applicants only those chosen to speak should provide for a compelling event for all those interested in domestic and international construction law.

Once again members of the Alway Group are at the forefront in the world Market of construction contract and legal advice.

### Training Around the World

Over the years Construction Study Centre and Alway Associates have undertaken training in many countries, and for many nationalities, in different parts of the World including mainland Europe, Middle East and Korea.

Recently we have had enquiries from Russia, New Zealand and Bangladesh to provide training and guidance on matters such as and regulatory control, dispute resolution and various forms and types of Contract.

### Ashes to Ashes

Richard Silver and Lorne Alway have finally found their way back to the UK after having been stranded abroad in most frustrating circumstances, having to suffer well over a week of additional sun and golf, Richard in Florida and Lorne in Portugal. Suffice to say everybody was relieved that they have returned to stop them improving their tans any further.

As all of our existing clients will know to their benefit, we have always been willing to offer over the phone initial advice on any specific matter at no cost. If you have a problem or question relating to a construction contract, be it legal or commercial, and want to speak to an expert in the field then call our free helpline on:

**0845 838 2759**

Alternatively you can click on the link below to send your question by email: [help@alway-associates.co.uk](mailto:help@alway-associates.co.uk)

Your call or email will be taken by one of our operators who will note your details. Our experts will then call you back to talk through your concerns and give some initial advice. We will aim to call you back immediately but, at peak times this may not always be possible. However, our undertaking is to ensure that all calls are responded to within 1 hour.



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