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Adjudication for the Republic of Ireland

The May 2010 edition of 'Construction' the official magazine of the CIF in Ireland asks the question does Ireland need a Construction Bill. The response to this question must be a resounding yes from the multiple subcontractors and main contractors throughout Ireland who often have little prospect of recovering monies due without long delays or expensive conciliation, arbitration or litigation procedures.

The UK experienced similar payment problems over ten years ago before the introduction of the Construction Act, the "Housing Grants, Construction & Regeneration Act 1996" where now, again according to the CIF, 90% of its disputes are resolved by adjudication within 28 days of a notice. The introduction of a Construction Act has been a resounding success where dispute resolution is more expeditious and therefore cheaper.

Senator Fergal Quinn introduced the Construction Contracts Bill 2010 into Seanad Eireann on 19 May 2010. It is hoped that the Bill is passed into law by October 2010 at the latest. If passed the new Act's effect will be immediate and radical. It will protect Contractors, Subcontractors and parties to a construction contract, along the same lines as the Construction Act in the UK, by making dispute resolution faster within 28 days and thus cheaper.

In summary, the proposed Construction Bill is divided into 10 sections with Section 7 providing a party to a construction contract a statutory right to a withholding notice for monies not paid (in the absence of such a notice payments must be made in full), Section 8 providing the statutory right of adjudication for any dispute (any difference) by giving notice at any time to refer a dispute to adjudication and Section 9 providing a party with a statutory right to suspend performance for non payment of monies properly due until payment is made in full.

This new legislation will have a major impact on the Construction sector in Ireland and companies should be considering how they will be affected and what steps, such as amendments to their standard contracts, they should be taking.

With the prospect of this new legislation round the corner Robert Shawyer of Alway Associates' Republic of Ireland office is presenting a seminar on the Proposed Construction Bill and Adjudication on Thursday 29 July 2010 from 12.30pm to 2.30pm at the Red Cow Moran Hotel, Naas Road, Dublin. The seminar will provide an insight into what to expect and how we can best prepare for it, providing a unique insight into our experience of adjudication in other countries and advice on avoiding the potential pitfalls.

For more information on the seminar or to confirm that you wish to attend please contact **Maria Daly** by telephone **Dublin 01 669 4772** or by email maria.daly@alway-associates.ie or **Shane Nash** by telephone **Galway 09 177 1578** or by email shane.nash@alway-associates.ie

"Reasonable Endeavours" Doesn't Mean Party Must Sacrifice to Commercial Interests

CPC Group Ltd. v Qatari Diar Real Estate Investment Company; 25 June 2010 - [2010] EWHC 1535 (Ch)

In a case which grabbed headlines because of the involvement of the Prince of Wales, the court ruled that a contractual obligation to use "all reasonable endeavours" did not always require a party to sacrifice its own commercial interests. The case concerned the redevelopment of the former Chelsea Barracks site in London. The site had been earmarked for a mixed development of housing and other facilities. However, the chairman of the development company, His Excellency Sheikh Hamad Bin Jassim Bin Jabr Al-Thani withdrew the planning application after the Prince of Wales wrote to him expressing dismay at the designs prepared by Rogers Stirk Harbour + Partners. The court concluded that such a reasonable endeavours clause should be read as to "use all reasonable but commercially prudent" endeavours. In the case at issue, however, the obligation was even clearer since the clause itself had added commercially prudent" to the phrase. The court rejected that there had been breaches of good faith or repudiatory breaches by the parties.

Mistake in Tender

Traditional Structures Ltd. v H. W. Construction Ltd., [2010] EWHC 1530 (TCC)

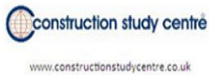
The Technology and Construction Court has rectified a contract where a subcontractor mistakenly submitted a tender for structural steelwork and cladding works which omitted a sum for the cladding from its quotation. The Court found that any reasonable reader of the quotation would have realised that an amount for the cladding works was missing, and had recklessly failed to clarify the quotation with the subcontractor. The main contractor had had actual knowledge of the mistake, particularly since it had obtained quotations from other subcontractors and had been aware of the general level of prices

being quoted. The subcontractor was entitled to a reasonable sum for the works. The absence of an express term as to the price for the cladding works was not fatal to the conclusion of the contract in the present case since the provisions of section 15 of the Supply of Goods and Services Act 1982 came into play.

Report Advocates the Use of Mediation in Planning

A report commissioned jointly by the National Planning Forum and the Planning Inspectorate says that mediation could play an important role in resolving planning disputes. The report concludes that mediation is a cost effective way of resolving disputes. The report was commissioned as a response to the 2008 Killian Petty Review which urged investigation into the use of alternative dispute resolution at all stages of the planning process.





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South East

Time-out for the hour glass

Lawyers and other professionals have long enjoyed the enviable operation of hourly rates, but clients in today's market are understandably keen on lump sums.

Under the Civil Procedure Rules solicitors are obliged to issue a costs estimate to the court upon allocation of a claim. The reality of course is that it is sometimes impossible to determine how much time is required to resolve a dispute from start to finish.

In *Leigh v Michelin Tyre plc [2003]* the Court of Appeal held that if an estimate is given but it turns out to be inaccurate, then the difference between the estimate and the actual costs may, in the absence of a satisfactory explanation, be prima facie evidence that the costs are unreasonable.

Adjudication is a different beast altogether though: it is an alternative to Court, and as such, is far more flexible. It is possible to compartmentalise Adjudication into the likely stages including the Notice, Jurisdictional Challenges, Referral, Response, Meeting, Reply, Rejoinder and Surrejoinder.

Lump sum prices can then be quoted for each stage, and whilst a client may not be guaranteed time for money, they will have the peace of mind that the hour glass is out of bounds, on this occasion anyway.

For more information please contact **Richard Silver** or **Ryland Ash** by telephone **01992 576440** or email on london@alway-associates.co.uk

Construction Study Centre

CDM training specifically for Designers

The latest Construction (Design and Management) 2007 regulations have been in place since 2007 so it may seem surprising that many of those involved in construction projects still do not fully appreciate their responsibilities under this Act. CSC has been providing training on the CDM regulations with a 1 day "Awareness" course and a 3 day course to allow people to become CDM Co-ordinators under the new regulations.

Whilst this delivered much of what the sector needed we have recently developed a new 1 day course specifically for "Designers" under the act. If you design or specify building work then under the act you are a "Designer" and will be recognised as having a responsibility to design for the safety and health for those that build, use, maintain and demolish.

This new course covers the requirements of the CDM Regulations from the Designer's perspective giving you the tools and understanding required. Feedback from a recent course for a Wales based Architects practice included:

- "I always thought this was an area I needed training in and now feel more confident in the subject. The course has highlighted areas I need to focus on."
- "It gives a very clear brief of the subject and is very informative."
- "Exceeded expectations – a lot of ground covered"
- "Met expectations and also was an enjoyable and interesting session – lots to think about"
- "A good overview, as well as being specifically for designers"

CSC will be running public courses for designers in the autumn and can also provide these courses delivered "in-house" at your offices to your teams.

To discuss what courses we can offer and how much they cost, please call and call **0845 3133 414** and ask for **Sarah Timms** or email sarah@constructionstudycentre.co.uk

Midlands

Collateral Warranties and Loss and expense

Last month we discussed the increasing trend to make onerous amendments to the terms and conditions of contracts. This trend is increasingly being reflected in collateral warranties, the incidence of which appears to be on the up. Many warranties are now requiring that not only does the contracting party provide the undertaking to perform its duties in accordance with the Contract and recognize that the beneficiary is relying on that warranty but are also requiring security of one form or another to form part of that warranty. The more common requirements that are now appearing include the incorporation of a parent company guarantee within the warranty creating a contractual link and a promise between the beneficiary and the contracting party's parent company and also the requirement for the contracting party to provide security to the beneficiary by the means of some form of bond akin to a performance bond. Whether such requirements are included in the documents provided at tender needs to be checked by contractors and subcontractors as the acceptance of a tender may create a contractual obligation for them to give something that they did not appreciate.

How damaging can the failure to submit a timely application for recovery of loss and expense be and can it ultimately prevent entitlement? Well, in a very recent judgement in the case of *WW Gear Construction Limited v McGee Group Limited [2010]* some guidance is provided where it was held that the contractors entitlement to pursue such losses under the Contract would be compromised when failing to comply with the timing and application of the notice provisions as set out in the amended JCT contract. To read more click here <http://www.alway-associates.co.uk/legal-update/article.asp?id=266>

For more information please contact **Jaz Bilkhu** or **Michael Rowlinson** by telephone **0121 702 1980** or email on jaz.bilkhu@alway-associates.co.uk or michael.rowlinson@alway-associates.co.uk

Northern Ireland

When Things aren't what they seem

Things aren't always what they seem. We have all done it – worked on the assumption that things are the same as they have always been. This is the same with Standard Forms of Construction Contract. We contract work under a Standard Form of Contract and assume that it is exactly the same as the Standard Form of Contract. However, this is not always the case.

Very often Standard Forms of Contract are heavily amended. The effect of these amendments can effectively change the Standard Form into something that is unrecognisable, with the liability for risk passed from one Party to another.

For example, a Standard Form of Contract may entitle a Contractor to additional payment and time for a certain event. However, an amendment to the Contract may remove that entitlement to additional payment or time for that particular event. This effectively passes the risk for that event from the Employer to the Contractor. If the Contractor is aware that that is the case then he can make allowances for it. The difficulty arises when the Contractor is not aware of it, has not allowed for it and has no means of recovering any additional payment or time when that event occurs.

Amendments or modifications to a Standard Contract should always be treated with caution. At Alway Associates we can advise on the risks involved with any Contract and provide assistance to ensure that your in-house procedures meet the requirements of any contract whether amended or not.

For more information please contact **Ruth Farrell** by telephone **028 9044 7180** or by email ruth.farrell@alway-associates.co.uk

Republic of Ireland

Arbitration Act 2010

The new Republic of Ireland Arbitration Act 2010 will come into effect 8 June 2010 and the previous Arbitration Acts of 1954, 1980 and 1998 will be repealed. The new Act essentially adopts the UNCITRAL Model Law into domestic arbitrations where previously it applied only to international arbitrations thus allowing Ireland to be marketed more effectively as a centre for international arbitrations. The 2010 Act thus applies to both domestic and international disputes.

Further news on the ADR front is that Tom Parlon (CIF Director General), Senator Fergal Quinn and Pat Kenny (radio presenter) were discussing in the media the prospect of adjudication similar to that used across the water in the UK under its Construction Act for construction disputes in Ireland. Senator Fergal Quinn has drafted a Bill to protect sub-contractors along the same lines as the Construction Act to ensure that in future subcontractors will be able to use a more expeditious and thus more economic dispute resolution means to go after monies that they are entitled to be paid.

Alway Associates has vast experience both in Arbitration and in Adjudication under the UK Construction Act and all methods of ADR in the Republic of Ireland, the UK and internationally. However, we always endeavor to exhaust all means of negotiated settlement before proceeding along the more formal resolution routes.

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. Further useful information on forthcoming events and articles can be found at www.alway-associates.ie. For more information please contact **Maria Daly** Tel.: **Dublin 01 669 4772**, email: maria.daly@alway-associates.ie or **Shane Nash** Tel.: **Galway 09 177 1578**, email shane.nash@alway-associates.ie

Brunswick

Management of Target Cost Contracts

Brunswick recently held a very successful seminar on the Principles and Effective Management of Target Cost Contracts at the offices of the Chartered Institute of Arbitrators. The free breakfast seminar attracted over 75 senior representatives from construction and infrastructure companies. Target cost contracts are a particular strength of the business which has wide experience of NEC3/ECC; ICE and IChemE target cost arrangements. If you would like to know more or would like a copy of the seminar slides please contact Kevin McKee at Kevin.mckee@brunswickis.co.uk (Tel.: 01295 226330).

Also in the month, Brunswick has been appointed as the Employer's Agent/Project Manager on another Medical Centre development following the successful completion of the Stubley Medical Centre in Derbyshire (see <http://www.brunswickis.co.uk/case-studies.asp>). The appointment is from inception of the project with the Employer not yet having completed the purchased the site or decided the final layout of the building. Nigel Clayton from our Sheffield office has developed considerable expertise in project management of Medical Centres and can be contacted at Nigel.clayton@brunswickis.co.uk (Tel. 01142 180608).

We have also been commissioned to provide commercial management services to a major contractor who is currently submitting proposals to a number of local authorities to develop major waste to energy plants in the UK.

The current outlook for infrastructure projects may be uncertain in view of the governments focus on public spending cuts but it is encouraging to see that through their expertise, commitment to building client relationships and provision of high quality services, Brunswick continue to be awarded new commissions.

Wales & South West

It's Not Cricket!

With the recent Wimbledon tennis tournament, it's a reminder that many construction disputes often deteriorate into a tit-for-tat exchange of allegations and denials resembling a particularly long and expensive tennis match. On many occasions our involvement in the match comes after the first few games have been played, and sometimes as late as match point.

At that stage, the Parties have already expended considerable amounts of time and money, become entrenched in their positions and often lost sight of the true matters in dispute. For that reason, we always advise that a claim should be set out clearly and concisely from the start; the Ministry of Justice produces a Pre Action Protocol for Construction and Engineering Disputes which aims to encourage the exchange of early and full information about the claim, to avoid litigation, and to support the efficient management of proceedings if litigation can be avoided.

Although successful in representing our Clients in Adjudication and Arbitration proceedings, we always consider that a last resort and many of the cases will be settled without recourse to those proceedings. The majority of the cases that settle are those where we become involved before the first serve of the match so that we are able to provide a relevant and realistic risk assessment to our clients, and properly manage the claim through to completion.

It's the difference between being a Henman or a Federer.

For further information please contact **Steven Evans** in Cardiff on **029 2046 4612** or email steven.evans@alway-associates.co.uk.

North

Typographical Errors Not Sufficient To Render Condition Precedent Provision Void.

It is sometimes said and argued that conditions precedent which have the effect of otherwise excluding what would otherwise be perfectly valid claims or entitlements are to be construed strictly

In *WW Gear Construction Ltd v McGee Group Ltd [2010] EWHC 1460 (21 June 2010)*, the Technology and Construction Court (TCC) was tasked with deciding the construction of a loss and expense clause in a JCT Trade Contract (as amended) which was claimed to be a condition precedent. The Employer sought a final determination from the Court as to the true meaning and effect of the clause which provided that a timely and detailed application would be a condition precedent to entitlement under that clause.

The issue that was central to the argument was that the clause contained drafting and typographical errors in that it referred to the wrong clause. That is, it did not precisely refer to the clause prescribing the time period for submission of a written notice of loss of expense by the Contractor.

The Court decided it was obvious that there is no specific entitlement under the wrong referenced clause. The drafting of the earlier parts of the loss and expense provision was sufficient in itself to establish the submission of a timely application as a condition precedent to recovery of loss or expense. The drafter had made an obvious mistake and, simply as a matter of construction, what the Parties clearly intended was to refer to that part of the overall clause which actually gives rise to an entitlement. While this seems to be another case where the Courts will support condition precedent clauses (even those with typing errors), there may be some remedies still available to Contractors that have not complied with the clause.

For more information and help on this area, please contact **Scott Milner** on **0114 2180668** or email scott.milner@alway-associates.co.uk.



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Legal News

Drive with caution

Up to one third of all road accidents are work related. Driving as part of work falls under Health and Safety Legislation and as such Employers have to ensure that driving risks are effectively managed. This applies to all industries including the construction industry where driving is a regular part of the job.

Under the Health and Safety at Work etc Act 1974, Employers have a duty to ensure as far as reasonably practical the health and safety of all Employees whilst at work and that others, i.e. Members of the public, are not out at risk by such driving activities. This means that Employers should carry out appropriate risk assessments and have applicable work policies all of which have to be regularly reviewed and updated if necessary. This applies to all Employers and to those who are self-employed but it does not cover commuting to and from one's place of work. The HSE suggest that such policies cover management, journey organisation, driver training and vehicle maintenance.

Recently the Health Protection Agency published a study which found that people who drive regularly are more likely to be at risk from legionnaire's disease. This is particularly so for "professional" drivers. Apparently the legionella bacterium is found in one in five cars which use water rather than screen wash to clean windscreens. As part of an Employer's health and safety risk assessment, all Employers need to be aware of this particular danger and to take steps to ensure that nothing nasty lurks under the bonnet in order to avoid a personal injury claim.

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 on **0845 345 1244** or by email at **sas@shemmingsllp.co.uk**

Group News

Chartered Institution of Civil Engineering Surveyors – Contract and Dispute Resolution Panel

The Chartered Institution of Civil Engineering Surveyors has appointed Alway Associates' Director, Michael Rowlinson, as Chairman of its Contracts and Dispute Resolution Panel. Michael, who has been a member of the Panel since 2005, will serve a three year term. The Panel provides advice and guidance to the Institution's members through various medias. Michael has written several articles for the Institution's Journal, *Civil Engineering Surveyor*, over the past few years and will be contributing more in the future as well as leading the development of other means of communicating with the membership. This role also means that Michael will serve as a co-opted member of the Institution's Commercial Management Practices Committee, which is the Panel's parent committee within the Institution's structure. Our congratulations go to Michael for taking on this prestigious role.

Helpline

Don't forget, 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:

UK: 0845 838 2759 / Republic of Ireland 1800 28 30 55

Alternatively you can click on the link below to send your question by email: 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.

Construct Safe

The HSE Plan of Work for Construction 2010/2011

The Construction Division of the HSE has produced a Plan of Work for 2010/2011 to reaffirm their commitment to improve health and safety in construction. The plan makes it clear that it is designed to improve health and safety performance of the construction industry, build on work carried out previously and continue the mission to deliver sustainable improvement in the industry's health and safety performance.

The main operational activities will target asbestos removal licence holders, small sites, refurbishment, homebuild and major projects. During any site visits generic issues will be considered associated with provision of welfare facilities, site transport, work at height, asbestos risks and good order.

As well as considering the generic issues the Plan of Work indicates that areas associated with leadership, CDM Clients and CDM Co-ordinators including Local Authorities, contractor compliance, temporary works, fire, roofwork, lifting, respiratory risks, manual handling and worker involvement will also be tackled.

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

Alway Silver Group Celebrates 20 Years of Business

On the 26th June we celebrated our 20th anniversary with a dinner and party at Wokefield Park near Reading. Just over 100 members of staff and guests came along to help us celebrate this significant milestone and a great night was had by all.

Back in June 1990, Lorne Alway founded Alway Associates to provide contract and commercial advice to our Clients in the construction and allied industries. The business has grown over the years to where we now have ten offices supporting our Clients around the UK, the Republic of Ireland and beyond.

In fact in 2009 the Alway Group was recognised in the Building survey of the top 250 consultants as the 18th fastest growing consultancy. We now consist of 3 main operating companies Alway Associates, Brunswick^{IS} and Construction Study Centre, with 2 more businesses Alway IT (IT consultancy) and Construct Safe Ltd (Health & Safety consultancy) being developed at the moment.

However we never forget that our success can only be thanks to our Clients' satisfaction with the services we offer. Central to our work ethos is the belief that our consultants and speakers are able to combine extensive practical experience of their sectors with a range of professional qualifications. This gives us an authoritative knowledge of our subject areas enabling us to offer a unique and beneficial blend of services to our Clients based on the following principles:

- We always seek to resolve Clients' problems as efficiently and cost effectively as possible.
- We deal with Clients on a personal and individual basis so that they know that we will provide them with excellent pro-active advice and at a very early stage.
- When our Clients contact us they will know who will be dealing with their instructions and that they can rely upon us as a part of their team.
- We ensure that deadlines are met, problems dealt with expeditiously and calls are returned promptly.

We are conscious of the need to continually provide outstanding service so that Clients return to us and our business continues to grow.

So as we head into our 21st year of existence we see a positive future where we will continue to build our reputation based upon the provision of high quality, reasonably priced, added value services delivered by staff who can speak the Client's language.

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