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THE PREVENTION PRINCIPLE IN AUSTRALIA

In *Gold City Developments Pty. Ltd. v Portpride Pty. Ltd.*, [2010] WASC 148, Gold City appealed to the Supreme Court of Western Australia, arguing that the Arbitrator in its dispute with Portpride had erred in finding that Gold City, as employer, had been responsible for some of the delays on the project and had granted the contractor, Portpride, an extension of time, even though Portpride had not notified or claimed any such extensions. The Supreme Court found that there had been no manifest error of law on the Arbitrator's part. He had been entitled to construe the contract as he had. The burden had been on Gold City to show that there was no evidence to show that none of its acts or omissions had caused any delay. From the award, it was clear that the Arbitrator had had evidence of causation.

Whilst the contractor had been under an obligation to give notice to Gold City, breach of it did not lead to the consequences which Gold City had argued before the arbitrator on the facts of the case.

GOOD HEAVENS

In September 2006, three teenagers went into the medieval parish church of St. Mary and St. Nicholas, Spalding which was unlocked and unattended and discharged two fire extinguishers which caused significant damage. The cleaning-up operation cost £240,000 and was paid for by the church's insurers, Ecclesiastical Insurance. Using their right of subrogation, the insurers brought a claim in the church's name against Chubb Fire Ltd. which had supplied the extinguishers, alleging that it owed a duty of care to warn the church that any discharge was likely to cause a mess. The church maintained that Chubb had negligently failed to issue such a warning, that the discharge of the extinguishers by the vandals, the consequent damage, and the need to clear it up had all been foreseeable. The church accepted that any potential claim it might have in contract against Chubb was statute-barred, and therefore brought a claim in tort, arguing that it was entitled to recover the cost of cleaning up the mess and making the required repairs. The judge in the Nottingham County Court awarded the church £240,000, and Chubb appealed.

The Court of Appeal found that the evidence did not support Chubb's contention that it had warned the church about the potential mess from the extinguisher. Whilst Chubb might not have foreseen the extent of the damage which could be caused by a discharge from the extinguisher, it knew that the discharge from a dry powder extinguisher could cause a mess, and if it were extensive that the cleaning-up costs could be significant.

However, the burden was on the church to prove that, on the balance of probabilities, it would have definitely rejected the extinguisher had Chubb given a warning about it. The judge had failed to take into account evidence given by Canon Barker that further professional advice would have been sought if the warning had been given; nor had the judge dealt with witness evidence that the ultimate priority had been to install an extinguisher that was the best for fighting fires in the church. If he had done so, the evidence would have led him to the conclusion that the extinguisher would have been installed in any event because it was the safest and most cost-effective solution where electrical equipment and large amounts of Class A material were present.

With the rationale for the doctrine of "new intervening act" in mind, the court concluded that it was unfair to hold Chubb liable for the independent acts of the vandals. The attack occurred seven years after Chubb's breach of duty. Whilst malicious discharge of the extinguisher had been foreseeable in 1999, no one thought then that there was any degree of likelihood that the combination of events which did occur would occur. The vandals' intervening conduct rendered Chubb's original breach of duty as part of the history of events, and Chubb was not liable for it.

Chubb Fire Ltd. v The Vicar of Spalding and The Churchwardens and Church Council of the Church of St. Mary and St. Nicholas, Spalding, [2010] EWCA Civ 981

SCOTTISH SUITE OF PPC CONTRACTS TO BE PUBLISHED

The Association of Consulting Engineers has announced that it is to publish a suite of Scottish versions of its PPC, SPC and TPC contracts in December 2010. The Standard forms of Project Partnering contracts have proved popular and are used by many local authorities and housing associations. There are also going to be two new additions to the PPC family: STPC2005, the ACA Standard Form of Specialist Contract for Term Partnering and the SPC2000 Short Form - ACA Standard Short Form of Specialist Contract for Project Partnering. The ACA has also just published a revised 2010 edition of its SFA/010 ACA Standard Form of Building Contract for the Appointment of an Architect, which was originally published in 2008 as an alternative to the RIBA's forms.

JCT ISSUES REVISED PROJECT BANK ACCOUNT DOCUMENTATION (PBA)

This document contains the three relevant parts, i.e. Project Bank Account Agreement, Additional Party Deed and the Enabling Provisions, to enable a project bank account to be set up and operated.

JCT published a set of proposed PBA documentation as a consultation paper in 2009. The 2010 edition reflects comments received from the consultation and a full report is annexed. The PBA costs £12.00 plus VAT.



London & South East

THE NEW CONSTRUCTION ACT- STOP PRESS

In November of last year after a lengthy consultation, the Local Democracy, Economic Development and Construction Act 2009 was passed, but the part relating to Construction Contracts is still not yet in force. The new Act's key proposals are first to extend its scope to contracts that are oral or partly oral (the existing law says that in order for the statutory rules on adjudication and payment to apply, the Construction Contract must be an "agreement in writing") and second, to bring in a new payment notice regime (giving both payer and payee the right to issue payment notices). Before the new Act can come into force, a new Scheme for Construction Contracts has to be finalised. The Construction Sector Unit of the Department for Business, Innovation & Skills is at present analysing responses received to consultation on the Scheme, which ended on 18 June 2010. An analysis report of the responses is to be published this Autumn. Current indications are that the Act is unlikely to be brought into force until Spring 2011. Once in force, this will mean another round of amendments to Standard Forms of Construction Contract and bespoke conditions will need revision too. Developers will also wish to review development agreements and associated documentation. It would be advisable to prepare for the new Act sooner rather than later because it will apply to all qualifying construction contracts (as defined by the Act) entered into after it has been brought into force. For more information please contact **Nikola Evans** by telephone **01992 576440** or by email **london@alway-associates.co.uk**

Midlands

COLLATERAL WARRANTIES AGAIN

Last month we talked about onerous conditions in Collateral Warranties. Since then the issue of assignment and step in rights in such Warranties has become an issue for a number of Clients. Often these matters are coming up in relation to the same project, where one of the Beneficiaries' assigns its rights under the warranty to a third party and at about the same time the Contractor becomes insolvent. This position results in two separate issues arising and to be considered. Despite what some people think the two are not linked. Most Warranties contain a provision whereby the Beneficiary can assign its rights on two occasions without requiring the consent of the Subcontractor. When a Contractor becomes insolvent those Subcontractors who have given warranties should inspect the terms and where the beneficiary has the right to 'step in', i.e. take over as the Subcontractor's 'Employer', they should issue the necessary notice to the Beneficiary. The advantage for the Subcontractor here is that if the beneficiary elects to step in it preserves the Subcontractor's right to be paid and sometimes gives them the right to be paid for work done previously.

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

North

CONCURRENT DELAY – FINALLY A DEFINITION AND INTERPRETATION OF JCT CONTRACT EOT PROVISION?

The recent decision of the Inner House of the Court of Session in Scotland in the case of **City Inn v Shepherd Construction, [2010] CSIH 68 CA101/00**, has provided further thinking on the issue of 'concurrent delay'. Generally, concurrency is described as delay caused by the Contractor (culpable delay) occurring at the same time as a delay caused by the Employer which both cause delay to completion.

In **City Inn [2010]**, Lord Osborne set out five propositions that a decision maker should consider in deciding an extension of time. On currency he favoured a broad approach whereby two or more events "*possessed a causative influence upon some subsequent event, even though they did not overlap in time*". According to Lord Calloway, concurrency is not an issue under a JCT Contract as it requires the architect to do three things: (i) decide on whether a Relevant Event had occurred; (ii) decide on whether that Relevant Event had caused or would cause a delay to the Completion Date; and (iii) to calculate an appropriate EOT, acting in a fair and reasonable manner. If contract and extension of time claims/assessment were so simple!

We will be holding a **complimentary breakfast seminar on delay analysis in Leeds and Sheffield**. Please contact **Scott Milner** on **014 2180668** or email **scott.milner@alway-associates.co.uk**.

North West

THE LIFE CYCLE OF THE CONTRACT

Over the next few months, the Warrington branch will be presenting a series of free Breakfast Seminars tracing the life cycle of a contract from its inception to completion. This first Briefing will address the Formation of the Contract, covering letters of intent, the battle of the forms and incorporation of terms. Reference will be made to the major forms of contract: JCT, NEC 3, the ICE forms, PPC and MF/1

The topics of future Seminars will be:

Briefing 2 Contract Administration, site progress, notices, records;

Briefing 3 Changes and Variations, practice and procedures, valuation;

Briefing 4 Claims unravelled including a review of the mysteries of delay analysis;

Briefing 5 Final account, how to get paid;

Briefing 6 Dispute resolution, avoiding and managing disputes, introduction to adjudication.

All the Seminars will be held at the Ramada Encore at Birchwood near Warrington.

To book your place, please e-mail **ann.glacki@alway-associates.co.uk** or telephone **01925 642198**.

International

CHINA LEADING GLOBAL RECOVERY

A recent report by Oxford Economics says that by 2018 China will be the largest construction market in the world. By 2020, it is expected to be worth US\$ 2.5 trillion representing 19.1% of total global output. I think I know why. It was the summer of 2008, two weeks before the Olympics were due to commence in China. Gulping lungs of smog astride my bicycle, I battled my way through the bustling, ancient streets of Beijing in search of the landmark "bird's nest" stadium, when it appeared in the distance. Then I hit a fence. Beyond me, restricted from access, was what can only be described as baron waste land, still in the early stages construction. No grass. No paths. No pavement. No car parks. No access! Two weeks? Impossible, I thought.... Two weeks later, from my couch in London, I witness to my amazement the most spectacular Olympic ceremony ever. From the dust, in two weeks, an inner-city oasis had sprung into life. That's the way to do it, I thought. Ok so it's a communist state and the rights of workers are less than paramount. But surely we can learn a thing or two from a culture that has been building things for 5000 years. Tactics like 24 hour floodlit sites, total access restriction, greater resources on standby and above all, disciplined management and incentive programmes for contractors, could all help improve efficiency. In an uncertain world, one thing is for sure: China is leading the way to recovery, two bricks at a time. - *Ryland Ash*

For more details on our International services please contact **Richard Silver** or **Ryland Ash** on **+44 1992 576440** or email **london@alway-associates.co.uk**

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Wales & South West

NEC- DEFECTS CORRECTION

With September upon us, many people's thoughts stray to the start of another academic year. Schools, of course, due to the need for continuity of their teaching provision to pupils, find any relocation disruptive, and for this reason such relocations are ordinarily targeted at times between terms, or at half terms.

What then for a Project Manager operating under NEC3, faced with the progress of the works to a new School falling behind programme, so that completion planned to enable such a move at a logical time will be late? He has a choice of disappointing the School population, who by this time will have whipped themselves into a state of excitement, or accepting takeover of a scheme with some works still remaining to complete. The latter choice will give rise to a situation where defects are outstanding and will need to be corrected, although the School will have become occupied by the building users. If the necessary arrangements can be made, and the items cleared, well and good.

If, however, a later inspection of the site after the lapse of the *defects correction period* confirms that any advised defects notified in accordance with clause 42.2 of the Contract have not been corrected, and the Contractor has been allowed use of and access to the applicable parts of the works to enable correction of the defects, then it will be appropriate for the Project Manager to enact the operation of clause 45.1 of the Contract and write to the Contractor in suitable terms.

This will then permit the necessary clause 45.1 assessments to be compiled and made available for incorporation in the next Project Manager assessment of payment, and identify the assessed cost of having the work undertaken by others for reimbursement by the Contractor, either by reducing the overall amount of the assessment or as a debt. The assessment would need to include for all supervisory costs, including Project Management, Supervision and CDM Coordination, by the appropriate parties.

The Works Information is then treated as having been changed to accept the uncorrected defects, and the Contractor becomes liable to pay the amounts, which are advised. This course of action, although unsavoury, recognises the Contractor's breach of clauses 27.3 and 43.1 of the contract to undertake the correction of those items within the identified contractual *defect correction period* (as per clause 43.2), and prevents the situation of uncorrected defects persisting indefinitely at great inconvenience.

The situation is quite different, of course, in the situation where the Employer cannot give access to the Contractor, (clause 45.2), and in this case the "cost to the Contractor" is the amount of his liability to pay determined by the Project Manager's assessment.

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

Northern Ireland

CAN YOU BE FORCED TO HONOUR YOUR CONTRACT? – MAYBE NOT

The continuing dispute over the sale of new property has produced an interesting decision from the Northern Ireland High Court. The Developer of the Titanic Quarter was seeking Specific Performance of an agreement for the sale of one of its newly built apartments. Specific Performance effectively means that the Court would order the Purchaser to complete on the sale.

The problem arose because the Agreement was made in 2007 when things were very different in the property market. The Purchaser's circumstances have changed since then – he has lost his job and had to sell his existing home at a reduced price. The Purchaser failed to complete the sale and Titanic asked the Court to order the Purchaser to complete. In his defence the Purchaser argued that this was impossible as he lacked the funds to go through with the sale. Interestingly, Mr Justice Deeney agreed saying that the Purchaser's lack of funds was a ground to refuse the order for Specific Performance. This not only will have repercussions on sale of property but is a potential 'get out of jail free' card for a host of contractual situations. Don't get too excited – the Purchaser may still be liable to Titanic and the matter will proceed to a full trial on the issue of Damages.

For more information please contact **Ruth Farrell** by telephone **02890 447180** or by email ruth.farrell@alway-associates.co.uk.

Brunswick^{IS}

IN-HOUSE TRAINING AND PROJECT MANAGEMENT

Brunswick^{IS} have been selected to provide a continuing series of practical training seminars to a major blue chip company in the infrastructure sector. Brunswick's in depth knowledge of rail related processes as well as their understanding of forms of contract combined with experience of project and commercial matters in the rail sector persuaded the Employer that Brunswick were the team to deliver what is expected to be over 50 seminars.

Ongoing practical experience is not restricted to Rail. Current project management works continue with new build medical centres as well as enquiries for assistance at the early stages of the project life cycle, feasibility, and this is encouraging in what are difficult times. With the upturn in workload it is vital to ensure the Project Management role is adding to the project's success. One commentator of Project Management recently wrote

"Project Management is process driven, or task focused, methods. These [methods] are designed for suitably trained people to follow and get consistent results. Followed blindly they add paperwork and costs without increasing success."

This may well strike a chord with readers! At Brunswick^{IS} our project managers are trained and qualified in more than 'just ' project management process and continually seek to enhance a projects success using skill and expertise derived from other factors as well as project management training.

For further information call **Nigel Clayton** in Sheffield on **01142 180608** or email nigel.clayton@brunswickis.co.uk

Construction Study Centre

NEW COURSES FOR THE AUTUMN 2010 TERM

We understand that a trained and qualified workforce contributing to your profit is the key to a successful business in this competitive environment. With this in mind the Construction Study Centre has put together a new schedule of courses for our **Autumn 2010** term which starts in September. Amongst the new courses, as requested by previous NEC course attendees, we have developed the **NEC ECC Advanced Users' Guide** to provide delegates with a working knowledge of the NEC forms, with a review of the Contract, at an advanced level. Also new, **'The Effective Management of Target Cost Contracts in the Infrastructure Sector'** which will be invaluable to those working for Employers, Main Contractors and Sub-Contractors in sectors such as rail, utilities, nuclear, power and process engineering. Back due to popular demand we also offer **'The Essential Guide to Property & Development law'**, aimed at an intermediate level for construction and property professionals to highlight the risks and salient issues involved in the stages of land acquisition and disposal, for both investment properties and major development sites. For our new programme, please see our website www.constructionstudycentre.co.uk which details all of our courses, or call us on **0845 3133 414** to discuss what we can offer you.

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Legal News

OUTSTANDING DEBTS & STATUTORY DEMANDS

The business news makes dreary reading at the moment. The economic outlook is as bad as the summer weather (although autumn is supposed to be warm and sunny). We are in for a "choppy recovery" according to the Bank of England. The good news is that the Construction Industry grew in output by 8.5%. However this uncertainty does not help companies trying to manage their cash-flow.

In this practice we have seen a rise in instructions to recover outstanding debt and one way to do this is to issue a statutory demand. The demands are very effective and can offer a prompt recovery. Statutory demands can only be used where the debt is undisputed and is over £750.00. It is a formal demand for payment within 21 days. If payment is not made then the debtor is deemed to be unable to pay its debt and is thus insolvent. This then allows the creditor to issue a winding up petition, if the debtor is a company or a bankruptcy petition if the debtor is an individual.

Another very effective but simple way to obtain payment is to send a "solicitor's" letter requesting payment. There's no harm in trying this step first!

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** at Silver Shemmings by telephone 0845 345 1244 or by email office@shemmingsllp.co.uk

Construct Safe

CONSTRUCTION OCCUPATIONAL HEALTH MANAGEMENT ESSENTIALS (COHME)

When dealing with hazards and risks in the Construction Industry safety is often the primary consideration. However, ill health is an area that is equally important but often ignored as the issues are not always immediately obvious or are less clear.

The HSE on their website have a section that tells you how you can manage occupational health risks and meet the requirements of the CDM Regulations 2007.

The common ill health problems in construction include back pain, skin problems, breathing problems, problems caused by noise and vibration and stress.

The information provided associated with COHME is set out for each duty holder under CDM 2007 and should assist all parties concerned with considering ill health issues.

The Construction Industry employing more than 2 million people has a high incidence of occupational ill health due to the nature of work carried out. Managing occupational health is not just about providing things like first aid and welfare it covers many other issues that Clients, Designers, Contractors, Principal Contractors and CDM Co-Ordinators should be aware of.

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

Forthcoming Seminars

FREE BREAKFAST SEMINARS - OCTOBER

- The Lifecycle of a Contract - 06/10 Warrington
- Design Obligations & Negligence Claims- 13/10 London

CSC PUBLIC COURSES – OCTOBER

- Working with CDM
- Becoming a CDM Coordinator (3days)
- CDM for Designers
- Property & Development Law
- Latest Building & Fire Regulations
- New Building Regs Part L and F in action
- Asbestos, Fire, Legionella – Contractors' and other H&S checks
- Structural Surveys – Identification & Repair of Structural Defects
- Dealing with Condensation, Damp & Rot
- Tackling Party, Boundary Wall and On-site Liability Problems
- Project Management Boot Camp
- "Plan & Specification" Building Projects
- Effective Management of Target Cost Contracts
- NEC Compensation Events
- Getting to grips with NEC3
- NEC3 ECC advanced users guide
- JCT 2010 Contracts
- Construction Contract Principles
- Design & Build using NEC and JCT Contracts
- Choosing the right contract for refurb, maintenance small works contracts
- Construction Delays, Damages & Claims
- Construction Disputes – Adjudication & Dispute Resolution
- Rules of Correspondence, forms, Negotiation & Admin

For full details including dates, locations and prices call 0845 3133 414 or visit www.constructionstudvcentre.co.uk

Group News

IT IS A HARD LIFE!

Lorne Alway has reluctantly agreed to go to Mauritius for a week and provide advice and training to Construction Industry professionals on construction contracts and dispute resolution. In all seriousness the Alway Silver Group are delighted that Construction Study Centre, in association with the AEA Training Centre in Mauritius, are providing advisory surgeries, training and workshops in both September and November 2010.

PROFILED

Alway Associates Director, Michael Rowlinson features in the 'Meet the Membership' section of the September 2010 issue of *Civil Engineering Surveyor*.

NEW ICES REP FOR CIC

ICES fellow Robert Shawyer has become the institution's new representative on the Construction Industry Council's Liability Panel. The panel, chaired by Frances Paterson MBE, is one of CIC's longest running committees and currently has 40 members. Its responsibilities include drafting contractual documents and issuing liability briefings to CIC's membership. Robert Shawyer was approached for the position as a member of the ICES Contracts and Dispute Resolution Panel.

** Free 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.

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