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In this edition:

Page 2

- Legal Check List
- BRRR!!
- Tender Loving Care
- Merry Christmas- Here's Your Present

Page 3

- Extension of time
- An Important Lesson to Learn
- Happy New Year
- CSC to Work Closely with ICS

Page 4

- Are you Protecting Your Data?
- The HSE and BCA
- Forthcoming Seminars and Group News



DON'T FORGET TO FILL ALL THE BITS IN

The Technology and Construction Court has ruled that an NEC contract did not contain an arbitration clause because part one of the subcontract data where the parties need to specify the tribunal had not been completed. There is no standard definition of "tribunal", and the subcontract did not "make provision for" arbitration. The parties make their own definition of "tribunal" when they complete Part One, which they had not done in the present case. The rest of the relevant part of the Data was predicated on a condition. The "tribunal" in the condition is only an arbitral tribunal if the parties have selected it as such. Consequently, the defendant subcontractor was not granted a stay of the proceedings brought against it.

Walter Llewellyn & Sons Ltd., Rok Building Ltd. v Excel Brickwork Ltd, [2010] EWHC 3415 (TCC)

NEW CONTRACT DOCUMENTS PUBLISHED

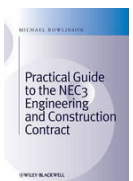
The Institution of Engineering Technology has published a new edition of its MF/contract, edition 5. The new Revision 5 incorporates changes to clauses 2, 27, 36, 40, 49, 51 and 52. In addition, there are amendments to the Performance Bond and Form of Defects Liability Demand. A new Parent Company Guarantee has been included. As well as this the Association of Consultant Architects has published a new "Guide to the Term Partnering Contract (TPC2000) and the STPC2005" If you are interested in these, they are both available from BLISS Books. <http://www.blissbooks.co.uk>

PAY UP FIRST

The Scottish Outer House has decided that if an adjudicator has made an award against one of the parties, there can be no recourse to the courts until that debt has been paid. This would apply even in cases of apparent bias on the adjudicator's part. Whilst this might be "rough justice", the parties would know where they stood and there would be no delay to the adjudication which might affect cash flow. The emphasis is on expedition of the process.

"A PRACTICAL GUIDE TO THE NEC3 ENGINEERING AND CONSTRUCTION CONTRACT"

Michael Rowlinson's forthcoming book will be available in April 2011. Further details and the ability to pre-order a copy can be found at <http://www.wiley.com/remtitle.cgi?isbn=9781444336887>. Michael completed the final check of the proofs over the Christmas holiday period and the book is now going through the final stages of production.



CORPORATE CHANGES DID NOT INVALIDATE ADVANCE PAYMENT GUARANTEE

The claimant argued that there had been a material variation to the principal contracts,

Meritz Fire and Marine Insurance argued that it was discharged from liability under Advance Payment Guarantees (APGs) given in respect of a number of shipbuilding contracts because the shipbuilding company had changed hands, and because the defendants, on whose behalf the APGs had been given had agreed with the shipbuilder to defer the delivery dates of the vessels, thereby increasing the period of the Meritz's exposure under the APGs. What was important in this context was whether the defendants had agreed to vary the shipbuilding contracts and, if they had, whether the claimant, the guarantor, affirmed the APGs with knowledge of such variation.

Because Meritz had not taken the opportunity it had to challenge the merger in the Korean courts, and so under Korean law was deemed to have agreed to it, it couldn't now argue that it had been discharged from liability. This was the case even though the APGs were subject to English law. The owners of the new company, to whom the contracts had been assigned, B were jointly and severally liable to perform the obligations of the builder under the shipbuilding contracts. On the evidence, the defendants had not agreed to a postponement of the delivery dates. At the best, their faxed letters were conditional offers of variation provided there was performance by the specified dates. There had been no contractual variation.

PROPERTY MISDESCRIPTIONS ACT - CONSULTATION

The Department for Business Innovation and Skills has today (10 January 2011) launched a consultation on the repeal of the Property Misdescriptions Act 1991.

The introduction of the Consumer Protection from Unfair Trading Regulations 2008 provides similar protection, and means that there is some duplication of legislation.

The consultation document considers how best to remove unnecessary regulation for property description whilst maintaining consumer protection. It also includes an impact assessment. Responses are invited by 5 April 2011.



London & South East

LEGAL CHECKLIST

When a dispute has arisen and a legal opinion required, it is sometimes difficult to unravel the paper trail – here are some tips on what to assemble to get the most out of your advice:

- The Contract/Order form and terms together with any documents included in the Contract, whether attached, or identified in the Contract as being incorporated.
- Are any contracts further up the contractual chain relevant? Is there an obligation to observe/perform contract terms in a head contract? If so, supply a copy.
- If there is no formal contract, all correspondence between the Parties concerned and, if applicable, short statements from key personnel.
- Any other agreements relating to the dispute, such as supplemental agreements, bonds/guarantees/insurance policies.
- All relevant correspondence (including emails) and meeting notes between the Parties and, if applicable, their Representatives.
- Copies of all Certificates issued in relation to the works (such as practical completion/making good/maintenance/final) and payment (interim/final).
- Applications for payment, invoices, valuations and Certificates.
- Any contractual notices (such as notices of payment/withholding).
- Requests for information/instructions.
- Any previous opinions/advice obtained.
- Expert reports.
- A short narrative of the dispute 'telling the story'.
- Where there are a large number of items in dispute (e.g. variations/defects) a schedule itemising those items with details as to liability (responsibility) and quantum (cost/value); this could form the basis for the preparation of a Scott Schedule for use in future proceedings.

The above list is not intended to be definitive, because each dispute is different, but it is hoped provides a starting point.

For more information please contact **Nikola Evans** by telephone **01992 576440** or by email nikola.evans@alway-associates.co.uk

Midlands

BRRR!!!!

The return of the snow in December has prompted Contractors and Sub-Contractors to check their contracts in respect of the right to an extension of time, and possibly additional payment, in respect of bad weather occurrences.

The extent of such entitlements, if any, will depend on the wording in the actual contract that applies for each project.

The JCT family of contracts uses the term 'exceptionally adverse weather conditions'. Other contracts use terms such as 'exceptionally inclement weather'.

The problem with both of these is that they are subjective, i.e. that they are open to interpretation and judgment rather than being measurable. So the view of what one person considers to be 'exceptional' (that being the key word in both examples) can easily differ from someone else's opinion of the same facts.

Both opinions are valid but a difference or dispute has been formed. The NEC family of contracts on the other hand uses a pre-determined set of weather data to compare with the actual that occurs and thereby provides an objective measure of the conditions to determine that an entitlement has arisen or not.

For more information on weather related and other delays please contact **Michael Rowlinson** on **01295 275075** or e-mail him at michael.rowlinson@alway-associates.co.uk.

North

TENDER LOVING CARE

Despite the current economic climate (or perhaps inactivity), invitations for tender do not seem to have taken a down turn. We cannot dismiss the fact that many developers and employers out there still have a wish list of future projects but funding is yet to be secured.

Those contractors tendering should however take a note of the matter between *BSkyB Limited & Another v HP Enterprise Services UK Limited & Others* (No.2), [2010] EWHC 862 (TCC). A planned CRM System was delayed and finally went live 5 years later. BSKyB claimed that EDS had made fraudulent and negligent misrepresentations in order to secure the CRM system project, and claimed nearly £700m damages. EDS had represented that they had carried out a proper analysis of the time required in order for the system to be launched, but those representations were false and had been made dishonestly. Before the letter of agreement had been signed, EDS had also represented that it had developed an achievable plan for the project. BSKyB was awarded damages for fraudulent misrepresentation.

So a reminder for you tenderers, give your tender some care by ensuring that your written and oral representations are made honestly and can be objectively shown to be correct. A court will award all of the damages to the injured party that flow from a misrepresentation, and those can be substantial.

For pre-contract advice and tender appraisal, contract drafting and dispute resolution please contact **Scott Milner** on **0114 2180668** email scott.milner@alway-associates.co.uk.

Scott is also a Solicitor with Silver Shemmings.

North West

MERRY CHRISTMAS - HERE'S YOUR PRESENT!

Just when our minds were turning to the holiday season I received a panic phone call from one of my clients; he had received an unexpected Christmas present from one of their sub-contractors and it was not the traditional bottle of whisky but a Notice of Adjudication. "This can't be right", he bemoaned: "It's an ambush we are on holiday for two weeks". I carefully explained that an important element of adjudication is that they can commence at any time and that the Construction Act when applied to the timetable does not respect weekends or the construction industry shutdown- apart from public holidays no exception is made. So my message was that just because people go on holiday it's tough luck. My client's suggestion to switch off the fax machine was not a robust solution! So what is the solution?

Adjudicators whilst sympathetic in instances of such perceived ambush are bound, if they accept the appointment, to the 28 day timetable imposed by the Construction Act but of course even Adjudicators like to have a break and may want, before accepting the appointment, to agree a timetable which discounts the holiday period-but don't count on it.

In the absence of a pragmatic approach you will have to get on with it and as with any other adjudication the secret is not to panic, prompt action and preparation in the knowledge that adjudication can be commenced at any time can help to avert a "working" holiday.

For further information, please contact **Peter Ormston** on **01925 642198** or e-mail peter.ormston@alway-associates.co.uk

Wales & South West

EXTENSIONS OF TIME DUE TO ADVERSE WEATHER

It was looking a lot like Christmas through most of December with the snow having South Wales in its icy grip and refusing to let go.

Whilst it may look picturesque, there is no escaping the disruption it causes to people and businesses, the construction industry being no exception.

In many cases, the disruption is effecting projects in two ways; either by preventing the work being carried out on site or by preventing the workforce getting to the site. This double whammy does nothing to help a construction industry struggling to emerge from a recession.

What it does mean is that the New Year brings many claims for extensions of time due to this adverse weather. However, the Contractor must be aware of the weather provisions in his particular contract. For example, the JCT and NEC deal with extensions of time for weather in completely different ways. In some cases, if the contract has been amended, the provisions for obtaining an extension of time for inclement weather have been removed entirely leaving the Contractor out in the cold.

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

Northern Ireland

AN IMPORTANT LESSON TO LEARN

A recent case in the High Court was that of Simms Construction Limited and G.R Homes Limited. These two Companies had a long established relationship with Simms having built some five housing developments for GR and also a new home for one of GR's Directors. Despite the large volume of work involved the Parties never committed to any form of written contract. As the Judge in the case commented "...the commercial relationship between them appears to have been, to say the least, fairly fluid."

Simms contested that the Parties had made agreements that there would be an annual uplift of 10% to the builder's rates, an increase of 10% to the rates for site developments works and a handling fee for 'white goods' and other fittings. In line with the commercial arrangement between the Parties none of this was recorded in writing. The Judge commented that to contract under such circumstances was "...likely to be a recipe for disaster ending in litigation."

The Judgment concluded that various agreements had been made between the Parties but that there was not sufficient evidence to support Simms position. This case highlights the importance of having a written contract and also recording any subsequent discussions or agreements in writing.

For more information please contact **Ruth Farrell** by telephone **028 9031 1272** or by email ruth.farrell@alway-associates.co.uk.

Republic of Ireland

"HAPPY NEW YEAR"

Christmas is over the snow has gone (at last) and the adverts are out to book your holiday.

So optimism is in the air. Indeed it is with optimism that we can look to the Public Sector Contracts.

At Alway Associates we spent most of last year providing in house, public and Chartered Institute of Building lectures, seminars and training courses on this suite of Contracts.

The old problems still arise such as when is the Contract actually formed; what is incorporated within the Letter of Acceptance and what version of the Contract is entered into? i.e. is it the Form current at the date of the issue of the Letter of Acceptance or the version current within the Contractor's tender which is incorporated within the Letter of Acceptance which itself is incorporated expressly?

This year we have again been asked to discuss the drafting of this Contract and how to manage it so watch this space in the coming months for announcements of future dates and venues to join in the discussion and learning process regarding this and other topics that we started last year.

From everyone in the Republic of Ireland offices we wish you all a healthy and wealthy New Year.

Robert Shawyer – robert.shawyer@alway-associates.ie

Brunswick^{IS}

In a month usually high in expectation we saw much of the Country at a standstill with snow in December. A recent report of the Construction Industry has brought little to raise our Christmas spirits KPMG's global construction survey shows that more than one in eight of UK construction firms were bidding on a break-even basis whilst others are reported as cutting prices by more than 10%. The report spokesperson said "Globally, around 5% of people are increasing prices, but in the UK everyone's reducing. The UK is clearly feeling the pain more, and this shows just what a really challenging time it is." The Construction Products Association also warned that construction was heading for a third dip, falling back into decline in 2011 and that the decline will continue into 2012.

On a more positive note it was pleasing to read that Mott MacDonald, in a team with Grimshaw and URS Corporation, has won an engineering contract for engineering design services for the development of the proposed high-speed rail line between Birmingham and Manchester. In terms of the UK infrastructure spend on Crossrail the Bam Nuttall, Ferroviario and Kier JV has been awarded two jobs, worth £550m in total, to both build the western tunnels and the access shafts to Bond Street and Tottenham Court Road stations. In addition Crossrail has named the winning bidders for the Eastern tunnels for Whitechapel and Liverpool Street Stations as being the JV of Irish contractor Sisk and Spanish builder Dragados, while a consortium of Balfour Beatty, Vinci and Morgan Sindall has been awarded the access shafts work which are due to start in 2012.

For more information please contact **Nigel Clayton** by telephone on **01142 180608** or by email nigel.clayton@brunswickis.co.uk.

Construction Study Centre

CSC to work closely with ICS

Lord Young in his report 'Common Sense, Common Safety' of October 15th has called for construction safety standards to be raised and a web based directory of accredited health and safety consultants to be established. There is a certain amount of uncertainty in the industry as to what makes a CDM Co-ordinator "qualified" to do the job. All too often we get calls from companies, or individuals, having taken on the role, asking what qualifications are required. The short answer to this is that there is currently no direct academic qualification as a CDM Co-ordinator, leading to a "ticket to practice". As with many H&S positions it is a matter of being able to **prove competency in the role**. The CDM 2007 Regulations place significant emphasis on ensuring competence at all levels.

The Institution of Construction Safety which provides a membership and accreditation scheme for CDM Co-ordinators has been discussing with the HSE issues around competency and competence assessment. Having audited the content of our three day 'Becoming a CDM Co-ordinator' course, and our speaker qualifications, the ICS approves this course. If interested in CDM or other training, please take a look at our website which details all of our courses www.constructionstudycentre.co.uk or call us on **0845 3133 414** to discuss.

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	Epping 01992 576440	Galway 091 771 578	Sheffield 01142 180668	Warrington 01925 642 198	

Legal News

ARE YOU PROTECTING YOUR DATA?

Data protection is very much in the news at the moment – Wikileaks is causing much consternation to a number of authorities by showing how easy it is to obtain secure data.

Protection of data is covered by the Data Protection Act 1998. The Act sets out how to use and protect personal and sensitive information held by commercial organisations, businesses and public authorities. The Act requires the information to be kept secure and that measures are in place to protect that information – security is paramount.

Recently several high profile breaches have been in the news – discs containing personal data relating to salaries going missing in the “post”; members of staff leaving laptops on trains or losing USB sticks containing sensitive information. None of this makes for happy reading and recently the Information Commissioner took action against 2 organisations for failure to keep data safe. As a result one local authority was fined £100,000 and another company £60,000.

As we are past Christmas and New Year break, now would be a good time to check that all of the data is secure and that you do not suffer your own “Wikileaks” in the New Year because of a failure to check that your data was secure.

Silver Shemmings is a firm that works closely with Alway Associates. For more information please contact **Sarah Shemmings** on **0845 345 1244** or by email **sas@shemmingsllp.co.uk**

Construct Safe

THE HSE & BCA (BUILDING CONTROL ALLIANCE) AGREEMENT

The Health and Safety Executive Construction Division (HSE) and the Building Control Alliance (BCA) recently signed an agreement that establishes they will work together in England and Wales to promote and encourage improved standards of health and safety in construction. The agreement relates specifically to Building Control Professionals who are anyone carrying out duties as Building Control Surveyors or Approved Inspectors.

The agreement considers that Building Control Professionals are in an excellent position to help promote improvements in health and safety for those working in the construction sector, particularly on small sites, which HSE Inspectors find most difficult to target. The scope of the agreement covers the provision of information on construction health and safety to various parties and the arrangements for handling concerns about health and safety standards on construction sites.

The arrangement covers the provision of information and arrangements for handling concerns about standards. It covers issues such as providing advice, reporting serious concerns, confidentiality, assistance to HSE, assistance to Building Control Professionals and structural safety.

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

Forthcoming Seminars

CSC PUBLIC COURSES

– FEBRUARY / MARCH

- Carrying out **Building Surveys & Inspections**
- A Practical Approach to **Sustainable Construction**
- **Property Related Risks** to Ignore at your Peril
- Working with **CDM 2007**
- Becoming a **CDM Co-ordinator** (3day)
- Working with the latest **Building Regulations**
- **Project Management** Bootcamp - 50 Things a PM needs to know
- Getting to Grips with **NEC3 Contracts** (including the **new Construction Act**)
- At the Cutting Edge of **JCT Contracts** (including the Construction Act)
- Every Project Managers Toolkit
- **Structural Surveys** – Identification and Repair of Structural Defects
- Negotiating the Planning Jungle
- **Effective Planned Maintenance** of Buildings
- Managing and Assessing **NEC Compensation Events**
- Working with **JCT Minor Works** contracts
- The ‘must know guide’ to **Construction Contract Principles**
- Successfully Managing **Construction Disputes & Adjudication**
- Effective Contract Management of **Design-Build Projects**
- Advanced Contractual Claims (2 Day)
- Making the Jump to NEC Contracts
- NEC ECC Advanced Users’ Guide

For full details including dates, locations and prices call **0845 3133 414** or visit

Group News

Ryland Ash – Associate Director

We are delighted to announce that Ryland Ash, working out of our Epping Office, has been promoted to Associate Director as of 1 January 2011. Ryland has worked very hard and effectively since joining the Practice in 2008 and has created a reputation for himself as a person and professional of very high standards. We thank Ryland for his commitment and we are sure he will continue to be a great success.

At long last!

Finally, even though most of us thought it had happened years ago, Mark Austin (Company Accountant) finally reached maturity when he was 40 on New Year’s Eve. Congratulations to Mark. For those who know Mark you will appreciate that in his 40 years he has done more talking than people twice his age! Happy Birthday!

New Arrival

Congratulations to Steven Evans (Associate Director at our Cardiff office) and his wife Lindy on the birth of their son Dylan Cenarth who was born on 14 December. We wish them all the very best.

** 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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