# Centra News

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Centra Consult LLP
Dispute resolution, claim preparation and delay analysis

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## CHAIRMAN'S INTRODUCTION

Time passes quickly and I am astonished that it is May already, it seems only a short time ago I sat down to write the last Newsletter. Some of you will recall that in my last introduction I had a bit of a dig at collaborative working, very tongue in cheek I might add but sufficient that I managed to elicit a response from Mr John Sturrock QC who is certainly the pre-eminent mediator in Scotland.

I have worked with John many times and he offered to put me straight on the matter of mediation and collaborative working so I am delighted to include John as our guest speaker for this edition of the Newsletter. As I mentioned, my comments were tongue in cheek as I am a great fan of mediation at the right time and truly collaborative working is what drives an effective society.

On a more positive note (for us as a business) disputes continue and we have had a very busy year so far with a whole variety of projects and training. I have just completed a short training course for a client and it reminded of some cold winter's days sitting in Woverhampton of all places, in the early 80's. (These days 'Barry' from 'Auf Wiedersehen Pet' always comes to mind whenever I think of Wolverhampton).

The only difference being I am the one delivering the training instead of the being on the receiving end. The surprising thing is how similar all of the issues are that came up. Perhaps the only real change being the prevalence of 'condition precedent' clauses, designed solely to catch the contractor out.

The old oracle that used to train me in Wolverhampton always said contracting was easy, all you had to do was what it said in the contract, no more, no less and don't attend meetings or you might agree to do something which you do not need to agree to and will not get paid for.

# CHAIRMAN'S INTRODUCTION CONTINUED ....

We used to say that was a very cynical view of the world but age and experience has taught me that cynical it may be but it remains as true today as it was nearly 40 years ago. Perhaps you should bear it in mind?

A short tale about the advice of 'experts' – I was in the offices of a firm of lawyers recently and they have just gone through a corporate rebranding with expert input at, no doubt, great expense. Nothing wrong with that you might say, keeps us all modern and up to date in this digital age. I am also a member of IAM (Institute of Advance Motorists) albeit Chairman of the local motorcycling group. The IAM have also just completed a corporate rebranding to update their image (apparently beards and driving gloves have now been banned – ok, no I just made that bit up). My point is this – IAM have moved from a red corporate colour to a pale blue as the experts advised that red is the sign of danger and warnings and is apparently off putting whereas pale blue is apparently warm, friendly and inviting.

The office I visited has moved from red to a deeper shade of red – experts – don't you just love them!

Our red logo was an entirely random choice and I do not see any immediate need to consult with experts at this time.

# GUESS SPEAKER - JOHN STURROCK

*"The one thing I'd do differently is that I'd contact you and have a proper conversation about this before it went off the rails completely. Nip it in the bud. The guys on the ground were too close to it. We stopped working on site, thinking that would bring you to the table. You then served notice of breach. We thought we had nowhere to go but to make a claim. We went off to the lawyers quickly and the thing then became contentious."*

Hindsight is a great thing. As a mediator, on nearly every occasion I sit with the principals - the decision-making clients - in the early part of the mediation day, I hear a conversation which sounds like this. Fortunately, in mediation, we can build on these words, and use this recognition that there is something to be learned by acknowledging what has gone wrong, to serve as a platform for meaningful negotiations.

The water that has flowed under the bridge cannot be redirected but those who are now meeting on the bridge can survey both that which is past and that which is still to come. From that vantage point, it is possible to divert the resources, the management time, the opportunity costs, the thinking time, the budgets and the risks which are streaming towards the parties if they persist in an adversarial approach.

Modern problem-solving is moving away from the contentious, position-taking tendency which has characterised some of the construction industry's approach to disputes, both emerging and deep-seated.

It is possible to be rigorous and direct without getting stuck in a binary, win/lose impasse. Of course, most matters will still resolve even after such an impasse, but only after a lot of money, time and energy has been spent - and often at the expense of the speedy completion of a project and the contractual and professional relationships which are the essential glue of so much of what we all do.

What is remarkable about mediation, as an option for solving difficult problems, is how quickly it can be set up and how quickly it can produce an acceptable outcome.

In just a few days or weeks, everyone can be gathered together for a meeting which lasts a day or two. With skilful guidance from the mediator, the parties can work through the real issues and find useful options to take matters forward sensibly.

Nearly always, the dispute is sorted.

CONTINUED OVERLEAF...

*Two questions to ask, therefore, are these: "Are my professional advisers recommending mediation? Are they skilled in using it?" If the answer to either question is "No", the next questions are "Why not?" and "What are we, as clients, going to do about it?"*

John Sturrock is chief executive and senior mediator at Core Solutions and Scotland's most experienced commercial mediator with an extensive practice in the UK and beyond, in construction and many other fields.

**John Sturrock QC**
Chief Executive and Senior Mediator

## WHAT'S NEW?

Perhaps not exactly new but something to be aware of. An important case from 2015 for anyone concerned with contracts and some principles that can be drawn from it.

Arnold –v- Britton [2015] UKSC 36 in which Lord Neuberger enunciated the following principles of contractual interpretation:

1. Commercial common sense should not be used to undermine the importance of the language actually used in the contract;

2. The less clear the drafting of a provision, the more ready the court will be to depart from its natural meaning; but the court should not hunt for problems with the drafting of a contract solely in order to justify departing from its natural meaning;

3. Commercial common sense must be assessed as at the date the contract was entered into, and should not be invoked retrospectively only once it has become clear that the bargain "has worked out badly, or even disastrously, for one of the parties";

4. The court should be slow to reject the natural meaning of a term merely because it appears to have been an imprudent term to have agreed, even at the time of entering the contract;

5. Surrounding factual circumstances may only be taken into account to the extent that they were known or reasonably available to both parties;

This is a welcome case for all parties involved in contract and in particular the legal profession. It seems that there has been a move away from 'red pens' and 'commercial common sense' and back to some degree of certainty.

I had understood that the purpose of commercial law was to provide certainty to parties, such that they could rely upon their agreements being given force to rather than being rewritten in a manner which they had not intended subject always to the vagaries of the language they had actually used.

Unintended consequences is a function of careless drafting but unless both parties claim an error has been committed, then the parties have an agreement that means what it says even in the result are less than satisfactory for one of the parties.

The lesson for Employers/Contractors/Subcontractors being that if you mean something, say it clearly and if you do say it clearly, then the words used will apply and hurrah for that.

# MATTERS OF INTEREST

This edition includes an article by my colleague Chris Atkinson addressing the matter of 'Ground Conditions' and the risks attaching to these.

## Risk allocation and unforeseen ground conditions

## 1. INTRODUCTION

Construction contracts will set out the respective rights and obligations of the parties to the contract and will also allocate risk between the parties. It is a commonly used phrase that any type or category of risk should be allocated to the party best able to manage or control it.

This article briefly considers one of the important risks in many construction contracts; the risk that ground conditions actually encountered will be less favourable than was expected at the time the contract was entered into.

## 2. KEY ISSUES

The case law in respect of unforeseen ground conditions and the common law position goes back to the 19th Century. The case of Bottoms v York Corporation (1892) considered a project where no boreholes were sunk prior to contract, for sewerage works near the River Ouse, but a price was agreed. The Contractor found that the ground it was excavating in was such as to require unforeseen measures in order to construct the sewers. It was held that there was no representation or guarantee as to the nature of the soil and that the contractor was not entitled to additional payment.

More recently, a century on, this underlying common law position was restated in the case of Workshop Tarmacadam Co Ltd v Hannaby (1995) 66 Con LR 105, CA. Here, whilst the works were subject to measurement on completion, the contract terms were held to be insufficiently wide as to give entitlement for additional payment to the Contractor in respect of unforeseen hard rock which it encountered:

"Had the plaintiffs wished to make such a provision in the event of unforeseen conditions being encountered, it would have been the easiest thing in the world for them so to have provided in specific terms. They did not do so"

Put simply, the common law position is that the risk of unforeseen ground conditions rests with the contractor. Unless a contract makes specific provision for additional time and/or money in the

## 3. STANDARD FORMS

The JCT contracts adopt an approach akin to the common law position. Unforeseen ground conditions are not a Relevant Event / Matter giving rise to entitlement to an extension of time or additional payment. The only route for relief might be where the unforeseen ground is such that the design of the works requires to be changed and the Contractor is entitled to additional payment or time as a consequence of a variation. Other standard form contracts adopt a different position than the common law one.

For example the NEC3 Engineering and Construction Contract provides for a compensation event in certain circumstances where the Contractor encounters physical conditions that had "such a small chance of occurring that it would have been unreasonable for him to have allowed for them" (clause 60.1(12)). However, in judging physical conditions for the purposes of a compensation event certain factors need to be taken into account, including site information provided to the Contractor (clause 60.2).

## 4. SITE INFORMATION

Site information available at time of tender and included in a contract is another important factor in considering the risk of unforeseen ground conditions.

An employer has no general duty to provide site information (the employer does not warrant the site).

Where information is provided to a Contractor and it is clear he may rely on it then the Employer may be taken, expressly or by implication, to have warranted the accuracy of that information. If the information turns out to be wrong the Contractor may have a claim for damages. Such a proposition is supported by the Court of Appeal case Bacal Construction (Midlands) Ltd v Northampton Development Corporation (1975) 8 BLR 88, CA. In that case the Contractor was directed to design foundations based on the information provided.

However, an Employer may provide site information and not cut across the underlying position that a Contractor is obliged to undertake works for the stated price even if the ground conditions turn out to be worse than expected.

It is also the case that site information can be provided but with disclaimers included in the contract to the effect that any inaccuracies or errors will not give rise to liability for the Employer. In effect "here is some information which I possess, but you are still liable for accurately assessing the ground on which the works are to be constructed".

Contractors must be aware that the onus is on them to obtain and understand site information necessary for construction of the works.

## 5. RISK ALLOCATION

The above is a very brief summary of some aspects of the common law position as regards unforeseen ground conditions. There is much more that could be said on the topic, way beyond the scope of this article.

What is interesting to consider here is the issue of risk allocation. The modern best practice is to place the risk with those best able to manage or control it. However, it is common to see unforeseen ground conditions clauses either deleted from contracts or heavily amended to place the risk more clearly on the Contractor (or Subcontractor).

In particular as regards Subcontractors (e.g. earthworks or drilling subcontractors) are attempts to pass on this risk to them in line with industry best practice on allocation of risk?

Some such as piling Subcontractors will seek to include in contracts their standard terms and conditions excluding liability for the effect of unforeseen ground conditions.

Others may not appreciate, until it is too late, that they are being passed the risk of unforeseen ground conditions by the deletion (or lack) of clauses providing entitlement to recompense in such circumstances.

There are arguments for and against passing such risk down the contractual supply chain. However, often clauses passing this risk down that supply chain are doing no more than that, without true consideration as to the appropriateness of that risk allocation. This can lead to subsequent disputes and expense.

Perhaps a better way would be to have an open and honest discussion on respective obligations and risk allocation at time of entering into contract and to be as precise as possible about what risk is allocated where.

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Sandy is the Chairman and founding partner of Centra Consult. Having graduated in 1983 he worked for a variety of well-known building and civil engineering contractors in commercial roles. In 1999 he left contracting and joined a firm of specialist consultants dealing with matters from the Royal Opera House in London to the repainting of the Forth Rail Bridge. In 2007 he founded Centra Consult to carry on delivering specialist consultant services to clients in a fashion tailored to meet their particular requirements.

# THE PEOPLE

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Chris joined Centra Consult in 2008 and is a Quantity Surveyor with over 23 years' experience. Chris is a registered Adjudicator and has considerable commercial and contractual experience. Chris is experienced in civil engineering and process plant construction as well as the usual building projects.