Help Your Construction Project From Ending In Dispute

Written by Clarke Jeffers Solicitors

CLARKE JEFFERS & CO.
SOLICITORS

Contents

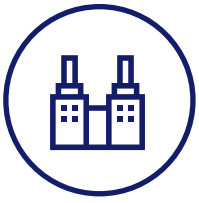
Introduction

It is not an understatement to say that the Irish Construction Industry has had a tough time over the last decade or so as it has attempted to recover from one of the worst property meltdowns the world has ever seen.

The industry has been doing well of late and the market is growing with good activity levels beginning to move out from the Dublin and Leinster area. The Construction Industry Federation's Outlook for 2017 reports that 519 projects, totalling almost €19billion, have been approved and due to commence during 2017. With this growth in activity, however, brings with it the very real possibility of an increase in construction disputes occurring.

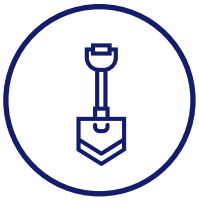
The Construction industry is no different to any other area of business where disputes can occur, the only difference is that with Construction projects the sums involved can quite often be very large and the impact far-reaching. There are so many factors to think about before breaking ground and starting work on a new construction site - from planning permissions to health and safety precautions, environmental considerations and financing, to name but a few.

It is estimated that in the UK over £100 million is spent every year on construction disputes alone and with the Irish construction sector not much different in its make up, delays, disruption on site and contractual issues continue to beset the industry and lead on to costly construction-related litigation. One only has to look at a few of the large scale project failures across the world from the last decade to see how mistakes and overruns can occur at any level.



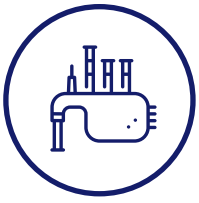
Olkiluoto Nuclear Power Plant, Finland

Delays, defects and disputes led to a claim for €2.6bn from the contractor followed by a €3.4bn counter claim with the combined effect that the project is still not completed.



The Big Dig, Boston

A highway construction project which ended up 8 years late and $20bn over budget.



Scottish Parliament, Edinburgh

Whilst the figures are lower in the case of the Scottish Parliament, the 730% cost overrun could have build a fully equipped general hospital.

It is an unfortunate fact of life that disputes can and will happen. The old saying attributed to Peter Drucker, "The best way to predict the future is to create it" is particularly apt. The prevention rather than cure approach is what is important. Thus starting with a well-considered plan, identifying all of the potential issues and accounting for them is what is important.

With so many parties involved in a construction project - from developers to the builder to numerous sub contractors and professional advisors and whether or not it is a residential, commercial, civil or industrial - build - there are many ways for things to go wrong and negatively impact on the build. Construction sites are rife with challenges and potential law suits waiting to happen around every corner.

Most disputes on a construction project are resolved by conciliation and/ or arbitration however, should your construction dispute end up in Court in Ireland different Courts will deal with the dispute depending on the financial size of that dispute:

District Court
Up to €15,000

Circuit Court
Up to €75,000

High Court
Unlimited Jurisdiction

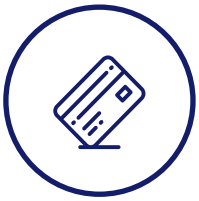
Commercial Court
Fast Track (in excess of €1million)

The industry standard construction agreements e.g. RIAI, Engineers Ireland provide for alternative dispute resolution by way of conciliation and arbitration (regardless of its financial size) as set out in more detail below.

This document will now look at some of the most common areas where construction disputes often happen and help to identify what might be done to help avoid these disputes occurring in the first place.

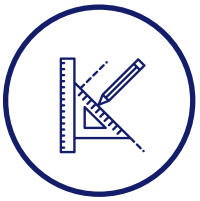
Common Legal Issues

Realistically, how long is a piece of string when it comes to listing how a dispute can arise on a project? For the purposes of this document, however, we have listed out several common areas where issues and risk can occur:



Finance
Page 6

Property Title
Page 9



Planning
Page 12

Environmental
Page 15

Health & Safety
Page 18

Time Delays
Page 21

Taking time out now to be aware of these risks will allow your business to be better equipped to deal with any future problems as they arise. It will never be possible to eliminate all the issues that arise but proper planning can help eradicate the “money pit” problems or worse, the “project killer” problems. The first step in maximizing your profit is to stay out of the litigation arena.

Finance

One of the most obvious concerns for any business is getting paid, however, if a construction project is delayed, incomplete, defective or deemed inadequate for its purpose then there is the very real prospect of payment being withheld and the dispute ending up in litigation.

Delayed payment can also present the very real prospect for any company, no matter where they are in the chain, of facing insolvency. Cash is king and a disruption to cash flow is not only undesirable but potentially lethal.

Traditionally, construction projects were financed through debt, however, banks are now generally unwilling to provide funds for new projects, other than on very onerous terms. Alternative forms of funding are therefore becoming more and more common with funding being

provided, either for some or all of a project, in return for an equity stake. No matter how your project is funded, if there is an issue over receiving payment on a project this will undoubtedly impact on your ability to honour repayments as part of your overall financial commitments. This will have a further knock on effect on your position and could result in either interest charges rolling up, penalties being applied, equity being lost, a receiver being appointed or all of the above.

How To Help Avoid Finance Disputes

1. Payment Terms in contract.

Always remember that contract is king so make sure that the contract clearly defines the manner in which payment is to be made. It is also important to make sure your contract addresses progress payments, retention, time for payment, and final payment.

It is important to also be aware of the provisions of the Construction Contracts Act (the Act) which came into effect on 25 July 2016. The Act applies to the vast majority of construction contracts with only limited exclusions; for example those with a value of less than €10,000 or related to certain domestic projects. It is not possible for parties to contract out of its application. The Act imposes certain requirements regarding payments under construction contracts including making, in most cases, pay when

paid clauses ineffective and also introduces the right to refer payment disputes to adjudication for the first time. A Code of Practice relating to the conduct of adjudications has been published by the Department.

2. Dispute Resolution Clause.

In addition to making sure your contract specifies exactly how and when you will be paid it is also essential for a Dispute Resolution Clause to be included. A Dispute Resolution Clause is an agreement within a contract which sets out how any potential dispute might be resolved between the contractual parties. By including a Clause such as this in your contract you will have agreed terms upfront on how disputes between parties will be dealt with and owing to the fact that in the Construction world time is money, make sure there is a fast-track decision making process.

A detailed Dispute Resolution Clause will often include details of an independent person that both parties agree who will adjudicate on the dispute. Quite often it will be a professional, such as a Quantity Surveyor, who will adjudicate. Remember - the sooner a dispute is resolved, the sooner people are back on-site working again.

Land Titles

Land registration is compulsory across all of Ireland with two parallel registries in existence:

The Registry of Deeds
Clárlann na nGníomhas

The Land Registry
Clárlann na Talún

The Registry of Deeds refers to the registration of deeds in relation to your particular land or property and is termed 'Unregistered Title'. Registering a Deed merely records that a Deed actually exists with the original documents returned to the 'lodging party'. If your land or property is registered by Deed, you will guarantee legal priority over any deeds which have not been registered previously. Under this system your solicitor will 'trace' the Title to ensure that you have good title to the land or property in question.

The Registration of Title system records the title itself and provides State guaranteed Title to your land or property. This is therefore known as 'Registered Title'. The majority of land in Ireland is now Registered Title and as time passes the older Registry of Deeds system will be phased out in favour for the much 'cleaner and clearer' Registration of Title.

When Land Registry accept title for registration of the original Title Deeds they will be retained and a Folio produced. This Folio will be conclusive evidence of ownership and is guaranteed by the State that it is a true record of title to the land or property in question. The Folio will record

details of the land or property itself, include a map, the name and address of the registered owners, the type of ownership and any burdens upon it such as a mortgage or other charge registered against it. Once a folio has been produced every subsequent transaction will be recorded and registered on that Folio.

How To Help Avoid Land Title Disputes

The first step to take when considering purchasing land for construction purposes is to get the land vetted to understand exactly what (and where) it is you are dealing with. This will also allow you to identify any conditions attached to ownership of the land.

Quite often people make the mistake of focusing solely only on the title of the land they are interested in buying and developing, however, what about the adjoining areas? What will your new site border and what conditions may the neighbours try to impose on you? Also consider reviewing the Local Authorities 10 year plan for the area. This should include the plans that the County Council have for the area in terms of development, zoning etc. This is a crucial piece of information to have as it may dictate the viability of your proposed development.

By examining the title of your land, plus the adjoining areas and the Councils plan for the area, you will be in a much stronger position to understand and identify any potential issues which may work against you or worse which may be used against you to extort a fee. Two very important areas of consideration crop up at this point:

1. Access

How will you access your new site and will the final scheme need enhanced access over and above the access which you have title to? It is not uncommon for the owners of adjoining areas of land to recognise the value of their land under these situations and attempt to deny access to your land until a figure has been agreed. If this is the case and it is necessary to acquire even a small piece of adjoining land then you can be sure that this acquisition will cost a lot more once you are committed. The term “ransom strip” is as frightening in reality as it sounds. If this problem arises then its twin brother problem does also. You will be bound to all your contractual commitments in terms of loan repayment, paying all

contractors on site etc and all to construct a functioning development. If you can't legally access it, you can't use it and you would certainly have an incredibly difficult time selling it (unless at a knock down price to the holder of the ransom strip!)

2. Services

People often overlook the fact that they need to bring services to their land in across an adjoining field or piece of ground owned by someone else. Under these circumstances will the owner of that field or piece of ground be open to this or could they delay construction until a sum has been agreed for the facility? Worse still if they flat out refuse to allow the connection through their property. Having a detailed opinion from your engineers is crucial in this regard. It is also worthwhile having a pre planning (or purchase) meeting with the Local Authority to canvas their requirements in terms of service locations and any possible alternatives.

It is also very important to keep in mind that not all roadways may have been taken in charge of the local authority and may remain for a considerable period of time in the ownership of a private individual or company. This can be particularly true in built up areas. Thus when reviewing access and services it is important to carry out an ownership search and/or a local authority search to identify the true ownership of these roads and to secure all necessary permissions before loan monies are drawn down or ground is broken.

It is essential that before construction begins that plans are studied closely to identify any potential area for trouble. Ensure that your solicitor has thoroughly vetted the title to your land and that you have fully considered the surrounding area to ascertain where potential disputes may arise. Is your land Registry of Deeds or Registered Title? If it is unregistered ensure it is registered immediately to ensure your proper ownership of the land (this also makes it easier to sell individual units in the future). If there is a particular laneway which you need to use and it is unregistered you can apply to have this registered as well and in doing so specifying the need for access to your own land.

The bottom line in relation to Land Title is to not start anything until you clearly understand exactly what you own and what you don't own but need before a digger gets anywhere near your site. By doing this you will ensure that you minimise the chances of any potential dispute in relation to your ownership of the land because once committed and teams are on site then any potential dispute and delay can and will be costly. The term "over a barrel" comes to mind.

Planning

Obtaining planning permission is a prerequisite before most building work can begin on site. Just because a grant of planning permission has been received does not mean that a legitimate planning dispute may not arise during the course of the development.

Whether planning permission has been breached either accidentally or intentionally, the knock on effect could have very serious repercussions for the developer including fines, onerous restrictions being imposed or in the worst case scenarios, having to knock the building down. It therefore goes without saying that the planning permission obtained for a particular site needs to be completely understood. This does not just mean with regard to the use of the land but also the many and varied conditions which may be attached to the planning permission. Each planning permission, depending on the complexity of the scheme, may contain conditions which must be satisfied prior to the development evening beginning (preconditions). Commencing construction without first complying with these pre conditions can be disastrous, and could at worst lead to the development being unauthorised.

Common issues to consider when looking at planning permission include:

- Time Conditions
- Materials to be used
- Foundation type
- Below Ground level conditions
- Ventilation & extraction
- Energy Efficiency
- Parking
- Boundary Treatment
- Landscaping
- Drainage
- Utilities
- Neighbourhood Consultation
- Historic / Local Heritage concerns
- Public/ Common areas

Whilst each condition may bring with it an element of cost in order to comply with the regulations of your local authority, if they are built in from the beginning of a scheme they can be used to enhance overall quality and ensure that the development gets off to a good start from the beginning. The alternative to receiving conditions to planning permission is the option of no planning permission at all, so taking a positive approach to the conditions can bring their benefits and see schemes proceed which may otherwise be refused.

Taking time to understand the conditions attached to your planning permission is time well spent. It may also be useful before planning even issues, to approach your local planning authority to have pre-planning discussions and ensure that many of the conditions of planning are already included within your application. Having this level of information in advance will also allow you to fully cost your scheme and ensure that the overall development is viable from the beginning.

At the end of the day, planning needs to be applicable to what is being planned for. For example, it may appear to be a trite point but you cannot submit a planning application for a petrol station and then proceed to build a restaurant. Whilst this may appear to be a ludicrous situation, it is not uncommon for a property to be purchased with existing planning conditions of use attached for a retail unit and the new owner proceeds to convert the unit into a restaurant without resubmitting an application for a change of use.

You must also properly consider the restrictions and use of the planning received. For example, does your local authority only permit building work to be done during specific hours, such as from 7am to 5pm, in order to fit in with a nearby residential area? What happens if a builder has submitted costs to deliver the scheme within a specific time frame based upon bringing in three shifts working around the clock? This is something a builder would need to be aware of before submitting a proposal to build, especially if there is a short turn-around time to complete the scheme or there is another project they need to move on to at a certain date. Failing to complete a scheme within the allocated time could lead to penalties, disputes and ultimately legal proceedings and an appearance in Court.

How To Help Avoid Planning Disputes

The best way to avoid planning disputes is to take the time to understand what it is you actually have planning for and all of the conditions attached to it. If making an application for planning make sure you have done your homework extensively and talk to your local planning authority in advance. The more you have taken the time to consult with all the relevant parties and build in any conditions which may be applicable, the more chance there will be for your planning application to succeed. Having advanced knowledge of the Local Authority's requirements will also cut down on potential further information being required during the planning process leading to a faster Grant of planning issuing.

Once planning has been approved make sure you go through the conditions with a fine tooth comb and come up with a detailed plan of attack regarding how you are going to satisfy them. Don't be afraid to consult with your planning authority to ensure your response to the conditions of planning are acceptable. If in doubt, get it from the horse's mouth.

Lastly, do not try to bend the rules! No matter the temptation to change the use of a scheme from the use the planning has been granted for, don't do it. You may succeed in the short term, but it will just take one disgruntled person to let the planning authorities know and work will stop and a dispute will occur with your local planners. The outcome of this could range from costly remedial work, work on site being stopped, to your building being deemed to be unauthorised. It should also be noted that new additions to planning laws allow for the Local Authority to refuse an individual or company planning on the basis that they are not satisfied that the last development was done correctly or finished.

Finally, on this point it is worthwhile remembering that the day you buy is the day you sell. If your planning is not adhered to or correct then it is unlikely that people will purchase from you and anyone using finance to buy will not be permitted to purchase from you.

Surrounding Area

No matter if you are a Developer, Builder or Contractor, in this day and age everyone needs to be conscious of the immediate and surrounding environs in which they plan to build on (or nearby to).

Acting responsibly and respectfully towards the surrounding area is an essential part of successful construction today. Understanding what is around you will allow you foresee any potential issues. Examples of this could include having an old graveyard or historical monument close to your site. This would almost certainly mean that you will require an archeological report before construction commences. Other important considerations include understanding whether or not there are any conservation areas close by the site or if a protected species lives on it (or nearby). Again such issues will inevitably require reports at best and large expense at worst. Despite this the benefit of knowing at an early stage is that it can be factored both in terms of cost and time into the overall plan. Also considering nearby rivers or streams. Will a flood plain assessment be needed? Is there a danger that part of the site will be designated a flood plain and thus not suitable for building on? Historically local authorities used to require a 100 year assessment on flood plains. Nowadays however most of the Local Authorities are requesting 1,000 year assessments. The benefit of knowing this information is that you can design your scheme accordingly. All schemes will require a percentage of ground to be designated as green space or open area. Encompassing unutilisable areas in the percentage is permitted under certain circumstances.

The danger for developers is that Conservation areas flood plains etc are not always shown on maps so primary research is vital. The best remedy for this is to get someone out on the ground to build up vital local knowledge and intel. Who is the local go-to person for local knowledge in the area? Who knows what has been tried and failed before? Who knows who the troublemakers are and who the perennial complainers will be who will object to everything at every turn? The more intel you have before you apply for planning the better armed you are to deal with the issues when they arise.

Another important area for consideration is to ensure your scheme is a sustainable build which will not adversely impact upon the natural environment. The Government has therefore introduced a number of strategies to promote sustainable development - the first published in 1997, then updated in 2002, 2008 and 2012.

After Ireland attended the HABITAT II conference in Istanbul in June 1996, the Irish government, in agreement with other UN Member States, has committed to ensuring that policies in relation to housing and the urban environment provide adequate shelter for all and sustainable human settlements in the urbanising world.

This was known as the HABITAT agenda and the outcome from this was the 'Sustainable Development - A Strategy For Ireland' in 1997. Despite the economic challenges Ireland has experienced since 2007, sustainable development continues to be a priority. Much progress has been achieved in embedding the principles of sustainable development across all policy areas in the years since the publication.

There are a lot of different environmental issues to be considered that could all adversely impact upon your proposed scheme. For example, if a petrol station is to be constructed then all of the various petrol regulations will need to be adhered to in addition to the normal environmental regulations. If the proposed building isn't going to be functional for the purpose it is intended for or it will fail to meet the required regulations then this could be a costly mistake.

How To Help Avoid surrounding area disputes

Avoiding local area disputes requires a sensitive and considered approach by developers and builders alike. To avoid falling foul of these local factors you should take the time to consider each of the following (Particularly if developing outside of Dublin or more densely built up areas):

1. Speak To The Locals

As has already been mentioned, one of the first steps to consider when thinking about the environmental situation surrounding your site, is to get to know the locals. Having someone on the ground, putting out feelers in the local community and speaking to the people who live in and around the area, will give you invaluable local knowledge. For example, a local person may well know about a particular trouble spot for flooding that you otherwise would not have heard about. This will also help to capture other valuable information which may be vital to your build but which may otherwise have 'slipped through the net'. Talking the time to gather some local intel could prove invaluable towards the ultimate success of your development.

2. Environment Impact Assessment

If the site on which you plan to build has the potential to significantly impact upon the environment around it then the best option is to undertake an Environment Impact Assessment (EIA). An EIA is an essential requirement for large developments and should be given proper consideration from the very beginning. Being able to provide evidence of an EIA is also a useful way to demonstrate how your company is committed to the environment and puts you in a good light should something unforeseen or inadvertent go wrong down the line.

3. Hire An Archaeologist

With Ireland's rich historical legacy there is fair chance that you may be planning to develop beside or close to an area of archeological importance. If this is the case then there will almost certainly be a requirement imposed by the Local authority in terms of an archeological report. Reports of this nature, while important, can be costly and long running. It is therefore better to have the report commissioned before the team begins to break ground and loans are drawn down. Failing to properly consider this can lead to long periods of time where building contracts are sitting around doing nothing and banks are still demanding monthly payments.

4. Understand Applicable Legislation

Whilst there will be specific environmental legislation to bear in mind such as how to manage waste water, flooding, wildlife, etc. it is also important to ensure that you have considered all the relevant legislation which is applicable to the particular use your scheme will perform. For example, a petrol station will have specific petrol storage regulations, the need for intermittent fuel interceptors etc whilst a restaurant and entertainment complex will have specific health and safety, fire and even parking regulations to consider to name but a few.

It is safe to say that no matter the purpose of your scheme, get in early and understand what it is you are dealing with. Only by doing this will you understand the implications your scheme will have on the surrounding area and the relevant legislation in force pertaining to your proposed use. As always one of the best ways to avoid a dispute is to be responsible and try to understand in advance the potential minefields that exist and at this point you can make appropriate decisions which will demonstrate your position as a responsible developer/ builder.

Health & Safety

Unsurprisingly, Health and Safety considerations are a huge priority on a building site. No matter the purpose of your scheme, with so many people working on site, with large and potentially dangerous pieces of machinery and equipment, accidents can and do happen.

Health & Safety legislation should therefore be at the forefront of everyone's mind and all relevant legislation adhered to at all times - with no exceptions.

Common construction accidents include, falling from a height, tripping over equipment/material, mishandling machinery and many more. The outcome of such accidents can often result in hospitalisation and in the most severe cases, death.

In Ireland, the construction industry is obliged to abide by a series of 'Safety, Health and Welfare' regulations to ensure a minimum standard of health and safety in the workplace, and to specify certain equipment and procedures to minimise risk. The last thing your scheme needs is a serious accident resulting in the Health & Safety Executive closing the site and launching an investigation.

Common areas to be aware of when looking at protecting the Health & Safety of your site:

Working At Height

Working With Machinery

First Aid Capabilities

Fire Safety

Hazardous Materials

Storage Of Waste

How To Help Avoid Health & Safety Disputes

Health and Safety law in Ireland requires a Project Supervisor to be appointed for both the Design Process and for the Construction Stage. They will be responsible for undertaking a health and safety review prior to work beginning on site. Health and safety assessments will also need to take place at regular intervals throughout the build to ensure that the constructed building can be maintained safely and without risk to health during subsequent use.

Failure to comply with these steps could lead to serious repercussions for your scheme should an accident occur and someone is injured. It is much better to take the time, appoint the relevant person and conduct (and document) regular reviews of health and safety. Whilst some may see these reviews as a waste of time when other more important work needs to be attended to, however, often a review will identify a dangerous practice which needs to be addressed immediately. No matter how onerous you may feel about doing this the outcome could potentially save a worker from serious injury or death. Nothing can be more important than this.

It is also important if someone gets injured that this incident is recorded. Even the most minor accident that happens on site should be recorded immediately, with a witness explanation provided if possible. Once again, this will help to protect your business should a health and safety dispute arise at a later stage. Remember, it only takes a small nail cut to later develop into tetanus. Just because the injury does not appear serious does not mean there won't be a significant compensation case arising from it.

In addition most modern policies of insurance require notification of anything which might give rise to a claim. The word ‘might’ is crucial and requires that any incident on site no matter how insignificant should be reported.

Finally, one of the most important matters to attend to prior to commencing any development is to ensure it is adequately insured in all respects but specifically to include occupiers and employers liability insurance. It may be that if you are hiring contractors that they will carry their own insurance. If this is the case then care needs to be taken to ensure that these policies cover you sufficiently and do not lapse during the construction period (this is particulary important if the project spans a period of time greater than 12 months). This ties in with the above advice on recording accidents. In order to ensure that your insurance company provides indemnity to you in the event of an incident you will need to have recorded matters sufficiently and notified them in accordance with the policy.

While reviewing insurance policy documents could bring on a sleep induced coma to some readers, it is worth studying your policy in detail and raising any areas of concern with your insurer. As stated, you cant always avoid problems but not having to pay for them goes a long way to protecting the viability of your project.

Building Delays

A delay to the completion of a scheme or even a dispute over whether or not a project is complete can all too often happen. Anything that extends beyond the agreed project completion date, whether or not this is an interim milestone or a final completion date is considered as a delay and could have serious ramifications for your company.

Delays can be caused by a variety of factors and very rarely can they be clearly attributed to just one party. Often delays are the outcome of a series of intertwined events occurring throughout the build. This is made even trickier if delays are partly due to uncontrollable factors such as weather-related issues, such as severe storms, flooding etc.

Performance delays often occur when one or more of the parties involved in the build provides sub-standard work. It could be the employer pausing activity for one reason or another, the contractor failing to co-ordinate work effectively, sub-contractors continually failing to turn up to work on the site, and so on. Of course the source of the substandard work is often hard to establish. It may be that the builder is being blamed for not including appropriate steel in a part of the build. He in turn may blame the engineer for not specifying it who in turn may blame the the architect for not accounting for it and so on and so forth. And we wonder how a construction dispute can cause such a delay!

In the Royal Institute of Architects of Ireland (RIAI) form of building agreement, contractor delay can be dealt with either by way of liquidated and ascertained damages for the delay or can be excusable by way of an extension of time which include the occurrence of force majeure events (those events which prevent parties from fulfilling their contractual obligations for causes which could not be anticipated and/or are beyond their control. Otherwise known as “Acts of God”). Employer caused delay is also an extension of time event under the RIAI form of contract and results in an extension of the completion date.

One of the greatest enemies to a profitable construction site is time so if there is an individual or group of people not pulling their weight, loosing control of the project or not carrying out their work in accordance with good standards, then delays are inevitable.

Time can put pressure on every party to a construction project. Nowhere is the phrase “time is money” more accurate. The developer will have various finance commitments which will become increasingly onerous as time ticks by without a resolution. For example, a developer who has borrowed five million Euro to fund a development will have an interest repayment of approximately 5% per annum. A six month unforeseen delay at the beginning of the project could therefore cost one hundred and twenty-five thousand Euro that was not accounted for in the budget.

For the Builder holding everything together on site there will be a lot of pressure to keep teams busy working towards a particular date. Failure to meet deadlines could result in non-payment by the developer, reduced payment or even penalties. Whereas at the same time a time delay by whichever party is responsible could result in a number of sub contractors moving on to their next job and not fulfilling their obligations to the Builder. For the numerous sub contractors being brought in for various aspects of the build they may all be required at a specific time and point in the project. A delay in these timelines could lead to all sorts of problems for the sub contractor and potentially lead to a situation whereby they just don’t turn up on site to finish the job - further compounding the woes of the Builder.

How To Help Avoid Delays

Delays can occur on any build. Whether this is through bad management, bad workmanship or bad weather, thus a proper plan to deal with these delays can help avoid a problem becoming litigious.

1. Monitor And Record Activity

Contractors should monitor and record the activity of all work undertaken by their team and the work of consultants and subcontractors involved in the build. All parties involved in a construction project should keep a record of work completed (and related costs), so they are fully aware of progress and any potential or encountered delays.

2. An Experienced Site Foreman

The key to a smooth site running on schedule is to have an experienced site foreman with a good track record of completing projects on time and on budget. A good site foreman is one of the keys to a successful build and will help to reduce the likelihood of any delays. A good site foreman will oversee and manage the entire project, adhering to a strict schedule of activity. They will also anticipate potential delays, work to avoid extensive set-backs and have contingency plans in place to deal with

adverse conditions such as bad weather, poor workmanship, building material delays and so on. A good foreman will act quickly and mediate where necessary - liaising with relevant parties to avoid delays and disputes.

3. Agree On Appropriate Penalties Incurred By Delays

Contracts should clearly specify what penalties will be incurred by a delay during the construction project and this is ordinarily by way of liquidated and ascertained damages ("LADs") payable by the contractor for every day or week the project is delayedIt is established by case law that the figure inserted into the contract for LADs should be a genuine pre-estimate of the employer's loss arising due to the delay (not just a randomly chosen punitive sum). The contract should also aim to predict all possible delays, and who takes the risk for each delay event.

4. Fast Track Resolution Mechanism

Make sure you have a fast track procedure to deal with any disputes related to delays and if necessary hire a solicitor who understands modern alternative dispute resolution techniques, such as mediation, conciliation, facilitation, adjudication etc. A solicitor with a modern outlook will have the ability to look at all of the different variables at play and assess the best way to resolve disputes quickly and efficiently for their clients. There are unfortunately a lot of solicitors who's first instinct is to take all disputes to the High Court. Whilst this may eventually achieve a favourable ruling for their client it could mean months, or even years, tied up in litigation. Unfortunately, this could be time that their client doesn't have. It is one thing to have a good case. It is quite another to have the time and money to run it. Never mind the headaches and the stress for all the parties involved in litigation, if a site is closed and no-one is working then it will be a long time before the scheme is complete and final payment is received.

It is also crucial that you not only agree a form of alternative dispute mechanism in your contracts, but you also agree how it will work including how the mediator, facilitator, etc is appointed (thus eradicating an argument at a later stage) and how quickly they must happen. At least if a dispute arises on site there is a method to get it resolved quickly with the least amount of money being wasted. A mechanism that is all too often overlooked in this country. And one which has the potential to save the financial buoyancy of a project in the event that a war begins.

Specific Contract Clauses Of Note

Construction contracts are becoming increasingly complex and onerous and so it is more important than ever to be aware of the ones that affect you the most. In this section, we will look at some of the most common contract clauses of note for the construction sector.

Forms of Contract

Although contracts can be made by word of mouth or by conduct, it is difficult to prove what has been said or done unless some form of record has been kept. Thus having a written contract in place is vital if all parties involved are to better protect themselves in the event of a conflict or dispute. A properly written contract should have a balanced allocation of risk between the parties involved in the construction.

The Royal Institute of Architects in Ireland (in conjunction with the Construction Industry Federation and the Society of Chartered Surveyors) produce the most commonly used forms of building contract in Ireland, known as RIAI forms of contract.

In Ireland the choice of contract depends primarily on whether the project is in the private sector or in the public sector. Private sector building construction projects are typically carried out under the RIAI Standard Form of Building Contract.

The contract fixes the agreement between the parties. Standard Forms are specifically designed to suit the construction process and provide a pragmatic approach to dealing with common construction issues. The terms of the contract lay down how risks are allocated between the parties and the principles by which conflicting interests of the parties are settled.

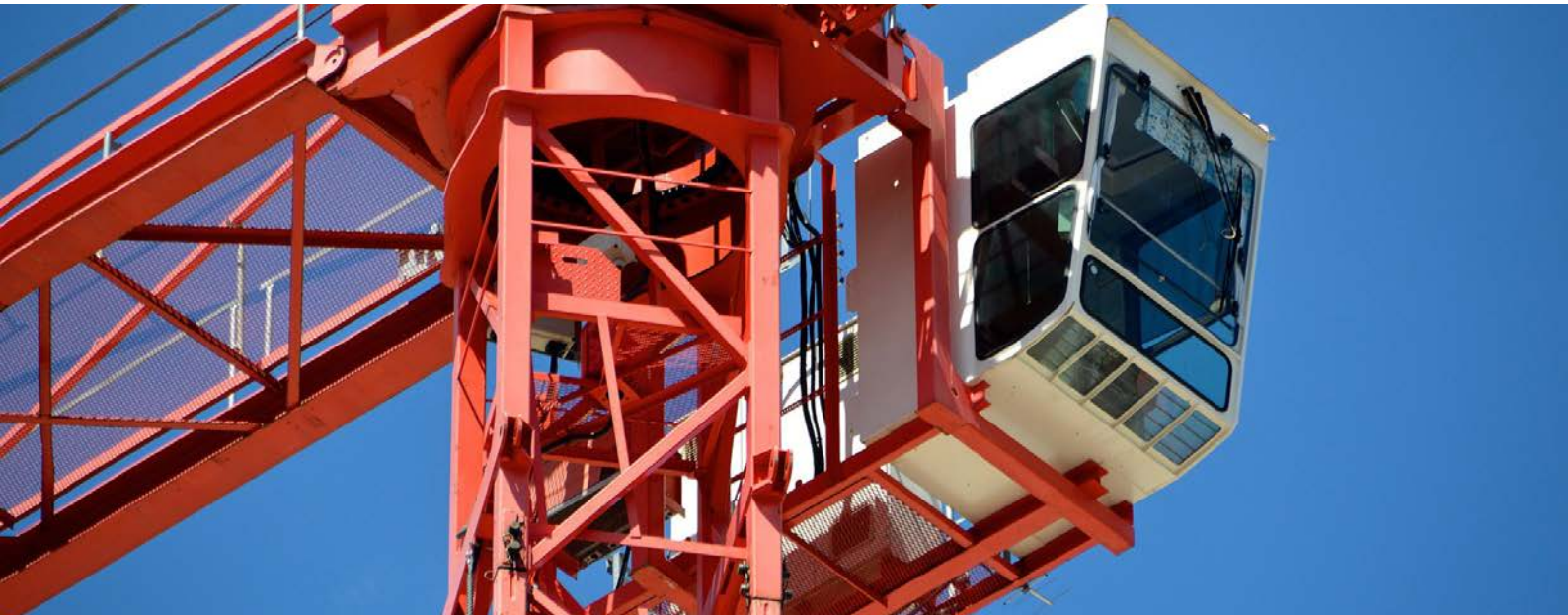
Engineers Ireland (in conjunction with the Association of Consulting Engineers of Ireland) produce the most commonly used forms of engineering contract, which are known as IEI forms of contract.

The Government Construction Contracts Committee (GCCC) also has a suite of contracts which are used for government construction projects, or contracts entered into by public bodies.

For larger construction projects, construction companies often use standard amended forms, drafted and negotiated either by in-house lawyers or external counsel.

Limitations of Liability

There are a number of different types of Limitation of Liability (LoL) Clause and contractors often seek to have these included in the main construction contract, consultants in their appointments and by both parties in their collateral warranties. Conversely the employer under the contract and appointments and the beneficiaries of any collateral warranties will ordinarily resisit some or all of these clauses and they can become the subject of negotiation. The LoL clauses include the following:



- Exclusion of recoverability for consequential or indirect losses;
- Financial cap on liability to a multiple of the contract sum/fee or as more typical to the level of professional indemnity insurance. The cap can be an overall cap or a cap per claim under the contract/agreement; and
- Net contribution clause.

Conditions Precedent

A Condition Precedent is a contractual requirement in a clause which, in its simplest terms, makes clear that the clause (and the benefit thereunder) will only come into force upon the satisfaction of certain conditions.

Often employers include conditions precedent as part of the extension of time, variations and loss and expense clauses. The conditions precedent include prescribed notification provisions that the contractor has to comply with including methods of notification and time frames which are strictly interpreted and applied. Conditions precedent can be difficult to spot because it is not necessary to actually use the words “Condition Precedent” and instead a contract might use wording such as “provided that” or “subject always to”.

Practical Completion

If substantial completion of a construction project has been completed then this is referred to as Practical Completion and the building is fit for

purpose, whether that is immediate occupancy, a fit-out, or similar. Assessing Practical Completion is not always straightforward. The danger is if a project is already significantly delayed and there is a pressure to sign off on Practical Completion when doubt surrounds whether or not the build is fit for purpose. If doubt exists then the client should be made aware and legal advice should be sought.

If the size and extent of the list of outstanding works and defects requiring rectification is substantial then a project cannot be regarded as complete and fit for its intended end-use.

It is the Architect who ordinarily issues a Certificate of Practical Completion at the end of a build. If Practical Completion is not certified by the completion date as may be extended for the agreed extension of time events then the contractor may be liable to pay liquidated and ascertained damages to the employer.

Performance Security

On a construction project there are documents required as security for performance - which could relate to many things, including payment, design or management. In complex projects, there may be many different types of security and performance documents required by several parties.

Construction security and performance documents typically used in a construction project are:

- parent company bonds and guarantees
- collateral warranties
- direct agreements; and
- payment security methods (such as escrow accounts and project bank accounts).

Bonds and guarantees are typically used for performance of the contractor. They are also increasingly provided as an alternative to retention monies and also as security for the employer's performance (i.e. payment). Where used as security for the contractor's performance, bonds are often treated as an alternative to a parent company guarantee, when in fact they are very likely to have different legal effects and provide different remedies. Performance bonds will usually be required for the sum of 10% of the contract price/value and may be either "on demand" or payable on contractor default.

Collateral warranties is a contract under which a professional consultant (such as an architect), contractor or a sub-contractor warrants to a third party (such as a funder) that it has complied with its professional appointment, building contract or sub-contract. Essentially, it creates a contractual link between the consultant/contractor/sub-contractor and the interested third party where one does not already exist.

Direct agreements provides funders with protection should the project run into difficulty - for example if a contractor terminates their works. The funder will be able to step in, either directly or through a nominee or representative, to remedy the termination event or to substitute a new project company or contractor. Such an agreement creates an opportunity for the funder to complete the construction works and to minimise disruption to the income stream.

Payment security methods exist to protect the supply chain against unjustified non-payment or the insolvency of the employer and/or main contractor. Payment security methods may take a number of forms including:

Escrow accounts

An account may be opened by an employer into which monies are deposited and can be released to the contractor under certain circumstances (e.g. on the issue of payment certificates under the building contract).

Project bank accounts

A bank account opened usually in the names of the project parties into which the employer must make payments in accordance with the building contract. The funds are usually held in trust and released directly to the relevant members of the supply chain in accordance with their contractual entitlements.

BCAR

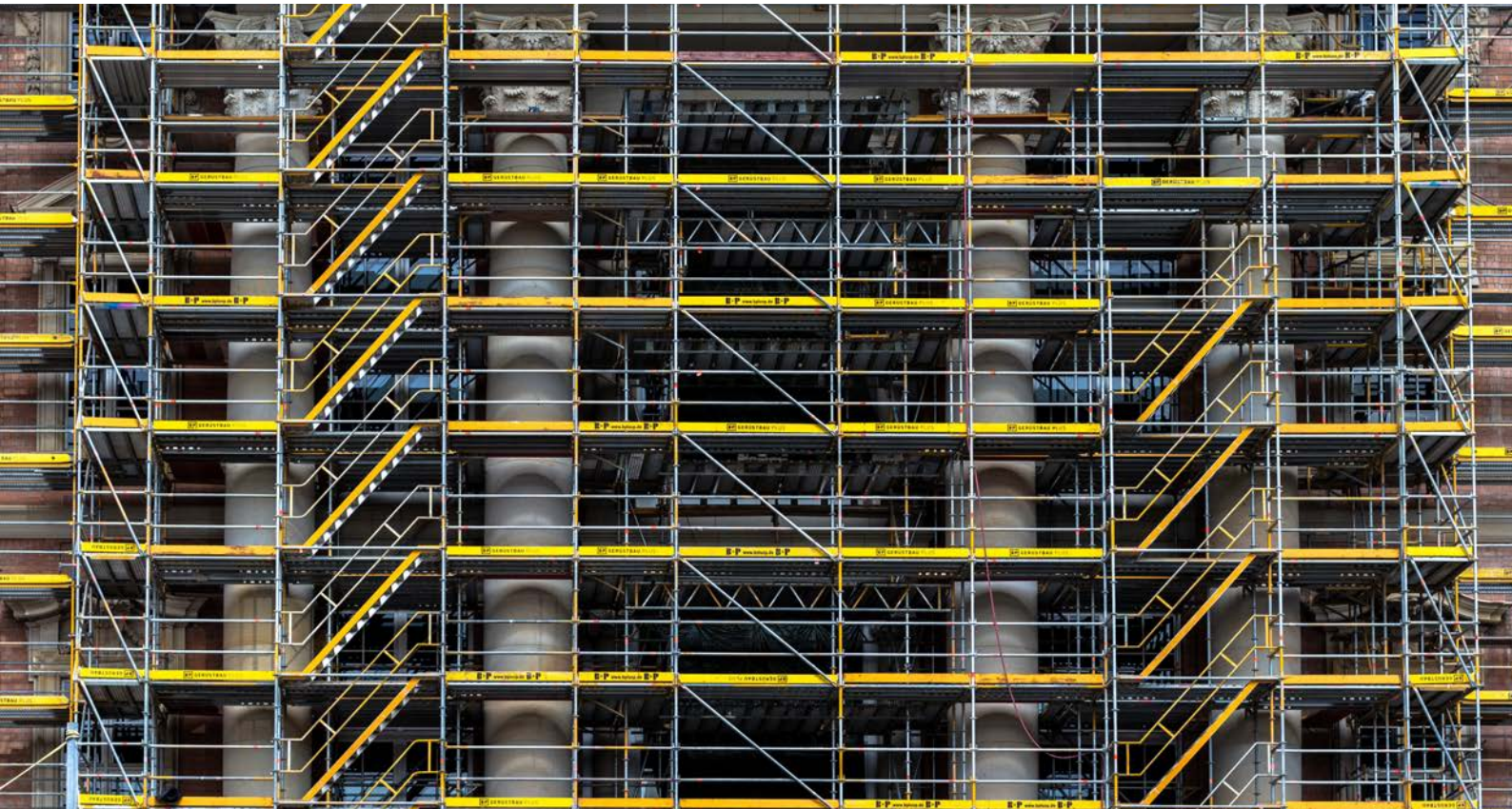
The Building Control (Amendment) Regulations 2014 (BCAR) introduced a range of measures affecting applicable development at the commencement, construction and completion stages, with implications for owners, builders, designers and certifiers as the lines of responsibility for design, construction and assessment of works were formalised.

BCAR exists to ensure developers and private home builders demonstrate compliance with the design and the building regulations from the start to the end of the work. It begins with the commencement notice, through to the build and then to a series of certificates that must be signed off on.

BCAR requires that a Certificate of Compliance on Completion must be accompanied by documentation which outlines how the works or building as completed “complies with the Second Schedule of the Building Regulation”. This schedule includes information on such matters as fire safety, drainage, waste disposal and ventilation.

A Certificate of Compliance on Completion must be lodged with the Building Control Authority and placed on the public register before the building may be opened, occupied or used. The Certificate must be signed by the Assigned Certifier and the Builder. It certifies that the building or works have been carried out in accordance with the Building Regulations.

The certifier is legally vulnerable in the case of claim.



Getting Out & Staying Out

Heading to dispute proceedings should be the last resort for any Construction dispute. Costly and time-draining, formal proceedings should only be reserved for the most serious construction law disputes between parties and as a forum of last resort.

A strong and well thought out contract is the bedrock of your protection. If your contract is detailed and covers all the necessary roles and responsibilities and has clauses applicable to your individual position together with well thought out alternative dispute mechanisms then you will be in the best position to protect your assets and reputation.

You will need a solicitor to help compose a contract and to review it with your interests in mind. We will discuss choosing the right solicitor for you in the final section of this document, however, it is suffice to say at this point that your solicitor needs to have experience in construction contracts, handling disputes and using alternative forms of dispute resolution.

Ideally, any dispute that arises should be dealt with quickly and efficiently with no third party input, or in a more formal but private mediation meeting, moderated by a independent mediator. Only in more complex circumstances should a dispute be referred to the Courts.

As we have seen throughout this ebook some of the best ways to help avoid your Construction Project ending up in Court is to not commence any building works until:

- You have established correct title over the land/ property concerned and you have properly considered the lands around you.
- You understand all of the costs involved
- You have received and understand the builder's estimation of costs schedule
- You have detailed plans with rigorous timelines regarding what will happen by when (and by whom)
- You have all necessary finance in place
- You have received full planning permission and understand all of the conditions attached
- You have identified a person with a good sense and knowledge of the locality
- You have carried out an Environmental Impact Assessment (if the development size warrants it)
- You understand all the relevant environmental regulations you need to comply with
- You understand the specific regulations pertaining to your proposed use of the scheme
- You have appointed a Health & Safety Project Supervisor and conducted a Health & Safety Assessment
- You understand the implications and any penalties due to delays in construction
- You have introduced an effective alternative dispute mechanism to your legal contracts.

It is inevitable that disputes can and will continue to happen in the Construction industry. Your success and the success of your Construction project will therefore be dependent on your thorough approach to the project and by taking a considered approach to the steps outlined above. The more potential problems found before ground is broken the better as each of these could slow the build down and / or lead to a costly dispute. Forewarned is definitely forearmed when it comes to successful construction projects.

What to do if a dispute arises?

For disputes that arise which affected parties cannot satisfactorily resolve between themselves, it is best to consult a solicitor to decide on what the best professional resolution method would be for the matter in hand.

Outlined below are the four main types of conflict resolution methods used in construction legal matters.

Adjudication

Adjudication offers a quick and inexpensive method for resolving construction disputes. It can be the preferred method of resolution if a dispute arises in the midst of a built and a decision needs to be made as quickly as possible to reduce the time spent off-site and the money lost in proceedings. An independent adjudicator will decide on the outcome and an enforceable decision can often be reached in 4-6 weeks.

Adjudication is less likely to be used in complex and technical issues such as professional negligence.

Mediation

Mediation is one of the most under-used dispute resolutions methods, but its merits should be considered. Not only is it one of the cheapest ways to resolve disputes but it is very useful for narrowing the scope of the dispute and for better understanding the oppositions stance, thus helping to maintain future professional relationships.

On average, mediation cases last just 1-2 days and all discussions are kept private and confidential. An independent Mediator will moderate discussions between the affected parties and help bring about a satisfactory solution.

Some parties may feel their issue is too complex or the dispute is 'too far gone' for mediation, but this could be short-sighted. Ideally, resolution by mediation should be looked at first by the parties involved. Indeed, if a dispute reaches Court, the Courts like to see that mediation has been attempted and they can impose cost sanctions if it has been declined.

It should be noted however that usually mediation is non-binding which means that there is potential for the dispute be be unresolved. However, at worst some of the issues clouding the dispute might be put to bed thus making any further litigation potentially less complex.

The true benefit to mediation is that it not only helps quickly resolve a dispute but it helps maintain relationships. This cannot be overstated in its importance. It can be difficult to go back working with a builder / developer that you have just beaten up in Court. How long do you think it would be before another row erupts? Mediation allows for parties to resolve the dispute in a more controlled, less hostile environment. Much more conducive to future good will.

Conciliation

Conciliation is similar to mediation in that it is a process which aims to bring both parties together to resolve their dispute in a calm meeting-style environment. It offers a flexible, private and low-cost approach to bring about resolution.

A conciliator will oversee the process and put forward recommendations on how the parties can overcome the conflict. The parties will have control over the structure and content of the meetings and if both parties can agree to the proposed solution then the matter will be resolved. Unfortunately, if one or both parties do not agree then another method of dispute resolution - most likely arbitration - will need to be used.

Arbitration

Arbitration is often the preferred dispute resolution method for the construction industry and it is an increasingly popular alternative for commercial contracts. Whilst arbitration can be an expensive method for resolving disputes it does offer privacy and convenience, which commercial parties often seek when resolving disputes.

Disputes are resolved on the basis of material facts, documents and principles of law. Affected parties can ask for an adjudicator with the technical knowledge of their particular construction issue(s).

One word of warning. While the process is quite effective, it can be very costly and long running. Maybe even on parity to that of a full Court case.

Litigation

The traditional route of using the Courts to determine the dispute. It is one of the most expensive dispute resolution methods, and is the only one to be held in public.

Litigation can be a long, drawn out process, with a Judge's decision final. It's worth noting that the ruling will be made public and will only be kept confidential under limited circumstances.

Choosing The Right Legal Team To Suit You

You cannot underestimate the importance of employing the right legal team - one that understands the complex nature of construction disputes and can effectively advise and represent you in the event of a dispute or Court hearing.

The right legal team will also help to resolve disputes and legal issues before a situation escalates. Their priority from the outset should always be protecting your assets and professional reputation. The goal is to get the project finished, not to end up in Court.

It is also important that your Legal team can communicate with you in a way that best suits you. All the expertise in the world is no good if the advice cannot be imparted in a way that makes sense.

While most Legal teams include a partner, it is vital that you have access at all times to that decision maker. Never meet a partner day one and don't see them again after that. If you are paying for the service, ensure that you get access as required to everyone on the team.

Choosing a solicitors firm that holds a requisite level of professional indemnity is crucial. Solicitors by law must carry a minimum cover of €1.5 million. If the aggregate value of your project is greater than €1.5 million then you should ensure that your chosen legal team carries excess cover sufficient to protect your project.

With extensive experience in construction and business law and offices in Carlow and Dublin, Clarke Jeffers & Co. Solicitors is an Irish law firm which takes a contemporary and straight talking approach to the law. For legal advice and representation for all your construction needs, please do not hesitate to contact managing partner, Victor Clarke on 01 567 5938 / 059 913 1656 or victor@cj.ie

CLARKE JEFFERS & CO.
SOLICITORS

Find us online at www.cj.ie