

In this issue

Faculty name: Quantity Surveying and Construction

Faculty direction: Forward

David Carun

Stephen Turner asked on the RICS Discussion Forum at 1427 on 22 November 2004 if '... surveyors miss not having a faculty dedicated to quantity surveying.'
Two immediate responses:

'Not really!' and

'... It's criminal that RICS is without one'

– sum up people's feelings regarding the name of the Construction Faculty.

Its roots began ages before now. A concerted channeling of viewpoints, as you can see from the above, commenced just over 12 months ago. Now, a couple of years and a couple of changes at the top of the Faculty Board later, we can officially announce that 'Construction' – one of the three faculties under the Built Environment Group – has changed to 'Quantity Surveying and Construction'. So to all involved and to all who wanted this change (and I would presume that's a large part of the Faculty's membership) congratulations!

Without delving too much into why the QS Division was abolished in the first place and why what emerged was called the Construction Faculty (the Quantity Surveyor thread in the discussion forum on www.rics.org should be able to throw a lot of light on this), let's take a look at what this name change means to you as a Member.

This bulletin is brought to you by Michael Sullivan, Ed Badke, David Carun and Clare Barker. To contact any of them with your comments/feedback or to contribute to the future issues, please email construction.faculty@rics.org

To start with, I am sure all the QS Members who have had an identity crisis and have felt a bit lost without a dedicated faculty – one look at the said discussion thread will reveal there are many – will begin to feel that RICS is listening and that it is not scared to make changes on their behalf. The debate on whether the larger firms want to be called quantity surveyors again, whether the term quantity surveying truly reflects the work a quantity surveyor does in the current global market and whether there really is support from the grassroots Members for this change will be an ongoing one, but with a consultation held in June 2005 when you, as Members, were given the opportunity to vote, one should realise that this has been a democratic process and the change to 'Quantity Surveying and Construction' is based on the results of your vote.

Michael Byng, Faculty Chair, commented: 'This name change represents a positive and forward looking step for the profession, for the faculty and for the wider RICS. The QS has a varied and unique skill set to offer clients. Whether providing feasibility advice, a procurement programme strategy or a life cycle cost analysis, it is my objective to establish the QS as the consultant of choice both within the UK and internationally.'

Michael Sullivan, the Faculty's Vice Chair added: 'This change – together with an increased and consistent delivery of more technically relevant products as well as the change of name to give Members their identity back – is good for the Institution and its Members as a whole. We believe your feedback is important – so do let us know what you think and by doing that, you'll be helping us to help you.'

David Carun is the Product Development Manager of the RICS Built Environment Group.

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Marine and coastal construction working group

The RICS Quantity Surveying and Construction Faculty Board is considering developing a marine and coastal construction working group. The aim of this group would be to improve communication and best practice across Members who have an interest in construction on the waterfront and in coastal/offshore waters. The specific objectives would be to have an annual workshop on the theme of marine and coastal construction and to support this with an information/networking point on the RICS website.

For the last 20 years across the world there has been a great deal of legislation at international, national and regional levels looking at water-space and coastal management, in the main driven by environmental issues. The formation of this group would enable a coordinated RICS response to be developed towards consultation on further legislation representing the views of construction, a view point perhaps rarely heard. With sustainable development in coastal and marine areas becoming an increasingly important issue it is vital that construction has a voice.

Although the idea for this group originated in the RICS Quantity Surveying and Construction Faculty because of the related complex environmental, planning and valuation issues it is thought that this group would operate across RICS Faculties and Forums.

RICS has operated a working group in the past in this area but not with a construction and development focus. To get an idea of interest from RICS members in joining this working group, which will primarily be a networking facility within RICS but linking to other institutions, we would be very interested in your views. If there is enough support for this initiative a meeting will be called in early 2006. Please contact Tim Goodhead (RICS Quantity Surveying and Construction Faculty Board member) at construction.faculty@rics.org if you would like to be part of this networking group.

- Consider the benefits of whole life and collaborative contracts vs. traditional design and construct
- Establish standards (if not for the industry at large then at least per project/client)
- Establish guidelines for 'best practice' interoperability
- Establish pre and post-project design team/contractor audits.

The aim of the interactive workshop which followed the presentations was to identify all factors – nature of the industry, processes, data, commercial view of the product, etc – influencing interoperability in the industry.

CICA hope to utilise the results in the formulation of specific recommendations.

Neil Cannon is head of ICT, RLF, and member of the RICS Quantity Surveying and Construction Faculty IT Working Group.

The dream project

For those not in the know, the CICA (or Construction Industry Computing Association) is a division of the National Computing Centre and has a diverse membership drawn from users and vendors from all parts of the industry. It is dedicated to promoting the effective use of IT in the construction industry.

I attended their convention on behalf of the Quantity Surveying and Construction Faculty IT group on 14 October 2005 to be pleasantly surprised by the fact that it was not yet another talking shop, which, to be frank, was what I expected.

The theme of the convention was to address the extent to which interoperability between all members of the construction process was succeeding and failing and what would need to be done to address this in pursuit of the 'dream project'.

What is interoperability?

The dynamic and seamless exchange of accurate, useful information on the built environment among all members of the building community throughout the lifecycle of facilities in a meaningful, controlled, auditable and secure manner – anytime, anywhere.

Why is it important?

A US study (NIST GCR 04-867) conservatively estimated the cost of inadequate interoperability in their capital industry to be \$15.8 billion per annum. Two thirds is borne by owners and operators. This represents 3% of revenue costs to occupiers – a large chunk of potential profits for any industry.

Lack of awareness, inertia, inadequate exchange and workflow standards, lack of guidelines and a fragmented industry to name a few were identified as the key barriers to interoperability.

What can we do about it?

- Educate the client, ourselves and others to understand the benefits
- Be open to process and cultural change. Abandon 'protectionism'. Innovate

What's your view in 2006?

Help RICS meet your needs more effectively, let us know what you think of your membership by having your say in the 2006 RICS Member Survey.

There's more than one way to make your opinion count, and your participation, which will be invaluable for developing RICS services and Member communications, will also qualify you for a prize draw to be in with a chance to win a 10% discount from RICS Books (see www.rics.org/membersurvey2006 for more details).

You'll find this year's questionnaire enclosed in the membership pack that all members will receive once membership is successfully renewed for another year. Complete and return the survey in the envelope provided before 31 March 2006, or why not take a few moments to share your views online by filling in the survey at www.rics.org/membersurvey2006

If you have any questions not answered by visiting the website, call the RICS Contact Centre on +44 (0)870 333 1600 or email contactrics@rics.org where extra copies can also be requested if needed.

Project management is simple?

Project management methodologies and best practice are frequently criticised for being too complex to follow and for often requiring formal training and comprehensive knowledge of theory. As a result, many organisations have lost confidence in the effectiveness of common methodologies in enabling them to deliver projects to plan, and, more importantly, deliver the expected benefits.

NCC Group, an independent ICT and business consultancy, have developed a Project Management Toolkit designed specifically to assist organisations in planning, defining, controlling and closing projects of any size. Offering a scalable, easy to follow methodology, the Toolkit allows organisations to apply consistent governance across all of their projects.

Based upon best practice, it makes project management simpler and less onerous to follow by focusing on the project outcomes, rather than the methodology itself. All the methods, techniques and forms required to take a project from conception to successful completion are included in the Toolkit, along with a comprehensive glossary and an interactive training programme.

The Toolkit is simple and straightforward to use and enables clients to complete the project tasks like project scaling, building a business case, efficient allocation of resources, application of effective standards and quick, easy scheduling.

Available in CD format, the Toolkit is easily deployed over a local intranet or network and can be accessed by multiple users without extra license fees.

NCC Group is looking to set up a RICS user group to pilot the Project Management Toolkit with a view to providing feedback and a case study.

For more information, contact Maxwell Nicklin on **+44 (0)161 209 5386** or by email at maxwell.nicklin@nccgroup.com

Qs connect

QS Connection is a new forum for the London and Surrey region. It provides a unique opportunity for Qs and allied professions to meet, learn and network.

The value of this interaction is well demonstrated by the popularity of existing RICS web-based discussion forums, but on the evidence of the first RICS – QS Connection event (which was attended by over 100 delegates) meeting peers face to face cannot be beaten.

Tony Bingham, the guest speaker, led some energetic discussions on a number of QS related issues, including set off, valuing of contentious variations, adjudication procedures, cartels and the submission of fraudulent daywork sheets.

He began with words of caution for sub-contractors and contractors who present less than honest accounts for payment, advising that such behaviour can lead to criminal proceedings for obtaining money by deception. Ultimately, he said, this could even result in imprisonment.

Delegates participated in proceedings every step of the way. In teams of ten, they discussed pre-prepared questions, before presenting their findings through a team spokesperson. These conclusions were then analysed by Tony Bingham, in the light of current legislation and thinking.

RICS supported the event, with members from their Head Office, Faculty Board and Governing Council in attendance. Surrey Chamber of Commerce, Adair Associates and Roy Ilott & Associates subsidised the event.

The next QS Connection event will take place on 8 March 2006, at the Queens Stand, Epsom Racecourse. Geoff Brewer, Director of Brewer Consulting, is the guest of honour. He will lead a debate on procurement and Alternative Dispute Resolution (ADR). The ticket price is only £55.00 and includes three hours LLL (CPD), lunch and wine.

RICS are planning further QS Connection events in London this year, and the concept may be extended to other regions. For further details – or to book for the event in March – contact Justin Sullivan of Adair Associates on **+44 (0)1372 847 900** or email justin.sullivan@adair.co.uk

Many years of tape measure, SMM and Spons later...

The inaugural 'QS News Awards' gave the profession a long overdue event to celebrate the valuable work Qs provide the construction industry. The lunchtime ceremony, held at the end of 2005 in Vinopolis, attracted a crowd of 400 leading professionals and clients and saw winners announced in 11 award categories ranging from business achievements to success in areas such as product innovation, training and human resources. The winner of the prestigious best all round QS category was Boxall Sayer, a medium-sized firm that beat off a very strong shortlist that included Turner & Townsend, Gardiner & Theobald and Faithful & Gould. Other winners included David Bucknall, voted QS champion of the year for his sterling work in promoting quantity surveying during his career.

A key theme stressed at the event was the importance of recruitment and training for the profession, one that will be continued at the second ceremony to be held later in 2006. Speaking before the awards were handed out, judge and leading client Steve McGuckin, head of project management at developer Land Securities, reinforced the point. 'I don't employ a QS because they've got a glamorous office of amazing software,' he said. 'I employ them for the people they've got and their track record. People are their only real asset!'

Nigel Dorman (NHS Estates), Graham Smethan (Trak Group), Tony Keller (University of Central England) and Ed Badke (RICS) were the judges on the awards panel.

Phil Clark is the editor of QS News.



Chim Lungu, Turner & Townsend, winner of QS Young Achiever award.

All about risk

Procuring engineering services has become more complex, where procurement routes have diversified, services are being unbundled into packages, designs have become more complex and greater involvement of specialist manufacturers and construction/design programme constraints are becoming more critical.

The above, combined with the fact that clients are becoming more risk averse, means the Main Contractor has now become, more often than not, the holder of the construction risk and thus spends considerable resources mitigating these, both up and down the procurement chain.

This is even more critical when one considers where the design of engineering services lies in the design programme (and the constraints placed on the engineer) to produce a coordinated and complete design so one can get out to tender. This gets more protracted when the services are unbundled into separate standalone packages.

We therefore need to consider the following when looking at procurement of engineering services:

- Identify risk and the parties best placed to take on this risk
- Understanding project drivers
- Completeness of design
- Design scope change
- Early design management
- Design responsibility
- Design programme
- Risk transfer within the procurement chain.

It is not being said that these are not being considered. Nor that they are being ignored. Some are considered and others are not. As such, we are having an inconsistent approach. Risk is not being mitigated early enough and is thus being passed down the procurement chain.

There is not one single panacea for mitigating all risks but these need to be considered at least on a project by project basis. There are common themes, and instead of reinventing the wheel everytime, we need to understand these common threads.

The RICS Building Engineering Services Business Group (made up of a number of major professional practices, main contractors, services contractors and industry bodies) has considered this issue and has asked the question whether as an industry we are passing down risk inappropriately and if we can alleviate this with better methods of procurement.

This will be the theme of the conference to be held on 26 April 2006 at the RICS headquarters.

Please contact the Quantity Surveying and Construction faculty at construction.faculty@rics.org for information on registration.

David Nicholl is Chairman of the RICS Building Engineering Services Business Group.



New year, new job?

A new resource for job hunters in land, property and construction is available from 30 November 2005 as RICS launched its official recruitment website, RICS Recruit.com. The site offers a comprehensive list of up to date vacancies for people working in these sectors in the UK.

Visitors to the site will be able to look up company profiles, do advanced job searches and make online applications for positions in all areas of surveying.

Organisations that are already advertising positions on the site include Buckley Prichard International, Macdonald & Company Property Ltd, Jones Lang LaSalle, Douglas & Gordon and Home Inspectors.co.uk

Peter Moore MRICS, Managing Director, Macdonald & Company Property Ltd says:

'RICS Recruit is the natural choice for both job seekers and recruiters alike. The site will allow international exposure for jobs at a low cost and help job seekers keep up to date with the best jobs in the market, as they arise.'

www.ricsrecruit.com will be linked to the main RICS website www.rics.org which has an average of 128 404 visitors each month. The facility will be available to both members and non-members of RICS.

Yellow Pages and Thomson Local

RICS works with Yellow Pages and Thomson Local to provide corporate advertising space for members. These corporate advertising schemes are designed to promote you and your firm, as well as raising public awareness of RICS and the profession. In total there are over 3 000 member firms currently involved. You can list your firm in the corporate box at lineage rates www.rics.org/RICSservices/RICSpecialoffers/Yellow+Pages.htm will give you more information.

Partnering – only good for a few?

Roy Morledge

Since the early 1990s, when the perceived poor performance of the construction sector began to spawn a series of reports, increased collaboration has been identified as providing potential for improvement.

At the same time, partly as the result of these reports, partnering was highlighted as one strategy offering significant benefits through collaboration, as well as a potential move away from low bid thinking. Impressive cost reductions on projects were mooted with the Reading Construction Forum, quoting potential savings of 30% or more, where strategic partnering was adopted.

The key elements of partnering are usually accepted to be mutual objectives; an agreed method for early problem solving and continuous, measurable improvement. Unless these are inherent in the relationship and are supported by key stakeholders, then presumably partnering cannot be successful.

Most construction projects are unique, relatively short-lived and initiated by inexperienced clients. Large projects are in the extreme minority, and it is rare for the project team to remain together after completion. The nature of construction is such that only a minority of clients have a continuous demand, and relatively few of those have repetitive projects.

Consequently, it is most likely that the minority of experienced clients (particularly those with a constant need for projects) are those who can benefit most from partnering, as they can use their buying power to lever improvement through change. They are also most likely to be in a position to adopt methods of measuring performance from project to project.

An examination of the procurement strategies adopted by the experienced, regular clients confirms that they frequently adopt partnering. This is in contrast to the inexperienced or occasional clients who still tend to adopt traditional approaches.

However, the key elements of partnering appear to belie the usual behaviour within the commercial world of construction. Contractor or subcontractor organisations are usually primarily concerned with performance objectives in terms of profit and turnover (annual accounting issues) and tend to view these targets as more important than long-term potential (a bird in the hand etc). This raises some doubt as to whether mutuality can exist between client and subcontractor objectives, and whether these objectives can be truly aligned through a main contractor in a partnering arrangement.

Continuous improvement is only measurable through repetition and comparing performance. Typically this occurs most successfully in the manufacturing sector. Applying measurement to partly repetitive construction projects is probably more to do with an attempted justification of a changed strategy than true performance measurement.

Problems, or more particularly, disputes are likely in construction projects where each project is a one-off, and where no previous prototype has illustrated the problem or cause of the dispute. It is rare to be able to establish a truly blame-free or trusting culture where company profits drive the need to pursue a solution to its ultimate outcome – via the law.

A partnering relationship where there is a true supply chain makes sense and is very clearly illustrated in the retail sector. There is a level of beneficial interdependence: a scenario where improving the product benefits for both buyer and seller in an environment where disputes are less likely, and where improvement is easily measurable. Attempting to transfer this thinking from a product-based culture to a project-based construction scenario is, at best, optimistic (in most cases). There are few true examples of a supply chain in construction, though supply networks of a less mutually dependent nature do exist.

To assure a value output, there is probably a case for a third way. One which adopts approaches that enable specialists and subcontractors to be rewarded for contributing to planning and innovation at an early stage in project design.

Collaborative strategies which fall short of partnering do enable integration at the design stage and emphasise the selection of a project team, based predominantly upon proven previous performance and reputation rather than price. This sort of arrangement is fairly straightforward to arrange, has the potential to improve performance and can be adopted for the one-off or infrequent project.

In summary, partnering is undoubtedly proving beneficial for the few clients with sufficient spending power or repetitive business to lever an advantage and develop a supply chain. For clients without repetitive demand, perhaps partnering contains inherent risks unpalatable for many clients, including uncertain cost, potential loss of control and expensive preparation. There are better strategies for these clients to achieve greater value and better performance from the construction industry.

Roy Morledge is a professor at the School of the Built Environment in Nottingham Trent University.



Payment – aiming for best practice

Stewart Dunn

The ability to effectively deal with payment issues is an important aspect of quantity surveying practice. There are two principal skills which come into play when such issues arise: (i) legal skills and (ii) accountancy skills.

The law

So far as legal skills are concerned, knowledge of the common law is essential. If there are no terms or missing terms then common law principles apply. If there are provisions, in the contract or relevant statute, then those provisions must be construed in a manner which is consistent with the common law background in the absence of a clear contrary intent. This important rule of statutory or contract interpretation is known as 'the (strict) presumption against changes in the common law'.

The common law is based on concepts of reasonableness. Reasonableness, the common law and common sense are synonymous terms. The courts will, for example, construe a commercial contract in a manner which gives reasonable business common sense to its provisions: *Antaios Compania Naviera SA vs. Salen Rederierna AB* [1985] AC 191.

Reasonableness is also synonymous with fairness. There is no distinction between a fair valuation, reasonable price, equitable adjustment or quantum meruit. Having common sense/a sense of fairness is, therefore, a good starting point. Keeping up to date with developments in the law (ie interpretation by judges as to what is reasonable) is essential.

It is important to be flexible in the approach to issues of valuation/assessment since, in any case, there is likely to be more than one potentially viable, alternative method of assessment.

To illustrate the point, either an actual cost plus or an estimated cost plus/value based/re-pricing approach can be taken to the fair valuation of a variation, or to the assessment of fair compensation (damages). Whether the actual cost or estimated cost/re-pricing method should be applied depends, inter alia, on what will be the better estimate (the best estimate rule) in terms of reliability/accuracy. If the matter in question is inherently difficult to estimate, then actual costs (adjusted, if appropriate, to give effect to the 'but for' principle) could be the most appropriate method of assessment. If, however, actual cost data is unreliable, then a 'guesstimate'/re-pricing method might be the best alternative. A leading case which illustrates this point in the construction context is *Penvidic Contracting Co vs. International Nickel Co of Canada* (1975) 53 DLR (3d) 748 (Supreme Court of Canada).

The *Penvidic* case also illustrates flexibility in the context of making a choice between concurrent/alternative legal remedies. On the facts, there was a choice between concurrent remedies (variation alternatively damages) and a choice between alternative methods of assessment/valuation. The task in each case is to apply the best/most appropriate remedy and method of assessment (or combinations thereof) with the overall fair valuation/compensation principle in mind. The issue of concurrent remedies, in the context of direct loss and/or expense vs common law damages, was considered in *London Borough of Merton vs. Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

Actual costs and accountancy skills

Undoubtedly, there are circumstances in which actual cost data will be relevant and, therefore, admissible evidence in relation to an issue of valuation/assessment. With an understanding of good construction accountancy practice, it should be possible to (a) identify what information is required, and when (note that there is an implied duty to co-operate and to act fairly and in good faith in relation to the valuation of the work), (b) assess the reliability of the data, (c) to make the assessment/valuation in question. The sooner the cost information can be provided the better. Good accountancy practice on the part of the contractor can lead to early indication of difficulties on site, leading to earlier notification of loss.

Standard accountancy software is available which can facilitate the requirements of the industry. A basic working knowledge thereof, on the part of both the quantity surveyor and the contractor, would be beneficial. One difficulty is that many firms, especially smaller contracting firms, maintain only very basic and disorganised accounts information. Accounts staff may, for example, be interested in record-keeping for tax purposes only.

It seems therefore, that there are some important issues to be considered, including:

- The extent to which both quantity surveyors and the industry as a whole are currently in a position (in terms of knowledge of good practice) to effectively deal with payment issues
- How RICS Members can best acquire the requisite knowledge
- In relation to the longer term, how acquired knowledge of good practice will benefit:
 1. The profession, its Members and its clients (in terms of the breadth and quality of services)
 2. The industry as a whole, as a result of acquired knowledge being passed on to contractors and other interested parties.

Related articles on the *Penvidic* case etc can be accessed via the Quantity Surveying pages at www.rics.org

Stewart Dunn is a quantity surveyor and practising barrister and author of *The Law of Damages*.



Costs – but have you thought about this one?

Jeremy Glover

If you become embroiled in a legal dispute, the question of your legal costs immediately becomes an important factor. You need to factor into your calculations the likely costs of pursuing or defending a claim and the chances of your recovering those costs – you never recover all your legal costs even if you are the successful party. Therefore it pays dividends to keep an eye on the cases coming out of the courts to see what the judges have to say about the recovery of costs over the past year. Amongst the issues covered by the courts over the past year are:

- (i) Recovery of costs from non-parties
- (ii) Penalties for failing to consider mediation and
- (iii) Costs incurred during the 'pre-action protocol' stage of a case.

Of these three cases, the second confirms that you must have a good reason for refusing a genuine offer to mediate. The first deals with the situation when the other side, after losing a case, goes under with the result that the successful party is unable to recover his costs. The final case provides guidance on who is responsible for the costs incurred by parties who embark on the pre-action procedure required by the courts before formal proceedings are commenced.

(i) Non-party costs

In an action in the TCC before HHJ Thornton QC, Mr and Mrs Gimson had been awarded a sum in excess of £232 000 plus interest and costs against Gemma Limited. As soon as the litigation was lost and the company was faced with a substantial judgment, Gemma Limited went into liquidation since it had only been kept afloat by Mr and Mrs Davies for the purpose of conducting the litigation. On losing it, they immediately decided to pull the plug on the company and on, so they hoped, Mr and Mrs Gimson's chances of recovering something from it.

However in this case, almost the entire funding of its claim and its defence and of the security provided for Mr and Mrs Gimson came from Mr and Mrs Davies. The decision to prosecute Gemma Limited's claim and to defend to the hilt Mr and Mrs Gimson's counterclaims was taken exclusively by Mr Davies with Mrs Davies' knowledge and approval. In these circumstances therefore, the court felt it right that Mr and Mrs Davies should pay the Gimsons' costs.

(ii) Penalties for failing to consider mediation

It has become increasingly clear that following decisions such as *Halsey*, a party who refuses a genuine offer to mediate largely does so at his own risks on costs. This was reinforced by the Court of Appeal decision in *Burchell vs. Bullard*.

This was an appeal by a small builder against a costs order made following heavily contested litigation arising out of work done to a property owned by the Bullards. The builder's solicitors, in May 2001, suggested that to avoid litigation the matter be referred to ADR. The response was that as the matters complained of were technically complex, mediation was not an appropriate way to settle matters. In 2001 the act of refusing mediation was not necessarily an unreasonable step.

However, it would be today. LJ Ward then considered the *Halsey* case. He thought that a small building dispute is exactly the kind of dispute that lends itself to ADR. LJ Ward specifically drew attention to Paragraph 5.4 of the Pre-Action Protocol Construction Engineering Disputes which expressly requires parties to consider that a pre-action meeting or some form of ADR procedure be more suitable than litigation.

Therefore if you refuse to mediate today without good reason, even if you win in court, you might find yourself not being able to recover your costs.

(iii) Pre action protocol costs

The *Burchell* case was commenced prior to the introduction of the Pre Action Protocol for Engineering and Construction Disputes. Since the introduction of the Protocol, one question that has arisen is who pays the cost of investigating issues raised during the protocol process but dropped when proceedings came to be issued? The answer to that seems to be: not the person who raised the claim which was dropped.

McGlinn v Waltham Contractors Limited & Others, McGlinn issued proceedings as a result of alleged defective work in the building work carried out to his property. Before commencing the proceedings, McGlinn went through the steps prescribed by the Pre-Action Protocol. This led to a mediation which was unsuccessful. However, the claims made by McGlinn in the proceedings in the TCC, did not include claims in respect of overpayment and loss and expense paid to Waltham. These were claims made at the outset of the Pre-Action Protocol Procedure.

At the first case management conference, one of the defendants sought an interim payment of £20 000 in respect of costs which they claimed were thrown away at the Pre-Action Protocol stage in considering and responding to these claims which had been abandoned by McGlinn. There was no direct authority on the question of the general recoverability of costs incurred in compliance with the Pre-Action Protocols.

The Judge felt that it would be contrary to the whole purpose of the Pre-Action Protocols, which are an integral part of the CPR, if claiming parties were routinely penalised if they decided not to pursue claims in court which they had allegedly included in their Protocol claim letters. The whole purpose of the Protocol procedure is to narrow issues and allow a prospective defendant, where possible, to demonstrate to a prospective claimant that a particular claim is doomed to failure. This is what had happened here. Therefore, unless these circumstances were exceptional and thereby gave rise to some sort of unreasonable conduct, costs incurred by the defendant at the Pre-Action Protocol stage in successfully persuading a claimant to abandon a claim, and not costs, to the extent of any subsequent proceedings and are not therefore recoverable.

Jeremy Glover is a partner at Fenwick Elliott.

EU legislation: will simplification facilitate cross border business?

Kerstin Fischer

At the start of its mandate almost a year ago, the European Commission made clear its intention to streamline EU legislation, renewing the focus on economic growth and jobs. It has now lived up to its promise, coming up with a three year action programme for simplifying the existing thousands of pages of EU legislation. The outcome should be legislation that is easier to apply and therefore more effective. The programme covers 222 basic laws and more than 1 400 related legal acts.

Simplification can mean anything from repealing existing legislation, simple codification, recasting, to modifying the means of regulation. The last three will affect construction.

Codification

This is the consolidation of an original legal act and all the subsequent modifying acts into one new legal text. Some EU rules need constant amendment as new substances or technologies develop and thus move the goalposts. Because an EU Directive must be implemented in each member state by its own local legislation, one Brussels law leads to 25 new laws across the Union. It fits, therefore that fewer directives on a subject coming out of Brussels lead to a much reduced legislative burden at national level.

An example is asbestos at work: the protection of workers against risks from asbestos exposure is laid down by Directive 83/477/EEC, along with a series of related legal acts, going back as far as 1980. With codification, these will all be consolidated into one single stand-alone directive.

Recasting

This means the redrafting of existing legislation to make it clearer, easier to understand (and apply) and to improve any part of the original text that, in the light of experience, proved to be too vague, ambiguous or open to opposing interpretation. Recasting will be applied to the Waste Framework Directive, to satisfy the industry's demand for a definition on when waste ceases to be waste. It will clarify, for example, when certain construction and demolition wastes are of a high enough environmental quality to be used again as aggregates.

The construction products Directive will also see some trimming: Under its current rules, approval and norms for construction products used on building sites are extremely cumbersome. More flexibility in the formulation and use of technical specifications, lighter certification rules, and elimination of obstacles in implementation will reduce administrative costs, in particular for SMEs.

The recasting method will be used, too, on the Directive on safety and health of workers and its 19 related directives, to harmonise reporting periods, and possibly replace several reports by a single one.

The modified regulatory approach

Common technical standards are the most effective alternative where the introduction of legislation is neither necessary nor desirable. There are currently about 17 000 European standards, considerably reducing the need for regulatory interventions. Standardisation has a crucial role to play as industry and stakeholders are in a better position than legislators to design and enforce decisions in their area of expertise. The Commission is looking at extending standardisation to domains such as machinery noise and emissions or health and safety at work. Construction products (see above under Recasting) is another area where the interface between regulation and private standards is being strengthened.

One of the simplest (but at the same time most powerful) simplification tools is to substitute directives with regulations. Directives are heavy legislative tools, as they impose lengthy implementation procedures on member states each time there are technical amendments. The use of regulations allows better keeping up with the constant development of know-how. As regulations are directly applicable, they also help prevent diverging interpretations in the different member states during implementation. Public procurement will see the directives on the use of standard forms in the publication of public contract notices replaced by a regulation.

Public procurement will also benefit increasingly from the reinforced use of IT. Secured integrated IT solutions at EU level considerably cut costs for business and administration. Accordingly, the Common Procurement Vocabulary (CPV) has recently been updated and modernised to transform it into a tool for fully electronic procurement procedures.

The full list of legal acts to be simplified is available at europa.eu.int/comm/enterprise/regulation/better_regulation/simplification.htm

Whether this simplification speeds things up, makes the application of laws more uniform, reduces the risks of errors, facilitates cross border business, and saves money for companies and public budgets remains to be seen.

Kerstin Fischer is a regulation policy officer at RICS, Brussels.



Measuring up in 2006

Ed Badke

It is now February, but as this is the first edition of the **Construction** bulletin in 2006, we would like to take the opportunity of wishing you, your families and businesses a very happy and prosperous new year.

In what seems to be an exciting year for the Quantity Surveying and Construction Faculty, we have very ambitious plans for the **Construction** bulletin. During the course of this year we plan to increase content from 12 to 24 pages; to increase the frequency from quarterly to bi-monthly; and to further improve the quality of the copy. Clearly, we have a number of important decisions to take over the next few weeks on content and style, and your guidance would be greatly appreciated. What do you like or dislike about the **Construction** bulletin the way it is now? What is missing, and what regular features would you like to see included?

Please email us your thoughts to us at construction.faculty@rics.org

The **Construction** bulletin is only a part of our strategy for getting more professional information out to members of the faculty. Over the last year we have introduced a quarterly soft copy legal ebrief with CMS Cameron McKenna and an annual insurance ebrief with Aon.

Member feedback on both of these products has been excellent. However, I am aware that many of you may be missing out if we don't have your latest email address. If this applies to you, please call our contact centre on **+44 (0)870 333 1600** and update your details.

Turning now to measurement, you may have been following the recent debates in the technical press and on our web discussion boards. Firstly, to clear up any possible misunderstandings, RICS is very supportive of measurement standards. The SMM7 has served, and continues to serve, the profession well.

However we have now set up a steering group to address the needs of the 21st century construction industry. We will be announcing our programme for taking this project forward in the next edition of the **Construction** bulletin. This is another ambitious project and we have a lot to do if we are to deliver it. However the only place where success comes before work is in a dictionary.

I would also like to thank the many members who have written in to offer help or express support for this measurement initiative. We will be in touch with you all shortly. If you wish to contribute to the project please contact us at construction.faculty@rics.org

Ed Badke is the director of the RICS Built Environment Group.

INFORM 2000

Welcome to the re-introduction of INFORM – the professional/technical guidance source for quantity surveyors in Scotland. Future editions will cover areas such as the publication of new forms of building contract, a question and answer section and other information of use to quantity surveyors working in Scotland.

INFORM 2000 will also be published on www.rics.org

1. New SBCC Forms of Contract

The first of a new suite of building contracts has been published by the Scottish Building Contract Committee Limited (SBCC). They now incorporate the JCT conditions so there is no need to buy the JCT conditions and the separate Scottish contract – they come as one. The forms recently published are:

SBC with Quantities (2005)	£26.95
SBC without Quantities (2005)	£26.95
SBC with Approximate Quantities (2005)	£26.95
SBC Minor Works (2005)	£23.95
SBC Minor Works with Contractor's Design (2005)	£23.95
SBC Guide (2005)	£15.95

2. New electrical daywork rates

The following new rates will apply from 9 January 2006:

Technicians – £16.94	Approved electricians – £15.04
Electricians – £13.87	Labourer – £11.11

INFORM 2000 is edited by the Scottish Construction Faculty Board as a service to members.

RICS-MBS scholarship – winner joins unique new MBA

RICS, in partnership with Manchester Business School Worldwide, offered a 50% scholarship, to a Chartered Member for a January 2006 entry to the business school's new MBA for Construction Executives. Tom Kapapa of John Doyle Construction Ltd., winner of the scholarship said, 'The MBA scholarship by the RICS has financially helped in my decision to do the programme. I am very thankful for the scholarship as it has given me another big but enjoyable challenge and the opportunity to learn new skills.'

Question 1:

We are considering using ICD 2005. Can you advise on responsibility for co-ordination and completion of design for the Contractor's Designed Portion?

Under the contract, the Contractor's obligation is to complete the design of the Contractor's Designed Portion, to comply with the Architect/Contract Administrator's instructions regarding integration of the Contractor's Designed Portion with the Works as a whole, and to comply with regulation 13 of the CDM regulations. The required standard of design responsibility is the same as that required of an architect or other appropriate designer acting independently under a separate contract with the Employer.

Designs prepared by the contractor should be submitted to, and approved by, the Design Team before works are commenced. Similarly, the contractor should co-ordinate any elemental components of the Contractor's Designed Portion before designs are submitted to the Design Team.

You may also wish to consider drawing up a schedule of design team and contractor responsibilities and outputs as part of the tender documentation. This should clarify the roles of individual members of the design team and the contractor, the level of information that is expected from the contractor and the process that will be used by the design team to manage completion of the contractor's designed portion. Clause 12 of the Major Project Construction Contract (MP 2005) provides a useful template to follow.

The guide which accompanies this contract (IC/G 2005) provides more details.

Question 2:

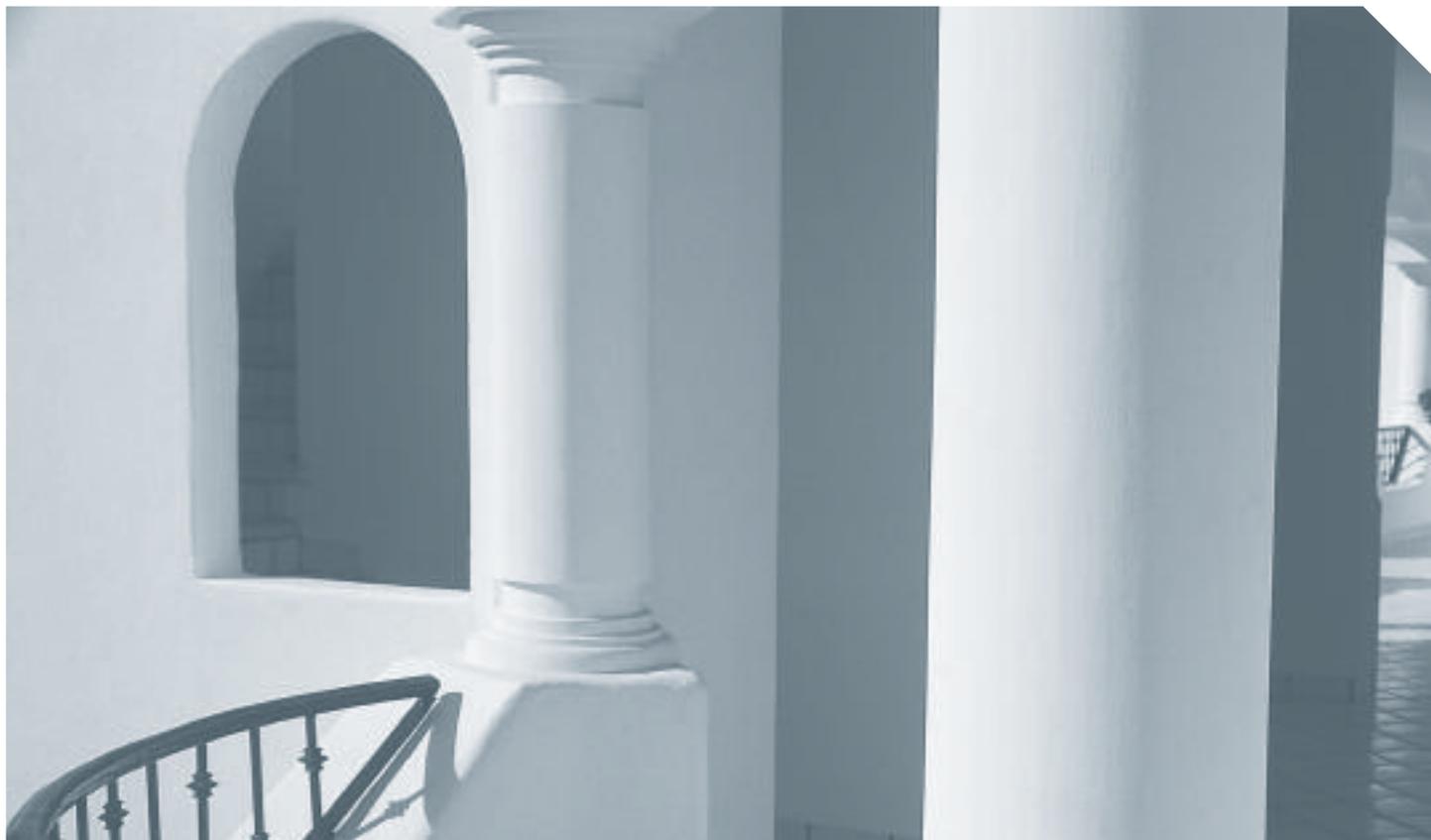
Why has the term 'rectification period' replaced 'defects liability period' in the suite of JCT 05 contracts?

The term 'rectification period' was adopted in preference to 'defects liability period' because it was felt to be a positive and more accurate description of the intention of the parties to the contract.

This first became apparent when the Major Projects Form was being drafted and debated. Consequently the new term has been introduced into the suite of JCT 2005 contracts.

The change of terminology to 'rectification period' does not seek to change the traditional risks and responsibilities associated with defects that arise within a specified period after practical completion.

Peter Hibberd, Professor
Secretary – General of the Joint Contracts Tribunal.



The real world and APC – do you have the right fit?

Alpesh Patel

I am often told, much to my surprise, that the APC does not reflect the 'real world'. The APC is a professional acknowledgement of the depth and breadth of what one should be doing in practice, not only to safeguard the client, but also both the candidate's employer and the candidate himself/herself (Merrett vs. Babb!) from professional negligence. If this is not a motivation to link the requirements of the APC to the 'real world' I don't know what is.

Is it not a reasonable expectation for the candidates, their supervisors, counsellors and employers to have dealt with the appropriate breadth and depth not only for APC's sake but also for the sake of the business? This is clearly not happening. Why would we otherwise have on average a 40% failure rate and does this mean that 40% of these 'real' fee generating candidates are actually providing the wrong/inadequate advice in the 'real' world!

There obviously is a problem and I think some of the 'problems' are manifested by the candidates, supervisors, counsellors and employers themselves, because quite simply they haven't read the competencies in detail. However, and on the other hand, those who have read them have encountered difficulties in relation to the actual definition of each of the competencies. Although there are direct definitions for some of the competencies, some are rather too 'open to interpretation' and herein lays the perceived problem.



Let's take an example. Core Competency 069 Measurement and Costing of Construction Works, amongst other things, states '...Advise on and/or supervise the valuation of work in progress for interim payments; prepare, evaluate and agree variations, claims...' Some candidates are being signed off by their supervisors and counsellors at the three monthly progress meetings simply on observing an 'overview' that because the candidate's Diary, Logbook and evaluation of the candidate's workload says that the candidates have actually undertaken an interim valuation, that they have met the competency requirements. It is one thing to have undertaken an interim valuation and another thing altogether to have done it adequately to cover the breadth and depth required professionally and in accordance with the contract conditions. For example, although the competency definition does not expressly state that one needs to know about the full process of valuing materials on and off site, or for that matter the pedantic nature of the adjustment of attendances on prime cost sums, there is an implied requirement for candidates to know the full details. I come across candidates all the time, who have undertaken interim valuations, some for several years, who upon 'interrogation' admit that they have undertaken the chore without reference to the terms of contract. Indeed, several have exercised obligations in this respect that don't even exist under their particular form of contract, such as payment for materials off site. Surely there is a link here between the requirements of the APC and the 'real world'?

How do we overcome these difficulties in the 'interpretation of the competencies'? Quite simply by making it an expectation of the supervisor, counsellor, candidate and employer to have developed a detailed, kind of 'second tier' or 'sub competencies' of the requirements of each of the competencies in their own words and which are meaningful to them specifically. Once these have been established, to ensure that the candidate gets the opportunity and the time to gain both 'on the job' experience and 'off the job' training via professional development, and for the supervisor and counsellor to then 'interrogate' and test the knowledge on a regular basis at the detailed level as part of the routine help for the candidate and in preparation for the final interview. Admittedly, this is time consuming, particularly for a profession that is currently working flat out meeting the needs of their clients in an industry that is booming.

Globally the RICS qualification is highly valued over others because it is directly linked with the requirement for a high quality qualification process. My understanding is that RICS is not intending to lower the standards, so surely supervisors, counsellors, candidates and employers need to work together to rise up to what is required.

Alpesh Patel is the director of APC Coach Ltd.

What you can do about skills shortages

Shortages of professionally qualified quantity surveyors at various levels of seniority have become an increasing challenge for employers to overcome and on both sides of the fence, Contractors and Practices alike.

In 2001, Work Permits UK recognised that Civil Engineers were in scarce supply and gave the profession higher status in the approval system. I have long argued that similar treatment must be afforded to quantity surveyors. Work Permits UK are prepared to consider this if evidence is provided through the representative body that there is a shortage nationally.

RICS is supporting this initiative and is seeking evidence from contractors, practices and the profession, that shortages are serious and this is restricting employers to provide the most efficient and effective services to their clients.

Please email the RICS Quantity Surveying Construction Faculty at construction.faculty@rics.org, briefly explaining your particular problems, the lengths you have gone to trying to resolve them, and the results.

David Knowles is Managing Director of PRS Selection Limited.

About time

What do you think would be a good attendance at a mid week, after work CPD event held in London and programmed for an hour and a half? Fifty, sixty, a hundred? How about three hundred, with more turned away at the door? That was the turn-out on 18 October 2005 when the Society of Construction Law and Kings College London put on an event entitled 'The Great Delay Analysis Debate'.

So, what enticed so many quantity surveyors, other construction professionals, contractors and lawyers to give up an evening and £20 each to attend?

Interest in the subject of delay analysis has grown dramatically since the Society of Construction Law produced its 'Delay and Disruption Protocol' in October 2002. An understanding of programming techniques is essential for the increasing number in the industry who are using NEC standard forms of contract, which are highly prescriptive and demanding in terms of the production programmes.

'The Great Delay Analysis Debate' provided a rare opportunity to hear what four experts had to say about the different ways in which construction delays can be analysed. Each expert had about 15 minutes to advocate a particular methodology, and to say why the other approaches were not appropriate. This was not done in an abstract way, but was based on a set of certain assumed facts.

The four different types of analysis used by the experts to calculate the delays caused by the same set of events were:

- As-planned impacted
- As-planned vs. As-built
- As-built but for, and
- Time-impacted.



Each of these techniques, as applied by the experts, produced a different extension of time period for the given factual scenario. So which one of the four was the correct one to use? Having heard the debate, the audience was asked to vote. The show of hands was not conclusive – each technique received some support. A good number sat on their hands. What did they think? Perhaps they thought none of the four techniques was appropriate, or that some or all had a degree of merit, or perhaps they were too confused to know what to think.

The pros and cons of the different methods of delay analysis, how they work and when they are suitable for use, are some of the subjects covered in a new book to be published by RICS Books early in 2006. *About Time* (by Stephen Lowsley, a consultant programmer, and Christopher Linnett, a chartered quantity surveyor and adjudicator, and Quantity Surveying Construction Faculty Board Member) also reviews the top twenty cases relating to delay claims, the requirements of the standard forms of contract – including the 2005 editions of the JCT and NEC forms – and gives simple, practical advice on this difficult subject.

Making its way onto the bestsellers list is *Case in Point Construction Adjudication* by Richard Mills. This provides a practical, comprehensive guide to case law arising from construction adjudication, and guides you through myriad cases, interpreting the adjudication provisions of the Housing Grants, Construction and Regeneration Act 1996. (RICS Books, price: £24.95, stock code 9040).

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