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**CONSTRUCTION CONTRACTS ACT (2013): IMPLICATIONS OF THE  
ACT FOR THE PRACTICING QUANTITY SURVEYOR.**

*A COMPANY BASED INVESTIGATION*

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Date: Dec-2016

College: Dublin Institute of Technology (Bolton Street)

Course: MSc Quantity Surveying & Economics

## **Abstract**

*The Construction Contracts Act 2013 was introduced into the Irish construction industry for the primary benefit of the sub-contractors, and to address their exposure to the poor payment practices that were prevalent in the industry.*

*The Act was introduced in the Seanad by Senator Feargal Quinn in May 2010, as a private member's bill. It was enacted on 29<sup>th</sup> July 2013 and recently came into effect on the 25<sup>th</sup> July 2016. The Act seeks to regulate payments under construction contracts and to provide fast track dispute resolution for matters related to payments. The Act is centred around three vitally important elements within construction contracts:*

- *The payment process.*
- *The right to suspend works.*
- *Dispute resolution.*

*It is expected to have a major impact on industry and the Act will apply to most construction contracts with few, but none the less, noteworthy exceptions.*

*The research was carried out to discover if the introduction of the Act held any implications for the practicing quantity surveyor. To achieve this, a qualitative research was carried out utilising action research and semi-structured interviews along with a literature review. This research revealed that currently the role of the quantity surveyor has not altered greatly, but moving forward as the Act is embraced, they will play a vital role in implementing the conditions of the Act.*

*Based on the research the Author discovers little has changed from a procedural or documentation point of view and he makes several recommendations he feels may improve the implementation of the Act, such as: Improved education, industry regulation, enforcement from contract administrators and a full review of the Act in coming years to identify any alterations which may improve on the legislation.*

**Key Works:** Construction Contracts Act 2013, The Act, Quantity Surveyor, Conditions, Payment Procedures, Adjudication, Suspension.

## **Declaration**

I certify that this document which I now submit for examination for the award of MSc Quantity Surveying & Economics, is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

This thesis was prepared according to the regulations for postgraduate study by research of the Dublin Institute of Technology and has not been submitted in whole or in part for an award in any other Institute or University.

The work reported on in this thesis conforms to the principles and requirements of the Institute's guidelines for ethics in research.

The institute has permission to keep, to lend or to copy this thesis in whole or in part, on condition that any such use of the material of the thesis is duly acknowledged.

Signature\_\_\_\_\_ Date\_\_\_\_\_

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To my beautiful children Paudí and Connie, who have done without their father, far too often during this time. This was all for you.

Lastly to my wife and soul mate Carol, words cannot express how thankful I am for the help you have provided me from the start. Without you, I have no doubt this journey would have been a bridge too far.

## **List of Abbreviations**

- CA.... Contracts administrator
- CBI.... Central Bank of Ireland
- CCA.... Construction Contracts Act 2013
- CIF.... Construction Industry Federation
- CIRI.... Construction Industry Register Ireland
- CPD.... Continued professional development.
- CSO.... Central Statistics Office
- DECLG.... Department of the Environment Community and Local Government
- DJEI...Department of Jobs, Enterprise, and Innovation
- EEN.... Enterprise Europe Network
- ER.... Employers Representatives
- GCCC.... Government Construction Contracts Committee
- GDP.... Gross Domestic Product
- HGCRA.... Housing Grants Construction and Regeneration Act
- IEI.... Institute of Engineers Ireland
- IMF.... International Monetary Fund
- ISME.... Irish Small and Medium sized Enterprise Association
- PPP.... Public Private Partnerships
- QS.... Quantity Surveyor
- RIAI.... Royal Institute of Architects Ireland
- SCSI.... Society of Chartered Surveyors of Ireland

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## Chapter One: Introduction

### 1.1 Background

Historically, the Irish construction industry is a sector which has the ability to significantly influence the State's macro economy. This was most evident from the period 1995-2007 'Celtic Tiger' right through to the recession 2007-2013. During the Celtic Tiger, construction output was at an all-time high of €36.5 billion, directly contributing 21% to Gross Domestic Product (GDP). This level of activity and the reliance placed on the construction industry was unsustainable; - a fact pointed out by the International Monetary Fund (IMF) (2006). The international credit crunch took hold in 2007 and with it came a period of contraction which proved to be devastating to many organisations operating in the construction industry at the time. Construction output fell to €9 billion, just 5.5% of GDP. To place the contribution to GDP into context, a correctly functioning construction sector should contribute 9-10% of overall GDP. Activity within the sector shrank, work became scarce and was extremely hard to secure leading contractors to scramble for work in order to maintain turnover and survive. This led to poor tendering practices and below cost tendering among contractors (O'Sullivan, 2014).

The phenomenon of below cost tendering, while creating a dangerous environment for companies in which to operate, also exacerbated the already poor payment and contractual conditions which sub-contractors within the supply chain were experiencing, such as delayed payment, under-payment or occasionally non-payment. This contributed to many organisations becoming insolvent with those remaining under severe pressure to survive. These difficulties provoked a reaction from the industry and led for calls to improve the situation in order to afford greater protection to vulnerable contractors.

The pressure placed upon government at the time by lobbyists, such as the CIF, led to the introduction of the Construction Contracts Act 2013 (Number 34 of 2013), referred to hereafter as 'the Act'. The Act was introduced in the Seanad by Senator Feargal Quinn in May 2010, as a private member's bill. The Act was enacted on 29<sup>th</sup> July 2013 and recently came into effect on the 25<sup>th</sup> July 2016. The Act seeks to '*regulate payments under construction contracts and to provide fast track dispute resolution for matters related to payments.*' (Mulrean, 2014). The Act is centred around three vitally important elements within construction contracts- payment terms, the right to suspend works and dispute resolution. It is expected to have a major impact

on industry payment and dispute resolution practice (SCSI, 2016). The Act will apply to the majority of construction contracts with few, but none the less, noteworthy exceptions.

Prior to the introduction of the Act, main contractors were often perceived, to be imposing onerous payment conditions on their subcontractors. This was supported by the Irish Small and Medium Enterprise Association (ISME), this showed a waiting period for payment of 75 days in 2012, and currently lying at 61 days (ISME, 2016) indicating some improvement. Of particular concern to subcontractors were 'pay when paid clauses' and payment periods equalling that of the main contract, regardless of duration. This effectively meant that subcontractors were financing construction projects on behalf of the main contractor. This transferred much of the financial risk relating to construction projects onto subcontractors for long periods, regardless of having completed their works on site. Such clauses under the new legislation are now unlawful, and although they may still be incorporated within construction contracts, they are not enforceable under new law except for very limited circumstances, i.e. when parties up stream in the supply chain are in liquidation. Payment must be paid in accordance with the Act once uncontested notices are provided by the parties in line with the timelines set out in the contract or within the Schedule. The period of payment to subcontractors is set at 30 days or better terms, with the exception of short contracts. However, the payment relationship between the main contractor and employer is still open to agreement, at whatever intervals the parties agree to in the contract.

The Author's company (The Company) provides quantity surveying services to construction employers, administrators, and contractors, all of whom are involved in the efficient administration of construction contracts. A central aspect of this service is to represent and advise clients at all levels of the supply chain regarding, procurement, payment procedures and cost control. The topic therefore concerns the ever-evolving role of the quantity surveyor, contract administration and contract practice. All of these competencies are core skills required of chartered quantity surveyors and relate directly to the central programme outcomes of the Dublin Institute of Technology, DT107 Masters in Quantity Surveying, and in particular, QS Practice.

## **1.2 Rationale for the Research**

This research is being carried out as a company based project, with the express goal of ascertaining the level of knowledge of the Act within the Company's current client base. The study also investigates the preparations, if any, are required by the Authors company to ensure clientele comply with the conditions of the Act. Based on the perceived importance of the Act,

and its statutory implications, this research is considered to be essential to the Company in order to ensure that it is offering its clients the best advice possible from a contractual point of view, and ensuring that the correct procedures and measures are in place to comply with the Act.

The knowledge and information gathered from this research will serve to inform Company decision making, with the view to providing improved, evidence-based advice to its existing clientele and to make its services more attractive to potential new business clients.

Much of the previous research on this topic concerned draft forms of the Act and/or was undertaken before its commencement on 25<sup>th</sup> July 2016. The research concentrated mainly on reviewing legal commentary regarding the content of the draft Bill and published Act while also reporting opinions held by industry participants on how various particulars contained in the legislation *might* impact upon the industry. This research therefore builds upon and extends previous academic, undergraduate, and post graduate studies carried out by Cunningham 2013, O’Sullivan, 2014 and Quinn 2013 etc. This research is focussed upon how the legislation *is* impacting upon quantity surveying practices’ and is therefore considered to be both timely and relevant.

### **1.3 Scope of the Research**

The scope of the research will include a review of the Act through a detailed investigation taking into account its individual features i.e. payment procedures, the right to suspend work and to seek adjudication of payment disputes. The investigation seeks to identify the positive and negative aspects of the Act derived from available literature, seminar proceedings, discussions and correspondence with stakeholders and authorities related to the subject matter.

The Company’s clients comprise a diverse group of companies, including main contractors, subcontractors, employers, and contracting authorities/administrators. Similar types of organisations will be the focal point of the investigation, offering a broad spectrum of research and an unbalanced view. A description of the different organisations is included below.

- Main contractors: generally, are responsible for the overall completion of the whole project from start to finish, in line with the particular contract agreement. They manage and are responsible for the activity of all subcontractors and personnel on site in order to complete the works in a timely fashion. The Company’s services to main contractors include general commercial surveying services, procurement advice and the provision of contractual advice in relation to the main contract with the employer, which is

described as 'tier 1 contract' (O'Brien, 2016) and those with subcontractors which are described as 'tier 2 contracts' (O'Brien, 2016).

- Subcontractors: generally, provide 'trade' and specialist services to supplement the workforce of the main contractor, in a business-to-business arrangement (Nathan, 2013) or contract. Again, there can be two types of contract: subcontractor and main contractor (tier 2) or subcontractor and the employer (tier 1). The common types of services provided by subcontractors include electrical, mechanical, plumbing, painting, joinery, signage, groundworks; - basically anything that the main contractor does not provide for directly but is required to complete in order to perform the project. The services the Company provides on behalf of subcontractors are commercial surveying and contract advice.
- Employers: are the Company's clients who commission construction projects. Their primary responsibility is to honour the certificates issued by the contract administrator. Their lines of communication within the project are through the contract administrator / authority. The company is generally retained by employers for project cost control and monitoring, and contract advice if required.
- Contract administrators and authorities: These are employed directly by the employer and the contract will be formed between them. The role the contract administrators and authorities play is to administer the contract fairly and correctly between the employer and the main contractor and to advise on contract obligations. On occasion the Company is retained by contracting authorities and administrators who utilise its services to advise on projects costs for variations and to make recommendation as to the value of works on site due to be paid, this scenario almost always results in the contract being directly with the employer and the Company.

For the purpose of the research the Author has categorised organisations in the following manner:

- A) Small construction enterprise: are those with a turnover less than €2 million in a single year.
- B) Medium construction enterprise: are those with a turnover exceeding €2 million but not exceeding €10 million in a single year.
- C) Large construction enterprise: are those exceeding €10 million turnover in a single year.

The Author's categorisation is made irrespective of the definition given to such organisations by the Enterprise Europe Network (EEN), Irish Small and Medium Enterprise (ISME) and The



European Commission (EC) (2003) which categorise the size of enterprises in a different manner (see Chapter Two). Although the research is being carried out primarily to benefit the Company's clients, who are predominantly small to medium sized organisations, some large organisations will also be investigated to establish if they are better equipped to deal with the requirements of the Act. The investigation will examine the measures larger organisations have taken to prepare for the Act, and the alterations they have made to their previous procedures in the areas of payment and dispute resolution. The information gathered will be used to develop a strategy for implementation within this Company's current client base.

There are limitations to the research, such as the lack of historic information relating to the Act, which is still in its infancy. The fact that the Act has only been commenced on 25<sup>th</sup>-July-2016, means that up to date information is still being produced and developed.

## **1.4 Research Aims and Objectives**

### ***1.4.1 Aims***

The purpose of the research is to:

A) identify what are the implications of the Act for practicing quantity surveyors, and to reveal the level of preparation they will require from an administrative and procedural aspect in order to be compliant with the conditions of the new legislation.

### ***1.4.2 Objectives***

The following objectives have been devised in order to fulfil the overall aim of the research.

- explain the rationale for the introduction of the Act;
- review and summarise the provisions of the Act;
- report commentary in the literature regarding the Act from the main individual and stakeholders;
- formulate an effective method of investigating industry awareness of, knowledge of, preparations made for, and changes to practice made in response to the implementation of the Act;
- report the experiences of the interview participants regarding various issues raised by the implementation of the Act;

- analyse the findings of the investigation and reflect upon the impact of the Act on current practice in the Author's organisation and identify areas of potential for improving service delivery to its clientele.

## **1.5 Structure of thesis**

### ***1.5.1 Chapter One: Introduction***

Chapter One introduces the research topic, setting out its context, and the industry expectations of the Act. It also explains the rationale for, and the scope of the research.. The aims and objectives of the Author are highlighted, while the giving the context to the research.

### ***1.5.2 Chapter Two: Literature review***

Chapter Two reviews the literature relating to the Act. The review summarises the content focussing on the payment, work suspension and dispute resolution procedures contained within the Act. The industry's perception of the Act will be analysed to establish the positives and negatives that accompany the introduction.

### ***1.5.3 Chapter Three: Research Methodology***

Chapter Three explains the design employed in order to achieve the research objectives. The Author has engaged a single method qualitative research, utilising phenomenological and action based research methodology. The use of semi structured interviews will be employed in order to identify current practice and procedures operated in the workplace.

### ***1.5.4 Chapter Four: Findings & Analysis***

Chapter Four presents the findings of the semi structured interviews, providing analysis of the findings and highlighting key themes which emerged throughout the interviews and the secondary research. A discussion will follow and the Author's own interpretation of the findings will be aired while commenting on the key themes, perceptions, attitudes, and experiences derived from the research.

### ***1.5.5 Chapter Five: Conclusion and Recommendations***

Chapter five concludes the research and summarise what has been completed and achieved. The Author will discuss how the aims and objectives have been achieved by the research, and

whether the research methods employed were appropriate. Any recommendations arising from the study will be proposed and areas for further research identified.

## **Chapter Two: Literature Review**

### **2.1 Introduction**

This literature review provides a framework for the reader to assess the information which has been gathered from numerous sources relating to the subject e.g. journals, online, seminars, masterclasses, text-books, periodicals, previous dissertations, and other studies. Naoum (2007, p. 20) comments the literature review process involves the identification of ‘*appropriate*’ literature. The Author attempts this by collating, comparing and critiquing the information. ‘*the literature review involves reading and appraising what other people have written about your subject area*’ (Naoum, 2007), Naoum explains that the review can be both descriptive and analytical, in the way it describes previous research but also critiques the information. This is important as the information relates to a relatively new subject, where many commentators hold vastly differing opinions.

The review outlines the recent history to the Irish construction industry and explains the requirement for the legislation. It reviews the Act itself, its background, its provisions, and its likely effects on construction industry participants. The review endeavours to satisfy the following objectives set out in Chapter One:

- explain the rationale for the introduction of the Act;
- review and summarise the provisions of the Act;
- report commentary in the literature regarding the Act from the main individual and stakeholders

The study is generally confined to Ireland as the Author’s company exclusively works in this jurisdiction; however, for reference purposes, it considers similar UK legislation.

### **2.2 Background to the Construction Industry of Ireland**

The Irish construction industry is an important sector within the nation’s overall macro economy. During the years 1995 – 2013 the industry experienced a spectacular boom to bust cycle. 1995 - 2007 were the most prosperous in Irish construction history. The International Monetary Fund (IMF) at the time, referred to Ireland’s economic performance as ‘*remarkable*’ (2006, p. 4). The Fund however, commented upon and emphasised Ireland’s over reliance on the construction sector, which was the leading sector driving growth (2006, p. 3). Naturally, as a direct result of the high levels of activity, construction-related employment was also at an all-time high of almost 296,000 people (CSO, 2015).

This period of prosperity became infamously known as ‘*The Celtic Tiger*’ era. The unprecedented level of construction activity however, was ultimately unsustainable. When the recession and worldwide credit crunch took hold late in 2007, the construction and property sectors bore the brunt of its effects, mainly due to the State’s over reliance on these sectors (Barrett & McGuinness, 2012. IMF, 2006). The IMF’s (2006) forecasted ‘soft landing’ and gradual reduction in construction activity was over optimistic. The crash was ‘swift’ (Barrett & McGuinness, 2012), devastating and brutal.

In the following years (2008-2013) the industry experienced a major contraction, with output levels falling to €9 billion, or just 5.5% of GDP (CBI, 2015). This led to a ferocious scramble by contractors to obtain work and maintain turnover, in order to survive. During this period, tender prices were often cut to levels below the cost of performing the work, as was reflected in tender price indices published by industry commentators (Bruce Shaw, 2015).

The practice of below cost tendering often produces devastating effects within the industry. Cunningham, (2013, p. 16) comments that construction is a cyclical industry in which firms struggle to survive and insolvency is common when work becomes scarce. He adds that the negative effects of below cost tendering are experienced throughout the supply chain and generates situations where main contractors either have no means to pay sub-contractors for works they have carried out, or have decided against paying to secure a profit margin, or in some cases, just to survive.

The problem the sub-contractors encountered in getting paid were exacerbated by the onerous contracts they had entered or, indeed, the absence of formal written contracts. The payment process was described by one law firm, Mason, Hughes & Curran, when they referred to getting paid for construction works as ‘*not straight forward*’ and getting paid promptly as ‘*even more challenging*’ (2015). This view was reinforced by Irish Small and Medium Enterprise Association (ISME) in 2012, which stated the average waiting period to get paid for construction work was 75 days (Cunningham, 2013). McEvoy (2015) suggests that ‘*sometime non-payment of sub-contractors*’ within the construction sector is a reality.

The protracted, largely unregulated payment activity, led to calls for ‘something’ to be done regarding the severe cash flow problems being experienced within the industry, and throughout the entire supply chain. The sub-contracting sector was part-financing projects for main contractors (Kelliher, 2016) until full payment had been received.

### **2.3 Rationale for the introduction of the Act**

One of the key objectives of this research is to explain the rationale for the introduction of the Act. The research to date indicates that it was complaints from the construction sector regarding the poor payment procedures, severe cash flow problems and failing business which led to the introduction of the Act. The Act represented an ambitious attempt to alleviate these. It was introduced into the Seanad by Senator Feargal Quinn in May 2010, as a private member's bill, which in itself was unusual (McEvoy & Rowan, 2015), as it was the first time in over 50 years such a bill was presented to the Seanad (O'Connell, 2014).

McEvoy (2016) comments that the Act was '*Born out of the economic recession, with the purpose to regulate payments under construction contract in order to create a sustainable future for the Irish construction industry*', Cunningham (2013), however, notes that previous prompt payment legislation had been introduced in 1997 & 2002, to address the issue of poor payment practices, he argues the problem was prevalent long before the recession. It could be argued therefore that the Act was probably warranted long before the recession, but the recession reinforced its necessity.

The importance of the Bill was acknowledged as it moved through the stages of the Oireachtas, however, only on the 29<sup>th</sup> of July 2013 was the Act finally enacted. There, it remained in stasis for a further three years until the 13<sup>th</sup> April 2016 when interim Minister for Business, Employment and Innovation, Gerald 'Ged' Nash, signed the commencement order on the Act, stating the date of effect would be 25<sup>th</sup> July 2016.

The delay was seen as unfortunate and drawn out (McEvoy & Rowan, 2015), a sentiment echoed by Senator Quinn in numerous public statements, one of which was published in the *Irish Times* when he denounced the delay, remarking: "*the law is not providing crucial protection to contractors for non-payment of the work that they have carried out.*" (Dowling-Hussey & Dunne, 2016). Dowling-Hussey & Dunne further comment that '*The exact number of contractors who went out of business between 2010 and 2016, who might have survived had they been able to avail of adjudication, will never be known*' (2016). A statement questioned, by Quinn (2016) who believes that the process of adjudication may have only '*prolonged the inevitable*' for many of the parties whose organisations subsequently failed.

The timetable between the introduction, enactment and commencement of the Act compares quite poorly internationally (Dowling-Hussey & Dunne, 2016). They comment that the reason for the delay was the time taken to appoint members of the adjudication panel required under

S.8 of the Act (Cummins, 2016). Quinn (2016) points to a lack of willingness on behalf of the Government as the main reason for the delay in its introduction, a point Senator Quinn himself supports, condemning the efforts of ‘successive governments’ to deal with the Act more efficiently.

## **2.4 Basis for the Act**

Quigg Golden (2016) note that Part II of the UK Housing Grants Construction and Regeneration Act (HGCRA) 1996 provided the template for the introduction of Act into Ireland. The UK HGCRA Act contains many of the recommendations which were set out in the Latham Report (Marshall, 2012), which expressed the need for improved efficiencies within the UK construction industry. The most important recommendations from the Report, included in the HGCRA legislation were: satisfactory payment mechanisms, right to refer disputes to adjudication and the right to suspend works in the event of non-payment. The adjudication process in the UK is slightly different to that of the Irish version, in that **any** dispute in the UK can be referred to adjudication for resolution (Marshall, 2012), while in Ireland **only** payment related disputes can be referred to adjudication (GCCC, 2014) The task highlighted by Quinn (2016) is to find a dispute that does not involve some sort of payment issue. The success of the HGCRA is generally acknowledged and accepted, this was revealed by Blake, Laphorn, Tarlor and Lyons (2016) writing on the effect of the UK Act stated that *“During its life to date it has achieved a modicum of success in terms of improving cash flow”*. The success of the Irish model very much depends on the courts treatment of the adjudication process. In the UK adjudication is fully supported by the courts, but Irish courts favour a more constitutional approach to rulings (Quinn, 2016), therefore it remains to be seen if the courts will support, or overturn adjudicated decisions. Only time will reveal this, as it is expected that many of the early adjudication decisions will be appealed to the courts, on the grounds of ‘natural justice’ (Fenelon, 2016) but based on the results to date in the UK its support is essential to its success (Quigg Golden, Hughes, 2016).

## **2.5 Review of the Act**

The Act was introduced to improve payment procedures throughout the supply chain in the construction industry, a full copy of the Act can be located from the electronic Irish Statute Book (eISB) at <http://www.irishstatutebook.ie/eli/2013/act/34/enacted/en/html>. The explanatory memorandum accompanying the Bill describes its purpose as:

*‘This provision is proposed in ease of persons along the chain in the construction sector who may suffer unduly where an entity under a superior contract would find*

*itself withholding payment unilaterally without cause. This would bear unfairly upon the payee or others dependent upon the payee* (Oireachtas, 2010).

The wording above is significant because it emphasises *'persons along the chain in the construction sector who may suffer unduly where an entity under a superior contract would find itself withholding payment'* basically alluding to subcontractors. This was supported by Senator Quinn where he said the objectives were to *'improve crucial cash flow to those sub-contractors working in the industry'*. Nevertheless, the Act applies to main contractors as equally as it does to sub-contractors, a point emphasised by Curtin (2016), who further acknowledged that when it comes to the payment process, while *'probably nothing'* will change regarding the main contract, everything will change regarding *'sub-contracts'* referring to payment durations

The legislation, from the 25<sup>th</sup> July 2016 automatically applies to all construction contracts whether written or oral, with few exceptions. An essential part of the Act is that parties to the contract cannot *'opt out'* (O'Connell, 2014) or *'contract out'* (Quinn, 2016) of the legislation. Quinn (2016) points out that it is possible to include clauses in a contract that contravene the Act but having them enforced would be impossible.

The three main areas of change that the Act has introduced are discussed below, these items are the most significant parts of the legislation affecting the contracting parties, and the industry.

- Mandatory payment conditions: Section 3 & 4
- A right to suspend works for non-payment: Section 5
- A right to refer payment disputes to adjudication: Section 6

The Author has also included a further section within the review, which deals with the definition of some of the key elements contained in the legislation, for the purpose of the Act.

- Interpretation and Definitions: Section 1

### ***2.5.1 Interpretation and Definitions: Section 1***

The Act defines the following technical elements of conditions, within the information handbook provided by the Department of Jobs, Enterprise and Industry (DJEI), (2016) for the contract:



### 2.5.1.1 Construction Contracts

“For the purposes of the Construction Contracts Act, 2013, A construction contract is an agreement (whether oral or written) between an Executing party and another party, where the Executing party is engaged for any one or more of the following activities:

- carrying out construction operations by the Executing party;
- arranging for the carrying out of construction operations by one or more other persons, whether under subcontract to the Executing party or otherwise;
- providing the Executing party’s own labour, or the labour of others, for the carrying out of construction operations.”

The party to the contract which is referred to as ‘another party’ within the description of a construction contract, is further defined, *‘the Act refers to this party as the "Other party" .... the Other party, means the party which is not the Executing party under the construction contract. There may be more than one "Other party" to a construction contract’* (DJEI, 2016)

i.e. The Employer

This is basically referring to the client or anybody else but not the contractor or the person carrying out the physical works.

### 2.5.1.2 Executing party

The Act identifies the "Executing party" in relation to a construction contract means:

- where the parties to the construction contract are a contractor and the person for whom the contractor is doing work under the contract, the contractor; or
- where the parties to the construction contract are a contractor and a subcontractor, the subcontractor; or
- where the parties to the construction contract are two subcontractors, whichever of the subcontractors agrees to execute work under the contract

Simplified, this phrase ‘Executing party’ refers to the party doing the physical labour, be that a contractor or a subcontracted party.

### 2.5.1.3 Subcontractors

The Act defines a subcontractor as *‘a person (or company) to whom the execution of work under a construction contract is subcontracted by the contractor or another subcontractor,* (DJEI, 2016).

#### 2.5.1.4 Construction Operations

Construction operations contain the basic process in construction (W. Halpin & S. Riggs, 1992, p. 97) this includes a large spectrum of operations. The definition accompanying the Act maintains ‘*Construction operations for the purposes of the Act mean any activity associated with construction*, (DJEI, 2016). The DJEI provide a full list of construction operations covered under the act on their website:

<https://www.djei.ie/en/Publications/Information-Booklet-Construction-Contracts-Act-2013.html>

The Act further defines what exactly is **not** considered a construction operation under the legislation, and the conditions of the Act will not apply to these arrangements. The DJEI (2016) maintain ‘*for the purposes of the Act, construction operations do not include the manufacture or delivery to a construction site of:*

- building or engineering components or equipment;
- materials, plant or machinery; or
- components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems.

#### 2.5.2 Exemptions to the Act: Section 2

The Act encompasses all construction related activity, operations and contracts. These range from main contracts, to subcontracts, cleaning, professional services, building services, landscaping and archeology (the list is not exhaustive). There are a few exceptions where the Act does not apply, which are not considered to be a construction contract (Department of Justice and Law Reform, 2013) these are outlined as follows:

##### 2.5.2.1 Low value contracts

Contracts of less than €10,000 are not covered by the Act, this is welcomed as the original Bill had a €200,000 threshold which would have ruled out many maintenance and renovation contracts. The previous threshold had been condemned by many commentators (Cunningham, 2013). The €10,000 threshold does not differentiate between public and private contracts.

Curtin (2016) explores the idea that it could be possible to enter into a contract with a subcontractor based on a series of ‘low value contracts’ below €10,000 with the overall accumulation equalling multiples of the threshold figure, for example, if a contract was worth

€50,000, that 5 contracts worth €9,999.99 could be entered into, with the balance being negligible. Quinn (2016) argues this type of contract activity would be questionable, and points to the administrative burden it would place on the parties involved, and that this could not be applied to any substantial size works packages. Quinn (2016) also questions the legality of this type of arrangement as it could be viewed as ‘side stepping’ or ‘circumventing’ the Act.

#### 2.5.2.2 Residential Dwellings

Domestic dwellings with a floor area of not more than 200m<sup>2</sup>, and a party to the contract occupies or intends to occupy the dwelling as a residence are not considered to be subject to the Act. It is worth noting that both criteria must be met in order to satisfy exemption (Hughes, 2016). Regarding the floor area, the Act does not define this term. Hughes (2016) points to the absence of a formal method of measurement such as ARM 4 or similar, when calculating the floor area, as being potentially problematic, and challengeable in the courts.

Potentially one of the more contentious elements of the exemptions will be the determination on the occupation of the dwelling. Hughes (2016), refers to the UK case of *Westfields Construction Ltd v Lewis*<sup>1</sup> where a contractor failed in an action to enforce an adjudication award because he could not disprove the client’s intentions not to occupy the building.

#### 2.5.2.3 Employment Contracts

Employment contracts between parties, which are involved in the construction industry e.g. a quantity surveyor directly employed by a main contractor, are not subject to the provisions of the Act. An employment contract is defined in the *Terms of Employment (Information) Act 1994 Revised*. It is worth reiterating that consultancy contracts are subject to the Act’s provisions.

#### 2.5.2.4 Public Private Partnerships (PPP)

The Department of Public Expenditure & Reform (DPER) define a public-private partnership (PPP) as being an agreement between the public (government) and private (industry) sectors, with a “*clear agreement on shared objectives*” for the completion of public services, and/or public infrastructure by the private sector party that would otherwise have been provided through the use of the traditional public sector procurement strategy ([www.per.gov.ie](http://www.per.gov.ie)). Davis (2015) contends the main reason for using PPP contracts is that public and private sector parties generally have different strengths when it comes to delivering large scale projects. Combining these individual strengths should result in the procurement of more economically effective projects and services.

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<sup>1</sup> [2013] EWHC 376 (TCC)

Quinn (2016) justifies the exclusion of PPP contracts on the basis that such contracts are typically extremely complex from an operational, administrative and implementation point of view, and the Act in its current form could hinder rather than help parties involved. For instance, Davis (2015) comments on the duration of the contracts which typically include extended service periods (a minimum of 5 years) as a complicating factor. Quinn adds that the findings of adjudication are private but sensitive information could potentially find its way into the public domain. If this was the case it could lead to increased adjudication of similar disputes, on other projects.

#### *2.5.2.5 Supply only contracts*

While supply contracts are not expressly identified as an exclusion from the Act according to the DJEI handbook, they are clarified as **not** being considered ‘construction operations, which effectively excludes them from the scope of the Act. These include contracts involving the manufacture off site and supply only to the site, including delivery contracts. Curtin (2016) comments that because of this exemption there will be an increase in the practice of labour only packages employed on projects, where the main contractor will try to make contracts separately, for the supply of material for subcontractors to provide the labour to fit, thus removing the requirement of the 30-day rule for the cost of material, with the only exposure being for the labour element. Quinn (2016) supports this view, but maintains there would be added costs of additional administration and procurement to be factored into the equation, which may render the practice counterproductive.

#### *2.5.3 Mandatory payment conditions: Section 3 & 4*

Durack (2016) argues that the Act would have been more accurately named the ‘Construction Payments Act’, this, a reference to the importance placed on payments in the Act. The reason he gives for this view point is explained in the chart below in Figure 1.

## QS Perspective

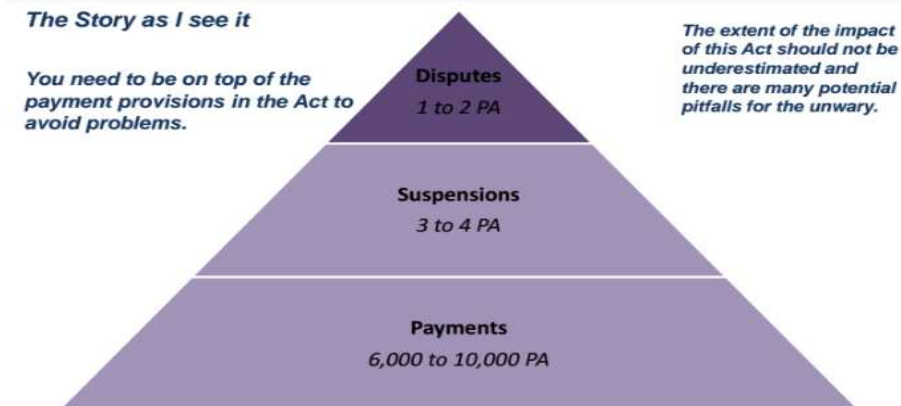


Figure 1 Estimated occurrences of important events in a typical year (single organisation)  
Source (Durack, 2016)

The chart illustrates that a typical organisation may encounter only a small number of disputes and suspensions but are likely to process many payments applications, each one containing the possibility of leading to a suspension and potentially adjudication. On the face of it, it could be argued that if payments are dealt with correctly 100% of the time, there will be no occurrence of suspensions or adjudications.

Sections 3 and 4 of the Act deal with ‘payments under construction contracts’ and ‘payment claims notices’, respectively.

### 2.5.3.1. Section 3 Payment under construction contracts

This section requires contracts to identify interim payment and final account amounts, along with the dates on which they fall due. Alternatively, contracts must provide ‘adequate mechanisms’ to determine these dates and amounts. This provision is a standard feature of most standard forms of building contract (Killoran, 2016). Where contracts do not accommodate such terms, the mechanisms contained in the ‘Schedule’ appended to the Act will apply. The Schedule requires payment 30 days after the commencement of the contract and at 30 day intervals thereafter up to substantial completion, then 30 days after final completion (Cunningham, 2013; O’Connell, 2014 p.4). Quinn (2016) explains that the payment date is 30 after commencement on site, which in theory could be a considerable time after the commencement of the contract. Curtin (2016) recommends that the commencement is fully ‘defined’ to avoid confusion. For shorter contracts of duration less than 45 days the terms are different, as final payment becomes due 14 days after final completion (Quinn, 2016).

The Act differentiates between main contracts and sub-contractor. It allows employers/clients to agree payment periods of longer than the 30 days set out in the Schedule with main contractors. In contrast, sub-contracts benefit from the Act's protections, which allow changes to the payment duration *only* if they are more favourable than those set out in the Schedule (O'Connell, 2014). According to Quinn (2016) this begs the question, what are more favourable terms? He questions whether a main contractor who offers a sub-contractor additional payment in exchange for 60 day payment terms, would be viewed as 'more favourable'. He believes this could be acceptable.

The Act (S.3 (5)) prohibits the application of 'pay when paid' clauses whereby main contractors pay their sub-contractors only when they themselves have been paid. With the exception being circumstances relating to the insolvency of the employer or contractor further up the supply chain (McEvoy & Rowan, 2015). The reason for the inclusion of pay when paid clauses in construction contracts, was basically a matter of risk allocation to the main contractor's benefit which protected them against the risk of employer's default on payment (Conway-Behan, 2012). This clause meant that if the employer defaulted then the main contractor would only be exposed to his own costs input to the project, while each of the subcontractors would also be exposed only to their cost input. This was not the view of Irish legislators who believe the risk of employer default should lie with the main contractor (Conway-Behan, 2012, p. 1)

While this is a welcomed and important change to the industry for subcontractors, there is no express mention of the outlawing of a 'pay when certified' clause which Quinn (2016) considers could become a feature of contracts. However, this view is not supported by Conway-Behan (2012) who argues that Irish legislation matches that of the UK, where all conditional payment term are outlawed under the Act. Alluding to pay when certified, Conway-Behan further insists that the law also bans the use of clauses which may be included and relate to payment of sub contractors, dependant on future funding of finance by other parties.

According to Quinn (2016) all contracts should continue to contain a 'pay when paid' clause to account for an occasion where a party 'upstream' in the supply chain becomes insolvent. The presence of the pay when paid clause then becomes applicable to lower tiered contracts; i.e. sub-contractors who may be seeking payment from the main contractor. This is the only instance where the pay when paid conditions set out in the Act, do not apply.

#### 2.5.3.2 Section 4 Payment claims notices

Killoran, (2016) and O'Connell, (2014), describe this procedure as a '*new phenomenon*' for the Irish construction industry. This Section sets out the procedures for applying for and issuing payment between parties. A 'payment claims notice' is a detailed and comprehensive document with calculations and breakdowns to justify the amount being sought, The DJEI (2016, p. 8), indicate the following as being required:

*A payment claim notice is a notice specifying the:*

- *amount claimed;*
- *period, stage of work or activity to which the payment claim relates;*
- *subject matter of the payment claim; and*
- *basis of the calculation of the amount claimed.*

It should be issued not more than 5 days after the 'payment claims date', from which the respondent has 21 days to respond to the claim, either agreeing to pay the full amount, part or none of the claim. If the payer does not agree with the amount due they must issue a 'withholding notice' providing a full and in-depth explanation as to why they are not paying the full amount, including calculations and breakdowns indicating how they came to the amount proposed, if any. The DJEI (2016, p. 8) indicate the following as being required:

*'Payment Claim Notice is required to respond to the Executing party, not later than 21 days after the payment claim date setting out:*

- *the reason(s) why the amount claimed by the Executing party in the payment claim notice is disputed, including any claim for loss or damage arising from an alleged breach of any contractual or other obligation of the Executing party; and*
- *the amount, if any, that is proposed to be paid to the Executing party and the basis of how that amount is calculated'*

Once the withholding notice is issued the parties have a further nine days to agree on an amount to be paid, before payment must be made, to comply with the provisions, 30 days after the payment claim date.

#### **2.5.4 Right to suspend works for non-payment: Section 5**

Section 5 is a significant part of the Act, and provides a strong sanction to the party seeking payment by conferring the right to suspend work in the event of non-payment

(O'Connell, 2014). The procedure requires a written notice to be issued at least one day after the 'due date' for payment, outlining the reasons for the action. The suspension must not commence for at least seven days after the notice has been issued. The effects of the threat of suspension are diluted somewhat by the fact that once dispute has been referred to adjudication this immediately ends the suspension and the party seeking payment must resume works (Eugene.F.Collins, 2013, Mulrean, 2014, O'Connell 2014).

The effects of suspension from a programme point of view are disregarded when taking into account the completion date of the project. I.e. the suspending party shall not be penalised for extending the length of the contract, unless the suspension was deemed to be unjustified. If the suspending party does not justify the suspension at adjudication he or she bear the cost implications arising from period of suspension (Quinn, 2016). This is a strong deterrent parties to rush into suspension or adjudication.

The effects of work suspension can be harmful, and the decision should not be taken lightly. It is likely that suspensions will damage working relationships between the contractor and the sub contractors, as it will probably lead to the contractor incurring penalties or accelerating the works to remain on programme, both having significant financial implications. Damage to the subcontractor's reputation could also result. Kelly (2016) suggests that even though the introduction of the Act allows for suspension, it does not mean the '*flood gates should automatically open and suspensions happen across multiple sites*'. Rather correspondance, dialogue and negotiations should be emphasised.

### **2.5.5 Right to refer payment dispute to Adjudication: Section 6**

Adjudication in Ireland is different than in the UK in some respects, in Ireland the adjudication process is a statutory right and is automatically implied whether written or not into a contract, while the UK enjoy a similar position, they have advanced the Act and altered their building contracts to include the right to refer disputes to adjudication (O'Sullivan, 2016). Adjuication is seen as a fast-track resolution mechanism for disputes, it is designed to deliver a swift decision administering '*rough justice*' (Curtin, 2016) within a period of 28 days from the beginning of the process. This period can be extended by a further 14 days with the permission of the referring party (O'Connell, 2014). However, Curtin (2016) contends that cases of adjudication have been known to go on for over 100 days.

A significant aspect of the process is that it allows a disputing party to refer a payment dispute to adjudication at 'any time' which means it does not exclude other forms of dispute resolution,



for example, conciliation and mediation are still possible options, but either party can refer the dispute to adjudication whilst conducting other forms of dispute resolution. From the date of 'notice of adjudication' the parties have five days to agree an adjudicator or have one appointed by the chair of the adjudication panel. After the adjudicator's appointment the parties have seven days to refer the dispute to the adjudicator.

The decision of the adjudicator is binding in the interim and can subsequently be overturned by a higher authority i.e. arbitration or litigation. The primary benefit of adjudication is that, the award becomes immediately enforceable (O'Connell, 2014) and the adjudicator's decision will have the same power as that of the courts (Cummins, 2016). The idea being 'pay now argue later', and in the process keep cash-flow moving and the work progressing. Generally, adjudication is cheaper than arbitration or litigation but may still be an expensive process. Legal costs are split between the parties (William Fry, 2016). Quinn (2016), explains that the cost of fees of the adjudicator can be split at the adjudicator's discretion from 50/50 to 80/20 depending on the judgement.

It is worth noting that the majority of adjudication decisions in the UK are upheld and supported by the courts. Quinn (2016) and McEvoy and Rowan (2015) comment that it remains to be seen if the Irish judicial system will be as supportive of the process as in the UK, citing constitutional differences between the countries.

There is a clear difference here between Irish legislation and legislation in the UK, whereby in the UK **any** dispute can be referred to Adjudication, in Ireland **only payment related** disputes may be referred. However, Quinn (2016) has said that '*with all of his knowledge of the industry, he did not know of a dispute that did not relate to money and payment in some way*' believing that basically all matters could be referred, once correctly framed.

#### ***2.5.6 Right to suspend work for failure to comply with adjudicator's decision: Section 7***

Section 7 of the Act deals with matters related to the adjudicators decisions. The main point to note, is the decision reached at adjudication is binding unless the parties mutually agree to an alternative, or the adjudicators decision is over turned at a higher authority i.e. arbitration or litigation in the courts (DJEI, 2016). The adjudicators decision is of immediate effect and carries the same enforceability as an order directly from the courts.

According to the DJEI (2016) should the executing party fail to secure payment from the other party within seven days of the adjudicators decision, the executing party reserves the right to

suspend the works until such time as monies are paid. The executing part is required to notify the other party in writing, given seven days' notice of suspension, along with a reason for the suspension. The suspension must end on receipt of payment in-line with the adjudicators decision, or after the matter has been referred further to arbitration or court proceedings.

If a work suspension effects the completion date of the project, the delay period shall be disregarded in calculating the completion date, (DJEI, 2016) this is provided the work suspension was justifiable in the first instance.

### ***2.5.7 Remainder of section in the Act: Sections 8-12***

Below is a brief summary of the remaining section contained within the Act, which could be considered for information purposes, However the Author has chosen to review these to provide a full review of the Act.

- Section 8 contains information regarding the panel of adjudicators and in particular their selection to the panel, the attributes of candidates, and the person charged with selecting them (Office of Attorney General, 2016).
- Section 9 relates to the code of practice for the Act, along with the ministers right to introduce such a document. This document has been introduced and is termed '*Code of Practice Governing the Conduct of Adjudications under Section 6 of the Construction Contracts Act 2013*' this can be found at <https://www.djei.ie/en/Publications/Publication-files/Code-of-Practice-Governing-Conduct-of-Adjudications.pdf>. (Office of Attorney General, 2016)
- Section 10 of the Act relates to delivery of notices under the Act, it clarifies that the delivery of notices can be in any manner, once agreed by the parties. If not agreed the delivery must be by post or other method of delivery which is effective. It also addresses the delivery of notices which fall on days such as weekends and bank holidays, noting that the note becomes due on the next working day (Office of Attorney General, 2016)
- Section 11 relates to expenses of the minister in carrying out his duties in relation to the Act, and notes that these expenses are covered by monies made available by the Oireachtas (Office of Attorney General, 2016)
- Section 12 clarifies the correct citation for the short title of the Act 'the construction contracts Act', along with its commencement date as appointed by the minister.

## **2.6 Contracts.**

While it is beyond the scope of this research to analyse in-depth the various contracts currently used within construction industry, it is considered appropriate to review the role which contracts play in construction operations. It is also important to discuss the influence that contracts exert on the outcome of construction projects. Private sector clients may utilise any construction contract, be it standard form or bespoke, provided both parties agree to the particular choice. In the public sector, however, only certain contracts are permitted. The Author's company carries out quantity surveying work on behalf of clients who operate in both the private and public sectors. The clients, exclusively, use standard forms of contract where the employer provides the design. The introduction of the Act has direct implications for the company's daily practice in providing services to its clients.

### **2.6.1 Construction contracts**

In the construction industry, contracts are used to form agreements between employers and contractors during the process of carrying out construction works. Contracts are defined as '*an agreement between two or more parties that is binding in law*' (Duxbury, 1997). Contracts can be made verbally, however this is not advisable for anything other than simple small contracts. Cunningham (2013), explains '*as it is difficult to prove what has been said or done unless some form of record has been kept*'. Written contracts provide physical evidence that an agreement was made and exists in the first instance and that both parties agreed to its conditions. The purpose of a contract agreement is to set out the rights and obligations of the contracting parties and to regulate various matters common in construction contracts.

Written construction contracts are essential because of the nature of construction projects, which create intense, dynamic working environments where large sums of money are often required to fund unique projects. Murdoch & Hughes (2000) support this by identifying projects as having a '*technological complexity, which ranges from the familiar, well known materials and trades through to the highly complex facilities involving multiple interacting subtrades*'. It comes as no surprise to the Author that contracts are usually heavily relied upon, due to the many variables each project will contain. Quinn (2016) suggests that a large main contractor can expect to deal with up to 120 individual subcontractors during the construction stage of a medium sized project each of which must be effectively administered.

Murdoch & Hughes (2008) observe that '*contracts are drawn up with the intention of relying upon them in a court of law at some point in the future*'. To elaborate on this further, most

construction contracts will have a dispute resolution process with the intention of avoiding litigation, but it may be possible for disputes to be referred to litigation, should the contract procedures fail to produce a determination.

The Egan Report (Egan, 1998) found that the following problems were commonplace within the UK construction industry and represent the main contributing factors in disputes.

- *40% projects were late or not completed time,*
- *50% projects came in over budget*
- *30% projects failed to meet the expectations of users'*

The same problems exist within the Irish construction industry, reinforcing the importance of an appropriate choice of contract. Cunningham (2013) argues that:

*'Successful building projects are those which are delivered to the required quality standards, safely, on time, and within the approved budget. Effective project management seeks to ensure that these objectives are achieved: choosing an appropriate contract arrangement is a key element in this process'.*

## **2.6.2 Commonly used contracts**

### *2.6.2.1 Royal Institute of Architects of Ireland (RIAI) forms of contracts*

RIAI Standard Forms of Building Contract produced by the Royal Institute of Architects of Ireland (RIAI), are commonly used contracts throughout Ireland within the private construction sector. The three RIAI forms which this company encounter frequently are: The RIAI '*Yellow Form*' (with quantities) which is used on substantial projects where the employer bears the risk of incorrect quantities, the '*Blue Form*' (without quantities) which is used on minor works where the contractor bears the risk of incorrect quantities, and the 'SF88' 'pink form' or short form.

### *2.6.2.2 Government Construction Contracts Committee (GCCC) Public Works Contracts (PWC)*

The PWC contracts introduced in 2007 are used to procure all public works, which is part funded by the exchequer to a value equalling or exceeding 50% of the cost of the overall project, (Cunningham (2013, p. 13)

The contracts most widely employed in this office are:

- PW-CF1 - Building Works Designed by the Employer (Major works over €5 million)

- PW-CF5 - Minor Works for Building and Civil Engineering Works Designed by the Employer (Minor works over €500,000)
- PW-CF6 – Short Form of Contract

#### *2.6.2.2.1 PW-CF 6*

The PWC which the clients of this company are typically required to engage in, is the PW-CF6- Short Form of Contract. This form of contract is described as a traditional form of contract where the works are designed by the employer. This contract is suitable for projects valued under €500,000. Projects carried out utilising this form of contract are typically, small classroom extensions, refurbishment works to public buildings or small scale new builds (Tracey, 2013). The contract documents will generally include drawings and specification and may or may not include a pricing document, it is referred to as a fixed price-lump sum contract. While it can be used on both building and civil contract it is shorter and less complex than its counterpart, PW-CF 1 & 3 (design and build), which are recommended for projects in excess €5,000,000.

### **2.7 Effects of the Act on the payment process.**

The author's company is involved in all aspects of the payment process, our scope of services includes carrying out:

1. recommendations for employers, architects and employer's representatives,
2. submitting valuations of works for main and sub-contractors, and
3. organising payments on behalf of the main contractor to respective subcontractors.

It is essential, therefore to fully understand the process and the potential effects the Act may have on current practices.

#### ***2.7.1 Generic payment procedures***

The process of receiving and making payment for construction work is perhaps the single most important function of the contract administrator in regulating cashflow (Cunningham, 2013). It is vital that a steady cashflow is maintained within the supply chain. The standard payment procedure is initiated by the main contractor who values the works at the time period set out in the contract, and submits an application for interim payment. The valuation should also contain all subcontract works done to date. The subcontractor carries out the same procedure only this valuation will be submitted to the main contractor. After initial checks to ensure the valuation corresponds to the actual works on site, the architect or employer's representative issues an

interim certificate, stating the amount due to the contractor. The employer, in turn, must pay the main contractor within the time period contained in the contract. Once the main contractor receives payment it then pays the sub-contractors thereby completing the cycle, and commencing the next one, and so on until project completion. This is, perhaps, a simplistic view of the payment process as rarely does it operate in such a smooth fashion.

#### *2.7.1.1 Payment procedures using different forms of contracts*

The process as set out in 2.7.1 is similar for most contracts, However, there are slight variations to the durations between payment within each contract. These variances are set out below:

##### *RIAI form of contract*

The contractor issues his payment application to the Architect generally on 4 weekly basis unless otherwise stated. upon receipt of this the architect in conjunction with his QS has 5 days to certify, either the amount the contractor sought in his application or an alternative amount deemed reasonable. A copy of the certificate is issued to the contractor and the client, from this day the client has a further 7 days to issue payment to the contractor. The contractor has 5 more days in which to pay any nominated sub-contractors her may have.

##### *Public Works Contracts (PWC)*

The PWC contracts already contain many elements that have been introduced by the Act, for example, payment durations are on a 30-day basis (unless stated differently in the accompanying schedule 1L). the PWC have a payment claim date to which a payment claim notice must be issued by the contractor within 5 days. However, unlike the RIAI contracts the process take considerably longer to achieve. The employer's representatives (ER) has 14 days to issues the certificate for payment, and upon receipt of invoice the contractor the employer has a further 21 days to make the recommended payment.

##### *CIF Subcontract for public works (NN)*

This form of contract is designed for use with specialists or nominated sub-contracts involved the PWC. The contract is updated in line with the Act, it sets out that the sub-contractor should submit his application to the main contractor for payment on or before the claim date, to which the contractor has 21 days to respond, if he disagrees with the amount being claimed. If the contractor has no complaints the subcontractor should be paid within 30-days or sooner of the claim date. In reality regardless of the conditions contained in any sub-contract in use in Ireland, the conditions set out above apply, where the Act is in effect.

### ***2.7.2 Difficulties encountered around payments***

While the Act does not change the process of payment, it places more emphasis on it. Historically if payments were late, it may have caused some discontent. However, there was little that could be done about it without causing a long arduous dispute, which nobody, especially the subcontractor wanted. Since the introduction of the Act there is now a recourse for late payments, in the form of suspension and adjudication. (Quinn, 2016). This has made the process of payment even more important to a smooth construction project. However, (Durack, 2016), comments that the Act has made the task of issuing and assessing payments increasingly procedural and labour intensive, to the point where a contractor might need to employ an additional team of surveyors to process payments (Quinn, 2016). Durack, points out the volume of information required to be submitted and responded to by the Act in processing payment claims has increased dramatically. (See 2.5.3.2 above)

Templates of typical notices and response notice can be obtained from the <https://www.djei.ie/en/Publications>. Project specific calculations and other required information should be populated onto the notices.

Durack (2016) claims that the short turnaround period could lead to errors in the responses, due to the volume of subcontractors seeking payment over the course of a payment period. This view is supported by Quinn (2016). Errors in this process can now lead to adjudication, and Durack further alluded to a practise which arose in the UK under their corresponding HGCRA Act, of subcontractors intentionally claiming exaggerated valuations, where contractor were struggling to achieve payment deadlines, and seeking either errors in response or the award of the higher valuation. Quinn (2016) comments that a solution to large number of payment applications could be resolved by staggering the claim dates of some of the sub-contractors, so that some claim dates will fall at different times of the month than others.

Employers are free to agree payment durations of any length within the main contract, this is not subject to payment durations, like those of the subcontract (maximum 30 days). This is a feature which will cause problems for main contractor cashflow (Curtin, 2016). The reason given by Curtin is, that employers can demand in excess of 30,60 or 90-day payment terms, but subcontractors must be paid in line with the conditions of the Act, i.e. 30 days or better terms, potentially causing the main contractor major cashflow problems. Curtin, maintains this is a major flaw within the Act, and employers on larger projects must be lobbied to enable the

negotiation of shorter payment periods. Below, Figure 2 provides an example of a payment cycle for a subcontractor:

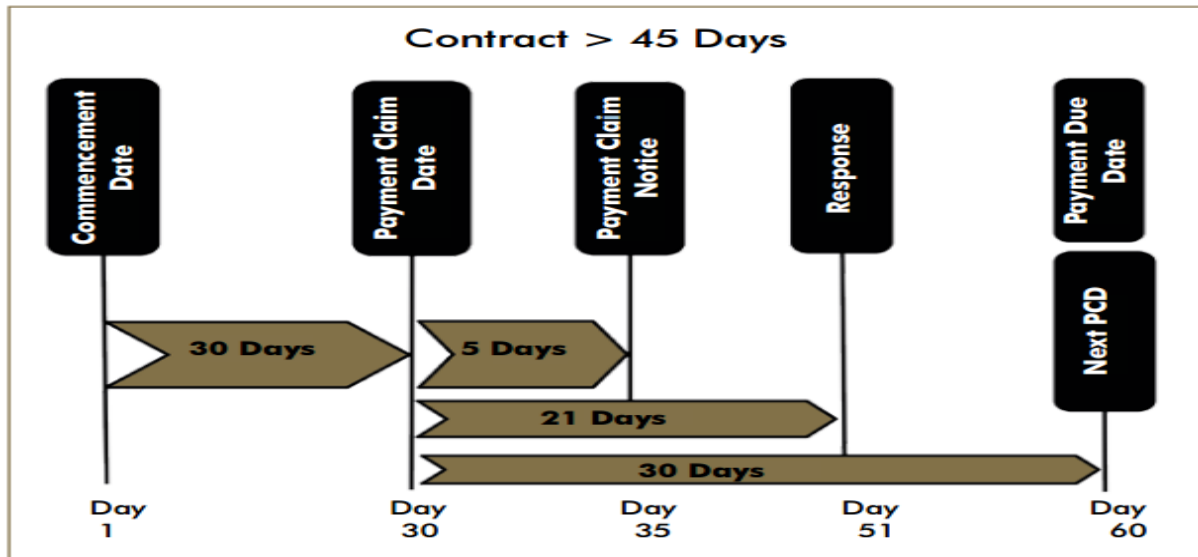


Figure 2: Payment Cycle according to the ACT

Source: Quigg Golden

## 2.8 Commentary regarding the Act

The Author includes here general literature commentary from the main stakeholders and key individuals at the forefront of the implementation of the Act. Much of the commentary has been gathered at public events or publications by various stakeholder bodies such as the SCSI, CIF, IEI, law firms, main contractors and sub-contractors, who are affected by the Act and how developments might unfold over the coming months and years.

### 2.8.1 Senator Feargal Quinn,

The main instigator of the Act and credited with its successful introduction and enactment, commented the following:

*'This legislation will be hugely valuable to those working in the construction sector, a sector which was hit very harshly by the economic down turn. This Act focuses on the issue of the non-payment of contractors and subcontractors in the construction sector. The Act provides for the use of interim payments and in this way reducing a payee's exposure to non-payment. (Senator Quinn, 2016)*

Senator Quinn criticised the government's handling of the Act and expressed his frustration as to the length of time it took to implement:



*“I have seen governments dismiss Private Member’s Bills just because they came from the wrong side of the House. We need a more inclusive legislature – the Government benches of the Seanad and the Dáil do not have a monopoly on wisdom. It should not take six years to have sensible legislation enacted.”* (Senator Quinn, 2016).

In relation to contractors who were suffering while the legislation was not yet law:

*“the law is not providing crucial protection to contractors for non-payment of the work that they have carried out.”* (Dowling-Hussey & Dunne, 2016)

### **2.8.2 Construction Industry Federation (CIF)**

The CIF have endorsed and unconditionally welcomed the enactment of the Act. They see it as critical to the continued growth of the industry. Several of their executive members have made statements approving the Act and its positive features:

CIF President said:

*This Act will benefit the entire supply chain by bringing more certainty to contracts and dispute resolution in the industry. The sector is in recovery mode and this Act will help companies plan, budget and invest more accurately in meeting Ireland’s increasing economic demands. I’d like to thank the Minister on behalf of the industry for his efforts in bringing this important piece of legislation into being.* (Stone, 2016).

Philip Crampton: CIF Chairman of the CIF’s Procurement, Tendering and Contracts Committee said:

*The Act is positive news for construction sector and will mean more certainty of payment for all in the supply chain. This certainty will improve the competitiveness of the sector facilitating growth and the delivery of quality public and private construction projects. The new legislation will also reduce the amount of management time and expense currently involved in dealing with costly disputes. The Procurement Tendering and Contractual Matters Committee has worked closely with Minister Nash, Senator Feargal Quinn, the late Brian Lenihan and many others over the last seven years to facilitate this legislation. It’s a significant day for the industry.* (Crampton, 2016).

Tom Parlon: CIF Director General said:

*The Construction Contracts Act is the single most important piece of legislation for Irish construction companies that has occurred in recent years. Its enactment will regularise cash-flow for companies, reduce cost burdens, and provide rapid resolution of disputes. It is extremely positive news for our industry and will mean more certainty of payment for the entire construction supply chain. All of this means that companies are now free to focus on the task of rebuilding Ireland and providing cities and regions with much needed infrastructure. (Parlon, 2016)*

However, the CIF as an organisation were highly critical of the Government's perceived failing in introducing the Act within a reasonable timeframe. This view supports Senator Quinn's comments in relation to the matter. The Federation highlighted the fact that the government missed several chances to implement the Act and frequently missed their own targets.

General CIF Statement:

*'We are completely dismayed by the ongoing delays. We have received several assurances that this legislation would take effect by a certain date and yet none of those dates have been met. The most recent suggestion is that we must wait until spring next year. But in their latest statement the Government is already watering down that possibility saying "With a tightly managed timeline it is expected that the new service will be fully operational, and the Act commenced by spring 2015." That looks like the Government is already preparing to miss yet another expected commencement date'. (CIF, 2014)*

*'Bear in mind that the Government themselves had committed in their Construction 2020 strategy for the construction industry to complete the implementation of the Construction Contracts Act by Q2 2014. It now looks like they will be at least a year behind their own target' (CIF, 2014)*

### **2.8.3 Society of Chartered Surveyors of Ireland (SCSI)**

The SCSI welcomed the introduction of the Act and hailed its success around the process of adjudication.

*The Society are pleased to announce that the Construction Contracts Act 2013 has been signed into law by Minister Ged Nash.... This Act, which introduces a statutory payment process, will aid cash flow in the construction industry and ensure parties have effective remedies where disputes arise with the introduction*

*of the new statutory dispute resolution process known as adjudication. (SCSI, 2016).*

Chair of the SCSI professional group (Quantity Surveying): Micheál Mahon

*With the long-awaited introduction of the Act we are pleased to say that positive steps can finally be made towards growth within the industry. (Mahon, 2016)*

#### **2.8.4 The Legal Sector**

The legal sector is of great importance where the Act is concerned, they will play a major role in interpreting the Act in the coming years, from the point of view of challenges to adjudicators decisions through the courts, along with defining the meaning of some of the conditions that are open to interpretation. Many organisations involved in the construction sector such as; Regulatory bodies, consultants, employers, contractors, and sub-contractors have retained legal firms to offer advice, masterclasses, and guidance to prepare for the introduction of the Act. Therefore, their perception of the Act is of importance and is highlighted below.

##### **2.8.4.1 Quigg Golden**

Quigg Golden are leading specialists in area of construction and procurement law throughout the UK and Ireland. They have first-hand experience relating to the Act and adjudication through their UK operations dealing with the HGCRA, which is similar to the Irish Act.

*The Act is similar in many ways to the UK Housing Grants, Construction and Regeneration Act 1996, which has proved hugely successful since its implementation...This legislation here is in many ways an improvement on the UK Law and it a positive and an encouraging step forward for the Irish construction industry. (Quigg Golden, 2016)*

Brian Quinn, Associate of Quigg Golden pointed out the positivity that the Act brings, as regards the firm payment structures and recourse where not adhered to. He also explains that there were many aspects of the Act, still left to be fully clarified and open to interpretation, which will inevitably lead to challenges through the courts. He also commented a period of years was likely to pass before all the issues become clarified.

##### **2.8.4.2 William Fry**

William Fry describe the Act as the most '*significant pieces of industry legislation in recent years and is likely to prove a game changer*' (William Fry, 2016). They also point toward its similarities with the UK Housing Grants, Construction, and Regeneration Act 1996, and in

particular the aspect of adjudication, where they state: ‘a significant body of persuasive, although non-binding, caselaw from the UK will be helpful in understanding the Act and its implications’ (William Fry, 2016). They point to the various contracts and the need for alterations and education on these to fully comply. They also question the presence of adjudication and whether it can have the same effect as in the UK, by over taking the traditional forms of disputes i.e. conciliation and arbitration.

*The Act is likely to have a revolutionary effect on payments in the construction industry and dispute resolution in construction and projects contracts. Most construction contracts will need to be reviewed in the context of the Act. The various professional bodies have been updating their own contracts, and the public sector works suite is also being adapted. This is likely to raise some practical issues going forward. It will also be interesting to see whether adjudication overtakes conciliation and arbitration as the preferred method of dispute resolution in the construction industry. Parties in the public and private sector will need to familiarise themselves with the Act, and seek legal advice both in relation to the drafting of contracts and how the Act will apply in practice. (William Fry, 2016)*

#### 2.8.4.3 Hughes Construction Claims Resolution (HCCR)

HCCR is the first and only Irish consultancy that focuses exclusively on construction claims preparation and defence; and alternative dispute resolution. Its founder Paul Hughes writes extensively for the *Engineers Journal*, and indicated that the Act should result in better cash flow within the industry...

*The Construction Contracts Act 2013 will give the parties to a construction contract the right to refer a payment dispute to adjudication. The aim of the legislation is to balance the financial inequality that often exists between the parties. It gives the parties to a construction contract a method of resolving disputes quickly and cheaply. As the decision of the adjudicator is binding (at least temporarily) this should help with cash flow. (Hughes, 2016)*

Hughes, emphasises the word ‘should’ and gives the Act a cautious endorsement while identifying, that the implementation of the Act may cause some issues that will need to be addressed:

*Although welcome, the legislation as it currently stands may give rise to some problems once implemented. These include an issue in relation to appointments*

*made by the chair of the Ministerial Adjudicators Panel, whether bonds and collateral warranties could be considered construction contracts for the purposes of the Act, abandoning the adjudication before the adjudicator's decision, the residential exemption and agreeing the adjudicator on the sixth day (Hughes, 2016)*

Hughes further contends that, while in a perfect world the Act and in particular adjudication would bring about favourable results for those previously left exposed, the success of the Act may hinge on the parties' full participation in the adjudication process, which does not appear to be clear cut:

*It is difficult to say at this stage how smoothly the adjudication process will run in Ireland. Much will depend on how the parties decide to engage with the process and how they regard the adjudicator's decision. If, overall, an adjudicator's decision is accepted, then adjudication should be welcome in the industry. However, if the parties decide to constantly challenge the process and an adjudicator's decision, then adjudication might be seen as an additional burden. (Hughes, 2016).*

### **2.8.5 Industry**

Possibly the biggest stakeholders are those at the 'coal face' of the Act: the main contractors and sub-contractors who have been doing business with one another for many years. The following views were gathered during an SCSi conference involving the Act.

#### *2.8.5.1 Main-contractor (Director: National & International tier 1 main contractor)*

While acknowledging the requirement for the Act, the commenter highlights that the Act is primarily for the benefit of subcontractors, and that 'nothing' changes for the main contractor. He maintains that employers, who the main contractor would engage with can still negotiate and agree payment durations more than the 30-day maximum duration which is outlined for subcontractors. The commenter, further explains that this will cause huge financial pressure on main contractors who could be forced to fund the entire project, through multiple payment cycles of subcontractors. Increased administration, was another difficulty which the commenter highlighted, claiming that additional surveyors or at a minimum more pressure on administration staff would be required to process and check incoming valuations, to ensure the correct responses are being issued. He suggested that employers be lobbied to shorten their payment terms, to reduce the burden being placed in the main contractor.

On the issue of adjudication, the commenter said that *'any sub-contractor who adjudicates against his company will not be an ex-subcontractor'* he further maintains that *'the fastest way to populate your client list with ex clients is by means of adjudication'*. From this view point it is obvious the main contractor does not hold the same plaudits for the introduction of the Act that many other stakeholders within the industry.

#### *2.8.5.2 Sub-contractors (John Kelly, Group Commercial Director: Imtech UK & Ireland.*

Kelly (2016) maintained that the Act will benefit subcontractors greatly and he further endorsed its introduction as a huge step forward for the industry. However, Kelly was adamant that it will not be a case of subcontractors immediately suspending works and turning to adjudication every time a dispute arises. He explains that when a dispute arises, often a high-level (directors) correspondence with the threat of action and a reminder of the rights that now exist for the subcontractor, will often be enough to get 'things moving and resolved'. Kelly draws on the extensive experience that his organisation has gained through operations in the UK, where similar legislation exists. He insists that the Act will drive better behaviour from main contractors regarding payment, and comments that while adjudication is quick and cheaper than other dispute resolution methods, it is not to be taken lightly, and that the referring party must have a lot of work done on their claim and be certain of their position before entering the 'intense process' of adjudication.

## **2.9 Limitations to the Literature Review**

Some limitations apply to the literature review as the Act is in its infancy and there are limited sources its operation. The majority of the information was gathered from industry magazines, web-based sources, periodicals, articles and the author's attendance at workshops, seminars, and masterclasses. There were few academic sources and those that were predated the enactment of the legislation. At the time of writing there were no adjudication cases nor challenges in the courts to report.

## **2.10 Conclusion**

The literature review indicates that employers, administrators, and contractors will need to make significant changes to their current payment procedures in order to comply with the Act. These changes are primarily of an administrative nature, requiring a more efficient organisation of the payment process and possibly more staff to fulfil the tasks. The consequences of delayed payment could possibly lead to work suspension and adjudication.

The review revealed that while suspension and adjudication are now strong deterrents for contractors, that they should not be abused or taken lightly, as there are repercussions associated with their use. Suspending work can destroy working relationships on resumption of works and bring about a poor reputation within the industry. Adjudication is seen as an aggressive process where the outcome is never certain and demands significant human resources and costs in framing and conducting a case.

Main contractors appear to be the least enthusiastic regarding the introduction of the Act, mainly because they do cannot demand more flexible payment terms from subcontractors and, with the abolition of ‘pay when paid’ clauses, now have less control over their outgoing cashflow. Although the main contractor can benefit from the suspension and adjudication elements, it seems unlikely they will exercise this power due to the risk of making ‘existing clients, ex-clients.

The Act, is generally welcomed by the stakeholders with some heralding it as a revolutionary piece of legislation that is likely to change the Irish construction industry for the better. Supporters of the Act refer to the success of the UK (HGCRA 1996) model. However, the legal sector indicates that the UK Act was a success, mainly because it received the full support of the court system there. They further maintain the same level of support is not guaranteed in Ireland. This Author concludes there may be an uncertain few years ahead in the industry in relation to the Act. Much of which will be shaped and moulded by the interpretation, and practices of individuals involved in payments. Indications are that fingers may be firmly pointed towards the quantity surveyor.

## Chapter Three: Research Methodology

### 3.1 Introduction

This chapter endeavours to reveal and explain the research methodology chosen to answer the central question on which this author is focussed: What are the implications of the Construction Contracts Act 2013 for the practicing quantity surveyor? Discussed are the common approaches to research, which are contained in the research design i.e. strategies and methods of data collection. These are critically analysed and thus justifying the reason for their inclusion, while outlining the reasons for discounting other methods of enquiry which were not deemed adequate to satisfy the research.

The methodology chosen will be designed to suitably answer the questions which arose from the literary review, which are listed below:

- What are the effects on an organisations cashflow?
- Is there an increased cost to the main contractor of financing projects?
- Have payment conditions improved since the introduction of the Act?
- Has the payment process become easier or more administrative because of Act?
- Will additional staff be required to satisfy the additional administration?
- Will there be an increase in tender pricing because of the Act?
- Will adjudication take over from conciliation and arbitration as the main form of dispute resolution?
- Will the courts support the adjudication process?
- Will the rate of disputes increase due to the introduction of the Act?
- Will subcontractors gain the benefit the Act is designed to have?

The author believes the questions as set out above will require a qualitative investigation using interviews with participants to gain an intimate insight into what the industry perceive to be the answers to these questions.

#### 3.1.1 *The research aims*

Research is defined by the Oxford Dictionary (2002) as the '*systematic study of materials and sources in order to establish facts and reach new conclusions*'. O'Sullivan (2014) maintains such a description alludes to the idea that in order for research to be effective it must have a clear direction of the objectives to be achieved i.e. what questions need to be answered.

The purpose of the research is to:



A) identify what the implications of the Act for practicing quantity surveyors are, and to reveal the level of preparation they will require from an administrative and procedural aspect to be compliant with the conditions of the new legislation.

B) it is proposed to identify a strategy of implementation, which will be applied to all client organisations, therefore improving the service the company provides.

### **3.1.2 Objectives**

This chapter will seek to satisfy one of the main objectives of the research which was highlighted in chapter one:

- formulate an effective method of investigating industry awareness of, knowledge of, preparations made for, and changes to practice made in response to the implementation of the Act;

Previously in Chapter Two, the following objectives were satisfied:

- explain the rationale for the introduction of the Act;
- review and summarise the provisions of the Act;
- report commentary in the literature regarding the Act from the main individual and stakeholders.

## **3.2 Research Design**

A research design is described as a document which is prepared by a researcher before any research is actually carried out (Blaikie, 2009). Naoum (2007) describes it as a '*an action plan for getting from here to there*', and further contends that the 'here' can be defined by the collection of information, while the 'there' generally being the conclusion and overall findings regarding a research topic. In essence, the research design is a plan that outlines the procedures the researcher will use, such as: '*procedures of enquiry (strategies) and specific methods of data collection, analysis and interpretation*' (Creswell, 2007) to carry out his investigations and uncover findings.

The research design chosen is dependent on, and based around the research problem at hand. This research endeavours to explore a collection of experiences from a select number of stakeholders within the construction industry, and appraise them against the standards which are required to be compliant with the conditions of the Act.

This researcher has chosen a qualitative investigation using action based research. A qualitative data collection regime will be carried out, employing a suitable method comparable to the investigation:

- Interview.

By way of illustration, the researcher has adapted Creswell’s framework for research design (2007, p. 5) Fig 3. This adaptation portrays the proposed framework for this research. This illustrates the interconnection of World view philosophy, strategies of inquiry and specific methods which will be employed to satisfy the research.

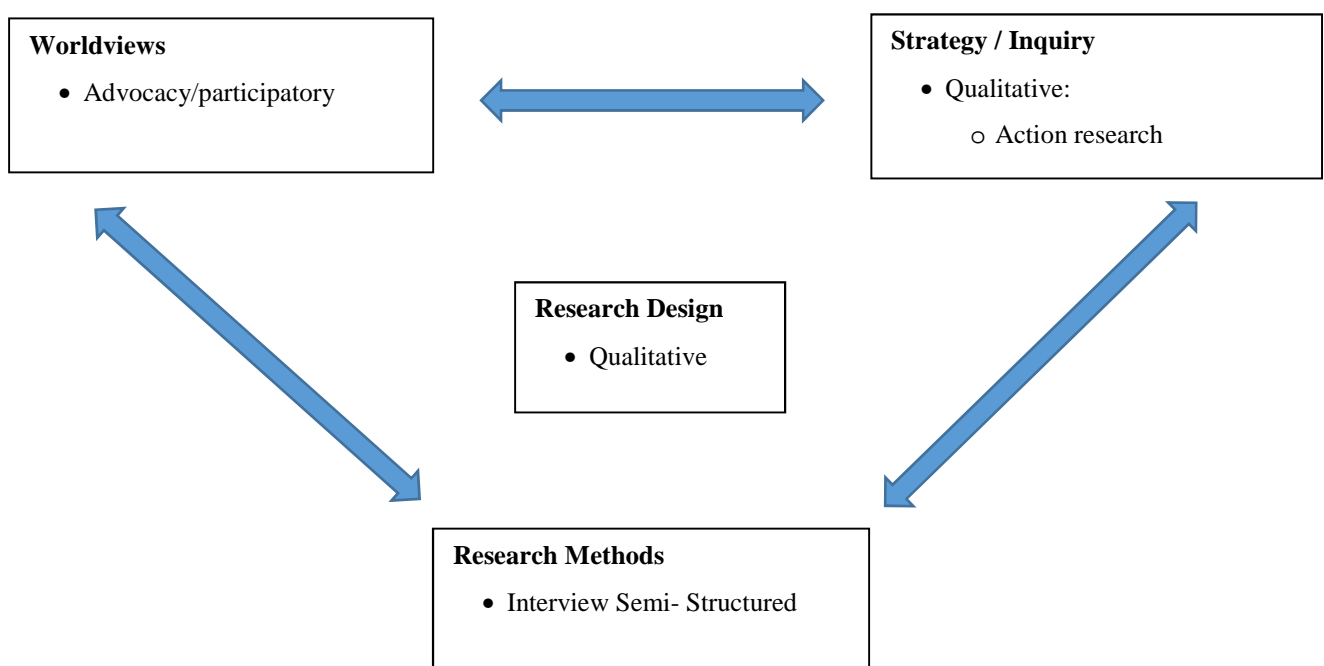


Figure 3: Framework of Research Design (adapted)

Source: Creswell 2007

This design will reveal current procedures and best practices within subject organisations, which will be compared against what the researchers company is currently doing, with the overall goal to implement the changes required and irradiate the now redundant practices currently in use, thus improve our service to our clients.

### 3.2.1 World Views

World views refer to the way we look at the environment we find ourselves in, they are influenced by the very culture that is bestowed on us at birth. O’Leary (2004, p. 46) maintains the views we use to make sense of the world we live in i.e. our patriotism, understanding of family, belief in justice and equality and our morals are instilled within us long before we have

the ability to recognise them as constructs. The world views we know can alter the way we carry out our research. Therefore to remain unbiased we must take them into account when carrying out research.

#### *3.2.1.1 The Advocacy and Participatory Worldview*

This is a view which supports and is typically seen where a qualitative research is being carried out. According to Creswell (2007, p. 8) research of this type contains an '*action agenda for reform*' which may change the lives of participants and the institutions in which they work. This is in line with the research which is being carried out by the author, in that the current practices of the company and its employees need to be altered and brought in line with modern practices required to become compliant with the Act. This worldview lends itself to collaboration with the participants, leading them to assist in the question designs, data collection and as a result reap the rewards of the research (Creswell, 2007). The advocacy and participatory worldview, contains elements of collaboration and is change orientated which fit well with action research.

Other world views were considered: Postpositivist worldviews was discounted because it is suited better to quantitative research and produces results of a statistical and numerical nature. Constructivist worldviews were also discarded. While they support a qualitative investigation, they tend to focus on the individual and try to understand them in their environment rather than seeking to make a change.

#### *3.2.2 Strategy of Inquiry*

This term can also be referred to as research strategy and Naoum (2007) states that '*deciding on which type of research to follow, depends on the purpose of the study and the type and the availability of the information which is required*'. The strategy chosen should indicate the specific direction for procedures throughout the research design (Creswell, 2007). To fully understand the complexity of the topic and the procedures carried out by the participants, an in-depth and detailed investigation has been undertaken. In order to achieve this, the researcher has identified the requirement for a strategy that will allow a deep and rich understanding of the participants with the view to absorbing their expert knowledge of the subject area. The strategy most appropriate to this investigation is a qualitative method incorporating action research.

### 3.2.2.1 Quantitative research

This is used to quantify a research problem, and this is achieved by the generation of data through numerical and statistical means. Naoum (2007) cites Creswell where he defines it as *'an inquiry into a social or human problem, based on testing a hypothesis or a theory composed of variables, measured with numbers, and analysed with statistical procedures in order to determine whether the hypothesis or the theory hold true'*. Its primary use is to quantify attitudes, opinions and behaviours from a bigger sample population. Quantitative Research uses measurable data to formulate facts and uncover patterns in research. The data collection associated with this type of research is generally surveys of which there are multiple types, and laboratory experiments. Quantitative research offers a broad but shallow insight into a research topic. The information received will be accurate and reliable but not abstract, so does not lend itself to elaboration from participants, and therefore cannot offer a deep and rich insight into the topic. The author discounted this strategy of inquiry based on this fact.

### 3.2.2.2 Qualitative research

Qualitative research is described by Naoum as 'subjective' in nature. It emphasises meanings, experiences (often verbally described), description and so on' (2007). This type of research is exploratory and promotes an in-depth and intimate investigation of the topic, with information received from direct experiences, opinions and views of the participants. Qualitative research also allows for gathering information of high quality, because the selected participants are generally part of a small group who have expert knowledge and insight into the chosen topic. White (2000) 'This method of data collection is not standardised and uses a variety of formats, such as structured, semi structured and unstructured interviews' this will develop solutions to the current underlying questions.

Based on the technical issues regarding the Act and the finer details which are contained within much of the legislation, this researcher required in-depth interviews and rich understanding of the participants view on the various issues which have a risen because of the Act.

#### 3.2.2.2.1 Action research

Action research is the chosen strategy by this researcher as this is suited to the nature and objectives of the research which are being carried out in this study. According to Fellows & Liu (2008) action research requires the *'participation by the researcher in the process under study, in order to identify, promote and evaluate problems and potential solutions'*. However, O'Leary (2004, p. 138) indicates that this view should be further assembled to distinguish between action research which is participatory and 'participatory action research'.

Participatory action research includes the participation of the researcher as a central tenant within the research, while action research which is participatory includes the involvement of the subjects as the central tenant. Regardless of the type, action research is defined as follows; *‘A research strategy that pursues action and knowledge in an integrated fashion through cyclical and participatory process’*. (O’Leary, 2004) This researcher will be participating in the research in relation to bringing about change within the organisation in which he works.

Action research is a cyclical process see Fig 4 below which is based on real life struggles and situations, where a problem is required to be identified and a permanent change required to remedy the problem in the context of that environment. O’Leary (2004) maintains it is common for action research to be carried out in situations where ownership of change is of importance, within the research being carried out by this researcher the change element will be directly linked to the current practices being carried out by quantity surveyors. This is supported by O’Leary as she argues *‘action research works towards situation improvement based in practice, Action research is valuable to this investigation, ‘examples of the benefit of action research include changing organisation policy towards promotion, designing a new information flow system, recommending a new system for measuring the quality management of the organisation and the like’ as maintained by (Fellows & Liu, 2008).*

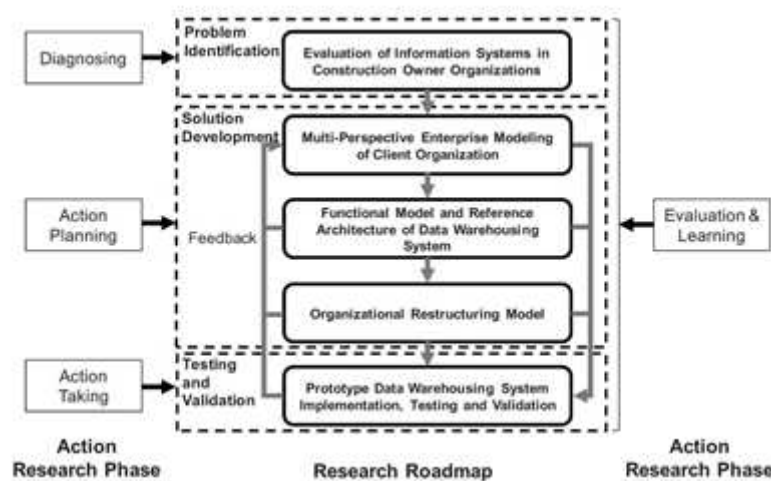


Figure 4: Stages of action research, indicating its cyclical nature.

Source (Azhar, et al., 2010)

The researcher considered the strategy of ethnographic research, while its basis sits well with the topic of studying groups in their natural settings, it requires monitoring over a long period in order to be successful. The author was time constrained in his investigation and discounted ethnography for this reason, similarly with a case study. Neither method appeared change

orientated in nature. Similarly, the author considered a phenomenological approach which met many of the markers required for a sound strategy, i.e. it involves the study of a small group of participants, based on their experiences as they occur, the researchers own experiences does not come into consideration. This approach was discounted as it was not change orientated and does not support researcher participation

### **3.2.3 Research Methods**

#### *3.2.3.1 Data Collection*

Data collection is the communication process which takes place between the participant and the researcher. It is how information, knowledge and answers are gathered regarding the topic, and is essential to the integrity of the research. According to Fellows & Liu (2008) *'The primary aim in collecting data is to maximise the amount and accuracy of transfer of meaning (convergence) from the provider to the researcher'* Naoum (2007) maintains there are two main types of data collection- primary data collection and secondary data collection, and O'Leary (2007) argues that neither method is inherently better than the other. The author has carried out both forms of collection within this study.

#### *3.2.3.2 Primary Data Collection*

Primary data collection is data that is obtained first hand by the researcher, and not published in any other medium. Johnson & Christensen (2008) define a primary data source as *'A source in which the creator was a direct witness or in some other way directly involved or related to the event'*. Primary data collection allows the researcher to personally investigate the subject matter, using many tools such as observation, interviews, and surveys. This is critical to maintain the focus of the research. Primary data collection has its negative points as it is much more time consuming to achieve than secondary data collection. Basically, the author is tasked with breaking new ground about information gathered, which may involve more travel and in turn is labour intensive and time consuming.

The primary data collection carried out in this investigation was the interview method, in which one on one correspondence was carried out. Generally, the interviews were carried out face to face, but in some circumstance this was not possible from a geographical point of view, but also because of the time constraints which the Author finds himself.

Other Primary data collection methods were considered but discounted on analysis. A summary of these are below:

- Observation: This is the practice of the researcher gathering information on the participant's behaviour and activities at the research site. It could be argued there was a marginal element of this to my collection process. However, it would not be considered appropriate to include this method as a data method I used, as it was not carried out over a period time and little time was spent observing the practices being carried out. The benefits of this method are that it allows for real-time recording of events as they occur and the researcher also gains first-hand experience. The limitations are that at times the researcher may be seen to be intrusive on the subjects, sensitive information may be obtained but unusable because of its nature
- Focus groups: conducted and lead by the researcher, the primary function of a focus group is to concentrate on the topic through their individual thoughts and experiences. They can provide historical information and are beneficial in new research topics as they are generally made up of specialists in the field. The idea of a focus group was rejected by the researcher, based on the difficulty in organising an event. It is difficult to arrange participants who are generally high profile and busy people for a group meeting all at the one time. Focus groups can become biased if a strong participant is over bearing among the rest.

Only data collection methods from a qualitative perspective were considered for this research, supporting the research design, other data collection methods exist i.e. surveys and experiments in a lab environment however this type of collection is more suited to a quantitative research, and hence are not suitable in this framework.

#### 3.2.3.2.1 The Interview

O'Leary (2004) defines Interviewing as '*A method of data collection that involves the researchers asking respondents basically open-ended questions*'. The interview process is an important feature of data collection; it allows researchers to gain valuable in-depth knowledge from participants who are involved in the topic. Interviews tend to rely on open-ended questions to gain information and opinions (Naoum, 2007). While interview is recognised as an excellent way of achieving good information, a lot depends on the human element involved. This takes in to account that the participant may be having a bad day or may not wish to be perceived in a certain way. They can then manipulate the correct answer or view to maintain a certain façade, or so not to negatively impact a third party. O'Leary (2004) points out that if an interviewee is feeling judged, ashamed, offended, or awestruck then collecting accurate information is not guaranteed.

Interviews are a form of communication that can be complex in nature which make the simple task of asking a question more difficult. The author had to select the correct type of interview to satisfy the research. In doing so he chose a semi structured interview process as this will best draw out information from participants and allow elaboration where required to define the more technical aspect. The interview will be based on predetermined set of question but will allow flexibility of discussion. This promotes a more conversation style interview, but insures that the list of questions set out will be answered thus alleviating any risk of omitting important data.

The author chose not to utilise the other interview methods:

- Structured: This type of interview is predetermined and there is little room for exploring an interesting point which may arise during the conversation, which will be required by this researcher to assess the technical aspects that the participants have knowledge of
- Unstructured: This type of interview is fully supportive of the conversational style, questions are prompted as the interview progresses. This was viewed as an unsuitable style for this research because there are important aspects which will require in-depth discussion and the risk of overlooking vital information or omitting the question while involved in a discussion on another aspect, is possible.

### *3.2.3.3 Piloting the questions*

The importance of a pilot interview has a twofold benefit per Bryman (2004) who points out that *'The desirability of piloting such instruments is not solely to do with trying to ensure that survey questions operate well; piloting also has a role in ensuring that the research instrument as a whole is performing well'*. By piloting the interview, and in turn its questions, it allows the interviewer to gain experience of the process. Piloting also serves to streamline the questions by identify any of the questions which have little bearing or relevance in the grand scheme of the topic and may well raise other question which need to be included.

Bryman (2004) recommends that the pilot not be carried out on a member of the sample group as this may affect the outright response they would have offered. The pilot was carried out with a senior quantity surveyor with an academic background, who is not part of sample group. The pilot took place face to face and lasted approximately 50minutes.

On revision of the pilot the participant commented that he felt that there were to many questions which lead to a drawn-out interview process. However, he was happy with the content and the delivery of the questions. Armed with this insight the question list was revised and all non-



essential questions removed which lead to a streamlined interview process, lasting approximately 30-35minutes. A copy of the pilot interview questions and the issued interview questions are attached in Appendix A.

#### *3.2.3.4 Sampling*

Sampling relates to the selection of respondents that are chosen to participate in the research. We have already established that we opted for a semi-structured interview process, which is more time consuming and requires more organisation than say circulating a questionnaire. For this reason, the sample will be naturally smaller in size.

The type of sampling chosen was non-random. This was because the sample required would not be described as homogenous as they had to have some correlation to the construction industry as the Act is specifically related to construction contracts. The sample group chosen are a diverse group and contain the two main parties effected by the Act; the main contractor and the sub-contractor, others were members of the legal profession which operate within the construction industry and the other set of participants were from a professional / consultancy background.

The candidates were made up of members of staff who held senior roles within their respective organisations who would, or should, be directly affected by the introduction of the Act. These are mainly quantity surveyors, contracts managers etc. It was the view that utilising a diverse group of experienced personnel would achieve deep understanding of the Act.

#### *3.2.3.5 Secondary data collection*

This involves the collection of data that has been produced by others, in which the researcher is not involved. However, secondary data is derived from the collection of primary data produced by others. Based on the fact it is readily available from many sources i.e. libraries, publications from organisations, internet, journals, and basically any other platform where information has been previously published, it proves to be less time consuming than primary collection. The researcher remained objective while reviewing the secondary data, as some of the sources of information may be biased in its publications, e.g. the SCSI were biased toward the introduction of the GCCC form of contracts as they did not agree with some of the terms contained within. Many SCSI publications relating to the negative aspects, while government publication was very positive towards it, both sides had vested interests.

This author carried out a literary review early in the research process which offered good insight into the Act. Although there was, and still is limited academic data available relating to

the Act, this is because of its relative infancy. However, the DIT library and Arrow forum proved valuable. The author attended many conferences, lectures and masterclasses picking up presentations and handouts which were provided from the various bodies and stakeholders involved.

### **3.3 Limitations of Methodology**

The methodology contained certain limitations which were revealed as the process of investigation was carried out. The available literature was limited and academic sources almost non-existent. Much of the literature was dated and offered little depth into the subject. Much of the information available was produced by legal entities, with minimum amounts offered by industry. Any that were produced by industry appeared to be heavily influenced by the legal sector.

The Author had great difficulty in securing interviewees for the research This was mainly due to the current activity in the industry, several interviews were organised, and subsequently postponed, rearranged or cancelled. This proved time consuming and costly.

With the interviews that were completed none of the interviewees were comfortable in revealing their identities within the research. The author believes this was for two reasons: A) The participants were not knowledgeable enough in the area and were slightly embarrassed, B) Some of the participants had flippant views regarding compliance with the Act, and while they were happy to privately discuss this, they were not happy to have their name associated with them. For the purpose of the interview and in compliance with good ethics the author abided by the wishes of the participants.

### **3.4 Ethical Position.**

The researcher assumes responsibility for his own ethical conduct in the process of carrying out this research. This is supported by Denscombe (2002) who cites (Kimmel, 1996) when describing the construction of ethics. The word ethics has evolved over the years, and is derived from two words, ethos (Greek) relating to a person's character, and moralis (Latin) relating to customs or manners. The English language has amalgamated the words and now link them with the duties and responsibilities of persons with moral principles and codes of conduct (Denscombe, 2002). Creswell (2007) argues that the researcher needs to protect their participants, develop trust, promote the integrity of the research and guard against misconduct.

This research is carried out in line with British Educational Research Association (2010), which align the responsibilities of participants, sponsors, and the wider research community. The research will follow three basic principles as set out in The Belmont Report (1979)

- Informed Consent
- Assessment of risks and benefits
- Selection of subjects

Informed consent will be afforded to the participant with the express comfort of knowing they can withdraw from the research at any time. It is proposed to provide them with as much information as possible regarding the subject and their expected participation. This will allow participants to make an informed decision regarding participation. The researcher will also create a platform for the participants to ask questions about the topic. Any participants requiring anonymity will be afforded this by referring to them as a letter or a number, with their identity only known by researcher and mentor. A letter to this effect confirming anonymity will be made available to each participant if requested.

The researcher will endeavour to provide a detailed summary of any potential hazards or benefits which will likely arise from the research or from a subject's participation, Fellows and Liu (2008, p. 254) suggests that tabular format is the best option. If the subjects view any of the hazards beyond the realm of safety, they will be afforded the option to alter their participation or withdraw from the research.

The predominant ethical issue will be outlined in an initial letter along with a consent form to obtain information from each participant, the type of processing methods and the storage of the information will be outlined. If boundaries to the use of data are requested, then the participants will have the ability to highlight these. It is being considered but not confirmed that a copy of this proposal be attached as early correspondence with the subjects.

### **3.5 Conclusion**

Within this chapter the author sought to develop a suitable research approach which would provide satisfactory answers to the question: what are the implications of the Construction Contracts Act 2013 for the practicing quantity surveyor? which is the basis of the investigation.

The author constructed a qualitative research design, employing A) advocacy / participatory world views which examines subjects and seeks reform through and action agenda involving researcher participation. B) qualitative action research which studies groups in their natural setting, but also enacts change through the research and C) a semi- structured interview process

enabling a varied but in-depth conversational based data collection method. This design was developed after an appraisal was carried out on other approaches to research, but these methods were discounted because of various inadequacies in relation to this research. Both primary and secondary data was collected to satisfy the objectives as set out in chapter one, primary research in the form of the semi structured interviews and literary review completed the secondary collection process. The Author has concluded that the objectives have been completed utilising the methodology as set out above. The findings and analysis of the data collection process are contained in section four.

## Chapter Four: Research Findings & Analysis

### 4.1 Introduction

This chapter divulges the findings ascertained from the interview process and analyses the participant responses, comparing the different views held by each participant. There were nine interviews in total, which gave a good insight of what participants' thoughts were in relation to the Act. Where possible the interviews were carried out on a face to face basis. However due to location, timing, and the pace of the current industry the author had no option but to forge ahead with phone interviewing. The interview questions are contained in Appendix A.

This chapter seeks to satisfy the original objective as set out in chapter 1:

- report the experiences of the interview participants regarding various issues raised by the implementation of the Act;
- analyse the findings of the investigation and reflect upon the impact of the Act on current practice in the Author's organisation and identify areas of potential for improving service delivery to its clientele.

### 4.2 The Interviews

The interviews were carried out on a semi structured basis on nine participants, who are all industry stakeholders and are involved in diverse and varying activities within the industry. The aim was to gain an in-depth perspective of the tasks the stakeholders were carrying out since the introduction of the Act. The semi structured style of the interview allowed for flexibility and discussion. While getting answers to questions was crucial, it was also important to be able to probe the questions that required more detailed exposure. The findings are presented in a running commentary format. Table 1, 2 & 3 below show the schedule of interviewees, which are broken up in to three individual groups for clarity.

#### Main Contractors

Participant	Company	Area of Work	Activity	Position	Turn over €
A	Top-Tier Main Contractor	Civil	Utilities	Contracts Manager	400m
B	Top Tier Main Contractor	Commercial Industrial	General Main Building Contractors	Snr Quantity Surveyor	1.1bn

C	Medium Main Contractor	Commercial Industrial	General Building Contractors	Snr Quantity Surveyor	180m
D	Small Main Contractor	Commercial Industrial	General Building Contractors	Snr Quantity Surveyor / Contracts Manager	7-10m

Table 1: Schedule of Main Contractor interviewees

### Sub-contractors

Participant	Company	Area of Work	Activity	Position	Turnover €
E	Derchil – Large Sub Contractor	Residential Commercial Industrial	Plastering	Director/Commercial Manager	7-10m
F	Harbour- Medium Sub Contractor	Residential Commercial Industrial	Electrical	Director / Chief Estimator	4m
G	MW Roofing- Medium Sub Contractor	Residential Commercial	Roofing / Cladding / Building	Director/Commercial Manager	3m

Table 2: Schedule of Sub-Contractor Interviewees

### Consultant Quantity Surveyors

Participant	Company	Area of Work	Activity	Position	Turnover €
H	National Chartered Quantity Surveyor	Residential Commercial Industrial	General Quantity Surveying and Cost management	Senior Associate / Quantity Surveyor	Not disclosed by interview
I	Chartered Quantity Surveyor	Residential Commercial Industrial	General Quantity Surveying and Cost management	Managing Director / Quantity Surveyor	Not disclosed by interviewee

Table 3: Schedule of Consultant Quantity Surveyor Interviewees.

#### 4.2.1 The Interview Questions

The author constructed a single set of questions to best extract the required information and experiences from the participants. The same set of questions (unaltered) were asked of each of the participant groups. The questions were carried out like this to enable the author view the different perspectives each group have.

#### *4.2.1.1 Background / experience*

Q 1. Approximately how long have you been involved in the construction industry?

Q 2. What area of construction do you operate in? approximately % of each area

Q 3 Approximately on average, what would be a standard size project in value terms you would be involved on?

Q 4 Have you had construction experience in any other country other than Ireland? i.e. Malaysia, New Zealand, N-Ireland or UK, where similar legislation is in use?

Question 1 to 4 were designed to gain an insight into the experience each of the participants and there organisations had within the construction industry. A separate agenda behind the line of questioning was to ascertain if the participants were part of a small, medium or large organisation operating within the construction, with a view to determine later in the interview if the smaller or larger organisations were better prepared or more knowledgeable regarding the Act. The analysis of the interview process is presented in a structured commentary format which mirrors the style of the interview method chosen.

All the participants had more than 15 years' experience in the construction industry, except for participant C who had amassed 10 years of experience, while participant E indicating he had more than 35 years of construction related work behind him, and commented that *'most of it spent haggling over money with main contractors, and generally begging for what was mine in the first place'*. All participants work in multiple area of construction industry, including residential multiple unit projects indicating their relevance to the interview. The value range of the works involved ranged from €1,000,000 to €110,00,000 million per project. The combined number of years' experience between all the participants was 153 years. Three of the participants (B,C & F) had experience in other jurisdictions where similar legislation exists, none of the participant considered working under the legislation much different to the way things are carried out here, participant F commented while working in the UK that *'the legislation wasn't anything special in that it wasn't referred to in any way, it is just how business is done over there and seemed to work well'*. He also maintained that the court system was much more efficient in dealing with construction related disputes. Participant B worked in

the UK but was not privy to contractual or payment related matters so didn't have any valid input to offer on the matter.

#### *4.2.1.2 knowledge of the Act*

*Q 5 Are you aware of the CCA, and what is your understanding of it?*

The purpose of the above question was to gain some insight into the level of knowledge the participants had in relation to the Act, It also probed the participants on the sources of the information. The literary review in Chapter Two revealed that many of the main bodies involved in the construction industry i.e. SCSi, CIF, IEI and RIAI produced information via their individual websites, and held their own individual masterclasses and seminars which were pay to attend events, most had reduced fee for members. The average cost to attend these events ranged from an average of €160-€250. The format of all the groups appeared to be similar and included a representative from most corners of the industry, main contractor, subcontractor, legal representatives and the various consultancies of design and quantity surveying.

#### *Main contractors*

All the main contractors except one, Participant D were aware of the Act, and could easily point out the major elements that are contained within it. At first, they were slow to reveal exactly how much they knew possibly because they were not confident in themselves, In this scenario the author would assist where possible. Participant A became aware of the Act through the SCSi, and subsequent in-house masterclass delivered from Quigg Golden. He described it as *'legislation to create a level playing field for subcontractors who are being deprived payment which is due to them'* while participant B had similar comments when describing the Act. Participant C was aware of the Act however, his description was different from the other participants, claiming, *'It was the governments way of saying hey look we're doing something to show subcontractors we are thinking of them, when there working with the big bad main contractor'*. Clarifying his comments, he maintains it is a politically driven Act that will change very little in the industry. However, he was positive towards its intentions. While participants A, B & C knew of the Act and what it was designed for, only one, participant C mentioned the inclusion of adjudication as the new means of dispute resolution.

Surprisingly, the main contractors interviewed had positivity towards the introduction of the Act and said it was a positive thing to see all parties involved in construction being protected from payment default, realising they fell into that category. Participant A maintains *'it may well entice badly needed competition into the market, by reducing the risks for start-up*



*subcontractors to begin works*'. Participant C, believes it is a positive step but questions its implementation.

#### Sub-contractors

Participant G was the only participant from the sub-contract group that had any knowledge of the Act, and mentioned, *'What he knew was basic at best, and not even enough to get him out of trouble'*. Participant E and F both reacted with surprise when the author gave a brief description of the Act and its conditions. Participant F commented that *'with that type of thing in place, a lot of guesswork is taken out of cashflow moving forward enabling better planning'*.

#### Consultant Quantity Surveyors

Both consultant quantity surveyors were chartered with the SCSI, and held important prominent positions within their organisations. Both participants had in-depth knowledge regarding the Act, and both were deeply involved with the payment process, and if required, dispute resolution also fell within their remit. Participant I commented that he carried out the services of contractor's quantity surveyor and specifically the commercial management of subcontractors. He commented *'I'm in a position where I have a client [Main Contractor] who has not amended his sub-contracts since the introduction of the Act which contain pay when pay clauses etc., and have not adjusted the process in dealing with payment or notices, I'm being instructed not to alter our process, it is concerning to consider the consequences'*. Participant H was well versed in the conditions of the Act and could easily explain all the major points. Both participants commented that the information came directly from the SCSI and the conferences they facilitated. Participant I describe the Act as being *'Beneficial to the sub-contractor, a hindrance to the main contractor and a money spinner for the legal entity involved'*. Participant H described it as a *'revelation and a long-awaited solution to subcontract constant worries'* Both maintain that it makes little difference to the practice of the PQS

#### 4.2.1.3 Section 2: Exemptions

Q 6 Are the exemptions to the Act reasonable?

- Low value contracts less than €10K
- Residential dwelling
- Employment Contracts
- PPP Projects.

The rationale behind this question was to gather the thoughts of the participants on the exemptions contained in the Act, and explore their opinions as to whether some of the

exemptions were justified or should the list have been expanded. Chapter Two of the research critically analysed each of the exemptions justifying each of the exemptions and the reason behind their inclusion within the Act. Low value contracts were exempted as the cost in relation to the expense of adjudication would not make economic sense, residential dwellings were excluded to protect the everyday members of the public from the Acts conditions, PPP projects was mainly for two reasons, A) Those types of contracts are far too complex to benefit from the Act and B) They involve government business and the process of adjudication may reveal sensitive information which the government do not wish to disclose.

### Main Contractor

All the participants maintained the same view that the residential aspect of the exemptions should not have been an exclusion. Participant A rationalised his position by commenting '*the residential market, in particular, the one-off area can be a dangerous area to be involved in, primarily because they involve the least number of professionals, which means they have the least amount of guidance on how to behave with contractors, I believe this leaves contractors exposed*'. Participant C agreed it should not be an exclusion, as residential units to which the Act applies could potentially be carried out on a 100% direct employment basis [of sub-contractors], what happens if the home builder does not pay these subcontractors? '*These are the very organisations the Act was designed to protect*'. Participant B and D maintained residential or not they are still subject to a construction agreement and in turn should be covered by the Act. Most participants maintained that considering the size and amount of construction work involved in PPP projects they also should be covered by the Act. Participant D took the view that he will never be involved in one so, he has no comment either way. The remainder of the exemptions were acceptable to the participants, when the author explained the rationale as pointed out in Chapter Two.

### Sub-contractors

The only exemption that raised comment from the subcontract participants was the exclusion of the residential dwellings from the Act. All the comments followed a similar vein, and amounted to the fact that residential dwellings involved significant subcontractor involvement and yet they were not afforded the protection of the Act. All participants disagreed with its inclusion. Participant E added he was not involved in one off dwellings but thought their inclusion under the Act '*Was very important in order to protect smaller subcontractors*'

### Consultant Quantity Surveyors

Participant I did not agree with the exemption related to the PPP projects, maintaining *'that it was impossible to carry out these projects without significant financial exposure'* and that the contractor is left at significant risk if payments are delayed by even a short duration, because of the monies involved. Participant H believed that the residential exclusion was a *'missed opportunity to fully protect subcontractors and contractors alike'*, commenting that a lack of urgency and formality can often exist in residential dwelling construction, and that payments can often be delayed pending a third party such as a banks approval for a mortgage drawdown.

#### 4.2.1.4 Section 3: Payment under the Act

Q 7 How has the Act effected the commercial management of projects? (30-day cycle)

- Implications of the 30-day payment cycle for subcontractors.
  - Impact on cashflow
  - effect on tender prices because of additional financing requirements (main contractor)
  - Barrier to the market, increase risk of longer financing periods (main contractor)

Q 8 Have in-house contract documents been altered for use under the Act?

Q 9 Is there a greater emphasis on 'procedure' between parties in relation to payment?

The reasoning for this set of questions is to establish what effects if any, the Act has had on the payment process, day to day financial management of projects and the activities associated with this area. In Chapter Two it was revealed that many commentators believed that this section was in ways the most important section of the new legislation. The rational for this was based on the sheer number of payment transaction that are carried out during a construction contract, between contractors and subcontractors, each one carrying the possibility of default if not correctly performed. It was also commented that contract documentation would need to be altered to bring compliance.

#### Main Contractor

All participants indicated concern at the prospect of the 30-day payment cycle, but currently only one of them are in compliance with the Act in relation to this. Participant A commented that his large sub-contractors were *'mutually agreeable'* to 60-day payment terms despite the conditions of the Act, clarifying, *'they weren't in a great position to negotiate considering we would be transferring anything up to €2million every two months into their account'*. When probed by the Author if he was aware that even though a mutual contract existed that the subcontractor was still entitled to seek payment after 30 days he said *'I am aware, but these*

*are subcontractor we have been dealing with for many years and have excellent relationships with, it just wouldn't make sense for them to go back on their side agreement'*. Participant A also advised that to date, he had signed up many contracts and back dated them to before the introduction date of the Act, basing his decision for this on the fact that he secured quotations for the work around that time. Participant C maintains his conditions will remain the same including the pay when paid clause, until the issue is brought to his attention by his subcontractors, which he maintains *'is unlikely because they seem to be oblivious to its existence'*. Participant D had a similar approach in waiting for the other party to raise the issue regarding payment cycles. All participants agreed that if 30 day cycles were enforced they would struggle with cashflow unless their employer matched the payment terms, and all maintained they would negotiate hard on this point. Participant D commented that *'He would insist on 30-day payment duration or consider walking away from the job altogether, with hard couple of years behind us I don't know how contractors could carry any sizeable job otherwise'*

The Author put the question to the participants regarding the 30-day cycle increasing the financing cost to the main contractor, if his payment cycle is longer than that of the subcontract, and would it result in increased tender prices. Participant C and D maintained this would not be the case as the market is still too competitive. While participants A and B were adamant that it would certainly have an impact on tender prices, for the same reason as the other participants *'the market is still too competitive and prices have not risen sufficiently for the main contractor to take these types of costs on the chin'* (participant A).

None of the Participants believed that increased periods financing projects would be a barrier to the market, citing the quantity of work currently available. Participant C commenting *'there is so much work and not enough contractors to do it, companies will find a way into the market'*

None of the participants had altered contract documents to account for the Act, and participant A and D claimed there was no more emphasis on the payment process as of before the Act, stating that there were always processes to go through to get paid regardless.

### Sub-contractors

Only participant G could offer any insight into the commercial management as the remainder of the Participants were not aware of the Act until the interview. However, participant G stated that to date the Act had no effect from a commercial perspective but he has yet to sit down with his main contractors or seek alternative payment durations as *'many of my main contractors are already on 30-day terms and the others will have no choice but to follow suit in the new*

*year (2017) and that he certainly will not be accepting any more 60-day payment durations’.* All three participants agreed that the option of adjudication does offer more certainty regarding cashflow, which will enable better commercial management overall. Participant E and F stated their intention to go after better payment conditions with contractors who currently are not in compliance with the Act, in the new year (2017).

Regarding altering contract documents none of the participants had done this or insisted on it from main contractors, and all participants had similar comments to main contractor regarding the payment process, Participant G noting *‘there was and is always a bit of work to be done in getting paid, I don’t see this being much different because of the Act’.*

#### Consultant Quantity Surveyors

Participant H had received no feedback yet regarding an improvement or otherwise from commercial managers he would be involved with, citing the early stages of the Act for this. Participant I while involved in a commercial capacity had noticed no difference but said *‘things could change quickly once the word spreads among sub-contractors of their entitlements’* referring to the 30-day cycle. The participant maintained he expects *‘difficult conversations down the line with sub-contractors’*

Both participants were still using the same process of payment as before, by accepting contractor payment applications and reconciling it, then making a recommendation based on that exercise. No new information or different information is being provided on the payment applications.

#### *4.2.1.5 Section 4: Payment Claim Notices*

Q 10 Are payment notices and responses being issued between parties, to your knowledge or has anything changed in this respect?

Q 11 What is the process if a payment notice is not received or issued?

As uncovered during the literary review an additional aspect to the payment process has arisen out of the introduction of the Act, setting out a payment date where the executing party notify the other party that payment is due. This is then followed not more than five days later with a payment claims notice. This notice should contain details of the site, project and a full breakdown of calculations and explanation as to the makeup of the claim.

The point of this set of questions is to investigate if the above process is happening, between contractors / sub-contractors and contractors / employers, in accordance with the Act. Q11 further enquires what is the outcome if the correct notices are not produced between the parties.

#### Main Contractor

Participant B, C and D maintain nothing has changed since the Act about how payments are applied for. Commenting, generally, an application is produced which contains a valuation of the works done to date with a *'few site details'* and is sent to the client or client representatives for approval. This is how it has always been done. Participant A & D both made similar comments stating *'there is no point notifying the client of payment without having it backed up with figured so everything goes on the payment claim date, what benefit is there waiting five further days'*

Regarding payment notices not being received or issued, participant A stated he would still pay the subcontractor so long as there was sufficient back up to his application, *'it would have no bearing on me if the application was received on the payment claim date or 5 days later, so long as they submit something that can be justified'* Participant D held the same viewpoint.

In relation to a response to a claim, all participants said they are doing things as before, with participant C stating *'it's usually done with a courtesy call first explaining our position and followed by a remittance giving the figure to be paid, they (sub-contractors) are usually happy with this once the reasons are justified'*.

#### Sub-Contractor

Participant G being the only subcontractor to have knowledge of the Act from its introduction, maintained he had raised the issue with his employers (main contractors) but was told *'We will have to look at it again but for now continue as is'*. The other participants mention they may visit it in the new year but are generally happy with their current agreements. Neither of the participants saw the *'Value'* of notifying the employer of a claim and following up with details five days later. All participants stated they would still expect to be paid if not in accordance with Act's conditions on payment, but provided the minimum that they did before its introduction.

#### Consultants Quantity Surveyors

Both participants in their professional capacity maintained they would be bound to insist on the conditions of the Act being met, in regards to payment notices. However, notice of the

claim date and follow-up details of the breakdown are not being issued, only a single application is still being submitted. They both have issued payments without those notices being provided. Participant I stating *'the only reason he would not recommend payment with the correct notices, was if the contractor was being out of order or he had to put manners on him (the contractor)'*.

#### *4.2.1.6 Section 5: Right to suspend work for non-payment*

Q 12 Has the threat or action of works suspension increased since the introduction of the Act?

In Chapter Two the area of works suspensions was discussed in detail along with the issues relating to same i.e. legality of it, effect on programme, cashflow and delay to completion dates. It was also discovered that they are a relatively rare occurrence. Now that the Act provides an official, and transparent platform for work suspensions relating to non-payment, the Author, through this question is investigating if the threat of suspensions has increased now that there is a clear implied condition pertaining to construction contracts relating to it.

#### Main Contractor

Only participant A and B (large main contractors) have experienced work suspensions on their projects, and Participant B said he *'cannot remember the last time this occurred'* and that he doesn't expect subcontractors to begin banting around threats of suspensions as working relationships build up over the years will not change overnight because of the Act. Participant C said it was a *'one off experience and I've had no trouble since, and had no threats of suspension in years'*, all participants have experienced the threat of work suspensions over the years. Participant A maintained he has not had any threats of suspension since the introduction of the Act, and participant D, said that he had threats of stoppage but has never had a *'stoppage of any sort, because I look after my subcontractors and only work with the ones I built good relationship with'*. He further clarified that *'if any subcontractor carry out a work stoppage with me, they will be stopped for good'* as he would not allow them back to work or consider employing them again in the future. He also does not believe sub-contractors will be threatening to suspend works unless the reason is valid and maintains they will *'never carry it out regardless, because they know the consequences and wont risk losing out on work going forward'*.

#### Sub-contractors

Participant G believed it would be inevitable that sub-contractors would increase or begin to threaten suspensions going forward, commenting *'once they are aware its readily available to*

*them, and they are well protected I think going we will see a hell of a lot more of it*'. Participant E maintained that suspensions were not something that he would consider unless things got '*really bad*' on site and didn't appear to be getting resolved by negotiation. He further didn't believe that threatening main contractors with suspension would achieve anything worthwhile and only serve to destroy relationships. Participant F maintained a similar view to participant E, whereby he would not consider using the threat of suspension unless there was '*absolutely no alternative and it was completely justified*'. None of the participants had taken part in threatening the suspension of works since the introduction of the Act or had any intention of doing so in the future.

#### Consultant Quantity Surveyors

Neither participant H or I experienced a suspension of works in their professional working careers, and maintained even the threat of it is rare while dealing with main contractors although it does happen. To date, no increase in the threat of suspensions has taken place according to the participants. Both participants believe the threat of suspension and possibly the actions of it, will increase but mainly from a subcontract point of view.

#### *4.2.1.7 Section 6: Right to refer payment disputes to adjudication*

Q 13 Do you think adjudication will be utilised?

Q 14 Do you think adjudication is a more effective dispute resolution process in comparison to, conciliation or arbitration?

It was established in Chapter Two that adjudication was a new form of alternative dispute resolution introduced as part of the Act. Its role is to fast track the dispute resolution process so cashflow is not stemmed for long durations and work stoppages are kept to a minimum. This question was asked to reveal if the participants believe adjudication will be used and if it is a better form of dispute resolution than the common mechanisms in use in Ireland today.

#### Main Contractors

While the participants were all reasonably well informed regarding the Act, the participant's knowledge of adjudication was less advanced, with participant A being the exception. Based on this the author gave an overview of the main points involved in adjudication. Participant A, maintained '*on paper adjudication could be the single best thing to happen to the industry, but this will not be the case*' he cited legal difficulties from court challenges and the expense of it as being the biggest barrier to its success. He also maintained that in his view conciliation is by far the best way to resolve disputes in Ireland, as it is relatively cheap, and for the most part



quick. Interestingly participant A does believe adjudication will inevitably overtake arbitration as the next step after conciliation, due to its lower cost and timescales.

Participant B and C, speaking based on what the author had informed them of adjudication both maintained a similar view that if adjudication is quicker and cheaper than the alternative then it will and should be used utilised. Participant B has extensive experience of conciliation and believes it to be extremely effective in dealing with disputes and thinks the industry will stay with what they know works, as they will be apprehensive about using a new form of dispute resolution. He then justified this by putting this statement to the author *'Would you want to be the guinea pig to try adjudication? I know I won't be!'*

#### Sub-contractor

Only participant G had any knowledge of adjudication. Participant E and F had no knowledge of it, but were aware of conciliation and arbitration. As with other participants, a brief overview was offered for the purpose of the interview questions. Participant G pointed out that the construction industry was slow to embrace change and that sub-contractors will wish to use the cheapest but more importantly the best form of dispute resolution which he currently believes to be conciliation. However, he also maintains that the speed that adjudication brings to a dispute resolution will be a vital factor as *'time is money'*. Participant E and F maintained that adjudication, based on my description appeared to be beneficial to all concerned and could not provide a reason as to why the other methods would be used going forward. Participant F called adjudication a powerful weapon for the subcontractor to have if locked in a dispute.

#### Consultant Quantity Surveyor

Participant H was apprehensive regarding the use of adjudication, maintaining he would be slow to rely on it as *'not enough is known about it currently'* which can lead to further cost if it is challenged after the adjudicator has made his findings. He claims the dispute resolution process needs quite an overhaul as it is currently too expensive and too time consuming. He further commented that while adjudication was a success in the UK, *'only time will tell if it reaches the same status in Ireland'*. Participant I was more optimistic regarding adjudication and said as soon as people begin to see the benefits it will *'certainly spell the end for conciliation and arbitration, which are currently over expensive and often benefit the party who has the deepest pockets to go the furthers'*. He does concede it will take several years for adjudication to be fully realised as the best approach to dispute resolution

#### 4.2.1.8 Concluding question

Q15 Do you think the CCA 2013 will have a positive, negative or any effect on the construction industry.

The desk study in Chapter Two explored the Act from every aspect along with the key commentator's views of the subject. The majority outlined that the Act will be very beneficial to the industry and in particular, the sub-contractor section. These views were formulated before the Act came into effect, therefore this question sets out to discover the views of participants that are now actively working under the conditions of the Act.

In general terms, all the participants maintained a similar view to the introduction of the Act, except for participants H and I. The majority maintain the Act will eventually make a positive difference to the industry, but stress that it will not happen overnight and it may take years to see the effects. Participant B maintains *'it's like everything in the Irish construction industry, nobody will be too rushed to get themselves in line with the Act, until someone or something forces them to, which we all know won't be the case'*. Participant H and I are of the view that we will begin to see the effects in the new year as more and more contracts are signed under the new Act. Both believe it will be a positive feature of the industry going forward.

### 4.3 Chapter Conclusion

This chapter revealed important findings using the primary data collection method of semi structured interviews. The information obtained in this was compared and referenced with that of the secondary data collection carried out during the literary review in Chapter Two. The opinions and experiences of stakeholders identified many interesting points e.g. current practices, perceptions and the level of compliance in relation to the Act which will be discussed in detail in Chapter Five. The findings will be used to satisfy the overall objectives of the research. Chapter five concludes the research, make recommendations and suggests areas where further may be beneficial.

## **Chapter Five: Conclusion and Recommendations**

### **5.1 Introduction**

Chapter Four outlined the findings and analysis of the data collection process and highlighted the key statements abstracted from each method used. This chapter summarises the findings and analysis and discusses them in line with the aims and objectives, and how they were achieved through the chosen methodology.

### **5.2 Thesis Aims**

A) Identify what are the implications of the Act for practicing quantity surveyors, and to reveal the level of preparation they will require from an administrative and procedural aspect in order to be compliant with the conditions of the new legislation.

### **5.3 Thesis Objectives and Findings**

#### ***5.3.1 Objective One: Explain the rationale for the introduction of the Act.***

This objective was primarily achieved during the secondary data collection process carried out in Chapter Two. The secondary data was made up of a review of the published literature which was collected from several sources. Some insight was gained throughout the interview stage of the research.

The literature indicated that the construction industry, although hit badly by the recession, had a poor record in good payment practices before the recession took hold. Evidence of this was the introduction of prompt payment legislation in 1997 & 2002, which was unsuccessful in dealing with the poor payment practice. The poor payment practices had a particularly bad effect on sub-contractors, whereby main contractors, in an effort to maintain profit, delayed and refused payment. This was exacerbated by the recession where long durations (in excess of 75 days) without payment put sub-contractors under enormous pressure to survive and many did not. The exact number of sub-contractors and contractors who went out of business directly because of poor payment will never be known. It was the suffering of the sub-contractors that prompted complaints from the industry for something to be done, to help their situation. During the Interview section, it was revealed that most of the participants had encountered delayed payments at some stage, and it was considered a regular occurrence.

#### ***5.3.2 Objective Two: Review and summarise the provisions of the Act;***

The literature review was instrumental in achieving this objective. It identified that the legislation had made significant changes to the way construction contracts would be administered moving forward. The Act is based on the UK model of similar legislation namely Part II of the Housing Grants Construction and Regeneration Act (HGCRA) 1996. There are minor differences regarding the type of dispute etc. that can be raised. The Irish model includes only for payment related disputes, under the Act. The key area of change was in, payment, right to work suspension and the introduction of adjudication as a new form of dispute resolution.

In the area of Payment, the inclusion of certain payment related clauses was outlawed e.g. the pay-when-paid clause, meaning parties no longer must wait on payment subject to a third-party payment. This relates directly to the relationship between subcontractor and the main contractor, whereby it was standard practice for a main contractor to hold payment on a subcontractor while awaiting payment from the employer. The only instance this is now acceptable is when the employer is in liquidation. Under the new legislation payment must be paid to subcontractors on 30-days or better terms. However, the main contractor is not entitled to the same benefit from his contract with the employer which payment durations remain open for negotiation. The interview process identified that main contractors will begin to negotiate with employers on payment terms to match that of the subcontractor, if the Act is implemented correctly.

The literature also identified the inclusion of payment notices in the Act. These notices are designed to notify the employer that a payment application is imminent. A payment claims notice is considered a very detailed breakdown of what is being sought for payment, with further details regarding the site and organisation attached. Once this is received the payer is required to respond with a notice of response either accepting or rejecting the application with a fully broken down and detailed explanation as to why this is the case.

Chapter Two gave an insight into the right to suspend the works for non-payment. This covers non-payment of a payment claim, providing the correct responses are not in place and the non-payment of an adjudicator's decision. A justified suspension does not expose the suspending party to penalties in relation to the duration of the suspension. This does not form part of the programme calculations. However, when a stoppage is referred to adjudication this ends the period of suspension and work must proceed. This was highlighted as being a negative aspect of the Act, because the suspending party at that time would still be out of pocket.

The introduction of adjudication as an implied dispute resolution mechanism in construction contracts, is potentially one of the most important aspects of the Act. This gives a platform to resolve disputes quickly and with less expense than the traditional alternative. Adjudication was designed to deliver rough justice in a speedy manner, to keep cash flowing and work progressing. Many issues arose during the literary review regarding adjudication. The main one being that Irish law follows a model which favours the constitutional right to natural justice. It is believed many challenges through the courts will be made to the initial decisions of adjudicators, based on the right to natural justice having being impeded. The other major issue was appointment of the chair of the adjudication panel Dr Nael Bunni. Some commentators maintain his appointment was a flawed process, and in turn any appointment of an adjudicator by Dr Bunni may lead the entire adjudication process of that case flawed.

### ***5.3.3 Objective Three: Report commentary in the literature regarding the Act from the main individual and stakeholders;***

This objective was included as the Author thought it important to analyse the commentary of some the main people and organisations involved in construction industry, on issues relating to the Act. In order to see if it was positive or negative from their point of view. The literary review achieved this objective by revealing and analysing key statements from stakeholders in relation to the Act. The overwhelming support for the Act was evident from the statements obtained from published sources. Some disappointment was revealed from the main contractor's side, commenting they have not been afforded the same protection from the Act as subcontractors, however they maintained it was a positive step. The parties included in the commentary were: political entities, legal entities, professional bodies, and representation from the industry i.e. main and sub-contractors.

### ***5.3.4 Objective Four: formulate an effective method of investigating, industry awareness of, knowledge of, preparations made for, and changes to practice made in response to the implementation of the Act;***

This objective was achieved in Chapter Three of the thesis, with several strategies of design considered and discussed throughout the chapter. The different options were critically analysed highlighting the advantages and disadvantages of each. The author chose a strategy which would allow him to explore and record the experiences of practicing professionals now working under the Act, while abstracting the important processes and procedures from them, and implementing them into his current practice, introducing change and a better service to his current clientele.

The chosen research design was based on a qualitative investigation, which held an advisory/participatory worldview. This was complimented by a qualitative strategy of inquiry which was based around action research. The author chose this as it is associated with bringing change which the author requires within his company, to bring the current practices up to date and in line with the conditions of the Act. The research methods of data collection chosen was semi-structured interviews. This enabled the author to get a deep and rich insight into the experiences of the participants while operating with the industry since the Act was introduced.

***5.3.5 Objective Five: report the experiences of the interview participants regarding various issues raised by the implementation of the Act;***

The experiences of participants were reported in Chapter Four, and in doing so satisfied this objective. The experiences of the interview participants were surprising to the author. Based on the information gathered throughout the literary review, the introduction of the Act would bring many important changes to the industry. However, evidence has arisen to the contrary.

The information gathered during the interview process indicate that the participants have not experienced any significant change to the way they conduct their business or administer the contracts.

*5.3.5.1 Payment durations*

Subcontractors currently are not receiving payment terms in line with the Act i.e. 30 days, nor are they seeking them. While many of the participants from the subcontract area were not aware of the Act and its important features such as the 30-day rule, they did maintain that in the new year (2017) they would be seeking the terms of the Act to be met, in this respect. However, they also maintained that they were happy with the current conditions and while they encountered delays in payment or reduced payments this was not affecting their working relationships. Main contractors are still paying sub-contractors on same basis as before the Act, and have not altered this. It became clear during the interviews they will not be altering them until forced to do so.

*5.3.5.2 Payment notices*

The process of payment as laid out in the Act is also an area that is being over looked in the industry, according to the comments received during the interview process. Payment notices and responses are not being exchanged among the parties, yet payment transactions are still

being made, as per pre-Act procedures. There appears to be no penalty for incorrect or non-existent payment notices with participants happy to operate without them. While some of the main contractors operating in the public sector have had conversations with the employer's representatives regarding the payment process, to date, no change has occurred. Consultants quantity surveyors comment that they are requesting notices and responses but say that they are not 'yet' insisting on them.

#### 5.3.5.3 Payment Administration

In Chapter Two it emerged that the possibility exists of organisations requiring additional staff to handle the payment procedures now imposed on the industry. It was indicated that the whole procedure regarding payment would bring more administrative duties to all the parties involved in the industry. Based on the interviews in Chapter Four, this does not seem to be the case. Organisations are reporting they do not require additional staff as the procedures, despite the Act, have remained the same.

#### 5.3.5.4 Work Suspensions

The participants are currently not experiencing an increase in the threat to suspend works on site. Surprisingly most of the participants claimed that this is not a practice they would partake in lightly, citing the damage it can cause to working relationships and the reputation of the company might be damaged as a result. However, it was clarified that the practice would only be used as a last resort.

***5.3.6 Objective Six: analyse the findings of the investigation and reflect upon the impact of the Act on current practice in the Author's organisation and identify areas of potential for improving service delivery to its clientele.***

#### 5.3.6.1 Lack of education in relation to the Act

Considering the importance of the legislation, the author was surprised that some of the participants had very little, if any knowledge of the Act or its contents. The Author also identified a divide in the knowledge between main contractors and subcontractors. The main contractors were well informed in relation to the Act, while it was evident that sub-contractors were lacking in the area. The knowledge levels reduced in line with the company turnover, indicating the larger organisations have invested in training their staff in the Act, while the smaller organisation have not.

While some of the participants who were aware of the Act, had a grasp of its elements, only two of the participants had knowledge of the adjudication process and its ramifications. Most of the participants had no concept regarding the required notices i.e. payment claim date and the payment claim notice, frequently mixing up the two.

While the main contractors and the consultant quantity surveyors gained knowledge of the Act through membership with various organisations such as SCSI some of the main contractors employed the legal firms to give masterclasses on the issue. The subcontractors took no such action and remained uninformed.

#### *5.3.6.2 Change to practice*

In the literary review, it was highlighted that major changes to the current practice was required to comply with the Act and to avoid adversary moving forward. The interviews indicated that nothing has changed since the introduction of the Act. Main contractors maintain they have not altered their practices in payment etc. and are still paying subcontractors as before and more than the 30-day period. Evidence of circumventing the Act was revealed during the interview by means of back dating contracts to before the Act's introduction. However, the participant who partook in this practice admitted he was more than likely in breach of his contract.

The pay when paid clause still exists among some of the main contractors, and they insist they will utilise it until the other party notifies them otherwise. This is a worrying revelation as that clause was designed specifically to benefit the sub-contractors, yet it appears to be ineffective among the participants.

#### *5.3.6.3 Working relationships*

Throughout the interview process the word working relationships was mentioned frequently by all participants. A common theme appeared that many of the participants were involved with other parties (Main or sub-contractors) for many years and were pleased with their current conditions. It appeared that the participants would do almost anything to preserve these relationships, however when the topic changed to new business relationships they each claimed they would have no problem enforcing the conditions of the Act on the other party.

#### *5.3.6.4 Impact on Authors organisation*

The literary review indicates that many things require updating in the Author's organisation- payment procedures, contract documents, administration of contracts and our approach to



dispute resolution. However, the current service we provide is in keeping with the participants of the Interviews. The Author's research indicates that while things are slow to change, they will inevitably, and in order to be ready for this the Author believes his organisation needs to provide practical training in the conditions of the Act, and its most significant features. This will have a financial impact as well as a time lost during the training process. It is evident that being educated in line with the Act and its conditions will improve our service to our clients and that is main goal of the organisation.

## **5.4 Recommendations**

The following recommendations are based on the investigation carried out during the literature review and the findings of the semi-structured interviews.

### ***5.4.1 Improve education***

The level of knowledge appears to be quite low in the industry, except for large main contract organisations, who seem to have undergone some level of training. However, their technical knowledge on the main points was not considered to be strong, considering the importance of the Act. Knowledge is non-existent among sub-contractors and smaller organisations. It is imperative that this is addressed, as the Act was introduced to protect this group. Organisations within the industry such as SCSI, CIF and IEI etc. should continue education programmes.

Construction companies should consider engaging in in-house training in order to bring themselves up to date on the practices and procedures that are required to comply with the Act. The obvious source of this training would be from the legal sector, who appear to have invested time and money into developing masterclasses on the issue.

### ***5.4.2 Industry regulation***

Based on the research there appears to be a laid-back attitude towards the Act, which is a typical position adapted in the construction industry. To address the gap in the knowledge and application of the Act, it may be considered prudent to consider regulating training on the Act and its conditions. This could potentially tie in as part of the Construction Industry Register Ireland (CIRI) system as set up by CIF and the Department of the Environment Community and Local Government (DECLG). A continued profession development (CPD) module could provide the required training to bring participants up to date on the Act and its conditions. CIRI is a register of contractors, sub-contractors, builders, tradesmen etc. who have been certified as competent in the discipline of construction. If the regulation regarding the Act was included in

CIRI, potential clients could consult the register to ascertain if their chosen contractor is competent in operating within the Act.

### ***5.4.3 Enforcement***

Regardless of the current activity, the Act is not just a recommendation, it is the law. Like all laws, it should be complied with. Contract administrators and consultants in general should enforce the conditions of the Act, and insist that all parties comply as regards payment process, notices, and contract conditions. If this is not the case, then sanctions should be forth coming from their respective professional bodies. It is the Author's view that contract administrators are best placed to enforce the conditions on the parties.

### ***5.4.4 Review of the Act***

The Author believes a full review of the Act would be beneficial in two or three years from its introduction. The review could take in the level of compliance and the implementation of the Act industry wide. This review period will have given enough time for legal challenges to be made in relation to adjudication, and the findings revealed, and would also allow the exemptions to be assessed and allow for the possibility of further exemptions or a reduction of the number of exemptions, contained in the Act. The benefit of a review is that it allows weaknesses exposed over the bedding in period to be corrected and updated to provide a better all-round piece of legislation.

## **5.5 Limitations of the research**

### ***5.5.1 Literature***

One of the major limitations of the research was that very little literature has been published since the introduction of the Act. Much of the available material is dated in terms of when it was produced. Many of the commentators began producing information and statements in relation to the Act when it was first enacted but little information was forthcoming since its introduction. Much of the information was brief in nature and only summarised the main points, and was completely void of detail.

### ***5.5.2 Participation in the research***

The current activity in the industry made it extremely difficult for the author to secure good quality interviewees, many of them citing their current work load as a reason for this.

Several participants initially agreed to take part and either cancelled the appointment or just failed to show up. The Author did secure high calibre candidates and managed to conduct interviews. However, for geographical reasons or organisational issues many of them would only commit to phone call interviewing.

### ***5.5.3. Lack of Knowledge***

The lack of knowledge made it difficult to secure participants for interviews. Many candidates approached, were reluctant to give an interview as they simply had no knowledge on the topic, which was surprising as some of them were part of large organisations. The candidates appeared apprehensive and even embarrassed about their lack of knowledge in such a fundamental part of the industry, and simply would not commit to participate.

### ***5.5.4 Implementation of the Act***

It soon became evident during the interview process that the Act is not being implemented in any way between the parties to the contracts. This meant that the Author found it difficult to gather any evidence of changes made within organisation, to comply with the Act, because they simply were not implementing the conditions.

## **5.6 Future research**

A continuation of this research should be taken in the area dispute resolution under the Act, in particular, the treatment of the courts towards adjudicators decisions and natural justice. Further research would also be beneficial in the area of cashflow among the parties, to reveal if the main contractors are being placed under more pressure to finance projects for longer periods. This research could include a report on tender prices indices to evaluate if the main contractor is passing the increased cost of financing projects for longer periods on to the clients, and in turn pushing up tender prices.

## **5.7 Conclusion**

The research has examined the introduction of the construction contracts act 2013 in detail and the conditions that relate directly to the quantity surveying profession. The Author reviewed the literature and conducted interviews to gain an insight in to the requirements of the practicing quantity surveyor, in relation to compliance with the Act.

The introduction of the Act is generally perceived to be a positive addition to legislation pertaining to the construction industry, and has been well received on all avenues with minor exceptions in main contract organisations. However, it must be noted that currently the Act is

not being implemented by the parties involved in construction projects. The research identifies the main reasons for this:

- lack of knowledge in relation to the Act.
- unwillingness to disturb current good working relationships.
- An industry that is notoriously slow to change in general.

The research revealed that activity in the industry is currently robust and none of the participants of the interviews have reported any trouble getting paid in the last 18-24 months. While this is excellent news for the industry and the organisations that operate within it, the Author believes this could be a reason for the casual attitude in enforcing the clauses of the Act. During the current active period in the industry contractors need to keep steady payment to sub-contractors to keep them working in an efficient manner. It may well be the case that if work conditions within the industry begin to deteriorate from a financial point of view, we may see an increase in the implementation of the Act, particularly from a sub-contract point of view.

As the situation currently stands, the role of the quantity surveyor has not changed dramatically, if at all, in relation to the Act. However, if the implementation of the Act is rolled out fully in the coming months and years as expected, the quantity surveyor will play an instrumental role. Mainly because of the position and role the quantity surveyor assumes, particularly in the essential areas of- the payment process, work suspension and dispute resolution.

~~~~~END~~~~~

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## Appendix A- Questionnaire and Pilot Questionnaire.

### Semi- Structured Interview Question Schedule (Issued)



Dear participant,

Thank you for being part of the interview process for this research.

#### **Introduction**

I am carrying out research in the area of construction contracts and in particular, the new legislation introduced in Irish law on the 25<sup>th</sup> of July 2016: The Construction Contracts Act 2013.

This legislation relates to all construction contracts with very few exceptions, whether written, oral or otherwise, and has the potential to be revolutionary in its application. The legislation relates to three main areas of construction contracts

- A) The payment process
  - i) Removal of pay when paid clause.
  - ii) Must pay sub-contractors in 30 days or better terms.
  - iii) Introduction of payment notices.
- B) The right to suspend works for non-payment.
- C) The right to refer payment disputes to adjudication.

The Act was driven by Senator Feargal Quinn and introduced through a private member's bill in the Seanad. This was done in an attempt to improve payment practices in the construction industry and protect subcontractors against non-payment, by introducing the following: maximum payment duration of 30 days or better, right to suspend works penalty free and

providing an efficient dispute resolution mechanism which is quick and less expensive, namely adjudication.

### **Participant information**

By taking part in this interview the author will ensure complete privacy of the information you provide, and can if you wish, conceal your identity in the final document, thus ensuring your views will be published but your identity will remain unknown to all future readers except for myself and my allocated mentor. The author also wishes to notify the interviewee, that the right to withdraw at any time from the research is within their control.

Participant Name:

Organisation:

Date:

### **Introduction / Background**

Q 1. Approximately how long have you been involved in the construction industry?

Q 2. What area of construction do you operate in? roughly %

Q 3 Approximately on average, what would be a standard size project in value terms you would be involved on?

Q 4 Have you had construction experience in any other country other than Ireland? i.e. Malaysia, New Zealand, N-Ireland or UK, where similar legislation is in use?

### **The Act**

Q 5 Are you aware of the CCA, and what is your understanding of it?

Q 6 How did you become aware of the Act, where did you get information?

### **Section 2: Exemptions**

Q 7 Are the exemptions to the Act reasonable?

- Low value contracts less than 10K
- Residential dwelling
- Employment Contracts
- PPP Projects.

### **Section 3: Payment under the Act**

Q 8 How has the Act effected the commercial management of the company?

Q 9 Have you attempted to altered Payment terms with your Employer?

Q 10 Is there a requirement for Additional staff to deal with payments?

Q 11 Have in house Contract documents been altered for use under the Act?

Q 12 What was the process if payment was delayed, before the introduction of the Act?

Q 13 Has the Act made getting paid any easier or reduced delays in payment?

Q 14 Is there a greater emphasis on 'procedure' between parties in relation to payment?

#### **Section 4: Payment Claim Notices**

Q 15 What effect have payment claims notices had on the payment process?

Q 16 Are payment notices and responses being issued between parties, to your knowledge or has anything changed in this respect?

Q 17 What is the process if a payment notice is not received or issued?

#### **Section 5: Right to suspend work for non- payment**

Q 18 Has the threat of works suspension increased since the introduction of the act?

Q 19 Do you think parties to the contract are now more likely to suspend work because of the Act?

#### **Section 6: Right to refer payment disputes to adjudication**

Q 20 Do you think adjudication is a more effective dispute resolution process in comparison to:

- conciliation?
- arbitration?

Q 21 If a payment dispute arises at what stage would you adjudicate?

Q 22 Would you be willing to accept the result of an adjudication or challenge it in the court?

#### **Concluding the interview**

Q 23 Does the Act leave any party more exposed from a financial point of view?

Q 24 Has the Act, in your opinion addressed the perceived power balance between subcontractors and main contractors?

Q 25 Do you think the Act is positive or negative for the industry?

## Semi- Structured Interview Question Schedule (Pilot)

Participant Name:

Organisation:

Date:

### **Introduction / Background**

Q 1. Approximately how long have you been involved in the construction industry?

Q 2. What area of construction do you operate in? roughly %

- Residential
- Commercial
- Industrial
- Civil

Q 3 Approximately on average, what would be a standard size project in value terms you would be involved on?

- €0-500K,
- €0.5m – €1m,
- €1m- €5m
- €5m +

Q 4 What is the most important aspect of the role you carry out within your organisation?

Q 5 Have you had construction experience in any other country other than Ireland? i.e. Malaysia, New Zealand, N-Ireland or UK, where similar legislation is in use?

Q 6 Generally how much interaction would you have on daily with: (Daily, Weekly, Monthly)

- Sub-contractors (Daily, Weekly, Monthly)
- Main Contractors (Daily, Weekly, Monthly)
- Administrators / Employers representatives (Daily, Weekly, Monthly)

Q 7 How would you describe your interaction with the other parties involved on projects, generally?

- Positive
- Confrontational
- A mix of both

Q 8 Has this changed since the introduction of the Act

Q 9 What are the usual cause(s) of arguments/disputes in your experience?

Q 10 How are disagreements normally resolved when they arise?

- Negotiation %
- Dispute resolution %

Q 11 After a disagreement is resolved, generally how would you describe relations between the parties afterwards?

### **The Act**

Q 12 Are you aware of the CCA, and what is your understanding of it?

- Knowledgeable
- Know of it
- No Knowledge of it.

Q 13 How did you become aware of the Act, where did you get information?

Q 14 What training was under taken in preparation for the Act, if any?

### **Section 2: Exemptions**

Q16 Are the exemptions to the Act reasonable?

- Low value contracts less than 10K
- Residential dwelling
- Employment Contracts
- PPP Projects.

Q 15 Do you think the list of exemptions should be altered.

### **Section 3: Payment under the Act**

Q 16 How has the Act effected the commercial management of the company?

- Project financing
  - Implications of the 30-day rule.
    - Impact on cashflow
    - effect on tender prices because of additional financing requirements (main contractor)
    - Barrier to the market, increase risk of larger financing periods (main contractor)

Q 17 Have you altered Payment terms with your Employer?

Q 18 Is there a requirement for Additional staff to deal with payments?

- Administration of payments.

Q 19 Have in house Contract documents been altered for use under the Act?

- Pay when paid removed
- Retention
  - Increase or decrease

Q 20 What was the process if payment was delayed, before the introduction of the Act?

- How often would this occur, on average?

Q 21 Has the Act made getting paid any easier or reduced delays in payment?

Q 22 Is there a greater emphasis on 'procedure' between parties in relation to payment?

#### **Section 4: Payment Claim Notices**

Q 23 What effect have payment claims notices had on the payment process?

- Standardised the process?
- Made it more administrative?

Q 24 Are payment notices and responses being issued between parties, to your knowledge or has anything changed in this respect?

Q 25 What is the process if a payment notice is not received or issued?

- Will payment still be processed, based on payment claim only?

Q 26 Do you think payment claims notices are a useful addition to contracts?

#### **Section 5: Right to suspend work for non- payment**

Q 27 When do you think it is fair to suspend works?

Q 28 Has the threat of works suspension increased since the introduction of the act?

Q 29 Do you think parties to the contract are now more likely to suspend work because of the Act?

Q 30 Would a work suspension effect your working relationship moving forward on the project?

Q 31 Would you be likely to engage a suspending party on works in the future?

#### **Section 6: Right to refer payment disputes to adjudication**

Q 32 Are you familiar with adjudication and its purpose

Q 33 Do you think adjudication is a more effective dispute resolution process in comparison to:

- conciliation?

- arbitration?

Q 34 would you be comfortable with using adjudication over the tried and tested methods currently used in the Irish Construction Industry

Q 35 If a payment dispute arises do you think the other party are now more likely to adjudicate?

- How likely %

Q 36 If a party adjudicates how will this affect the working relationship moving forward, in your opinion?

Q 37 Would you be willing to accept the result of an adjudication or challenge it?

Q 38 Would you pay the sums recommended by the adjudicator while the challenge is being processed?

Q 39 Who do you think is most affected by the Act?

Q 40 Do you think the Act is positive or negative for the industry

### **Concluding the interview**

Q 41 Do you think adequate information was made available in preparation for the Act?

Q 42 Do you think the Act could have been improved in any way?

Q 43 Do you think the Act is positive or negative for the industry?

- Who in particular?

Q 44 Has the Act, in your opinion addressed the perceived power balance between subcontractors and main contractors?

Q 45 Does the Act leave any party more exposed from a payment point of view?

- Cashflow problems
- Finance costs passing onto client
- Increased tender's prices

Q 46 Do you think the Act is positive or negative for the industry?



## Appendix B- Research Proposal

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## Table of Abbreviations

CCA.... Construction Contracts Act 2013

RIAI.... Royal Institute of Architects Ireland

SCSI.... Society of Chartered Surveyors of Ireland

CIF.... Construction Industry Federation

IEI.... Institute of Engineers Ireland

DJEL...Department of Jobs, Enterprise and Innovation

CBI.... Central Bank of Ireland

IMF.... International monetary fund

ISME.... Irish Small and Medium sized Enterprise Association

PPP.... Public Private Partnerships

## **1.0 Working Title.**

The Construction Contracts Act 2013: A company based project investigating the level of awareness and preparation required in anticipation of the commencement of the 'Act', among small and medium sized construction organisations.

## **2.0 Introduction**

This research is undertaken in line with the pending commencement of the Construction Contracts Act 2013 (CCA) here and after referred to as the 'Act'. The Act comes into effect on the 25<sup>th</sup> July 2016 and is expected to have a major effect on the construction industry from a payments and dispute resolution point of view (SCSI, 2016). The act will apply to the majority of construction contracts with few, but none the less, noteworthy exceptions. The individual elements of the Act, along with overall awareness and preparation within certain organisations will be critically examined throughout the research.

## **3.0 Aim of the research**

The purpose of this investigation is to gauge the level of knowledge and preparation regarding the Act, that exists among small and medium sized organisations within the construction industry. This research will centre around the following points:

The CCA 2013 and its significant features.

The level of awareness among stakeholders, to the commencement and importance of the pending Act.

The procedural changes required by stakeholders to their current mechanisms, in order to comply fully with the Act.

## **4.0 Objectives**

The foremost question steering this research is fundamentally, what level of knowledge and preparation exists among companies in anticipation of the Act. In an attempt to elucidate this question, the following objectives have been established.

Critically evaluate the Act, highlighting, accurately interpreting and elaborating on the most significant elements contained within the Act.

Determine the level of awareness among stakeholders, while ascertaining the following:

Has adequate information been made readily available by professional bodies i.e. RIAI, SCSI, CIF and IEI etc.?

What training has been made available too, and (or) undertaken by personnel directly involved with the provisions of the act.?

Do the stakeholders feel they have been adequately informed regarding the commencement of the act, considering its potential effect?

Do the stakeholders believe enough time has been allocated to prepare for the introduction of the Act?

Appraise the current mechanisms employed in-house by stakeholders, in the area of payment and dispute resolution compared to the requirements after the commencement of the Act.

Develop standard documents, forms, statements and procedures which can be implemented within an existing organisation, to ensure smooth transition between current procedures and those required under the Act.

## **5.0 Rationale for the research**

Much research completed to date on the CCA has been carried out absent of any definitive facts regarding the actual contents the Act, it has largely been based on draft forms of the Act and some speculation among informed parties. However, the contents of the Act have subsequently been confirmed, and on the 13<sup>th</sup> April 2016 Statutory Instrument no 165 of 2016 was signed into law by the minister at the time Gerald (Ged) Nash (DJEI, 2016). This finally confirmed the definitive commencement date of the Act (25<sup>th</sup> July 2016) and also the definitive contents of the Act, as they apply to the contracts concerned.

The effects of the Act will be far reaching, and will affect construction contracts between clients, main contractors, sub-contractors, sub-sub-contractors and professional services. This particular research is carried out as a company project, as many of our client's rely on our advice, relating to elements contained within the Act, in particular, payments and dispute resolution. The findings of this research will assist in providing tailored and valuable information which can be applied to our current and future clients, which we may gain going forward.

According to some commentators the commencement of the Act is likely to have a revolutionary effect on the payment and dispute resolution aspect of construction operations (Byrne, et al., 2015). These areas are of vital importance to the seamless running of an organisations and to projects as a whole.

The payment elements will have critical consequences towards cash flow, which is the lifeblood of any construction project from a financing and funding point of view, while dispute resolution will play a part in the continuity of works on site and the maintenance of a good working relationship.

Most research to date centres around the Act itself and its provisions. The research proposed within this investigation will focus on the awareness and preparation that existing organisations have, and the adjustment required to cater for the statutory changes to the contracts they have been using to date.

## **6.0 Scope and Limitations**

The scope of the research is to review and assess the Act through a detailed investigation, taking into account its individual features along with the positive and negative aspects as derived from available literature, seminar proceedings, discussions and correspondence with all stakeholders and authorities related to the subject matter.

The study will be confined for the most part in Ireland; however, it will take into account for reference purposes similar legislation that exists in the UK. Sub-contractors, Main contractors, Contracting authorities (CA) and Employers representatives (ER) that utilise the services of this company will be the focal point of the investigation, for comparison and balance it is also proposed to use organisations who are not currently involved with this company.

Although the research is being carried out primarily to benefit small to medium sized organisations within the construction industry, some large organisations will also be probed and investigated to establish if they are better equipped to deal with the commencement of the Act, what steps they have taken to prepare and what alterations they have made, if any, to the way they currently operate in the areas of payment and dispute resolution. The information gathered here will be used to develop a strategy for implementation within our current client base.

There are limitations to the research, one obvious item being the lack of historic information relating to the Act from an Irish perspective, primarily because the act is in its infancy in terms of construction contracts. The fact that the act has only been signed into law since 13<sup>th</sup>-April-2016 and is due to take effect on 25<sup>th</sup>-june-2016, means that up to date information is still been produced and developed throughout the country. Much of the information been rolled out is done so by means of workshops, seminars and masterclasses delivered throughout the country, attending requires a good deal of travelling, expense and time on the researcher's behalf.

Supplemental and other forms of guidance note etc. are still being published and to date are still outstanding i.e. the liaison committee amendments to code of practice, therefore the research is limited.

The timeline allocated to the research may prove to be constraining, as the Act will come into effect late July leaving only four months to assess, record and report on the progress of the Act since it came into effect, until the deadline for the submission.

## **7.0 Initial Literary review**

The initial literary review will provide a framework for the reader to assess the information which has been gathered from numerous sources relating to the subject e.g. journals, online, seminars, masterclasses, text books, periodicals, previous dissertations and other studies. As commented by Naoum (2007, p. 20) the literature review process involves the identification of *appropriate* literature.

The author will endeavour to remain wholly objective throughout the review, while also collating, comparing and critiquing the information. *'the literature review involves reading and appraising what other people have written about your subject area'* (Naoum, 2007), Naoum further insists the review can be both descriptive and analytical, in the way it describes previous research but also critiques the information. This will be of paramount importance to this review as the information is based on a relatively new subject, where many commentators could maintain vastly differing opinions.

The Initial review will provide a history to the construction industry in Ireland and illustrate the requirement for the legislation. It will also review the Act itself, in particular: background, the different sections and the likely effects on the construction industry and parties involved.

### **7.1 History of the Construction Industry in Ireland**

The Irish construction industry has proven to be one of the most influential contributors to the country's macro economy throughout the years, most notably the years (1995 – 2013) in which a boom to bust scenario arose. The period of 1995 - 2007 were the most prosperous in the country's construction history, The International Monetary Fund (IMF) at the time, referred to Ireland's economic performance as 'remarkable' (2006, p. 4). The report also commented on and emphasised Ireland's unbalanced reliance on the construction sector which was driving growth (2006, p. 3). Naturally as a direct result of the high levels of activity, construction related employment was also at an all-time high of almost 296,000 people (CSO, 2015).

This particular period of prosperity became infamously known as *'The Celtic Tiger'* era. The enormous level of activity within the construction industry however, ultimately proved to be unsustainable. When the recession and worldwide credit crunch took hold late in 2007, inevitably the construction sector and the property sector bore the brunt of its effects, mainly due to the country's over reliance these sectors (Barrett & McGuinness, 2012. IMF, 2006). The slow decline in construction activity as forecast by the IMF (2006) was by no means accurate, it was 'swift' (Barrett & McGuinness, 2012), devastating and brutal.

In the years that followed the economic crash a major contraction of the construction industry in Ireland ensued, with levels of construction output falling to €9 billion which was just 5.5% of GDP (CBI, 2015). This led to a ferocious scramble by contractors to obtain new works and maintain turnover, and effectively ride out the storm of recession. During this period tender prices dropped to unprecedented low's, this was reflected in indices published by industry commentators (Bruce Shaw, 2015).

With this, a dangerous culture of below cost tendering began to unveil itself in the most devastating fashion, as typified by Cunningham (2013, p. 16) in his description of a cyclical industry which flourishes in times of prosperity, but becomes daunting when work is scarce. The culture of below cost tendering compounded the problems which were conceived by the credit crunch, contractors were being forced to submit tenders which were ultimately inadequate to cover the costs involved. This was unsustainable practice (Cunningham, 2013, p. 16) and generated situations where main contractors either had no means to pay sub-contractors for works they had carried out, or just decided against it in order to maintain profit margin or in some cases, just to survive.

The problem the sub-contractors encountered getting paid were exacerbated by the contracts they were being bound to or as it transcribed in many cases, the lack of contracts in place. The payment process was described by one law firm, Mason, Hughes & Curran when they referred to getting paid for construction works as *'Not Straight Forward'* and getting paid promptly as *'even more challenging'* (2015). This view was reinforced by Irish Small and Medium Enterprise Association (ISME) in 2012, which stated the average waiting period to get paid for construction work was 75 days (Cunningham, 2013). McEvoy (2015) challenges this broadly to suggest *'sometime non-payment of sub-contractors'* within the construction sector is a reality.

It was the protracted, largely unregulated payment activity which led to calls for ‘something’ to be done regarding the severe cash flow problems being encountered within the industry, and through the entire supply chain. In Particular, the sub-contracting sector which was laboured with the burden of part financing projects for main contractors (Kelliher, 2016) until full payment had been received.

## 7.2 Background to the ‘ACT’

Calls from the construction sector regarding the poor cash flow and payment procedures were addressed by means of the introduction of the Construction Contracts Act 2013. The Act was produced in an ambitious attempt to alleviate the burden of poor cash flow and questionable payment practices within the construction industry. It was introduced into the Seanad by Senator Fergal Quinn in May 2010, via a private member’s bill, which in itself was unusual (McEvoy & Rowan, 2015), as it was the first time in over 50 years such a bill was presented to the Seanad (O’Connell, 2014).

McEvoy (2016) comments that the Act was ‘*Born out of the economic recession, with the purpose to regulate payments under construction contract in order to create a sustainable future for the Irish construction industry*’, however, Cunningham (2013) contends that previous prompt payment legislation was introduced in 1997 & 2002, to address the issue of poor payment practices, indicating that the problem was prevalent long before recessionary times. To this end, it could be viewed that the act was conceived long before the recession, but the recession reinforced its necessity.

The importance of the bill was acknowledged as it moved through the stages of the Oireachtas, however, only on the 29<sup>th</sup> of July 2013 was the bill finally enacted. There, it remained in stasis for a further three years until 13<sup>th</sup> April 2016 interim Minister for Business, Employment and Innovation at the time Gerald ‘Ged’ Nash signed the commencement order on the Act, stating the date of effect would be 25<sup>th</sup> July 2016.

The delay was seen as unfortunate and drawn out (McEvoy & Rowan, 2015), this sentiment was echoed and further characterised by Senator Quinn in numerous public statements, one of which was published in the Irish times when he denounced the delay, remarking: “*the law is not providing crucial protection to contractors for non-payment of the work that they have carried out.*” (Dowling-Hussey & Dunne, 2016). Dowling-Hussey & Dunne further proclaim that ‘*The exact number of contractors who went out of business between 2010 and 2016, who might have survived had they been able to avail of adjudication, will never be known*’ (2016).



A statement questioned, by Quinn (2016) who believes that the process of Adjudication may have only '*prolonged the inevitable*' for many of the parties whose organisations subsequently failed.

The timetable between the introduction, enactment and commencement of the Act compares quite poorly internationally (Dowling-Hussey & Dunne, 2016) with the reason for delay placed on the time taken to appoint members of the adjudication panel, which is required under S.8 of the Act (Cummins, 2016). Quinn (2016) points to a lack of willingness on behalf of the government as the main reason for the delay in introduction, a point Senator Quinn himself supports, condemning the efforts of 'successive governments' to deal with it the Act more efficiently.

### 7.3 The 'Act'

As portrayed by so many commentators and highlighted above, the Act was introduced in an attempt to improve payment procedures throughout the supply chain in the construction industry. However, the explanatory memorandum accompanying the Bill described its purpose as:

*'This provision is proposed in ease of persons along the chain in the construction sector who may suffer unduly where an entity under a superior contract would find itself withholding payment unilaterally without cause. This would bear unfairly upon the payee or others dependent upon the payee'* (Oireachtas, 2010).

The wording above is significant because it emphasises '*persons along the chain in the construction sector who may suffer unduly where an entity under a superior contract would find itself withholding payment*' basically eluding to subcontractors. This was supported by Senator Quinn where he said the objectives were to '*improve crucial cash flow to those sub-contractors working in the industry*' (Cunningham, 2013, p. 18). However, it must be clarified that the Act applies to main contractors equally as it does sub-contractors, a point emphasised by Curtain (2016), who further acknowledged that when it comes to the payment process, while '*probably nothing*' will change regarding the main contract, everything will change regarding '*sub-contracts*'.

The legislation, which from the 25<sup>th</sup> July will automatically apply to all construction contracts whether written or oral, with few exceptions. A fundamentally essential part of the Act is that parties to the contract cannot '*opt out*' (O'Connell, 2014) or '*contract out*' (Quinn, 2016) of the

legislation, Quinn (2016) does point out that it is possible to include clauses in a contract that contravene the Act but having them enforced would be impossible.

The three main areas of change that the Act will affect are discussed below, these items are the most significant parts of the legislation, that will have by far the most significant effects on the parties to the contract, and the industry as a whole.

Mandatory payment conditions

Right to Suspend works for non-payment

Right to refer payment disputes to adjudication

### 7.3.1 Mandatory Payment Conditions

Section 3 & 4 of the Act deals with ‘payments under construction contracts’ and ‘payment claims notices’, respectively. Section 3 stipulates the provision within contracts to identify interim payment and final account amounts along with the dates they fall due, or ‘adequate mechanisms’ to determine them. This provision would be a standard feature of most contracts (Killoran, 2016). Where contracts do not accommodate such terms, the schedule to the Act will apply, insisting on payment 30 days after the commencement of the contract and at 30 day intervals thereafter up to substantial completion, then 30 days after final completion, as eluded to by Cunningham (2013, p. 21) and O’Connell (2014, p. 4). However, Quinn (2016) contends that the payment date is 30 after commencement on site, which in theory could be a considerable time after the commencement of the contract. Curtin (2016) recommends that the commencement is fully ‘defined’ to avoid confusion. For shorter contracts of duration less than 45 days the terms are slightly different, as final payment becomes due 14 days after final completion (Quinn, 2016).

The Act differentiates between main contractors and Sub-contractors, where it allows employers/clients agree periods of payment with main contractors in excess of the 30 days as set out in the schedule. In contrast, sub-contracts benefit from the stipulations of the schedule, which allow only changes to the payment duration if they are more favourable than those set out in the schedule (O’Connell, 2014). According to Quinn (2016) this begs a question, what are more favourable terms? if for example, a Main Contractor were to offer the sub-contractor an additional percentage on top of the submitted price for works in exchange for 60-day payment terms, could this be viewed as ‘More favourable’ Quinn believes this could be acceptable, however, he contends that it remains to be decided and probably will be by Adjudication.

The Act (S.3 (5)) also prohibits the application of 'Pay when paid' clauses whereby main contractors pay their sub-contractors only when they themselves have been paid. With the exception being circumstances relating to the insolvency of the employer or contractor further up the supply chain (McEvoy & Rowan, 2015). While this is a welcomed and important change to the industry for subcontractors, there is no such restriction on 'Pay when certified' clause which Quinn (2016) digressed would become a prevalent feature of contracts going forward. He further argues that all contracts should continue to contain a 'Pay when paid' clause to account for an occasion where a party 'upstream' in the chain becomes insolvent.

Section 4 of the Act contends with 'Payment claim notices' a totally new phenomenon to the Irish construction industry (Killoran, 2016. O'Connell, 2014), This sets out the procedures for applying for and issuing payment between parties. A 'Payment claims notice' is a detailed and comprehensive document with calculations and breakdowns to justify the amount being sought. It should be issued not more than 5 days after the 'payment claims date', from which the respondent has 21 days to respond to the claim, either agreeing to pay the full amount, part or none of the claim. If the payer does not agree with the amount due they must issue a 'withholding notice' providing a full and in-depth explanation as to why they are not paying the full amount, including calculations and breakdowns indicating how they came to the amount proposed, if any. Once the withholding notice is issued the parties have a further 9 days to agree on an amount to be paid, before payment must be made, to comply with the provisions, 30 days after the payment claim date.

### 7.3.2 Right to Suspend Works for non-payment

This is a significant piece of legislation, and strong piece of armour to the party seeking payment. It is contained in section 5 of the Act and only refers to suspension in return for non-payment (O'Connell, 2014). It requires a written notice at least one day after the 'due date' for payment, outlining the reasons for the action, and suspension must not commence for at least 7 days after the notice has been issued. The effects of the threat of suspension are diluted somewhat by the fact that once dispute has been referred to adjudication this immediately ends the suspension and the party seeking payment must resume works (Eugene.F.Collins, 2013. Mulrean, 2014. O'Connell 2014).

The effects of suspension from a programme point of view are disregarded when when taking into account the completion date of the project i.e. the suspending party shall not be penalised for extending the length of the contract, Unless the suspension was deemed to be unjustified.

If the suspending party receives an unfavourable award at Adjudication after a period of suspension, then the suspension will be seen as unjustified and the cost implications that come with the period of suspension will be born by the losing party (Quinn, 2016). This may serve as deterrent for parties to rush to suspension or adjudication.

### 7.3.3 Right to refer payment dispute to Adjudication

Adjudication is seen as a fast track resolution mechanism for disputes, it is designed to deliver a swift decision administering '*rough justice*' (Curtin, 2016) with a period of 28 days from the beginning of the process. This period can be extended by a further 14 days with the permission of the referring party (O'Connell, 2014). However, Curtin (2016) contradicts this and contends that case's of adjudication have been known to go on for over 100 days.

A significant aspect of the process is that it allows a disputing party to refer a payment dispute to Adjudication at 'Any Time' which means it does not discount other forms of dispute resolution, for example, conciliation and mediation are still a viable option, but either party can refer the dispute to adjudication whilst in the throws of these forms of dispute resolution. From the date of 'Notice of Adjudication' the parties have 5 days to agree an Adjudicator or have one appointed by the chair of the Adjudicatorion Panel Dr. Nael Bunni. After the Adjudicators appointment the parties have 7 days to refer the dispute to the Adjudicator.

The decision of the Adjudicator is binding in the temporary and can only be overturned by a higher authority i.e. Arbitration or Litigation. The standout feature and benefit of Adjudication is that, the award becomes immediately enforceable (O'Connell, 2014) and the adjudicators decision will have the same power as that of the courts (Cummins, 2016). The idea being 'pay now argue later', and in the process keep cash-flow moving and the work progressing. Generally, Adjudication is cheaper than Arbitration or Litigation but is still an expensive process. Costs are split between the parties (William Fry, 2016), referring to their legal costs, as clarified by Quinn (2016), who states the cost of fees of the adjudicator can be split at the Adjudicators discretion from 50/50 to 80/20 depending on the judgement.

It is worth noting that the majority of Adjudication decisions in the UK are upheld and supported by the courts. Quinn (2016) and McEvoy & Rowan (2015) comment that it remains to be seen if the Irish judicial system will be as supportive of the process as in the UK, citing constitutional differences between the countries.

Section 6 of the Act sets out the 'Right to refer payment disputes to Adjudication'. There is a clear difference here between Irish legislation and legislation in the UK, where by in the UK

Any dispute can be referred to Adjudication, in Ireland only payment related disputes may be referred. However, as divulged by Quinn (2016) ‘with all of his knowlege of the industry, he did not know of a dispute that did not relate to money and payment in some way’ eluding to the fact that basically all matters could be referred, once correctly framed.

#### 7.3.4 Inclusions & Exemptions to the Act

The Act encompasses all construction related activity, operations and contracts. Ranging from main contracts, subcontracts, cleaning, professional service, building services, landscaping and archeology (the list is not exhaustive). There are a few exceptions where the act does not apply, which are not considered to be a construction contract (Department of Justice and Law Reform, 2013) as detailed as follows:

##### *Low value contracts*

Contracts worth less than €10,000 are not covered by the Act, this is welcomed as the original draft had this figure as high as €200,000 which would have ruled out many maintenance contracts and renovation projects. The threshold was condemned by many commentators (Cunningham, 2013). The threshold does not differentiate between public and private contracts.

##### *Residential Dwellings*

Domestic dwellings with a floor area of not more than 200m<sup>2</sup>, and a party to the contract occupies or intends to occupy the dwelling as a residence. The Act does not define floor area as being internal floor area or gross floor area, a point that will be the subject of debate going forward (Hughes, 2016). Hughes further contends that the proof of occupation or future occupation is difficult pointing to case law in the UK.

##### *Employment Contracts*

Employment contracts between parties which are involved in the construction industry e.g. a Quantity Surveyor being directly employed by a main contractor, are not subject to the provisions of the Act. It is worth reiterating that consultancy contracts are.

##### *Public Private Partnerships (PPP)*

These contracts are excluded, a reason for this as explained by Quinn (2016) is that these types of contracts are extremely complex and the Act in its current form may hinder rather than help parties. Another potential reason which could be debated, is that the findings of Adjudication are made public, and this may not be desirable where government business is involved.

### *Supply only contracts*

These include contracts which involve manufacture off site and supply only to the site, which is the subject of the contract. Quinn (2016) comments that this could lead to the splitting of many subcontract packages into two separate contracts, one for supply and one for labour. The added administration to this and the legality as regards 'Circumventing' of the Act is questionable (Quinn, 2016).

The Act is generally supported by industry (Cunningham, 2013, p. 23), a sentiment agreed upon by general stake holder's SCSI, CIF and the legal profession as a group. However, the lack of awareness in the industry is a concern that requires addressing immediately, as eluded to by Quinn (2016) and supported by Durack (2016). It is apparent from reviewing the literature there is a general anxiousness about the unknown, and a certain tense atmosphere between stakeholders in anticipation of what the CCA will bring.

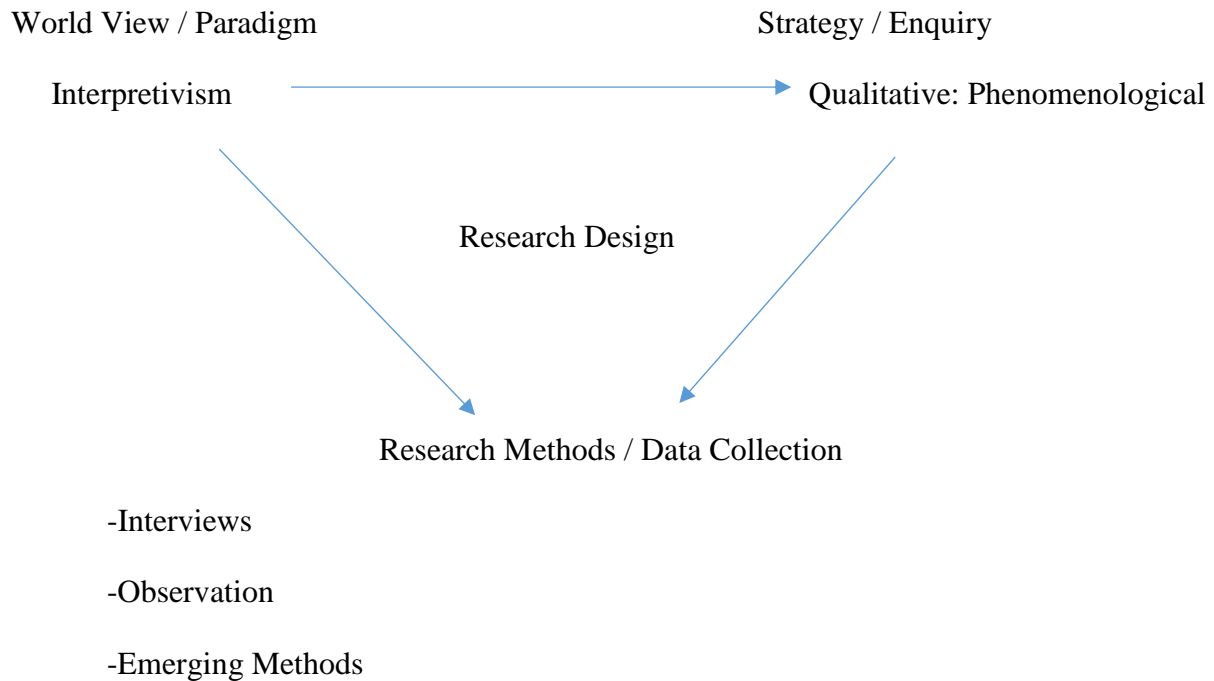
### **8.0 Research Design**

A research design is described as a document which is prepared by a researcher before any research is actually carried out (Blaikie, 2009), Naoum (2007) describes it as a '*an action plan for getting from here to there*', and further contends that the 'Here' can be defined by the collection of information, while the 'There' generally been the conclusion regarding a research topic.

This research endeavours to explore a collection of experiences from a select number of stakeholders within the construction industry, and appraise them against the standards which will be required in the near future. This will be achieved by using Interpretive paradigms, as argued by Fellows & Liu (2008, p. 18) '*such determination is likely to require extensive discussion with the participants in order to achieve agreement on their descriptions*'. This will enable this researcher to view the topic and determine the facts 'through the subject's perspective' (Fellows & Liu, 2008), then compare what they are doing to what they should be doing.

It is proposed to utilise a qualitative investigation using phenomenological research. A qualitative data collection regime will be carried out, employing numerous suitable data collection methods, comparable to the investigation, i.e. observation, interview and emerging methods. The goal is to discover current knowledge levels and procedures within subject organisations, and compare them against the evolving requirements within the construction industry.

By way of illustration, the researcher has adapted Creswell's framework for research design (2007, p. 5) Fig 1. This adaptation portrays the proposed framework for this research.



To fully understand the complexity of the topic and procedures carried out by the stakeholders, an in-depth and detailed investigation will be under taken. For this reason, the researcher has discounted the prospect of using quantitative research as it would not delve thoroughly in to the topic at hand. Quantitative research typically aims to provide a snapshot and produce results of a statistical nature i.e. how much, how many etc. and readily describes as cross sectional (Fellows & Liu, 2008). It is a firm sentiment of this researcher that statistical or numerical data such as those achieved by surveys or experimental means would be of not benefit to this study.

Qualitative research supports the requirement of the research aims and objectives, as it surmises to find out the 'why' in a research question. Phenomenology is a qualitative based research and is the study using direct experiences as they occur, along with people and their organisations (Fellows & Liu, 2008, p. 70). A case study is not considered suitable as considerable integration with participants will be required throughout the study and the constraints that exist would not allow the completion of a full case study.

This researcher argues that research methods such as observation and interview (Semi-Structured) and the study of emerging methods will be critical to the success of the research.

The interview being crucial to explain the question area fully and on a personal basis, to ensure the correct information is acquired.

A number of participants have been identified as the focus of the study, the majority are clients of the researcher. There is a proposal to include non-clients in the study in the interest of creating balance, and obtaining knowledge of other work practices. Some of the participants have not confirmed participation at this time. Fig 2 is the list of participants proposed.

Fig 2. Participants of the research.

| Ref | Participants   | Organisation              | Business         | Position                | Status       |
|-----|----------------|---------------------------|------------------|-------------------------|--------------|
| 1   | Jill Noctor    | Mosart                    | Architect        | Director                | Client       |
| 2   | Paddy Sweeny   | Reil/Emprova              | Utility Provider | Director                | Client       |
| 3   | Johnny Bennett | Extend Architecture       | Architect        | Director                | Client       |
| 4   | Andrew Driver  | Glenagua                  | Main Contractor  | Senior contracts manage | Non - Client |
| 5   | Colm Kelly     | BAM Construction          | Main Contractor  | Senior QS               | Non - Client |
| 6   | John o Hanlon  | John O Hanlon Engineering | Engineer         | Director                | Client       |
| 7   | Tim Murnane    | Punch Murnane             | Engineer         | Director                | Client       |
| 8   | James Kelly    | LMH engineering           | Sub contractor   | Senior estimator        | Non- Client  |
| 9   | A Another      | Construction Legal        | Legal            | Senior                  |              |
| 10  | A Another      | PQS                       | PQS              | Senior                  |              |

It may be necessary to conduct alternative interview formats to suit the different participant areas of involvement. For example, the information being obtained from a legal entity will require different questioning to that of a contractor. A pilot interview system will be set up to tailor each interview, with a view to identify questions which are of no use, useful, develop other questions and to streamline the interview process.

## 9.0 Ethical Position.

The researcher assumes responsibility for his own ethical conduct in the process of carrying out this research. This is supported by Denscombe (2002) who cites (Kimmel, 1996) when describing the construction of ethics. The word ethics has evolved over the years, and is derived from two words, ethos (Greek) relating to a person's character, and moralis (Latin) relating to customs or manners. The English language has amalgamated the words and now link them with the duties and responsibilities of persons with moral principles and codes of conduct (Denscombe, 2002). Creswell (2007) argues that the researcher needs to protect their participants, develop trust, promote the integrity of the research and guard against misconduct.

This research is carried out in line with British Educational Research Association (2010), which align the responsibilities of participants, sponsors and the wider research community. The research will follow three basic principles as set out in The Belmont Report (1979)

Informed Consent



Assessment of risks and benefits

Selection of subjects

Informed consent will be afforded to the participant with the express comfort of knowing they can withdraw from the research at any time, it is proposed to provide them with as much information as possible regarding the subject and their expected participation. This will allow them to make an informed decision regarding participation. The researcher will also create a platform for the participants to ask questions about the project. Any participants requiring anonymity will be afforded this by referring to them as a letter or a number, with identity only known by researcher and mentor. A letter to this effect will be made available to each participant.

The researcher will endeavour to provide a detailed summary of any potential hazards or benefits which will likely arise from the research or from a subject's participation, Fellows and Liu (2008, p. 254) suggests that tabular format as the best option. If the subjects view any of the hazards beyond the realm of safety, they will be afforded the option to alter their participation or withdraw from the research.

The predominant ethical issue will be outlined in an initial letter along with a consent form to obtain information from each participants, the type of processing methods and the storage of the information will be will be outlined. If boundaries to the use of data are requested, then the participants will have the ability to highlight these. It is being considered but not confirmed that a copy of this proposal be attached as early correspondence with the subjects.

### **10.0 Timeline for Research**

It is estimated that the research from start to finish will take in the region of 6 months to complete. A programme is presented for guidance below in Fig 3.

Fig 3. Dissertation Timetable

# Dissertation Planner

Period Highlight: 17

Plan
  Actual
  % Complete
  Actual (beyond plan)

| ACTIVITY              | PLAN START | PLAN DURATION | ACTUAL START | ACTUAL DURATION | PERCENT COMPLETE | PERIODS |          |          |         |          |         |         |         |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
|-----------------------|------------|---------------|--------------|-----------------|------------------|---------|----------|----------|---------|----------|---------|---------|---------|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|
|                       |            |               |              |                 |                  | May 16' | June 16' | July 16' | Aug 16' | Sept 16' | Oct 16' | Nov 16' | Dec 16' |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Research proposal     | 1          | 5             | 1            | 5               | 100%             |         |          |          |         |          |         |         |         |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Submit proposal       | 17         | 1             | 17           | 1               | 100%             |         |          |          |         |          |         |         |         |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Lit Review            | 5          | 14            | 5            | 14              | 80%              |         |          |          |         |          |         |         |         |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Methodology           | 14         | 5             | 0            | 0               | 0%               |         |          |          |         |          |         |         |         |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Interviews            | 19         | 2             | 0            | 0               | 0%               |         |          |          |         |          |         |         |         |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Transcribe interviews | 21         | 2             | 0            | 0               | 0%               |         |          |          |         |          |         |         |         |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Analyse Findings      | 23         | 2             | 0            | 0               | 0%               |         |          |          |         |          |         |         |         |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Discussion/Conclusion | 25         | 3             | 0            | 0               | 0%               |         |          |          |         |          |         |         |         |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Proof & Bind          | 26         | 3             | 0            | 0               | 0%               |         |          |          |         |          |         |         |         |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Submit                | 29         | 1             | 0            | 0               | 0%               |         |          |          |         |          |         |         |         |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |

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## Appendix C- Safe Assign Report Summary

The screenshot shows the Safe Assign interface. At the top left is the logo "safe assign by Blackboard". At the top right are icons for printing and help. The main content area is divided into two columns. The left column contains the following information: a highlighted title "1 CONSTRUCTION CONTRACTS ACT (2013):", the subtitle "IMPLICATIONS OF THE ACT FOR THE PRACTICING QUANTITY SURVEYOR.", the topic "A COMPANY BASED INVESTIGATION", author "Author: Roy Byrne (D14125656)", supervisor "Supervisor: Tony Cunningham", date "Date: Dec-2016", college "College: 2 Dublin Institute of Technology (Bolton Street)", and course "Course: MSc Quantity Surveying & Economics". The right column contains a grey box with the course code "RECE9050-B - DISSERTATION AND RESEARCH METHODS", the title "FINAL Dissertation submission", author "Roy Byrne on Thu, Jan 05 2017, 11:08 PM", a progress bar showing "5% highest match", submission ID "b137287a-c740-4a2b-97cd-4cdeccf364d5", a white box with "Thesis 100% Comple...", word count "Word Count: 31,321", attachment ID "148752838", and a "5%" indicator. At the bottom of the right column is "Citations (12/12)".

**safe assign**  
by Blackboard

RECE9050-B - DISSERTATION AND RESEARCH METHODS

**FINAL Dissertation submission**

Roy Byrne on Thu, Jan 05 2017, 11:08 PM

5% highest match

Submission ID: b137287a-c740-4a2b-97cd-4cdeccf364d5

**Thesis 100% Comple...**

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Citations (12/12)

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IMPLICATIONS OF THE ACT FOR THE PRACTICING QUANTITY SURVEYOR.

A COMPANY BASED INVESTIGATION

Author: Roy Byrne (D14125656)

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The full 97-page report is available in pdf format from the Author, if required.