

JCT 2024 Edition of Contracts The Changes



Presenters

Karen Kirkham, BDB Pitmans LLP, JCT Chair

John Riches, HCC Ltd Vice Chair, JCT Drafting



Karen Kirkham, JCT Chair

- Solicitor in private practice at BDB Pitmans LLP
- Non-contentious construction lawyer
- The majority of my construction clients are developers or occupiers with some architects and contractors
- I've worked with the JCT since 1996 when I was at the Construction Confederation
- Now in my second term as JCT Chair



Principles

- Amendments to the JCT Contracts are achieved through consensus
- They represent input from the full range of industry sectors
- The participants are private and public sector clients, main contractors, subcontractors/specialists, RIBA, RICS and the mixed sector Scottish SBCC



Principles

- Contracts are there to spell out the legal rights and duties of the parties
- On the basic principle that contracting parties must comply with all relevant law, we make the bare minimum of references to specific legislation
- We do not use any procedural matters or secondary obligations in our contracts
- Reference to technical scopes and social policies belong in other contract documents



Future Proofing



Construction Playbook

- **Better, faster, greener, safer**
- Principally for public sector but also best practice for private (where applicable)
- 14 Key Policy areas

- JCT Contracts already comply but more emphasis now given to
 - Collaborative working
 - Sustainable development and environmental considerations
 - Notification and negotiation of disputes

3 Supplemental provisions now mandatory



Collaborative working

- Previously Supplemental provision 5 in JCT DB
- Wording has not changed but now appears at **Article 3**:
‘The parties shall work with each other and with other project team members in a co-operative and collaborative manner, in good faith and in a spirit of trust and respect. To that end, each shall support collaborative behaviour and address behaviour which is not collaborative’
- CA gave guidance on good faith in **Re Compound Photonics Group Ltd [2022] EWCA Civ 1371** :
 - Core duty to act honestly and not in bad faith
 - Depending on contractual context, likely to prohibit conduct that reasonable and honest people would regard as commercially unacceptable, but not necessarily dishonest.



Sustainable development and environmental considerations

- Previously Supplemental provision 8 in JCT DB
- Wording amended and now a contract condition:

Clause 2.1.5:

*'The Contractor is encouraged to suggest economically viable amendments to the Works which, if instructed as a Change, may result in an improvement in environmental performance **and sustainability** in the carrying out of the Works or of the completed Works **and a reduction in environmental impact, provided that no such instruction shall extend the Contractor's obligations in relation to design under this Contract.'***

Clause 2.2.2:

*'The Contractor shall provide to the Employer all information that **the Employer** reasonably requests regarding the environmental impact of the supply and use of materials and goods which the Contractor selects.'*

- PCSA can include more detailed provisions – model wording in Guidance Notes



Notification and negotiation of disputes

- Previously Supplemental provision 10 in JCT DB
- Wording has not changed but now appears at **Clause 9.1:**

‘With a view to avoidance or the early resolution of disputes or differences (subject to Article 8) each party shall promptly notify the other of any matter that appears likely to give rise to a dispute or difference. The senior executives nominated in the Contract Particulars (or if either is not available, a colleague of similar standing) shall meet as soon as practicable for direct, good faith negotiations to resolve the matter’
- Corresponding entry in contract particulars to be completed
- Not expressed as a condition precedent but that does not mean the Court will not enforce it



Disputes

- Notification and negotiation of disputes at 9.1 now 'mandatory'.
- Caveat is that the Construction Act does not allow negotiation, mediation or other dispute avoidance procedure to be a condition precedent to the right to adjudicate "at any time"
- Still, if we are in the behaviour modification game, it is a nod in the right direction



• Other Updates

- Gender neutral language rolled out across the entire suite
- Measure mirrors the approach taken by government
- Masculine he pronoun replaced with it/they
- Approach also ensures that the format and language of the contract will remain familiar to regular JCT contract users
- JCT Fluctuations Options have been taken out of the printed document and will be available via the JCT website
- Nominating body/appointer – Adjustments to allow parties to specify a nominating body or appointer of their own choosing in relation to adjudication and arbitration



Gender Neutral Language

- Why?
- Why *NOT*?
- Complex theories around the use of language (NLP, semiotics) suggesting that language can reprogramme behaviour
- There may be unconscious bias/assumptions underpinning the use of language in contracts
- Having constantly to revisit whether your contractor or contract administrator is he, she, it or they it is a bit of a pain.



Miscellaneous / 'housekeeping' amendments

- Fluctuations options have been shunted off out of the body of the contract but are available on the JCT website.
- The contractor design provision has changed to include an express exclusion of design liabilities over above reasonable skill and care and an express exclusion of any duty, obligation or liability that requires design to be fit for purpose.
- 2.17.2 and 2.17.3 clarified in that the defective premises provisions refer not only to the provision of a dwelling but work to a dwelling



Miscellaneous / 'housekeeping' amendments

- List of ANBs has been rationalised to 4 named:
- RIBA
- RICS
- Constructionadjudicators.com
- Chartered Institute of Arbitrators
- PLUS ANY OTHER ANB YOU WANT
- Otherwise we would have to set criteria



Communications

- Brought the provisions on electronic communications up to date
- There is now specific provision on email
- There are 2 provisions on notices. One relates to standard notices the other relates to critical notices.
- Critical notices can now be served by email but only to specific email addresses identified in the Contract Particulars
- Attestation has been updated to provide for electronic execution recognising the increasing importance of digital working especially following the pandemic
- Guidance notes on execution follow the Law Commission Report



Insurance Particulars

- There is now a space to enter the full range of aggregate covers under the Contractor's professional indemnity insurance policy
- Also space to enter categories of cover which are excluded
- Reflects the rapidly changing PI market



John Riches

- Surveyor in private practice at Henry Cooper Consultants Ltd
- Full Time Arbitrator, Adjudicator, Expert Determiner, Mediator
- All types of disputes in construction, civil engineering, heavy engineering and process engineering. Lots cladding at present.
- Been with JCT since 1997 through RICS
- Drafting September 2000, Council since December 2001



Legislative Changes



Legislative Changes

- **Building Safety Act 2022 and related legislation** – Updates to accommodate new Part 2A of the Building Regulations 2010
- **Construction Act 1996** - Termination accounting and payment provisions added to section 8
- **Corporate Insolvency and Governance Act 2020** - New insolvency grounds added to section 8



Building Safety Act 2022 and related legislation

- Major legislative update to accommodate the new Part 2A of the Building Regulations 2010, introduced in the Building Regulations etc. (Amendment) (England) Regulations 2023.
- a new Article (Article 7) has been inserted to deal with the appointment of the Principal Designer and Principal Contractor under Part 2A of the Building Regulations. Article 6 now deals with both the appointment of the Principal Designer and Principal Contractor for the purposes of the CDM Regulations.
- As the Building Regulations provide that instead of appointing a separate principal designer and principal contractor, the client may certify that the CDM principal designer and the CDM principal contractor should be treated as appointed in these roles for the purposes of the Building Regulations (Part 2A, regulation 11D(2)). The CDM clauses have been extended to provide specific contractual cross-undertakings by the Parties to comply with (as applicable) their respective duties under the CDM Regulations and Part 2A of the Building Regulations.
- More information on the higher-risk building regime under the Building Safety Act 2022 is available via the JCT website.



Construction Act 1996 as amended

- Termination accounting and payment provisions (Section 8)
- In respect of the requirements of the construction act, the provisions have been amended to refer expressly to the Construction Acts payment regime
- It follows the principles in Section 4 of the contract which deals with primary payment



Corporate Insolvency and Governance Act 2020

New insolvency grounds have been added to section 8 of the contract to reflect the relevant aspects of the Corporate Insolvency and Governance Act 2020



Modernising and Streamlining



JCT

Modernising and Streamlining

- Extension of time and Unforeseen Conditions
- Liabilities
- Communications
- Other Updates



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• Extension of time and Unforeseen Conditions

- The drafting of notification provisions has been improved
- The timetable for interim extensions of time and the procedures have been altered to streamline and expedite the process
- The timing to grant an interim extension of time has been reduced from 12 to 8 weeks
- Final extension of time review timetable remains unchanged
- Events – now include a provision for epidemics and has expanded the provisions concerning changes in law after the base date.
- This now includes taking into account the publication of government guidance, which makes the provision more flexible
- There is revised provision for antiquities



• Extension of time – – Interim Notification procedure

- Process:
- Contractor shall give notice of circumstances, including cause of delay
- Contractor shall give particulars of expected effects with notice or "as soon as possible thereafter"
- Contractor supplies further information as Employer "~~may at any time reasonably require~~"
- "NEW – Employer has 14 days from notification or particulars to ask for such further information as is reasonably necessary"
- Time period for Employer response
- ~~• 12 weeks from receipt of required particulars~~
- 8 weeks from later of: (a) particulars/notification; or (b) further information



• Extension of time – Relevant Events and Matters

- Epidemic
- Arises (or its effects change) after the Base Date
- Affects availability of persons, services, materials or goods for the Works
- Ground conditions
- Clause 3.15 expanded to cover contamination, asbestos, UXO
- Could lead to extra time and money



Liabilities



Liabilities

- Revamped the provisions on reasonable skill and care.
- Throughout all suites there should now be no doubt that there cannot be a fitness for purpose obligation

Liabilities

- Design liability cl 2.17.1

New cl 2.17.1.2: fitness for purpose carve out

"to the extent permitted by the Statutory Requirements [no greater duty than reasonable skill and care]...and under no circumstances shall the Contractor be subject to any duty...which requires that **any such design** shall be fit for its purpose"

Interface with other elements of the contract [Recital 3 and Clause 2]

- Deletion of 'diligence' from reasonable, skill and care clause
- Liability cap cl 2.17.3o **New** guide note 34/47 - drafting for overall liability cap
- Insurance cl 6 PII obligation subject to "reasonable rates and terms"
- Reinstatement work, where Option A applies, now includes an EOT



The Brand-New Target Cost Suite



Why?

- We listen!
- Member Groups wanted a Target Cost that followed familiar territory.
- We even had a large law firm saying if you produced a Target Cost Contract, we would use it
- The revision to all suites for 2024 was an ideal opportunity to slot in something new
- In the same way we updated the Project Bank Account Documentation for the 2016 suites this is demand driven (will be issued as part of 2024 suite)
- Our aim was to provide a familiar and therefore simple step into the world of Target Cost



The Target Cost Suite

- The Target Cost main contract
- A Target Cost Sub-Contract – encouraged but not mandatory
- Flexibility to use any form of Sub-Contract
- A Guide
- Based on JCT Design & Build – yes it is possible to have design
- The calculation of cost follows the model from the Prime Cost Contract
- All the other changes to the suites overall are incorporated in this suite



How does it work

- Target Cost is equal to the Contract Sum in other Contracts. It is adjusted in the traditional way that all other contracts are. e.g. Changes are dealt with the same way they are in the D&B form
- Payment is made of the Allowable Cost, the Contract Fee and the Difference Share
- The Difference is the amount determined by deducting the Allowable Cost plus the Contract Fee from the Target Cost
- The Difference Share is then distributed in the proportions stated in the Contract Particulars
- The parties are risk sharing hopefully resulting in savings to the project overall



Find out more...



JCT Network - keeping you informed
with updates about the forthcoming
JCT 2024 Edition.

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