

ePaper:

JCT Design & Build 2024: Evolution Rather Than Revolution



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JCT Design & Build 2024: Evolution Rather Than Revolution

By John Wallace

Introduction

New versions of the JCT suite of contracts do not come around often and so it is with great anticipation that we look forward to reviewing the changes made to, what is, the most commonly used form of standard form construction contract in the UK. Around 70% of projects in the UK use JCT contracts. A new edition therefore has a significant impact on the construction sector in the UK.

The last five years have seen a huge amount of change in the construction sector. From the most substantial change to construction legislation for a generation (Building Safety Act and a spectrum of secondary legislation) to increased interest rates, Minimum Energy Efficiency Standards and a crippled planning system.

The 2024 edition was therefore an opportunity for wide ranging changes to the standard form. But of course, we know from previous editions, that changes are nearly always modest.

In this ePaper we examine the amendments to the 2016 edition and provide some commentary on where we see the JCT are taking their standard form contracts. We also look ahead to the next edition, which will be published in around 2034, and consider what we can expect to see in future editions, given the current direction of travel.

Collaboration, Good Faith and Negotiation

The formerly optional Supplementary Provisions in the 2016 edition for parties to collaborate with each other in good faith is now a mandatory provision, albeit using the same wording.

A previously Supplemental Provision has been brought into the main body of the contract at clause 9.1 requiring parties to negotiate, in an attempt to resolve disputes.

This feels like a movement towards the NEC's approach and collaboration. Given the cost incurred in resolving disputes, such an collaborative approach ought to be welcomed. Perhaps not by Adjudicators.

Bringing Construction Law into the 21st Century

It only took until 2024 for JCT to accept that notices and communications may be sent by email as a standard term. The 2024 edition also sees the adoption of gender-neutral terminology and the recognition of electronic signatures.

Sustainability and Environment

DB 2016's Supplemental Provisions relating to a Contractor suggesting changes to works that would benefit the environment and supply the Employer with information regarding the environmental impact of goods and materials are now in the Main Conditions at 2.1.5 and 2.2.2. The wording of the former being widened to cover sustainability and reduced environmental impact, in addition to environmental performance.

Dutyholder roles under the Building Regulations

Next, the 2024 edition includes changes relating to the amendments to the Building Regulations brought about by the Building Safety Act 2022 (amending the Building Act 1984). The key amendment being the empowering of the Secretary of State to prescribe requirements on those who i) procure, ii) plan, iii) manage and iv) undertake building work (known as “Dutyholders”) by way of new Building Regulations.

The 2016 edition pre-existed the Dutyholder regime and therefore these are dealt with for the first time in the 2024 edition, but change is limited to:

1. Requiring the parties to identify the Principal Contractor and Principal Designer (Article 7).
2. Ensuring that the Employer must supply the Contractor with “Building Information”. Building Information is information held or obtainable by the Employer that relates to design or construction, which includes information about a) the work, b) planning and c) management & information about how compliance with the Building Regulations is achieved (clause 2.7.2).
3. Imposition of general duties on a Contractor to comply with its Dutyholder obligations (Article 7).

Contractor’s Design Liability

Clause 2.17 has been revamped in respect of a Contractor’s design liability.

A Contractor now warrants that it will carry-out the design with “reasonable skill and care”. Of course, this is familiar wording for those in the construction sector.

A Contractor now benefits from wording, to the extent permitted by statute, expressly stating that they have no greater duty than to “exercise reasonable skill and care” and that “under no circumstances” is a Contractor subject to a fitness for purpose obligation.

Liability under the Defective Premises Act 1972

Sections 1 and 2A Defective Premises Act 1972 requires a) Professional Consultants, b) Contractors and c) Property Developers working on a “dwelling” to i) work in a “professional or workmanlike manner, ii) use proper materials and iii) ensure that the dwelling is fit for habitation. Section 2A, which extends the origin provision relating to the construction of dwellings to any work undertaken to a dwelling (provided the work is done “in the course of business”), was brought in via the Building Safety Act 2022. The obligation is extended to ensure that the dwelling is fit for habitation.



Assessing Delay Claims

Clause 2.24.4 is amended so that the Employer's request for "further information" supporting a delay claim must now be made within 14 days. This is a much stricter time frame for Employers, who, under the 2016 edition, could request such further information "at any time".

Similarly, the time within which an Employer must respond to a delay claim reduces from 12 weeks under the 2016 edition to 8 weeks. This period runs from the later of i) the initial notification/particulars of the delay claim and ii) any further information requested by the Employer.

New Relevant Events and Relevant Matters

JCT contracts have normally set out the basis on which a Contractor can seek a) an extension of time ("Relevant Events") or b) loss & expense ("Relevant Matters"). In what must be a direct response to the Covid pandemic, the 2024 edition sees a move away from that by inserting a new sub-clause relating to the impact of an epidemic on the Works (clauses 2.26.7 and 4.21.6). It also amends clauses 2.26.8 and 4.21.7, widening the range of situations and specifically including a reference to the "publication of guidance" (by government). The 2024 edition provides that the publication of guidance can entitle a Contractor to a right to claim contractual relief, but there is no express obligation on the Contractor to comply with such guidance in the definition of "Statutory Requirements".

These new rights only form part of the list of "Relevant Matters" if the parties agree that in the Contract Particulars. The 2024 edition's default position is that such situations are treated as a "neutral event", meaning the Contractor is entitled to an extension of time, but not financial compensation.

Liquidated Damages for Delay

In what appears to be direct response to the Supreme Court's decision in *Triple Point technology Inc v PTT Public Co Ltd* [2021] UKSC 29, a new clause 2.29.5 has been inserted clarifying that liquidated damages do not accrue post termination.

Sub-Contracts following Termination of the Building Contract

Clause 3.4.1 of the 2016 edition seeks to clarify the position in circumstances where a sub-contractor's employment is terminated on the termination of the Employer/Contractor relationship.

The automatic termination of the Contractor/Sub-Contractor relationship is subject to any step-in rights that may exist in favour of a Funder or Employer.

A Sub-Contractor is entitled to suspend performance on termination of the Employer/Contractor relationship, to allow for a step-in notice to be served in relation to its sub-contract. If a step-in notice is served, then the sub-contract terminates.

The suspension of work by a Sub-Contractor pending step-in is considered having been instructed by the Employer, entitling the Sub-Contractor to relief under the sub-contract.



Asbestos, Contaminated Material or Unexploded Ordnance

Whereas clause 3.15 of the 2016 edition made express provision for what the Contractor should do if it found fossils, antiquities or other objects of interest, the 2024 edition widens that clause to catch asbestos, contaminated material, unexploded ordnance and other substances that may be discovered during excavations.

This amendment is mirrored in changes to the applicable Relevant Event and Relevant Matter that entitle a Contractor to relief. Clauses 2.26.4 and 4.21.3, of the 2024 edition, now clarify that relief will not be granted where the material was already identified in Contract Documents or brought on to the site by the Contractor or a Contractor's Person.

Professional Indemnity Insurance

The 2024 edition amends clause 6.15, the professional indemnity insurance provision in the Contract Particulars, allowing parties to agree sub-limits within the overall level of cover and any exclusions from the insurance policy. This is explained at clauses 6.15 and 6.16 as resulting from the fact that cover for cladding and fire safety claims is offered as a sub-limit in an annual aggregate amount and subject to restrictions, exclusions and higher excesses than other claim types.

Insolvency

The 2024 edition amends the definition of "Insolvent" in clause 8.1 to reflect legislative changes introduced by Corporate Insolvency and Governance Act 2020.

Interestingly, the amendments to the 2024 edition do not deal with other aspects of the 2020 Act. For example, section 233B of the Insolvency Act 1986 (an amendment brought about by the 2020 Act), preventing a Contractor from immediately terminating or suspending the performance of its obligations on the Employer's insolvency.

This feels like a missed opportunity and amendments may be needed to deal with these omissions.

Payments Post Termination

Substantial amendments have been made to section 8, which deals with the respective parties' termination rights and the consequences that flow from termination. This is in part to comply with the payment and payment-related provisions in the Housing Grants, Construction and Regeneration Act 1996, often referred to as "the Construction Act".

What can we expect to see in the 2034 edition?

We now cast our eyes into the future. Given the last edition of JCT contracts was in 2016, we should expect to wait nearly a decade before the 2024 JCT suite is updated. So what do we expect to see in the 2034 edition?

Future standard obligations in relation to Environmental, Social and Governance (“ESG”) (supplier diversity, social responsibility etc) and sustainability goals. This is an ever increasingly important area, where Employers are putting pressure on Main Contractors, which filters down the supply chain, to behave in a way that is environmentally and socially responsible and considered good governance.

Although hard copy contracts will still be provided by JCT, they are pushing digital, so expect full digitisation by the time of the launch of the next JCT suite. On a similar note, could block chain be used where contracts will automatically be entered into or payments automatically made when triggered by certain events? Possibly.

The end of retentions? Retentions are considered by many (perhaps not all Main Contractors) as outdated and harmful for Sub-Contractors. NEC3 and NEC4 contracts do not include retention as a standard provision (Option X16 can be used if a retention is appropriate). There are other options, such as bonds, or the proposal that trust accounts will be established, administered by an independent third party. 30 day standard payment terms, the norm in respect of public works, seem unlikely to appear in the private sector.

In line with the emergence of the concept of Environmental, Social and Governance (“ESG”), we may see a movement towards the Construction Supply Chain Payment Charter which promotes never justifiably delaying or withholding money owed, making payments within 45 days or less of the end of calendar month, removing retentions or making them less burdensome and adopting a more collaborate, transparent and honest approach. Perhaps the ESG train will push JCT to introduce some of these ideas into future editions.

It seems inevitable that AI will be used in the drafting and implementation of JCT contracts to enhance efficiency, reduce risk and improve overall contract administration. Without wishing to do ourselves out of a job, AI ought to be able, at some point in the future, to recommend amendments, deletions and insertions based on “current market” standards and best practice. There will still be room for lawyers to make final bespoke amendments to make the contract work for a particular project, but expect to see amendments being produced at greater speed and, in theory, at lower cost, as AI is adopted within the sector.

We are JCT specialists. Email Tim on tseal@ridgemont.co or call us on 0203 909 9590 if you have any questions or need any advice relating to JCT contracts.



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