

JCT NEWS

THE JCT CONTRACTS UPDATE FOR THE CONSTRUCTION PROFESSIONAL

TWERTON MILL

The recently completed 7,500m² Twerton Mill development offers 327 premium student living units, located on a site steeped in industrial heritage and within a popular student and local residential area. Built by Midas Construction Limited, the project was commissioned to tackle an accommodation shortage across the city, where the rising student presence has contributed to 67% of population growth within recent years. Based on a challenging site, the use of the JCT 2011 Design and Build contract provided a good balance of cost certainty with flexibility when resolving ad-hoc construction issues.

Introduction

The city of Bath is globally renowned for its elegant architecture, extensive use of locally sourced limestone, and a proud history of industrial and manufacturing prominence. These characteristics have formed a distinctive local vernacular, and maintaining this image across the Twerton Mill site was a key development objective. The architect achieved this aim by incorporating structures resembling both town houses and industrial buildings into the design. Based on real examples from the city and surrounding area, these designs create a seamless aesthetic transition from the new development to its neighbouring buildings.

The finishing materials were carefully chosen to enhance this resemblance. Coursed random

rubble stone cladding, quarried locally in Somerset, was used on the town houses as a cost-effective alternative to traditional Bath Stone. Additionally, red engineering bricks were placed around north-facing roof lights, popular in 20th century manufacturing buildings, to complete the industrial style accommodation blocks. One of the blocks incorporates full-height feature glazing at its gable ends, displaying the industrial-

themed decoration within, and sections of the original mill wall and iconic gates at the entrance to the site have been refurbished and blended into the new design.

Features

The Twerton Mill student accommodation development features six distinct buildings in total, comprising a mix of 2/3-storey town



Twerton Mill – Internal courtyard demonstrating narrow site and linking buildings

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houses and 4/5-storey residential blocks, each with a range of accommodation and communal facilities. Five of the buildings were constructed adjoining at least one of the others, with town houses connected to residential blocks at varying levels. Accommodation comprises a mixture of self-contained studios with en suite bathrooms and kitchenettes, and cluster bedrooms with en suite bathrooms arranged around common kitchen and dining areas. Communal and operational facilities built across the site include the main reception, office, gym, laundry, common room, cycle and bin stores, and substations and plant rooms. External communal spaces were also created, with two courtyards formed with a mixture of slab and brick pavers and heritage kerbs, and landscaped patterned green areas planted with trees and shrubbery.

Challenges

The project was undertaken on a constrained brownfield site adjacent to the A36, one of the two main roads leading into Bath from the west. The site is situated half a mile from the city centre, and is bound on the east and west

sides by commercial and residential properties, to the north by the River Avon, and to the south by the A36, with a raised Network Rail line on the opposing side. The site sits above the Bath aquifer, the body of rock through which the Bath hot springs water runs. The new building footprints were positioned close to the site boundary to make optimal use of available space, and left a small area at the centre of the site to form a courtyard upon completion.

The main issues facing the project team, pre and post-commencement, revolved around the site location, the condition of the ground, the lack of space available, ensuring the effective programming of building interface work (linking the separate buildings) and the incapacity of existing services to accommodate the new development.

Challenge 1 – Programming and interfacing buildings

To achieve the project completion deadline, set to meet the needs of the new student intake in September 2015, programming challenges had to be overcome; specifically with addressing the construction of multiple buildings and the

interface of those buildings, in combination with the constrained nature of the site.

The construction of the North and South blocks produced challenges with programming and construction sequencing. Due to the connecting interface between buildings, temporary works were necessary to ensure rain water ingress was mitigated to allow the fit out of the South blocks to run in tandem with the completion of envelope works on the North blocks. To ensure effective progress against programme the project team worked closely with the design team and supply chain members to create exhaustively detailed programmes of works that kept trades segregated.

The last planner review technique was implemented to monitor programme risks and works progression across the numerous trades working on the site at the same time. Each proposed programme was reviewed at commencement, with earliest possible start and latest possible finish dates for each package used to plot S-curves on the corresponding Gantt chart, which in turn were used to highlight programme risks. These risks were then closely monitored, and precautionary plans created.

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Key Facts

Contract.....	JCT DB 2011
Cost	£16.86m
Start.....	May 2014
Completion	September 2015
Internal Floor Area.....	7,500m ²
Architect.....	Stride Treglown Limited
Client	McLaren Limited
Structural Engineer.....	Waldeck Consulting
M&E Consultant.....	MTT Limited
Quantity Surveyor.....	Quantem Consulting LLP
Main Contractor.....	Midas Construction Limited



Twerton Mill – Roadside frontage at night

GLOBALISATION: WINNERS AND LOSERS

Chairman's Letter



Richard Saxon CBE

Construction used to be the most local of industries. Buildings were made from the nearby materials by local craftsmen and master masons. There were no 'professionals'. As modern materials came in so they were sourced from further afield and professionals emerged to decide how to use them. Whilst bulky materials are expensive to ship, the UK has largely gone over to importing building products, with a major negative balance of payments for manufactured components. For a wide variety of reasons, UK suppliers are now mainly re-sellers of foreign products. European firms are world leaders. As to main contractors, you will have noticed how many of the top thirty are now foreign-owned firms or direct ventures by overseas contractors. Again, European firms dominate. There are some who think that all the top UK contractors will be overseas-owned by 2020, given the large differences in scale between UK-owned firms and the global giants.

It's somewhat different in professional services. Foreign ownership has absorbed many of the UK's engineering and surveying firms, and some architects. But we have some global players based in UK. What is unusual is that UK-based professional services, wherever owned, are in demand world-wide and London in particular has become a global hub for built-environment professional services. This embraces design and project management services, but also legal and property services, a multi-billion market.

Global construction is rising steadily, with a total spend of USD 15.5 trillion expected by 2030, an 85% rise in the next 15 years⁽¹⁾. Most of the growth will occur in urbanising economies, but the USA, Canada and the UK are also strong contributors. The UK will be the world's sixth largest construction market by 2030, based on strong infrastructure and housing growth, driven by a rising population and economy. This will draw in more foreign direct investment but also give a strong home market for UK professional services. The urbanising world's need for master-planning and design services will continue to pull in UK professionals.

The position of London is extraordinary. Using architects as a yardstick, 40 of the world's top 100 practices are based in London, a far greater concentration than in any other world city. 15% of UK architectural firms work internationally, compared to only 3% across the EU. 22% of fees earned by UK chartered practices are from export, with 86% of these earned in London offices. Those

offices earn over half of all fees earned in the UK, whilst employing just under half of the professional staff.

Why has this concentration occurred? The Company of Chartered Architects, a Livery Company of the City of London, has done a study of this phenomenon⁽²⁾ and is lobbying for recognition and support of our Global Hub. They point to the value, perceived internationally, of the UK's established professional institutions, their education standards and quality assurance. British professionals are seen as creative, innovative, ethical, expert, technically competent and giving quality of service. UK universities provide excellence in education and research for these professions, and attract many overseas students who then form links between countries in their practice at home or in the UK. The open and stable business environment of the UK, with its effective networks of supporting services and specialists, appeals to worldwide investors. Our non-prescriptive regulations and technical standards are an advantage too. Our professionals have become familiar to worldwide clients by virtue of their travels, but also through the support they give inward investors to the UK. Last but not least, our leadership is recognised in the change from analogue working to digital: the UK leads on the use of BIM and GIS (Geographical Information Systems) and in computer aided design. We may not be good at languages but the world increasingly speaks our language.

There are threats to this positive situation: immigration concerns limit the flow of talent into UK universities and offices; we need priority visas to keep up the UK's advantages. Government promotion of UK professional services is less than that from rival countries; we need support to avoid being shut out of markets where non-UK technical standards are taken as the norm. Support with financial arrangements is also less than ideal. Finally, infrastructure: the UK's air services to opportunity cities are limited by runway capacity; broadband is behind world standards; housing availability in the capital is a major drawback to firms based there. How can we advise the world on the built environment if we can't look after ourselves?

The City of London used to say, before Murray, that it was like Wimbledon Tennis, it put on a great show but its local players were not contenders. UK construction shows a mixed picture: leaders at consultancy but followers in products and contracting. At least the work is being done from here, by everyone, in the new, global style.

(1) *Global Construction 2030, by Global Construction Perspectives and Oxford Economics.*

(2) *The Company of Architects' Global Hub campaign.*



JUDGING PANEL SET FOR JCT'S MOST CREATIVE STUDENT COMPETITION TO DATE



JCT's student competition is now in its fifth year, continuing its success in creating links with the education sector and the industry. JCT is committed to improving the understanding and learning of construction contracts and the competition is an important feature to enable us to provide contact and support to students and future JCT contract users. As the competition has become established, it has also evolved over time, recognising the different ways in which construction students learn and the various industry backgrounds and disciplines from which students are drawn.

Furthering the focus on creativity that was established in the 2015 competition, the 2016 competition asks for creative ideas and solutions to address a range of industry topics and issues, including skills shortages, sustainability, collaboration, BIM, and technology. In recognition of the different learning requirements of courses and the variety of requirements for different disciplines, we have broadened the options, beyond essays, by which students can enter the competition.

Submissions could be videos, designs or drawings, a photographic essay, a traditional essay, an article – as long as the idea is creative, students have the flexibility to form their entry as they wish. The change also follows feedback from judges to focus on creativity and the originality of the ideas presented. It is hoped that a wider and more flexible range of options will prove

to be more compelling for students and result in some interesting submissions.

The competition closed on Wednesday, 16th March and the final judging of the entries will take place in late May. JCT has brought together an established panel of judges for the 2016 competition, once again comprising experts from the education, law, training and skills, and media sectors within the construction industry.

The panel includes:

- **Tony Bingham**, Barrister and Arbitrator, 3 Paper Buildings, Temple
- **Neil Gower**, JCT Chief Executive
- **Alan Jones**, Course Leader, BSC Building Services Quantity Surveying, University College of Estate Management
- **Daniel Kemp**, Features Editor, Construction News
- **Christine Townley**, Executive Director, Construction Youth Trust

The JCT Student Essay Competition aims to provide a significant boost to construction students, to assist with their studies, and provide development opportunities. This year a winning prize of £1,000 will be available, along with £250 prizes for runners-up.

JUDGING PANEL



Tony Bingham is a barrister and arbitrator at 3 Paper Buildings Temple, and is best-known as the legal columnist for *Building* magazine, which he has written for the last 25 years, and for his role in the Channel 4 series *Don't Blame the Builder*. He was called to the Bar in 1992, completing his pupillage at 3 Paper Buildings, Temple, London, subsequently becoming a full member of chambers, where he has been ever since. He is a visiting lecturer at Reading University, University College of Estate Management, and since 1996, he has been training new adjudicators for the CI Arb and the Chartered Institute of Building.



Neil Gower is a solicitor and Chief Executive of the Joint Contracts Tribunal (JCT). He was responsible for the launch of JCT's successful Education and Training Initiative, which is now supported by JCT Contracts Discovery, a standard education and learning module on JCT contracts. Neil is a judge on the Construction News Specialist awards. He was admitted as a solicitor in 1984 and spent his early years in private practice dealing with commercial and residential property work and then moved to the Law Society as its property specialist. Neil has been heavily involved in the development of both standardised legal documentation and on line services, including the National Land Information Service and is leading JCT's development of a new range of online services to meet the needs of the construction industry.



Alan Jones joined the University College of Estate Management (UCEM) in April 2012 and is course leader for the BSc in Building Services Quantity Surveying course. He also leads the RICS Professional Membership APC Adaptation Route 1 programme and the RICS Associate 600/900 hours study programme. Prior to joining CEM, Alan worked in both the public and private sectors dealing with all aspects of quantity surveying. His previous posts include the Strategic Property Adviser to the States of Guernsey Government and Head of Asset Management and Property Services at the Borough of Poole. Alan's experience of teaching in higher education includes a role as senior lecturer at Southampton Institute (now Solent University), where he delivered measurement, contract law and construction economics modules for higher diploma and honours degree courses.



Daniel Kemp is features editor at *Construction News*. He covers a range of topics for the title's website and magazine, including regular features on sustainability and the supply chain, and edits the publication's legal section. Daniel also writes a number of *Construction News*' weekly project reports, visiting sites in person to report on the technical challenges that contractors face, and covers innovation and technology for the magazine. He is the current International Building Press Construction/Infrastructure Writer of the Year. Prior to joining CN, Daniel worked in Sydney, Australia for UGL Limited, carrying out technical writing and providing other support to the company's operations and maintenance bid team.



Christine Townley is a chartered civil engineer with experience in both construction and education having supervised major construction projects and helped in the development of national adult skills projects for the Basic Skills Agency. Combining these two passions, Christine is now the Executive Director of Construction Youth Trust, a charity working with industry to support young people from all backgrounds to inspire and enable the next generation of constructors.

IS IT TIME FOR AN INTERNATIONAL JCT CONTRACT?

BARRY HEMBLING – FLADGATE LLP

English language standard form contracts are an appropriate choice for use on international construction projects. This was the conclusion of The Hon. Sir Vivian Ramsey at the 2015 JCT *Povey Lecture* which considered the international applicability of the cultural and legal concepts of using such contracts abroad. The principal theme of the lecture was that parties may not be able to rely on various terms that might otherwise be implied into contracts when English standard forms are used overseas.

That English standard form contracts are becoming more widely used on projects outside the UK is due to a number of factors, including the greater role played abroad by UK professionals. Parties that may have established a course of dealings on particular contract terms may wish to adapt what they have already agreed for use on a project abroad rather than starting from scratch. English standard form contracts are also attractive to UK professionals, employers and lenders as they contain a tried and tested risk profile with which they will be familiar. Language also plays its part where English may be the language of the contract and project communication.

All these issues make English standard form contracts a suitable starting point for use on international construction projects. However, in terms of the practicalities of using English standard form contracts abroad, the issue is wider than one of interpretation as covered in the JCT *Povey Lecture*. Parties must consider the actual amendments to be made to the standard form text in order to make it work abroad. These amendments fall into two parts.

Firstly, parties must consider what must be added to the standard form drafting. These amendments will vary according to the local jurisdiction of the project. It will be necessary to address through express contract amendments issues that would otherwise be implied by English law or to include drafting

to cover issues which might be addressed differently in the local jurisdiction.

Secondly, it is necessary to consider the parts of the underlying standard form text which must be removed to make the contract work abroad. The advantage of using English standard form contracts is that they are drafted to reflect English law, practice and procedure, with separate versions available for Northern Ireland and Scotland. However, as things currently stand it is first necessary to remove and adapt large parts of the standard form text before deciding which amendments ought then to be incorporated to reflect the local jurisdiction. Some of the principal areas for consideration are as follows:

- **Payment:** English standard form contracts are drafted so they comply with applicable legislation in Great Britain regarding payment in construction contracts. Where relevant contracts do not include a valid payment regime then statute will imply terms that supersede the non-compliant contract terms. The legislation applies to affected contracts in Great Britain but will not extend to projects carried out abroad. Parties must therefore consider whether the British compliant payment procedure is to be followed or whether they wish to follow a simplified procedure that might be easier for the project team to administer whilst reducing the paperwork to be served at each payment cycle. In some jurisdictions from a common law background, parties may not have that choice where security of payment legislation, not dissimilar to that in force in Great Britain, might trump non-compliant payment terms.
- **Insurance:** English standard form contracts are drafted on the basis of an insurance arrangement that reflects the standard market position in the UK, but those terms require careful consideration when used abroad. In the UK, it is not uncommon to see separate insurance policies for public/

products liability, professional indemnity and contractor's all risks insurance. However, this arrangement may not reflect the local position, especially where it might be common to group insurance risks into a single general liability policy. Drafting concerning the extent of the works insurance also requires careful review to ensure the contractor's all risks insurance is back to back with the actual cover in place. Amendments removing references to the Joint Fire Code are also likely.

- **Health and safety:** English standard form contracts comply with relevant health and safety arrangements applicable in Great Britain but will require careful amendments when used on projects overseas. CDM Regulations drafting will not apply to projects outside Great Britain save where construction work is carried out in the territorial sea or an area designated for the exploration or exploitation of renewable energy. In its place, parties must import relevant local rules and regulations to ensure that works are carried out in compliance with the health and safety regime that applies in the country of the location of the site.
- **Dispute resolution:** Adjudication provisions feature in English standard form contracts but such clauses must be considered carefully where the project is outside Great Britain. As with the issue of payment terms referred to above, in some common law countries local legislation provides a similar statutory entitlement to adjudicate disputes. In this scenario, amendments will be required to reflect the local position, including where appropriate including details of the local adjudicator's appointment body. Where a local statutory entitlement to adjudication does not apply, parties should consider whether a contractual entitlement should arise and, if so, what that entitlement might look like.

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English standard form contracts present a suitable starting point for use on international projects. Whilst amendments will always be required to reflect differences in how the contract will be used and interpreted in the relevant jurisdiction, the use of standard form contracts abroad is not made easy where it is first necessary to scrutinise the underlying standard form text to remove drafting that is only applicable to projects in Great Britain.

This exercise can deter clients from using English standard form contracts altogether, or create longer than necessary schedules of amendments to the standard form text. As we all know from personal experience, the more extensive the contract amendments the more time and cost will be involved in reaching agreement.

A better starting point would be a standard form contract that preserves the best of

current practice and procedure, that meets commonly accepted international standards but is still flexible enough to be adapted for use in multiple jurisdictions. Is it not therefore time for an international JCT contract?

Barry Hembling is a partner in the construction team at Fladgate LLP. He acts for a number of international clients and specialises in construction projects with an international angle.

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Challenge 2 – Adjacent to arterial road and Network Rail

The challenges presented by the site's location adjacent to an arterial city road and Network Rail line were two-fold, firstly affecting the construction works, and secondly requiring building features to optimise noise mitigation within the development.

The delivery and on-site movement of materials was a complex issue. The site team used Zone Manager, a web-based booking system, to coordinate deliveries and avoid obstruction to the busy arterial city road adjacent to the site. Deliveries were restricted to outside of peak traffic hours, and the booking system ensured that the high volume of construction traffic required was evenly spaced with clear windows between each vehicle arrival and departure.

Two tower cranes were erected on site, and a series of cranes and hoists were installed to facilitate the movement of materials. The senior project manager maintained close liaison with Network Rail representatives to ensure that all corresponding method statements were created in line with rail requirements, including restrictions on the size, type and movement of crane used.

In order to successfully mitigate noise transfer from the road and rail line into the new buildings, high performance double glazed windows with integral noise attenuated ventilation units were installed. This feature provided the double benefit of a high level of noise reduction plus natural ventilation.

Challenge 3 – Ground contamination

The site had previously been used as a location for motor vehicle garages and workshops, resulting in significant petrochemical contamination within the ground. The team created a comprehensive remediation strategy, employing a specialist contractor to assist with the rapid extraction and treatment of affected material in order for critical path groundworks to progress in line with the construction progress. Remediation of contaminated materials, both on site and at a specialist treatment plant, led to the re-classification of materials from hazardous to non-hazardous, and from non-hazardous to inert.

Challenge 4 – Interaction with council drainage network

The development included the construction of a large combined sewer overflow system (CSO),

required by the local water authority to alleviate pressure on the existing local drainage network. The installation included a high specification telemetry system, providing the water authority with remote monitoring. The CSO had to be constructed in an extremely constricted area within a narrow lane adjacent to the site. Requiring deep excavations and extensive temporary works the construction could only be carried out towards the end of the project, and complex reprogramming of several elements of works was undertaken to ensure the installation was completed on time for student occupation.

Summary

The Twerton Mill development is an example of how intelligent design and creative problem solving can be combined to breathe new life into challenging sites. Collaboration between the design team, contractor and supply chain promoted innovation and the optimal use of all this location has to offer, allowing challenging aspects of the project to be incorporated into the final building's defining features.

Daniel Hill is Proposals Coordinator at Midas Group Ltd.



JCT INTERVIEWS...



In this series we shed some light on some of the key people who are involved with or give their time to support JCT, to ensure that all areas of the construction industry are represented and can contribute to the development of our contracts. We will look at how our interviewees contribute to JCT specifically, and gain their views on JCT's wider role within the industry.

DR ANDREW FLOOD

JCT Council Member, Local Government Association (LGA)

Chair, JCT Sustainability Working Group

Dr Andrew Flood is a director of SSPP Ltd, a company he formed in 2005 specialising primarily in public sector procurement.

Commencing work as a trainee quantity surveyor for a roofing contractor, Andrew moved to local government where he pursued a public sector career working for Newcastle-under-Lyme Council within the architect's department. After graduating from Nottingham Trent Polytechnic (now Nottingham Trent University), his career took him to such varied places as the Western Isles and Thurrock Council in Essex, where he became chief quantity surveyor and then head of procurement and property services.

A chartered surveyor since 1985, in the mid-1990s Andrew completed an MBA with the Open University. He is a former president of the Society of Chief Quantity Surveyors (SCQS) within local government and a co-author of a number of publications including the *Calculation and Deduction of Liquidated Damages*.

In 2004 Andrew Flood completed a professional doctorate from Anglia Ruskin University. His research thesis, *Constructing a Substantive Theory: A Grounded Theory Approach to the Thurrock Local Business Initiative* was nominated and short-listed for a European Union award relating to 'The role of local and regional authorities in the sustainable development strategy.'

JCT: Andrew, how did you first come to be involved with JCT? Why do you think it is important to be involved?

AF: I first became involved with JCT around 13 years ago through the Local Government Association (LGA) Procurement Panel, which was the vehicle for nominating the JCT client college representatives for local government onto the JCT Council. I was always keen to be a member and be involved with various working groups because of the knowledge that is created, acquired and shared through participation.

But of course like many of us my first true involvement with JCT was as a young man and student when studying construction and contracts at college.

I think it is important to be involved with JCT because the way in which the contracts are developed enables users, practitioners and stakeholders to contribute and influence the outcome. Accommodating different perspectives, including the public sector, does, I believe, contribute to the success of JCT and it being the contract of choice for the industry.

JCT: You are a not only a member of JCT's council, representing the Local Government Association (LGA), but also the Chair of JCT's Sustainability Working Group. Can you tell us more about what that role involves and the activities of the Group?

The requirement to have a sustainability working group is something JCT recognised a number of years back due to the importance of sustainability to the construction industry as a whole and the values of JCT as an organisation.

The working group was set up to consider JCT's approach and policy as an organisation to sustainability, and also the role that JCT contracts can have to help other organisations realise their own sustainability objectives and ambitions.

My role as chair has been to help formalise a programme and to bring together representatives

from the JCT colleges and a number of co-opted sustainability experts to develop JCT's work in this area.

We have published the guidance note *Building a Sustainable Future Together* along with a number of other useful resources online via the JCT website, which includes details of the JCT Sustainability Policy, sustainable case studies, and links to useful sustainability websites.

An aspect currently being considered is the area of social value and how this can best be recognised and accommodated.

JCT: Do you have any personal career highlights? What are you most proud of about the construction industry as a whole and where do you think it most needs to improve?

AF: My most rewarding construction project was one whilst at Thurrock Council. I was the project manager/quantity surveyor (on, I hasten to add, a JCT contract). It was a joint development on a church site for three – the church, a private day care centre and the Primary Care Trust.

The levels of complexity and uncertainty were high, funding for each of the three clients was complicated and at the same time dependent on one another. There were no title deeds for the land, but by working together as a team we were able to get the project committed and the contractor constructed a very attractive looking scheme, designed by a young local architect, on what was previously a rundown site. The scheme looked quite stunning, was much needed and was well used by the community. It was an excellent team effort and achievement from everyone.

I have also managed to work with and help some local businesses grow, as part of a local business initiative (subject of my doctorate research) and I helped to run and create a trade school for 15-year-olds. The aim was to encourage young people to obtain a skill and enter a trade. The trade school was held on Saturdays and comprised a 30-hours learning course over 12 weeks, which was very hands-on and great fun. At the end of the course, a graduation ceremony was held where the young graduates were presented with certificates, a DIY book, tools and a tool bag for their trade and an open reference. It became central to the Council's local business initiative and construction strategy to encourage local businesses to employ these young people as apprentices. Over the years hundreds of young people have graduated the course, but getting the scheme off the ground initially meant overcoming a great number of invisible organisational barriers.

The construction industry has great diversity and an ability to adapt and be creative, whilst still being rather set in its ways. It needs to be able to adapt due to the cyclical nature of the economy, and how it manages to adapt and cope is something to be proud of, along with the undoubted high skill level of the workforce in many areas.

So where does the construction industry need to improve? I think we can all always do more and better, but so much is linked to the economy, funding need and supply and demand. Ensuring that we have a skilled workforce of the right age must be a continued priority as no workforce means no industry.

JCT: What do you think makes JCT unique? What are the benefits of the way in which JCT contracts are produced?

AF: Without doubt it is the college structure of JCT and how all stakeholders are represented and contribute, with many freely offering their services. The structured approach of having Council and additional key working group meetings, and the nature of the JCT representation means that JCT is always up-to-date in what it discusses and its publishing intent.

The stakeholder rather than shareholder model of JCT means that its contracts are produced through partnership and the collaborative working of industry experts and practitioners.

Having a fully representative membership enables knowledge to be created, as views and opinions are presented and subjected to scrutiny, lively debate and challenge to arrive at what is best and appropriate for the industry. In addition, JCT contracts are aided by the historic precedents and expert professional and legal advice that is on hand.

JCT: What do you see as the main challenges for the construction industry, particularly related to public sector or sustainability issues, over the next five years?

The main challenge for the industry from the public sector perspective is uncertainty. Uncertainty as to funding levels in the medium and long term, uncertainty as to who will be in power and uncertainty in relation to future economic activity. Yes, profits are important and we know that many house builders have been able to double their profit levels, but what is really needed is more sustainable housing that is planned to a more sustainable programme. I believe that the public sector can play a major role but I do fear that the potential of that role may not be best exploited.

JCT: Does JCT have a wider role to play in the industry beyond producing contracts?

AF: Yes definitely, but in many ways the role JCT currently has is more than just producing contracts, although that in itself provides value.

The journey is often as important as the destination. It is how JCT goes about producing its contracts in an inclusive way, how knowledge is created and shared and how it contributes to and seeks to influence the industry. To my mind this is what makes JCT a valuable institution, a body that is sustainable and will be around for the next 80 years, when the world and industry will be in a different but hopefully more sustainable place.

INSOLVENT ABUSE

PETER HIBBERD

Insolvency of any party on a building project is regrettable and something advisers should look to militate against at pre-tender stage.

Pre-contract checks on financial position, current workload and resources are essential prerequisites to entering a construction contract: yet, despite such checks, insolvency remains a possibility.

Although insolvency in the industry has fallen slightly over the past year, history shows that, once construction activity picks up, insolvency is likely to increase. Insolvency numbers have been lower because monetary policy has provided financial props and their removal will, in all likelihood, produce an increase. As construction is the sector that frequently produces more insolvencies than any other, detailed consideration should be given to contract termination provisions and what type of security might be sought, for example, performance bonds, parent guarantee, and so on, to provide protection in the event of insolvency.

Insolvency itself is not a breach of contract but its effect frequently means that repudiation follows. Repudiation generally means the contract can be brought to an end regardless of whether or not the contract contains any termination provisions.

However, most building contracts contain express provisions dealing with termination events; insolvency being one.

Until 2005 a contractor's insolvency triggered an automatic termination under the JCT Standard Contract but as this was problematic the position was revised so that the contractor's employment continues in the event of insolvency, unless it is terminated by the employer.

Despite the JCT Standard Building contract 2011 (SBC2011) containing a framework for termination by the contractor or employer in a range of specified circumstances it is without prejudice to other rights (clause 8.3.1); such provisions are common to many JCT contracts including the Intermediate

Building Contract and the Design and Build Contract. That saving provision raises the question as to whether one should terminate under a contract provision or at common law.

Thomas Feather & Co vs Keighley Corporation (1953) and Architectural Installation Services Ltd vs James Gibbons Windows Ltd (1989) illustrate the difficulty, but it is suggested that one should generally rely on express contractual provisions.

Where terminating under specific contractual provisions it is essential to follow the procedures set out because otherwise serious consequences may follow. SBC2011 provides that if a contractor is insolvent (defined in clause 8.1) the employer may give notice at any time to terminate the contractor's employment; no warning notice is required but, as it is generally appropriate to have discussions with the contractor upon insolvency, such notice is unlikely to be a surprise.

Clause 8.5 spells out the position upon insolvency, which applies whether or not the employer has given notice of termination. This clause brings into effect clause 8.5.3 and consequentially (inter alia) 8.7.3 which means "no further sum shall become due to the Contractor [...] other than any amount that may become due [...] under clause [...] and the Employer need not pay any sum that has already become due either", where a pay less notice has been given or the contractor has become insolvent after the last date that a pay less notice could have been given.

Those provisions (under the JCT Intermediate Building Contract with contractor's design 2011 (ICD2011)) came under scrutiny in *Wilson and Sharp Investments Ltd vs Harbour View Developments Ltd* (2015).

That case revolved around whether the insolvency provisions applied in all situations of insolvency or just those where insolvency occurs prior to termination of the contract and those

where the contract is terminated for insolvency. The issue was relevant because the contractor (*Harbour View*) had become insolvent after termination had arisen. If such provisions did not apply where the contract had previously been terminated by the contractor, then clause 8.7.3 governing the suspension of payments would be inoperative. The Court of Appeal established that the "insolvency" provisions under clause 8.5 of ICD2011 apply, regardless as to whether the insolvency occurs prior to or after termination (and regardless as to whether termination is because of insolvency). In doing so the CA disagreed with the High Court judge who had taken a more limited view.

Also it established that where the "employer accepts that interim payments have become due, because of a failure to serve a pay less notice, (the employer) is not prejudiced by such acceptance when it seeks to raise a serious and genuine cross claim". Insolvency together with a serious and genuine cross claim means payments on account that arise at any time, regardless of the absence of any pay less notice, can be suspended. That was the position established in *Melville Dundas Ltd vs George Wimpey UK Ltd* (2007). The fact that suspension of payment can apply at any time may seem surprising, particularly in light of the new provision in the Construction Act, as reflected by clause 8.7.3.2 ICD2011, but it appears insolvency law generally prevails. Though the outcome of the *Wilson and Sharp* case may not meet with everyone's approval it confirms JCT's intentions.

Although enforcement by summary judgement of an adjudicator's decision for payment will often be successful where there is no pay less notice, a contractor's insolvency creates a very different situation and enforcement depends upon the facts: the outcome may well be one that is not expected.

This article was first published in Building (5 February 2016).

JCT 2016 EDITION – NEW FEATURES ANNOUNCED



With the JCT 2016 Edition due to arrive later this year, commencing with the Minor Works family of contracts in the Summer, a preview of the key changes and features of the 2016 edition was given by JCT chair, Richard Saxon CBE, in a speech at the Olswang Annual Construction Conference in February.

Here is an overview from Richard's speech of the key features of the JCT 2016 Edition:

- The JCT 2016 Edition will incorporate and update provisions from the JCT Public Sector Supplement relating to Fair Payment, transparency and BIM into JCT contracts as a whole.
- Provisions relating to the CDM Regulations 2015 (first published as amendment sheets downloadable via the JCT website) will be fully incorporated.
- The JCT 2016 Edition will reflect the Public Contracts Regulations 2015, with provisions for use by public bodies, contractors and sub-contractors on public sector projects.
- There are a number of changes in respect of payment, designed to reflect Fair Payment principles and to simplify and consolidate the payment provisions:
 - Establishing, for Fair Payment purposes, Interim Valuation Dates which will operate at main contract, sub-contract and sub-subcontract levels.
 - Under the interim payment due date provisions, the monthly cycle of due dates applicable to payments up to practical completion now continues to apply after practical completion, up to the due date of Final Payment. This change is consistent with a new Loss and Expense ascertainment procedure and with Fair Payment principles.
 - Revising and simplifying the payment provisions more generally, including introducing a procedure for prompt assessment of Loss and Expense claims, providing further flexibility in relation to Fluctuations Provisions,

and consolidating the provisions containing the notice requirements of the Housing Grants, Construction and Regeneration Act 1996.

- JCT 2016 will include provisions for the grant of Performance Bonds and Parent Company Guarantees and we have extended the optional provisions for the obtaining of Collateral Warranties from sub-contractors to include, as an alternative, the granting of Third Party Rights by sub-contractors.
- There will also be an extension of (Works) Insurance Option C to allow alternative solutions to the problems encountered by tenants and domestic homeowners in obtaining Existing Structures cover for Contractors, and consolidation within the main text of the generic provisions that apply to Insurance Options A, B and C (evidence of insurance, insurance claims and reinstatement work).
- Further changes to improve functionality and user-friendliness across the suite, including minor updates and clarification of the intellectual property provisions, and incorporating (where appropriate) the provisions of the JCT Named Specialist Update 2012.

More details of these modifications, and any that may apply specifically to a group of contracts, will be outlined as the publication of each family of contracts within the suite approaches. Tracked Change Documents which show changes from the 2011 will also be released.

If you would like to receive updates relating to the JCT 2016 Edition and the changes made, you can sign up to the JCT Network, a new initiative set up to provide exclusive benefits and features to JCT users. Get early notification on updates to JCT contracts. You can get access to JCT news, blogs and forums, invites to exclusive JCT networking events and special discounts on JCT products. To sign-up visit the JCT website at corporate.jctltd.co.uk/jct-network.sign-up



JCTNEWS



JCT ON DEMAND

COMPLETE YOUR JCT CONTRACT ONLINE

With JCT On Demand you can:

- Complete your contract through an intuitive interview process - all your answers are saved automatically
- Access explanatory notes to help you answer the questions
- Preview your draft contract and make further changes if needed
- Save and print drafts
- Save and print your final contract
- Access completed contracts

JCT On Demand contracts also include the JCT Amendments concerning the CDM Regulations 2015 automatically, so no need for extra amendment sheets.

It is anticipated that the following contract will be added next to JCT On Demand:

Design and Build Sub-Contract Agreement (DBSub/A)

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Try JCT On Demand today for our best-selling contracts:

JCT Minor Works Building Contract (**MW**)

JCT Minor Works Building Contract with contractor's design (**MWD**)

JCT Design and Build Contract (**DB**)

Intermediate Building Contract (**IC**)

Intermediate Building Contract with contractor's design (**ICD**)

Contractor Collateral Warranty for a Funder (**CWa/F**)

Contractor Collateral Warranty for a Purchaser or Tenant (**CWa/P&T**)

Sub-Contractor Collateral Warranty for the Employer (**SCWa/E**)

Sub-Contractor Collateral Warranty for a Funder (**SCWa/F**)

Sub-Contractor Collateral Warranty for a Purchaser or Tenant (**SCWa/P&T**)

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