

# JCTNEWS

THE JCT CONTRACTS UPDATE FOR THE CONSTRUCTION PROFESSIONAL

## LE PETIT FORT, JERSEY

Le Petit Fort is a private family residence located on the shoreline of St Ouen's Bay in Jersey. The house has been developed and constructed within the walls of a 20th century fort which has had, along with the surrounding landscape, existing materials, and history, a significant influence on the new building's design. A winner of the RIBA South East Regional Award 2016 and shortlisted for the 2016 Building Awards, a JCT Intermediate Building Contract was the contract solution.

Despite Le Petit Fort's prominent location on the Jersey coastline, from the beach it is hard to see. Heavily fortified, it sits beneath the site's existing stone walls with the appearance of a low-set watch tower – with just its first floor and central 'keep' (itself a reference to the nearby Napoleonic Martello towers) visible to passers-by. It has been designed very much in castle terms, taking inspiration not just from the Napoleonic Martello towers but also the Second World War fortification and the slits in the 1920s perimeter walls. The existing thick granite walls have been retained and restored and remain a focal feature. A missing fourth wall has been added, enclosing the central living structure representing the keep. Whilst retaining much of the original granite, the existing building itself was too small for a family of five and was also oriented incorrectly, with just one small window looking out to sea.

The finished house is arranged with two wings angled at 110 degrees spanning out from a central granite three-story tower block. The wings frame a landscaped pool terrace, garden and



Le Petit Fort

© Photo: Joakim Boren

entrance forecourt within the main enclosure of the perimeter walls. The courtyard space created by the two wings within the enclosure largely shelters the pool terrace and garden from the elements. Contrary to the fortified exterior, the interior is very open; each room offers views out on to the landscape – the beach to the west and the hillside to the east.

The fort-like character of the building is most apparent from the entrance, where the Napoleonic tower and Second World War fortification influences are highlighted. The view from the rear is less imposing and more welcoming, as the fort wings embrace the pool courtyard and garden. A main feature of the property is the stairwell running through the main

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tower – a helical staircase constructed out of oak and Corten steel. Viewing the entire property from above, it has the appearance of the axle of a giant hinge. The two wings intersect where the staircase and the space above it rise up through the entire tower, which is capped with a 2m tilted and frameless circular rooflight.

Corten steel, the building's most prominent material, is used to clad the external upper levels, although it is also used inside, for the aforementioned staircase and the main fireplace. The use of Corten gives the distressed heavy-industrial effect desired by the client and the aesthetic weathering of the material is encouraged. Iroko timber cladding is also used on the exterior, breaking up the steel and creating space for the large expanses of glass to slide behind when opening up the building to the elements. Beneath, smooth polished concrete is used to clad the ground floor. Deceptively, the concrete gives the appearance of heavy cast in-situ walls, but is actually just a thin layer disguising the block wall behind.

In order to achieve the building's aim of being able to open up to the courtyard and seascape,

a robust glazing solution was required to protect it from the elements. A microclimate effect with a lot of funnelling of wind into the angles of the building also needed to be considered to make sure that rain wouldn't get in. Shueco was chosen because it was suitable to work in an extreme maritime environment. The ground floor uses Schueco AWS 75 full height tilt-and-turn aluminium windows. Shueco ASS 70 sliding doors are used on the first floor where the two wings meet, with Shueco ASS 80 FD bi-folding doors on the first floor balcony facing west and Shueco AWS 70 windows on the second floor.

Looking inside, entering through the front door in the east wing, the feature staircase spins visitors through 360 degrees and takes them upstairs and in line with the main axis of the west wing's reception rooms. Moving through a set of descending levels, visitors eventually arrive at the main sea-facing balcony. The master bedroom suite in the opposite wing is linked by a large landing which provides extra space to relax. The ground floor contains family bedrooms, a media room, sauna, laundry and plant room. The glass rooflight at the top of the staircase floods the space below with light. A

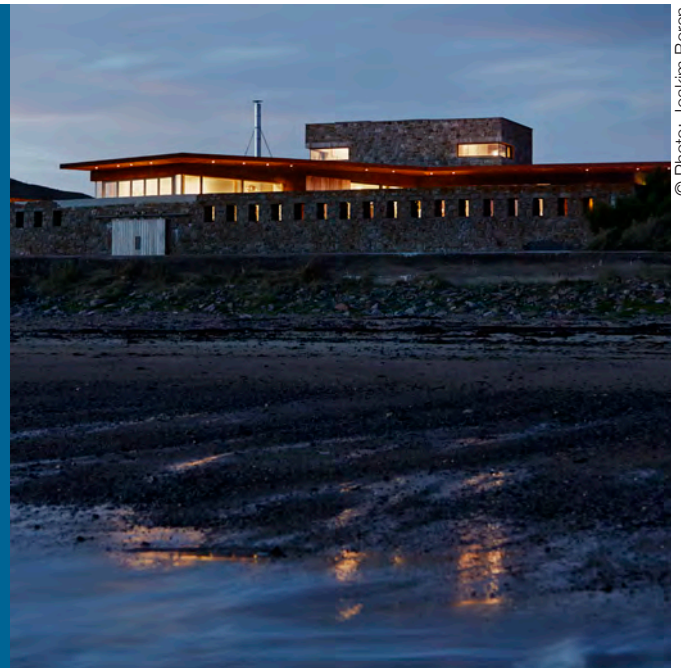
further storey adds a guest room and a study.

A standout feature of the house's interior is the joinery, which has all been bespoke built by local craftsman. Built-in oak cupboards hide televisions behind sliding doors while purpose-built shelving units provide storage. Full height doors in the corridors can be clipped back, and allow areas of the house to be separated, future-proofing it as the children grow up. These elements of craftsmanship are equally matched by the cast-concrete elements of the kitchen and bathrooms.

Despite being a residential building, the complexity of Le Petit Fort means that the use of the JCT Intermediate Building Contract is an ideal choice. Realising such a unique design – incorporating reclaimed materials, interesting and unusual new materials, and a large number of specialist services – requires a contract that, even on a relatively small project, can reflect this complexity and define roles and responsibilities in detail. Just as Le Petit Fort is designed to be protected from the elements, yet open and transparent, the JCT Intermediate Contract provides the contractual fortification to allow the project to be conducted in the same spirit.

## PROJECT SUMMARY

<b>Start:</b>	January 2014
<b>Completion:</b>	December 2015
<b>Size:</b>	475m <sup>2</sup>
<b>Cost:</b>	Undisclosed
<b>Client:</b>	Private
<b>Architect:</b>	Hudson Architects
<b>Main contractor:</b>	Mitchell Construction Group
<b>Structural engineer:</b>	Ross-Gower Architects
<b>M&amp;E consultant:</b>	Henderson Green Partnership
<b>Quantity surveyor:</b>	Tillyard
<b>Approved building inspector:</b>	Bob Febrache, States of Jersey
<b>CAD software:</b>	Autodesk Revit
<b>Onsite energy generation:</b>	Approx 80% inc. air-source heat pumps
<b>Annual mains water consumption:</b>	Approx 285m <sup>3</sup>
<b>Airtightness at 50 PA:</b>	7.762m <sup>3</sup> /h.m <sup>2</sup>
<b>Hot water load:</b>	21kW input (recovery in 1.5 hours)
<b>Heating load:</b>	23.6kW input
<b>Overall area-weighted U-value:</b>	0.333W/m <sup>2</sup> K



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## IS OFFSITE THE ANSWER?

### Chairman's Letter



Richard Saxon CBE

The construction industry is heading for the buffers. Capacity is draining out as skilled tradesmen retire and few enter as apprentices. The go-to supply of EU migrant tradesmen is likely to be restricted soon and is already less interested as the pound falls. Construction quality is poor in the housebuilding world. Mark Farmer's message: Modernise or Die, which I quoted in my last newsletter, is clear that a major move to offsite construction is needed to keep the industry from decline.

The proponents of offsite construction see it as meeting several needs simultaneously. Firstly, industrialised fabrication raises capacity by enabling machines to join the workforce and less-skilled people to work with them. Secondly, the factories provide steady work in fixed locations, with social hours and better health and safety. This will enable employers to attract a wider and more diverse workforce who would not consider sitework. Thirdly, the offsite-fabricated elements are made to a higher quality than the site-fabricated equivalent, given the better working conditions and the contribution of automation in the factory. Productivity, the great weakness of construction, is improved by all of this. Costs should fall as productivity rises. Fourthly, machine-assisted construction must be done in a digital working environment, providing work of the type attractive to millennials.

Already a rising percentage of any building is being fabricated offsite. Construction products (other than raw materials) make up an increasing part of specifications. Buildings are 'ecosystems' of several layers of elements: substructure, super-structure, skin, systems, fit-out and furnishing and equipment. Most of the latter elements are fabricated offsite now. Mechanical and electrical systems are being assembled into large riser and distribution modules offsite. Bathrooms and kitchens come as pods. Envelopes are delivered as unitised panels, sometimes several storeys tall. Steel frames are all factory made and pre-casting is increasing for concrete elements. Fully fitted modules of accommodation such as hotel and student rooms and apartments are routinely ordered now, whilst Cross Laminated Timber (CLT) is becoming the new concrete: able to provide complete structures or modules made accurately and quickly offsite.

So, is the Offsite construction future a self-fulfilling prophesy? Will it become the norm without any further effort? The evidence so far suggests not. Specialist firms making offsite elements are proving just as prone to business failure as on-site builders. Costs are usually higher because of the capital required and the sporadic flow of orders, causing traditional methods to undercut offsite. Supply chains remain fragmented. On-site assembly of parts is fraught with risk of damage.

Construction has been a low-capital intensity business, making entry easy and survival dependent on cash flow. Overcapacity keeps margins low. Small, privately-held firms can prosper in the low-margin environment because the return on their modest capital is good. However, innovation and training are both costly and are driven out by the low margins. Subcontracting, to give flexibility during the inevitable and exaggerated business cycles which construction suffers, further depresses the capacity to train or to do research and development. Recessions strip the industry of future talent and make the trades poor lifetime investments. Offsite raises the ante, needing more capital and a steady flow of orders, abhorring downturns.

Toyota's housebuilding operation in Japan is often pointed to as a model. It could not be more different than UK businesses. Toyota specialises in replacing aging homes on existing plots. Homeowners, often with 100-year mortgages passed down the family, replace the actual building at intervals. The site holds most of the mortgaged value. They have a customised design made within Toyota's options, are moved into a hotel for a week and return to a new home with the latest specification. Toyota manages the sales process to keep the production lines flowing at optimum pace. The supply chain is a long-term one with capacity to keep innovating.

UK construction will need to become much more integrated to prosper in an offsite world. Production flow stability must be a high priority, with demand managed to achieve it. The myriad of competing methods on offer needs to be weeded down to some strong, insurable options. Site assembly needs to be considered at the offsite stage. Digitally enabled design for manufacture and assembly, known as DfMA, needs to become normal in professional offices, so that the decision to build offsite is made at the start, with contractor involvement, and not after a conventionally designed building has got planning permission.

The best hope of progress may lie in the emerging market for institutionally funded 'Build to Rent' homes, now finally endorsed by the Housing White Paper. One institution, Legal and General, is investing in its own factories. Others are considering buying from existing or planned factory capacity. This sector is far less likely to suffer recessions and it values the speed of build and the lifetime quality which can be achieved offsite. Higher density development, which carries the construction costs better, will form the backbone for the sector.

Several contractual issues arise in building offsite, as considerable value is created before it arrives onsite. What happens if the supplier fails before delivering? Lawyers are already writing about such issues. JCT will adapt to provide solutions.

## JUDGING PANEL ANNOUNCED FOR JCT STUDENT COMPETITION 2017



JCT's Student Competition continues for 2017, focusing on creativity and finding innovative solutions to address a range of industry topics and issues. Categories for this year's competition included skills shortages, sustainability, collaboration, BIM, technology, and health and wellbeing.

Students can enter their submissions in any format they choose – it could be a video, design or drawing, photographic essay, traditional essay – as long as the idea is creative and original, the competition is designed to be flexible to allow students to form their answer as they wish.

The JCT Student Competition is a well-established competition for construction students. JCT is committed to improving the understanding and learning of construction contracts and the competition is an important way to enable us to provide contact and support to students and future JCT contract users. The range of topics and methods of entry are designed to reflect the various industry backgrounds and disciplines from which the students are drawn.

The competition closed on Wednesday 15 March and the final judging will take place in May. JCT has brought together a panel of judges for the 2016 competition, once again comprising experts from the education, law, media, and professional practice sectors within the construction industry.

### The panel includes:

- **Tony Bingham**, Barrister and Arbitrator, 3 Paper Buildings, Temple
- **Neil Gower**, Chief Executive, JCT
- **Michael Haste**, Director, Pascall+Watson Architects
- **Alan Jones**, Course Leader, BSc Building Services Quantity Surveying, University College of Estate Management
- **Daniel Kemp**, Features Editor, Construction News

The JCT Student Competition aims to provide support 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 2017



**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.



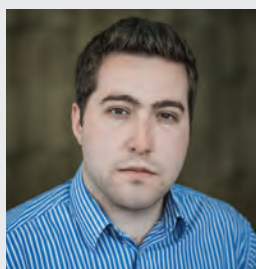
**Neil Gower** is a solicitor and Chief Executive of the Joint Contracts Tribunal (JCT). He was responsible for the launch of JCT's successful Education and Training Initiative, which is now supported by JCT Contracts Discovery, a standard education and learning module on JCT contracts. Neil is a judge 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.



**Michael Haste** is a graduate of the Sheffield University School of Architecture, winning its Stephen Welsh prize for his final year works in 1986. He joined the architectural practice of Sir Norman Foster and Partners straight from his studies. Becoming a registered architect in 1990, Michael then went onto join the practice of Pascall+Watson in 1993, becoming a Director in 2000, and helping the practice to develop into an internationally recognised company with a current staff of around 150. His own works, and those of his practice, are largely based in the transportation design sector, with their major works focused on airports and railway stations. Michael has led design teams undertaking significant architectural projects at Kings Cross, London Bridge, Blackfriars and St Pancras International Stations and has also worked extensively with Network Rail, Crossrail, London Underground and Docklands Light Railway in the UK. Internationally Michael has designed three new underground stations in Johannesburg and provided peer reviews on proposals for the Sydney Metro. Michael studied and gained a Master's degree in Construction Law and Arbitration at Kings College, but he remains firmly in the design field of his work, whilst being responsible for reviewing all contracts that pass through his office.



**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 UCEM, 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 2015 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.

## JCT DESIGN AND BUILD AND JCT STANDARD BUILDING CONTRACTS 2016 – PART II

SUZANNE REEVES – PARTNER, WEDLAKE BELL

JCT has published the new edition of 2016 Design and Build Contract in conjunction with the Design and Build Sub-Contract for use with it. The purpose of this note is to outline the principal changes from the previous 2011 edition and answer some frequently asked questions. Part I of this article was published in the February edition of JCT News.

### How is Loss and Expense for delay dealt with?

Section 4 which deals with loss and expense still requires prompt initial notification of claims, or the likelihood of claims as before that notification is required *“to be accompanied, or as soon as reasonably practicable, followed by the Contractor’s initial assessment of the loss and expense incurred and any further amounts likely to be incurred...”*. However, it goes on to provide for monthly updates from the Contractor *“for as long as is necessary for final ascertainment”*.

These requirements are an attempt to avoid the practice of loss of and expense claims not being made or the particulars of them not being given until late in the project after the events giving rise to delay and consequent loss and expense have long since passed.

JCT has not adopted the approach of some bespoke amendments whereby notification by the Contractor in accordance with a time limit is a condition precedent to entitlement to loss and expense, which means that in principle non-compliance avoids the claim.

The Employer (through the Employer’s Agent in the case of DB and the Contract Administrator in the case of SBC) is required to notify the Contractor of his initial ascertainment within 28 days of receiving the required information from the Contractor with further notifications being made within 14 days of each subsequent update. In each case the Employer/Contract Administrator is required to identify any points on which that ascertainment differs from the Contractor’s assessment.

In the amended JCT provisions not only does the Contractor have to notify circumstances which may give rise to loss and expense and keep the Employer/Contract Administrator updated, but also the Employer (through the Employers Agent/Contract Administrator)

should not be able to leave loss and expense to one side pending practical completion.

The Relevant Matters which give rise to loss and expense are unchanged and still include Changes to the Employers Requirements (in the case of DB) or Variations (in the case of SBC).

However, loss and expense is now to be included in the valuation of a Change in DB if the procedure set out in Supplemental Provision 24 (Valuation of Changes – Contractor’s Estimates) is used. So clause 4.21 which deals with Changes to the Employers Requirements will only be relevant if Supplemental Provision 24 does not apply.

### Any changes to the Final Account Provisions?

Clause 4.12 of DB requires the Contractor to submit the Final Statement to the Employer within three months from practical completion of the Works, as was previously the case. If he fails to do so either within that period or within two months of a reminder notice from the Employer, the Employer may issue the statement. Either way, unless the final balance shown is disputed within the time limits specified by the contract, the statement then becomes conclusive as to the final balance. It then has further conclusive effects in accordance with clause 1.8 (materials, goods and workmanship being to the Employer’s Requirements standards, extensions of time given and loss and expense awarded) except where and to the extent that proceedings have been instituted and until those claims have determined.

Clause 4.25 of SBC deals with the final adjustment and final payment. The relevant Quantity Surveyor statement and ascertainment is to be provided to the Contractor, within 3 months of the Contractor providing the relevant documentation. That documentation is to be supplied within a maximum of 6 months after Practical Completion of the works. Clause 4.26 then deals with the issue of the Final Certificate. That Final Certificate must be issued within 2 months of the *last* of the end of the Rectification Period of the Works, the date of issue of the Certificate of Making Good Defects or the date on which the Contractor is sent the Final Certificate. Then the Final Certificate has the same conclusive effects under Clause 1.9 as referred to above regarding Clause 1.8 of DB.

### What changes have been made to the insurance provisions?

There remains three principal Joint Names Works Insurance Options (A, B and C). However, Option C, which usually applies where there are existing structures, has been amended so as to allow alternative (non JCT prescribed) solutions for existing structures and contents cover to be adopted through a Replacement Schedule. This is an attempt to provide flexibility where works are being undertaken in only part of a multiple occupancy building. In such circumstances it can be difficult for the Employer to obtain Contractors All Risks cover because of the risk of a specified peril such as a fire starting with the works and also causing damage to neighbouring properties or their contents in the rest of the building.

Works Insurance may also not be available for works carried out by tenants where insurance of the existing structures is the landlord’s responsibility.

Often the value of the works themselves and the additional risk in respect of the structures and contents of the rest of the building is within the cover that a contractor has or can obtain under the contractor’s public liability insurance. However where a tenant-employer is in a building in multiple occupancy, the overall value of the structures for the whole of the building and contents belonging to the other tenants or the Landlord, may be beyond the contractor’s public liability cover. Where this is the case alternative insurance arrangements involving different layers of cover and risk may be necessary. Such insurance becomes more complex the higher the value of the works and the greater the risks to the adjoining properties. Where the potential liabilities to the contractor exceed any agreed level of cover, the contractor may require an indemnity from the Employer in respect of any claims above those agreed limits.

Where there are existing structures on site but they consist of the building shell or retained façades that have a reinstatement value substantially less than the value of the works to be undertaken, the contractor’s works insurers may be prepared to extend Option A cover to include such structures and this is worth exploring before investigating alternative Option C cover.

It is therefore very important that a prospective employer seeks special insurance advice ideally prior to tender. Any employer-tenant should also consult his landlord on the insurance arrangements.

#### Any change to the provisions relating to terrorism cover?

No. The position remains that often joint names or risks cover of the Works excludes cover for acts of terrorism apart from (depending on the terms of the cover) a small level of cover. Accordingly terrorism cover needs to have been specifically required and an appropriate entry to this effect needs to be made in the Contract Particulars. This can be under the Pool Re scheme or other cover such as that provided by the Lloyds market. However, the terms of the cover should be checked carefully. Lloyds market cover does *not* include chemical and biological damage. Pool Re cover excludes nuclear, chemical and biological risks in respect of a residential property. Pool Re cover also always requires annual renewal. However, Lloyds market cover may be available on a project basis.

#### Does the contract require evidence of insurance to be provided?

Helpfully the provisions relating to evidence of insurance previously set out in each of the three Works Insurance Options are now consolidated into Section 6 and the insuring party is required to provide evidence of cover as the other party reasonably requires within seven days of a request to do so.

#### How are performance bonds and guarantees dealt with?

If a parent company guarantee or performance bond (or conceivably both) are required an appropriate entry will be made against Section 7 in the Contract Particulars. The new enabling provisions are dealt with in section 7 of each Contract which previously dealt only with assignment, third party rights and collateral warranties. This is a welcome addition as previously the requirement for such security from a contractor had to be added by way of amendment to the standard form.

#### What are Third Party Rights (TPRs) and how have they been amended in the Contract?

TPRs are an alternative to standalone collateral warranties. They are in similar terms to collateral warranties but importantly can be invoked simply by serving a notice on the party giving the warranty rather than that party having to execute a collateral warranty. In practice sub-contractor warranties are often difficult to obtain. Unlike other design parties on a project, design sub-contractors may be engaged as the works progress and the collateral warranty requirements can be overlooked or sought later when a sub-contractor has left site. JCT has now included as an option TPR's from sub-contractors which if used may reduce these difficulties. Previously the 2011 edition only provided for TPR's from the contractor.

JCT TPR's comprise Rights Particulars and Rights Conditions. As stated above the former part 2 of the Contract Particulars (in which the Contractor Rights Particulars were previously dealt with) has been deleted. JCT has also made certain other amendments as follows:

- the provisions in relation to professional indemnity insurance have been harmonised so that the provisions are the same in both the JCT standard collateral warranties in favour of a purchaser tenant and funder, as they are under the TPR's. Therefore the beneficiary of a warranty or the TPR's (as the case may be) will automatically receive an undertaking from the Contractor in relation to such insurance in the same terms as those given to the employer under the main contract. However, in sub-contracts it is still necessary for the employer in his Rights Particulars to specify the level of professional indemnity or product liability cover (as the case may be) that the contractor is to require from various sub-contract trades.
- there is now a net contribution clause included in the terms of the TPR's from the contractor and the JCT contractor warranties.
- a default provision has also been added (in clause 7.4.2) so that where the Employer or Contractor (as the case may be) has failed to specify whether rights are to be granted to a beneficiary by TPR's or a collateral warranty. In that case the grantee contractor or sub-

contractor can choose how to provide the rights whether by TPR's or a warranty.

#### Will Schedules of Amendments to the JCT terms still be used?

We anticipate that the answer is yes. Whilst JCT have addressed some of the amendments commonly made in the market, they have not included the principal amendments often sought by Employers.

In respect of DB (and the design portion of SBC) these often require the Contractor to accept full design responsibility. This may involve the novation of design consultants to the Contractor. As yet there is not a JCT novation agreement nor any operative provisions allowing for it in the new form. It is generally the case that under an unamended JCT DB Contract (and SBC design portion) the Contractor does *not* take full design responsibility. The Contractor is liable for the Contractors Proposals only in response to the Employers Requirements.

Many main contractors also amend the JCT subcontracts to reflect their standard terms as well as to step down amendments made to the main contracts terms and conditions.

Suzanne sits on the JCT Drafting Subcommittee and JCT Council. She is Head of Construction at Wedlake Bell Solicitors.



Suzanne's practice covers all issues relating to construction projects including contract drafting and dispute advice and resolution.

Suzanne has over 25 years' experience in the construction industry dealing with both contract drafting and disputes (domestic and international), acting for most sectors of the industry and involving a wide range of projects large and small, such as house building, office and retail development, manufacturing plant, hospitals, sports stadia and infrastructure.

## JCT MINOR WORKS 2016: INSURANCE PROVISIONS

BEN PATTON, PARTNER AND SADIA MCEVOY, EXPERTISE – ASHURST



Ben Patton



Sadia McEvoy

The JCT Minor Works Building Contract (Minor Works) is designed for smaller, basic construction projects where the work is of a simple nature. Accordingly, the insurance provisions are shorter and simpler than those in contracts such as the JCT Design and Build Contract. However, it is still very important to carefully consider the insurance provisions contained in Section 5 of the contract and ensure that they meet the project requirements.

Section 5 provides for three types of insurance: **public liability insurance, employer's liability insurance and insurance of the Works** (and potentially of existing structures). Public liability insurance covers the contractor's liability arising from death or personal injury to third parties and their liability for damage to property. Employer's liability insurance covers claims arising from injury or death to the contractor's own workforce. Works insurance covers physical damage to the Works and site materials.

When insuring the Works, the Minor Works contract caters for three alternatives:

### Clause 5.4A

Under clause 5.4A the contractor takes out Works insurance and each Party is covered under the policy as a 'composite' insured. This means that although it is the contractor who insures the Works, the employer is separately covered under the same policy in respect of their interest. Clause 5.4A insurance should be taken out where there are no existing structures (i.e., on 'new builds').

### Clause 5.4B

Clause 5.4B provides for a different insurance arrangement and is for use where there are existing structures. For example, a Minor Works contract might be used by a tenant to carry out certain fit-out works on one floor of a building and part of the necessary insurance arrangements would involve ensuring that cover is in place in the event that a fire started due to the Works and destroyed not only the Works but the building as well.

Under clause 5.4B rather than the contractor insuring the Works, the employer arranges composite cover for the Works and for the existing structures. However, the insurance cover in respect of existing structures is not on an all-risks basis (like the Works insurance) but only applies to loss or damage due to a 'Specified Peril', for example, fire.

### Clause 5.4C

Experience has shown that there can often be difficulties in arranging satisfactory joint cover in respect of existing structures under a policy held by the employer. Before the introduction of the 2016 suite, the Minor Works dealt with these difficulties by offering a third option

(clause 5.4C) that envisaged two separate policies: the Employer taking out cover in its sole name in respect of existing structures (under clause 5.4C) and the Contractor insuring the Works (under clause 5.4A). However, this was potentially onerous for a Contractor because without existing structures cover they could end up being liable for damage occurring to those structures due to their negligence.

The significant amendments in the 2016 contract reflect JCT's acknowledgement of these difficulties and their efforts to alleviate them by improving the flexibility of the provisions and giving the parties freedom to sort out their own bespoke insurance solution. In particular, JCT was aware that problems can occur where a homeowner finds the cost of obtaining appropriate cover prohibitive, or when the Works are being procured by a tenant and the insurance arrangements are more complex than the old clause 5.4C was able to cater for, for example, because it is the freeholder who is responsible for insuring the building or an intermediate lessor. As a result, the new clause 5.4C permits insurance of the Works and existing structures by "other means".

If the parties want to insure by "other means" they must state this in the Contract Particulars by deleting options 5.4A and 5.4B and retaining the option that states "Clause 5.4C (Works and existing structures insurance by other means) applies". They are also required to identify the documents containing the bespoke arrangements they have agreed upon. As the footnotes to this choice indicate, it is vital that if this option is being considered the parties should consult the employer's insurance advisers prior to the tender stage. In addition, if the employer is a tenant whose landlord insures the structure they should also consult them prior to that stage.

The principle of giving greater flexibility to the parties in relation to their insurance arrangements is mirrored in the JCT 2016 Edition of contracts designed for larger projects, which also provide for alternative solutions through the concept of a "Replacement Schedule" which enables the parties to replace the options on offer within the contracts with their own bespoke arrangements. These changes have been widely welcomed within the industry as adopting a practical and sensible approach to a difficult issue.

There are a few other less significant changes to the insurance provisions, designed to simplify and clarify. It is worth noting that JCT has not provided for professional indemnity insurance, so if the contractor is carrying out any design the employer may wish to amend the standard form to cater for this.



# JCT MINOR WORKS 2016: PAYMENT MADE EASY

PETER HIBBERD



Peter Hibberd

The interim payment process need not be difficult. Actually, it is quite straightforward under the JCT framework for payment, which complies with the requirements of legislation and reflects the fair payment charter.

An easy way to understand the process is to recognise that the Interim Valuation Date (a defined term in the contract), which also applies to JCT sub-contracts and sub-sub contracts, is the key factor in the contractual time framework.

At pre-contract stage it is necessary to state the first Interim Valuation Date and also the interval between Interim Valuation Dates and to insert these in the Contract Particulars. In arriving at what these should be, users should take note of the following:

- the employer's internal payment processes;
- the first Interim Valuation Date should not be more than one month after the commencement date; and
- the intervals between Interim Valuation Dates should not be more than one month.

The Interim Valuation Date determines the due date for each interim payment which is the date 7 days after the relevant Interim Valuation Date (clause 4.3).

Payment of each interim payment must be made within 14 days from the due date of the interim payment (i.e. 21 days from the Interim Valuation Date).

That simple structure sets out the time framework but in order for a payment to be made it is necessary to certify the amount of each payment. The Architect/Contract Administrator shall within 5 days of the due date for each interim payment (i.e. 12 days from the Interim Valuation Date) do this by issuing an interim certificate.

The amount to be stated as due in the interim certificate is made up of the applicable percentage (e.g. 95%, as stated in the Contract Particulars at 4.3) of the value, as at the **Interim Valuation Date**, of:

- work properly executed etc. as clause 4.3.1; and
- materials and goods reasonably and properly on site as clause 4.3.2.

Both of these amounts are then adjusted for any fluctuations that are stated in the Contract Particulars

(4.3 and 4.8) to apply and from that total amount the following are deducted:

- total of sums stated as due to the Contractor in previous interim certificates;
- any sums paid in respect of any payment notice given by the Contractor after the issue of the latest interim certificate;
- any amount deductible under clause 2.10 (2.11 in MWD) for defects not to be made good; and
- any amount deductible under clause 3.5 for non-compliance with instructions.

The resulting amount is that which is stated as due in the interim certificate. The amount stated as due must then be paid within 14 days from the due date of the interim payment unless the Employer issues a pay less notice in respect of that amount not later than 5 days before the final date for that payment. Where the Employer issues a pay less notice the payment due is not less than the amount stated in that notice.

Where the Architect/Contract Administrator fails to issue a certificate on time, or not at all, the process is different but nevertheless it is still straightforward. Where the Contractor has in relation to an interim payment made an application for payment, which it may do so not later than the Interim Valuation Date under clause 4.4.1, then this application becomes a payment notice (4.4.2.1) and is treated in much the same way as a certificate, had one been issued.

If the Contractor has not made an application under clause 4.4.1 then under clause 4.4.2.2 it may do so at any time after the latest date for issuing the relevant certificate (i.e. after expiry of 5 days from the due date for the interim payment). The only difference in the process thereafter is the final date for payment of the sum specified in the payment notice is postponed by the same number of days as the number of days after the expiry date (for issue of the certificate) that the Contractor's payment notice is given.

In both of the above cases the Contractor's application shall state the sum it considers due to it at the relevant due date in accordance with clause 4.3 – that clause requires the amount due at the due date to be the valuation of work and materials as at the **Interim Valuation Date**.

## JCT INTERVIEWS...



### MARC HANSON

**Member of the JCT Council  
Chair of the Performance  
Bond Working Group**

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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.

Marc Hanson is a partner and Head of the Construction team at international law firm Berwin Leighton Paisner LLP. He has over 25 years' experience advising on UK and international construction and engineering projects with values of up to £18 billion. He represents the British Property Federation on the JCT Council.

Marc can be reached at <https://www.linkedin.com/in/marc-hanson-7177a023/>

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

MH: I was introduced to the work of the JCT by Ann Minogue over 12 years ago. Ann and I worked together at Cameron McKenna and I learnt everything I know about construction law whilst working with her. Ann was involved with the JCT for many years as a representative of the British Property Federation and played a significant role in ensuring that the construction clients' voice

was heard in the drafting and evolution of the JCT contract suite.

Like Ann, I represent the BPF in my work with the JCT. Initially I sat on the JCT Drafting Committee and later I was appointed to the JCT Council. After 6 years on the Drafting Committee I stood down following the publication of the new 2011 JCT suite of contracts. Since then I have focused my time on the work of the Council.

The JCT is a unique contract drafting body as it brings together all sides of the industry in the drafting of its contracts. As such JCT contracts are now well balanced in terms of risk and this in turn has led them to become the contract of choice for private sector construction clients. My role as a representative of the BPF is to ensure that the concerns of such clients continue to be addressed in the drafting of the JCT contracts.

**JCT: Can you tell us about any specific work you're currently doing with JCT – through any boards, groups or committees, for instance?**

MH: I have been appointed chair of a working group to look at the drafting of the JCT forms of bond. Whilst the JCT has agreed forms of bond in relation to advance payments, off site goods and materials and retention, it has not been possible in the past to agree a form of on default performance bond. There is now a real will across the various JCT colleges to fill this gap in the JCT suite of documents.

**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?**

MH: I have had the good fortune to work on a number of very challenging projects for some very professional developer clients. The ones that stick in the mind are those where the client has focussed on place making rather than just development. Indeed the UK construction industry is fortunate to have some very forward thinking clients and together they have produced some world class projects. I think the quality of most major UK construction projects, including their architecture and engineering, is excellent especially when compared to what we see (and litigate) overseas. Unfortunately the industry can be rather introspective, focussing on things that

go wrong and not celebrating the many more things that go right. In particular there is a conviction that the UK industry is particularly riven by disputes. Construction projects are highly complex yet in my experience they do not generate more disputes than any other complex projects. In addition there are no more construction disputes in the UK than in other jurisdictions where the rule of law applies.

Where things do go wrong it is often due to payment issues. Various initiatives from Government and industry have tried to address the worst aspects of payment abuse but past results have not been particularly successful. Given the importance of freedom of contract a legislative solution may not be the most appropriate remedy. Encouraging (one way or another) better payment practices by all employers and main contractors would be a better solution.

**JCT: What do you see as the main challenges for the construction industry over the next five years?**

MH: The uncertainties thrown up by Brexit will have a major impact on the construction industry over the next five years. The devaluation of sterling and resultant inflation are already impacting on material and wage costs and that impact is likely to increase in the medium term. Increasing labour costs will be exacerbated by likely restrictions on the hire of non British labour once the UK leaves the EU. Construction employers should not expect a sympathetic hearing from politicians who will want to see them training up UK workers rather than hiring foreigners. All of this will of course have a cost impact and that will ultimately need to be picked up by construction clients.

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

MH: The JCT suite of contracts are the most widely used contracts in the UK. As such the JCT should (and increasingly does) take a leading role in educating users in the use of the contracts. In addition as a body that represents all sides of the industry it is uniquely placed to educate construction procurement professionals on a collaborative and consensual approach to construction procurement. After all, JCT contracts do not just include a few lines on collaborative working, they are all the product of actual cross industry collaboration.

# JCT NEWS

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- We've made the works and existing structures insurance provisions more flexible.
- We've revised and simplified the Section 4 Payment provisions, including:
  - Establishing (for Fair Payment purposes) Interim Valuation Dates that apply to main contract, sub-contract and sub-subcontract levels
  - Increased flexibility in relation to fluctuations provisions
  - Consolidating the notice requirements of the Housing Grants, Construction & Regeneration Act 1996.
- We've included provisions for the grant of Performance Bonds and Parent Company guarantees.
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