

# JCTNEWS

THE JCT CONTRACTS UPDATE FOR THE CONSTRUCTION PROFESSIONAL

## RAVEN'S ENCLOSURE, TOWER OF LONDON

Legend has it that the kingdom will fall should the ravens ever leave the Tower of London. It was extra important therefore to provide a safe and comfortable new habitat for the iconic birds – one that was sensitive to its historic environment and enhanced their role as a visitor attraction. With a careful and collaborative approach required, the JCT – Constructing Excellence Contract provided the contract solution.

The ravens of the Tower of London are an important part of British cultural folklore and history, and a feature of one of our most historic buildings. In creating a new enclosure for the ravens, there were three important considerations: one – to provide a safe and clean night accommodation; two – to minimise the impact visually (in terms of design and materials) and physically (in terms of the construction process) on the surrounding historic fabric; three – to improve the facility as part of an overall series of enhancements to provide increased educational and public engagement.

To achieve these objectives, special consideration was given to both design and construction. Every detail, in terms of materials selected, method of construction, design, and accessibility has been carefully thought out to ensure the welfare of the animals, protect and enhance the visibility of the ravens against the historic background, and promote greater public engagement.

The brief and design for the project was developed in consultation with Historic Royal



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Palaces, the independent charity that cares for the Tower of London, the Ravenmaster and with specialist input from the Zoological Society of London. The design of the enclosure was evolved through a process of simplification and refinement. By using restrained detailing and selecting materials to ensure durability and low maintenance, the structure is able to work in harmony with a UNESCO World Heritage Site and Scheduled Ancient Monument.

The frame for the enclosure is created with a series of English oak slatted structures. Oak was used specifically because of its reference to the historic use of the same material in construction on the historic site. Each section contains the ravens' night boxes and frames the open space between them, against the White Tower. Slatted sliding gates provide access to the open areas of the enclosures, allowing them to open on one another, whilst maintaining transparency through. The night boxes are also crafted from oak, with small, finely detailed wicket gates. As the ravens are allowed free reign of the tower during the day, openings in the rear allow the birds free access. Tensioned stainless steel netting forms the caging of the enclosure. These are woven with two different types of weave pitch. A tight weave at the base prevents foxes from penetrating the enclosure, whilst a wider weave is used above to maximise transparency.

Maintaining transparency was particularly important as it was desired to show the ravens in their setting against the Tower – allowing them to be visible to the public at all times. This also applied to the roof of the enclosure, as the ravens are highly visible from the Wall Walk and the White Tower steps above. The height of the enclosure was designed to align with the adjacent lawn. Building on the public access, the setting includes an area of decking designed for an expanded programme of educational talks and workshops.

Putting together the project required a great deal of collaboration – between the client, architect, contractor and numerous specialist craftspeople. Due to the archaeological presence on the site, it was necessary to be flexible with the type and position of the foundations. As such, the enclosure has been constructed to be free-standing from the historic fabric. Much of the design was developed to be



fabricated off-site, meaning that public access could continue throughout the construction phase, and this also minimised the impact of having a prolonged on-site presence.

With the need to be flexible during construction, utilise a range of specialist crafts and skills, be sensitive to the public, and to work within the site of such an ancient and protected building, such a project requires a concerted effort from

all parties to be open, collaborative, and share risks and challenges equally. By using the JCT – Constructing Excellence Contract, the client is provided with a framework to ensure that all parties are in a position to achieve full partnering. This helps to enable an open and collaborative approach. Much like the enclosure itself, the JCT CE contract is a support within which work can be carried out with full transparency.

## PROJECT DETAILS

<b>Start</b> .....	February 2015
<b>Completion</b> .....	July 2015
<b>Floor area</b> .....	50m <sup>2</sup>
<b>Contract</b> .....	JCT – Constructing Excellence Contract
<b>Architect</b> .....	Llowarch Llowarch Architects
<b>Client</b> .....	Historic Royal Palaces
<b>Structural Engineer</b> .....	Hockley and Dawson Consulting Engineers
<b>Quantity Surveyor</b> .....	Historic Royal Palaces
<b>Specialist Steelwork</b> .....	N H Ricketts Engineering Ltd
<b>Contractor</b> .....	Ward & Co (Building Conservation Ltd)
<b>Stainless Steel Mesh</b> .....	MMA Architectural Systems
<b>Electrical Contractor</b> .....	P J Oliver Electrical Services

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## WILL WE EVER COLLABORATE?

### Chairman's Letter



Richard Saxon CBE

2016 was another year in which insightful reports were published castigating the UK construction industry for its dysfunction and making recommendations that may or may not ever be acted upon. The recent much publicised Farmer Review: 'Modernise or Die', was preceded by 'Collaborative Construction: More myth than reality?', produced by Pinsent Masons. Mark Farmer joined the December meeting of JCT Council to discuss his report's implications for contracts.

The Collaborative Construction report is the result of a wide consultation and strong analysis. It sees pressure mounting to change the way we work as the potential of new technology becomes apparent. Collaboration is both enabled by BIM and enables better use of BIM. Digital technology is bringing the potential of whole-life optimisation of the built environment. Yet the industry resists change in its short-termist, silo-based working approach. Many reasons are identified:

- We are comfortable with the familiar, even though it underperforms;
- We perceive collaborative working to be more costly and time-consuming;
- Those involved in any project for a limited time think in the short term;
- Incentives tend to be sticks rather than carrots;
- Industry leadership is quiet on the issue and frustrated by the industry's fragmented nature;
- Clients are reluctant to share project control;
- There is little training in collaborative working on offer;
- The most used standard forms of contract and professional appointments do not embrace collaboration;
- Insurance models are based on the familiar allocation of risk.

They suggest several shifts that they believe would help move the situation forward:

- Project success measurement needs to become based more on whole-life outcomes. Completion on time and budget is too limited a view of value;
- BIM blurs responsibilities (beyond Level 2) and contract-writers and insurers need to respond. Project insurance and latent defect cover should replace approaches which drive team members apart;
- Single-stage tendering should go, with the constructor ideally on board before design is committed, either in charge of the supply team or in partnership with the client and consultants (similar to the US definition of Integrated Project Delivery);
- Clients should share control of the project with their team, to avoid self-inflicted risks; decisions should be unanimous;
- Consultants should rethink their aversion to delivering fitness for purpose; they stand to descend to tier two level otherwise;
- Gainshare incentives, right down the supply chain, would oil the collaborative wheels without costing the client;
- Alliancing styles of contract may be the best route forward, based on a project board, collaboration, risk-sharing and use of digital technology;
- It will take more time and cost to set up better projects, but it will pay back.

Some of these ideas are bold and need more development. A second Collaborative Construction report is promised in mid-2017 to take them further. I will be staying close to this process to assist JCT in developing forms of contract for Level 3 BIM use and for the broader future.



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## OBTAINING PLANNING CONSENT – WHAT IS YOUR RESPONSIBILITY?

EMILY DICKSON AND EMILY PITTAWAY – BLP LAW

Securing planning consent is a fundamental first step for any development project.

Where a building contract does not expressly oblige either party to apply for or obtain planning consent, or other project specific approvals such as conservation area or listed building consent, who bears this responsibility?

This is an important issue, particularly in circumstances where such consents are not obtained in time for the works to start. If responsibility falls on the employer, then the contractor may be entitled to an extension of time or an adjustment to the contract sum.

This was a key preliminary issue in the recent case of *Walter Lilly & Co Limited v Jean Francois Clin* [2016].

### The Walter Lilly case

The case concerned a dispute between Mr Clin (the claimant employer) and Walter Lilly (the defendant contractor) about who was responsible for obtaining the necessary consent for demolition works to be performed.

The employer engaged the contractor under an amended JCT Standard Building Contract 2005 (with Contractor's Designed Portion) (Revision 2, 2009). The contract required the contractor to ensure that any works it designed would comply with statutory requirements, but did not include an express term requiring either party to obtain planning or conservation area consent. The local authority subsequently notified the parties that the proposed demolition works required conservation area consent (which the court noted formed part of the planning permission and no longer existed as a separate consent).

It was common ground that the primary responsibility for *applying for* planning (including conservation area) consent rested with the employer.

However, a key question for the court was whether there should be an implied obligation on the employer to ensure that consent was *obtained* prior to the commencement of the works.

If this obligation fell on the employer, and he failed to do so, with the result that the contractor could not reasonably be expected to continue with the work, in the court's view that would have amounted to an act of prevention and therefore a Relevant Event under the contract.

The court held that, in the absence of an express term to the contrary, the employer was under an implied obligation to provide in good time to the local authority

the information that its planning officers required to determine the application for consent.

However, he did not have an absolute obligation to secure the consent, because he could not guarantee that consent would be granted. The court found no justification for imposing on the employer (or the contractor) sole responsibility for the consequences of capricious conduct by the local authority.

If the employer supplied the information that was reasonably necessary for the planning officers to make their decision in good time, both at the outset and in response to any reasonable requests, then he would have discharged his duty.

### Final thoughts

Permission has been given to appeal the decision, and the Court of Appeal is expected to hear the appeal in July 2017.

In the context of a traditional procurement route, such as that in *Walter Lilly*, it is perhaps not surprising that the employer was held responsible to apply for, and supply information in respect of, the planning consent (and other project specific approvals) in the absence of any express provision to the contrary.

However, where the contractor is responsible for all activities from design through to commissioning under a 'turnkey' arrangement, the position may well be different.

The *Walter Lilly* case offers a reminder for employers and contractors alike to ensure the contract terms expressly reflect the parties' intentions. It is good practice to take account of planning issues by:

- identifying at the outset all necessary consents (including any project specific approvals such as listed building and conservation area). Any consents the employer will apply for or has obtained should be stated in the Employer's Requirements. The contract should also state whether the contractor is responsible for obtaining any other consents needed for the works;
- ensuring that the programme takes account of statutory and other time periods for obtaining the consents, including an allowance for delays or potential challenges;
- identifying who is responsible for appealing any decisions and in what circumstances they must appeal; and
- including express terms allocating the risk that necessary consents may not be obtained.

## NOT SO STANDARD CONTRACTS

PETER HIBBERD

*After Brexit, the UK is to go its own way regarding procurement and contracts but it will still have to work within parameters set by others if it is to trade internationally - something which JCT will continue to pursue regardless of the UK's membership of the EU.*

During the past year, few subjects have created as much angst and foreboding as Brexit even though its definition is unclear – perhaps that is the problem. This article does not repeat the well-trodden arguments over European Union (EU) membership but considers standard construction contracts in the context of the EU and the UK's decision to leave.

Each EU member state has primary responsibility for the regulation of most matters within its jurisdiction and, consequently, each has its own laws. This is equally true in respect of construction contracts, which are a matter of private law albeit often reflecting public law, such as that around procurement. This means conflict can arise between the laws of a member state and those of the EU and, should this happen, the law of that member state may be held inapplicable because EU law has supremacy. On leaving the EU, this would no longer apply.

Much EU work in terms of trade has concerned harmonisation. It has aimed to achieve consistency in laws, regulations, standards and practices to create fairness and efficiency and overcome trade barriers created by differences between national laws, and is implemented through EU directives.

There are limits in designing a system to incorporate different legal systems and conflict can emerge. However, this has not prevented the EU from endeavouring to set up such a system, for instance in its work on contract law. This confirms its longer-term objective to achieve uniformity in member states' laws, whether through legislation or by convergence. A passive approach arising through custom and usage is a pertinent issue.

The overall objectives of reducing trade barriers caused by fragmented national systems and of reducing transaction costs are laudable. Such objectives are identical to those of the Joint Contracts Tribunal's (JCT) sphere of operation.

To get many members to agree is always difficult, more so where different legal systems, cultures and languages exist. JCT is constituted, albeit UK centric, in a similar way to the EU, with members seeking solutions and outputs through collaboration.

Even in the narrow area of construction contracts, priorities are different and reaching agreement, even where achievable, can be lengthy. Not everyone in the UK is prepared to sign up to a single contract or even to adopt contracts from a single authoring body. What chance therefore for either to be achieved across the EU?

The UK is to go its own way now and adopt its own solutions – as far as it can. That is the crucial point. We all work within parameters, many set by others. JCT seeks views and requirements from across the property and construction industries to provide standard contracts that reflect good practice for a particular procurement route. In doing so, it is cognisant of many other factors both internal and external to the UK – these factors will remain after Brexit.

Once a JCT document has been published, it is up to the market to decide whether to use it. Practitioners may amend it to address specific issues without destroying the principal benefits. In contrast, an EU directive becomes law and, while member states can choose the form and method of its implementation, they must comply.

After Brexit, new EU law will not apply to the UK existing law will remain and affect construction until it is changed or repealed. That process is likely to be ad hoc with pleading from interested groups, and much may be left as it is. Either way, this will not unduly affect standard construction contracts but it will affect procurement, specifically framework-type agreements.

Leaving the EU will mean that, while operating in the UK, one is subject only to laws enacted by the UK parliament; it does not mean we can ignore laws other than our own if we are to continue to take a global perspective.

The impact of Brexit on construction contracts, compared with procurement and the sale of goods, will be small. However, if the UK had not decided to leave, the EU's desire to establish EU contract law would have brought another type of uncertainty and had far greater effect. Even so, that might be a small issue compared with the difficulties presented by the greater involvement that will be needed with many other jurisdictions throughout the world. Clearly, properly formulated standardisation, wherever achieved, offers transactional benefits and improves efficiency.

**This article was first published in Building Magazine on 9th December 2016.**



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

SUZANNE REEVES – PARTNER, WEDLAKE BELL

### JCT Design and Build 2016 Contract

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.

In summary, these are:

- Introduction of common “Interim Valuation Dates” which will apply throughout the contract chain including at sub-contract and sub-sub-contract tiers.
- Introduction of a procedure for prompt assessment of Loss and Expense claims.
- Consolidation in a single sub-section of the payment notice requirements of the Construction Act.
- Amendments to reflect the CDM Regulations 2015.
- Consolidation within the main text of the general provisions of Insurance Options A, B and C and ability to adapt bespoke existing structures requirements.
- Flexibility in relation to adoption of Fluctuations Provisions (if used).
- Inclusion of provisions for the grant of Performance Bonds and Parent Company Guarantees.
- Inclusion as an option of Third Party Rights instead of collateral warranties for sub-contractors.
- Updating of the wording of clause 1.8 (Effect of Final Certificate) to bring JCT Design and Build into line with amendments already been made to other JCT contracts in the 2011 editions.
- Inclusion of a new clause 1.10 to eliminate the need for multiple repetitions of the requirements for consents and/or approvals not to be unreasonably delayed or withheld.
- Inclusion of the Public Contract Regulations 2015 for public sector works.
- Minor updating of the intellectual property provisions.

### JCT Standard Building (SBC) Contract 2016 (November 2016)

In addition to the amendments referred to above:

- The main contract form now incorporates (in Supplemental Provision 9 in Schedule) the provisions of the JCT 2012 Named Specialist Update which previously was published separately. Clause 3.8 of the SBC contract conditions continues to offer the employer some control over the selection of specialists by providing for selection from an (adjustable) list of three or more approved sub-contractors. This is for discrete work packages identified in the Contract Documents. However, where Optional Supplemental Provision 8 is utilised by reference in the Contract Particulars, the employer can name individual specialists for work packages that fall outside the Contractors Designed Portion. This can be either pre-contract or post-contract. In the latter case the work will be identified as the subject of a Provisional Sum.
- The Articles of Agreement remain in their previous format but reference to them has been dropped from the Agreement heading.
- “Measurement Rules” are defined as the RICS New Measurement Rules, unless otherwise stated. These rules supersede the Standard Method of Measurement.
- “Site Manager” now supersedes “Person in Charge”.

### Frequently asked Questions on JCT Design and Build (DB) and Standard Building (SBC) Contracts 2016

#### Has there been a change in the risk profile?

JCT’s stated aim was that the 2016 edition amendments do not materially affect risk allocation. However it is unusual for an unamended JCT contract to be used particularly where JCT Design and Build is the form of procurement. Where there is a Schedule of Amendments agreed between the parties, those amendments will themselves change the risk allocation.

#### How will Third Party Rights (TPR’s) be granted in the new editions now that this is an option for sub-contractors to grant such rights?

The Contract Particulars in the Articles of Agreement have been simplified by the deletion of part 2 of the Particulars. This used to set out the warranty and TPR requirements but sometimes caused confusion. Instead employers who have developed their own forms of third party rights and collateral warranty requirements can now incorporate these by reference in the Particulars. Alternatively JCT has on its website model forms for the “Rights Particulars” if the Employer does not have bespoke ones. (See below for more detail on TPR’s.)

#### Are the Contract Particulars entries the same?

The Contract Particulars have been simplified by the deletion of part 2 of the Particulars (as referred to above); the insertion of a new entry against clause 1.1 for the identification of any BIM protocol and to give a wider choice of provision in respect of fluctuations provisions in section 4 (if they start to be adopted again). There is also an additional entry for clause 6.7 and Schedule 3 relating to insurance to reflect the amendments made to insurance option C. This allows a replacement schedule for existing structures insurance (as to which see below).

#### Are the contracts still executed in the same way?

Yes each contract can still be executed either as a deed thereby attracting a twelve year limitation period or underhand thereby attracting a six year limitation period. The only change is to allow a foreign company Employer, which is not operating through a UK subsidiary, to be able to execute the contract in accordance with its own corporate requirements.

#### If a BIM protocol is included in the contract what order of precedence does the protocol take?

Some model protocols provide that the provisions of the protocol override the Agreement and other Contract Documents,

JCT does not consider that unqualified overriding provisions are appropriate and therefore clause 1.3 which deals with the precedence of documents has been amended slightly to make it clear that the Articles of Agreement and Conditions take precedence over any BIM protocol. However, a new clause 1.4.6 has been added to provide that where there is a BIM protocol or other protocol relating to the supply of documents or information documents should be in a form or medium conforming to that protocol.

**If there is a BIM protocol what effect will that have on the Design Submission Procedure?**

A. Clause 2.8 provides for the supply of the Contractors Design Documents as specified by the BIM Protocol, if one is applicable. If not the procedure set out in Schedule 1 (the existing Design Submission Procedure) will apply subject to any modifications to it specified in the Contract Documents (the definition of which includes the BIM Protocol, if there is one).

**What changes have been made to the intellectual property provisions?**

The wording in clauses 2.19 and 2.20 of DB and clause 2.21 to 2.23 of SBC have been amended. There is some minor rewording in clauses 2.19 of DB and clause 2.21 of SBC. New clause 2.20.2 of DB and 2.23.2 of SBC requires the Contractor promptly to notify the Employer if he is or becomes aware that complying with any instructions may infringe any patent rights. Such instructions will not then take effect unless confirmed by the Employer. If so confirmed any royalties damages or other sums payable by the Contractor will be added to the Contract Sum. However the general principles embodied in the clauses remain the same.

**What changes have been made to the payment provisions in Section 4?**

Generally the section has been rearranged with a view to simplification. There are now eight subsections in a more logical order. A general payments and notices provision has also been included.

However, the main change is the establishment of **Interim Valuation Dates** which are common valuation dates also intended to apply to sub-contracts and sub-sub-contracts. This has been introduced in order to comply with the Government's Fair Payment campaign by providing a common assessment date throughout all tiers in the contractual chain. If the payment provisions are unamended, payment will be made from the top to the bottom of the chain within thirty days. The Interim Valuation Dates will be specified in the Contract Particulars and Sub Contract Particulars.

Under clause 4.7.3 of DB the Contractor is required to make an Interim Payment Application in respect of each interim payment before each Interim Valuation Date. Subject to the application being made late, (which is dealt with in clause 4.7.3), the due dates for interim payments are 7 days after the relevant Interim Valuation Date.

Under SBC the Contract Administrator is required to issue an Interim Certificate no later than 5 days after each Interim Valuation Date, being the due date in each case. The Contractor may (but is not required to) make an application for payment by the Interim Valuation Date.

Employers (and in relation to sub-contracts, Contractors) should bear in mind that under the Contract Particulars, Interim Valuation Dates in certain months will be altered to the nearest Business Day in the month. That alteration will directly affect the due date and also the five day period for the issue of the payment notice, the last day for giving a Pay Less Notice and the Final Payment Date. This is particularly noteworthy given the importance of serving the relevant notices in time and the consequences of not doing so as determined by the Court in recent cases when the amount of the Contractor's application may become payable however inflated.

**What are the Public Contract Regulations 2015 (PC Regulations) and when will they apply?**

These apply to works procured by a local or public authority employer and not to private

sector projects. Where they do apply new Supplemental Provision 12 includes provisions to reflect the sub-contracting requirements of Regulation 71. Under this regulation there is an obligation on a public employer to require the main contractor to provide basic information on his sub-contractors and to keep that information updated.

The inclusion in the contracts of relevant provisions relating to the PC Regulations also means that there are three new termination events set out in Section 8. These would be implied into the contract in any event but JCT has chosen to include (in express provisions) both the basis on which they will be exercised and the consequence of termination. Obviously it remains to be seen if the PC Regulations are repealed or amended in the light of Brexit.

*Part two of this article will appear in the April edition of JCT News.*

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 and wide range of projects large and small, such as house building, office and retail development, manufacturing plant, hospitals, sports stadia and infrastructure.

## TRUST, RELATIONSHIPS, AND CLEAR OBJECTIVES: TONY GIDDINGS TALKS COLLABORATION AT JCT POVEY LECTURE 2016

“Collaboration: how Argent developed its successful way of working” was the title of the JCT Povey Lecture 2016, given by Tony Giddings at The Building Centre, London on Thursday 10 November.

Tony Giddings described how Argent’s collaborative approach has led to the successful delivery of over £1.2bn worth of construction projects, including Brindleyplace in Birmingham, Thames Valley Park in Reading, Piccadilly Place in Manchester and recently, the redevelopment of the 69-acre site at King’s Cross in London.

Tony identified a number of factors that, in Argent’s case, were crucial to ensuring that a collaborative working philosophy could be successfully implemented throughout the project team. This focused on trust, establishing good and lasting relationships, and setting clear objectives and responsibilities:

“Form the team: as the client you are the catalyst for the form of relationship that’s formed on a project [...] you’re the one

who’s actually going to make the team work together well.

“Too often, we as clients don’t really tell the architect how far we want them to go [...] I’m quite clear about it. Similarly with the consultants [...] define those duties.

“Retain them [the team] if they are any good [...] you always will make mistakes on a project, if you make mistakes on that project, you’re not likely to make it again on the next one. [...] And every building’s a prototype, so the more you can bring along the same team and work time and time again, the better.”

Tony Giddings’ final project with Argent, before stepping down this year, was the redevelopment of the 69-acre site at King’s Cross, London. With a significant amount of the development given for use by the local community, including areas for retail and public leisure, affordable housing, and a new building for the University of the Arts, Tony explained how a collaborative approach can move beyond just the project team, to ensure

investment from all parties:

“Collaboration is not just collaboration within our industry in terms of delivery. It’s also collaborating with the local authority, the planning authority, the end users, the funders, the landowners. It’s all about collaboration. And doesn’t that make sense?”

A video of Tony Giddings’ Povey Lecture can be viewed at: <http://corporate.jctltd.co.uk/jct-povey-lecture-2016/>

The JCT Povey Lecture is an annual event at which an eminent person is invited to give their thoughts on significant matters that are relevant to the construction and property industry. The purpose of the lecture is to stimulate thought and encourage ways of continuing to improve the quality and value of construction output.

The event was inaugurated in 2003 to acknowledge and pay tribute to Phillip Povey, who served JCT for fifty years. More information is at: <http://corporate.jctltd.co.uk/category/jct-povey-lecture/>

## JCT 2016 EDITION OF CONTRACTS – LAUNCH WEBINAR

The JCT webinar, “JCT 2016 Edition of Contracts”, hosted by Building, was broadcast live on 23 November 2016. The webinar was set up to provide more information to JCT users about the 2016 Edition, specifically covering the main areas of change. This session included information on:

- Introduction to the 2016 Edition
- Building Information Modelling (BIM)
- The Public Contracts Regulations 2015
- Payment

- Insurance
- Performance Bonds and Guarantees, Third Party Rights and Collateral Warranties

The Webinar included the following expert speakers:

**Victoria Peckett** – partner, head of construction, CMS Cameron McKenna LLP; chair, JCT Drafting Sub-Committee

**John Riches** – arbitrator and adjudicator, Henry Cooper Consultants Ltd; vice-chair, JCT Drafting Sub-Committee

**Ben Patton** – partner, Ashurst LLP; member, JCT Drafting Sub-Committee

With over 2,500 registrations and over 100 questions submitted by viewers during the broadcast, the JCT webinar is the biggest and most successful webinar hosted by Building to date.

The Webinar can be viewed on demand, along with more information about the JCT 2016 Edition at <http://corporate.jctltd.co.uk/jct-2016-edition/>



## SKILLS SHORTAGE

**CHRISTINE TOWNLEY – EXECUTIVE DIRECTOR, CONSTRUCTION YOUTH TRUST**



It's been well known in the industry for many years that we are facing a skills shortage caused by an ageing construction workforce and the return to economic growth. It's vital that the industry plans for the future and secures the talent and skills needed, so that it has recruited effectively for the workforce of tomorrow. There is a lack of young people coming into the industry to sustain it at the moment - only about 10% of those working in the industry are aged between 19 and 24, with 1-2% aged between 16 and 18. But as the current workforce ages and retires, the sustainability of the industry lies with these young people and we all need to be doing more to nurture new talent and recruit the sheer numbers of young employees needed to get the industry ready for a brighter future.

According to CITB more than 182,000 construction jobs are set to be created in the next few years. It's a lot of people to recruit and train, especially in a time when, according to a report by Direct Line for Business, the gap between available apprenticeships in construction and those starting and completing apprenticeships has fallen. Apprenticeships are an excellent way of introducing young talent to the sector and now the higher level apprenticeships can also attract bright school leavers who would rather learn on the job than run up large university debts. However, how many young people consider construction as a career? Are they aware of the range of roles available and the opportunities it can bring them?

Construction Youth Trust is working to raise awareness of the range of construction careers available to young people. We work with young people every day and we know there is lot of talent within the 16-24 year old age range. Currently over 1 million of them are not in employment, education or training (NEET) so we urgently need to reach out to these young people. Through

the provision of courses aimed at both the trades and professions we enable them to discover the vast array of careers construction can offer. If we can raise awareness and inspire them, then we have a chance at solving the skills shortage issue we're facing.

Giving young people the chance to experience construction first hand through our courses and through work experience placements, the future talent of the industry can be exposed to the huge array of careers open to them in construction and the built environment. We need to work with the industry to raise awareness, not only amongst young people, but their parents, teachers and stakeholders about the roles available and the progression options they offer.

Vital to the growth of the industry and key to attracting more young people is to ensure the construction industry continues to challenge negative perceptions and celebrate diversity in the sector – specifically around encouraging more young women and those from the LGBT community to enter the industry.

There are many construction companies who support our work by offering work placements and funding courses – but with more support, we could reach even more young people - the future of the industry depends on it.

*Christine 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.*



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## 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.



## CHRISTOPHER J PROBYN MIERS

**JCT Council Member**  
**Member of the JCT Drafting**  
**Sub-Committee**

Christopher Miers is an architect expert in dispute avoidance and resolution in construction conflicts worldwide, with over 35 years' experience with standard and bespoke forms of international contracts. He is regarded as a leading negotiator and advisor in his various capacities as an arbitrator, mediator, adjudicator, and as a dispute board member. Christopher has been appointed in over 400 projects of up to €15m value and on claims in excess of €200m on multidisciplinary construction projects worldwide such as rail and transport systems, energy and power, skyscrapers and sports infrastructure. He is a co-leader who introduced the procedure rules for effective dispute resolution at 'Rio Janeiro 2016 Olympics & Paralympics'. He is a past president of the Dispute Resolution Board Foundation (DRBF)-Region 2, a 'FIDIC President's List' Approved Adjudicator and he serves on dispute boards and dispute adjudication panels worldwide. He is also RIBA representative to the Construction Industry Council Appeals Tribunal. In 1998 he founded 'Probyn Miers' which has grown to be the UK's leading 'think tank' of architects in forensic analysis and international dispute avoidance and resolution with offices in London and Dubai. He is past chairman of the Society of Construction Law; a visiting professor at Peking University, School of Transnational Law; a visiting lecturer in UK universities and a member of several international panels. He is a regular speaker on DAB/DBs and FIDIC contracts and lectures extensively at international forums on 'How to Avoid Disagreements Escalating into Disputes'. Christopher is also the author of several publications on dispute avoidance and resolution including the latest 'Delay and Disruption in Construction Contracts' (*Law-Routledge*, February 2016, 5th Edition); and "Real Time Dispute Resolution in Rio de Janeiro... Since you cannot Delay the Olympic Games" (*Construction Law Journal*, Special Issue: Dispute Boards, 2015).

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

CM: I was introduced to JCT by a distinguished RIBA member, John Hermsen FRIBA, now retired from practice and from JCT. I had worked for John when I first qualified as an architect in the early 1980s while I was working at Ahrends Burton & Koralek. John was a marvellous guide and mentor to me in professional practice. John and I both subsequently studied construction law at King's College London. My legal training formed the foundation for my specialist

work bridging across between everyday architectural practice and dispute avoidance and resolution.

For me it is important to be involved with JCT since I bring to the Council on behalf of the RIBA and the architectural profession an extensive understanding of the complexities of the role of the architect combined with the challenges of successfully procuring construction projects. Within the work I do I regularly see how issues arise which have the potential to impact on the project outcomes and develop into disputes. Contracts clearly need to support successful procurement and to develop with the industry.

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

CM: I sit on the Drafting Sub-Committee for JCT, and I also have a particular interest in all measures to support collaborative working and proactive dispute resolution.

**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?**

CM: I work on major international and domestic projects; these are complex and require an in-depth understanding of contracts and procurement strategies. One recent highlight is that I have recently completed work for the Rio 2016 Olympic & Paralympic Games, where I – together with two colleagues (a lawyer based in Miami and a lawyer based in Sao Paulo) – developed and implemented the dispute avoidance and dispute resolution procedures for approximately 40 overlay contracts for construction and associated professional services for the Olympics projects.

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

CM: JCT is a unique body, in my opinion, due to the way in which it represents all sectors of the construction industry. It deserves support from us all. The fact the JCT Council includes representatives from architects, engineers, quantity surveyors, local government and private sector clients, contractors and specialist subcontractors, means that the contracts truly represent a shared view of a fair risk balance in construction procurement.

This representation across industry also creates challenges for the drafting of contracts, as you may imagine, since perceptions of the appropriate risk allocation may be different depending upon which parts of the construction industry you approach from. The consequence is that, quite often, developing agreed wording takes considerable time. However, the benefit is that at the end of this when contract editions are issued, these have been extensively considered by all member colleges of JCT Council, and therefore they reflect a consensus across industry.

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

CM: One of our key challenges in the next five years is to continue to harness technology for optimising design and construction, whilst retaining design integrity. Coordination of the design process is critical, recognising the increased role for specialists in carrying out parts of the detailed design for construction. Architects continue to be key in achieving the overall quality of design.

Amongst all this, it must not be forgotten that the initial stages form the critical foundation for the project. It is in the interests of clients to allow sufficient time for the initial briefing process and design to be developed and coordinated through to tender stage. The commercial pressure to reduce the period for pre-tender design, and to minimise upfront professional fees, can so easily give rise to the loss of opportunity to optimise the design and also to an increase in risk of later difficulties where time pressure leads to the design being incomplete or not yet fully coordinated.

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

CM: JCT's focus on construction contracts should, in my view, be seen in the wider context of the need to support all areas of the construction industry in procurement best practice. JCT therefore has an important role not merely in providing construction contracts which reflect a consensus across industry – which it does – but also in promulgating these contracts through education, training and support, and guidance. It also can provide a point of contact between other bodies which have a role to play in the construction sector, including for example insurers, manufacturing and software developers.

# JCT NEWS

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- We've incorporated the provisions of the JCT Public Sector Supplement 2011 that relate to Fair Payment, Transparency & BIM.
- We've made adjustments to reflect the Construction (Design & Management) Regulations 2015 and the Public Contracts Regulations 2015.
- 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.
- We've extended the optional provisions for Collateral Warranties from sub-contractors to include Third Party Rights.
- We've changed the way the requirements for Collateral Warranties and/or Third Party Rights are set out.
- We've incorporated the provisions of the JCT 2012 Named Specialist Update.

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