



JCT's Richard Saxon speaks to Francis Ho



The Joint Contracts Tribunal (JCT) is the UK's leading provider of standard form construction contracts. Its chair, Richard Saxon, discussed new contracts, the competition and other matters, with Olswang's Francis Ho

Francis Ho: **How did you become chair of JCT?**

Richard Saxon: When the previous chair's tenure came to an end, JCT's member bodies [the British Property Federation (BPF); the Local Government Association; the Royal Institute of British Architects (RIBA); the Royal Institution of Chartered Surveyors (RICS); the National Specialist Contractors Council; the Contractors Legal Group; and the Scottish Building Contract Committee] were sounded by the management for ideas. I came up enough times to be on the list.

FH: **What are your duties?**

RS: JCT's remit is to provide standard forms of contract for the industry that the industry finds acceptable and up-to-date. We do what it says on the tin. I chair the meetings of the JCT council and board. I also act as an ambassador for JCT generally. The council represents the construction industry and proposes and approves any changes to the contracts. Those contracts are the fundamental engine of what we do. The council has sub-committees, including the Drafting Sub-Committee. That's a specialist group with its own chair.

The board comprises the seven member bodies of JCT and deals with the business issues as distinct from the matter of the contracts themselves. I convene and chair those meetings and try to move the agenda forward.

Necessarily, they also expect me to help shape that agenda. This thought leadership aspect is the interesting bit. Inevitably, the first thing that comes to mind with a body like JCT that has a long-established history, is that it helps if there is somebody who can stand back and say: "Why don't we do something different?" That's me.

FH: **Where does JCT's income come from?**

RS: It's all commercial, through royalties on contract sales. There are no subscriptions paid by the JCT members. They cover their own costs of being members in the sense of the time taken to do things.

FH: **Presumably, that income influences JCT's ambitions?**

RS: JCT aims to run a small surplus so we have the ability to invest in new things and generally be proactive rather than defensive.

FH: **Is your post for a fixed term?**

RS: It's for three years. I've just done a year and a bit and it's up to the council to decide whether to ask me to do it again. Most chairpersons have done it at least twice. I should be quite old by the time I finish the second term on that basis so we shall see. >>



» FH:

Some industry surveys have suggested that the JCT contracts may be losing market share. Does that worry you?

RS:

JCT welcomes competition from other contract writers because it creates a flow of ideas. It's evidence that some people want different things to what we've been doing and we do respond to that sort of evidence of the needs of the industry in creating changes in our own forms of contract or additions to it. If it's what you had in mind, we don't accept the NBS [National Construction Contracts and Law Survey 2015's] idea that we're fading away. That survey represents a very small sample and is probably quite lopsided. We have a much larger sample because we have registered customers. Increasingly, we know who our customers are because they buy through our online store. We know that sales are buoyant and, in fact, increasing. We think quite a lot of former users of other forms of contract are returning or changing to JCT. So, we're not concerned about the competitive situation.

There's also the central government effect because it's invested in NEC3. Although when you ask the Cabinet Office it forgets that that's what they're doing. They think they're being even-handed but in fact they're not. People are under instructions to use NEC3 unless they have good reason. Commercial developers use JCT almost exclusively. When the development market rises, so do our sales. I think it's likely, however, that we will continue to focus on building-related contracts.

FH:

Talk me through the process of how the JCT forms are revised and updated.

RS:

It's literally continuous. I mean we've started publishing the 2016 set of contracts. That means that formal updates won't be published for a few months after the final 2016 Edition contract is published, but changes are constantly flowing, driven by legislation, feedback or case law. We accumulate all those for the next edition. Occasionally, we do a note to attach to contracts when we feel there has to be an immediate change rather than waiting for the next full edition.

FH:

You mean amendment sheets and practice notes?

RS:

Yes, because you can't otherwise revise than through quite a long drawn-out process. The new edition incorporates a number of these notes and amendments that have been attached in the last five years. It's essentially done through the Drafting Sub-Committee, which has representatives from the five colleges. I should mention that JCT's member bodies are not the same thing as the colleges. The colleges are essentially consultants, main contractors, specialist contractors and clients. JCT has more members than there are colleges on the council. The members, if you like, are the leaders of the colleges. For example, the RICS and the RIBA lead the consultants' college but they're not the only people who sit on it. Other consultant bodies can be on it. The BPF and the Local Government Association are represented on the client college but they're not the only people who can be on it. They can invite others. Ideas come up through all these routes.

FH:

Is there a limit to the number of people that can be invited?

RS:

There is a maximum number of seats for each college. The colleges decide amongst themselves and each college decides who they want on it. The members are the considerable source of feedback about what's working, what's not and what needs to change in the next edition. The Drafting Sub-Committee produces any drafts that then go to the council and then council decides whether they're going to be accepted. Nothing changes until the council is in agreement. It's got to be unanimous.

FH:

Are the Drafting Sub-Committee's members independent?

RH:

They're members of the colleges.

FH:

So, generally speaking they might have their own perspective?

RS:

They'll have a perspective. The council comes up with the principles but the sub-committee has a lot of discretion to finish off the detail and scope to sort out the final wording.

FH:

What's JCT attitude to new initiatives such as BIM and whole life costing? Does it look to lead or does it prefer to let the market find a settled position first?

RS:

JCT is a mixture of adventurous people and conservatives. I hope I'm tilting it towards the adventurous people. The very first recognition of BIM by any standard form contract authoring body was actually done by JCT in 2011, which was just after the government policy was published. We produced a public sector supplement which incorporated recognition of BIM, something that was ignored by other contract producers. That supplement has effectively been absorbed into the 2016 Editions along with one or two other elements. Our approach to Level 3 BIM won't be here instantly because it would be silly if we tried to do it now. Level 3 isn't fully defined yet but we want to have a Level 3 product available by the time Level 3 is actually ready to use.

FH:

It's interesting that JCT is already grappling with Level 3 when the industry is still looking for Level 2 BIM to become established.

RS:

We're listening. We're looking at what other people are thinking. For example, there's a debate about whether Level 3 has to be a multi-party product or whether it can be a conventional two-party product. We have the same debate with BIM protocols. Should we produce our own protocol? Should the protocol even be part of a future contract? It's attached to the contract now. Should the protocol be multi-party even if the contract isn't?

FH:

Presumably, a standard form multi-party contract would be particularly complex because you'd need all the colleges to agree to its terms?

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» RS:

Absolutely. The question would also be how is a team built? When do various parties join the contract because those who are there at the beginning can be parties to the negotiation that leads to the contract, but those who then join later, particularly specialist contractors, will have to attach themselves to something that exists rather than be able to change it in any way. There are issues like that to be addressed as to whether that would be workable or whether in fact it's essential or whether you do what [Integrated Project Insurance (IPI)] has tried to do, which is to bring everybody in early. Even the participants in the IPI pilot project haven't achieved that. Only some of the parties are under its multi-party contract.



I think we're still open to whether in fact it has to be a multi-party contract in order to serve a future Level 3 based service or whether it's perfectly possible to keep on with the idea of individually recognised contributions and have the BIM aspect exist as a multi-party overlay.

FH: **Not unlike how the Construction Industry Council (CIC) has proceeded with its BIM protocol.**

RS: The CIC's approach fits with today's outlook on contracts and insurance. There will be a lot of people that'll be very reluctant to let go of the idea that you can identify the problem, then identify the liability for that problem and thereby discipline the team and make sure that you can manage risk. Whereas the multi-party approach essentially says the whole team stands and falls together. If you've got a problem it's the whole team's problem. Some people say that's an extremely good idea because it means problems get solved instead of being run away from. Those who want to identify culpable individuals must understand that this leads to problems festering as people try and avoid responsibility.

FH: **One of the current debates on Level 3 BIM is whether IPI is fundamental to its implementation. By doing away with the blame culture and bringing in insurers as stakeholders, IPI allows the project team to collaborate more effectively.**

RS: On the other hand, that method makes you more careful about who you have in your team. Rather like the Japanese approach. Contractors and consultants want to be in that team forever so they make extra efforts to make sure they never let the team down. It's not the client that punishes you if there's a problem. It's your own team that says you're out; we're not using you again. That's a commercial recourse not a legal one. The biggest sanction in my view is the possibility of future work. If you can say to people that there will be future work then they will go miles for you. If you say to them there won't their attitudes are quite different.

Until frameworks emerged, one of the great weaknesses in public sector procurement was that you couldn't reward somebody who did well by giving them another job [due to competition laws]. You had to put them back into competition with everyone. That may have been seen as ethical but it was commercially counter-productive. You don't get that from the major private sector buyers. They use that carrot of future work very strongly as a motivator.

FH: **Where does JCT intend to take its work on Level 3 BIM?**

RS: One element which has come up early with Level 3 BIM is the idea of a facilities management contract. It's that whole life dimension which you mentioned before. It's fairly obvious that Level 2 BIM introduced this as an area which most clients had previously ignored. The question of whether a project is successful in the long-term, as distinct from merely being successful on the handover date as being completed on time and budget, to specification, and so on. But does the facility actually do the job? Does it cost too much to run? Does it help the occupiers to perform their jobs? None of that is in the contract. Most designers would tell you they have no idea what the building would cost to run and they were never asked.

The whole arrival of "soft landings" and the toolkit that goes with BIM enables you to ask those questions now. Therefore, you can say we want a building with design for both predictable capital cost and predictable whole life cost and in the case of Government Soft Landings, predictable performance against the business case that justified the project in the first place. Facilities management, which governs how well the building operates, is in a "Wild West" state in contract terms, in comparison to building contracts, which have evolved and become quite civilised. It's still dog-eat-dog in the world of facilities management. It's been suggested to us that we should devise a standard facilities management form contract along the lines of the standard construction contract to which elements specific to the project can then be attached. This could also dovetail into practical completion under the construction contract so that the outputs of the construction contract become the inputs to the facilities management contract, which is what soft landings says.

FH: **Is the facilities management contract proposal driven by the colleges or was inspiration taken from the 2011 Government Construction Strategy?**

RS: Actually, the idea came to us from outside the colleges entirely. We floated it at a council meeting and the RICS in particular responded that they would like to pursue it. The RICS has a facilities management board and it includes a number of major public and private owner occupiers. They will probably be involved in the development of the idea to the point where we can say we're right, let's start doing some drafting. The concept of the building environment has evolved. Delivering satisfactory buildings now means more than just completing on time and budget.

FH: **With its wide market penetration but restricted system of colleges, how does JCT ensure that all industry voices are heard, not just the loudest ones?**

RS: Obviously, the loudest voices come from JCT's members, which include clients. In practice, the needs of the market are heard by all »



» the branches of the industry. Consultants listen to clients. The Local Government Association represents all sorts of public sector clients. Contractors and subcontractors also have an understanding of what clients want.

FH: Are there plans to solicit more feedback directly from users?

RS: There are plans that have been put into action. If you go to the new JCT website [corporate.jcttd.co.uk], there's a new initiative for this. This year we launched the JCT Network, which is a way of people registering that they want to have a two-way conversation with JCT. These users want to know more about what goes on and provide feedback. That is just starting and I think it's going to be very useful. We do get submissions from people all the time who would like to influence what comes next.

The main source of feedback remains the colleges. They look at their own drafting and see whether it's working and come back with comments that say we need to say this in the next one or review some of our provisions. We're always reviewing the contracts. Some changes are driven by outside forces like legislation, case law or other moves in the market that suggest that something needs to be changed.

FH: What do you do with the feedback from the JCT Network?

RS: Whatever comes back will be available to be looked at. We will report to the council any important feedback. Again, we can put out guidance or respond if we think people are getting the wrong end of the stick or just acknowledge that we're getting interesting feedback. It's part of digitisation and we've been very advanced on that compared to others. You can now do almost everything electronically with the JCT contracts.

FH: Will the feedback from the JCT Network or the reports to the council be publicly available?

RS: JCT is seeking to be as transparent as possible and will provide as much information and feedback to the JCT Network as it can. It's all about consensus. We don't want to put pressure on anyone by disclosing anything which then might lead to one opinion taking more weight than it perhaps deserves. It's going to be useful but it's not necessarily going to be formative. The JCT Newsletter is the same. There are lots of articles in the newsletter that are very interesting but they're not necessarily the voice of JCT.

FH: How is pricing set for the JCT contracts?

RS: We use an outside publishing house and have done for quite some time. The costs of publishing and the income from it is the publisher's judgement. Essentially what [publisher] Thomson Reuters is doing is saying we think the market will bear this price because that's what the price is. It's not cost-plus. In practice, if the sales results show that the prices are OK then clearly we shouldn't be uncomfortable.

FH: What's the timetable for rolling out the 2016 editions?

RS: We're focusing on the best-selling contracts. The Minor Works Building Contract family has already been published. Next will be the generic contracts with the Short Form of Sub-Contract [ShortSub] and Sub-Subcontract [SubSub]. The Design and Build Contract family will be next, arriving early in the autumn. This will be followed in autumn/winter with the Collateral Warranties, the Standard Building Contract family and the Intermediate Building Contract Family.

Hard work is currently in progress to make sure each family of contracts is complete, checked to comply with JCT's standards and ready to come out on time. As the more detailed and larger JCT contracts become available a suite of information, providing guidance and explanation of specific elements of the 2016 edition, will be available via the JCT website. JCT Network members will be notified first as new contracts and new information becomes available.

FH: When will the JCT Guides for each contract family arrive?

RS: Wherever possible guides will be produced and released alongside the publication of their respective contract family.

FH: Are there any future plans to integrate digital signatures into the electronic versions of JCT, for example, using third party services such as DocuSign or Adobe Sign?

RS: We are working hard on producing digital services that meet the needs of the industry and provide a benefit to our users. Nobody has asked us to do e-signatures, so it's not in the pipeline. If there was a clamour to produce an electronic signature facility then we'd definitely look at it but there hasn't been.

FH: Every so often, there are rumours that JCT wants to broaden its horizons beyond the UK. Have there been any steps towards producing an international building contract?

RS: The interesting thing is that JCT forms of contract are being used internationally a lot and, if anything, that's increasing. We're selling overseas via our digital channel. What's happening is that local practitioners are making the necessary modifications to suit their particular markets. It's principally Commonwealth countries or those still used to the British way of doing building contracts. Because of that, there is no pressure to produce an international version because international versioning is done by the local lawyers who are buying them for use in other countries.

FH: You're tracing all that through the digital service?

RS: The main source of information is sales through our online store.

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FH: **On a similar note, how does JCT assess whether or not to introduce a new contract form?**

RS: Essentially, the channel is the council and the colleges on the council – what they think the market needs. For example, if the facilities management contract eventually becomes part of our programme – at the moment it's only going through the exploratory proposal – it will be because it rings people's bells. The same thing has happened with each of the subdivisions. You could say well why did we end up with so many different scalings, for instance, Minor Works, Intermediate and Standard?



That's because people thought there was a virtue in scaling it down so that we had households at one extreme and the major projects at the other. It comes from the council. If the council thinks that there's a gap and that there's something that we could've done that would have worked better for a part of the market then that will lead to an additional form coming out. In the next 10 years there will be a very different perception of what is required because the idea of building contracts being based purely on successful completion of the capital phase look as though they will remain part of the market but will no longer be the whole market. The Digital Built Britain report from last year suggested that performance contracts might well be part of the landscape even though they have not been used for buildings other than in PFI. The facility over time delivers the described performance. That will be partly operating costs, partly availability of the spaces within and the limits of functionality that have been defined. You can imagine what those would be. The contractor gets an income based on the success of the facility, not purely on the cost of the capital project.

For the question of whether it gets to be used again in building contracts following the success or failure of PFI, which is much more our territory, you could say it might well be once we have the Internet of Things (IoT). IoT will tell us how things are working. At the moment it's far too expensive to find out how things are working so we tend to regard it as a non-issue. It won't continue to be once it becomes easy and cheap to tell whether the building is working the way we said it would. We all know buildings don't work the way they were intended to work. There's a big performance gap.

FH: **As the technology develops, people's minds will change.**

RS: Their expectations will change. That will shake the foundations of the idea of a capital project contract. The very fact that we're using that term – capital project – as distinct from a building contract, which ends and at practical completion is informative. BIM's going to be a strong part of the swing over to various digital technologies. IoT as well. There are others. We can't even tell you what the limits of this are. It's an interesting time to be involved.

FH: **What do you hope to achieve during your tenure?**

RS: I've been involved now for just over a year. There's certainly been quite a change in the quality of communication. For example, we're just making a series of videos for the website explaining the new edition. Instead of just having to buy it and read it or wait for guidance there will be explanatory videos about different parts of it that are being recorded by leading members of JCT.

The thing that specifically interests me is to help steer JCT into the digital era of construction, not just the digital era of communicating contracts. The BIM Working Group is a particular interest of mine. The more I look at digital built environment the more I realise that the whole life issue is a new and very important territory. It costs more than building the building in the first place. It's actually the best way of deciding whether you have built the right building. I think it's going to be very interesting indeed. For example, if a contractor is under pressure to hit the contract sum and he suggests to the client the substitution of one product for another for reasons of cost reduction, the client usually gets a bit of advice as to whether this is reasonable. However, he's not actually got a picture that says the whole life cost of this product is actually higher than the one that was originally specified. Or that the carbon footprint of this product is higher than the original one.

Looking forward, both of those numbers will be easily attained. You'll be able to say to the main contractor we will only entertain a change if the whole life cost does not go up and the whole life carbon footprint does not go up. That data, which is attached to the product data template which comes with the product, was unavailable until now. I think it's going to make a huge difference because what main contractors have typically done is to kick costs down the road and basically say yes, we hit our goals, but all they've done is to push up the whole life cost of the building. They didn't even know that was happening. Now they will know and clients will know. It's going to get much more difficult for main contractors to substitute products.

Richard Saxon was speaking to Francis Ho, head of construction at Olswang and a regular columnist in the legal section of Building