

JCT 2016 and Case Law Update



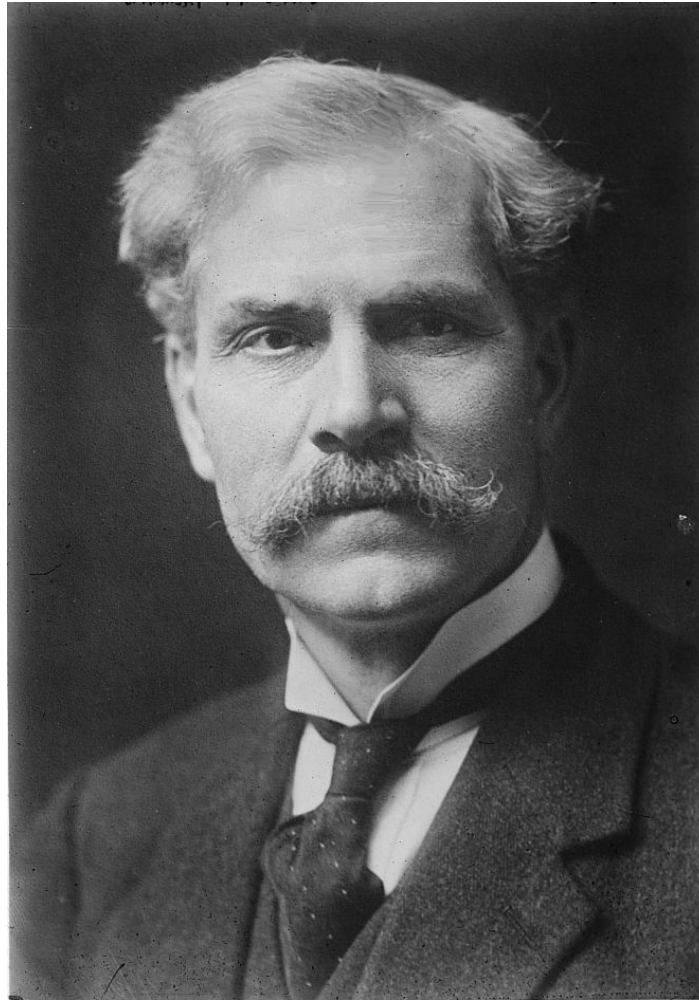
Constructing Excellence SC
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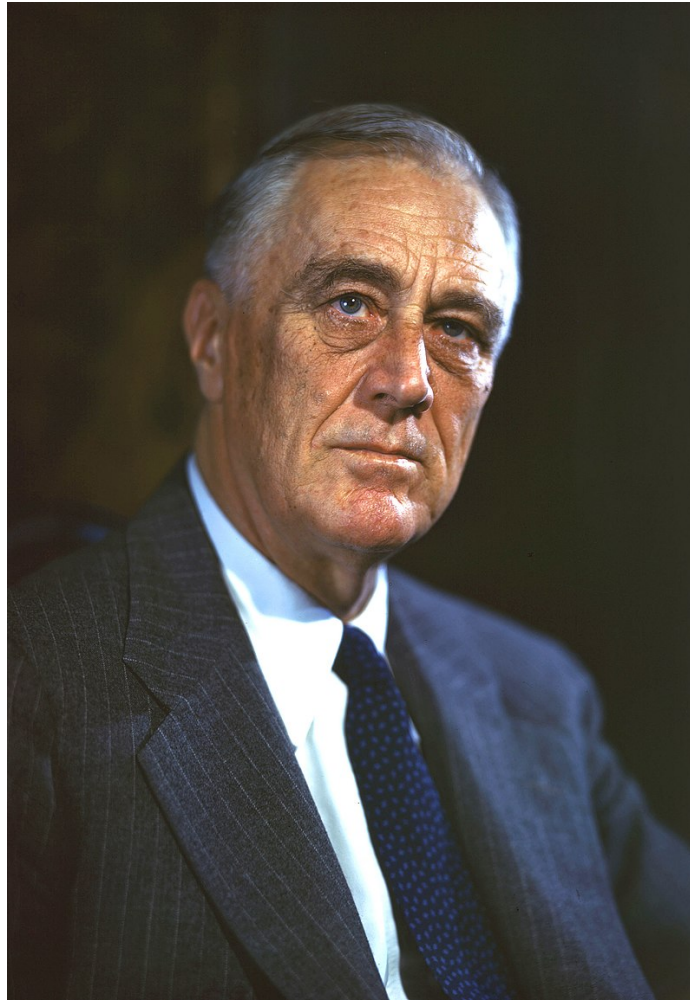
JCT Contracts

Still leading after all these years

1932









NBS Contracts in Use Survey 2018

- **Contracts most often used**

- JCT 62% 

- NEC 14% 

- Constructing Excellence 1%

- **Contracts used**

- JCT 70%

- NEC 39%

Why not collaborate?

NBS Contracts in Use Survey 2018

- Why not collaborate?
 - Client did not want it 43%
 - Project too small 30%
 - Parties have different objectives 29%
 - Concerns about risk 28%
 - Concerns about liability 27%
 - Previous negative experience 9%

Letters of intent

Why do we use them?

‘Your good intentions will never overshadow your deeds.’

— Bruce M. Morgan, Interpretations

‘A good intention, with a bad approach, often leads to a poor result.’

— Thomas Edison

Letters of Intent

- When are most contracts signed?
 - Before work starts 65%
 - After work starts 32%
 - After completion 1%
 - Never 2%

- **2 letters of intent**
- **Expiry: 29 April 2016**
- **Cap: £430,000**

Merit Holdings v Lonsdale [2017] EWHC 2450 (TCC)

- Work ran on to 12 July 2016 when it was terminated
- Payments made already exceeded the cap
- Claimed value was £1,128,106
- Payment entitlement under LOI was for costs wholly and necessarily incurred
- Applications and payments were made by reference to agreed “contract sum and SOR”
- Should payment be on basis of cost or ‘*contract sum and SOR*’?

JCT 2016

What changed?

What was the Extent of the Changes?

- Updates for CDM, Public Contracts Regulations, BIM and Public Sector Supplement
- Evolutionary changes in some areas
- Drafting improvements and rationalisation
- For example,
‘the amount stated in any Acceleration Quotation for which there is a Confirmed Acceptance’ (JCT DB 2011)
becomes
‘any amount agreed by Confirmed Acceptance of an Acceleration Quotation’ (JCT DB 2016)
- The pace of change is increasing

What is the Extent of the Changes?

‘It is not believed that any of the 2016 edition amendments or changes in format will in practice materially affect risk allocation’

(JCT Design and Build Guide 2016)

Payment

Payment – The 2016 Revised Provisions

- DBC 4.12 and 4.13; SBC 4.8 to 4.10; ICD 4.8 – 4.11; MW 4.3.
- Interim Valuation Date: first to be stated in Contract Particulars and then monthly
- Applications to be made no later than IVD [Required in DBC; optional in SBC]
- Due Dates: 7 days after Interim Valuation Date or [DBC only] 7days after receipt of application, if later
- Monthly payment cycle after PC

Pay Less Notices

DBC 4.9.5 and 4.10; SBC 4.11.5 and 4.12;
ICD 4.12.5 and 4.13; MW 4.5.4

- Provisions rationalised and applied expressly to final payments

Payment after termination

Adam Architecture v Halsbury Homes [2017] EWCA Civ 1735

- Issue as to whether Adam's engagement terminated under the contract or by repudiatory breach
- CA found it was a contractual termination
- Adam had delivered final invoice and had referred non-payment of it to adjudication
- Adam won the adjudication but failed in its attempt to enforce
- RIBA form provides for a pay less notice for interim payments but not for final payment or payment following termination

Payment after termination

Adam Architecture v Halsbury Homes [2017] EWCA Civ 1735

- Decided:
 - S 111 Construction Act requires a pay less notice in respect of all payments provided for by a construction contract
 - That includes the final payment and payment following a contractual termination

Retention

Do we need it?

Retentions – further change on the way?

A BILL TO

Make provision about protecting retention deposits in connection with construction contracts; and for connected purposes.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Retention deposit schemes

- (1) The Housing Grants, Construction and Regeneration Act 1996 is amended as follows.
- (2) After section 111, insert:—

“111A Retention deposit schemes

- (1) The appropriate national authority must by regulations made by statutory instrument make arrangements for securing that one or more retention deposit scheme is available for the purpose of safeguarding any cash retention withheld in connection with construction contracts...

Grove Developments v S&T [2018] EWCA (Civ) 2448

- The Court of Appeal held that where a paying party fails to serve a pay less notice, and a payee therefore refers to adjudication to enforce their payment, the paying party may still refer to a second adjudication to determine the true value of the works.
- Previously, the paying party would have to wait until the next payment cycle or even the final account to challenge this.
- This is a significant development that could mark an end to ‘smash and grab’ adjudications.
- However, the loser in the ‘smash and grab’ adjudication must pay that award first, a point considered further in ...

M Davenport Builders Ltd v Greer & another [2019] EWHC 318 (TCC)

- Following the decision in Grove, the question arose as to whether a payer can commence a 'true value' adjudication and rely upon the decision of that adjudication as to the 'true value' of the interim payment without having first paid the sum required by the earlier decision.
- The Greers attempted to rely on the 'true value' adjudication decision as a defence or set-off during enforcement proceedings by Davenport to enforce the earlier adjudication decision.
- The High Court rejected this.
- It is essential that the payment is made before starting the true value adjudication. This applies to both interim and final applications for payment.
- The door was left open for exceptions to this rule but the Court did not go on to set out any specific circumstances in which such an exception could apply so the ambit of this remains untested.

Schedules of Payment Dates

Balfour Beatty Regional Construction Limited v Grove Developments Limited [2016] EWCA (Civ) 990

A cautionary tale about:

- Failing to agree important matters before contracting
- Finite schedules of payment dates

Practical completion

Should you try to define it?

- *The contract provided:*
- **"Practical Completion"**: *a stage of completeness of the Works or a Section which allows the Property to be occupied or used and in which: ...*
- **"Property"**: *the property comprised of the completed Works.*
- **"Works"**: *the works briefly described in the First Recital, as more particularly shown, described or referred to in the Contract Documents, including any changes made to those works in accordance with this Contract.*
- *Q: Can Practical Completion of a Section occur before Practical Completion of the whole?*

Practical Completion

What does it mean?

Mears Ltd v Costplan Services and others [2019] EWCA Civ 502

- Practical completion is easier to recognise than to define; there are no hard and fast rules
- Patent defects and incomplete works are treated in the same way
- The works are to be completed free from patent defects other than any to be ignored as trifling
- ‘Trifling’ is a matter of fact and degree to be measured against the purpose of allowing the employer to take possession and use the premises as intended, but ...
- That does not mean that the fact that the employer could take possession and use the premises as intended means they are practically complete
- The fact that there may be a defect that is incapable of remedy does not, on its own, mean the works cannot be practically complete

Loss and Expense

The 2016 provisions

(clause numbers in the following are in JCT DB Contract 2016)

Loss and Expense

4.19.1 If in the execution of this Contract the Contractor incurs or is likely to incur any direct loss and/or expense as a result of any deferment of giving possession of the site or part of it under clause 2.4 or because regular progress of the works or any part of them has been or is likely to be materially affected by any Relevant Matter, he shall, subject to clause 4.19.2 and compliance with the provisions of clause 4.20 be entitled to reimbursement of that loss and/or expense.

Loss and Expense

4.19.2 No such entitlement arises where these Conditions provide that there shall be no addition to the Contract Sum or otherwise exclude the operation of this clause 4.19 or to the extent that the Contractor is reimbursed for such loss and/or expense under another provision of these Conditions.

Loss and Expense

4.20.1 The Contractor shall notify the Employer as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from deferment of possession becomes (or should have become) reasonably apparent to him.

Loss and Expense

4.20.2 That notification shall be accompanied or, as soon as reasonably practicable, followed by the Contractor's initial assessment of the loss and/or expense incurred and any further amounts likely to be incurred, together with such information as is reasonably necessary to enable the Employer to ascertain the loss and/or expense.

Loss and Expense

4.20.3 The Contractor shall thereafter, in such form and manner as the Employer may reasonably require, update that assessment and information at monthly intervals until all information reasonably necessary to allow ascertainment of the total amount of such loss and expense has been supplied.

Loss and Expense

4.20.4 Within 28 days of receipt of the initial assessment and information and 14 days of each subsequent update of them the Employer shall notify the Contractor of the ascertained amount of the loss and/or expense incurred, each ascertainment being made by reference to the information supplied by the Contractor and in sufficient detail to enable the Contractor to identify differences between it and the Contractor's assessment.

Concurrent Delay

- Amendment to JCT contract provided:
 - *‘2.25.3(b) any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account’*
- *Court of Appeal upheld decision that the provision was effective, saying:*
 - *‘I can see no basis on which clause 2.25.1.3(b) could be struck down or rendered inoperable by the prevention principle. The clause is clear and unambiguous and it does not cut across clause 2.26.2.5 (which prima facie entitled the contractor to an extension of time for anything that might be considered an act of prevention by the respondent). The only thing the clause does is to stipulate that, where there is a concurrent delay (properly so called), the contractor will not be entitled to an extension of time for a period of delay which was as much his responsibility as that of the employer. That was an allocation of risk which the parties were entitled to agree ...’*

Liquidated Damages

- Where a contract provides for liquidated damages for delay, do the liquidated damages apply to delay following termination or abandonment?
- Do liquidated damages apply:
 - Up to completion?
 - Up to termination/abandonment?
 - Not at all?
- It depends on the contract – this case is in the ‘*not at all*’ category

JCT – Notices in respect of liquidated damages

- JCT contracts require 3 notices:
 - Notice of non-completion
 - Notice that the Employer may require payment of or withhold/deduct LDs (warning notice)
 - Notice that the Employer requires payment of or will withhold/deduct LDs (deduction notice)

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- ***Grove Developments v S&T [2018] EWHC 123 (TCC)***
 - The deduction notice was sent seconds after the warning notice
 - The contract does not stipulate any interval between the two notices nor does it stipulate that the warning notice must be received before the deduction notice is sent
 - Question: should a term be implied to the effect that there must be a reasonable interval between the two notices?

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- ***Grove Developments v S&T [2018] EWHC 123 (TCC)***
 - Answer: ‘no’
 - It is not necessary give the contract efficacy
 - It would introduce uncertainty – what is a reasonable period?
 - That would make the contract impossible to operate sensibly

JCT 2016 - BIM

- Provision for BIM Protocol (new definition and entry in contract particulars)
- Parties to supply the protocol
- Design Submission procedure now defined by reference to BIM Protocol with Schedule 1 applying where none
- BIM Protocol is a Contract Document (see definition) but does not override or modify Agreement or Conditions (DBC clause 1.3)
- Practice Note: *BIM and JCT Contracts* (May 2016)

JCT 2016 - Insurance

- JCT recognises difficulty faced by occupiers of existing structures insured by others – typically tenants whose landlords effect insurance
- Tenants may not be able to effect joint insurance of existing structures under C1
- Contract now provides for bespoke arrangements to be set out in a C1 Replacement Schedule 30

- What alternatives might be provided for?
 - In lower value jobs the contractor's PL cover may respond but check policy carefully for exclusions
 - Higher value may need more complex arrangements with different layers of cover
 - Where existing structure is a shell or façade, it may be possible to use extended Option A cover
 - **Take advice from insurance specialists**

JCT 2016 - Security Documentation

- Contracts now contain provisions requiring a performance bond or guarantee and/or a parent company guarantee
- Contract Particulars to indicate whether required, relevant form and details
- No JCT standards are provided
- No enforcement provisions

JCT 2016 - Collateral Warranties and Third Party Rights

- Unsatisfactory Contract Particulars, Part 2 has gone
- 'Rights Particulars' now to be set out in separate document identified in Contract Particulars
- JCT provides model forms for Rights Particulars
- Rights may be TPR [not in IBC] or warranties
- Default warranties are JCT forms

Swansea Stadium Management Co Ltd v Swansea City and County Council and Interserve Construction Ltd [2018] EWHC 2192 (TCC)

- A collateral warranty may have retrospective effect where that was the clear intention of the parties. That was the intention here as the warranty:
 - provided a direct right of action against Interserve in respect of its obligations under the building contract
 - explained in the recitals that the beneficiary's interest was to ensure Interserve performed its obligations in accordance with the building contract
 - the direct warranties to the beneficiary were in respect of past and future performance under the building contract
 - limited the liability of the beneficiary to that it would have had if the beneficiary were named as joint employer under the building contract
- The time limit for starting proceedings therefore started running at practical completion

JCT Collateral Warranties

- Warranty Particulars truncated in favour of cross-reference to main principal contract
- Net contribution clause
 - No longer optional
 - Reference to contractor/subcontractor deleted

JCT 2016 - Other Changes

- Updated for CDM Regulations 2015
- Design submission procedure under ICD now aligned with those in DB and SBC
- Incorporation of Public Sector Supplement
- Supplemental Condition 11 provides for compliance with Freedom of Information Act 2000
- Supplemental Condition 12 requires subcontracts to comply with certain provisions in Public Contracts Regulations (where applicable)

JCT 2016 - Other Changes

- Clause 8.6 and 8.11 provide for termination in circumstances where Reg 73(1) of Public Contracts Regulations require it to so provide
- MW form aligned with others by permitting instruction not to make good defects and to make an '*appropriate deduction*' instead
 - But what is an appropriate deduction?

VAT Reverse Charge

- The Value Added Tax (Section 55A) Specified Services and Excepted Supplies) Order 2019
- Will come into force on 1 October 2019
- This is an anti-fraud measure which removes the opportunity for fraudsters to charge VAT and then go missing before paying it over to HMRC
- The reverse charge will apply through the supply chain up to the point where the customer receiving the supply is no longer a business that makes supplies of specified services