



# Construction and Engineering

## **BPE Construction & Engineering Newsletter – December 2014**

### **We have not seen activity levels slowing down and indeed in November:**

- Emilie Sclater and Gemma Bill joined the team
- Along with our other colleagues in the Renewables Team, Jon has been advising on several EPC contracts for disposal to pension funds.
- Anna and Jon attended an excellent CDM Regulations briefing from Constructing Excellence (with nearly 100 people there from all over the country)
- (Technically not November) – Jon is off to the ADR Group annual mediator's conference in Oxford.

### **Back in the office we've been dealing with:**

- Redevelopment work in Swindon, Milton Keynes and Cheltenham
- A potential "repudiatory breach" dispute
- Bank requirements for funding of GP developments
- Drafting, negotiating and overseeing execution of a JCT PCSA to ensure that a design & build healthcare project stays on track
- Whether or not certain points of dispute were suitable to be dealt with as "Preliminary Issues" in a tripartite TCC matter
- Trying to facilitate mediation in a dispute

### **As this is our December edition, we have a few festive messages:**

#### **A few Christmas Construction Jokes**

- How does an Eskimo fix his house? Igloos it together
- It's getting near Christmas and a builder asks his son what he'd like as a present. 'What I really want is a baby brother.' says the boy. 'Sorry, son,' says the father. 'Christmas is only 2 weeks away, I can't get you a baby brother in that time.' The son replies, 'Can't you do what you do at work and put more men on the job?'
- What does an electrician get for Christmas? Shorts.

**And finally.... Merry Christmas in Legal Terms**

Please accept without obligation (express or implied) ~~these best~~ all reasonable wishes for an environmentally safe, socially responsible, low stress, non-addictive, and gender neutral celebration of ~~Christmas- the winter solstice holiday as practised~~ within the most enjoyable traditions of the religious persuasion of your choice (but with respect for the religious or secular persuasions and/or traditions of others, or for their choice not to practise religious or secular traditions at all) and further for a fiscally successful, personally fulfilling, and medically uncomplicated onset of the generally accepted calendar year (including, but not limited to, the Christian calendar, but not without due respect for the calendars of choice of other cultures).

The preceding wishes are extended without ~~regard-prejudice~~ to the race, creed, colour, age, physical ability, religious faith, choice of computer platform, or sexual preference of the wishee(s).

**Contract Administrator (JCT) v Project Manager (NEC3) v Engineer (FIDIC) - decision-making powers**

**By Jon Close**

There are subtle differences as to how administrators of JCT, NEC3 and FIDIC interpret and operate their duties. For instance, the Engineer under FIDIC may enjoy more independence in decision-making powers than his counterparts under the JCT or NEC suites, as he is not required to apply a judicial-type approach in its decision-making process. Nevertheless, the Engineer is still required to consult with the Employer whenever he needs to make “a fair determination in accordance with the Contract”.

In JCT, the Contract Administrator is afforded a certain amount of protection in terms of its decision making responsibilities. Provided the decision is ‘reasonable’ then he should not be open to successful challenge. The standard provisions make the final certificate conclusive in the following respects; namely that:

- The quality and standards are to its reasonable satisfaction;
- Additions, omissions and adjustments to the Contract Sum have been correctly made save in the instance of accidental inclusion or exclusion or arithmetical error;
- All and only such EOTs contained in the certificate have been given; and
- All reimbursement of direct loss and expense has been made to the contractor.

This is, of course, subject to a party not bringing an action within 28 days of the certificate being issued, in which case it is only conclusive in respect of those matters not subject to that action. No other certificate of the Contract Administrator is conclusive that the Contractor’s works, design, materials or goods are in accordance with the contract.

In comparison, NEC3 does not have express conclusivity provisions. It does, however, contain a mechanism in terms of assessing additional time and cost, whereby the Project Manager is deemed to have accepted the Contractor’s proposal if it has not rejected it within a specified timeframe. For instance, in condition 61.4, if the Project Manager does not notify his decision to the Contractor as to whether or not an event constitutes a Compensation Event either within one week of such a request (or such other period as the parties decide) then a failure by the Project Manager to reply within two weeks of this notification amounts to acceptance that the event is to be treated as a Compensation Event. This is also deemed to be an invitation for the Contractor to submit quotations. Although not a conclusivity provision as such, it does mean that any adjudicator/court should find in the Contractor’s favour should a debate as to the status of an event subsequently arise.

Similarly in FIDIC, there are no express conclusivity provisions, however, the parties are required to give effect to each agreement or determination by the Engineer pursuant to clause 3.5 “until and unless revised under clause 20 [Claims, Disputes and Arbitration].”

The subjective opinion of the third party certifier can be called into question, especially in JCT and NEC3, where the relief for the contractor may hinge on the certifier “becoming aware” of a certain event or circumstance having taken place.

In JCT forms, the contract stipulates that “if” the Contract Administrator becomes aware of any divergence between statutory requirements and the contract documents, he shall give an immediate notice to the Contractor. Within 7 days or becoming aware of such divergence, the Contract Administrator issues instructions which (if they vary the Works) amount to Variations.

In JCT, this subjectiveness in becoming aware is limited and not extended to wider matters. Unlike NEC3 below, it is only ‘if’ the Contract Administrator becomes aware that the clause is triggered, so a Contract Administrator may never become aware of any divergence until and unless a situation arises. To overcome this, the Contractor is not prejudiced and can obtain relief in clause 2.17.3 so that it will not be penalised for carrying out non-compliant works that are stipulated in the contract documents.

In comparison, the NEC3 form says that the Project Manager shall notify the Contractor of any matter which could increase, delay or impair the Works “as soon as [he] becomes aware”. This is worded much wider than in JCT. However, any ambiguity in the wording of the contract is intended to be tempered by some inherent fail-safes. If, for example, the Project Manager fails to notify the Contractor of a Compensation Event when he should have done so, the Contractor will not necessarily time barred from applying for relief for time and additional cost (condition 61.3).

There should be less scope for the same risk to arise in FIDIC which requires the Engineer to obtain the Employer’s consent when exercising a specified authority. The requirements and situations for obtaining consent should be pre-agreed and listed in the Particular Conditions (clause 3.1). In all other respects, the Engineer should be free to make determinations on a fair basis (clause 3.5). Therefore, there is arguably more certainty as to when the Engineer can and cannot act of his own accord.

As with any contract, standard industry or bespoke, the parties need to consider the precise role of the parties. Contract administration can substantially aid the successful completion of a project provided everyone understands the precise scope of responsibility and power afforded to the person undertaking that role.

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## **New RIBA contracts for small scale commercial and domestic projects**

**By Katie Pickering**

Last month I wrote an article on the new RIBA contracts; the RIBA Concise Building Contract and the RIBA Domestic Building Contract. It has been noted that the new contracts are similar to the JCT Minor Works Contract and the JCT Home Owner Contract.

### **RIBA Domestic Building Contract v JCT Homeowner Contracts**

The RIBA Contract describes its client as a Residential Occupier: it is suitable for all types of non-commercial building work. The JCT Contract describes its client as a home owner/occupier: it is intended for small domestic building works such as extensions and alterations.

The RIBA Contract is easy to follow in 3 main parts: it also includes guidance notes and an explanation of terms which is useful for the Residential Occupier (named as the customer in the Contract). It also includes an appendix at the back which gives the layout for a Notice of Cancellation. The JCT Contract is a basic 8 pages set out in two parts (the arrangement for the work and the conditions) it is also very easy to follow but does not include any guidance notes or an explanation of terms and even though it includes less provisions than the RIBA Contract, it may be difficult to follow. Both Contracts have easy payment mechanisms and allow for payments in stages.

The RIBA Contract is currently up-to-date on all consumer regulation (including the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 whereas the JCT Contract is not. Below I have listed the 4 main distinctions between these 2 Contracts.

- Under the RIBA Contract, The customer is entitled to liquidated damages if the contractor fails to achieve practical completion of the work/section of works (Item I, clause 10). The JCT Contract has no provision for this.
- There is no collaborative working provision in the JCT Contract.
- The JCT Contract does not allow for completion in sections whereas the RIBA Contract does.
- There is no detailed rule governing application and calculation of changes to the completion date in the JCT Contract but there is in the RIBA Contract.

In conclusion, the JCT Contract is perfect to use in a small projects such as alterations, where the RIBA Contract maybe too complex. If the works are slightly more complex such as large extensions, the RIBA Contract or the JCT Minor Works Contract may be more applicable as it has more provisions for extensions of time and completions in sections.

### **RIBA Concise Building Contract v JCT Minor Works Contract**

The RIBA Concise Building Contract describes its client as private and public employers: it is suitable for all types of commercial building works and is set out in the same 3 sections as the Domestic Building Contract. The JCT Minor Works Contract describes its client as Private and local Authority Employers and is intended for smaller projects (domestic or otherwise) but can be used in larger ones provided the works involved are simple in character.

The RIBA Contract is 30 pages long as is set out in the same way as the Domestic Building Contract with guidance notes and a useful explanation of terms. The JCT Contract is 45 pages long and is set out in 4 sections including guidance notes and schedules.

Unlike the JCT Homeowner, this JCT Contract includes a provision for collaborative working as does the RIBA Concise Building Contract. They both also include a provision for liquidated damages. Both also include useful guidance notes.

The main differences between these two contracts are listed below:

- The RIBA Contract has a provisions for advance payment and flexible payment provisions whereas the JCT Contract does not. The RIBA Contract uses milestones payments which are not included in the JCT Contract.
- There are no provisions for completion in sections in the JCT Contract but there is in the RIBA Contract.

In conclusion, as with the other two contracts, the JCT Contract would come to better use if the project is simpler in character. The JCT Contract is not suitable for use where the Works are of a complex nature. The RIBA Contract allows for extra provisions which would be more relevant in complex projects.

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## **Collaborative Working – a solicitor’s view**

**By Anna Wood**

As the season of good will approaches with the pace of a galloping reindeer, I cannot help but contemplate collaborative working. Having recently overheard comments that “lawyers are ruining all prospects of collaborative working: all they want to do is sue people” I do feel slightly defensive about my fellow professionals – we’re not all the sprout on the Christmas dinner plate you know!

Good solicitors who advise on construction contracts (and professional appointments) have to contemplate the situation when it all goes wrong: to (snow)plough on with blind positivity would not only be naïve, but it would be negligent. We also have the job of balancing competing interests and often negotiating between the rock (the funder) and the hard place (the contractor/professional) for our employer/developer clients. We can therefore often come across as the Scrooge when really it is simply a case of other factors in play.

Collaborative working in construction is all about early involvement of all members of the team, to facilitate better design and VE from an early stage. Often this early team does not involve legal advisors (or, indeed, the funder). This can lead to problems later on and can actually damage relationships that have been carefully f(r)ostered from the start. These issues can be avoided if solicitors are involved at the beginning (even if their level of involvement then drops off for a while to keep costs under control). Again, good solicitors will mould contracts to the job and not expect the job to be re-structured to fit an off-the-shelf contract.

There are numerous guides out there for collaborative working that all focus on the design side of projects. Whilst I absolutely agree that this must be the core focus of collaborative working, as my little Christmas gift to you, here are my top tips for collaborative working from the contracts side of things:

1. Get the funder on board early (or at least get an early understanding of what funders may require).
2. Get solicitors on board early (not just for the employer/developer) – take proper legal advice on structure and wording of contracts.
3. Ensure that the team is aware of the legal obligations they are likely to be asked to take on (including accurate information about levels of PI, 6 vs 12 year liability, collateral warranties etc).
4. Give prospective professionals and contractors a copy of the anticipated form of contract (including schedule of amendments and ancillary documents such as collateral warranties) as early as possible.
5. Don’t be too fixated on the *form* of contract. Yes, there are certain contracts that are structured and phrased in a more collaborative way than others on

the face of it, but no contractual wording is stronger than a team that wants to (or doesn't want to) work together.

6. Take a collaborative approach to negotiating contracts – if you're rejecting the inclusion of a clause, say why and propose a compromise. Parties can work together to find wording that is acceptable to all but "just say no" is a phrase that should be left for Zammo and not permitted in contract negotiations.

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## **Adjudication? Not so fast....**

**By Emilie Sclater**

With its rapid and relatively cost-effective process, adjudication is an attractive proposition for potential claimants, particularly where cash-flow is an issue. For responding parties, notice of adjudication can come as a nasty shock with little time to prepare a reply.

However, a dispute referred to adjudication must have “crystallised”. There are no hard and fast rules and crystallisation is determined on a case-by-case basis. A dispute is likely to have crystallised in circumstances where a claim from one party is met with rejection, prolonged silence or procrastination over a response (e.g. excessive requests for further information).

Whichever side you are on, it is worth considering this issue at an early stage – perhaps at the merest hint of a claim. Referring parties should ensure that the dispute has crystallised. Responding parties may be able to delay the adjudication, allowing time for response preparation or even resolution of the claim.

### **For the referring party – ensuring your dispute has crystallised**

Commencing an adjudication before a dispute has crystallised can result in protracted debates over crystallisation and adjudicator’s jurisdiction, or worse, may result in a court refusing to enforce an adjudicator’s decision. Often there is a clear rejection of your claim and in such cases there is little doubt the dispute has crystallised, however where the responding party has not responded or is seeking further information, it can be difficult to be certain.

Case-law requires that where the parties have been engaged in discussions or correspondence over an issue, a reasonable period must be given to allow a party receiving a claim to respond. Parties wishing to crystallise a dispute will often use wording such as “It is clear that a dispute has arisen between us” or perhaps “If you do not make payment/agree our position within [x] days we will assume that you dispute our claim”.

### **On the receiving end?**

It can be a useful tactic to delay or prevent crystallisation of a dispute. Consider whether you need further information, use wording such as “We understand your comments, however...” and (making no admissions) avoid any hint of denial. Case-law suggests that the information given by the referring party need not be complete before a dispute is referred to adjudication.

Responding parties will need to take a view on this and consider whether the information is sufficient to allow a broad assessment of the claim. Clearly if fundamental information is missing, a dispute is unlikely to have crystallised. A word of warning however – use time wisely and don’t delay unduly as the responding

party must make its position clear within a reasonable time and disputes can crystallise quickly if that is not done.

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## **Guest Article : Osborne Stamps his Authority**

**By Nick Haines – Partner, Hazlewoods**

How many years have people in the property sector been talking about how unfair the Stamp Duty Land Tax system is? How often were petitions made to the various Governments bemoaning the fact that a £1 increase in the price paid for a property resulted in a £5,000 rise in tax?

And then came the 2014 Autumn Statement, George Osborne's last before a General Election, and what happens? It's all change. Call me a cynic, but I think the May date may have had some influence on the sudden change in policy!

So, what was the change? Just a complete overhaul of stamp duty land tax for residential properties! Gone is the long hated "slab" system and instead it is replaced with a progressive system from midnight on 3 December 2014.

The new table is:

£0-£125,000	0%
£125,001-£250,000	2%
£250,001-£925,000	5%
£925,001-£1.5m	10%
Over £1.5m	12%

A comparison to the current regime shows that only homes purchased for more than £937,000 will be worse off, which represents approximately 2% of homes. It is predicted to cost the Exchequer some £650m each year.

Those who have exchanged contracts before the new regime comes into force will be able to choose which regime to pay tax under, meaning some 98% will probably choose the new! I am sure many will hope that this will be a boost to the property market, particularly for first time buyers.

But that wasn't the end of the good news on property. The double small business rates relief is to be extended for another year, helping over 800,000 businesses.

The annual tax charges on corporates holding residential property are to be increased by 50% above the rate of inflation, in a further encouragement not to "envelope" residential properties.

Such was Mr Osborne's confidence about the measures he was introducing that he even found time for some comedy, suggesting that a certain Labour leader may be able to take on the voice over work for Wallace due to the retirement of Peter Sallis and, potentially, Mr Milliband being out of work, but as to who will be laughing come 8 May 2015, we will have to wait and see.

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## Cutting through the legalese: “exceptionally adverse weather”

**By Anna Wood**

“I’m dreaming of a White Christmas... just like the ones we used to know”.

So does that mean that snow is now unusual? How much snow does there need to be before the contractor gets an extension of time?

Whilst most sensible programmers will have allowed for a certain amount of cold weather this winter, what happens when the unexpected happens, weather-wise? It’s all very well and good saying that we should expect snow in the winter but of course an official “White Christmas” merely requires the falling of a single snowflake at the Met Office in London at some point in the 24 hours of 25 December and that is actually rarer than rocking-reindeer-sh..... *anyway*, suffice it to say it’s hardly enough to stop construction works (even if it were a Working Day)!

So what exactly gets you an extension of time anyway?

Contract type	Wording	Interpretation
JCT	“exceptionally adverse weather conditions”	There is nothing in the guidance to help and very little by way of judicial interpretation. It is generally considered to be different from “normal” adverse weather. Amendments are often made to bring the assessment closer to NEC methods (1 in 10 year).
NEC	<p>“A <i>weather measurement</i> is recorded:</p> <ul style="list-style-type: none"> <li>• Within a calendar month,</li> <li>• Before the Completion Date for the whole of the <i>works</i> and</li> <li>• At the place stated in the Contract Data</li> </ul> <p>The value of which, by comparison with the <i>weather data</i>, is shown to occur on average less frequently than once in ten years.”</p>	<p>There are clear, prescriptive and objective data and measurement details in the Contract Data that can be agreed by the parties.</p> <p>It is worth noting that it only deals with rain, cold and snow (i.e., it does not deal with extreme heat or wind).</p>
IChemE	“exceptionally severe weather conditions or the consequences thereof” (as part of Force Majeure”	Similar to JCT – ends up being a matter for the Engineer to consider in the circumstances.
FIDIC	“exceptionally adverse climatic conditions”	Similar to JCT – ends up being a matter for the Engineer to consider in the circumstances.

Whilst NEC may be too prescriptive for some, we would recommend making amendments to JCT, IChemE and FIDIC contracts to give greater objectivity. Setting the boundaries at the drafting stage could save a lot of difficulty at final account stage.

Finally, it is worth noting that all building contracts are usually quite prescriptive about timescales and contents of notices to be given where weather may cause a delay. You should always check your contract (and any bespoke amendments) as a matter of urgency so as not to risk being time-barred in a claim for extension of time.

**You can contact Anna Wood on [anna.wood@bpe.co.uk](mailto:anna.wood@bpe.co.uk) or 01242 248215.**

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**My Perfect Sunday: Anna Wood, BPE Solicitors LLP**

**I've been involved with the construction sector since:** a “six week secondment” to assist the construction specialist at my previous firm, during the final seat of my training contract in 2010.

**The best thing about my job is:** the variety of the work and the fact that my colleagues, clients and other contacts take their work, but not themselves, seriously.

**The worst thing about my job is:** being a female, lawyer, under 35 years of age – sadly there are still too many people working in construction who have a problem with at least one of those attributes: luckily they are getting rarer.

**The first album I ever bought was:** I actually bought two in one day: Kylie (by Kylie) and Ten Good Reasons (by Jason).

**My favourite holiday was to:** Goa

**My favourite bar/restaurant in Gloucestershire is:** The Vine (top of the High Street, Cheltenham) – amazing Thai food, lovely staff, good drinks, great atmosphere.

**Make mine a (e.g., pint of real ale/rum and coke):** For now, a pint of milk! But looking forward to a rum and coke in March/April!

**In 2015....** I am excited to be becoming a Mum for the first time (but I'll be back in the office by the Autumn!)

**My perfect Sunday would be:** A lie in, brunch cooked by my other half, a walk with our gorgeous dog, meeting up with friends in the afternoon and then Sunday lunch at my parents' house in the evening. (Alternatively – anything other than D.I.Y.!!)

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