

The JCT & the top 10 most common amendments

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Introduction

- Contracts remain heavily amended (often as long as the underlying contract)
- Typically, 50% longer than they probably need to be to reflect the requirements of the project. Often very little focus on the project.
- So what? Because everyone has seen them 100s of times there can be a tendency to glance over them without appreciating the implications.
- Look at a handful of amendments and explain why they may not be needed at all or, if they are needed, do not work quite as the parties intended them to.
- Questions at the end.

ERs and Design

- A reminder of the basics:

“...the Contractor shall not be responsible for the contents of the Employer’s Requirements or for verifying the adequacy of the design contained within them. (D&B, clause 2.11. SBC, 2.13)”

- Keys things: (1) the party responsible for the document bears the risk of problems with it; and (2) it is a design completion contract (note the various references in JCT to completing the design in the ERs). The contractor is not required to check that the design contained in the ERs works or that it’s really what the employer wants.
- Almost always changed to make the contractor fully responsible for the ERs (including the design ie as if the contractor had done that design). Something like this:

“The Contractor is fully responsible for any mistake, inaccuracy, discrepancy or omission in the Employer’s Requirements and is responsible for verifying the adequacy of any design contained in the Employer’s Requirements.”

- Is the change needed and is it reasonable to make it? Range of scenarios: (1) no ERs at all; (2) very high-level ERs (perhaps a concept design); (3) fully developed set of ERs (eg including construction drawings) prepared by Employer’s professional team.
- When might the amendment be appropriate? Answer: (1) ERs developed in conjunction with the contractor; (2) contractor has been able to verify the ERs (eg in a 2-stage route); (3) novation of the design team (but see below).
- When might it not be appropriate or needed?
- Is novation the answer? Think very carefully.
- Is there a halfway house between standard JCT and the amendment?

Standard of design

- Reasonable skill and care versus something higher (eg fit for purpose)
- JCT says the contractor has the same liability for any inadequacy in the design as an architect or other appropriate designer would have (2.17 D&B)

- Consider this common amendment:

“(a) the Contractor shall exercise reasonable skill, care and diligence to be expected of a qualified and experienced architect or other relevant professional designer experienced in projects of a similar size, scope and value

(b) the design of the various elements of the Works will be properly co-ordinated and integrated with one another

(c) the Works will comply with any performance specification or requirement included in the Employer’s Requirements”

- What’s the problem?
- What’s the answer?

Third Party Agreements (TPAs)

- A reminder on why jobs go wrong.
- What are TPAs? Agreements that the employer has entered into with other parties and are relevant to the work. Examples include: agreement for lease, licence to alter, funding agreement etc
- Typical amendment may say:

“The Contractor shall not cause or contribute to the Employer being in breach of the Employer’s obligations under any of the Third Party Agreements. The Parties acknowledge and agree that liability of the Employer under any Third Party Agreements is in the contemplation of the Parties at the date of this Contract as being the probable consequence of any breach by the Contractor of this clause. If a Third Party Agreement is provided to the Contractor after the date of this Contract compliance with that agreement will be treated as a Change if compliance would require material additional work by the Contractor”
- Why is it done and what’s the problem?
- First, there will be conflicts between the TPA and the main contract. This is because AFLs, LTAs etc also deal with the same issues as the main contract (scope, quality, timing, requirements to get PC, warranties etc). Only needs a slight difference in wording to cause a problem and they can be very difficult to spot. How might a court interpret the difference?
- Second, the extent or types of loss that could be claimed. Often drafted to include an indemnity. How would liquidated damages be affected?
- Third, what about new TPAs issued post-contract?
- What is it that the employer needs to be able to do that cannot already be done under an instruction?

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Statutory Undertakers



Statutory Undertakers

- Two aspects here:

- Definition (clause 1.1):

*“any local authority or statutory undertaker **where executing work solely in pursuance of its statutory obligations** including any persons...”*

- Relevant Event (clause 2.26.7):

*“the carrying out by a **Statutory Undertaker** of work in pursuance of its **statutory obligations** in relation to the Works, or the failure to carry out such work”*

- And a common amendment to clause 2.26.7:

Additions at the end of clause 2.26.7

- *“provided that the Contractor has given reasonable notice...”*
- *“made necessary arrangements...”*
- *“has used all reasonable endeavours to mitigate...”*
- *“timely performance”*

Statutory Undertakers

- Example case law on the point

Henry Boot v Central Lancs New Town Dev Corp

Extension of time – limited to a period of suspension



Extension of time - limited to a period of suspension

- Underlying drafting – clause 2.25
 - Extension of time to be granted is as the Employer “estimates to be fair and reasonable”;
 - NB – often amended itself, such that additional notice requirements, time bars, information provision, etc. are set out and must be complied with under clause 2.24;
 - Particular Relevant Event at clause 2.26.5: “*suspension by the Contractor under clause 4.11...*”

Extension of time - limited to a period of suspension

- Common amendment
 - Any extension of time granted in connection with the period of suspension
 - Extension of time granted will be “*no greater than the period of suspension*”
 - At first reading, that sounds fair and sensible, but is it?

Extension of time - limited to a period of suspension

- Secondary aspect on this, instructed suspension by Employer
 - Similar concept and approach to above:
 - If any suspension is instructed by the Employer, an extension of time will be granted but it will be “*no greater than the period of suspension*”

Loss and expense – deferment of possession



Loss and expense – deferment of possession

- Clause 4.19.1:

“direct loss and expense as a result of any deferment of giving possession of the site”

- Note – this is not a “Relevant Matter”, it sits outside those although 4.20 does apply – notifications, assessments etc.
- Clause 2.4 – interplay here, permitted maximum period of deferment but 4.19.1 wording still kicks in immediately

Loss and expense – deferment of possession

- Common amendment:
 - Deletion of entitlement to L&E for deferment
- Often argued:
 - Entitlement to deferment at clause 2.4, so no L&E should flow

Termination account – deemed price to complete



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- Clause 8.7 – certain outcomes of termination for Contractor default, insolvency, or PC Regs (clauses 8.4 - .7);
- Clause 8.7.4 in particular. Following completion of Works and defects remedy, account of net total cost to complete and loss and damages incurred weighed up against amount Employer would have paid original Contractor;
- Clause 8.7.5 – if Employer has ended up paying more, Contractor reimburses Employer, and vice versa.

Termination account – deemed price to complete

- Common amendment to clause 8.7.4:

“provided that if Employer procures ... completion ... for less than the Employer would have had to pay the Contractor ... it shall be deemed to have paid the same amount to procure the outstanding Works ... as it would have had to pay the Contractor ... under this Contract”

Termination account – interim forecast amount



Termination account – interim forecast amount

- Clause 8.7.4 again: following completion of Works and defects remedy, account of net total cost to complete and loss and damages incurred weighed up against amount Employer would have paid original Contractor;
- Clause 8.7.5 to reiterate – if Employer has ended up paying more, Contractor reimburses Employer, and vice versa.

Termination account – interim forecast amount

- Principles of a common amendment here:
 - Any time between termination and finalising account under 8.7.4;
 - Employer can send interim forecast of amount due;
 - Employer's forecast amount shall be debt payable either way;
 - Amount paid shall be deemed on account of final 8.7.5 difference.

Thank you.
Any questions?



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