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Collaborative working and conflict avoidance in construction and beyond

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One of the new features of the 2024 edition of the Joint Contracts Tribunal (JCT) standard form building contract, is the emphasis on collaborative working and conflict avoidance. In parallel, the Royal Institution of Chartered Surveyors (RICS) is actively promoting its conflict avoidance process and pledge, to encourage a life cycle of conflict avoidance and early intervention measures to prevent disputes in construction and engineering contracts.

The change of emphasis is achieved by shifting two optional supplemental provisions from the 2016 JCT contract to the main terms of the 2024 edition. There are just three lines for collaborative working, now tucked in at the beginning of the new standard form, and five lines for dispute prevention at the end of the contract.

The relocation of clauses in this way may not appear significant, but one impact of making them mandatory is to bolster the efficacy of the accompanying guide document. The guide explains how the provisions have been brought to the fore as a reflection of key industry focus areas, and as part of JCT's response to the Construction Playbook, a well-intentioned government publication to drive collaboration and eradicate poor practices in public procurement. It is worth noting that the actual wording of the JCT clauses themselves has not changed since 2016, indicating that while the principles have stood the test of time and do not need updating, there has been insufficient take-up of the promoted behaviours of collaboration, good faith, trust and respect.

Some construction litigators argue that the guide is optional, with compliance being preferable rather than essential. Taking that stance now will be much harder, and rightly so. If guidance has any purpose, it is to be followed. Solicitors more than most will understand this concept, as SRA guidance is expressed in terms of understanding obligations and how to comply with them. The SRA's guidance stands alongside its Standards and Regulations, and it is used to help practitioners identify and report on

regulatory breaches. The JCT Guide should perform a similar function for contractual breaches.

A good example of how this plays out in practice is retention payments. Usually, 5 percent of the contract price is held back for 12 months after practical completion for rectifying defects. The Guide requires the employer to issue a comprehensive schedule of defects before expiry of the rectification period, so that the contractor can carry out a properly managed rectification programme. If employers disregard the Guide and engage in an iterative process of multiple notifications of defects, it is almost impossible for the contractor to close them out. The employer can withhold the retention indefinitely and the contractor has no recourse to have it released.

RICS

The sixth Crux Insight Report published in October 2023 by HKA global consultancy's research programme shows how disputes are causing cost overruns and delays at eye-watering levels across the construction sector. The RICS has been active in recent years researching this trend, and it cites the Government's acknowledgement, when announcing the cancellation of the HS2 northern leg, that the UK construction industry is one of the worst in Europe for delivering projects on time and on budget.

The RICS has set up the Conflict Avoidance Process (CAP) to address some of these problems. CAP is a commitment for all parties engaged in construction to side-step adversarial and entrenched positioning, and to adopt collaborative approaches to delivering projects with cost and programme certainty. The Conflict Avoidance Coalition Steering Group now spearheads CAP initiatives, including a Conflict Avoidance Toolkit, supported by six leading institutions and two of the UK's biggest employers.

CAP offers a flexible, non-binding inquisitorial way of answering questions arising from a contractual disagreement or uncertainty, which

can then be used to negotiate a resolution, using independent subject-matter experts in a collaborative environment. It has a remarkable track record of success, with none of its recommendations being later referred to adjudication, and a dramatic reduction in further claims developing. By signing up to the CAP Pledge contractors, employers and lawyers alike can register their commitment to this movement, at a stroke.

The Finishes and Interiors Sector, a not-for-profit member organisation representing the voice of contractors, campaigns tirelessly in support of CAP aims. Its 2024 Manifesto promotes research conducted by the University of Reading and by AMA Research into Modern Methods of Procurement (the Reading Research) carried out in 2023, covering a wide range of questions to 269 contractors in the fit-out sector, and selected interviews.

One of the conclusions is that current procurement practices are creating adversarial relationships which limit the potential of the sector to improve productivity, to encourage investment and modernisation and ultimately to support the economy. Specifically, the Reading Research finds that contractors are routinely obliged to accept onerous conditions of contract which undermine trust from the outset.

In this context, the reconfiguring of clauses in the 2024 JCT is put in perspective. Perhaps the most important inference to draw is simply that prevention is always better than cure. And that starts with the terms of the contract. Everyone using a building contract should understand it.

Cause and effect

The origins of standard form building contracts go back well over 100 years. The General Builders Association said in 1866 ‘it is not right to bring under the builder’s consideration legal conditions the effect and value of which he cannot rightly estimate without consulting his solicitor’.

The first RIBA Standard Form of Contract came out in 1903. The 1939 edition explained ‘The position of the Standard Form acts as a guarantee

to both parties. Both are aware that skilled representatives of their interests have taken part in the compilation of the document and have acquiesced in, and given their sanction to, its final form.

But to sign the Standard Form of Contract is not enough: it is necessary also to endeavour to understand it'. The edition in 1953 contained a foreword by the RIBA's Chairman stating 'the whole benefit of standardisation is lost...if attempt is made to insert special conditions of contract by altering or adding to the text of the printed conditions'. (References kindly supplied by Robert Tustin MRICS).

The Reading Research found that despite industry resource invested in the concept of the standard form contract, they are seldom used without amendment. 37 per cent of respondents reported that standard forms are never unamended, with 33 per cent assessing they were sometimes unamended. Only 11 per cent of respondents said that contracts were always unamended. The standard form was designed as a means of setting fair risk allocation. How can contractors work collaboratively where the standard form is amended by a schedule of amendments drafted by lawyers, which the contractor's delivery team does not understand?

Lawyers have been conspicuously silent when it comes to public discussion of this principle. As there is no representative body to champion the cause from the lawyer's perspective, the case for amendments is expressed in a largely anecdotal and individual way. My understanding of it comes from contract negotiations I have been involved in.

The starting point is usually that the amendments are the base requirement for the employer, or that the amendments reflect market expectation, or it is not institutionally acceptable to have an unamended standard form. Where is the data, research or evidence to back up these claims? The employer's side appears to be finding ways to believe what it wants to be true.

In her book, The Scout Mindset, Julia Galef eloquently describes this way of thinking as the Soldier Mindset. The book contrasts the way a reconnaissance scout will seek out the truth and report back to base, with the mission of a soldier to win at all costs. The Soldier Mindset is prevalent in many walks of life. It asks can I believe something is true, instead of is it true. In our adversarial system it is almost inevitable that one or both sides will adopt the Soldier Mindset at some stage during contract negotiations, and of course in disputes, seeking to win rather than to collaborate.

If this mindset sets in at the pre-contract stage of a construction project and persists during the delivery stages, the chances of cultivating a collaborative working environment are diminished. Behaviour change is essential for it to work. Lawyers are in the front row to advocate for, and to bring about a lasting shift in thinking towards a new culture that can transform the landscape of building projects into universally cooperative alliances.

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