The New JCT Form: "A Farrago of Obscurities"?

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There can be no doubt that an immense amount of hard work and expertise has gone into the drafting of the new Joint Contract Tribunal's forms of building contract. The same could however be said of the 1963 main contract form but it was subsequently castigated by the courts as, *inter alia*, "Notorious for its obscurities" per Lord Reid and "deviously drafted with what in parts can only be a calculated lack of forthright clarity" per Sachs LJ. It was Lord Edmund Davies (then Edmund Davies LJ) who described it as a "Farrago of obscurities".

The improvements (or alleged improvements) in the new (1980) edition and the six new forms replacing non-JCT forms which accompany it are fully set out in the JCT's "Explanatory Memorandum". It is the purpose of this article to consider those features of the new forms which seem likely to provoke adverse comments from the courts. The corresponding articles and clauses (if any) of the 1963 edition are prefaced by the word "old" and this article should be read in conjunction with the text of both contracts.

Articles of Agreement

Article 3 (*old 3*). The opportunity has been missed to clarify the position of a replacement architect. What does he do (especially if Article 5 is deleted) about defective work passed by or overcertification by an original architect dismissed for incompetence?

Article 5 (*old clause 35*). The arbitration article fails to provide for immediate arbitration as to the reasonableness of a contractor's objection under clause 29.2 (—) or 35.4.1 (old 27(a)) but a more serious flaw is the absence of any machinery to ensure a quick decision: *cf* the adjudicator provisions in NSC4 clause 24 (old Green Form 13B). One pending "immediate" arbitration is fixed to commence 2½ *years* after the event entitling a party to require it.

The Conditions

Clause 1(—). The definition of "Contract Sum" differs from that in the Articles but the main defect of this clause is that the terms most in need of definition such as "engaged by" and "direct loss and expense" are not defined at all.

Clause 4.3.2 (*old 2*(3)(*b*)). No attempt has been made to clarify the position if a contractor receives confirmation of an architect's oral instruction posted within seven days but delayed in the post if the contractor has confirmed within seven days and the architect has gone on holiday and cannot dissent.

Clause 5.4 (*old 3*(4)). The word "Details" is not defined and it is not clear whether it is confined to explanatory matter on drawings or includes instructions (see clause 26.2 in which both terms are used).

Clause 6.3 (*old 4*(3)) does not define "work solely in pursuance of its statutory obligations" a phrase which on one interpretation could make this clause apply to the supply of gas to residential property (which is usually a statutory duty) but not to a factory (which is optional) with anomalous results.

Clause 8.1 (*old 6.1*). "So far as procurable" is not defined and no provision is made for what is to be done if "materials, goods or workmanship" are or are alleged to be not "procurable".

Clauses 8.5 (*old 6*(5)) *and 10* (*old 8*) deal respectively with exclusion of any "person" from the site and to "person-in-charge" (formerly foreman-in-charge). "Person" is defined in clause 1 as including a corporate body. Do these clauses mean that an architect can expel a sub-contracting firm or that the contractor can employ a service company to act as site agent?

Clause 12 (*old 10*). This very ambiguous clause relating to the clerk of works has not been amended at all although it is common knowledge that the Architect and Contractor may have different ideas as to the meaning of "two working days" and no provision is made for what is the effect of a purported confirmation after three or more "working days".

Clause 13 (*old 11*) greatly extends the definition of variation in a most illogical way. It would have been more logical to extend the provisions of clause 23.2 (old 21(2)) dealing with postponement instructions to deal with the matters covered by 13.1.2. It is anticipated that many unmeritorious claims will be made under 13.1.2.1 and/or 13.1.2.4.

Clause 16.1 (*old 14*(*1*)) is discussed in the comment on clause 30.2.

Clause 17.2 and 3 (*old 15*(*2*) *and* (*3*) still leave unresolved the question as to whether the architect can require a defect to be made good during the defects liability period which is wholly or partly due to a design error and how the provisions as to frost damage tie up with the exclusion of liability for burst pipes etc discussed below.

Clause 18.1.5 (*old 16*(*e*)) relates to the reduction of liquidated damages on partial possession. The old clause was grossly unfair to the employer because of the (still existing) definition of "Contract Sum" in Article 2. Now that "Contract Sum" is defined differently in clause 1 the clause is a model of ambiguity.

Clause 19 (*old 17*) still retains the legal "howler" "Assign this contract". This phrase has bemused *all* the learned commentators and Mr. Keating is driven to attribute a different meaning to it in the two sub-clauses of the Private Edition (see *Building Contracts*, 4th edition, pp. 331-332). If what is meant is that in the absence of written consent from the contractor or employer respectively novation will not be implied merely from certificates being issued by the architect in the name of or in favour of an assignee the phrase could be given the same meaning in both sub-clauses. This has been successfully argued but it would be much simpler to substitute wording expressly excluding implied novation.

The defects of *20.2* (*old 18*(*2*)) are discussed in the comments on 22.B below.

Clause 21.2 (*old 19*(*2*)). The failure to provide for joint names insurance against injury to the person—eg for the acts of "persons" employed under clause 29—is the most serious defect in this clause. Apart from this it is doubtful whether in its present form it would have protected the plaintiff in *Gold* v *Patman and Fotheringham* (1958) 2 All ER 297—the case which led to the inclusion of the original version of this clause in the 1963 edition.

Clause 22A (*old 20A*). This requires the contractor to start the work of reinstatement upon the "acceptance" of a claim. While this is an improvement on the original word "settlement" no thought seems to have been given to the possibility that the insurance company might reject the claim because of a breach of a condition—eg as to fire precautions—in the policy.

Clause 22B (*old 20B*) is however, much more objectionable when read in conjunction with 20.2 (old 19(2)). It was held in *Archdale* v *Comservices* (1954) 1 WLR 459 that an employer could not recover the cost of repairs necessitated by a contractor's negligence in starting a fire where a similar clause applied. That clause, however, only applied to fire risks, not to such ordinary contractor's risks as "the bursting or overflowing of water tanks, apparatus or pipes". Moreover, no thought has been given to the possibility of the insurance company repudiating liability because precautions were not taken which were required both by the policy and the contract bills. An employer in such a situation might be able to reply on *AMF International* v *Magnet Bowling* (1968) 1 WLR 1028 but the point is arguable and there seems no good reason why the Conditions should not contain the same specific requirement to comply with the requirements of insurance policies as is found in the new JCT nominated sub-contractor form NSC 4 clause 8.4.

Clause 24 (*old 22*). This provides for

liquidated damages. This is a useful remedy in public service contracts but one which often deprives an employer of the much heavier damages which he could recover as a result of the extra cost of having the contract carried out, eg fluctuations payable to nominated sub-contractors and suppliers (which are outside the scope of the "freezing provisions"—for what they are worth —of 38.4.7, 39.5.7 and 40.7.1) and higher payments to architects, surveyors and "persons" employed under clause 29. Clause 24 could easily be amended to allow such sums to be recoverable *in addition to* liquidated damages.

Clause 25 (old 23) dealing with extensions of time ends with a provision of remarkable obscurity. 25.4.12 empowers the architect to grant an extension if the employer fails to give "ingress or egress" over land etc "*in the possession and control of the Employer*" in accordance with the contract bills etc. It follows that if the bills or drawings contemplate the use of a wayleave which the employer has or will obtain over adjoining land delay by the employer in securing the use of this wayleave will not be a ground for an extension of time and if it delays the contractor the employer will lose his right to liquidated damages under clause 24—see *Peak* v *McKinney Foundations* (1970) 69 LGR 1 and the changed wording of the new clause 24 itself.

Nothing has been done to change the wording of the old 23(g)—now 25.4.7—despite the devastating criticism by the House of Lords in *Westminster City Council* v *Jarvis* (1970) 1 All ER 943.

Clause 26 (old 24) might have been expected to resolve the hotly contested issue of the entitlement of the contractor to payment for delays caused by statutory undertakers. They are arguably "persons" under clause 29 since this term now includes corporate bodies but do they fall within clause 29 insofar as they are solely performing statutory obligations?

Clause 27 (old 25) relating to determination by the employer is virtually unchanged. Some of its unsatisfactory features are attributable to the current state of the law on insolvency but the provision for automatic determination on the appointment of a receiver is patently absurd. What is a receiver who is quite willing to complete to do while he waits for the possibly prolonged deliberations of local authority committees and sub-committees?

It is arguable that clause 27.4 (27.3 in the Private Edition) (old 25(4) and (3) respectively) is invalid on insolvency situations as being inconsistent with the reasoning of *Exp Mackay* (1873) LR 8 Ch 643 which was approved by the House of Lords in *British Eagle* v *Air France* (1975) 1 WLR 758. In any case it can be grossly unfair to an employer who does not wish to complete or a contractor whose insolvency has been precipitated by delayed certification or payments.

Clause 28 (old 26)—determination by the contractor—is equally objectionable. The clause makes no provision for the situation where the employer refuses to honour a certificate because he has a bona fide cross-claim but a much more serious objection is that the contractor can claim "any direct loss and/or damage caused to the Contractor . . . by the determination" even, it seems, if the delay was caused by a variation or a postponement instruction necessitated by the default of a domestic sub-contractor (contrast the wording of 28.1.3.2 —relating to "Clause 22 perils"—and clause 28.1.3.4). In *Wraight* v *P and HT Holdings* (1968 unreported) Megaw J held that even though the old clause 26 applied in cases in which there had been no employer's default the contractor could recover his prospective loss of profit under this provision even though this right was expressly excluded in a clause 20C (now clause 22C) determination, eg if the site is flooded and further work becomes impossible after the contractor has done 1% of the work he could recover his anticipated profit on the other 99%.

Clause 30.2.1.2 (old 30(2)) obliges the architect to include materials properly on site in a certificate without any evidence of ownership. By clause 16.1 ownership passes from the contractor to the employer on payment but this is not binding on unpaid sub-contractors and in *Dawber Williamson* v *Humberside CC* (1979) CL (November) Mais J not only ordered the employer to pay the sub-contractor for materials for which the employer had paid pursuant to a certificate but also awarded damages for detinue.

Clause 35 (old 27) deals with nominated sub-contractors. It fixes the time limit for the contractor's exercise of his right of reasonable objection to the date when he sends NSC 1 duly completed to the architect if the basic method is used but where clauses 35.11 and 12 apply, the time limit is seven days from the receipt of an instruction re nomination. How can a contractor possibly make proper financial status enquiries within seven days about a proposed sub-contractor of whom he has never previously heard? These provisions seem calculated to increase the likelihood of professional negligence claims against architects.

In clauses 35.17 and 18 read in conjunction with clause 35.24, if the original sub-contractor becomes insolvent before due discharge of final payment if defects in his work come to light at this stage the cost of renomination falls on the employer but if the defects come to light after final payment but before the issue of the final certificate the whole loss falls on the contractor if the insolvency occurs in this period insofar as there is no dividend for ordinary creditors. This leads to the patently absurd result that if the sub-contractor becomes insolvent a week after a clause 35.17 certificate has been issued the contractor will stand the loss if he has honoured it but the employer will have to stand the loss if the contractor has taken full advantage of the period for honouring certificates (17 days) in NSC 4 21.3.1.1.

Clause 36 (old 28) relates to nominated suppliers. The new clause takes a well-merited swipe at *Romalpa* clauses but it still leaves the employer at risk in respect of latent defects in materials which come to light after the end of the "Defects Liability Period": see 36.4.2. The undesirability of this provision from the employer's point of view is exacerbated by the provision that if in a variation order or instruction to spend a provisional sum the architect specifies a product for which there is a sole supplier (as was the case in *Young and Marten* v *McManus Childs* (1969) AC 454) the supplier is deemed to be nominated.

The remaining clauses 37 to 40 relate to fluctuations. It is not immediately apparent why if a contractor takes two years to perform a contract which he should have performed in one he should be paid for the whole of the second year at the rate appropriate to the last month of the first year: he will have been paid much more than he would have received if he had proceeded "regularly and diligently" and finished the work when he should have finished it. Contractors could not reasonably complain if the suggested addendum were made to clause 24 (old 22) because they pursue strictly analogous claims against sub-contractors who delay their own work and so make it more expensive. It is even less apparent why amendments of the unsatisfactory provisions of clause 25 (old 23) should preclude *any* "freezing" of fluctuations.

Selective Tendering

The attention of the National Joint Consultative Committee for Building has been drawn to reports that discussions involving Government departments might have the effect of limiting the operation of selective tendering lists by local authorities, consequent upon the enactment of the Competition Bill, or another proposed additional Bill.

In view of the benefits of selective tendering for the industry and its clients, which the NJCC has stressed for more than twenty years, this matter was raised by the NJCC with the Office of Fair Trading.

The NJCC Code of Procedure for Single Stage Selective Tendering, endorsed by the Department of the Environment, is for use by "all who commission building work, whether they be private clients or public authorities". The Code sets out recommended procedures for single stage selective tendering and the NJCC is firmly of the opinion that if the carefully thought out procedures are adopted they will ensure fair competitive tendering on a properly regulated basis, which is of advantage to all in the building team as well as the client. Upwards of 30,000 copies of the Code, in several editions, have been sold.

A statement, approved by the Office of Fair Trading, confirms that the Government has "no intention of undermining the widely recognised practice of selective competitive tendering because the reasonable application of such procedures by local authorities does offer very real benefits both to authorities and to their suppliers".

As a result it is clear that the principle of selective tendering is protected and authorities may continue to use approved list procedures, says the NJCC.