

The Legal Beagle ³³


JCT Update

The JCT suite of contracts has been revised in recent months. I have previously touched on the changes, but here's some more detail. The contracts have been updated and revised to make them clearer and easier to use.

A major change is the decision to abandon the previous distinction between private and local authorities versions. The new contracts can be used by both sectors. Indeed, the re-drafting is more than just a face lifting exercise. Whilst they have been redrafted, using less legalistic language, adopting a more user friendly format, they also incorporate important developments responding to changes in the law and the industry. The new format follows a section-headed approach, splitting each contract into parts with titles such as "carrying out the works" and "control of the works". This has involved rearranging the conditions, although most conditions remain as before.

A major feature of this re-formatting is that there are no longer any separate supplements. Fluctuations, sectional completion and contractor's design portion have all been incorporated within the relevant contracts. For example, under the Standard Building Contract 2005 ("SBC 2005"), sectional completion is dealt with by express contractual provisions (in particular, the Articles of Agreement, the Contract Particulars, the Definitions under clause 1 and the Conditions) rather than by the addition and incorporation of a supplement. The body of the standard form has been reduced by cross-referring back to the Contract Particulars. For example, under the 1998 standard form contract there were lengthy options for the insurance of the works under clauses 22A, 22B or 22C, meaning that once one of these has been selected, the other two clauses are rendered superfluous. The result was unwieldy and potentially confusing. Clause 6.7 of SBC 2005 now simply provides: "*Insurance Options A, B and C are set out in schedule 3. The Insurance Option that applies to this Contract is that stated in the Contract Particulars*". Clause 22D, of JCT '98, has been omitted, reflecting "*its limited use, prospective non-availability and the increased sophistication of the wider Delay in Completion insurance market*" (JCT).

Other significant changes are the omission of the JCT 98 provisions for Performance Specified Work, Nominated Sub-contractors and Nominated Suppliers, due to them being little used. In respect of variations, the Contractors Price Statement procedure has been omitted. For adjudication, the Scheme for Construction Contracts is incorporated by reference, replacing the JCT's previous own rules and enabling the provisions of most of JCT 98 Clause 31 to be omitted. The extension of time provisions have been revised (now "adjustment of completion date"), together with loss and expense provisions, payment and withholding notices, and termination. Both DB 2005 (design and build) and SBC 2005 (standard building contract) contain a "design review procedure" whereby the contractor is required to submit all design documents that it prepares for review. Following such a review, design documents are graded.

The importance of the new format, whilst remaining substantially as before, is illustrated by the design and build provisions within the Intermediate and minor works forms as well as the design and build form (DB 2005). The Minor Works Building Contract with Contractor's Design ("MWD 2005") and Intermediate Works Building Contract with Contractor's Design ("ICD 2005") are specifically tailored for the smaller end of the market where the contractor provides some design input subject to supervision from the architect or contract administrator. Neither contract is intended to be a substitute for a design and build contract; indeed, both appear only to be suitable in circumstances where the parties intend that the contractor is to be responsible for a *discrete element* of the design. This attempts to address the current trend of design teams' to place increasing design responsibility on contractors. Perhaps understandably, the contractor's design obligation differs between the two contracts. Under ICD 2005, the standard of care in relation 



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Rob, author of the SCALA and LGTF '*Guide to Standard Forms of Construction Contracts*', has offered to share his experience and expertise with you and looks forward to hearing from readers.

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to the design of the particular portion is that of a professional designer. Conversely, under MWD 2005 the standard is that of reasonable skill, care and diligence. The courts may have to decide whether the reasonable skill and care to be expected of a contractor carrying out design work is different to the skill and care to be expected of a professional designer.

(SBC 2005), DB 2005, ICD 2005 and MWD 2005 expressly provide that a contractor is not responsible for checking the adequacy of any design contained within the employer's requirements (addressing *Cooperative Insurance Society v Henry Boot Scotland Limited* (2003) - where HHJ Seymour QC held that a contractor charged with “completion” of design work was under a duty of care to examine an employer's pre-existing design and to satisfy himself that the same was such that would produce a completed design capable of being constructed). However, JCT does not remove all such design responsibility from the contractor. Under SBC 2005, DB 2005 and ICD 2005 (though not MWD 2005), a contractor is obliged to notify any inadequacies in the employer's requirements and it is incumbent on the contractor to ensure that the employer's design complies with any statutory requirements.

Despite market demand for collateral warranties (re the House of Lords decision in *Murphy v Brentwood*) JCT had previously not made provision for a contractual warranty between main contractor and third parties. However, perhaps in response to the number of bespoke warranties in existence, SBC 2005, DB 2005 and IC/ICD 2005 (intermediate) now include provisions for main contractor and subcontractor collateral warranties in favour of purchasers, tenants and funders - albeit that the nature of such provisions varies markedly across the 2005 suite of contracts. For example, the MW/MWD05 contains no such clauses, whereas the SBC 05 makes provision for collateral warranties, sub-contractor collateral warranties and the granting of third party rights.

There are publishing innovations to make things easier. The contracts are colour coded to signify their “families” or specialisations. To avoid loose-leaf

amendments, in future amendments to the contracts will be incorporated into a contract and a revised version published immediately - amendments will not be published separately. Guides are produced to further enhance “useability” of the suite. Inside the front cover of each document is a note stating the intended use for the document.

Despite the rationalisation of public and private sector versions referred to above, the number of documents has increased by the inclusion of guides, the design and build and warranty documents referred to above - and the new Framework Agreement. This reflects a response to the changing needs of the industry. I have counted some forty documents on my shelves, including the guides, and there may be more to come - a partnering contract would be appreciated by the public sector! This adds up to a comprehensive resource, focused on the demands of the industry. 