

Construction Law Training – Session 4

Other key clauses in JCT contracts and common
amendments to the JCT forms [Catchy]

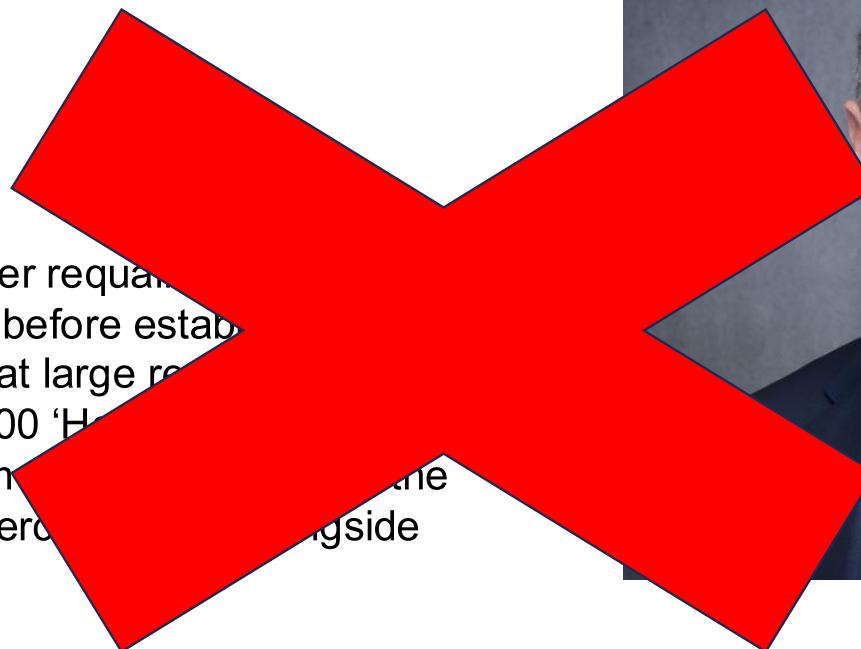
Presenter

Andrew Rush

Senior Partner

Andrew used to be an engineer. After qualifying as a chartered engineer, he spent time at a leading City firm before establishing an industry-leading construction team at large regional firms, becoming a member of the Legal 500 'Hot 100' in the process. His background allows him to understand the commercial issue and provide pragmatic commercial advice alongside specialist construction legal advice.

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Presenter

Carolyn Porter

Partner

Carolyn has a wealth of experience with all things construction and is known for her ability to handle whatever's thrown at her when others wouldn't be able to keep the plates spinning. Her "practical, pragmatic approach" has been praised by clients (Legal 500).

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Presenter

Hanna McNab

Partner

Most of Hanna's work involves disputes, but she is equally adept working on contract documents, giving ad hoc advice, and providing training. Hanna is queen of the escrow agreement, is involved with all sorts of industry bodies and committees, and, most importantly, is our Social Secretary (an honour she prizes above all others). Legal 500 has said Hanna is "on course for a very successful career". Hopefully that career is in law.

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Partners



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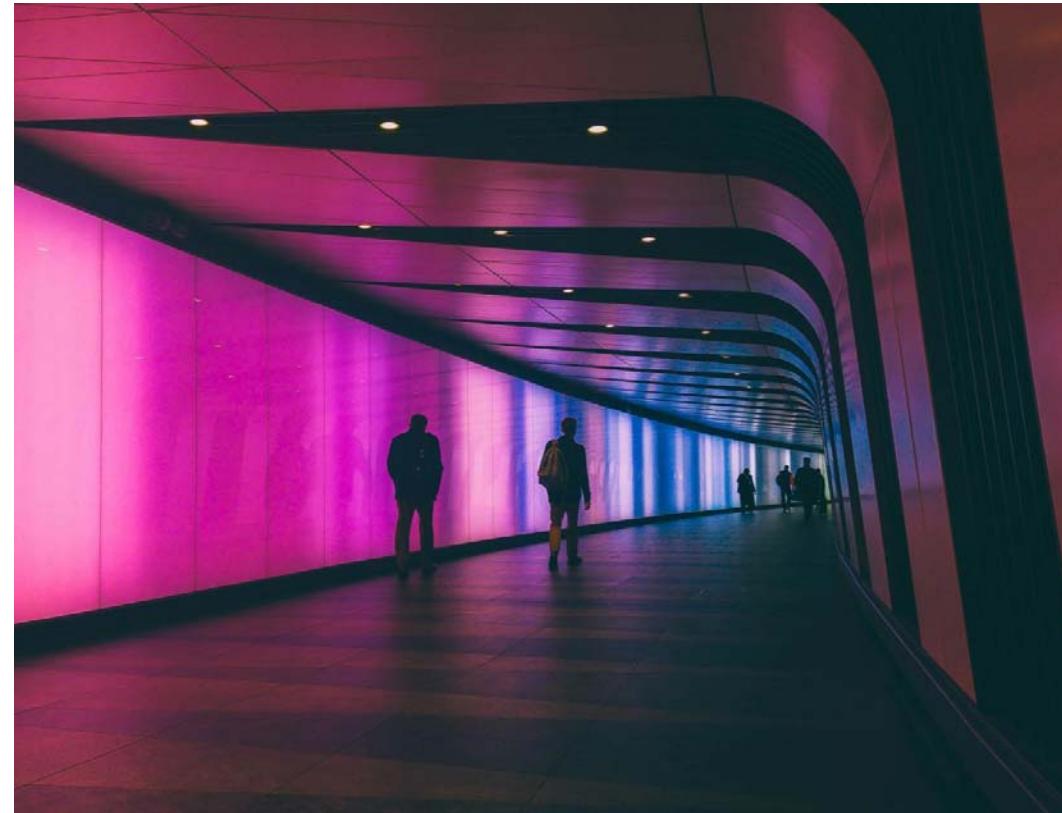
Abby Blake
Paralegal



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Paralegal

Session 4

1. Changes / Variations
2. Partial possession
3. Liquidated damages
4. Defects
5. Suspension and termination
6. Amendments



Changes / Variations

What is a Change?

- Clause 5.1 sets out two main types of Change:-

5.1 Definition of Changes

The term 'Change' means:

- 5.1.1 a change in the Employer's Requirements which makes necessary the alteration or modification of the design, quality or quantity of the Works, otherwise than such as may be reasonably necessary for the purposes of rectification pursuant to clause 3.13, including:
 - 5.1.1.1 the addition, omission or substitution of any work;
 - 5.1.1.2 the alteration of the kind or standard of any of the materials or goods to be used in the Works;
 - 5.1.1.3 the removal from the site of any work executed or Site Materials other than work, materials or goods which are not in accordance with this Contract;

What is a Change?

- The Second are changes to the working environment provided for by the ERs

5.1.2 the imposition by the Employer of any obligations or restrictions in regard to the following matters or any addition to or alteration or omission of any such obligations or restrictions that are so imposed or are imposed in the Employer's Requirements in regard to:

- 5.1.2.1 access to the site or use of any specific parts of the site;
- 5.1.2.2 limitations of working space;
- 5.1.2.3 limitations of working hours; or
- 5.1.2.4 the execution or completion of the work in any specific order.^[47]

What happens if a Change occurs?

- Obligation to comply, unless ~~reasonable objection~~ "H&S objection"
- Changes are a Relevant Event = EOT
- Changes are a Relevant Matter = L&E
 - Have you notified of delays and loss and expense?
- Impact on Contract Sum?

How are Changes valued?

- Can an agreement be reached?
- If not, valuation rules apply:-
 - For omissions, the price in the CSA is used
 - For additions, is there any similar work in CSA?
 - If so has there been any change in conditions to depart from the agreed price?
 - If not a fair valuation is made
 - Allowance for:-
 - More / less design
 - More / less site administration / facilities
 - Temporary works

Common Amendments

- Clause 5.1 is rarely amended, but beware of:-
 - Condition precedent clauses
 - Additional clauses that seek to prevent Changes, e.g:
 - Changes to statutory requirements after the Base Date
 - Omission of works to give to others

Condition Precedent

"The Contractor shall notify the Employer in writing of any event or circumstance that constitutes a Change within 7 days of becoming aware of the event or circumstance. The notification shall include:

- A description of the event or circumstance giving rise to the Change; and*
- The anticipated impact on the contract sum*

The Contractor shall not be entitled to an adjustment to the contract sum unless the notification required under this clause has been strictly complied with.

The Contractor acknowledges that compliance with the notification requirements set out in clause 1 is a condition precedent to any adjustment to the contract sum"

Changes to statutory requirements after the Base Date

- Normally an Employer risk, but sometimes amended

"The Contractor shall not be entitled to an extension of time, adjustment to the Contract Price, or reimbursement of any costs or expenses arising from or in connection with any changes in legislation, statutory requirements, regulations, or the exercise of statutory powers that occur after the Base Date"

True (?) Omissions

"The Employer shall be entitled instruct the omission of any part of the Works and to procure that such omitted part of the Works is performed by a third party and the Contractor shall not have a or make any claim for loss of profit and/or any other loss."

- Not a 'true' omission

Changes

- What do you need to do?
- When do you need to do it by?
- What is the position on verbal instructions?
- Follow up in writing - everything in writing

This is how you do it: you sit down at the keyboard and you put one word after another until its done. It's that easy, and that hard.

- Neil Gaiman

Partial possession

What is partial possession?

- Prior to Practical Completion / Sectional Completion
- Employer takes possession of part of the Works or a Section
- Contractor's consent is required (or is it?)
- Often used for storage requirements / commencement of fit out
- Different to Early Use

What happens if partial possession is taken?

- Deemed PC of the 'Relevant Part'
 - Retention release
 - Commencement of DLP
- LDs become pro-rated (by value not area)
- Becomes part of the existing structure for insurance purposes

Common Amendments

- Contractor's Consent not required
- Employer's use permitted

"The Employer may, without the consent of the Contractor, use part of the site for the purpose of storage of materials, equipment, or other items necessary for the execution of the works, or for the purpose of carrying out other works on Site including but not limited to fit out works. Such use shall not constitute partial possession of the site or any part thereof, nor shall it be deemed to signify practical completion of any part of the works."

Liquidated damages

What are liquidated damages?

- Pre-agreed level of compensation payable for delays (where no EOT due)
- Main Contract only (normally)
- No need to prove (or have incurred) any losses
- BUT must represent a genuine pre-estimate of the loss
 - Cannot be extravagant or unconscionable
- Payable up to termination (general damages after)

Notice Requirements

2.29 Payment or allowance of liquidated damages

2.29.1 Provided:

2.29.1.1 the Employer has issued a Non-Completion Notice for the Works or a Section; and

2.29.1.2 the Employer has notified the Contractor before the due date for the final payment under clause 4.24.5 or (if applicable) the Termination Payment under clause 8.7.5, 8.8.2 or 8.12.4 that it may require payment of, or may withhold or deduct, liquidated damages,

the Employer may, not later than 5 days before the final date for payment of the amount payable under clause 4.24 or (if applicable) 8.7.6, 8.8.3 or 8.12.5, give notice to the Contractor in the terms set out in clause 2.29.2.

Notice Requirements



- 2.29.2 A notice from the Employer under clause 2.29.1 shall state that for the period between the Completion Date and the date of practical completion of the Works or that Section:
 - 2.29.2.1 it requires the Contractor to pay liquidated damages at the rate stated in the Contract Particulars, or lesser rate stated in the notice, in which event the Employer may recover the same as a debt; and/or
 - 2.29.2.2 that it will withhold or deduct liquidated damages at the rate stated in the Contract Particulars, or at such lesser stated rate, from sums due to the Contractor.^[37]

Notice Requirements?

4 Stages:-

1. Non-Completion Notice (per Section)
2. Warning Notice (per Section)
3. Deduction Notice (per Section)
4. Pay Less Notice (all)

But sometimes the contract will be amended to merge step 2 and 3 above into 1 notice

What can you do if LDs are deducted?

No easy relief!

- Have you applied for an EOT?
- If so, is there a dispute over entitlement?
- Adjudication?

Defects

What is a defect?

- Not defined in JCT – can be defined in amendments
- Time period for making good?
- Latent or patent?



Practical Completion

- Definition of Practical Completion?
- Snagging list
- Warranties
- Testing certificates etc



Defects during the Works

- Work not in accordance with the Contract

3.13 Work not in accordance with the Contract

If any work, materials or goods are not in accordance with this Contract the Employer, in addition to its other powers, may:

- 3.13.1 issue instructions in regard to the removal from the site of all or any of such work, materials or goods;
- 3.13.2 after consultation with the Contractor, issue such Change instructions (to which the proviso in clause 3.9.1 applies) as are a reasonably necessary consequence of any instruction under clause 3.13.1 (but to the extent that such instructions are reasonably necessary, no addition shall be made to the Contract Sum and no extension of time shall be given); and/or
- 3.13.3 having due regard to the Code of Practice set out in Schedule 4, issue such instructions under clause 3.12 to open up for inspection or to test as are reasonable in all the circumstances to establish to its reasonable satisfaction the likelihood or extent, as appropriate to the circumstances, of any further similar non-compliance. To the extent that those instructions are reasonable, whatever the results of the opening up, no addition shall be made to the Contract Sum but clauses 2.25 and 2.26.2.3 shall apply unless the inspection or test shows that the work, materials or goods are not in accordance with this Contract.

Defects during the Works

- Workmanship not in accordance with the Contract

Workmanship not in accordance with the Contract

3.14 Where there is any failure to comply with clauses 2.1.1 to 2.1.4 in regard to the carrying out of work in a proper and workmanlike manner or in accordance with the Construction Phase Plan, the Employer, in addition to its other powers, may, after consultation with the Contractor, issue such instructions (whether requiring a Change or otherwise) as are in consequence reasonably necessary. To the extent that such instructions are reasonably necessary, no addition shall be made to the Contract Sum and no extension of time shall be given.

Defects during the Works

- Inspection - tests

3.12 Inspection – tests

The Employer may issue instructions requiring the Contractor to open up for inspection any work covered up or to arrange for or carry out any test of any materials or goods (whether or not already incorporated in the Works) or of any executed work. The cost of that opening up or testing (including the cost of making good) shall be added to the Contract Sum unless provided for in the Employer's Requirements or in the Contractor's Proposals or unless the inspection or test shows that the materials, goods or work are not in accordance with this Contract.

Suspension and termination

Suspension

- Clause 4.11
- Non-payment
- MUST give 7-day notice
- Additional costs and expenses
- EOT

4.11 Contractor's right of suspension

4.11.1

If the Employer fails to pay a sum payable to the Contractor in accordance with clause 4.9 (together with any VAT properly chargeable in respect of that payment) by the final date for payment and the failure continues for 7 days after the Contractor has given notice to the Employer of its intention to suspend the performance of its obligations under this Contract and the grounds for such suspension, the Contractor, without affecting its other rights and remedies, may suspend performance of any or all of its obligations until payment is made in full.

4.11.2

Where the Contractor exercises its right of suspension under clause 4.11.1, it shall be entitled to a reasonable amount in respect of costs and expenses reasonably incurred by it as a result of exercising the right.

4.11.3

Applications in respect of any such costs and expenses shall be made to the Employer and the Contractor shall with its application or on request submit such details of them as are reasonably necessary for ascertaining the amount in question.

Termination (by Employer)

- Grounds?
 - Default by Contractor (clause 8.4.1):
 - Suspension without cause
 - Failure to proceed regularly and diligently
 - Failure to remove work not in accordance with the contract
 - Sub-contracting without consent
 - Assigning without consent
 - Failure to comply with CDM Regs and Part 2A Building Regs



Termination (by Employer)

- Grounds?
 - Insolvency of Contractor (clause 8.5)
- What is “Insolvent”?
 - Clause 8.1 for meaning
 - Rumours are not enough!



Termination (by Employer)

- Notices (for breach)
 - Notice specifying the default (or defaults)
 - Continues for 14 days?
 - Further notice of termination (within 21 days)
- Notice (for insolvency)
 - If Contractor is Insolvent, notice at any time



Termination (by Employer)

- Remedies?
 - No further payment
 - Recover additional cost of completing the works
- Consequences of termination – clause 8.7
- Termination payment:
 - 8.7.6.1 the amount of expenses properly incurred by the Employer, including those incurred pursuant to clause 8.7.1 and, where applicable, clause 8.5.3.3, and of any direct loss and/or damage caused to the Employer and for which the Contractor is liable, whether arising as a result of the termination or otherwise;
 - 8.7.6.2 the amount of payments made to the Contractor; and
 - 8.7.6.3 the total amount which would have been payable for the Works in accordance with this Contract,

and if the sum of the amounts referred to in clauses 8.7.6.1 and 8.7.6.2 exceeds the amount referred to in clause 8.7.6.3, the difference shall be an amount payable by the Contractor to the Employer or, if that sum is less, by the Employer to the Contractor (the 'Termination Payment').
- Employer's decision not to complete – clause 8.8



Termination (by Contractor)

- Grounds?
 - Default by Employer (clause 8.9):
 - Non-payment
 - Failure to comply with assignment clause (i.e. assigns without consent)
 - Failure to comply with CDM Regs
 - Insolvency (clause 8.10)
 - If Employer is Insolvent (same definition)
- Notices?
 - Specified default > 14 days > termination (within 21 days)
- Consequences?
 - Payment – including loss and/or damage caused to the Contractor



Termination Payment

- Does the Scheme apply?
- New clause 8.13 in JCT 2024
- Final date, notices and amount



Termination – Beware how you terminate!

- Wrongful termination? Breach of Contract
- Notices:

8.2.3 Each notice referred to in this section, except for the notices referred to in clause 8.13, shall be given in accordance with clause 1.7.4.

1.7.4 Any notice expressly required by this Contract to be given in accordance with this clause 1.7.4:

1.7.4.1 shall be delivered by hand or sent by Signed For 1st class or Special Delivery Guaranteed post (or any method of posting as has replaced either method and is then current) and, where sent by post in that manner, shall be deemed to have been received on the second Business Day after the date of posting; or

1.7.4.2 (where clause 1.7.4.2 is stated in the Contract Particulars to apply) shall be sent by email to the recipient's email address stated in the Contract Particulars against clause 1.7.4.2, or to such other email address as the recipient may from time to time notify to the sender (provided that such notification states that it is a notice of change under this clause 1.7.4.2), and shall be deemed to have been received on the next Business Day after the day on which it was sent.



Termination – Common Law Rights

- Clause 8.3
- In addition to contractual rights
- Common law



8.3 Other rights, reinstatement

8.3.1 The provisions of clauses 8.4 to 8.7 are without prejudice to any other rights and remedies of the Employer. The provisions of clauses 8.9 and 8.10, and (in the case of termination under either of those clauses) the provisions of clause 8.12, are without prejudice to any other rights and remedies of the Contractor.

Termination – Common Amendments

- **Grounds:**
 - Removal of non-payment by Employer
 - Removal of requirement to consent to assignment (for Employer)
 - Termination at will
- **Notices:**
 - Served on specific person
 - Method of service
- **Consequences**
 - No entitlement to loss of profit no matter how termination occurs
 - Removal of entitlement to losses caused to the Contractor by the termination

Amendments

Amendments – why?

- Risk profile
- What goes wrong on a project:
 - Design issues
 - Errors
 - Delays
 - Additional cost
 - Defects
 - Payment disputes



Typical Amendments

- Order of Precedence
- Consents / Planning
- Statutory Requirements / Building Safety Act
- Statutory Undertaker risk
- Third Party Agreements
- Design Risk
- Discrepancy Risk
- Ground conditions / Site conditions
- Condition Precedents for EOT / Loss and Expense / Variations
- Restrictions on EOT / concurrent delay?
- Termination at will
- Warranties / TPR's



Order of Precedence

- Clause 1.3
- What about the schedule of amendments?
- What about the Contractor's clarifications?



1.3 Agreement etc. to be read as a whole

The Agreement and these Conditions are to be read as a whole. Nothing contained in any other Contract Document or any Framework Agreement, irrespective of their terms, shall override or modify the Agreement or these Conditions.

Site Conditions

- Common law position = Contractor's risk
- Who is responsible for existing services?
- Refurbishment – who takes the risk for the existing structure?

Site Conditions

“The Contractor warrants that the Contractor has made all necessary allowances in the Contractor’s Proposals for all Site conditions (including any latent or unforeseen conditions). The Parties agree that no such conditions shall give rise to a Change in the Employer’s Requirements or to an entitlement to an extension of time under clause 2.25, loss and/or expense under clause 4.19, any other addition to the Contract Sum and/or damages”

The Contractor shall not be entitled to rely upon any drawing, survey, report or other document prepared or provided by or for the Employer regarding any matter referred to in this clause and the Employer makes no representation or warranty as to the accuracy or completeness of any such drawing, survey, report or document.”

Third Party Agreements

- Building contracts interlinked with:
 - Funding agreements
 - Agreements for lease
 - Basic asset protection agreements
 - Other project specific agreements

Third Party Agreements

“The Contractor may be supplied (before or after the date of this agreement) with copies of any third party agreements and any other documents (or such extracts of the same) as shall be relevant to the Employer’s obligations under those agreements or documents and the Contractor undertakes and warrants to the Employer that the Contractor in carrying out its obligations and duties under this contract shall not cause constitute or contribute to any breach by the Employer of its obligations and/or duties under such third party agreements or documents. Compliance with this clause shall not constitute a Change.”

Termination at will / Omission of work

- No automatic right to terminate at will
- Termination at will + no loss of profit
- Repudiatory breach if do so? Consequences?
- What about right to omit and give to third party?
- Common law position:
 - No right to omit and give work to others
 - Only a right to omit



Termination at will / Omission of work

"The Employer may at any time give the Contractor notice that the Contractor's employment under this Contract will determine fourteen (14) days after the date of receipt of such notice and the Contractor's employment under this Contract shall determine fourteen (14) days after receipt of such notice"

Or

"The Employer may at any time and for any reason give the Contractor notice that the Contractor's employment under this Contract will immediately determine."

Questions

Thank you

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