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# CONTRACT ADMINISTRATION UNDER JCT



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## What are we going to cover?

- The role of the CA
- Duties and liabilities
- Variations and changes
- Extensions of time
- Practical completion



## The role of CA

- JCT MW/IFC/SBC all incorporate the role of CA
- JCT D+B has “Employer’s Agent” rather than CA
- Roles are largely similar but subtle differences
  - JCT MW/IFC/SBC
    - The contract states that the CA shall issue certificates, grant EoTs etc
  - JCT D+B
    - The contract states that the “Employer” shall do these things
    - Article 3 states:
      - “..the Employer’s Agent shall have full authority to receive and issue applications, consents, instructions, notices, requests r statements and otherwise to act for the Employer under any of these Conditions”*



## What does the CA do?

- The CA role under a JCT contract includes the following:
  - Issuing instructions
    - Variations
    - Provisional sums
  - Approval of items submitted by contractor
  - Reviewing progress and attending site meetings
  - Issuing payment “certificates”
  - Assessing extensions of time
  - Certifying PC
  - Dealing with defects liability
  - Issuing certificate of making good
  - Agreeing the final account
  - Issuing final certificate



## Who should act as CA?

- JCT defines the role as “Architect/Contract Administrator”
- Often the project architect will be CA
- But it doesn’t have to be. It could be any professional consultant (surveyor, engineer, solicitor(!) etc)
- Clause 3.5 (SBC) sets out rules for replacing CA if the role is vacated. Usually should be a “like for like” replacement. Contractor can object to the new appointment.
- Can the CA be an employee of the Employer?
  - In theory yes but would be subject to challenge of partiality
  - In the case of LA Employer the position is different



## Duties and liabilities

- Terms of appointment
  - Contract between CA and Employer
  - CA is not a party to the build contract
- Dual role
  - Adviser to the Employer
  - Independent certifier under the build contract
- RICS Guidance Note:

*“The CA is responsible for administering the terms of the building contract between the parties. The CA will act as the agent of the employer in some circumstances but will be required to make impartial decisions in others (see 2.2.2). The obvious contradiction of this ‘dual’ role can give rise to difficult issues.”*



## Variations and changes

- Two roles in relation to variations:
  - Issuing instructions to vary the work
  - Valuing the effect of the variation
- Instructing a variation – the CA is acting as agent of the Employer (ie. the Employer has requested the change to happen). CA needs to ensure that the Employer has authorised the change.
- Valuation – CA is acting impartially and fairly. Must follow contract rules about how to value the variation (rates, BoQ, Quantum meruit)



## Extensions of time

- JCT SBC – EoT can be granted for Relevant Event
- Contractor should give notice requesting EoT specifying the reason for the delay (by reference to Relevant Event)
- CA should assess the impact of the Relevant Event and issue an EoT if it will impact on the Completion Date (must impact the critical path)
- If work not completed in time then CA should issue no-completion certificate (no certificate = no LDs)
- Within 12 weeks of PC the CA should review all EoTs granted and decide if any further adjustment is required



## Practical completion

- PC is not defined in the JCT contracts
- Generally means that the works are complete so the building can be put to its intended use and there are no outstanding defects
- PC impacts on the following:
  - Exclusive possession of site
  - Insurance
  - Liability for LDs
  - Rectification period starts
  - Release half retention
- PC can be certified if there are *de minimis* snagging items only
- CA should not certify PC if there are any substantial works or defects outstanding (but they often do!)





## Practical completion

- Partial possession – requires consent of Contractor
- Sectional completion – PC is certified for each section.
- Insurance and LDs stop
- Rectification period starts
- Post-PC – final monthly interim certificate. Thereafter interim certificates should be issued every 2 months (even if the valuation is nil).



## *“Freeborn v Marcal”*

- Highlights the importance of having written terms of engagement
- Architect designed and administered contract to build a home cinema. The client was unhappy with the end result. Architect said that designs were signed off at every stage
- Architect lost and was heavily criticised for not having a written contract of engagement
- Client recovered £500,000 damages against architect for design that he said he didn't approve



## *“Freeborn v Marcal”*

*“The central plank of the Defendant’s case on approval was the so-called daybooks. However, these daybooks – the tumble dryer of information – could not be relied upon because they could not be reliably used as a source document. Not even the Defendant could understand what they recorded or when these records were produced. The Defendant’s failure to produce a written brief was a serious breach of duty which went to the root of the difficulties which he and the Claimants encountered.”*



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## *Sutcliffe v Thackrah [1974]*

- Claim by Employer against CA (architect)
- Employer wanted to build a new house
- No formal terms of engagement with CA
- Build contract was in RIBA standard form
- CA issued interim certificates which Employer said over-valued the work
- Contractor became insolvent
- Employer claimed damages from CA for the over-certification

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### *Sutcliffe v Thackrah [1974]*

- CoA decided that CA is not acting as “arbitrator” when issuing certificates
- CA not immune from claims
- CA has a duty to act with reasonable skill and care
- However – in performing the role the CA also has a duty to act impartially and fairly between Employer and Contractor
- Duty of impartiality overrides duty to obey client’s instructions



### *“London Borough of Hounslow v Twickenham Garden Developments Ltd [1971]”*

- *under a building contract the architect has to discharge a large number of functions, both great and small, which call for the exercise of his skilled professional judgment. He must throughout retain his independence in exercising that judgment ... it is the position of independence and skill that affords the parties the proper safeguards and not the imposition of rules requiring something in the nature of a hearing*





### *“Pacific Associates v Baxter” [1988]*

- Claimant was contractor who was engaged to undertake dredging work in Dubai
- Build contract included for supervision by engineer retained by Employer
- Engineer responsible for certifying payments
- Engineer issued payment certificates which Contractor said undervalued work by £45m
- Alleged negligence against engineer based on failure to act fairly and impartially



### *“Pacific Associates v Baxter” [1988]*

- Court held that the engineer did **not** owe a contractor a duty of care in negligence when certifying payment
- The engineer only owed a duty to their client (the Employer)
- Contractor should have made their claim against Employer
- If the claim against Employer is upheld then Employer may have a claim in negligence against their engineer.



*“Trustees of Ampleforth Abbey Trust v Turner and Townsend” [2012]*

- Defendant was appointed as PM to act on three construction projects to provide new boarding accommodation at the college.
- A contract was never finalised between Employer and Contractor. Instead the works were carried out under various LOI's.
- The works were completed late.
- Had a contract been executed, the Employer would have been entitled to claim liquidated damages of £750,000 from the Contractor.
- Since no contract executed LDs did not apply.



*“Trustees of Ampleforth Abbey Trust v Turner and Townsend” [2012]*

- Employer alleged that TT had failed to exercise reasonable skill and care by allowing work to proceed on LOIs
- Court concluded that, if TT had insisted that Contractor sign contract, there was a two-thirds chance they would have agreed to do so.
- Court decided that LDs would have been £340K
- Awarded Employer 2/3 of that sum
  
- Whilst this related to a PM it could also apply to CA where a contract is in place
  - Performance bond
  - Collateral warranties





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