

RELEVANT EVENTS AND COMPENSATION EVENTS - A COMPARISON

Relevant Events and Compensation Events

For those of us who are used to JCT terminology it is not always easy to make the translation from JCT to NEC contracts. One of the most important mechanisms in both contracts is dealing with change and extension of time. The JCT 2005 suite of contracts deals with the effects of change on time and money by reference to relevant events and relevant matters, whereas the NEC contracts refer to compensation events.

To help with the translation on the rear of this Newsletter is a table in alphabetical order, referring to the events we usually come across followed by reference to the appropriate JCT and NEC clauses. The translation is not perfect because the wording in the two suites of contracts is quite different. We hope that this is a useful starter when faced with looking where to find the appropriate clauses when dealing with claims for additional time, loss and/or expense and compensation events. We are sure that some of you will have a different interpretation. If you do, please get in touch with us by email at enquiries@ramskillmartin.co.uk and we will get back to you and review the table in a future Newsletter. If you need to refer to DB then the references are to clause 2.26.

Cost of Adjudication

As a means of effectively avoiding the Adjudication provisions in the Housing Grants Construction and Regeneration Act 1996 parties often include a clause to the effect that the other party will have to pay both sides costs incurred in the Adjudication process. So, for example, if a Main Contractor had included such a clause in his Terms and Conditions and if there was a dispute over say, £50,000.00 which the subcontractor said he was owed by the Main Contractor, then the subcontractor could easily end up paying both sides costs, probably making the Adjudication a pointless exercise.

In *Yuanda (UK) Co Limited -v- WW Gear Construction Limited* in April this year Justice Edwards-Stuart disagreed with the judgment in *Bridgeway and Tolent (2000)* and it is likely that such clauses will now be outlawed.

It is worth noting that the DTI had recommended that such clauses (*Bridgeway Tolent*) should be outlawed and that this was to take effect in and be implemented through the Local Democracy, Economic Development and Construction Act 2009 (LDED Act), although when this will actually come into force is still a matter of conjecture.

Difficulty with partly written and party oral contracts

Since 2002 and the Court of Appeal decision in (*RJT Consulting -v- DM Engineering*) it has been the position that for a contract to be caught by the Adjudication provisions of the HGCR Act 1996 then all the contract needs to be evidenced in writing and not just part of it. This has been confirmed on a number of occasions since 2002. A useful reminder of the principles has been given by Mr Justice Akenhead in June of this year in the case of *ROK Building Limited -v- Bestwood Carpentry Limited*.

This involved a fairly typical situation in the construction industry. A number of instructions were given to Bestwood by ROK and the scope of Bestwood's work increased. ROK then asked Bestwood to provide rates and prices on a measured work basis and sent Bestwood a pro-forma instruction which was entitled "*Letter of Intent for Carpentry Works*" which said, amongst other things, "*please carry out all carpentry and associated works on price as agreed with our Quantity Surveyors*". The argument between the two sides was about the contractual or legal basis upon which the additional work was to be valued. For over three years the two sides tried to agree the final account and there were arguments about whether there was one contract, two contracts or no contract at all.

Mr Justice Akenhead accepted that contracts could have an implied term as to price where nothing had been agreed but found that the "*agreed rates between Bestwood and ROK were only agreed orally*" and accordingly he found that the contract was not wholly in writing and that the Adjudicator did not have jurisdiction.

It is not always easy during negotiations to ensure that everything will be agreed in writing, often we have meetings or telephone calls when contract terms are agreed. However, until the proposed changes to the HGCR Act (LDED Act) come into force which change the position about contracts in writing, if you want to take advantage of the HGCR Act then you must ensure that all terms are evidenced in writing.

Daywork—A Reminder

Daywork is an area in construction which is often a source of dispute. CAs and contractors often refuse to sign daywork sheets claiming that they are unable to do so as they were not on site or sign them "*for record purposes only*". Often contractors and subcontractors fail to submit the daywork sheets at the appropriate time.

One matter that the courts have considered is whether a Contractor can claim work to be a daywork and valued it as such if it has not been signed. In the case *JDM Accord Limited -v- DEFRA* the courts considered whether unsigned daywork sheets, which had been presented in accordance with the contract, were valid. Due to a failing on DEFRA's part to provide adequate supervision the sheets submitted by JDM were not signed; DEFRA later claimed it was unable to sign the sheets as it could not verify the hours claimed. The court decided that DEFRA was in breach of contract while JDM was viewed as fulfilling its part of the bargain by presenting the records for signature in accordance with the contract.

The effect of this case is that if the Contractor submits a daywork sheet for signature in the accordance with the contract, and the CA fails to sign the submitted sheet, it is for the Employer, at a later date, to demonstrate that the hours recorded in the daywork sheets are inaccurate—a *difficult task*.

It should be remembered that a signed daywork sheet is not a signed cheque. Many contracts contain rigorous procedures to be followed before work is classed as daywork or clearly state that valuation of work as a daywork is a final option if it cannot be measured in some other manner (typically bill rates, adjusted bill rates or fair and reasonable rates). A question often asked is "*If I cannot claim the work as a daywork and I cannot measure the work, how do I value it?*". The answer is usually In the contract, if the work cannot be measured and it is not possible to apply bill or adjusted bill rates it should be valued on a fair or fair and reasonable basis. The difficulty comes in ascertaining what a fair and reasonable rate/price is. We will look at this in a later Newsletter.

RELEVANT EVENTS AND COMPENSATION EVENTS

| <u>EVENT</u> | <u>JCT 2005 SBC/Q</u> | <u>NEC 3</u> |
|--|-----------------------|------------------------------------|
| <i>Antiquities</i> | 2.29.2; 4.24.3 | 60.1(7) |
| <i>Approximate Quantity</i> | 2.29.4; 4.24.5 | 60.4 - 60.6 (Option B) |
| <i>Civil Commotion; Terrorism</i> | 2.29.10 | 60.1(19) |
| <i>Deferment of Possession</i> | 2.29.3 | 60.1(2) |
| <i>Early Partial Possession</i> | | 60.1(15) |
| <i>Force Majeure</i> | 2.29.13 | 60.1(19) |
| <i>Instructions</i> | 2.29.2; 4.24.2 | 60.1(1) (2) (7) (8) (10) (11) |
| <i>Planning Permission (DB)</i> | 2.26.12; 4.21.5 | 60.1(5) |
| <i>Prevention; Default</i> | 2.29.6; 4.24.6 | 60.1(3) (5) (6) (9) (14) (16) (18) |
| <i>Specified Perils</i> | 2.29.9 | |
| <i>Statutory Powers</i> | 2.29.12 | 60.1(19) |
| <i>Statutory Undertakers</i> | 2.29.7 | 60.1(5) |
| <i>Strikes</i> | 2.29.11 | 60.1(19) |
| <i>Suspension of Performance</i> | 2.29.5; 4.24.4 | Y.2.4 |
| <i>Variations; Compensation Events</i> | 2.29.1; 4.24.1 | 60.1(1) (4) (8) (12) (17) |
| <i>Weather</i> | 2.29.8 | 60.1(13) |