Francis Ho For short works contracts, there's a new sheriff in town called RIBA – plain talking, bold and ambitious. But is it going to be able to outgun the competition?

HIGH NOON OR THE WILD BUNCH?

WITHOUT THE JCT'S BAGGAGE OF MAINTAINING CONSISTENCY, RIBA CAN FOCUS ON PLAIN LANGUAGE. INTELLECTUAL PROPERTY IS DEALT WITH IN 43 WORDS, ADJUDICATION IN 29

RIBA has resumed publishing building contracts and is pitting its new Concise Building Contract (CBC) and Domestic Building Contract (DBC) against the JCT's two Minor Works Building Contract variants (MWBC) and Home Owner Contracts (HOCs). This may appear to conflict with its role as a JCT member and co-founder. In truth, it's had little involvement with the JCT's building contract suite for a while.

More standard forms, you might say, to throw on the pile. Regardless, competition and fresh thinking drive progress. Only the NEC and CIOB have offered credible alternatives recently to the best-selling MWBC. For homeowner works, options are starker still. Short contracts mean softer learning curves, critical in an industry often resistant to change. Even so, RIBA must deliver compelling reasons to switch.

The CBC starts strongly. A capacity to stipulate sectional completion, a programme, advanced and milestone payments, third party rights and collateral warranties are enterprising developments for a small works agreement. Parties can even use a risk register.

If the contractor fails to apply for loss and expense in time, it loses the right to claim. If it does not submit the effect of a variation on the completion date or price within the required period, it is not entitled to more time or money. When contractor design is mandated, this is to be performed with professional skill, care and diligence and professional indemnity insurance maintained (fitness for purpose can be specified instead, which will undoubtedly excite insurers). Works must be carried out regularly, diligently and in a good and workmanlike manner. The contractor remains liable for any subcontracting.

This is bold, ambitious stuff but perhaps not much different to an MWBC incorporating

typical amendments. The conditions permit partial possession and for the employer to terminate the contractor's employment for material or persistent breach. The contractor may determine for material breach or non-payment. Practical completion is defined.

As with the NEC, the parties must give early warning of events affecting the price or progress of the works and endeavour to resolve it. The contractor's non-compliance can be taken into consideration in establishing whether it should receive more time or money. This may have fared better as an option. In context, the administrative load created may cause more harm than good.

The CBC tackles several of the MWBC's bugbears and does so, remarkably, all within 30 pages. Without the JCT's baggage of maintaining consistency, RIBA can focus on plain language. Intellectual property is dealt with in 43 words, adjudication in 29.

BREVITY NEEDS TO BE BALANCED WITH CLARITY AND SOME LAWYERS MAY FEEL THE CBC OCCASIONALLY GETS IT WRONG

Even so, something had to give. There is no fluctuations provision (less important here). And though it's meant that the CBC is far more accessible than the MWBC, vigorous pruning has not been without incident. An explicit reference to the Construction (Design and Management) Regulations would not have gone amiss. The parties must meet to resolve a dispute before issuing proceedings; however, the wording fails to make it obvious that this step does not catch adjudication (a breach of the 1996 Act). The contract is assignable by the employer but an additional reference to "burdens" inadvertently hints at novation.

Brevity needs to be balanced with clarity and some lawyers may feel the CBC occasionally gets it wrong. Likewise, it's a misstep that the employer must follow the architect/contract administrator's advice as to whether to seek liquidated damages for late completion. The only prerequisite should be a failure to complete on time. (Nothing prevents the employer being named as the architect/contract administrator.)

The CBC and the DBC are so similar that I'd query why two agreements were necessary. On the other hand, separate forms make marketing easier. Naturally, the DBC marks a steep upgrade on the HOCs, which are suited only to basic projects.

RIBA offers both agreements in print and online without subscription. Using the digital service was a breeze. They are user-friendly documents and will appeal to those who regard construction contracts as inscrutable. Coupled with their attempts to address market demands, this means that one of its members now presents the JCT with a fearsome rival.

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Gary Sinden RIBA's new dispute resolution schemes try to keep the parties from falling out with each other by making the process cheaper and less burdensome than adjudication

EASY DOES IT

An architect friend of mine recently pointed me in the direction of two new dispute resolution schemes from the RIBA launched in November 2014. They are described as "alternatives to more formal dispute resolution processes – RIBA fixed-fee mediation and RIBA third party opinion".

Although the fixed-fee mediation without doubt has significant benefits to the parties, it is the third party opinion which particularly caught my eye.

Before the introduction of this dispute method, I have often had to tell clients that certain disputes simply aren't suitable for adjudication. It wasn't that they might not have a good case, they often did, but the cost of going through the whole process from a risk profile point of view simply outweighed the potential recovery.

Adjudication is typically viewed as a mini arbitration with a raft of case law to review and legal challenges now the norm. It is little wonder lawyers see adjudication as fertile grounds for fee-earning and adjudicators' hourly fees reflect the level of knowledge they need to know, understand and apply.

Additionally some clients have steered away from adjudication as it typically creates a large divide between the parties with the result that neither side wishes to jump straight into another contract with the other. With the recession reducing the number of supply chain partners in the market and with the possibility that the current "good times" may increase long-term collaboration, I think it is right that adjudication is not seen as one size fits all.

Expert determination is an existing alternative to adjudication but the take-up within the construction industry is extremely low. Also, on low value disputes, the risk/reward profile still might not work. Most standard forms of contract don't include an expert determination process, so one would need to be created. With bespoke drafting required and consideration for such things as privacy, finality, procedure and enforceability, input from lawyers will often be required. Add the fact that most companies are busy building things, they probably don't even know who or where to look for a suitable expert.

Well, possibly all this will change with the introduction of the RIBA third party opinion. The RIBA describes it as: "An independent professional being appointed on behalf of the parties to provide a professional opinion and recommendation for settlement. Third party opinion is suited to disputes concerning matters of valuation or a technical nature such as the performance or installation of a product or service, where the matter can reasonably be expected to be resolved in a relatively short timescale. It is a procedure entered into by consent, rather than forming part of the contract terms."

The procedure is broadly the same as an adjudication process but some key differences do exist:

- There is no statutory right to use this process, and it has to be agreed by both the parties
- A party (or the parties) will apply to the RIBA administrator setting out the dispute on no more than two sides of A4
- Subject to the administrator being satisfied, both parties agree to the process and a £50 application fee is received; an independent professional will be nominated
- Once nominated, the independent professional will contact both parties and request their relevant submissions, being limited to 10 sides of A4 of supporting documents
- The independent professional fee is limited to five hours at £100 per hour (or such other timescale and therefore cost as the parties may agree), plus expenses
- If a settlement is reached the parties will sign a binding agreement with the agreement being confidential

SUCH A 'QUICK AND DIRTY' APPROACH ISN'T SUITABLE FOR MANY DISPUTES – SUCH AS HIGH TICKET ITEMS

- The parties are jointly and severally responsible for the payment of the fees.

With such a process I see the benefit not only being the minimal cost of determination, but also the minimal cost in party preparation due to the severe restraint on the submission size.

Obviously common sense must prevail – such a "quick and dirty" process isn't suitable for many disputes and certainly not high ticket items. Often however adjudications are single disputes but over multiple items and if one or two of them were settled early in the project, this would have set a precedence on how to deal with the remainder, thereby avoiding disputes. Additionally simply getting a determination of an item could prove beneficial therefore allowing the parties to carry on with their day job.

It will certainly be interesting to see if this alternative method changes the current dispute landscape. In any case we should take our hard hats off to the RIBA for looking at ways disputes can be resolved without the parties falling out with each other.

Further information can be obtained on the dispute resolution page of the RIBA website.

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