

# Navigating Construction Contracts in 2025

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# 5 Year Anniversary!

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The image shows a webinar interface. On the left, there are three video feeds stacked vertically. The top feed shows a woman with glasses and a dark top. The middle feed shows a man with glasses and a green shirt. The bottom feed shows a man with glasses and a dark shirt, with a 'MORE VIDEOS' button overlaid. The right side of the interface displays a presentation slide with a light blue background and a pattern of diagonal blue lines on the right side. The slide contains the following text:

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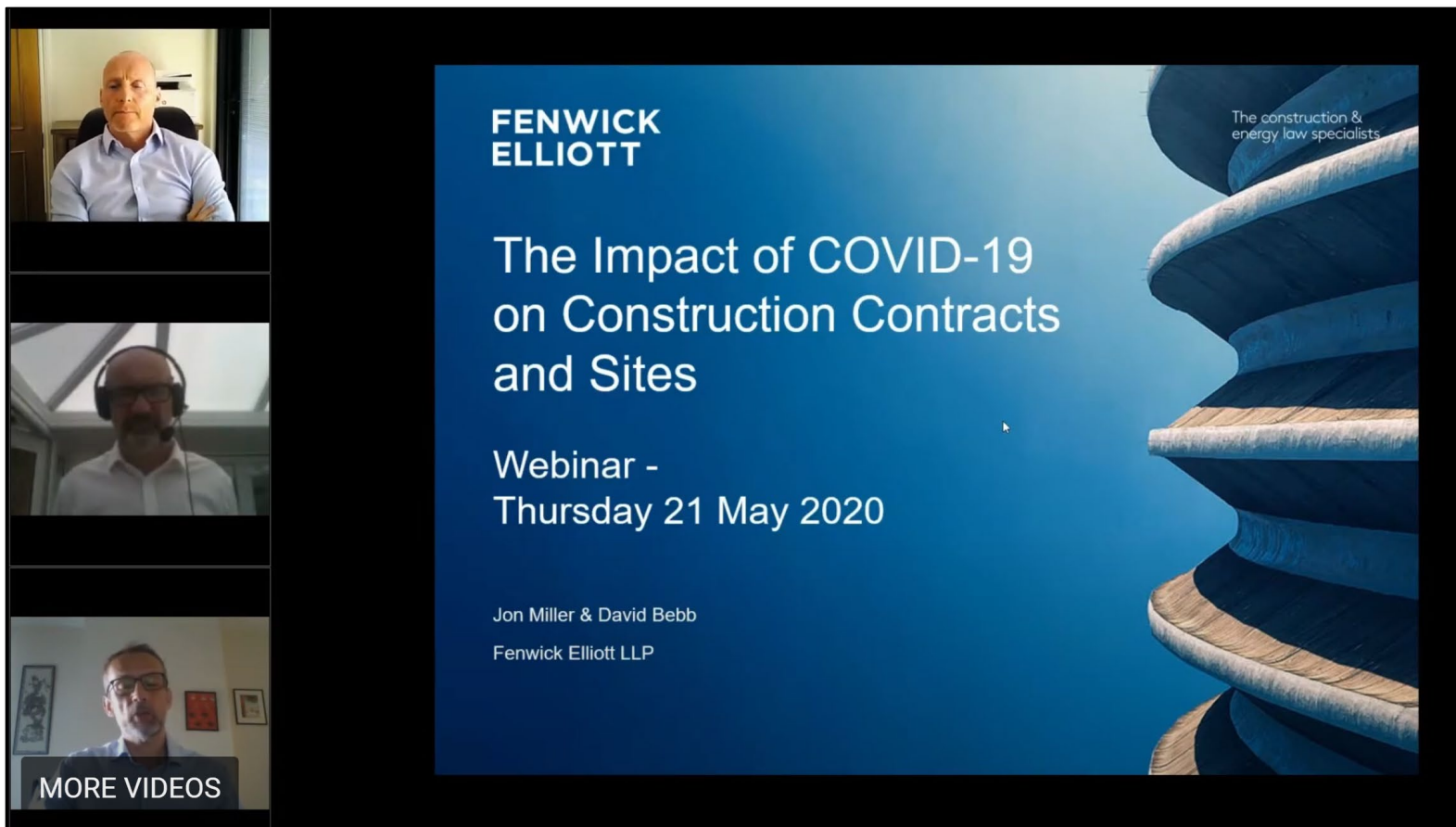
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# Introduction

- How did we choose today's topics?
- Couple of cases on very topical issues (design and tender clarifications)
- Design information, RIBA Plan of Work and conflicts in contract documents
- How to write a good clarification and properly incorporate it
- Insolvency risk in light of ISG (and others)
- Tariffs
- Supply chain
- Project funding
- Time for questions

# Design information, RIBA Plan of Work and conflicts in contract documents

## *Workman Properties Ltd v Adi Building and Refurbishment [2024]*

### **What was the argument about?**

The stage of pre-contract design by the client team.

ERs (para 1.4) said *“Significant design has been developed to date which has been taken to end of RIBA Stage 4, with some parts of contractor specialist design ...to Stage 4(i)”*

Adi said the design fell short of Stage 4 and wanted their costs to develop the design.

### **What was the outcome?**

Adi was responsible for *all* design, including pre-contract design included in the ERs. This was consistent with all the relevant terms in the contract.

Court said para 1.4 was an outlier, inconsistent with the terms and not enough to qualify all other terms. Numerous contract documents.

If 1.4 had been a warranty, Adi would have had no responsibility for satisfying itself that it could *“proceed to construction stage without checking the existing design was sufficient and adequate”*.

Adi took the risk of relying on the consultants’ earlier design without verifying its adequacy, and it could protect itself against this by relying on the novated appointments with those consultants.

# Design information, RIBA Plan of Work and conflicts in contract documents

## What are some of the lessons from Workman?

The Court focuses on the contract documents as a whole and the language in the contract. No new laws of interpretation here but very relevant to construction contracts (many documents, different authors, overlap etc)

If numerous express terms lean one way, it's unlikely one isolated, conflicting statement (i.e. para 1.4 in the ERs) will override them.

Pre-contract negotiations and subjective intentions will not help.

Can contract documents be consolidated? “Post-Tender Negotiations”, “Risk Allocation Schedule”, “Tender Clarifications” and “Amendments”. Huge scope for a mismatch. “Kitchen sink” approach.

RIBA plan of work is not intended to be a contract document but is relied on by the industry. It says what should be achieved but does not say who has to do it. Need to look at contract.

Is RIBA plan clear enough about Stage 4? *“All design information required to construct the project completed”* but *“Stage 4 will overlap with Stage 5 on most projects”*.

Draft carefully to ensure responsibilities are clear and documents do not conflict – if the design team and contractor have a different view on what is Stage 4, clarify it.

# Design information, RIBA Plan of Work and conflicts in contract documents

***John Sisk and Son Ltd v Capital & Centric (Rose) Ltd [2025]***

## **What was the argument about?**

Dispute over the allocation between of risk for ground conditions and existing structures.

Amended JCT DB 2016 included new clauses 2.42.1 to 2.42.3 imposing extensive risk on Sisk for ground and existing buildings.

An additional clause 2.42.4 qualified those risks by saying “*this clause 2.42 shall be subject to item 2 of the Clarifications*”.

## **What was the outcome?**

There were 2 clarifications documents: (1) “Contract Clarifications” (employer risk) and (2) “Tender Submission Clarifications” (contractor risk)

The “Contract Clarifications” was the relevant document so employer takes the risk.

Tender Clarifications were not in the contract document schedule, and nothing suggested they had been incorporated

# Design information, RIBA Plan of Work and conflicts in contract documents

## What are some of the lessons from Sisk?

Be careful about which documents become contract documents. There were both “tender submission clarifications” and “contract clarifications”

Use of hard copy and electronic contracts. The electronic version included both “tender submission clarifications” and “contract clarifications” whereas hard copy contained only the “contract clarifications”

Always dovetail with the contract conditions. Had Sisk not amended 2.43.3 then very high chance neither clarifications document would have applied. Sisk approach was correct – common amendments rarely reflect the deal.

Be careful with the drafting. If a document has a specific name/doc ID then refer to this accurately. Wide wording such as “clarifications” may not have worked. Drafting needs to point to a specific document.

# How to write a good clarification

Involve the right people (design, commercial, programme etc). What may be clear to you, may not be so clear to others.

Who has the final read through from start to finish? Usually only when there's a dispute. Look at the index of contract documents - scope for overlap?

Avoid including email trails – they almost always go quiet, people drop off copy, don't answer the question, are out of date. Often in pre-start minutes as well as clarifications.

Think of all the likely scenarios and how you want to deal with them. How would things pan out on site? What would be the best outcome? Is it as simple as “treated as a variation”?

“Employer risk” and “contractor risk” can be *“reasonably obviously understood in their normal or natural meaning , especially in the context of construction contracts.”* (Sisk)

Could the same issue also be covered in the contract conditions? Project teams should know basics (time, compliance with B Regs etc)

A good construction lawyer should not be afraid to roll up their sleeves. The most relevant and commercially important information won't be found in the front end of the contract.

Consider using worked examples, drawings, formulas etc. Can be a tendency for a clarification to be a series of bullet points. Why?

# Some good (and not so good) examples **FENWICK ELLIOTT**

## Could be clearer...

*The Contract is based on the CSA document; and supporting tender package returns”*

*“Contractor’s risk allowance has been included in the sum of £50,000 representing approximately 2.5% across the CDP”*

*“Inflation post IQ 2025 excluded”*

*“Excluded: Consequential improvements under Part L2 Building Regs”*

*“Excluded: Implications of Brexit / Coronavirus”.*

## Getting better...

*“”No allowance has been made for any security to the individual Sectional Completion elements of the development post Practical Completion. Any such requirement shall be instructed as a Change”*

# How to incorporate your good work

So, having done the hard negotiation work how do should the clarification be included?

Sisk may well have lost had they not made sure the relevant clause in the conditions referred to the clarifications document.

First, understand what the contract conditions say about priority. Is this standard form or has it been amended? If amended, what is the effect?

Do not rely solely on a priority clause. Not a substitute for taking care to avoid conflicts. They do not address ambiguities within a clause or between documents of the same priority (consider how many documents are in a set of ERs).

Second, the best solution is to get the clarifications recognised in the amendments as Sisk did with this:

*“This clause 2.42 shall be subject to items 2 of the Clarifications”*

This approach will only work where the client’s lawyers have bought into it. They should be bought in because the clarifications are likely to be a far more accurate reflection of the deal.

# Insolvency risk

Remains a major risk across the industry. ISG was a wakeup call for clients, main contractors, subcontractors and the surety market.

Same issues up the line (between employer and contractor) apply equally down the line between contractor and supply chain.

Employers: bonds, guarantees, step-in rights, valuation & longer payment terms, etc

Contractors: payment guarantees, advance payments, valuation and shorter payment terms, escrow accounts, retention bonds, etc

Subtle changes to contract conditions including the insolvency of a party's parent company is deemed to mean that party is also insolvent.

*“an event or circumstance occurs which [the employer] reasonably believes has or is likely to have a material adverse effect on [the contractor's] ability to complete its obligations under the contract”*

Bonds and counter indemnities with the sureties. Some sureties have tightened the wording (it seems following ISG).

# Inflation



- It's all about the contract!
- English law lets you divide up the risks as you wish and assumes you have understood what you have signed.
- Some of the standard forms deal with inflation but they are usually optional provisions and can be too general in their application.
- Commercial deals struck are usually more limited (eg to very specific materials such as steel or timber).
- Deals will vary hugely depending on the project. Is the risk in fuel prices, lithium or the steel? Prices fluctuate.

# Inflation: FIDIC

- The FIDIC Red and Yellow Books (2017) both include provisions for adjustments to be made to the contract price to reflect changes in costs of labour, goods and other inputs required for the works
- These provisions are optional and have traditionally been used in long-term complex construction projects where contractors cannot take the risk for price escalation over the contract term
- The reprint of the Second Edition issued in November 2022, removed the formula from the General Conditions into the Special Conditions at the back of the Contract
- The FIDIC guidance on these clauses states that they may be required where it would be unreasonable for a contractor to bear the risk of escalating costs due to inflation
- Can go up and down

# Inflation: some practical tips

- Existing contracts, you are subject to the terms of that contract or whatever deal you can negotiate to vary it. With JCT lump sum contracts the risk sits with the contractor.
- Tender clarifications. Are they clear? Are they properly incorporated? Is there a conflict with another clause?
- Is the issue buried elsewhere in the contract documents (and perhaps the parts the lawyers don't read but should)?
- Pricing of variations: always bear in mind how the valuation rules tend to work (more of the same/similar work is at contract prices – and they may not be indexed linked)
- Consider running real life figures through the deal. There is no better test for some drafting or a formula than to try it out.

# Sanctions



# Sanctions: Russia

- The Russia (Sanctions) (EU Exit) Regulations 2019.
- Practical effect: a person “*must not deal with funds or economic resources owned, held or controlled by a designated person if [he/she] knows, or has reasonable cause to suspect, that [he/she] is dealing with such funds or economic resources*”.
- So, if you know or suspect that your employer is sanctioned you cannot deal with them. If the employer company is *owned, held or controlled* by a designated person then you are caught as well.
- New sanctions are being issued all the time, most recently Tuesday 19 May 2025 by the EU and the UK.

# Sanctions: things to consider

- At pre-contract stage, can you be sure who is behind the company you are in contract with? In the UK, OFSI website, but offshore companies can be difficult to check, are there any alarm bells?
- What happens if a person becomes a 'designated person'?
  - Post-contract: right to stop work?
- Changes to the contract: ability to suspend work; termination; change to payment terms (escrow)
- Applies to all parties dealing with the employer and so would catch the professional team
- Key (sometimes only) player in supply of materials needed on every type of project
- What is the true source of the equipment that is being shipped in?

# Tariffs



- In the news, but a lack of clear knowledge about what tariffs have/have not been imposed.
- 2 April 2025, USA Executive Order 14098, but not confined to the USA. Reciprocal tariffs (or threats of tariffs) were introduced.
- Uncertainty.
- Who bears the risk?

# Tariffs: under the FIDIC Form

- Clause 14.1: the contractor is to pay: “*all taxes duties and fees*”
- BUT, if the tariffs result in significant additional costs for the contractor, is the employer obliged (under the contract) to compensate the contractor?
- Depends where the tariff increase originates:
  - Clause 13.7: adjustments for change in legislation

# Tariffs: under the FIDIC Form

- Clause 13.6 [YB]:

*“The Contract Price shall be adjusted to take account of any increase or decrease in Cost arising from a change in the (a) Laws of the Country...made and/or officially published after the Base Date, which affect the Contractor in the performance of obligations under the Contract.*

- No protection for the Contractor for tariff increases imposed outside of the place where the project is being carried out.

# Supply chain



- Limited assistance from compensation events. Possibility but challenging:
  - Clause 60.1 (19)

*“An event which ... stops the Contractor completing the whole of the Works ... stops the Contractor completing the whole of the Works by the date for planned Completion ... which*

- *neither Party could prevent*
  - *an experienced contractor would have judged at the Contract Date to have **such a small chance of occurring that it would have been unreasonable to have allowed for it** and*
  - *is not one of the other compensation events ...”*
- Option X2 [Change of Law]

BUT

- Must occur after the Contract Date

- Clause 13.6 [2017 YB]
  - Possible adjustment for Change in Law after the Base Date
- Clause 8.5 (d) [2017 YB]
  - Extension of time (subject to notifications under Clause 20.2) for:  
  
*“**Unforeseeable** shortages in the availability of personnel or Goods (or Employer-Supplied Materials, if any) caused by epidemic or governmental actions...”*  
  
*“not reasonably foreseeable by an experienced contractor by the Base Date”.*
- Clause 18: Force Majeure: Exceptional Events?

# Supply Chain: drafting (or negotiating)

- Best endeavours: clarify as far as possible what that will involve
- Communication and transparency with supply chain and suppliers
- Consider benchmarking what *has* been allowed for
- Substitution of materials: when it is permitted?
- Use of provisional sums – care taken, are they defined or undefined?
- Advance payment to secure early at a locked in price
- Diversify supplier pool
- Fluctuation provisions in contracts? Higher lump sum - guard against cost increases
- Research: check a suppliers' financial status

# Funding freezes



# Funding freezes

- Multilateral development banks and funding agencies have for many decades loaned or granted money to many governments in developing countries to help improve their infrastructure.
- Any pause or cessation of funding will create uncertainty
- Omission, suspension, termination (for convenience)
- FIDIC, clause 2.4: requests for “reasonable evidence” in relation to financing and payment of the project Cost.

“Unforeseeable”

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# Unforeseeable; Impossible; Frustration; Force majeure

- Moving definition
- Different meanings under different jurisdictions
- The fact that something is more expensive is rarely sufficient to say something is impossible
- Covid is now a known risk, even where there are new variants.
- New events will be a change, possibly a force majeure event
- No magic wand: these “get outs” are extremely difficult to call on

# Conclusions



# Conclusions

- The importance of keeping up to date and looking forward
- Supply chain diversification
- Early and direct engagement
- There are numerous deals that can be struck. Think them through, document them clearly
- Are there ways to share the risks and changes you might want to make to future contracts
- Advantages of a collaborative approach: maintain commercial relations and keep deals intact
- Ensure future contracts make provisions for conflict avoidance, early warning or similar approaches to avoid disputes.

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Thank you.  
Questions?

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