

## MISCONCEPTION OF DAYWORK UNDER THE JCT STANDARD BUILDING CONTRACT



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### THE JOINT CONTRACTS TRIBUNAL LIMITED (JCT)

JCT has been an established provider of construction contracts within the UK for a considerable period and continues to maintain its popularity as a go to option for construction projects.

This popularity appears likely to continue, with JCT reported in a recent RIBA survey<sup>i</sup> to constitute 59% of contracts most commonly used among respondents. Additionally, the standard terms and conditions of the JCT contract are one of a number of contracts recommended for use in public procurement<sup>ii</sup>, suggesting the implementation of these contracts will continue.

Despite its prevalence within the UK construction industry, certain mechanisms of the Contract are often misconstrued, and the valuation of Variations is a prime example which often leads to the erroneous use of daywork to value Variations. This is significant as parties applying different aspects of 'the

Valuation Rules' will arrive at different values, which will often be the primary cause of disputes.

This article explores the 'Valuation Rules' and identifies some of the misconceptions around when daywork should, and shouldn't be used to value Variations.

### VARIATION QUOTATION OR OTHERWISE

Before the 'Valuation Rules' are considered, the parties to a Contract have the option of agreeing the value of a Variation by reference to a Variation Quotation or otherwise. There is no provision in the contract to enable the Contractor to provide a quotation for a Variation unilaterally, however clause 5.2.1 confirms that the Valuation of Variations:

*"...shall be such amount as is agreed by the Employer and the Contractor (whether by Confirmed Acceptance of a Variation Quotation or otherwise)".*

i RIBA Construction Contracts and Law Report 2022 (p.16-17)

ii The Construction Playbook, Version 1.1, September 2022 (p.49)

Emphasis is added as there is no explicit procedure for reaching the 'otherwise' position, however this ultimately presents the parties with the freedom to choose to agree a valuation in any way they deem fit (and would not necessarily imply an entitlement to adopt Dayworks). A Variation Quotation is to be provided if such is requested by the Architect / Contract Administrator in accordance with the provisions of Schedule 2.

Both options first provide the opportunity for the parties to agree the value of the Variation, thus avoiding the 'Valuation Rules' as set out in clauses 5.6 to 5.10. The implementation of the Variation Quotation procedure is frequently not pursued, and the Contract provides that, where the Employer and Contractor do not agree the valuation, the parties must apply the 'Valuation Rules'. We hereby discuss the 'Valuation Rules' adopting the contract nomenclature except for Daywork.

## CLAUSE 5-6 - MEASURABLE WORK

In the first instance, the parties shall seek to determine whether the works subject to variation can be valued by measurement as clause 5.6 confirms such work shall be valued in accordance with the following rules:

*"5-6-1-1 where the work is of similar character to work included in the Contract Documents the Valuation shall be consistent with the relevant rates, prices or amounts for such work in the Priced Document and shall include a fair allowance for any change in the conditions under which the work is carried out and/or any significant change in the quantity of such work from that included in the Contract Documents;*

*5-6-1-2 where the work is not of similar character to work set out in the Contract Documents, it shall be valued at fair rates and prices".*



In respect of omitted works, clause 5.6.2 confirms the “valuation of the work omitted shall be in accordance with the rates, prices or amounts in the Priced Document”. Both clauses 5.6.1 and 5.6.2 provide clarity on how to address the most common types of Variation as a significant proportion of building works can be measured in accordance with the applicable standard rules of measurement.

### CLAUSE 5-8 - CONTRACTOR’S DESIGNED PORTION (CDP)

Where the Variation relates to the Contractor’s Designed Portion, the valuation shall be in accordance with clause 5-8 as follows:

*“5-8-1 Allowance shall be made in such valuations for the addition or omission of the relevant design work.*

*5-8-2 The valuation of additional or substituted work shall be consistent with the values of work of a similar character set out in the CDP Analysis, making due allowance for any change in the conditions under which work is carried out and/or any significant change in the quantity of the work so set out. Where there is no work of a similar character set out in the CDP Analysis, a fair valuation shall be made”.*

The rules concerning the omission of CDP replicate those of measurable works with clause 5-8-3 confirming “omission of work set out in the CDP Analysis shall be in accordance with the values therein for such work”. Clause 5-8 is therefore broad in nature, but also provides a last resort of a fair valuation which is often subject to debate.

### CLAUSE 5-9 - CHANGE OF CONDITIONS FOR OTHER WORK

This clause confirms that any substantial change in the conditions under which any other works is executed (including CDP works) resultant of compliance with any instruction requiring a Variation or expending a Provisional Sum, then this shall be treated as a Variation. The method of valuation of this Variation “shall be in accordance with the provisions of this section 5”. Emphasis is added to identify the salient point that there is a wide range of rules available to value such Variations which identifies that Daywork would not be an immediate method of valuation.

However, from experience, parties may encounter a change in conditions such as the requirement to undertake measured works outside of normal working hours.



This may prompt a party to submit a daywork claim based on a simple calculation for the increased hourly rate to address the labour increase, but this approach would be misconceived as the correct method would be to make a fair allowance for the change(s) to the original rates and prices.

### CLAUSE 5-10 - ADDITIONAL PROVISIONS

The purpose of Clause 5-10.1 is to provide a “general ‘safety-net’<sup>iii</sup>”, in that if parties cannot agree that a Variation can be reasonably valued in accordance with clause 5-6 to 5-9, then “a fair valuation shall be made”.

As a consequence of undertaking a Variation to the works (or further Variation arising from that Variation), then parties may seek to recover value associated with any effect the Variation has upon the regular progress of the Works or for any other direct loss and/or expense. Clause 5-10.2 confirms no allowance shall be made under the Valuation Rules for such costs as they would be reimbursed by payment under other provisions in the contract conditions. For example, a Contractor may seek to recover standing time associated with a Variation if the works are stopped by the Employer. This maybe through a simple Daywork calculation applying for a value based upon operatives hourly rates, however this would fail to comply with ‘the Valuation Rules’ as this would need to be addressed through other provisions.

### CLAUSE 5-7 - DAYWORK

Following Variation to the works, my experience indicates that parties often immediately default to Daywork as a method of valuation without considering ‘the Valuation Rules’. This instant deviation from the contract conditions can lead to disputes concerning the valuation if the Employer follows a different method to the Contractor.

Such disputes can affect multiple parties as a repetitive problem is the Contractors, subcontractor or their sub-subcontractor (and so forth) receive instruction to proceed with the Variation and they may proceed to automatically apply Daywork as a method of valuation. This escalates through the supply chain with the final dispute arising between the parties to the Main Contract.

The adoption of the daywork valuation method by parties in the first instance is due to the assumption that it represents a simple valuation method and an automatic entitlement under the contract conditions. Both of these assumptions are demonstrable misconceptions associated with the Daywork method of valuation because the threshold preventing their automatic use requires the parties to have exhausted the primary aspects of the ‘Valuation Rules’.

Parties attempting to value work on Daywork need to ascertain that the works fulfil the requirements as outlined in the ‘Valuation Rules’ as issues can arise if payments are made by the Employer on an ‘on account’

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iii JCT Standard Building Contract Guide 2016

basis throughout the construction period and then they revert to the 'Valuation Rules' to apply another method at a later stage. This can create additional work for the Contractor and other members of the supply chain as the requirement to value the works through another method may require extensive work. At a later stage in the project, personnel and records may not exist or be readily available which could reduce the opportunity to conclude agreement amicably or swiftly.

### SUMMARY

When parties take full cognisance of the contract conditions including the 'Valuation Rules' it becomes apparent that the threshold to adopt Daywork as the method of Valuation becomes increasingly high as it is likely conditions concerning Measurable Work and Contractor's Designed Portion will apply if an agreement is not reached through a Variation Agreement or otherwise. My opinion that there is a high threshold to implement Dayworks is reaffirmed by the fact it is likely building works can be measured if a design exists. These measurable works can then be valued consistently with the relevant contract rates, prices or amounts.

This demonstrates how the misconception that Daywork can automatically be adopted as the primary method of valuing Variation is incorrect and how it exists as last resort in the hierarchy of contractual mechanisms. Moreover, if it is determined Daywork is the correct method for ascertaining the valuation of a Variation, then parties need to be aware of the onerous procedures to be followed in

order to ensure their cost submission are valid and fulfil the contract requirements. Failure to follow Daywork procedures can also lead to dispute requiring parties to revert to clause 5-10-1 as a last resort to agree a "fair valuation".

For further information on issues associated with Daywork submission procedures, please refer to the previous DGA article 'Only A Matter of Time[Sheets]' issued October 2020. This can be accessed in the [DGA Reading Room](#).



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- **Time obligations & Programming**  
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Activity Schedule, Price for Work Done to Date, Applications for payment, Project Manager's assessment.

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- **Why a new edition?**
- **New terminology**
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#### FULL DAY SEMINAR

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#### JCT FORM OF CONTRACT

##### JCT MINOR WORKS AND INTERMEDIATE BUILDING CONTRACTS 2016

##### JCT INTERMEDIATE AND STANDARD FORM BUILDING CONTRACTS 2016

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