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**Insights**

# EMPLOYER'S AGENTS AND AGREEMENTS FOR LEASE: THE LOYALTY ONLY GOES SO FAR…

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SUMMARY

A tenant client was recently surprised by a clause in its agreement for lease (AFL). The clause allowed the landlord to defer the target access date and long stop date commensurate with any extension of time granted by the Employer's Agent (EA) under a JCT Design and Build contractfor the landlord's works.


It was the first time that the client had entered into an AFL so this was new territory for them. When they spotted the reference to the EA granting extensions of time, alarm bells started to ring.

Surely, they said, the very nature of the role of EA meant that when it came to taking any decisions under the building contract they would act in the landlord Employer's favour? What if the EA decided to grant an extension of time under the building contract to postpone the access date and long stop date for the landlord? This delay would have serious consequences for the tenant. Not only in terms of serving out the notice period on its current tenancy but also in delaying the start of its planned works where its contractor was geared up and ready to go. What on earth could they do?

Don't worry, we said: it will be fine. Here's why.

## Limits to loyalty

Let's start by taking a closer look at the EA's duties under a typical JCT D&B contract. The scope of the EA's services will be set out in its appointment, but this should dovetail with the obligations placed on it under the building contract. Key EA obligations under the JCT D&B 2016 edition (set out at Article 3) include receiving and issuing applications, consents, instructions, notices, requests or statements and otherwise acting for the Employer under the contract conditions.

These include the Employer's grant of extensions of time. So it is natural to assume that the EA undertakes these duties solely at the behest of the Employer, always acting in the Employer's interests.

What adds to this impression is the JCT D&B's approach when referring to the EA. While it provides for the appointment of the EA and prescribes the duties it may carry out, the contract does not then refer to the "Employer's Agent" as carrying out these duties throughout the contract. Instead, it references the "Employer". This is a different approach from other JCT contracts, such as the Standard Building Contract, which reference the "Architect/Contract Administrator" throughout. This change in terminology might suggest that the EA is simply a voicebox for the Employer in all matters. In practice these duties are carried out by the EA even if the JCT D&B wording does not reflect this. It may be a matter of semantics but understandably caused the client, unfamiliar with this practice, some concern.

Typically, under the contract, the EA is expected to act on behalf of the Employer when carrying out its contractual duties. But case law has evolved to place constraints on the loyalty of the EA to the Employer. This means that when the EA carries out its duties, it is expected to wear two hats.

When administering and managing the works by issuing instructions and approving variations, the EA acts as the agent of the Employer, as the name suggests. But, while acting as the decision maker in relation to extensions of time, loss and expense and payment applications, the EA must be impartial. Jackson J (as he then was) provided authoritative guidance in Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd as to how the EA must behave:

"Generally the decision-maker is not, and cannot be regarded as, independent of the employer.

When performing his decision-making function, the decision-maker is required to act in a manner which has variously been described as independent, impartial, fair and honest. These concepts were overlapping but not synonymous. They connote that the decision-maker must use his professional skills and his best endeavours to reach the right decision, as opposed to the decision which favours the interests of the Employer.

In my judgment, these propositions are all applicable to the construction manager in the present case. The fact that the construction manager acts in conjunction with other professionals when performing his decision-making function does not water down his legal duty. When performing that function, it is the construction manager's duty to act in a manner which is independent, impartial far and honest. In other words, he must use his best endeavours to reach the right decision, as opposed to a decision which favours the interests of the employer."

Although Jackson J was talking about a construction management contract, rather than the D&B form, Imperial Chemical Industries v Merit Merrell Technology confirmed that this analysis applies to other forms of contract. Referring to Scheldebouw, Fraser J held:

"In my judgment, exactly the same analysis applies… to most if not all of the standard contract forms in this field."

The EA's duty to act fairly and impartially when granting extensions of time is therefore clearly established, and this is why the tenant had little to fear in theory. Having an independent person act as EA itself offers a measure of protection, and if the Employer proposes one of its own employees as EA, this should raise a "red flag". But let's consider what might go wrong in practice. What protection would the tenant have if the EA forgot to switch hats when issuing an extension of time?

## Protection for the tenant

The tenant is not a party to the building contract, and more importantly is not a party to the EA's appointment. Therefore if the EA fails to act in the fair and impartial manner required by the common law, without further contractual protection, the tenant would be left with little (or most likely, no) direct recourse against the EA. This is why it's a good idea to include the following protections for the tenant in the AFL

- An obligation on the landlord to procure third party rights or a collateral warranty from the EA in favour of the tenant. This gives the tenant direct contractual recourse if it thinks the EA has been negligent or mistaken in granting an extension of time. In addition to this, an obligation should be included in the EA's appointment providing that the EA will act independently and impartially when exercising any discretion as between the Employer and a third party. This should then feed through into the third party rights given by the EA to the tenant.
- Provision for the rent commencement date to be delayed commensurate with any extension of time allowed by the EA under the building contract. This acts as an incentive to the landlord to ensure that the landlord's works are not unduly delayed.
- Finally, a liquidated damages clause by which the landlord would be liable to pay the tenant the agreed amount of liquidated damages in the event of any delay to the access date, save in the event of a tenant delay event.

## Final thoughts

The client's concern was understandable. The term "Employer's Agent" seems at odds with the impartiality of decision making that the common law demands. The obligation on the EA to act impartially is all very well but not much use if the tenant cannot enforce it. That is why it's so important to include the protections outlined above in the AFL. The commercial reality is that most landlords are keen to get tenants into their properties as quickly as possible so that they can start receiving rent. So they are just as unlikely as the tenant to welcome lengthy extensions of time. However, it makes sense to include incentives in the AFL such as liquidated damages just to make sure everyone's loyalties lie in the same place. 2 thoughts on "Employer's Agents and agreements for lease: the loyalty only goes so far…" Daniel Freedman April 11, 2019 at 8:38 am Not sure I agree on the LADs point as Landlord will need to back to back LADs with contractor who wouldn't have to pay them under the building contract for an EoT. Extensions to RFP shouldn't be triggered for EoTs unless EA has already served an Access Date notice meaning tenant has started to incur

mobilisation costs. Most tenants just rely on the EA's TPRs/warranty. Developers usually have financing and EoTs increase their financing costs so it is not really appropriate to try to further 'punish' the landlord for EoTs when it is not the Landlord's fault.

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This article first appeared on the Practical Law Construction blog dated 10 April 2019.

## MEET THE TEAM

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