



Modern Slavery Is construction chained to unfair contracts?



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"If you would like to discuss anything in this article, or if you require any assistance drafting a standard set of provisions to include in your contracts, then please contact me and I will be happy to assist you."

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"It ought to concern every person, because it is a debasement of our common humanity. It ought to concern every community, because it tears at our social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name - modern slavery."

– Barack Obama

As commented by Barack Obama, modern slavery ought to concern every person and every business. This is particularly true in the Construction industry which was identified in a 2015 research report by the European Union as the second largest sector prone to labour exploitation. The figures are startling with some \$34 billion of profit generated globally by forced economic exploitation within the construction industry alone.

Despite the above figure, the construction industry within the UK has certainly taken great strides in recent years to combat modern slavery. What was once thought of as a problem limited to a small number of unscrupulous companies, is now rightly acknowledged as an issue that could potentially affect all contractors

and sites regardless of their size, value or location.

Practically all contractors now have Anti-Slavery policies in place and staff are taught how to identify the potential signs of modern slavery. I attended one such CPD myself recently and although spotting the signs of modern-slavery is certainly one part of the battle, I couldn't help but think why is modern-slavery so prevalent in construction and what further measures could be put in place to prevent it?

In simple terms, construction by its very nature represents an easy market to target; far reaching supply chains spread across the globe, main contractors operating with hundreds of sub-contractors, labour agencies and

numerous materials suppliers with complex inter-relationships create a breeding ground set up perfectly for exploitation of vulnerable people, particularly those operating in low skilled jobs. Many of these issues are well documented and significant strides are being taken to improve transparency across the construction industry, both at home and in most other parts of the world. However, one topic which perhaps isn't considered enough, is what part do construction contracts play?

At the heart of every construction project is a series of contracts which connect the Employer, Main Contractor and their various sub-contractors together. Whether the contracts are JCT, NEC, or even bespoke contracts, one element always remains the same; each tier of the project will seek to amend the contract to suit its own needs, by attempting to limit the risk it is exposed, apportion liability to somebody else and to obtain cost certainty from the party it has contracted. Accordingly, that contractor will then step-down those same risks and liabilities to its own sub-contractors, who pass them down to their sub-sub-contractors and so on and so forth. In an industry driven by fierce competition, coupled with ever decreasing margins and significant risks at every turn, it's no real surprise that contractors seek to protect their position however possible.

But has anybody questioned how these “*unfair*” contracts might be contributing to issues such as modern-slavery? By seeking cost certainty, limiting rights to extensions of time and seeking to include liquidated and ascertained damages within a contract, the focus for all parties largely becomes focused on ensuring projects finish on time and are completed as cheaply as possible, without enough consideration given to what effects this might have.

Undoubtedly this type of environment leads to situations whereby some contractors are inevitably forced to procure materials at the cheapest price possible, without giving proper thought to where those materials came from or how they were made. These same contractors are also likely to seek the cheapest labour available, when a decision is made to “*get as many boots on the ground as possible*”, in order to accelerate a project so as to compensate for previous delays and avoid any associated claims for damages.

So, how do we alter this mentality and change the way many firms operate? The answer could simply lie in the use of “*fair contracts*”. The NEC for example was introduced as an alternative to the “*traditional*” JCT which focuses on liabilities and risk, whereas the NEC was

intended to be a “*fairer*” contract which both requires and enables a more proactive and collaborative approach, as demonstrated best by the much fabled and some might say “*infamous*” clause 10.1:

“The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in the spirit of mutual trust and co-operation” (emphasis added)

And although the NEC is far from perfect, perhaps if a collaborative approach was adopted in more contracts, then it would go some way towards changing the focus in construction away from liabilities and risks and instead move it towards creating a more positive project for all those involved.

Of course, in reality, businesses have to protect themselves and not all projects are able to run smoothly. Disputes will always occur (and thankfully so, otherwise I and many other construction lawyers would be out of a job). But perhaps in the coming years as the NEC continues to increase in usage and as awareness of moral issues such as environmental impact, modern-slavery and anti-bribery etc. become more prevalent in how companies engage with one another and also dictate how companies market themselves, we will see a gradual shift away from the current “*blame game*” towards a more harmonious industry.

However, in the meantime, the first step should be to ensure that not only do all contractors have sufficient policies in place but it should also become the norm for all construction contracts to contain detailed anti-slavery provisions, which encourage all staff to adopt a “*ask and check*” approach. As an industry it is vital that a more pro-active stance is taken because if we continue to ignore this problem, then we are all complicit in it. And perhaps if we all just take a little longer when drafting, reviewing or negotiating contracts to consider what is “*fair*” rather than simply what represents the “*safest*” option, we may find that we are all able in some way to help reduce or even eliminate modern-slavery and other negative aspects from the construction industry all together.

Further information on this topic can be found in two reports by Emma Crates, downloadable at ciob.org/campaigns/tackling-modern-slavery-construction

