

DAVID CHAPPELL

FIFTH
EDITION

Building Contract Claims

 WILEY-BLACKWELL

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Fifth Edition

David Chappell

 **WILEY-BLACKWELL**

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Contents

<i>Preface</i>	vii
<i>Acknowledgements</i>	x
<i>Contract abbreviations</i>	xi
PART I	1
1 Introduction	3
1.1 Structure of the book	3
1.2 Types of claims	3
1.3 The basis of claims	8
1.4 Architect's and contract administrator's powers and liability to contractor	11
1.5 Quantity surveyor's powers	16
2 Time	20
2.1 Time of the essence	20
2.2 Time at large	22
2.3 Extension of time clauses in contracts	26
2.4 Concurrency	32
2.5 Acceleration	40
2.6 Sectional completion	47
2.7 The SCL extension of time Protocol	51
3 Liquidated damages	57
3.1 The meaning and purpose of liquidated damages	57
3.2 Liquidated damages or penalty	58
3.3 Liquidated damages as limitation of liability	65
3.4 Sums greater than a genuine pre-estimate	66
3.5 Liquidated damages as an exhaustive remedy	67
3.6 Injunction	72
3.7 Liquidated damages in relation to loss	74
3.8 Where there is no breach of contract	75
3.9 Calculation of liquidated damages	77
3.10 Where there is partial possession	78
3.11 Maximum recovery if sum is a penalty	80
3.12 Maximum recovery if liquidated damages do not apply	82
3.13 Defences to liquidated damages in building contracts	84
3.14 Bonus clauses	93

4	Basis for common law claims	95
4.1	General	95
4.2	Implied terms	97
4.3	Variation of contract	103
4.4	Omission of work to give it to others	104
4.5	Extra work	107
4.6	Possession of site	109
4.7	Site conditions	113
5	Direct loss and/or expense	117
5.1	Definition	117
5.2	Direct v indirect	118
5.3	Exclusion of consequential loss	120
6	Points of principle	123
6.1	Measure of damages	123
6.2	Burden of proof	124
6.3	<i>Res ipsa loquitur</i>	125
6.4	Mitigation of loss	125
6.5	Betterment	127
6.6	Notices	128
6.7	Categories of claim	135
7	Potential heads of claim	140
7.1	Foreshortened programme	140
7.2	The 'knock-on' effect	143
7.3	The more common heads of loss	147
7.4	Cost of a claim	180
8	Causation	182
8.1	Theory	182
8.2	Use of networks	184
8.3	Float	189
9	Global claims	192
9.1	Basic principles of global claims	192
9.2	Unacceptable global claims	194
9.3	The current position	196
10	Preparation and substantiation of claims	201
10.1	Preparing a claim	201
10.2	Types of evidence required to support a claim	206
10.3	'Scott schedules'	213
	PART II	217
11	Extension of time under JCT standard form contracts	219
11.1	Standard Building Contract (SBC)	219
11.2	Intermediate Building Contract (IC and ICD)	248
11.3	Minor Works Building Contract (MW and MWD)	251

11.4	Design and Build Contract (DB)	254
11.5	Prime Cost Building Contract (PCC)	256
11.6	Management Building Contract (MC)	257
11.7	Construction Management Trade Contract (CM/TC)	259
11.8	Major Project Construction Contract (MP)	260
11.9	Measured Term Contract (MTC)	262
11.10	Constructing Excellence Contract (CE)	264
12	Liquidated damages under JCT standard form contracts	268
12.1	Standard Building Contract (SBC)	268
12.2	Intermediate Building Contract (IC and ICD)	273
12.3	Minor Works Building Contract (MW and MWD)	273
12.4	Design and Build Contract (DB)	274
12.5	Prime Cost Building Contract (PCC)	275
12.6	Management Building Contract (MC)	275
12.7	Construction Management Trade Contract (CM/TC)	275
12.8	Major Project Construction Contract (MP)	276
12.9	Measured Term Contract (MTC)	276
12.10	Constructing Excellence Contract (CE)	277
13	Loss and/or expense under JCT standard form contracts	278
13.1	Standard Building Contract (SBC)	278
13.2	Intermediate Building Contract (IC and ICD)	305
13.3	Minor Works Building Contract (MW and MWD)	309
13.4	Design and Build Contract (DB)	311
13.5	Prime Cost Building Contract (PCC)	315
13.6	Management Building Contract (MC)	316
13.7	Construction Management Trade Contract (CM/TC)	316
13.8	Major Project Construction Contract (MP)	316
13.9	Measured Term Contract (MTC)	318
13.10	Constructing Excellence Contract (CE)	318
14	Variations	319
14.1	Introduction	319
14.2	The baseline	320
14.3	Bills of quantities	321
14.4	Functions of the architect and the quantity surveyor	324
14.5	JCT Standard Building Contract (SBC)	325
14.6	JCT Intermediate Building Contract (IC and ICD)	345
14.7	JCT Minor Works Building Contract (MW and MWD)	350
14.8	JCT Design and Build Contract (DB)	352
14.9	JCT Prime Cost Building Contract (PCC)	360
14.10	JCT Management Building Contract (MC)	361
14.11	JCT Construction Management Trade Contract (CM/TC)	361
14.12	JCT Major Project Construction Contract (MP)	362
14.13	JCT Measured Term Contract (MTC)	364
14.14	JCT Constructing Excellence Contract (CE)	366

PART III	367
15 Claims Under The General Conditions of Government Contracts for Building and Civil Engineering Works (GC/Works/1(1998))	369
15.1 Introduction	369
15.2 Extension of time and liquidated damages	369
15.3 Prolongation and disruption	377
15.4 Valuation of instructions	381
16 Claims under the ACA Form of Building Agreement (ACA 3)	385
16.1 Introduction	385
16.2 Extension of time and liquidated damages	386
16.3 Prolongation and disruption	395
16.4 Valuation of instructions	402
17 Claims under the ACA Standard Form of Contract for Project Partnering (PPC2000)	407
17.1 Introduction	407
17.2 Extension of time and damages	408
17.3 Loss and/or expense	413
17.4 Changes	415
18 Claims under NEC 3 Engineering and Construction Contract (NEC 3)	418
18.1 Introduction	418
18.2 Compensation events	420
18.3 Delay damages	444
19 Sub-contract claims	446
19.1 Introduction	446
19.2 JCT Standard Building Sub-Contract Conditions (SBCSub/C)	446
19.3 JCT Standard Building Sub-Contract with Sub-Contractor's Design Conditions (SBCSub/D/C)	457
19.4 JCT Intermediate Named Sub-Contract Conditions (ICSubNAM/SC)	458
19.5 JCT Intermediate Sub-Contract Conditions (ICSub/C)	459
19.6 JCT Intermediate Sub-Contract with Sub-Contractor's Design Conditions (ICSub/D/C)	460
19.7 JCT Design and Build Sub-Contract Conditions (DBSub/C)	460
19.8 JCT Management Works Contract Conditions (MCWC/C)	462
19.9 ACA Form of Sub-Contract (ACA/SC)	465
APPENDIX	473
Example of contractor's claim for reimbursement of direct loss and/or expense under SBC with quantities clauses 4.23–4.26 – architect's and quantity surveyor's assessment with commentary	475
<i>Table of cases</i>	498
<i>Table of standard form contract clauses</i>	512
<i>Index</i>	523

Preface

It was with pleasure, flecked with trepidation, that, in 1997, I accepted the invitation to enlarge the scope and update the third edition of this popular book.

Much of the original text was retained, but updated in the light of case law; the number of case references was almost doubled and, at the wish of the late Professor Powell-Smith, footnotes were included; a change which has proved very popular. Some restructuring took place within chapters to establish a comprehensible system of sub-headings and a few topics, such as liquidated damages (the subject of many disputes), global claims, causation and concurrency, were given greater importance. The scope of the book was extended to include more contracts.

In the fourth edition, the opportunity was taken to carry out further fundamental changes to the structure of the book, bringing general principles to the beginning of the book and dealing with their application to specific contracts later. The text also was substantially revised and almost a hundred additional cases added. New contracts were added including: the JCT Construction Management and Major Projects contracts, the JCT Standard Form of Domestic Sub-Contract and the Engineering and Construction Contract.

In this fifth edition the structure of the book has been slightly amended to give greater prominence to important topics such as notices, mitigation and the measure of damages and more has been said about the way in which a contractor should put together a claim. Account has been taken of the JCT 2005 suite of building contracts and sub-contracts. The Constructing Excellence, Measured Term and the ACA Project Partnering contracts have been included for the first time and the latest NEC contract has been considered. As before, when dealing with JCT contracts the style has been to use the JCT Standard Building Contract 2005 (SBC) as the basis and highlight important differences in the other forms. In some instances there are few similarities. Reference has been made to more than a hundred additional legal cases. In previous editions, the text of relevant contract clauses was reproduced. In this edition, the decision has been taken to remove them. The reason is two-fold: it removes from the book many pages of clauses which many readers will not require and it is assumed that readers have a copy of the relevant contract beside them. At the time of writing, the latest official amendments have been taken into account as follows:

Main contract forms:

SBC	Revision 2
IC and ICD	Revision 2
MW and MWD	Revision 2
DB	Revision 2
PCC	Revision 2
MC	Revision 2

MP	Revision 2
CM/TC	Revision 2
CE	Revision 1
MTC	Revision 2
GC/Works/1 (1998)	
ACA 3	2003 Revision
PPC2000	2008 Amendment
NEC 3	June 2005 (with 2006 amendments)
Sub-contract forms:	
SBCSub/C	Revision 2
SBCSub/D/C	Revision 2
ICSub/NAM/C	Revision 2
ICSub/C	Revision 2
ICSub/D/C	Revision 2
DBSub/C	Revision 2
MCWC/C	
ACA/SC	2003 Revision

Reference has also been made to the *Housing Grants, Construction and Regeneration Act 1996* as recently amended by Part 8 of the *Local Democracy, Economic Development and Construction Act 2009* and the *Arbitration Act 1996* where appropriate. It should be noted that, at the time of writing, the 2009 Act is not yet in force.

It should also be noted that in the reproduction and commentary on the JCT standard forms, for brevity 'Architect' is used to stand for 'Architect/ Contract Administrator'. Throughout the book, contractors and sub-contractors have been assumed to be corporate bodies and they have been referred to as 'it'.

Building contract claims combine a good understanding of the law and of building practice. Certain principles can be discerned and this book is an attempt to explain the principles and to show how those principles should be applied to the popular standard contracts. Standard contracts not only set out the powers and duties of the parties and of various consultants, they also often give procedures which must be followed to enable the participants to carry out the duties and exercise the powers. However, it must not be thought that standard building contracts are excused from the operation of the general law of contract. They are contracts, like any others and subject to the same rules. Thereby hangs the solution to many perceived problems.

In my experience, many claims fail because the basic principles are misunderstood and contractors and sub-contractors do not appreciate the amount of effort required to properly substantiate a claim. A loss of money or lack of profit alone cannot substantiate a claim, although it is usually the trigger. The book is addressed to all parties involved in construction. It is not always possible to give a definitive answer to every question, either because the courts have not considered the matter or because there have been apparently conflicting judgments. Where there is doubt, the doubt is expressed and, if practicable, I have taken a view of the situation.

This book was the idea of the late Professor Vincent Powell-Smith LLB(Hons) LLM DLitt FCI Arb DSLP MCL FSI Arb and John Sims FRSA FRICS FCI Arb MAE. These two eminent practitioners in this field were responsible for the first and second editions and their names were kept on the cover in recognition of this in the third

and fourth editions although Vincent had died when I came to write the third edition and John took no part in the writing thereafter. It is a pleasure to formally acknowledge their inspiration and work without which, of course, there would be nothing of which to write a fifth edition. However, nothing of the original text now remains and it has been thought appropriate for their names to be taken off the cover for this edition.

One of the great perks of writing a preface is that it provides the opportunity to thank the people who have assisted me. I am extremely grateful for the help given to me by Michael Cowlin LLB(Hons) DipOSH Dip Arb FCI Arb Barrister (not practising) who has assisted me by locating cases and quotations, commenting on various portions of the text and making many helpful suggestions. Michael Dunn BSc(Hons) LLB LLM FRICS FCI Arb provided relevant citations and contracts and many useful comments. He went far and beyond what I could expect by giving me the benefit of a very detailed criticism of the material included in the Appendix and suggestions for its improvement. I am grateful for their expertise, but the responsibility for using or not using their suggestions is mine. I am grateful also to Caroline Dalziel LLB(Hons) Solicitor who was meticulous in preparing the Table of cases. My wife, Margaret, has shown her usual patience throughout the long writing process.

I have endeavoured to state the law from available sources at the end of February 2011.

David Chappell
Wakefield

February 2011

Acknowledgements

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Contract abbreviations

ACA 3	Association of Consultant Architects Form of Building Agreement 2003
ACA/SC	Association of Consultant Architects Sub-Contract 2003
CE	JCT Constructing Excellence Contract 2009
CM 02	JCT Construction Management Contract 2002
CM/TC	JCT Construction Management Trade Contract 2009
DB	Design and Build Contract 2005
DBSub/C	JCT Design and Build Sub-Contract Conditions 2009
DOM/1 and DOM/2	Standard Form of Sub-Contract for Domestic Sub-Contractors
DSC/C	Standard Form of Domestic Sub-Contract 2002
GC/Works/1 (1998)	General Conditions of Government Contracts for Building and Civil Engineering Works 1998
IC	JCT Intermediate Building Contract 2009
ICSub/C	JCT Intermediate Sub-Contract Conditions 2009
ICSub/D/C	JCT Intermediate Sub-Contract with Sub-Contract Design Conditions 2009
ICSub/NAM/C	JCT Intermediate Named Sub-Contract Conditions 2009
ICD	JCT Intermediate Building Contract with Contractor's Design 2009
IFC 98	JCT Intermediate Form of Building Contract 1998
IN/SC	IFC 98 Domestic Sub-Contract Conditions
JCT 63	JCT Standard Form of Building Contract 1963
JCT 98	JCT Standard Form of Building Contract 1998
MC 98	JCT Management Contract 1998
MC	JCT Management Building Contract 2005
MCWC/C	JCT Management Works Contract Conditions 2009
MP	JCT Major Project Construction Contract 2009
MPF 03	JCT Major Projects Form of Contract 2003
MTC	JCT Measured Term Contract 2009
MW 98	JCT Agreement for Minor Building Works 1998
MW	JCT Minor Works Contract 2005
MWD	JCT Minor Works Contract with Contractor's Design 2005

NAM/SC NEC 3	IFC 98 Named Sub-Contract Conditions 1998 New Engineering and Construction Contract 2003 revisions
NSC/C	JCT Standard Form of Nominated Sub-Contract Conditions 1998
PCC PCC 98 PPC2000	Prime Cost Building Contract 2009 JCT Standard Form of Prime Cost Contract 1998 Association of Consultant Architects Standard Form of Contract for Project Partnering
SBC SBCSub/C	JCT Standard Building Contract 2009 JCT Standard Building Sub-Contract Conditions 2009
SBCSub/D/C	JCT Standard Building Sub-Contract with Contractor's Design Conditions 2009
SMM7	Standard Method of Measurement of Building Works, 7th edition
SPC2000	Association of Consultant Architects Standard Form of Specialist Contract for Project Partnering
TC/C 02	Trade Contract for use with the JCT Client and Construction manager Agreement 2002
WCD 98	JCT Standard Form of Contract with Contractor's Design 1998
Works Contract/2	JCT Works Contract Conditions 1998

PART I

Chapter 1

Introduction

1.1 Structure of the book

The book has been arranged in three parts:

Part 1 deals with general principles relating to time, liquidated damages and financial claims of various kinds.

Part 2 looks at the relevant clauses in JCT contracts.

Part 3 looks at the equivalent clauses in other standard contracts and in some standard sub-contracts.

1.2 Types of claims

The dictionary defines 'claim' as 'a demand for something as due'.¹ Standard form contracts do not use the word 'claim'. In this book the word is taken to mean the assertion of an alleged right, usually by the contractor, to an extension of the contract period and/or to payment arising under the express or implied terms of a building contract. In the construction industry a 'claim' is usually used to describe any application by the contractor for payment which is additional to the payment to which it would be entitled under the general interim payment provisions in the building contract. Although commonly associated with money (i.e. a claim for direct loss and/or expense) 'claim' is also used to describe a contractor's application for extension of time. If it was not for 'claims clauses' in building contracts, the contractor would be obliged to fall back on a common law claim for damages (usually for breach of contract). In that sense, claims clauses may be considered, albeit not entirely correctly, as a contractual procedure for dealing with damages. More will be said about this later in the book.

It is useful to classify claims by contractors against employers into four categories. They are: contractual claims, common law claims, *quantum meruit* claims and *ex gratia* claims. It should not be forgotten that an employer may make claims against a contractor for liquidated damages or for payment of a balance owing on the final certificate or after termination of the contractor's employment by the employer.

¹ *The Concise Oxford Dictionary.*

1.2.1 Contractual claims

These are claims which are based on a clause or clauses in the contract which expressly provide for the contractor to make a claim in certain prescribed situations. A prime example is the direct loss and/or expense clause 4.23 in the Joint Contracts Tribunal Limited (JCT) Standard Building Contract 2005 (SBC). Such claims make use of the machinery in the contract to process the claim and produce a result. The principal reason for having such provisions in the contract is to avoid the necessity for the contractor to have to seek redress at common law and the inevitable expense involved for both parties in doing so. Most standard form contracts in any event preserve the contractor's right to seek damages at common law if it is not satisfied with its reimbursement under the contract.

1.2.2 Common law claims

Common law claims are claims for damages, usually but not exclusively, for breach of contract under common law. They may also embrace claims for breach of some other aspect of the law such as tortious claims or claims for breach of statutory duty. Most standard forms expressly reserve the contractor's right to make such claims, for example SBC clause 4.26. A common law claim may be made when it is impossible or difficult to make the claim under the contractual machinery, perhaps because the contractor has failed to comply with the criteria set out in the contract within the appropriate timescale. The making of an application within a reasonable time is an example of such a criterion. However, a common law claim may be more restricted in scope than the matters for which a contractual claim can be made, some of which (for example, architects' instructions) are not breaches of contract. Common law claims are sometimes referred to as 'ex-contractual' or 'extra-contractual' claims. These terms are sometimes confused with the term *ex contractu*. That term is, rarely, found in certain legal textbooks when referring to claims which arise from the contract.

1.2.3 *Quantum meruit* claims

A *quantum meruit* claim ('as much as he has earned') provides a remedy where no price has been agreed. There are four relevant situations:

- (1) Where work has been carried out under a contract, but no price has been agreed.
- (2) Where work has been carried out under a contract believed to be valid, but actually void.
- (3) Where there is an agreement to pay a reasonable sum.
- (4) Where work is carried out in response to a request by a party, but without a contract. This is usually termed a claim in quasi-contract or restitution. Work done following a letter of intent is a good example.

The type of claim and the method of valuation are two different things. It is useful to consider the method of valuation under two heads:

- (1) Where there is a contract
- (2) Where there is no contract.

Where there is a contract

For example a contractor may be instructed to carry out certain work to a property, but neither party has thought to agree the price before the work is commenced. In practice, this scenario is remarkably common. If the parties cannot subsequently agree the amount to be paid, the law is that the contractor would be entitled to a reasonable sum. In *Turriff Construction v Regalia Knitting Mills*² a contractor tendered for a design and build contract. The employer was anxious for completion by an early date and much preparatory work had to be completed. Although many things, including the price, remained to be agreed, a letter of intent was issued. It was held that in the circumstances an ancillary contract had been entered into which entitled the contractor to payment on a *quantum meruit* basis.

In *Amantilla Ltd v Telefusion PLC*,³ the court had to decide whether a cause of action was resuscitated under the Limitation Act (1980), but the cause of action centred on a *quantum meruit* claim. The contractor had carried out work for the employer for an agreed lump sum price. It was agreed that the contractor should carry out substantial additional work, but the price was not agreed. Various payments were made by the employer, but a final offer by the employer was turned down and matters proceeded to the court which held that the contractor was held entitled to recover, because:

‘A *quantum meruit* claim for a “reasonable sum” lies in debt because it is for money due under a contract. It is a liquidated pecuniary claim because “a reasonable sum” (or a “reasonable price” or “reasonable remuneration”) is a sufficiently certain contractual description for its amount to be ascertainable in the way I have mentioned.’⁴

A contractor will often argue that it is entitled to recover on the basis of a complete re-rating of the bills of quantities or on a *quantum meruit* basis, because the whole scope and character of the work has changed. Most such claims are doomed to failure, because the Works as defined in the contract rarely change and all standard form contracts provide for instructions to be issued to add to, omit from and to vary the Works. The extent to which the Works can be varied without changing their essential character is an interesting topic.

A successful case involved a contractor which contracted to construct an ordnance factory for the employer.⁵ The contract sum was £3.5 million and there was a subsequent agreement that the employer would pay the cost of the Works plus profit of between £150,000 and £300,000. The contractor thought that the work would cost about £5 million. The value of the contract was eventually increased to £6.83 million. This amount was paid together with a further £300,000 as profit. However,

² (1971) 9 BLR 20.

³ (1987) 9 Con LR 139.

⁴ *Amantilla Ltd v Telefusion PLC* (1987) 9 Con LR 139 at 145 per Judge Davis.

⁵ *Sir Lindsay Parkinson & Co. Ltd v Commissioners of Works and Public Buildings* [1950] 1 All ER 208.

the contractor contended that it was entitled to further profit, while the employer's position was that it was entitled to order unlimited extras provided that the total Works remained within the scope of the project. In holding that the contractor was due to further reasonable remuneration calculated on a *quantum meruit* basis, the Court of Appeal stated that the contractor had believed that the cost of the Works would not exceed £5 million and, therefore, a term would be implied into the contract that the employer was not entitled to receive work materially in excess of £5 million. The Court's view was that neither party could have contemplated such a great increase in the value of the work when the agreement was made.

Where there is no contract

In *British Steel Corporation v Cleveland Bridge & Engineering Co Ltd*,⁶ the employer had invited tenders for the fabrication of steelwork. The contractor was asked for cast steel nodes. Following the tender, a letter of intent was sent and, expecting a formal order, the contractor began work. Negotiations continued until almost the whole of the nodes had been manufactured and delivered. The court held that no contract had come into existence, the work had been carried out on the basis of the letter of intent and the contractor was entitled to be paid on a *quantum meruit* basis.

In another case⁷ a contractor submitted a tender for the design and construction of a factory. The contractor was informed that if certain insurance monies became available, its tender would be accepted. Before any such monies were available, the contractor was requested to, and did, carry out some design work and other design work was carried out without an express request but with the employer's full knowledge. There was no contract and it was held that all the design work had been carried out as a result of an express and implied request and that the contractor was entitled to a reasonable sum in payment.

The exact meaning of *quantum meruit* in practical terms can be a difficult question. It seems that in the absence of any other indicator, it must be a fair commercial rate.⁸ Moreover, it can be valued by reference to any profit on the work made by the other party and to any competitive edge which the provider of the service enjoys – for example, already being on site and, therefore, avoiding the need for mobilisation costs.⁹ Valuable guidance on the basis of *quantum meruit* was given in *Serck Controls Ltd v Drake & Scull Engineering Ltd*¹⁰ where Drake & Scull had given a letter of intent to Serck instructing them to carry out work on a control system for BNFL. Part of the letter said:

‘In the event that we are unable to agree satisfactory terms and conditions in respect of the overall package, we would undertake to reimburse you with all reasonable costs involved, provided that any failure/default can reasonably be construed as being on our part.’

⁶ (1981) 24 BLR 94.

⁷ *Marston Construction Co Ltd v Kigass Ltd* (1989) 15 Con LR 116.

⁸ *Laserbore v Morrison Biggs Wall* (1993) CILL 896.

⁹ *Costain Civil Engineering Ltd and Tarmac Construction Ltd v Zanin Dredging and Contracting Company Ltd* (1996) 85 BLR 85.

¹⁰ (2000) 73 Con LR 100.

The way in which the *quantum meruit* was to be calculated was the basis of the trial. Several points of interest were considered. Judge Hicks had to decide whether, by 'reasonable sum', was meant the value to Drake & Scull, or Serck's reasonable costs in carrying out the work. In his view the term *quantum meruit* covered the whole spectrum from one to the other of these positions. Reference to 'reasonable sums incurred' entitled Serck to reasonable remuneration. 'Costs' implied the exclusion of profit and, possibly, overheads, but the judge did not believe that they were excluded in this instance.

What, if any, relevance was to be placed on the tender? Because the tender did not form part of any contract, its use was limited. It could not be the starting point for the calculation of the reasonable sum. Probably its only use was a check on whether the total amount arrived at by other means was surprising.

So far as site conditions were concerned, if the criterion was the value to Drake & Scull, site conditions in carrying out the work would be irrelevant. If the starting point had been an agreed price, the only relevant points would have been any changes to the basis of the price. On the basis of a reasonable remuneration, the conditions under which the work was actually undertaken were relevant: if the work proved to be more difficult than expected, Serck were entitled to be recompensed.

The conduct of the two parties was considered, particularly allegations that Serck had worked inefficiently and what effect that had on the calculation of *quantum meruit*. It was held that if the value was to be worked out on a 'costs plus' basis, deductions should be made for time spent in repairing or repeating defective work, and for inefficient working. If the value was to be worked out by reference to quantities the claimant gains nothing from such deficiencies and, if attributable to the claimant or its sub-contractors, they are irrelevant to the basic valuation; extra time and expense enters into the picture at this stage only if relied upon by the claimant as arising without fault on its part. Defects remaining at completion should give rise to a deduction, whatever method of valuation was chosen.

In another interesting case¹¹ a letter of intent was sent to the contractor. It was somewhat unusual in nature. A letter of intent is usually an assurance by one party to the other which, if acted upon, will have limited contractual effect such that reasonable expenditure will be reimbursed. Usually, either party is free to stop work at any time. In this instance the letter imposed substantial and detailed obligations on both parties. The contractor had the option whether or not to start work but, once started, it would have to continue. The letter envisaged that both parties would continue to negotiate about the form of contract. In the event, no form of contract was finally agreed. The judge referred to the letter of intent as a 'provisional contract' which was intended to be superseded. He concluded that the reasonable remuneration should be that which would be payable under the building contract once entered into. The rates were to be derived from the bills of quantities and any extra remuneration to be derived from the terms of the intended JCT contract.

That approach was followed in a subsequent case which bridged the division between situations where there is a contract and situations where there is no contract.¹² There, the contractor submitted a tender to design and construct new sports

¹¹ *Hall & Tawse South Ltd v Ivory Gate Ltd* (1997) 62 Con LR 117.

¹² *ERDC Group Ltd v Brunel University* (2006) 109 Con LR 114.

facilities. The contract was based on the JCT Standard Form of Contract with contractor's design. No formal contract was ever executed and the work proceeded on the basis of various letters of appointment. The contractor continued work after authority expired under the last of the letters. On receiving the contract documents for execution, the contractor declined to execute them and instead argued that all work should be valued on a *quantum meruit* basis. It was common ground that a *quantum meruit* basis should be used but that there was disagreement between the parties as to what that involved. The court held that the letters of appointment and their acceptance amounted to a contract until the last letter expired. The court acknowledged that it was an unusual case in that there was a move from a contractual to a non-contractual basis. It held that the valuation of work carried out after the contract had expired should be on the same basis as the work carried out during the period when work was done under the letters of appointment, i.e. using the contractor's original rates and prices, but subject to some adjustment to take account of the costs of prolongation not otherwise covered.

1.2.4 *Ex gratia* claims

An *ex gratia* claim (strictly 'as a matter of favour') is a claim which has no legal basis. Consequently, an employer has no legal obligation to consider, let alone pay, it. A contractor will sometimes make such a claim when it is losing money, but has no basis for a legal claim. Hence it is often referred to as a 'hardship claim'. Architects have no powers under most of the standard form contracts to consider *ex gratia* claims. An employer occasionally may be prepared to consider such a claim if a project is almost complete on site and a small payment will prevent the contractor's insolvency, or at least delay it until the project is finished. However, such payments should be made with caution, because the contractor may become insolvent in any event and the employer has then paid out money with no return of any kind.

1.3 *The basis of claims*

1.3.1 General

'Claim' is often seen as a dirty word in the employer section of the industry. It is easy to understand why this should be so, because claims so often result in original budgets being exceeded. In fact, there are only two sorts of claim: justified and unjustified. A justified claim is one properly made under the terms of the contract or under common law. An unjustified claim is one which does not comply with the terms of the contract or which does not satisfy the criteria for a common law claim.

There is nothing wrong with a justified claim since most standard form contracts specifically entitle the contractor to apply for reimbursement of direct loss and/or expense which it incurs as a result of certain matters specified in the contract, all of which are within the direct control of the employer or of those for whom the employer must bear the responsibility in law. On the other hand, unjustified claims, or those that are engineered at the outset of the project or even, on occasion, during

the tendering process, can cause a great deal of trouble in the industry. They give rise to the common and unfortunately not always misconceived view that some contractors embark on a contract with the intention of creating conflict and making as much money as possible out of it. It is probably not too strong to categorise such claims as fraudulent and the construction industry is perhaps the only one where such practices would be tolerated and treated as the norm. This book is not concerned with that kind of spurious claim.

Undoubtedly there are situations in which the employer will be obliged to pay substantial sums because of circumstances which are largely if not entirely beyond the employer's control – or, indeed, beyond the control of the architect or other consultants. For example, there may be major re-design of foundations resulting from unexpected ground conditions that normal surveys could not have revealed. There may be implied terms that the ground conditions will accord with the hypotheses upon which the contractors are instructed to work, and in fact the ground conditions may be different.¹³ Indeed, the JCT and other standard forms of building contract and sub-contract are drafted on the very sensible basis that claims are likely to be made as the contract progresses. Appropriate clauses are included in an endeavour to cover the situation and to ensure that they are dealt with in an organised way. These provisions in such contracts, together with any bespoke amendments will determine the allocation of risk between the parties in such instances.

1.3.2 Contractual claims

Claims for both time and money under the terms of the contract are a feature of any construction project. Claims are very simple to generate, but are not always easy to substantiate, and therein lies the employer's protection. An employer is only bound to meet claims that are based on some express or implied provision of the contract or rule of law and it is for the contractor to prove its claim. Where the claim is brought within the contract procedure, the contractor must also show that it has followed the administrative machinery provided in the contract itself. Failure to comply precisely with the procedure will usually negate the claim, although that may not mean that the contractor is entirely without a remedy. Above all, contract claims must be founded on facts and these facts must be substantiated by the contractor. Merely because a contractor is losing money on a particular contract does not mean that it is entitled to look to the employer for reimbursement. It must be able to establish that the loss results directly from some act or default of the employer or those for whom the employer is responsible in law, or else is referable to some express term of the contract entitling the contractor to reimbursement.

1.3.3 Extension of time and loss and/or expense

Contractual claims for time or for money must stem from a particular clause in the contract. The JCT standard forms all contain provisions of varying degrees of

¹³ *Bacal Construction (Midlands) Ltd v Northampton Development Corporation* (1976) 8 BLR 88.

complexity which give the architect power to extend the time for completion of the contract (e.g. SBC clauses 2.26–2.28, IC clauses 2.19–2.20, MW clause 2.7). However, it should be noted that an extension of the contract period does not, automatically, entitle the contractor to make a claim for loss and/or expense. Indeed, under MW and MWD there is no express clause which allows the contractor to make a claim for loss and/or expense under any circumstances.

On the other hand, an extension of the contract period is not a pre-requisite to a claim for loss and/or expense. This is not very well understood in the construction industry. The confusion may have arisen, because the grounds on which a contractor can apply for loss and/or expense are all reflected in the grounds which may give rise to an extension of time. The reverse is not true, but that does not stop contractors seeking payment of money in respect of every week for which an extension of time is given. The giving of an extension of time is not linked to a right to loss and/or expense either contractually or otherwise in law.¹⁴ Having said that, it is very common for contractors to seek an extension of time before claiming loss and/or expense based on the extended period and some quantity surveyors deal with claims for loss and/or expense in no other way.

1.3.4 Unexpected problems

If the contractor experiences unexpected problems or expense in carrying out a contract, that is no basis for a claim. In *Davis Contractors Ltd v Fareham Urban District Council*¹⁵ a contractor undertook to construct a council house development in eight months for a firm price. The original tender had a letter attached which qualified the tender to the extent that it was subject to the availability of an adequate supply of labour. Following negotiations, the agreement did not refer to the letter. In the event skilled labour was not available and the eight-month contract became 22 months. The contractor argued that the tender was subject to availability of labour, therefore, the contract was frustrated. The contractor claimed payment on a *quantum meruit* basis. Importantly, the House of Lords held that the letter was not incorporated into the contract. Once the Lords had reached that conclusion, the frustration argument was doomed. The contractor was not excused performance if skilled labour was not available. Just because a contract became more difficult to perform than initially envisaged was no reason to excuse the contractor from further performance. Lord Justice Denning had a way of putting things clearly and simply. In the Court of Appeal, which also rejected the contractor's contentions, he summed up the situation in few words:

‘We could seriously damage the sanctity of contracts if we allowed a builder to charge more, simply because, without anyone’s fault, the work took him much longer than he thought.’¹⁶

¹⁴ *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106. See in particular page 120; *Methodist Homes Housing Association Ltd v Messrs Scott & McIntosh*, 2 May 1997, unreported.

¹⁵ [1956] 2 All ER 148 HL.

¹⁶ *Davis Contractors Ltd v Fareham Urban District Council* [1955] 1 All ER 275 at 278 CA.

Many claims are produced because the contractors concerned underestimated the cost of doing a job. Sometimes it is possible to discern, in the correspondence emanating from the contractor during a project, that the groundwork is being laid for a claim at a later date. It has to be said that there are some contractors who have a claim in mind right from the beginning of a contract and long before there can be any ground to support a claim. These are contractors to be avoided. On the other hand, there are many examples of contractors delayed and disrupted by the actions or inactions of the employer or the professional team but who find it quite difficult to recover the appropriate loss and/or expense.

1.4 Architect's and contract administrator's powers and liability to contractor

1.4.1 The contract terms

Most of the comments in this section will apply whether the contract administrator is an architect or some other construction professional. However, to avoid undue complication, reference is made only to the architect. What seems to be little understood is that the architect's powers, and indeed duties, are restricted by the terms of the particular contract. The law presumes that the architect is aware of the whole of the terms of the building contract under which he or she is acting. That is fundamental to the architect's responsibilities.¹⁷ Unfortunately too many architects have very limited knowledge of the contracts which they purport to administer. Lack of knowledge in that situation is negligent. The architect has no intrinsic powers by virtue of being the architect under a particular contract, still less by virtue of simply being an architect. Take for example SBC clause 3.14.1 which states that the architect may issue instructions requiring a variation. If that clause was not in the contract, the architect would have no power to issue such instructions. It should be noted also that the architect is not given general power under the contract to issue any instruction which may seem appropriate but only such instructions as are expressly empowered by the contract.

1.4.2 Agency

In another approach to essentially the same thing, architects sometimes believe that they have general powers of agency on behalf of the employer which enable them to act on the employer's behalf in every way provided that the action is connected with the project. Contractors are often under the same misapprehension. The powers of the architect to act as agent for the employer are to be found in the architect's terms of engagement or, if there are no written terms,¹⁸ by necessary implication. In either case, the powers of the architect to act as agent will be only such as are absolutely

¹⁷ *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190 upheld on appeal [2010] ScotCS CSIH 68.

¹⁸ It should be noted that the Codes of Professional Conduct of both the Royal Institute of British Architects and the Architects' Registration Board require architects to conclude written terms of engagement.

essential for the administration of the contract. Architects have no power to affect the legal relationship which exists between the employer and the contractor.¹⁹ Architects occasionally exceed their powers and the consequences can be severe.

1.4.3 Architect's discretion

So far as claims are concerned, the architect may only act in the way set out in the contract. If there is a pre-condition which must be satisfied before the architect can act, such as the giving of notice by the contractor, an architect who acts without that pre-condition is acting without authority and may become liable to the employer. An important point is that the architect has no powers to certify for payment sums in respect of common law, *quantum meruit* or *ex gratia* claims under JCT contracts. Some contracts may give the architect such power, but generally it would be necessary for the employer to specifically authorise the architect to so act and probably for the contractor to agree. The architect's position has been succinctly summed up thus:

'The occasions when an architect's discretion comes into play are few, even if they number more than the one which gives him a discretion to include in an interim certificate the value of any materials or goods before delivery on site . . . The exercise of that discretion is so circumscribed by the terms of that provision of the contract as to emasculate the element of discretion virtually to the point of extinction.'²⁰

It should be remarked that the judge was referring to the JCT 63 form and that even the discretion which the architect then had with regard to certification of materials off-site has since been removed. In other respects the statement is very much to the point. However, more recently, it has been said:

'In the administration of a complex contract, however, it is not uncommon to find that the procedural requirements of the contract are not followed to the letter. This is hardly surprising; if matters seem straightforward or if the practical result that is desired is clear, the niceties of procedure may not seem important, and there is an obvious temptation to ignore them. In a construction contract most of the procedural requirements will be matters with which the architect is directly involved on the employer's behalf. Consequently the decision to dispense with procedural requirements is likely to be that of the architect. In my opinion the architect must have power to dispense with such requirements. If that were not so, the contractor could never acquiesce in any procedural shortcuts, however clear the substance might be, for fear that at some future date the employer would reject what the architect had done. The result would be that every detail of procedure would require to be followed to the letter unless the employer agreed to dispense with it. That seems to me to fly in the face of common sense; it would, I suspect, add greatly to the administrative burden of most building contracts. For this reason I am of the opinion that the architect has power, at least under the

¹⁹ *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616.

²⁰ *Partington & Son (Builders) Ltd v Tameside Metropolitan Borough Council* (1985) 5 Con LR 99 at 108, per Judge Davies.

JCT Standard Forms, to waive or otherwise dispense with procedural requirements of the contract.²¹

Although that seems like sound commonsense, it was challenged on appeal. The Inner House of the Court of Session found it unnecessary to decide whether the distinction between procedural and other provisions in the contract was valid, because it was conceded that the clause being considered was more than simply procedural.²² It may be doubted whether the architect has the power to dispense with the procedural requirements in the contract. There is nothing in the contract or elsewhere to support that approach. The better view seems to be that the architect, like the parties, is bound by the words of the contract and only the parties, acting jointly, can dispense with procedural requirements.

1.4.4 Architect's liability to the contractor

So far as the provisions of SBC, IC and ICD are concerned, it is likely that the architect and the quantity surveyor, if so instructed, have an implied duty to carry out the ascertainment of direct loss and/or expense within a reasonable time from the time that reasonably sufficient information is received from the contractor.²³ A 'reasonable time' is a notoriously variable concept and the precise period will depend on the relevant circumstances. However, it seems that an architect or quantity surveyor who unreasonably delayed in the ascertainment of loss and/or expense might be liable personally to either the employer or even to the contractor. This proposition has received judicial support from an *obiter* observation: '[If] the period was unreasonable the chain of causation would be completely broken. This might give rise to a claim against the architect . . .'.²⁴ It is tentatively believed that this is a correct statement of the law and it appears to be supported by a clutch of other cases.

In *Michael Salliss & Co Ltd v ECA Calil*,²⁵ the contractor sued Mr and Mrs Calil and the architects, W F Newman & Associates. It was claimed that the architects owed a duty of care to the contractor. The claim fell into two principal categories:

- failure to provide the contractors with accurate and workable drawings
- failure to grant an adequate extension of time and under-certification of work done.

The court held that the architect had no duty of care to the contractors in respect of surveys, specifications or ordering of variations, but that he did owe a duty of care in certification. It was held to be self-evident that the architect owed a duty to the contractor not to negligently under-certify:

'If the architect unfairly promotes the building employer's interest by low certification or merely fails properly to exercise reasonable care and skill in his

²¹ *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190 at paragraph 148 per Lord Drummond Young.

²² *City Inn Ltd v Shepherd Construction Ltd* [2010] ScotCS CSIH 68.

²³ *Croudace Ltd v London Borough of Lambeth* (1986) 6 Con LR 70.

²⁴ *F G Minter Ltd v Welsh Health Technical Services Organisation* (1979) 11 BLR 1 at 13 per Parker J partially reversed by the Court of Appeal, but not on this point (1980) 13 BLR 7.

²⁵ (1987) 4 Const LJ 125.

certification it is reasonable that the contractor should not only have the right as against the owner to have the certificate revised in arbitration but also should have the right to recover damages against the unfair architect.²⁶

In arriving at that conclusion, the court was following the rules laid down by many other courts. In *Campbell v Edwards*,²⁷ the Court of Appeal said that the law had been transformed since the decisions of the House of Lords in *Sutcliffe v Thackrah*²⁸ and *Arenson v Arenson*,²⁹ because contractors now had a cause of action in negligence against certifiers and valuers. Before these cases, certifiers had been protected because the Court of Appeal in *Chambers v Goldthorpe*³⁰ had held that certifiers were quasi-arbitrators. The House of Lords overruled that in 1974. Until the *Pacific Associates* case at no time in the history of English law has it been doubted that architects owed a duty to contractors in certifying. After all, there was no need even to invent the doctrine of quasi-arbitrators if there was no liability for negligence. In the *Arenson* case in reference to the possibility of the architect negligently under-certifying, it was said:

‘In a trade where cash flow is perceived as important, this might have caused the contractor serious damage for which the architect could have been successfully sued.’³¹

The case of *Pacific Associates v Baxter*³² appeared to throw serious doubt on this position. Halcrow International Partnership were the engineers for work in Dubai for which Pacific Associates were in substance the contractors under a FIDIC contract. During the course of the work, the contractors claimed that they had encountered unexpectedly hard materials and that they were entitled to extra payment of some £31 million. Halcrow refused to certify the amount and in due course, Pacific Associates sued them for the £31 million plus interest and another item. It was claimed that Halcrow acted negligently in breach of their duty to act fairly and impartially in administering the contract. At first instance, the court struck out the claim, holding that Pacific Associates had no cause of action. The court noted that:

- there was provision for arbitration between employer and contractor; and
- there was a special exclusion of liability clause in the contract (clause 86) to which, of course, the engineers were not a party, whereby the employers were not to hold the engineers personally liable for acts or obligations under the contract, or answerable for any default or omission on the part of the employer.

The question of whether a duty of care exists does not depend on the existence or absence of an exclusion of liability clause although it may be one factor to be considered.³³ It may be argued that the very existence of such a clause suggests acceptance by the engineer that there is a duty of care which, without such a clause, would give

²⁶ (1987) 4 Const LJ 125 at 130 per Judge Fox-Andrews.

²⁷ [1976] 1 All ER 785.

²⁸ [1974] 1 All ER 859.

²⁹ [1975] 3 All ER 901.

³⁰ [1901] 1 KB 624.

³¹ [1975] 3 All ER 901 at 924 per Lord Salmon.

³² (1988) 44 BLR 33.

³³ *Galliford Try Ltd v Mott MacDonald Ltd* (2008) 120 Con LR 1, which includes a very thorough consideration of the duty of care.

rise to such liability. Whether such a clause would be deemed reasonable under the provisions of the Unfair Contract Terms Act 1977 has yet to be tested.³⁴ Surprisingly, it was held that the inclusion of an arbitration clause in the contract, General Condition 67, excluded any liability by the engineer to the contractor. Why that should be so is anything but clear. The fact that the employer and the contractor choose to settle any disputes by arbitration rather than litigation cannot in itself excuse the engineer from his clear duty to both parties. However, it seems that these two points were decisive in the decision. Moreover, it was upheld by the Court of Appeal. The decision can be criticised on three major points:

- (a) In *Lubbenham Fidelities v South Pembrokeshire District Council*³⁵ the Court of Appeal expressly affirmed the principle that the architect owed a duty to the contractor in certifying. The architects in that case were not held liable, because the chain of causation was broken and the contractor's damage was held to be caused by its own breach in wrongfully withdrawing from site. But the Court said:

‘We have reached this conclusion with some reluctance, because the negligence of Wigley Fox [the architects] was undoubtedly the source from which this unfortunate sequence of events began to flow, but their negligence was overtaken and in our view overwhelmed by the serious breach of contract by Lubbenhams.’³⁶

It expressly approved the first instance judgment saying:

‘Since Wigley Fox were the architects appointed under the contracts, *they owed a duty to Lubbenham as well as to the Council to exercise reasonable care in issuing certificates and in administering the contracts correctly.* By issuing defective certificates and in advising the Council as they did, Wigley Fox acted in breach of their duty to Lubbenham.’ (emphasis added)³⁷

- (b) The Court of Appeal is bound by its own previous decisions. This decision seemed to be contrary to all the previous cases, including those of the House of Lords by which it was bound, going back for more than a century together with well-established law that had been followed in all common law jurisdictions such as Hong Kong and Australia.³⁸
- (c) It apparently ignored or at any rate failed to consider the fundamental principle that (at that time) parties could not be bound by a term in a contract to which they were not a party and had not consented.

Subsequent cases³⁹ provide firm support to the idea that the reliance principle established in *Hedley Byrne & Co Ltd v Heller and Partners Ltd*⁴⁰ is capable of extension

³⁴ *Smith v Eric S Bush* [1989] 2 All ER 514.

³⁵ (1986) 6 Con LR 85.

³⁶ (1986) 6 Con LR 85 at 111 per May LJ.

³⁷ (1986) 6 Con LR 85 at 101 per May LJ.

³⁸ See, for example: *Ludbrooke v Barrett* (1877) 46 LJCP 798; *Stevenson v Watson* (1879) 48 LJCP 318; *Demers v Dufresne* [1979] SCR 146; *Trident Construction v Wardrop* (1979) 6WWR 481; *Yuen Kun Yen v Attorney-General of Hong Kong* [1988] AC 175; *Edgeworth Construction Ltd v F Lea & Associates* [1993] 3SCR 206.

³⁹ *Henderson v Merritt Syndicates* [1995] 2 AC 145, (1994) 69 BLR 26; *White v Jones* [1995] 1 All ER 691; *Conway v Crow Kelsey & Partners* (1994) 39 Con LR 1.

⁴⁰ [1964] AC 465.

to accommodate actions as well as advice given by the architect. In *J Jarvis & Sons Ltd v Castle Wharf Developments & Others*⁴¹ the Court of Appeal held that a professional who induces a contractor to tender in reliance on the professional's negligent misstatements could become liable to the contractor if it could be demonstrated that the contractor relied on the misstatement.⁴²

1.5 Quantity surveyor's powers

1.5.1 Valuation of variations

The most important task of the quantity surveyor under the JCT Forms of Contract, and one that cannot be carried out by the architect, is the valuation of variations, including any required measurement and calculations necessary for achieving this purpose (SBC, IC and ICD clause 5).⁴³ In SBC the quantity surveyor is also expressly charged with the production of what is called (in clause 4.5.2.2) 'a statement of all adjustments to be made to the Contract Sum' – in other words the final variation account. If the architect so instructs under clause 4.23, the quantity surveyor is to ascertain the amount of loss and/or expense.

The limited nature of the quantity surveyor's powers under JCT forms has been clearly stated:

'His authority and function under the contract are confined to measuring and quantifying. The contract gives him authority, at least in certain instances, to decide quantum. It does not in any instance give him authority to determine any liability, or liability to make any payment or allowance.'⁴⁴

The position appears to be the same under SBC so far as the quantity surveyor's powers are concerned. The terms of the contract, express and implied, give the quantity surveyor no independent authority.

1.5.2 Direct loss and/or expense

Under the JCT forms of contract the principal responsibility for ascertaining the amount of 'direct loss and/or expense' incurred by and reimbursable to the contractor rests with the architect. The duty is actually in two parts. The first part is to check that the application made by the contractor is correct in principle; that is to say the architect must be sure that the application satisfies all the conditions and that the relevant matters on which it relies are accurately cited and, most importantly, that the contractor is entitled to some reimbursement. The second part is the ascertainment of the actual amount of money which should be paid to the contractor as a

⁴¹ [2001] 1 Lloyd's Rep 308.

⁴² There is a very perceptive article by John Cartwright (Liability in Negligence: New Directions or Old) in *Construction Law Journal* (1997) volume 13, p. 157.

⁴³ See Chapter 14.

⁴⁴ *County & District Properties Ltd v John Laing Construction Ltd* (1982) 23 BLR 1 at 14 per Webster J, where this question arose under a contract in JCT 63 form.

result. The architect may decide to instruct the quantity surveyor to carry out this ascertainment and it makes complete sense to do so. The quantity surveyor only has power to carry out that function if expressly instructed by the architect. In practice, the quantity surveyor is best suited by training and experience to perform that task. Invariably, any claim put forward by the contractor will have been calculated in some detail, often before entitlement to anything is established. The contractor's calculations will have been carried out by its own quantity surveyor or perhaps by an external claims consultant who in any event will often be a quantity surveyor. Therefore, it makes perfect sense for any financial discussions to be dealt with by another quantity surveyor, speaking the same language.⁴⁵ Having said that, there are many quantity surveyors who have a tenuous grasp of the principles of ascertainment.

1.5.3 Quantity surveyor's duty

In some respects, the quantity surveyor's position is similar to that of the architect although, as has been seen earlier, unlike the architect the quantity surveyor has no power to decide liability. Usually, the quantity surveyor will have been engaged directly by the employer. However, sometimes the employer will insist on the engagement being through the architect. What is not often appreciated by an employer is that, in such an instance, the quantity surveyor's duty is owed, not to the employer but to the architect. In such cases, the position is that the quantity surveyor will owe a duty to the architect to act properly in carrying out functions prior to and under the building contract. If there is any failure in the provision of quantity surveying services, the employer would have difficulty bringing an action directly against the offending quantity surveyor unless a collateral warranty has been given by the quantity surveyor. Any action would be against the architect who, if the action was litigation, would have to join the quantity surveyor in any proceedings. The position would be more complicated in the case of arbitration. In other cases, where the employer is a local authority or a large organisation with its own technical department, the quantity surveyor may even be a member of the employer's own staff.

It is worthwhile highlighting a particular aspect of the quantity surveyor's duties which is perceived rather than actual. It is clear that the quantity surveyor's duty is to carry out the tasks set out under the building contract in strict accordance with the terms of that contract. The quantity surveyor's duty, under clause 4.23 of SBC, has already been mentioned. That is if the architect so instructs, to ascertain the amount of direct loss and/or expense which has been or is being incurred by the contractor as a direct result of the regular progress of the Works or any part having been materially affected by one or more of the relevant matters listed in clause 4.24. That is on the basis that the architect has already formed the opinion that regular progress of the Works has been or is likely to be so affected. It is therefore the quantity surveyor's duty to find out the actual amount of loss and/or expense incurred by the contractor as a direct result of the effect upon regular progress.

⁴⁵ See also Chapter 13, Section 13.1.4, for a consideration of the relative positions of architect and quantity surveyor where the latter carries out the ascertainment.

Although the quantity surveyor's duty is to ensure that the employer pays no more than the actual amount of loss and/or expense directly and properly incurred by the contractor, the duty extends to ensuring that the contractor recovers no less. It is not part of the quantity surveyor's duty to strive to reduce the amounts properly recoverable under the contract. Architects and quantity surveyors are often exhorted to resist, defend or to break, claims. That is no part of their duties which, so far as the quantity surveyor is concerned, comprise establishing on the architect's instructions and in strict accordance with the contract, the amount payable to the contractor.

1.5.4 Duty to the employer

Leaving aside the, increasingly rare, situations where the quantity surveyor is engaged by the architect, the primary and contractual duty of the quantity surveyor is owed to the employer when carrying out all pre-contract functions, such as the preparation of cost estimates, cost plans, bills of quantities, and carrying out the arithmetical and technical checking of the priced bills submitted by the lowest tenderer. It should not need saying that the quantity surveyor must always act in strict conformity with the professional standards of the discipline and maintain the highest ethical standards. As soon as a contractor is appointed and the contract is executed, quantity surveyors, like architects, assume dual responsibilities. Although, again leaving aside direct engagement by the architect, the contractual relationship, whether under a consultancy agreement or under a contract of employment, is still solely with the employer, one of the duties of quantity surveyors is to carry out the tasks under the building contract in accordance with its terms. The proper carrying out of those tasks is an important part of any quantity surveyor's duty to the employer. But the quantity surveyor, like the architect, also has a duty to the employer to act fairly between the parties.

That duty arises as a result of the nature of the tasks which the building contract requires the quantity surveyor to carry out. These tasks of their very nature demand of the quantity surveyor the application of even-handedness in carrying them out. If the quantity surveyor fails to carry out those tasks in accordance with the contract terms, the employer may be liable to the contractor for that failure as a breach of a contractual undertaking, but only, it seems, if the employer was aware of the quantity surveyor's duty and of the breach.⁴⁶ However, it must be emphasised that the quantity surveyor is not a party to the contract, any more than the architect or quantity surveyor. Therefore, for example, the contractor cannot refer a dispute with the architect to adjudication (although one occasionally hears of it being attempted) other than by adjudicating against the employer.

1.5.5 Quantity surveyor's liability to others

In exercising their professional skills, it is arguable that quantity surveyors may also owe a duty of care, to others in the building process. Usually this duty will only arise

⁴⁶ *Penwith District Council v V P Developments Ltd*, unreported, 21 May 1999.

if it can be shown that a party relied on the quantity surveyor to exercise reasonable care and skill, that the quantity surveyor was aware of that reliance in a situation where it was appropriate to so rely and if the party incurred a reasonably foreseeable loss in consequence of such reliance.⁴⁷ That may apply, not only to the main contractor, but also to anyone who may suffer damage as a direct result of the quantity surveyor's breach of duty, for example a sub-contractor. For instance, where it is a part of the quantity surveyor's duties to value work executed for the purpose of interim payment as is usual, a contractor who suffers damage through negligent under-valuation may be entitled to take legal action against the quantity surveyor for negligent misstatement in a similar way to an employer damaged by negligent over-valuation would be entitled to take action in contract and/or in tort. Action against the quantity surveyor by anyone other than the client is virtually unknown at present, but developments in the law point to the possibility of actions of this kind. The remarks in Section 1.4.4 earlier are relevant.

1.5.6 Commercial settlements

In most cases, much of the ascertainment process will involve discussion between the contractor and the quantity surveyor. In practice, most claims are ultimately settled by agreement. The quantity surveyor, of course, is not normally empowered to 'do a deal' and where some sort of 'broad brush' settlement is clearly to the benefit of the parties, the architect and the quantity surveyor must place the options in front of the employer and obtain instructions. Where such a commercial settlement is agreed and incorporated into the final account, the architect will have difficulty issuing a final certificate, because it will not be possible to say that effect has been given to all the contractual terms governing the calculation of the finally adjusted contract sum.

⁴⁷ *Hedley Byrne & Co v Heller and Partners Ltd* [1964] AC 465.

Chapter 2

Time

2.1 *Time of the essence*

2.1.1 Definition

A term, the breach of which by one party gives the other party a right to treat it as repudiatory is sometimes said to be of the essence of the contract. At one time the common law took a strict view with the result that a contract had to be performed on the date stated, the only relief being obtained through the Court of Equity. However, for three-quarters of a century, time has not been automatically considered as of the essence of a contract unless equity would have so considered it prior to 1875.¹ There are probably only three instances where time will be of the essence:

- if the contract expressly so stipulates
- if it is a necessary implication of the contract and its surrounding circumstances
- if a party unreasonably delays its performance so as to be in breach, time may be made 'of the essence' if the other party serves a notice on the party in breach setting a new and reasonable date for completion.

The term must be so fundamental that its breach would render the contract valueless, or nearly so, to the other party.

2.1.2 Serving notice

It is noteworthy that where a term is not originally of the essence it may be made of the essence by one party giving the other a written notice to that effect.² In that case, failure to comply with the notice would be evidence of a repudiatory breach rather than a repudiatory breach itself. This may be of some limited use in cases where a contractor consistently fails to meet time targets for reasons which do not entitle it to an extension of time under the contract provisions. However, in the case of most standard form building contracts, the provisions for termination (e.g. for failure to proceed regularly and diligently) adequately cover the situation. Care must be taken in serving such a notice.

¹ Law of Property Act 1925, s. 41.

² *Behzadi v Shafisbury Hotels Ltd* [1992] Ch 1.

In *Shawton Engineering Ltd v DGP International Ltd*,³ an attempt was made to make time of the essence by service of a notice. Shawton made a claim for over £1.5 million. Shawton, a sub-contractor, was claiming against a sub-sub-contractor (DGP). DGP was responsible for five packages of drawings and work, for which there were five separate completion dates. These dates were exceeded, but a factor was the substantial number of variations ordered for each package, some ordered prior and some after the completion dates. It was agreed that, since there was no provision for extending time, DGP's obligation became an obligation to complete within a reasonable time. Argument revolved about the meaning of 'reasonable time'. It was also accepted that Shawton had agreed to accept delivery at substantially later dates than had been agreed. However, that did not result in Shawton being prevented from serving a notice subsequently.

Importantly, at the date Shawton purported to terminate the contracts, DGP had produced a substantial number of drawings and they had manufactured and delivered a significant proportion of the equipment. The Court rejected Shawton's appeal against an earlier decision in this dispute. In doing so, the Court questioned whether the notice given by Shawton was expressed sufficiently clearly to make time of the essence and held that DGP was not in breach at the time the notice was given.

That does not mean that, once a party agrees to allow extra time for delivery or completion of work, it will be prevented from issuing a notice putting a cap on the time. The position has been set out succinctly:

'It would be most unreasonable if the defendant having been lenient and waived the initial expressed time, should, by so doing, have prevented himself from ever thereafter insisting on reasonably quick delivery. In my judgment, he was entitled to give a reasonable notice making time of the essence of the matter.'⁴

And later in the same case:

'The case therefore comes down to this: there was a contract by these motor traders, the plaintiffs, to supply and fix a body on the chassis within six or seven months. They did not do it. The defendant waived that stipulation. For three months after the time had expired he pressed them for delivery, asking for it first for Ascot and then for his holiday abroad. But still they did not deliver it. Eventually, at the end of June, being tired of waiting any longer, he gave four weeks' notice and said: "at all events, if you do not supply it at the end of four weeks I must cancel the contract"; and he did cancel it. I see no injustice to the suppliers in saying that that was a reasonable notice. Having originally stipulated for six or seven months, having waited ten months, and still not getting delivery, the defendant was entitled to cancel the contract.'⁵

An example where time may be made of the essence may be if a contractor/developer has ordered proprietary timber frames from a supplier on the supplier's own terms to be installed in a series of housing units. There is unlikely to be provision for extending time but there will be a date for delivery. Clearly, in the context of

³ [2005] EWCA Civ 1359.

⁴ *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 at 624 per Denning LJ.

⁵ *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 at 626 per Denning LJ.

construction of a commercial development, delivery on the due date will be very important. If the supplier fails to deliver on the due date and the contractor has done nothing to contribute to the delay, the supplier will be in breach of contract. Although the contract is unlikely to specify time as being of the essence, it would be open to the contractor to make time of the essence by sending the supplier a notice giving a reasonable time for delivery and making clear that failure to deliver on the new date would be treated as a repudiatory breach.

There is no general concept that time is of the essence of a contract as a whole. The question is whether time is of the essence in relation to a particular term. In the case of a hazardous or wasting asset, time can be made of the essence by service of notice to that effect even if the other party has not delayed unduly.⁶

2.1.3 Relevance of an extension of time clause

There is authority that time will not normally be of the essence in building contracts unless expressly stated to be so. This is because the contract makes express provision for the situation if the contract period is exceeded in the shape of an extension of time clause and liquidated damages.⁷ In that context, making time of the essence would be contradictory and of little or no practical benefit to the employer although it was done in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* and apparently gave the employer the right to ‘determine the contract at the end of’ the period as extended by the architect.⁸

2.2 Time at large

2.2.1 Definition

Where a building contract does not provide any agreed contractual mechanism for fixing a new date for completion, time may become ‘at large’ if the contractor suffers delay due to some action, inaction or default on the part of the employer or persons for whom the employer is responsible. In such instances the contractor’s duty will be to complete the Works within a reasonable time.⁹ Provided a contractor has not acted unreasonably or negligently, it will complete within a reasonable time despite a protracted delay if the delay is due to causes outside its control.¹⁰ In such circumstances time is said to be ‘at large’.

Time may also be at large from the beginning of the contract if the parties have not agreed any date for completion. In such circumstances, the contractor’s obligation will be to complete within a reasonable time. The determination of a reasonable time in such circumstances where there is no contractual date for completion and

⁶ *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] 3 All ER 492.

⁷ *Lamprell v Billericay Union* (1849) 18 LJ Ex 282; *Babacomp Ltd v Rightside* [1974] 1 All ER 142.

⁸ (1970) 1 BLR 114 at 120 per Salmon LJ.

⁹ *Wells v Army and Navy Co-operative Stores* (1902) 2 HBC 4th edition (vol 2) 346.

¹⁰ *Pantland Hick v Raymond & Reid* [1893] AC 22.

no delaying event may be a difficult task. In *J & J Fee Ltd v The Express Lift Co Ltd*, where there had been correspondence about the date for completion, the court held that there was an agreed date, but ventured the opinion that in any event a reasonable date for completion would be implied as not later than the date which had consistently been put forward by Express Lift.¹¹

2.2.2 Relationship with extension of time and liquidated damages

The question of time being 'at large' and the relationship between the extension of time clause and liquidated damages provisions in JCT contracts has been stated in this way:

1. The general rule is that the main contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer.
2. That is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the main contractor from completing his work by the completion date – see for example *Holme v Guppy* (1838) 2 M & W 387, and *Wells v Army and Navy Co-operative Society* (1902) 86 LT 764.
3. These general rules may be amended by the express terms of the contract.
4. In this case [which involved a contract in terms identical to JCT 63] the express terms of clause 23 of the contract do affect the general rule . . .'¹²

In practice, very few building contracts are without a clause enabling the employer or the employer's agent to fix a new completion date after the employer has caused delay to the contractor's progress. All standard forms have clauses permitting the extension of time although not all of the terms are entirely satisfactory. Even where a building contract contains terms providing for extension of the contract period, time may yet become at large either because the terms do not properly provide for the delaying event or, because the architect has not correctly operated the terms. The latter is sadly all too common.

2.2.3 Common reasons for time becoming at large

The JCT series of contracts (other than MW and MWD) favour a list of events giving grounds for extension of time. Because the architect's power to give an extension of time is circumscribed by the listed events, there is a danger that the employer may delay the Works in a way which does not fall under one of the events. In such a case, time would be at large. For example, the 1980 edition of the JCT Standard Form did not include power for the architect to extend time for the employer's failure to give the contractor possession of the site on the due date. Therefore, if an employer failed

¹¹ (1993) 34 Con LR 147.

¹² *Percy Bilton v Greater London Council* (1982) 20 BLR 1 at 13 per Lord Fraser of Tullybelton, delivering the unanimous decision of the House of Lords.

to give possession on the due date the result was that time became at large and the contractor's obligations became a duty to complete the Works within a reasonable time. This was the situation even in cases where it was acknowledged by the court that the contractor had itself subsequently contributed to the delay.¹³ It has been held that the architect has the power to give an extension of time if the employer causes further delay when the contractor is already in delay through its own fault, i.e. in culpable delay.¹⁴

By Amendment 4 in 2002, the JCT further improved JCT 98 by adding to the relevant events one which allowed an extension of time for any act or default of the employer – virtually a catch-all category. This is now the relevant event at clause 2.29.6 of SBC which refers to any impediment, prevention or default of the employer, the architect and others for whom the employer is responsible. The inclusion of this relevant event has enabled the JCT to dispense with some of the other relevant events which could be said to fall into this category, for example, the late provision of information by the architect.

Where the extension of time clauses are properly drafted, but the architect operates them incorrectly, time may become at large depending on all the circumstances. An example of this would be if the architect was late in delivering necessary drawing information to the contractor, but failed to give any extension of time. This is a clear case of the architect not taking advantage of the available mechanism. Another example is where the contract provision sets out a timetable within which the architect must operate to give an extension of time. If the power is not exercised within the relevant period, the architect's power to give an extension will end and time will become at large.

2.2.4 Whether time limits are mandatory

It has been said that such time periods are not mandatory, but simply directory on the authority of the Court of Appeal in *Temloc Ltd v Errill Properties Ltd*.¹⁵ This appears to be an incorrect reading of the decision. The court in *Temloc*, in making that observation, were interpreting the provisions *contra proferentem* the employer who sought to rely upon them. The employer had stipulated '£nil' as the figure for liquidated damages and the Court of Appeal held that this meant that the parties had agreed that if the contractor finished late, no liquidated damages would be recoverable by the employer. The court went on to hold that the employer could not opt to claim unliquidated damages. The contract provided that after practical completion the architect must, within twelve weeks, confirm the existing date for completion or fix a new date. The architect exceeded the 12 weeks and the employer contended that the liquidated damages clause could be triggered only if the new date was fixed at the right time. Therefore, the employer could claim unliquidated damages

¹³ *Rapid Building Group Ltd v Ealing Family Housing Association Ltd* (1984) 1 Con LR 1.

¹⁴ *Balfour Beatty v Chestermount Properties Ltd* (1993) 62 BLR 1, where the judge held that the architect had such power under the slightly amended form of JCT 80 under consideration. The decision has been referred to with approval in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32 and *Royal Brompton Hospital NHS Trust v Hammond and Others (No 7)* (2001) 76 Con LR 148.

¹⁵ (1987) 39 BLR 30.

for breach of an implied term. It was in this context that the court, in a view which is probably *obiter* in any event, suggested that the time period was not mandatory. They gave no real reasons, but a clue when it was said:

‘The whole right of recovery of liquidated damages under clause 24 does not depend on whether the architect, *over whom the contractor has no control*, has given his certificate by the stipulated day.’¹⁶ (emphasis added)

It seems that the court recognised that the architect is the employer’s agent. Had the employer’s argument succeeded, it would have been contrary to the established principle that a party to a contract cannot take advantage of its own breach.¹⁷ The 12 week review period subsequently was confirmed in another case dealing with the JCT 80 contract, but it is thought that its principles are applicable to SBC, IC and ICD:

‘The process of considering and granting extensions of time is to be completed not later than 12 weeks after the date of practical completion and the architect must, within that timescale, either finally fix the completion date or notify the contractor that no further extensions of time are to be granted.’¹⁸

However, there, the court seemed to hold the door slightly ajar. Its view was that the time limits in the JCT contract were ‘neither rigid nor immutable’. The court was principally considering the issue of the final certificate and the pre-conditions which must be fulfilled before it is issued. After considering a number of authorities, it was concluded:

‘It would be much more consistent with the mandatory language of the conditions and would give effect to that language if all the “shalls” are read in this way: the architect must issue the various certificates and the final certificate and in the sequence and with the prescribed time intervals between the successive steps. If the time limits prescribed by the conditions are not kept or maintained, the architect must still issue the certificates in question as soon as it is reasonably possible to issue them subject to the terms of any agreement as to their issue that has been reached or acknowledged by the parties. . . . The correct starting point is that the power is mandatory. It is then necessary to consider what the minimum relaxation would be that is necessary to give that mandatory requirement business efficacy. In that context, it can be seen that it is necessary to allow for a relaxation of the prescribed timescales subject to the imposition of a requirement of reasonableness. . . . Although the certifier has an implied power to issue certificates out of time, this power is limited since it would be unworkable and contrary to the presumed intentions of the parties for the power to issue certificates not to be subject to the obvious constraint that the parties should be notified of its intended exercise and should not be prejudiced by its exercise. In other words, the power must be exercised reasonably.’¹⁹

¹⁶ (1987) 39 BLR 30 at 39 per Nourse LJ.

¹⁷ *Alghussein Establishment v Eton College* [1988] 1 WLR 587 HL.

¹⁸ *Cantrell & Another v Wright & Fuller Ltd* (2003) 91 Con LR 97 at 147 per Judge Thornton.

¹⁹ *Cantrell & Another v Wright & Fuller Ltd* (2003) 91 Con LR 97 at 136–40 per Judge Thornton.

These words are very instructive. The court is referring to certificates and, although the courts often refer to giving an extension of time as giving a certificate or certifying, it is notable that the court does not do so here. When later referring to extensions of time as one of the pre-conditions before a final certificate can be issued, the court refers to fixing a completion date or to notifying the parties. Nevertheless, it may be argued that all the considerations which apply to the issue of the final certificate as regards timing apply also to the final decision on extensions of time. Importantly, both are referred to in mandatory terms. Therefore, it seems at least arguable, on the basis of this case, that the architect may issue a final decision on extensions of time later than prescribed in the contract subject to some fairly stringent conditions:

- there must be a powerful reason for the late issue, and
- the issue must be as soon as possible after the end of the prescribed period, and
- the late issue must not prejudice either party, and
- the parties should be notified of the late issue.

However, it remains doubtful whether the contractor's failure to provide information in time to be considered would be considered a powerful reason for issuing the decision later than stipulated in the contract. It is suggested that, save for wholly exceptional circumstances, the time period in the contract should be treated as mandatory.

2.2.5 Damages if time at large

Contractors sometimes argue that time is at large and, therefore, liquidated damages are not recoverable. Although, in appropriate circumstances, that is a very strong argument, the consequences of time becoming at large are not necessarily to prevent the employer from recovering damages. Unliquidated damages, with a ceiling on recovery equal to the rate of liquidated damages could be recovered.²⁰ When these questions go before an adjudicator or an arbitrator it is likely that it is actually presented as a claim that the architect should have given an extension of time to the date of practical completion and a reasonable date for completion will be set by the tribunal and treated, for all intents and purposes, as if the architect had issued an extension of time to that date; thus permitting liquidated damages to be claimed thereafter. The occasions when a tribunal is asked for a declaration that time is at large appear to be rare.

2.3 Extension of time clauses in contracts

2.3.1 Basic principles

If the parties intend that liquidated damages are to be payable if the contractor fails to complete the Works, a date for completion must be stipulated in the contract. That is because there must be a definite date from which to calculate liquidated damages.²¹

²⁰ See the discussion on this point in Chapter 3, Section 3.12.

²¹ *Miller v London County Council* (1934) 50 TLR 479.

There is an implied term in every contract that the employer will do all that is reasonably necessary to co-operate with the contractor²² and that the employer will not prevent the contractor from performing.²³ In the context of a building contract, the employer's co-operation probably extends to little more than ensuring that the contractor has all necessary drawings and instructions at the right time and adequate access to the site to enable it to carry out the Works. In this respect, the employer also has a duty to ensure that any appointed architect carries out his or her obligations under the building contract properly although the duty does not arise until the employer becomes aware that the architect is failing to perform properly and that there is a necessity to bring such failure to the architect's notice.²⁴

2.3.2 Hindrance by the employer

Alongside the implied term of co-operation, there must be in every contract an implied term that neither party will do anything to hinder or delay performance by the other.²⁵ Such a term was upheld as generally applicable to building contracts in *London Borough of Merton v Stanley Hugh Leach Ltd*.²⁶ An employer that does hinder the contractor can no longer insist that the contractor finishes its work by the contractual date for completion. This principle has the weight of judicial authority behind it. In *Holme v Guppy* it was said:

‘. . . and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default.’²⁷

That was a case where a builder agreed to construct a brewery in four and a half months subject to liquidated damages of £40 per week. Completion was late due to the default of the employer in failing to give possession of the site on the due date. It was said in a New Zealand judgment:

‘There is an established principle . . . which is put in various ways: that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; that a party is exonerated from the performance of a contract when the performance is rendered impossible by the wrongful act of the other contracting party; or more emotively, that a party cannot take advantage of his own wrong.’²⁸

It is clearly not an immutable rule; it will depend on circumstances. For example, where a contractor has undertaken to carry out works including any alterations or

²² *Luxor (Eastbourne) Ltd v Cooper* [1941] 1 All ER 33.

²³ *Cory Ltd v City of London Corporation* [1951] 2 All ER 85.

²⁴ *Perini Corporation v Commonwealth of Australia* (1969) 12 BLR 82; *Penwith District Council v V P Developments Ltd*, unreported, 21 May 1999; *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* (2000) 82 Con LR 89.

²⁵ *Barque Quilpue Ltd v Brown* [1904] 2 KB 261.

²⁶ (1985) 32 BLR 51.

²⁷ (1838) 3 M & W 387 at 389 per Parke B.

²⁸ *Canterbury Pipelines Ltd v Christchurch Drainage Board* (1979) 16 BLR 76.

additions which the employer might choose to make, it can be bound to its undertaking. In *Jones v St John's College Oxford* it was said:

‘... the plaintiffs undertake not only to do by a given time the works which were specified, and which they had the opportunity therefore of forming their own judgment upon, but they also undertake to do the alterations, that is to say, such alterations as are contemplated by the contract, within the time originally prescribed for the performance of the works.’²⁹

2.3.3 Defective clauses

It is not clear whether the judge was referred to *Jones* in *Wells v Army and Navy Co-operative Society Ltd* where the contractor was not liable to pay ‘penalties’ on account of exceeding the contract period.³⁰ The key facts seem to have been that although the contract provided for the contractor to complete by the due date notwithstanding variations, strikes and weather conditions, and subject only to any extension of time which the employer may (but was not obliged to) grant, it was not wide enough to cover the employer’s own defaults. In general, the courts adopt the approach that ‘it is not to be inferred that the one party meant to bind himself so very stringently, unless it is so stated.’³¹ In *Wells*, it was said:

‘In the contract one finds time limited within which the builder is to do the work. That means not only that he is to do it within that time but it means also that he is to have that time within which to do it . . . in my mind that limitation of time is intended not only as an obligation, but as a benefit to the builder . . . In my judgment where you have a time clause and a penalty clause (as I see it) it is always implied in such clauses that penalties are only to apply if the builder has, as far as the builder owner is concerned and his conduct is concerned, that time accorded to him for the execution of the works which the contract contemplates he should have.’³²

In *Dodd v Churton* it was held that an employer who prevents the contractor completing within the stipulated time, cannot recover liquidated damages.³³ *Jones* was distinguished, because although there was a term which empowered the ordering of additional work and this was done, the contractor had not agreed that, notwithstanding the ordering of additional work, it would complete within the original period. Very clear words will be needed in order to bind a contractor to a completion date if the employer is the cause of the delay. This principle is now well established³⁴ and it seems unlikely that a modern court would take so stern a view as the 1870 court in *Jones*.

Extension of time clauses should be drafted so as to cover all delays which may be the responsibility of the employer, for example SBC clause 2.29.6 or ACA 3 clause

²⁹ (1870) LR 6 QB 115 at 123 per Mellor J.

³⁰ (1902) 86 LT 764.

³¹ *Roberts v Bury Commissioners* (1870) LR 5 CP 310 at 327 per Kelly CB.

³² *Wells v Army and Navy Co-operative Stores* (1902) 2 HBC 4th edition (vol 2) 346 at 355 per Vaughan Williams LJ.

³³ [1897] 1 QB 562.

³⁴ *Percy Bilton v Greater London Council* (1982) 20 BLR 1.

11.5. Then, if the employer, either personally or through the agency of the architect, hinders the contractor in a way which would otherwise render the date for completion ineffective, the architect will have the power to fix a new date for completion and thus preserve the employer's right to deduct liquidated damages. The position was set out in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*:

'The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly contra proferentem. If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer. I am unable to spell any such provision out of...the contract [clause] in the present case.'³⁵

In that case, the extension of time clause, after referring to certain events of a neutral character, i.e. they could not be said to be the fault of either contractor or employer, made reference to 'or other unavoidable circumstances'. This was the phrase on which the employer relied, but 'delay due to the employer cannot be said to have been an unavoidable circumstance to anyone save the contractor.'³⁶ A similar phrase is 'other causes beyond the control of the contractor'. It has been held that these words 'ought to be construed with reference to the preceding causes of delay, and ought not to receive such an extension as would make the defendants judges in respect of their own defaults'³⁷ This view was noted with approval in *Perini Pacific v Greater Vancouver Sewerage and Drainage District*.³⁸

2.3.4 The prevention principle

It used to be thought that if the employer committed any act of prevention, the contractor was entitled to an extension of time whether or not it had complied with any notice requirements. That meant that if no extension was given, time would become at large and the contractor was relieved of its obligation to complete by the completion date in the contract. Instead the contractor's obligation was simply to complete the Works within a reasonable time. In an Australian case,³⁹ the employer claimed liquidated damages from the contractor for delay. The cause of delay was substantially down to the employer, but the contractor had failed to operate the strict requirement to give notice. An arbitrator found in favour of the contractor and this was upheld by the Supreme Court of the Northern Territory of Australia:

'Acceptance of [the employer's] submissions would result in an entirely unmeritorious award of liquidated damages for delays of its own making . . .'

Subsequently it has become clear that such an approach would allow a contractor to put time at large at will by simply ignoring notice provisions which would have

³⁵ (1970) 1 BLR 114 at 121 per Salmon LJ.

³⁶ (1970) 1 BLR 114 at 126 per Edmund Davies LJ.

³⁷ *Wells v Army & Navy Co-operative Society Ltd* (1902) 86 LT 764 at 765 per Wright J at first instance.

³⁸ (1966) 57 DLR (2d) 307 at 321 per Bull JA.

³⁹ *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] (2005) 21 Const LJ 71.

triggered the extension of time process. There is a strong argument that a contractor is entitled to use the contract terms for its own benefit since they have been agreed by both parties and, indeed in some instances, imposed by the employer. However, where there is a notice requirement, it is going too far to argue that the so-called 'prevention principle' overrides any failure by the contractor to comply with a duty to serve notice. It has since been held that if a contractor ignores a notice provision which is a condition precedent, there will be no entitlement to extension of time, even though there would otherwise be a clear basis on the grounds of the employer's acts of prevention.⁴⁰ Although the court was not called upon to decide the point, it provided a succinct analysis of the position:

'Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that the *Gaymark Investments* case represents the law of England. Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent. If the *Gaymark Investments* case is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set time at large.'⁴¹

The courts have also considered the position where an extension of time clause can be read, whether on account of bad drafting or for some other reason, so as to convey two entirely different meanings:

'It seems to me that, in so far as an extension-of-time clause is ambiguous, the court should lean in favour of a construction which permits the contractor to recover appropriate extensions of time in respect of events causing delay. This approach also accords with the principle of construction set out by Lewison in *The Interpretation of Contracts* (3rd edn, 2004).'⁴²

2.3.5 The architect's duty

In determining the appropriate extension of time, the architect must act fairly between the parties. This is an onerous duty, because in many instances the architect is put in the position of having to act as judge of his or her own behaviour. It is sadly common for an architect to give an extension of time on the grounds of exceptionally adverse weather conditions, a neutral event, rather than because an architect's instruction was late. An architect who tries to act fairly may often find that the employer is less than happy.

Architects should consult anyone who might be able to assist in arriving at the facts before making a decision. There is nothing wrong, and much to be gained, by

⁴⁰ *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* (2007) 111 Con LR 78.

⁴¹ *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* (2007) 111 Con LR 78 at 105 per Jackson J. Although obiter, this view was followed in *Seria Ltd v Sigma Wireless Communications Ltd* (2007) 118 Con LR 177 at 205.

⁴² *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* (2007) 111 Con LR 78 at 96 per Jackson J.

asking the employer, the clerk of works and other consultants. The architect should be seeking to establish the facts to enable the length of delays to be established with accuracy. It is essential that it is the architect who must decide the extension of time after considering all the evidence. Although not strictly necessary, architects will usually notify the employer as a matter of courtesy before giving an extension. In some instances, a client may not understand the situation and may attempt to instruct the architect about the length of extension or even that no extension can be given. The client is not entitled to give such instructions which amount to interfering with the architect's duties and effectively substituting the employer for the architect for the purpose of giving extensions of time.

In *Argyropoulos & Pappa v Chain Compania Naviera SA*,⁴³ the JCT Contract for Minor Building Works 1980 was being used. The architect reached the conclusion that the contractor was entitled to an extension of time and notified the contractor accordingly. The employer objected and refused to accept the extension and a later extension given by the architect as valid, at one point visiting site and telling the contractor that the architect had no power to give extensions of time. The employer went so far as to notify the architect that the employer's approval was required for any extension of time. In due course, the architect, on legal advice ceased to act. The resulting case dealt with several issues, among them the extension of time point in relation to which the judge said:

‘... the [employer] sought to interfere with the [architects'] performance of their duties under [the extension of time clause] which they very properly resisted. Some of [the employer's] letters were also very offensive and indicated a total lack of confidence in the [architects]. [The employer and their] Solicitors also undermined the [architects'] position in relation to the contractors. In my judgment the [employer's] letters, the Solicitors' letters and the [employer's] conduct were in breach of contract and the [architects] were amply justified in treating their engagement as at an end.’⁴⁴

It is clear that the court's view was that the architect acted properly and the employer improperly. The architect was entitled to damages for the unlawful termination.

An architect must have dealt with all questions relating to extension of time before issuing a default notice prior to termination which notifies the contractor of a failure to work regularly and diligently.⁴⁵

2.3.6 Further delays during a period of culpable delay

It is suggested that if the contractor, through its own culpable delay, is thrown into a season where weather conditions are less beneficial than during the original contract period, the contractor will have to put up with it. However, if during the period of culpable delay, the conditions are exceptional for that time of year, the contractor will be entitled to an extension of time if weather conditions are a ground

⁴³ Unreported, 1 February 1990; reported in abridged form in (1990) 7-CLD-05-01.

⁴⁴ Unreported, 1 February 1990 at 19 per Judge Newey.

⁴⁵ *Sindall Ltd v Solland* (2004) 80 Con LR 152.

for extension of time under that contract. In some contracts there is a term permitting the architect to extend time if any delays which are the responsibility of the employer or the architect occur after the contractual date for completion, but before practical completion. It is thought that the inclusion of such an express term precludes the architect from extending time if a neutral relevant event occurs after the completion date during a period of culpable delay. This approach appears to have received judicial approval.⁴⁶ Older authority from the Court of Appeal, however, suggests the contrary.⁴⁷

2.3.7 Dealing with Christmas holidays

A question which often arises concerns the period around Christmas and New Year, when many contractors take two weeks as holiday. If a proposed extension of time takes in the Christmas period or would end during the period, should the whole of the two weeks be added to the extension? There are two views of this. One view is that the whole of the two weeks should be added because the Christmas holiday period is well established as a time when all the contractors are on holiday. The other, and better, view is that the contractor is entitled to the public holidays (Christmas Day, Boxing Day and New Year's Day) just like any other public holidays, but not to any other days, because the decision to take two weeks as the Christmas holiday is simply a choice made by many contractors. It is not a statutory holiday and many people in the construction industry, including some contractors, do work during this time.

2.4 Concurrency

2.4.1 Introduction

A question which frequently arises in regard to causation⁴⁸ is the method of dealing with loss which may be due to either or both of two causes. It is important to differentiate between the delaying event or cause and the delay itself. It is generally recognised that there are times when there are delays which may be the result of different causes, but that sometimes the causes will run at the same time or overlap. This makes it difficult to decide how to treat the delay, particularly if the causes originate from different parties or the delays are of different kinds. For example, under the Standard Forms of Contract, some causes of delay may give rise to an extension of the contract period, some causes may give rise to extension and possibly also loss and expense, while other causes may not entitle the contractor to any extension or loss and expense whatsoever. Take, for example, the following situations:

⁴⁶ *Balfour Beatty v Chestermount Properties Ltd* (1993) 62 BLR 1, in which an amended JCT 80 was under consideration.

⁴⁷ *Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC* [1952] 2 All ER 452.

⁴⁸ See Chapter 8.

- (1) A contractor is just starting to carry out the covering of a large roof when it receives an Architect's Instruction to change the covering to another material which will take a few days to arrive on site. Within hours, the weather takes a turn for the worse and the contractor has to pull all its operatives off site for several days. If the overall delay is six days, is the architect responsible or can the contractor only get an extension of time due to exceptionally adverse weather conditions – if that?
- (2) A contractor is in delay through its own fault after the contract completion date and the architect postpones all the Works.
- (3) The contractor is about to start some complex trench excavation in a confined space, but it has not received the architect's detailed drawings. The contractor decides to make a start where it can, but its machinery breaks down. By the time it is in working order, the architect has got the drawings to site. Who is responsible for the delay and what, if anything, can the contractor recover?

At first sight, it is difficult to see a clear answer to some of these problems. '*Keating on Construction Contracts*'⁴⁹ looks at a number of propositions as follows:

- (a) *The Devlin Approach* which broadly contends that if there are two causes operating together and one is a breach of contract, the party responsible for the breach will be liable for the loss.
- (b) *The Dominant Cause Approach* which contends that if there are two causes, the effective, dominant cause is to be the deciding factor.
- (c) *The Burden of Proof Approach* which contends that if there are two causes, and the claimant is in breach of contract it is for the claimant to show that loss was caused otherwise than by its breach.
- (d) *The tortious solution* which enables a party to recover in full by showing that a defendant caused or materially contributed to its loss.

2.4.2 The dominant cause

It is sometimes said that the case of *H Fairweather & Co Ltd v London Borough of Wandsworth*⁵⁰ is authority to the effect that the 'dominant cause' approach is incorrect. Fairweather entered into a contract to erect 478 dwellings for Wandsworth on JCT 63 terms. Long delays culminated in the architect giving an extension of time of 81 weeks for strikes. The contractor sought arbitration in an attempt to have the extension allocated under different heads. It mistakenly thought that an extension of time under appropriate heads was necessary before it could become entitled to any loss and/or expense. The contractor wanted at least 18 weeks designated as on account of architect's instructions or late instructions. The arbitrator decided that where it was not possible to allocate the extension among different heads of delay, the extension must be given for the dominant reason. What the judge actually said in that case was:

⁴⁹ Stephen Furst and Vivian Ramsey (2006) *Keating on Construction Contracts*, 8th edition, Sweet & Maxwell, p. 272–3.

⁵⁰ (1987) 39 BLR 106.

“Dominant” has a number of meanings: “Ruling, prevailing, most influential”. On the assumption that condition 23 is not solely concerned with liquidated or ascertained damages but also triggers and conditions a right for a contractor to recover direct loss and expense where applicable under condition 24 then an architect and in his turn an arbitrator has the task of allocating, when the facts require it, the extension of time to the various heads. I do not consider that the dominant test is correct. But I have held earlier in this judgment that assumption is false. I think the proper course here is to order that this part of the interim award should be remitted to Mr. Alexander for his reconsideration and that Mr. Alexander should within six months or such further period as the court may direct make his interim award on his part.⁵¹

Besides, being almost certainly *obiter*, this statement is nowhere near the kind of condemnation often suggested. Other cases, indeed, show that the courts have embraced the dominant cause approach quite happily.⁵²

‘One has to ask oneself what was the effective and predominant cause of the accident that happened, whatever the nature of the accident may be.’⁵³

In *Fairfield-Mabey Ltd v Shell UK Ltd*, Shell entered into a contract with Fairfield-Mabey (FM) to fabricate parts of a gas platform in the North Sea. Sub-contractors were employed by FM to carry out weld-testing, etc. It was fast track work. Delays occurred and there followed claim and counterclaim. FM sued Shell and joined in Met-Testing (MT) claiming an indemnity against the counterclaim. The settlement reached was £280,000 to FM, but they then claimed £400,000 against MT. MT said that even if they were at fault regarding the testing, there was no damage because another sub-contractor had in any case caused the delay. It was held that the absence of approval for certain tests was not a cause of equal efficacy with the sub-contractor delays. The test was that of the ordinary bystander who would have said that the cause of delay was due to the sub-contractor.

Another case which is instructive is *Carslogie Steamship Co Ltd v Royal Norwegian Government (The Carslogie)*.⁵⁴ In 1941, the Heimgar, belonging to the respondents, collided with the Carslogie, which belonged to the appellants. The Carslogie was at fault. Temporary repairs to the Heimgar were carried out in England and the ship proceeded to the USA for permanent repairs. During her voyage, she suffered heavy weather damage which needed immediate repair. The ship remained in dock for 50 days and repairs to the collision damage and weather damage were carried out concurrently. It was agreed that 10 days should be allocated to the repair of the collision damage and 30 days to repair the weather damage. The respondents claimed damages for loss of charter hire during the 10 days attributable to the collision damage. It was held that the appellants were only liable for the loss of profit suffered by the respondents resulting from the appellants’ wrongful act. During the

⁵¹ *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106 at 120 per Judge Fox-Andrews.

⁵² See, for example, *Fairfield-Mabey Ltd v Shell UK* (1989) 45 BLR 113 and *Yorkshire Dale Steamship v Minister of War Transport* [1942] 2 All ER 6.

⁵³ *Yorkshire Dale Steamship v Minister of War Transport* [1942] 2 All ER 6 at 10 per Viscount Simon.

⁵⁴ [1952] 1 All ER 20.

time that the Heimgar was detained in dock she was not profit-earning because the heavy weather damage had made her unseaworthy, therefore, the respondents had not suffered any damage, because the vessel was undergoing repairs in respect of the collision damage for 10 days. The case contains reference to further examples which are very instructive.

‘It is well established that, if a ship goes into dock for repairs of damage occasioned by a collision brought about by the fault of another vessel, the owners of that other vessel must pay for the resulting loss of time, even although her owners take advantage of her presence in the dock to do some repairs which, though not necessary, are advisable. Thus, in *Ruabon S.S. Co. v London Assurance*, [1900] AC 6, the Ruabon suffered damage on the voyage which made it necessary for her to be put into dry dock. The owners (without causing delay or increase of dock expenses) took advantage of her being in dry dock to have made the survey of the vessel for renewing her classification, though this survey was not then due. It was decided that the expense of getting the vessel into and out of dock, as well as those incurred in the use of the dock, fell on the underwriters alone.’⁵⁵

A case dealing with the question of dominance is *Galoo Ltd & Others v Bright Grahame Murray*⁵⁶ where it was held that the ‘but for’ test of causation was not sufficient and it was clear that if a breach of contract by a defendant was to be held to entitle a claimant to claim damages, it must first be held to be an effective or dominant cause of his loss.

2.4.3 If the contractor is also in delay

In considering whether a breach of duty imposed upon a defendant, whether by contract or in tort in a situation analogous to a breach of contract, was the cause of the loss or merely the occasion for the loss, the court had to arrive at a decision on the basis of the application of common sense. In *Henry Boot (Construction) Ltd v Malmaison Hotel (Manchester) Ltd*, it was said:

‘Secondly, it is *agreed* that if there are two concurrent causes of delay, one of which is a Relevant Event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the Relevant Event notwithstanding the concurrent effect of the other event. Thus, to take a simple example, if no work is possible on site for a week not only because of exceptionally inclement weather (a Relevant Event), but also because the contractor has a shortage of labour (not a Relevant Event), and if the failure to work during that week is likely to delay the Works beyond the Completion Date by one week, then if he considers it fair and reasonable to do so, the Architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the

⁵⁵ *Carslogie Steamship Co Ltd v Royal Norwegian Government (The Carslogie)* [1952] 1 All ER 20 at 24 per Viscount Jowitt.

⁵⁶ TLR, 14 January 1994.

delay would have occurred in any event by reason of the shortage of labour.⁵⁷ (emphasis added)

This *dicta* was adopted in subsequent cases and noted with approval by some commentators despite the fact that it was clearly not a judicial decision, but rather a note of what the parties had agreed ('... it is agreed ...').⁵⁸ Moreover the court qualifies the statement further by the words: '... if he considers it fair and reasonable to do so ...'. Later in the judgment, the court appears effectively to contradict itself by accepting that the architect may say that the 'true cause of the delay was other matters, which were not Relevant Events and for which the contractor was responsible'. However, in a recent case, the court brushed that to one side. After noting that the judge in the *Henry Boot* case was apparently recording the agreement by counsel, the court said that 'the fact that he, as a judge with such wide experience in the field, noted the agreement without adverse comment is strong indication that he considered that it correctly stated the position.'⁵⁹ A useful view of concurrency and an interpretation of *Malmaison* was given in another case:

'However, it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgment, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a Relevant Event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a Relevant Event, "*the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date.*"

The Relevant Event simply has no effect upon the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a Relevant Event, while the other is not. In such circumstances there is a real concurrency of causes of the delay. It was circumstances such as these that Dyson J was concerned with in the passage from his judgment in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* at paragraph 13 on page 37 of the report which [Counsel] drew to my notice. Dyson J adopted the same approach as that which seems to me to be appropriate to the first type of factual situation which I have postulated when he said, at paragraph 15 on page 38 of the report: "*It seems to me that it is a question of fact in any case whether a relevant event has caused or is likely to cause delay to the works beyond the completion date in the sense described by Coleman J in the Balfour Beatty case.*"⁶⁰

This seems to come nearest to the solution, but none of the cases provides a universal solution.

⁵⁷ (1999) 70 Con LR 32 at 37 per Dyson J.

⁵⁸ See *Motherwell Bridge Construction Ltd v Micafil Vakuumtechnik and Another* (2002) 81 Con LR 44.

⁵⁹ *Steria Ltd v Sigma Wireless Communications Ltd* (2007) 118 Con LR 177 at 216 per Judge Davies.

⁶⁰ *Royal Brompton Hospital NHS Trust v Hammond & Others (No.7)* (2001) 76 Con LR 148 at 173 per Judge Seymour.

2.4.4 Apportionment

In *City Inn Ltd v Shepherd Construction Ltd*, the court expressed itself as having ‘some difficulty; with the court’s distinction in the *Royal Brompton Hospital* case.⁶¹ The court continued:

‘Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable. Precisely what is fair and reasonable is likely to turn on the exact circumstances of the particular case.’⁶²

And later:

‘In practice causation tends to operate in a complex manner, and a delay to completion may be caused in part by relevant events and in part by contractor default, in a way that does not permit the easy separation of these causes. In such a case, the solution envisaged by clause 25 is that the architect, or in litigation the court, must apply judgment to determine the extent to which completion has been delayed by relevant events. In an appropriate case apportionment of the delay between relevant events and contractor’s risk events may be appropriate. Precisely when and how that should take place is a question that turns on the precise facts of the case.’⁶³

The court then tried to give guidance on the way to carry out the apportionment:

‘In my opinion two main elements are important: the degree of culpability involved in each of the causes of the delay and the significance of each of the factors in causing the delay. In practice culpability is likely to be the less important of these two factors. Nevertheless, I think that in appropriate cases it is important to recognize that the seriousness of the architect’s failure to issue instructions or of the contractor’s default may be a relevant consideration. The causative significance of each of the factors is likely to be more important. In this respect, two matters appear to me to be potentially important. The first of these is the length of the delay caused by each of the causative events; that will usually be a relatively straightforward factor. The second is the significance of each of the causative events for the Works as a whole. Thus an event that only affects a small part of the building may be of lesser importance than an event whose effects run throughout the building or which has a significant effect on other operations. Ultimately, however, the question is one of judgment.’⁶⁴

⁶¹ [2007] CSOH 190.

⁶² [2007] CSOH 190 and paragraph 18 per Lord Drummond Young upheld on appeal [2010] ScotCS CSIH 68.

⁶³ [2007] CSOH 190 and paragraph 22 per Lord Drummond Young upheld on appeal [2010] ScotCS CSIH 68.

⁶⁴ [2007] CSOH 190 and paragraph 158 per Lord Drummond Young upheld on appeal [2010] ScotCS CSIH 68.

This does not seem to point to any kind of system for assessing the delay and apportioning it. It may perhaps be doubted whether apportionment is a useful or even a valid tool in the architect's kit.

2.4.5 Kinds of concurrency

When faced with a problem of concurrent delays, it is always worthwhile pausing and asking whether the delays really are concurrent. Most delays are in fact consecutive. True concurrency is rare. Usually it can be seen that one delay occurs after the other.

Therefore, before the question of concurrency arises at all, it must be established that there are two competing causes of delay operating at the same time and affecting the critical path or paths of the project. There are two kinds of concurrency and it seems that the courts regularly get them confused. This is what seems to lead to the apparent inconsistency and the difficulty the courts have in laying down any really useful guidance. The kinds of concurrency are:

- (1) Where two delays act during the same period on two different activities, for example if during the same week, there is a delay caused to plastering and also a delay caused to the installation of drainage.
- (2) Where two delays act during the same period on the same activity, for example if during the same week, the architect has failed to provide details of the kitchen layout and also the supply of the kitchen fittings is delayed.

If the delays act on different activities, the matter is relatively easily resolved by using computerised programming software. Inputting the delays, one at a time into the contractor's programme. Because it is only delays which the particular contract allows as grounds for extension of time which must be inputted, delays which are the fault of the contractor will be ignored. That will be in accordance with what one might describe as the *Henry Boot* dictum.

It is the effect of two delays on one activity which causes most problems. Fortunately, its occurrence is rare. If a computer analysis is being carried out in order to arrive at the extension of time, it will be necessary for the architect to critically examine each alleged delay before inputting it into the programme. The architect will be checking that it actually occurred, when it occurred and how long it lasted. If two causes of delay affect one activity during the same period, one being a relevant event and one being the contractor's own delay, the architect will be obliged to form a judgment about the actual cause of the delay before inputting it into the programme.

2.4.6 A practical approach

Examining the situations set out at the beginning of this section:

- (1) The delay is clearly caused by the architect's instruction which makes it impossible for the contractor to work for the 'several days' it will take to receive the new roof covering. That is the cause of the delay and any extension to the completion date. The bad weather, even if satisfying the criteria for 'exceptionally

- adverse weather', has no effect on the completion date which is already being delayed. Of course, if the roof covering arrives, but the bad weather continues, the bad weather will take the place of the late roof covering as a cause of delay.
- (2) This, in essence, is the *Balfour Beatty v Chestermount* scenario. There is no actual concurrency of either the delaying event or the delay itself, because what happens in this example is that although the contractor is in delay, it is still working on site, trying to finish. When the architect postpones the work, the contractor stops working on site and it is the postponement which is causing the delay until the architect brings the postponement to an end.
 - (3) It can be seen that there is no real delay until the contractor's machinery breaks down. Before it is repaired, the architect's drawings are issued. They are certainly late and it is a delaying event under most contracts, but the late drawings did not delay the completion date.

This is the approach outlined in *Royal Brompton Hospital* and what can be drawn from *Malmaison* if the *dicta* referred to earlier are read in context with succeeding paragraphs.

Assuming that the criteria for concurrency have been satisfied and assuming further that there are the same two causes in each case (one the fault of the contractor, the other the fault of the employer or the architect) acting on one activity, there are four possible situations.

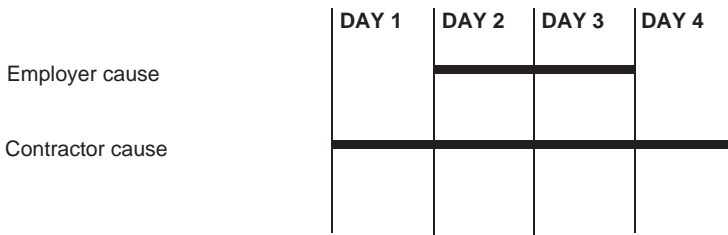
The third situation just discussed is shown in Figure 2.1(a), following the authorities, no extension of time is due to the contractor. Figure 2.1(b) is the converse: work is stopped awaiting the architect's information. During the delay, the contractor's machinery breaks down and is repaired again before the architect's information arrives. In this instance, the machinery breakdown had no effect on the completion date, because it was already being delayed by the late information from the architect and four days of extension of time is due.

Figures 2.1(c) and 2.1(d) are not specifically dealt with in either *Royal Brompton Hospital* or *Henry Boot*, but useful conclusions can be drawn from them. In Figure 2.1(c), the late information causes a delay. It continues for three days and affects the completion date similarly, because it is on the critical path. On the second day, the contractor's machinery breaks down, but it has no effect on the completion date which is already delayed due to the late information. However, when the information is provided, the machinery remains inoperative for a further day and, during that day, it and not the late information affects the completion date. The total delay is four days of which the appropriate extension of time is three days.

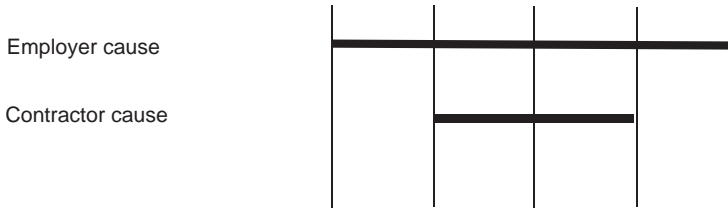
The final situation is shown in Figure 2.1 (d). In this instance, the machinery breaks down and causes a delay to the completion date lasting three days. On the second day, the architect's information should arrive, but it is delayed for three days. During the first two of those days, the late information has no effect on the completion date, but when the machinery is repaired, the remaining day of delay is caused by the architect's late information. Therefore, the appropriate extension of time would be one day although the total delay is four days.

The same principles can be applied if the concurrency involves a cause which would give an entitlement to extension of time and another cause which not only gives an entitlement to extension of time, but also, if the contractor makes

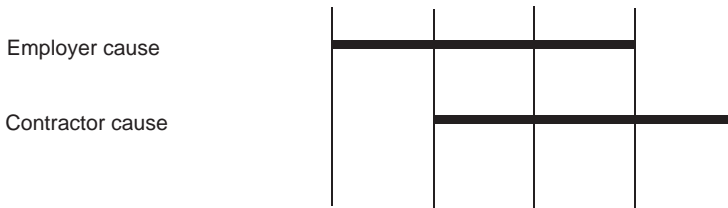
(a) No extension of time



(b) Four days extension of time



(c) Three days extension of time



(d) One day extension of time

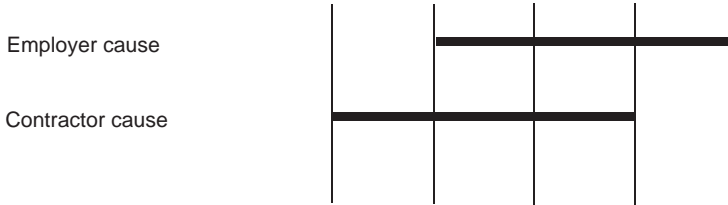


Figure 2.1 Concurrency

application, to loss and/or expense. Chapter 6, Section 6.7.2, considers concurrency and loss and/or expense.

2.5 Acceleration

2.5.1 Definition

‘Acceleration’ has been usefully defined as follows:

“Acceleration” tends to be bandied about as if it were a term of art with a precise technical meaning, but I have found nothing to persuade me that that is the case.

The root concept behind the metaphor is no doubt that of increasing speed and therefore, in the context of a construction contract, of finishing earlier. On that basis “accelerative measures” are steps taken, it is assumed at increased expense, with a view to achieving that end. If the other party is to be charged with that expense, however, that description gives no reason, so far, for such a charge. At least two further questions are relevant to any such issue. The first, implicit in the description itself, is “earlier than what?” The second asks by whose decision the relevant steps were taken.

The answer to the first question will characteristically be either “earlier than the contractual date” or “earlier than the (delayed) date which will be achieved without the accelerative measures”. In the latter category there may be further questions as to responsibility for the delay and as to whether it confers entitlement to an extension of time. The answer to the second question may clearly be decisive, especially in the common case of contractual provisions for additional payment for variations, but it is closely linked with the first; acceleration not required to meet a contractor’s existing obligations is likely to be the result of an instruction from the employer for which the latter must pay, whereas pressure from the employer to make good delay caused by the contractor’s own fault is unlikely to be so construed.⁶⁵

The reasons for acceleration usually fall into one the following categories:

- (1) By agreement between the parties or, if the contract so provides, on the instruction of the architect.
- (2) Unilaterally on the initiative of the contractor, often categorised as ‘mitigation’ by the contractor or as ‘using best endeavours’ by the employer.
- (3) Constructive acceleration where the contractor argues that it has no real alternative in the circumstances.

2.5.2 By agreement or instruction

Under the general law, the architect has no power to instruct the contractor to accelerate work. The contractor’s obligation is to complete the work within the time specified, or where no particular contract period is specified – within a reasonable time. The contractor cannot be compelled to complete earlier than the agreed date unless there is an express contract term authorising the architect to require acceleration.

A few standard form contracts give the architect power to order the contractor to accelerate, but it is not the norm. ACA 3 clause 11.8 empowers the architect, at any time, to issue an instruction to bring forward dates shown on the time schedule for the taking-over of any section or part of the Works. The architect must exercise this power reasonably and the contractor must comply immediately. The architect must certify a fair and reasonable adjustment to the contract sum. Alternatively, the architect, before instructing the acceleration, may request an estimate from the contractor. PPC clause 6.6 provides that the client’s representative may instruct acceleration of any date in the project timetable and any such instruction is to be treated as a change.

⁶⁵ *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd* (2000) 16 Const LJ 316 at 331 per Judge Hicks.

These are quite unusual clauses. More often, if an acceleration clause exists at all, it amounts to provision for the parties to agree to accelerate. It could be argued that the parties are entitled to agree anything whether or not there is such provision in the contract. MC clause 3.16, MP clause 19, GC/Works/1(1998) clause 38 and NEC 3 clause 36 are examples of clauses of that kind.

MC deals with acceleration in clause 3.16 which refers to a very complex schedule 6 for the procedure which involves seeking a quotation from the contractor. The architect may only issue an instruction seeking an acceleration quotation should the employer so require. MP contains a considerably simpler clause 19 which states that the employer may invite proposals from the contractor if it is desired to investigate the possibility of achieving practical completion before the completion date. GC/Works/1(1998) clause 38 is to similar effect, if somewhat longer. NEC 3 clause 36.1 authorises the project manager to instruct the contractor to submit a quotation to accelerate.

It is often thought that provisions in JCT contracts such as SBC clause 2.28.6.2 and IC and ICD clause 2.19.4.1 give the architect power to instruct acceleration. Reliance is placed on the particular wording of the clause which refers to the contractor doing '*all that may reasonably be required*' to the satisfaction of the architect to proceed with the Works. The clause is actually included to require the contractor to continue to proceed diligently. In doing so, the contractor must take note of the architect's requirements, but the architect can neither require the use of significant additional resources nor instruct that the Works are completed by any particular date other than the date for completion in the contract.

However, it is not unknown for an architect to instruct acceleration albeit the contract does not provide for it. If the contractor simply refuses to carry out the instruction, there is no difficulty. The problem arises if the contractor obeys the instruction. In that situation it is doubtful that the contractor has any entitlement to payment. If it is clear that the architect has no power to instruct acceleration, the contractor should be aware and cannot subsequently plead lack of knowledge. Otherwise everything will depend upon the authority, whether ostensible or implied, of the architect to give the instruction as agent for the employer. In most cases, the architect will not have such authority. Obviously, there should be no difficulty in the contractor obtaining payment where the architect, in the exercise of powers under a contract, orders acceleration of the Works or the employer and the contractor otherwise agree acceleration.

In practice, instructions to, or agreements with, the contractor to accelerate occur towards the end of a contract period when it is very obvious that the completion date will be exceeded and the employer is desperate to have the project finished by a specific date. The best time to accelerate is as soon as it seems likely that the contract period will be exceeded, because that gives the maximum time to the contractor to put the acceleration measures in place.

The only sensible acceleration instructions or agreements are those which require completion by a specific date, indeed it is essential that the agreement specifies the date for completion whether that is the original completion date or a different date. Inevitably the contractor will require additional payment and a quotation is essential so that it can be accepted by the employer and both parties know exactly where they stand.

If the acceleration simply amounts to the contractor agreeing to add specific resources and work during a specified number of extra hours per week, that is very unsatisfactory, because the contractor does not undertake to finish by a specific date and, after all the extra resources and overtime working have been applied, there may be no difference whatever in the projected date for completion, because the contractor may be inefficient.

There are four basic situations which may result in an acceleration agreement:

- (1) Where it is unlikely that the contractor will complete by the contractual completion date, because of delays for which the contractor would be entitled to an extension of time.
- (2) Where it is unlikely that the contractor will complete by the contractual completion date, because of delays caused by the contractor.
- (3) Where it is unlikely that the contractor will complete by the contractual completion date, because of delays caused by a mixture of the two previous reasons. This is probably the most common situation.
- (4) Where there is no delay, but the employer wishes the contractor to complete before the original completion date.

Situations 1 and 3 may be considered together. In each case, without acceleration the architect would be obliged to give an extension of time. The acceleration agreement is effectively a variation to the contract. It provides that despite the fact that the contractor is likely to finish after the completion date for reasons which would entitle it to an extension of time, it undertakes to complete by the original completion date or at least a date which is earlier than any extended date. Situation 4 is in a similar category, because in each of situations 1, 3 and 4, the contractor is undertaking to complete earlier than required under the terms of the contract. Therefore, in each of these situations, there is consideration on the part of the contractor in that it is agreeing to do something not required by the contract.

The somewhat different scenario presented by situation 2 raises a problem, because in the agreement to accelerate, the contractor is simply undertaking to do that which it is already obliged to do under the terms of the contracts. It is an old rule that simply agreeing to carry out a duty already imposed by a contract between the same parties is not consideration for a further payment.⁶⁶ Therefore, the question is: what is the consideration for which the contractor is entitled to be paid for simply doing what it is already being paid to do? The answer may be found in the modern Court of Appeal authority *Williams v Roffey Brothers & Nicholls (Contractors) Ltd.*⁶⁷

In that case Williams, a carpenter, entered into a contract with Roffey Brothers, a contractor, to carry out carpentry work on 27 flats for the sum of £20,000. Williams ran into financial difficulties, because the price as agreed was too low and he had failed to supervise his workmen properly. The contractor was concerned that Williams should continue the work to completion, because it would take time to engage another carpenter and they risked being late and incurring liquidated damages. Therefore, it was agreed that the contractor would pay Williams an additional £10,300 to be paid at the rate of £575 for each flat completed. The matter was originally heard

⁶⁶ *Stilk v Myrick* (1809) 2 Camp 317.

⁶⁷ [1990] 1 All ER 512.

in the county court and the Court of Appeal confirmed the findings of the Assistant Recorder. Essentially, the Court held that there was consideration for the agreement and the contractor accepted that the agreement provided it with benefit, because it ensured that Williams would continue work, that the contractor would not suffer liquidated damages and that it would avoid the expense and trouble of engaging others to finish the work.

Another point against the agreement being valid was discussed. It was that Williams took unfair advantage of the difficulties he would cause by declining to continue unless the contractor paid an increased price. In such a case, the agreement might be voidable on the grounds of economic duress.⁶⁸ The Court found on the facts that there was no economic duress in that case. The Court set out what it described as 'the present state of the law on this subject' as follows:

- '(i) if A has entered into a contract with B to do work or, or to supply goods or services to, B in return for payment by B; and
- (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and
- (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and
- (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and
- (v) B's promise is not given as a result of economic duress or fraud on the part of A; then
- (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.'⁶⁹

Although the Court did not purport to overrule *Stilk v Myrick*, but merely to distinguish it, it is not clear how the two can be reconciled.⁷⁰

Any question of the absence of consideration can be resolved quite easily if the parties take the simple expedient of executing the agreement as a deed, when consideration is not required. In each agreement, the grounds which would normally entitle the contractor to an extension of time are subsumed into the agreement so that the completion date as stated in the agreement becomes the new completion date for the contract. If the contractor fails to complete by the newly agreed date, the employer is entitled to recover liquidated damages in the usual way.

There is a further very important question. What is the employer's position where the contractor fails to complete by the contract completion date and, in fact, fails to deal with any of the delay or alternatively deals with only part of the delay? Clearly, the employer would be entitled to liquidated damages for the period of delay, but in some of the situations the employer would have been entitled to such damages even if there was no acceleration agreement. Moreover, liquidated damages have been held to be exhaustive of damages for delay.⁷¹

⁶⁸ *Carillion Construction Ltd v Felix (UK) Ltd* [2001] BLR 1.

⁶⁹ [1990] 1 All ER 512 at 522 per Glidewell LJ.

⁷⁰ See the discussion on this case in *Chitty on Contracts* (2004) 29th edition, Sweet & Maxwell, London at paragraphs 3.068 and 3.069.

⁷¹ *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30.

Plainly, a contractor failing to comply with the agreement would be in breach of contract. So is it simply the case that the employer would be entitled to damages in addition to any liquidated damages which may be recoverable for failure to comply with the building contract requirement to complete by the completion date? It may be argued that damages for breach of the agreement would not be attributable to the same breach for which liquidated damages are recoverable and, therefore, they would not be caught by the *dicta* in *Temloc v Errill*. Breach of the agreement could be distinguished from breach of the building contract in the same way as the Court of Appeal isolated an entirely separate *benefit* to the contractor in *Williams v Roffey Brothers* even though, on its face, it seemed as if Williams was simply undertaking to do what he had agreed to do under his contract. In this instance, the contractor would be in breach of an agreement to provide a separate benefit, i.e. achieving an earlier completion date or maintaining the completion date despite delays.

Alternatively, it has been suggested that where an employer and a contractor enter into an acceleration agreement they are doing no more or less than varying the building contract in respect of the completion date. In making the agreement, they will take into account, the amount by which the contractor is in culpable delay, the amount of any extension of time which would be applicable and the rate of liquidated damages. The price paid by the employer to vary or confirm the completion date will take account of all these factors including the fact that in the event of a failure by the contractor to achieve the completion date, the only remedy will be the liquidated damages. In other words, the parties will simply negotiate in full knowledge of the circumstances. That appears to be the better view.

If further delays occur after the agreement which would entitle the contractor to an extension of time under the particular contract in use, the architect must deal with them in the normal way with reference to the newly agreed completion date.

2.5.3 Unilateral acceleration

This is the situation where a contractor accelerates without any agreement with the employer or instruction from the architect. No pressure has been placed on it by the refusal of an extension of time, indeed in this situation it may be that the contractor is reasonably confident of getting an extension to the contract period. The contractor may nevertheless decide to place more operatives on site. The reason for so doing may be in order to find work for operatives from another project which is drawing to a close. The result may be that some time is recovered and an extension of time is not required.

With the assistance of computer programming, it is possible to indicate the extent to which the completion would have been exceeded had the contractor not accelerated. This can be used to support the cost of acceleration when compared with the alternative prolongation costs. It is by no means clear, however, under what contract provision the contractor could be paid even if the architect was sympathetic.

In most such cases, the contractor will find it difficult to contend that it was doing other than using its best endeavours to reduce delay. However, the contractor may find some degree of comfort in the *Ascon* case below.

2.5.4 Constructive acceleration

An argument sometimes advanced by a contractor is based on the architect's failure to give an extension of time to which the contractor believes it is entitled. A contractor will commonly put more resources into a project than originally envisaged and then attempt to recover the value on the basis that it was obliged to do so in order to complete on time, because the architect failed to make an extension of the contract period. The contractor contends that, as a direct result of the architect's breach, it was obliged to put more resources on the project so as to finish by the date for completion for fear that otherwise it would be charged liquidated damages. This claim is advanced whether or not completion on the due date was actually achieved. A failure in this respect is usually explained as a result of yet more delaying events which the contractor was powerless to control.

The important question to be asked before this kind of argument can be entertained is the extent to which pressure is put on a contractor. The contractor's problem is one of causation. Where the architect wrongfully fails to make an extension of time, either at all or of sufficient length, the contractor's clear route under the contract is adjudication or arbitration. If, as a matter of fact and law, the contractor is entitled to an extension of time, it may be said that it should confidently continue the work, without increasing resources, secure in the knowledge that it will be able to recover its prolongation loss and/or expense, and any liquidated damages wrongfully deducted, at adjudication or arbitration. If it increases its resources, that is not a direct result of the architect's breach, but of the contractor's decision.

In practice, it must be acknowledged that a contractor in this position may not be entirely confident. The facts may be complex and the liquidated damages may be high. Faith in the wisdom of the adjudicator, arbitrator or even the judge, may not be total. It may be cheaper, even without recovering acceleration costs, for the contractor to accelerate rather than face liquidated damages with no guarantee that an extension of time will ultimately be made. As a matter of plain commercial realism, the contractor may have no sensible choice other than to accelerate and take a chance as to recovery. Unless the contractor can show that the architect has given it no real expectation that the contract period will ever be extended and in those circumstances the amount of liquidated damages would effectively bring about insolvency, this kind of claim probably has little chance of success.⁷² Having said that, the principle of constructive acceleration has been accepted in the USA and there is an English case which appears to support that approach.

Acceleration was considered in *Motherwell Bridge Construction Ltd v Micafil Vakuumtechnik & Another*.⁷³ In the course of an extremely long judgment, the court concluded that the contractor was entitled to recover the cost of acceleration if an extension of time was justified, but refused, and the liquidated damages were 'significant':

‘[The contractors] say that since they incurred these costs in attempting to comply with [the employer’s] wish for the contract to be kept to time and against the

⁷² *Perini Corporation v Commonwealth of Australia* (1969) 12 BLR 82.

⁷³ (2002) 81 Con LR 44.

background of [the employer's] refusal to grant appropriate extensions of time, they are entitled to be paid for the work which they did in trying to accelerate the work to keep up with the schedule . . . I am satisfied that they were incurred by [the contractors] in an attempt to recover time lost in completing the work in circumstances where [the contractors] were subject to significant penalties for delay if they failed to complete the work on time. The causes were, in particular, the restrictions which [the contractor's] encountered when they entered on site and the very substantially increased scope of the work . . .'⁷⁴

Although the judgment was long, much of it was a recital of facts and the *ratio* for the decision is difficult to decipher although pressure from the employer appears to have been a significant factor. Moreover, the court appeared to agree that the contractor was additionally entitled to loss and/or expense for the prolongation which would, but for the acceleration, have taken place. That seems to give the contractor, not two bites at the cherry, but two cherries for the price of one.

It is thought that the better view is the one earlier set out in *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd* where it was said that there could not be

' . . . both an extension to the full extent of the employer's culpable delay, with damages on that basis, and also damages in the form of expense incurred by way of mitigation, unless it is alleged and established that the attempt at mitigation, although reasonable, was wholly ineffective.'⁷⁵

2.6 Sectional completion

2.6.1 Where there is just one date for completion

Employers and contractors often run into difficulties where the employer has chosen to incorporate sectional completion into the contract. It should be noted that, where there is just one date for completion in the contract, sectional completion cannot usually be achieved by simply inserting intermediate dates in the specification or bills of quantities⁷⁶. Moreover, although a court may be prepared to imply a date for completion of the Works in the absence of agreement, dates for sectional completion will not be implied,⁷⁷ certainly not in JCT contracts which have a clause giving priority to the printed form over other contract documents.

In such cases, the single completion date will take precedence despite a multitude of intermediate dates in the subordinate document. Where JCT contracts are not involved and there is no equivalent priority clause, the ordinary rule will apply that 'type prevails over print' and any intermediate or sectional completion dates stated in the bills of quantities or specification would apply. This would immediately give rise to a number of contractual difficulties, for example, most standard form

⁷⁴ (2002) 81 Con LR 44 at paragraphs 544 and 548 per Judge Toulmin.

⁷⁵ (2000) 16 Const LJ 316 at 332 per Judge Hicks.

⁷⁶ *M J Gleeson (Contractors) Ltd v Hillingdon Borough Council* (1970) 215 EG 165.

⁷⁷ *Bruno Zornow (Builders) v Beechcroft Developments* (1990) 6 Const LJ 132.

contracts provide for only one certificate of practical completion, one certificate of making good defects and one defects liability period (or their equivalents). Not least, such contracts refer to extension of time in relation to the completion *date* or fixing a new completion *date*. Such problems can only be resolved by goodwill on both sides or with the assistance of an adjudicator, arbitrator or judge. The adoption of sectional completion into a standard building contract requires a considerable number of contract amendments. Reference to the multitude of small changes required by the JCT sectional completion supplement to JCT 98 illustrates the point.

2.6.2 Dependent sections

A common problem occurs where sectional completion has been properly incorporated, but two or more of the sections are interdependent. For example, a school project may be divided into four sections, but section 3 may be dependent on section 1 in the sense that the contractor cannot be given possession of section 3 until section 1 has reached practical completion. That may be because the occupants of section 3 have to be moved to section 1.

Invariably, the dates for possession and completion of each section are inserted into the contract as a series of dates. The date for completion of section 1 may be 25 March and the date for possession of section 3 may be 30 March to allow the transfer of pupils and staff from one section to another. The problem arises when, almost inevitably, section 1 is not finished by the completion date. This could be because the contractor has been inefficient or it may be because events have occurred which entitle the contractor to an extension of time. Where a project is split into sections, any extensions of time must be given in respect of the particular section affected by the delaying event. Therefore, if the contractor is entitled to an extension of time, it is in connection with section 1 only. Whether or not it is so entitled is irrelevant, because in any event, when the 30 March arrives, the contractor is still working on section 1 and the occupants of section 3 cannot be transferred. The result is that the employer cannot give the contractor possession of section 3 on the due date. If no extension of time is due for section 1 and the cause of the delay is entirely the fault of the contractor, the architect may say that the contractor has itself to blame and cannot expect possession of section 3 on the due date.

This approach is to misunderstand the situation entirely. The principles of causation must be applied. The cause of the delay to possession of section 3 is not the contractor's delay to section 1, but the fact that the two sections are linked. If they were not linked, the contractor's delay to section 1 would not affect section 3 in the slightest degree. However, where the dates for possession and completion are simply expressed as a series of dates, there is nothing to put the contractor on notice of the likely problem. The contractor is likely to argue that the employer is in breach of contract and it would be correct. There are two immediate aspects to this problem:

- What can the architect or the employer do to retrieve the situation?
- What could have been done to avoid it in the first place?

If there is provision for the employer to defer possession of any of the sections by the appropriate amount, the employer will be obliged to take that route and the

contractor will be entitled to an extension of time and probably whatever amount of loss it has suffered as a result of the deferment of possession. If there is no deferment provision, the correct analysis of the situation appears to be that there is a breach of contract which, dependent upon its likely duration, may become repudiatory in nature. In any event, the contractor would be entitled to recover as damages the amount of loss it has suffered as a result. That is fairly straightforward and the amount payable to the contractor, whether by virtue of a loss and/or expense clause in the contract or as damages for the breach may not be substantial. The contractor would have to demonstrate its loss and, essentially, the situation is simply that section 3 has been pushed back in time.

In the absence of a provision for the delay situation in the contract (SBC, IC and ICD all include grounds for extension of time based on the employer's default), the architect would be unable to make any extension of time with the result that the contractor's obligation with regard to section 3 would be to complete within a reasonable time. Therefore, liquidated damages would not be recoverable for this section.

To prevent the situation occurring, the employer should indicate the links in the sections. Therefore, in the example above, section 1 would have a date for possession and a date for completion, but section 3 would not have a date for possession. That section of the contract would simply state 'the date for possession is X days after the date of practical completion of section 1'. In that way, a delay to completion in section 1 would be reflected in the date of possession of section 3 and breach of contract, damages and extension of time to section 3 would not be relevant. Moreover, the contractor would be aware of the situation and it could make some provision for it in its price. The date for completion of section 3 would not be inserted, but rather the following kind of phrasing used: 'The date for completion is X weeks after the date possession of this section is taken by the contractor.' It seems doubtful that the contractor could make any financial claim on the employer in this situation for delays to section 1 which cause a delay to the possession of section 3.

The courts have recently considered extensions of time in relation to completion of the Works in sections.⁷⁸ In *Liberty Mercian v Dean & Dyball*, the parties were in contract under JCT 98. The date for possession of the first section was a specific date, but the date for possession of each of the remaining sections was dependent on the date of practical completion of the previous section. That seems to be eminently sensible and in accordance with the suggestion in the previous paragraph. However, the completion dates for each section were specific dates. The contractor was in delay for eight weeks in the first section and the architect gave four weeks extension of time and four weeks extension for each of the following sections. That resulted in a period of culpable delay to the first section amounting to four weeks for which the employer deducted liquidated damages of £48,000. The contractor's difficulty was that it then found itself in a period of culpable delay for each of the succeeding sections, because in the case of each section, the date for possession was delayed by up to eight weeks each time, but only four weeks extension of time had been given. It was the contractor's case that for each section after the first section, the extension of time should reflect the initial eight weeks delay to the first section which

⁷⁸ *Liberty Mercian Ltd v Dean & Dyball Construction Ltd* [2008] EWHC 2617 (TCC).

irretrievably fixed the date of possession of the following sections. Indeed, the contractor argued that the liquidated damages had become a penalty and that they were unenforceable.

However, the court concluded that the liquidated damages were not a penalty and they were recoverable for all the weeks of culpable delay in each section. The court said:

‘Attractively though this point was argued, I do not accept [counsel’s] submission. It seems to me that it shies away from the critical feature of this contract, namely that the building works were always going to be carried out sequentially, and that the work on one section could not start until the work on the previous section had reached practical completion or (in certain instances) the stage of completion identified in the sectional completion schedule. It is plain from that schedule, and from the sectional completion agreement as a whole, that both sides were aware that culpable delay of 4 weeks on section 1 would automatically mean that work on sections 2, 3, 4 and 5 would start 4 weeks late.

. . . I consider that this is the only sensible construction of the sectional completion agreement . . . and the only construction which gives effect to the words used. What is more, such a result cannot be regarded as unfair. On the contrary, if the contractor is in culpable delay for 4 weeks in relation to section 1, which inevitably means that section 2 is also going to start 4 weeks late, so that the contractor’s default has caused the delay to section 2, he should therefore be liable for the liquidated damages that will flow in consequence.’⁷⁹

A rather different situation occurred in *Trollope & Colls Ltd v North-West Metropolitan Regional Hospital Board*.⁸⁰ The contract was divided into three sections. Each section had a separate contract sum and set of conditions. The contract had a provision that the third section should commence six months after the issue of the certificate of practical completion for section 1, but that it must be completed by a specified date. However, a delay occurred to section 1 and it delayed the issue of the certificate of practical completion and, therefore, delayed the commencement of section 3. But the completion date for section 3 was fixed, therefore, the period available to the contractor for carrying out the section 3 work was reduced from 30 months to 16 months.

Matters came to a head because there was provision in the contract for the nomination of sub-contractors and the contractor required the employer to nominate sub-contractors who could carry out their work within the reduced period. The employer could not find sub-contractors who could do so. Therefore the employer said that there must be a term implied in the contract to the effect that the section 3 completion date must be extended by the amount of any extension of time given to the contractor for delay in section 1. The court declined to imply such a term. The result was that the parties would be obliged to negotiate an extension to the completion date of section 3 with a resulting cost increase. If the delay had been shorter, the consequence might have been that the contractor was faced with a shortened work

⁷⁹ *Liberty Mercian Ltd v Dean & Dyball Construction Ltd* [2008] EWHC 2617 (TCC) at paragraphs 23–24 per Coulson J.

⁸⁰ (1973) 9 BLR 60.

period for section 3. This case does not appear to have been referred to in the *Liberty Mercian* case.

2.7 *The SCL extension of time Protocol*

In October 2002, the Society of Construction Law produced its 'Delay and Disruption Protocol' after some months of consultation throughout the industry. The object of the Protocol is stated in the introduction as providing useful guidance on some of the common issues arising in connection with extension of time and claims for compensation for time and resources. The Protocol purports to provide a means for resolving such matters and avoiding disputes.

There are two important points to make about the Protocol. The first is that it cannot replace the terms of the particular contract in use. Therefore, it will avail the parties nothing to quote the Protocol if the terms of the contract are at variance with it. The Protocol recognises this and suggests that its contents should be considered when contracts are being drafted. The second point is that the Protocol is not suitable for simply incorporating into any particular building contract. It is not written in the same way as a contract and the individual sections would conflict with standard building contracts. If an attempt is made to incorporate the Protocol as a complete document, the parties are likely to have great difficulty in working out how the Protocol fits with the contract provisions. The areas of conflict between the two documents would not be easy to resolve.

The document is divided into sections. In view of the publicity given to the Protocol, the sections will be briefly examined in order and comments given. Where appropriate, references to relevant parts of this book are given in brackets.

2.7.1 Core principles relating to delay and compensation

This section sets out the principal items on which guidance is given later.

2.7.2 Guidance notes section 1

Extensions of time

The summary of the extension of time position is generally good and the advice is sound although fairly general in nature.

Float as it relates to extensions of time

This part of the Protocol is a broadly accurate statement, but somewhat confused by references to hypothetical situations which appear to allow the contractor an extension of time although the contract date for completion is not exceeded. This would be an extraordinary outcome which runs counter to the reason for extending time.

The contract would have to contain special clauses to permit this result and no standard form contract currently has this type of provision.

Concurrency as it relates to extensions of time

The Protocol's approach seems to be to take a particular position on the subject of concurrency on the basis that it is a complex topic and a compromise solution is necessary. A basic principle is that no concurrent cause of delay which is the result of any fault of the contractor should reduce the extension of time to which it would otherwise be entitled. For the reasons stated elsewhere in this book, this approach is not considered to represent the true position in law and it is not recommended.

Mitigation of delay

This is a consideration of the general law duty to mitigate (see Chapter 6, Section 6.4).

Financial consequences of delay

This is a clear and accurate statement that entitlement to extension of time does not automatically entitle the contractor to any money.

Valuation of variations

The Protocol recommends a mechanism similar to the 1998 JCT price statement for dealing with the valuation of variations and associated extension of time and loss and expense.

Compensation for prolongation

It is rightly stressed that ascertainment must be based on actual additional costs incurred by the contractor. However, there appears to be some confusion between a contractor's claims for loss and expense under the contract machinery and claims for damages for breaches of contract. The former are reimbursable under most standard form contracts while the latter, being a claim outside the contract, are not so reimbursable.

There appears to be a half suggestion that payments to the contractor might be simplified by being dealt with by a reverse kind of liquidated damages clause. This approach was suggested many years ago and the appropriate clause to be inserted in the contract was termed 'Brown's clause' after the person who proposed it. Anything which can simplify and cheapen the loss and/or expense process while achieving a result which does not vary too much from the strictly accurate entitlement is to be welcomed, but the Brown's clause had a number of practical and legal difficul-

ties then and there is no reason to suppose that a similar clause now would be any better.

Relevance of tender allowances for prolongation and disruption compensation

It is refreshing to see that the Protocol considers that tender allowances have little or no relevance to the evaluation of the costs of prolongation or disruption.

Concurrency as it relates to compensation for prolongation

This appears to be a straightforward summary of the position.

Time for assessment of prolongation costs

Another straightforward summary.

Float as it relates to compensation

Where a contractor plans to complete before the contract date for completion, the Protocol recommends that it is entitled to compensation, but not an extension of time, if it is prevented from completing to its own planned date, but finishes before the contract date for completion. This is a complicated topic to which the Protocol does not do justice. However, the basic recommendation must be rejected. The position is that in deciding this question, all the circumstances must be taken into account (see Chapter 8, Section 8.3).

Mitigation of loss

A clear exposition of the situation. More could have been said about the contractor's rights, or otherwise, to claim the reasonable costs of mitigation (see Chapter 6, Section 6.4).

Global claims

It is good to see that global claims are discouraged in the Protocol (see Chapter 9).

Claims for payment of interest

Although this survey of the position seems to be broadly correct, it is not made clear that for interest to be claimable, it must be shown to be part of the loss and/or expense and not, as suggested here, a result of it (see Chapter 7, Section 7.3.10).

Head-office overheads

This is a clear and concise explanation (see Chapter 7, Section 7.3.3).

Profit

Very brief and to the point (see Chapter 7, Section 7.3.4).

Acceleration

This is a broadly correct interpretation of the position, but the reference to the possibility of accelerating by instructions about hours of working and sequence of working is to be doubted (see Section 2.5 of this Chapter).

Disruption

The definition of disruption does not adequately explain that disruption can also refer to a delay to an individual activity not on the critical path where there is no resultant delay to the completion date. It is also stated that most standard forms do not deal expressly with disruption. That, of course, is true. But it is also true that most standard forms do not expressly deal with prolongation. For example, JCT forms refer to regular progress being materially affected. That appears to be quite broad enough to encompass both disruption and prolongation (see Chapter 6, Section 6.7.3).

2.7.3 Guidance section 2

This deals with guidance on preparing and maintaining programmes and records. Stress is placed on obtaining an 'Accepted Programme'. That is a programme agreed by all parties. There are several problems with this. Perhaps the foremost is that an architect will be unlikely to have the requisite skills and/or experience or indeed the information required to accept the contractor's programme. The architect is probably capable of questioning parts of it, but highly unlikely to be possessed of sufficient information to be able to make a properly informed conclusion that the programme is workable. The Protocol, rightly, accepts that the contractor is entitled to construct the building in whatever manner and sequence it pleases, subject to any sectional completion or other constraints. The Protocol then states:

'Acceptance by the CA merely constitutes an acknowledgement by the CA that the Accepted Programme represents a contractually compliant, realistic and achievable depiction of the Contractor's intended sequence and timing of construction of the works.'

This is placing a responsibility on the architect (or CA as the Protocol prefers) which the architect is not required to carry. There appears to be no need for a programme

to be accepted. It is sufficient if the contractor puts it forward as the programme to which it intends to work. The architect is entitled to question any part which appears to be clearly wrong or unworkable. But, in the light of the contractor's insistence that it can and will carry out the Works in accordance with the submitted programme, it is difficult to refuse a programme (certainly under JCT contracts) unless firm objections can be raised. There is not a great deal of guidance on maintaining records generally (see Chapter 10).

2.7.4 Guidance section 3

This section deals with guidelines for dealing with extensions of time during the course of the project. It provides much good practical advice including the importance of calculating extensions of time by means of various programming techniques. Although every architect should be familiar with such techniques, careful consideration should be given to the aptness of any particular technique in a given situation. It is still possible to work out an extension of time perfectly well using old fashioned inspection techniques applied to the programme if the programme and the delays are not complicated.

2.7.5 Guidance section 4

This deals with disputed extension of time after completion of the project and spends some time examining the different types of analysis that can be employed.

2.7.6 Appendices

There are four appendices to the Protocol. Appendix A is a very useful glossary, B is a model specification clause intended for use when drafting a specification although the content appears more suitable for inclusion in the contract itself – if at all. Whether and to what extent one wishes to use the clause will depend on whether one wishes to go totally down the road pointed out by the Protocol. Appendix C is another sample clause to cover the keeping and submission of records. Finally, Appendix D graphically represents various situations involving concurrency, float and critical delays of various kinds.

2.7.7 Conclusion

The Protocol sets out ways of dealing with delays and disruption. Most of it is in line with what is generally understood to be the law on these matters. In some instances, the Protocol steps outside this boundary in order to suggest what it clearly considers to be a simpler or fairer way of dealing with the practicalities. All parties involved in construction contracts must be aware that the Protocol does not take precedence over the particular contract in use unless it is expressly so stated in the contract itself.

Therefore, the recommendation should be viewed with caution. Architects, contract administrators or employers cannot evade responsibility by arguing that they have acted strictly in accordance with the Protocol if the contract prescribes action of a different sort. On this basis, it is difficult to see why it was ever thought appropriate to produce such a protocol. One can see the benefit of a combined attempt to interpret the provisions of a standard form, such as SBC or ACA 3, in a practical way which will be useful for professionals trying to operate the provisions of these contracts. However, one struggles to see the benefit in producing a methodology such this, not as part of a contract, but entirely divorced from any contract.

Chapter 3

Liquidated damages

3.1 *The meaning and purpose of liquidated damages*

Liquidated damages means a fixed and agreed sum as opposed to unliquidated damages which is a sum which is neither fixed nor agreed, but must be proved in court, arbitration or adjudication. A more comprehensive definition of liquidated damages is given below. The addition of the words 'and ascertained' to 'liquidated damages' found in some contracts is not thought to be significant and the latest JCT series of contracts has dispensed with the additional wording.

Litigation is generally recognised as being expensive and lengthy. In order to recover damages in matters involving breaches of contract it is necessary to prove that the defendant had a contractual obligation to the claimant, that there was a failure to fulfil the obligation wholly or partly and that the claimant suffered loss or damage thereby. Very often it is clear that there is damage, but it is difficult and expensive to prove it.¹ To avoid that situation, the parties may decide, when they enter into a contract, that in the event of a breach of a particular kind the party in default will pay a stipulated sum to the other. This sum is termed liquidated damages.

In the building industry and elsewhere the terms 'liquidated damages' and 'penalty' are commonly used as though they were interchangeable. In fact, they are totally different in concept. Whereas liquidated damages are compensatory in nature and should be a genuine attempt to predict the damages likely to flow as a result of a particular breach, a penalty is a sum which is not related to probable damages, but rather stipulated *in terrorem*:² in other words, as a threat or even, in some instances, intended as a punishment. The courts will enforce the former, but not the latter though the parties may be no less agreed upon the matter in the first instance as in the second.³ It is, therefore, of prime importance to establish into which category a particular sum will fall.

Building contracts usually include a date on which the contractor may take possession of the site and a further date by which it must have completed the building.⁴ Alternatively, the contract may provide for a contract period which is triggered by a notice to commence,⁵ or in some other way the building contract will provide a

¹ *Clydebank Engineering Co v Don Jose Yzquierdo y Castenada* [1905] AC 6.

² *Cellulose Acetate Silk Co Ltd v Widnes Foundry* [1933] AC 20.

³ *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] All ER 501.

⁴ For example, SBC Contract Particulars 1.1 and 2.4.

⁵ For example, GC/Works/1(1998) clause 34.

means of fixing the date on which building operations must be finished. It is established that the employer must give the contractor possession of the site on the due date and an employer who is in breach of that obligation is liable in damages.⁶ Provided that the contractor is able to enter upon the site on the date stipulated for possession and thus to commence building work, it must finish by the completion date. If it fails to complete, the employer may recover such damages under the principles set out in *Hadley v Baxendale*⁷ as can be proven were a direct result of the breach.

In practice, it may be difficult to allocate damages; which damages directly and naturally flow from the breach and which damages do not so flow but depend upon special knowledge which the contractor had at the time the contract was made. The amount of the damage is seldom easy to ascertain and prove.

For more than 100 years it has been the practice in the building industry to include a provision for liquidated damages in building contracts to avoid these difficulties. The way the provision is generally expressed is that the contractor must pay a certain sum to the employer for every week by which the original completion date is delayed. That sum must represent a genuine pre-estimate of the loss which the employer is likely to suffer.

3.2 *Liquidated damages or penalty*

3.2.1 The relevant law

It is extremely important that the sum entered into a contract is liquidated damages and not a penalty. The rules for deciding whether a sum is to be considered liquidated damages or a penalty were formulated by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*.⁸ These are set out below with comment.

‘(i) Though the parties to a contract who use the words penalty or liquidated damages may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages.’

It is not particularly relevant that the parties have agreed the sum as liquidated damages. Since *Kemble v Farren*,⁹ the courts have paid little attention to the terminology adopted by the parties. In that case, not only was the sum expressed by the parties as liquidated damages, it was clearly stated that it was ‘not a penalty or penal sum’. Notwithstanding the clear words, the court had little hesitation in finding that the sum was a penalty. In other cases, the courts have held that sums stated as penalties are in fact liquidated damages:

‘All the circumstances which have been relied on in the different reported cases, as distinguishing liquidated damages from penalty, are to be found here. The

⁶ *Rapid Building Group v Ealing Family Housing Association Ltd* (1984) 1 Con LR 1.

⁷ (1854) 9 Ex 341.

⁸ [1915] All ER 739.

⁹ [1829] All ER 641.

injury to be guarded against was one incapable of exact calculation. The sum to be paid is not the same for every default, for that which should occasion small as for that which should occasion great inconvenience, but one increasing as the inconvenience would become more and more pressing, and finally, the payments are themselves secured by the penalty of a bond.¹⁰

Most modern forms of contract eschew the use of ‘penalty’ in favour of ‘liquidated damages’, but the term is often to be found in correspondence, site minutes and occasionally in forms of contract drafted by construction professionals. The term ‘delay damages’ which for no obvious good reason has been adopted by the NEC contract, seems to be equivalent to liquidated damages.

‘(ii) The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage’¹¹

A sum may be liquidated damages although it is not a genuine pre-estimate; for example if the sum is agreed at a lower figure. Some examples will be mentioned later.

‘(iii) The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of making the contract, not as at the time of the breach.’¹²

This rule is in two parts. First that the decision whether a sum is liquidated damages or penalty will hinge not only on the terms of a particular contract, but also on the inherent circumstances of that contract. The second part of the rule is that the terms and inherent circumstances to be considered are those existing at the time the contract was made, not when the term was breached. This is of importance when considering whether a sum is a genuine pre-estimate of loss, particularly when the likely damages were difficult or impossible to forecast at that time, but perfectly clear later. In looking at a sum, it should be considered in the worst possible light just as, if there are several possible breaches, ‘the strength of the claim must be taken at its weakest link’¹³. Therefore, if a sum would not normally be considered to be a penalty, but under certain circumstances it would be penal, then it is to be treated as penal in its entirety and the court will not sever any part.

Stanor Electric Ltd v R Mansell Ltd,¹⁴ provides an example of a sum held to be a penalty because of the circumstances in which it was sought to be applied. Liquidated damages expressed as a single sum for failure to complete two houses normally would present no problem. It was only the fact that one house was completed and taken into possession before the other which made the sum penal. It was not capable of division, because there was no provision in the contract allowing for the sum to be

¹⁰ *Ranger v Great Western Rail Co* [1854] All ER 321 at 332 per Lord Cranworth LC.

¹¹ *Clydebank Engineering Co v Don Jose Yzquierdo y Castenada* [1905] AC 6, was cited as authority for this proposition.

¹² *Public Works Commissioner v Hills* [1906] AC 368, [1906] All ER 919 and *Webster v Bosanquet* [1912] AC 394, were cited as authorities for this proposition.

¹³ *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] All ER 739 at 743.

¹⁴ (1988) CILL 399.

divided. The employer unsuccessfully attempted to deduct half the sum to represent one of the two houses. If both dwellings had been delayed by an equal amount, the sum would not have been held to be penal.

The principle is noticeable in the court's approach to hire purchase agreements. Very often, the sum to be paid on breach of the agreement by the hirer is not penal unless the breach occurs near the beginning of the hire period. Unless the sum is a genuine pre-estimate under all circumstances, it will not be upheld.¹⁵ Two Hong Kong cases are instructive, because, although they indicate the same principle, they were overturned on appeal.¹⁶ In each case, the liquidated damages provision in the contract was expressed in a complex form. At first instance, they were held to be void for uncertainty, because it was not easy to calculate the sum to be deducted at any particular stage, and the calculation could result in the sum being penal. The lesson appears to be that where complexities may arise, they should be severed from the primary liquidated damages provision.

In *Dunlop*, Lord Dunedin proceeded to set out tests which could prove helpful or even conclusive:

‘(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach.’

This is probably the most important of the tests. It has been explained thus:

‘I do not think the word “unconscionable” there has any reference to the fact that the parties were on an unequal footing. It does not bring in at all the idea of an unconscionable bargain. It is merely a synonym for something which is extravagant and exorbitant.’¹⁷

The fact that the sum stipulated as liquidated damages bears no relation to the contract sum is not relevant.¹⁸ The correct burden of proof has been stated like this:

‘The onus of showing such a stipulation is a “penalty clause” lies upon the party who is sued upon it. The terms of the clause may themselves be sufficient to give rise to the inference that it is not a genuine estimate of damage likely to be suffered but is a penalty. Terms which give rise to such an inference are discussed in Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co v New Garage & Motor Co* [1915] AC 79 at 87. But it is an inference only and may be rebutted. Thus it may seem at first sight that the stipulated sum is extravagantly greater than any loss which is liable to result from the breach in the ordinary course of things, i.e. the so-called “first rule” in *Hadley v Baxendale* (1854) 9 Exch 341. This would give rise to the prima facie inference that the stipulated sum was a penalty. But the plaintiff may be able to show that owing to special circumstances outside “the ordinary course of things” a breach in those special circumstances would be liable

¹⁵ *Landom Trust Ltd v Hurrell* [1955] 1 All ER 839.

¹⁶ *Arnold and Co Ltd v Attorney General of Hong Kong* (1990) 47 BLR 129 CA (Hong Kong), (1989) 5 Const LJ 263 and *Philips Hong Kong Ltd v Attorney General of Hong Kong* (1993) 61 BLR 41 PC, (1991) 7 Const LJ 340 CA (Hong Kong), (1990) 50 BLR 122.

¹⁷ *Imperial Tobacco Co v Parsley* [1936] 2 All ER 515 at 521 per Lord Wright MR.

¹⁸ *Imperial Tobacco Co v Parsley* [1936] 2 All ER 515 at 524 per Lord Slesser LJ.

to cause him a greater loss of which the stipulated sum does represent a genuine estimate.¹⁹

There appears to be no case where a sum stipulated as liquidated damages in respect of breach of a single obligation has been held to be a penalty on these grounds. The importance of this test probably lies in its application to multiple breaches or to breaches of multiple obligations.

‘(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.’

Lord Dunedin referred to this test as ‘one of the most ancient instances’. An example of the operation of this principle is to be found in *Kemble v Farren*,²⁰ where a comedian was engaged to appear on certain nights for £3 6s 8d per night. The contract provided that if either party failed to fulfil the agreement or any part, the party in default would pay the other a sum of £1,000. Tindall CJ said:

‘But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which the courts of equity have always relieved . . .’²¹

Although of little application to building contracts, it probably relies on the fact that where the breach lies in failure to pay a known sum of money, the likely damages are capable of precise calculation, being the sum itself together with, in certain circumstances, interest. Therefore, any greater sum must be a penalty.

‘(c) There is a presumption (but no more) that it is a penalty when “a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damages”’.²²

The application of this principle is clearly to be seen in *Ariston SRL v Charley Records Ltd*,²³ where a sum of money claimable if certain manufacturing parts were not returned within 10 working days was held to be a penalty, because the same sum was payable whether the whole or just a few of the parts were late and in the latter case, the sum would be extravagant in relation to the greatest likely loss. It is suggested that the principle is the key to some other decisions in relation to building contracts where there have been no proper provisions for dividing a single sum, expressed as liquidated damages, to allow for the completion and taking into possession of part of a building.²⁴

It is common for the provisions for the rate of liquidated damages in contracts to be completed by stating ‘at the rate of £XXX per week or part thereof’. That is

¹⁹ *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 142 per Diplock LJ.

²⁰ [1829] All ER 641.

²¹ [1829] All ER 641 at 642 per Tindall CJ.

²² *Lord Elphinstone v Monkland Iron & Coal Co* (1886) 11 App Cas 332 at 342 per Lord Watson

²³ *The Independent*, 13 April 1990.

²⁴ See, for example, *Stanor Electric v R Mansell* (1988) CILL 399 and *MJ Gleeson v Hillingdon Borough Council* (1970) 215 EG 165.

probably because at one time that form of words was printed in a standard form. It is likely that the intention behind the inclusion of that phrase is to indicate that the rate will be reduced pro rata the proportion of the week excluded from consideration. Of course, the phrase does not mean that. What it means, in simple terms is 'at the rate of £XXX for each whole week and at £XXX for any part of a week' which is why standard forms do not use the expression. There is a presumption that the provision amounts to a penalty, because it purports to levy the same rate of liquidated damages whether the delay is a whole week or only one day (or indeed one hour) of that week. If the rate is correct for a week, it must be excessive for an hour. It is a presumption which can be rebutted, for example by showing that the employer's damages begin to accrue at the very beginning of the week. An example might be a week's rent that becomes payable immediately the week commences.

'(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.'²⁵

This principle is of overriding importance in situations where the other tests have produced an inconclusive result.

There is a strong inference that a sum is liquidated damages where the parties have agreed a sum or sums as liquidated damages and the sum claimed is not excessive in relation to the actual loss suffered. It has been neatly summed up:

'The fact that the issue has to be determined objectively, judged at the date the contract was made, does not mean what actually happens subsequently is irrelevant. On the contrary it can provide valuable evidence as to what could reasonably be expected to be the loss at the time the contract was made.'²⁶

3.2.2 Recent developments

More recently, the Court of Appeal set out four principles to differentiate liquidated damages from a penalty:²⁷

- (1) The parties intentions must be identified by examining the substance rather than the form of words used.
- (2) A sum would not be a penalty where a genuine pre-estimate of loss had been carried out.
- (3) The contract should be construed at the time the contract was made, not at the time of the breach.
- (4) It would be a penalty if the amount was extravagant or unconscionable compared to the greatest foreseeable loss.

²⁵ *Clydebank Engineering Co v Don Jose Yzquierdo y Castenada* [1905] All ER 251 and *Webster v Bosanquet* [1912] AC 394 were cited as authority for this proposition.

²⁶ *Philips Hong Kong Ltd v The Attorney-General of Hong Kong* (1993) 61 BLR 41 at 59 per Lord Woolf repeated in *Ballast Wiltshire PLC v Thomas Barnes & Sons Ltd*, unreported, 29 July 1998 at paragraph 50 per Judge Bowsher.

²⁷ *Jeancharm Ltd v Barnet Football Club Ltd* [2003] EWCA Civ 58 at paragraph 27 per Gibson LJ.

In *North Sea Ventilation Ltd v Consafe Engineering Ltd*, liquidated damages were expressed in the contract as sums of money which increased in proportion to the seriousness of the breach.²⁸ The court held that such an arrangement was a characteristic clause and it did not amount to a penalty.

It has been pointed out that the categories of a genuine pre-estimate of loss or a penalty does not cover all possibilities.²⁹ Some clauses may operate when a breach occurs, but may fall into neither category, but be perfectly justifiable.

In a recent case, a contract was entered into between a luxury yacht builder and a prospective purchaser. By the terms of the contract, the builder agreed to construct a yacht and the purchaser agreed to pay €38 million for it, payable in instalments. One of the terms of the contract stated that, on lawful termination by the builder, the builder was entitled to retain out of payments made or recover from the purchaser 20% of the price, as liquidated damages. Any balance of sums received was to be returned to the purchaser. In addition, the builder retained the yacht.

When the purchaser failed to pay the first instalment, the builder terminated and sued the purchaser for the 20% liquidated damages less only an amount the purchaser had paid by way of deposit. The court held that the clause was not a penalty:

‘the evidence clearly shows that the purpose of the clause was not deterrent, and that it was commercially justifiable as providing a balance between the parties upon lawful termination by the builder. I do not accept the defendant’s submission that the court has to form a view as to the maximum possible loss that the parties would have expected to flow from any determination of the contract and the extent to which the stipulated figure for liquidated damages exceeded that maximum possible loss, and that since it cannot do so without extensive disclosure, and factual and expert evidence, the defendant must be permitted to defend the claim. This was a contract for the construction and sale of a very expensive yacht, aptly described in the evidence as a ‘super-yacht’. Both parties had the benefit of expert representation in the conclusion of the contract. The terms, including the liquidated damages clause, were freely entered into. As the authorities referred to above show, in a commercial contract of this kind, what the parties have agreed should normally be upheld. In my view, the clause in question is not even arguably a penalty, and is enforceable in its terms. It follows that the claimant is entitled to summary judgment for €7.1m being 20% of the contract price of €38m less €0.5m paid by way of deposit.’³⁰

The reason for the court’s decision seems to be that the clause was specifically negotiated by two parties who were both legally advised and the clause could benefit either party depending on when it was operated. Having said that, it is clear that although towards the end of the contract, the builder would receive only 20% of the contract price on termination, the builder was entitled to retain the yacht. However, the builder may have difficulty in selling the completed yacht to another buyer at 80% of the contract price.

²⁸ 20 July 2004 unreported.

²⁹ *Cine Bes Filmcilik VE Yapimcilik v United International Pictures* [2003] All ER (D) 312 (Nov).

³⁰ *Azimut-Benetti SpA (Benetti Division) v Healey* (2010) 132 Con LR 113 at 126 per Blair J.

It is not easy to see how this case will directly translate into guidance for the building industry. It is more likely to be an indication that the courts are open to new ways of formulating such clauses.

3.2.3 Summary

It may be useful at this stage to summarise the effect of the rules and tests in the light of other judicial decisions:

- (a) Where there is a single event and the pre-estimate of likely loss is relatively easy, a sum will be a penalty if it is greater than such loss, but otherwise liquidated damages.³¹
- (b) Where there is a single event and the pre-estimate of likely loss is difficult, the sum is more likely to be liquidated damages as the difficulty of pre-estimation increases.³²
- (c) Where there are several events and the pre-estimate of likely loss in respect of any one of them is relatively easy, a sum will be a penalty if it is greater than such loss, but liquidated damages otherwise.
- (d) Where there are several events and the pre-estimate of likely loss is difficult, the sum is likely to be liquidated damages, but other factors must be taken into account:
 - (i) If one sum is payable in respect of several events which result in different kinds and amounts of loss, it is likely to be a penalty.³³
 - (ii) If one sum is payable in respect of several events and the damage is the same in kind, but giving rise to differing amounts of loss, it may be liquidated damages.³⁴
 - (iii) If one sum is expressly stated to be an average of the pre-estimated loss resulting from each of several events, it is likely to be liquidated damages.³⁵
 - (iv) Where different sums are payable in respect of different events, they are likely to be liquidated damages.³⁶

The two important considerations are the extent to which an accurate pre-estimate of loss can be carried out and the existence of different events, each of which are said to give rise to liquidated damages. But the decision of the Privy Council of the House of Lords in *Philips Hong Kong Ltd v Attorney General of Hong Kong*, is significant. The Law Lords held that hypothetical situations cannot be used to defeat a liquidated damages clause. The court will take a pragmatic approach:

‘Whatever the degree of care exercised by the draftsman it will still be almost inevitable that an ingenious argument can be developed for saying that in a particular hypothetical situation a substantially higher sum will be recovered than would be recoverable if the plaintiff was required to prove his actual loss in that

³¹ *Kemble v Farren* [1829] All ER 641.

³² *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] All ER 739.

³³ *Ford Motor Co v Armstrong* (1915) 31 TLR 267.

³⁴ *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] All ER 739.

³⁵ *English Hop Growers v Dering* [1928] 2 KB 174.

³⁶ *Imperial Tobacco Co v Parsley* [1936] 2 All ER 515.

situation. Such a result would undermine the whole purpose of the parties to a contract being able to agree beforehand what damages are to be recoverable in the event of a breach of contract. This would not be in the interest of either of the parties to the contract since it is to their advantage that they should be able to know with a reasonable degree of certainty the extent of their liability and the risks which they run as a result of entering into the contract.³⁷

Subsequent decisions of the courts have confirmed that they favour a pragmatic approach and they are not likely to decide that a sum is a penalty based purely on hypothetical rather than factual grounds:

‘Because the rule about penalties is an anomaly within the law of contract, the courts are predisposed, where possible, to uphold contractual terms which fix the level of damages for breach. This predisposition is even stronger in the case of commercial contracts freely entered into between parties of comparable bargaining power.’³⁸

In that case, important factors were that the parties had comparable bargaining power, it was a commercial contract and the level of damages survived scrutiny by the parties’ legal advisors. Perhaps most important was that the court was following the lead set by higher courts and was predisposed to uphold terms which fix the level of damages.

3.3 *Liquidated damages as limitation of liability*

It appears that a sum will be classed as liquidated damages if it can be said of it that it is a genuine pre-estimate of the loss or damage which would probably arise as a result of the particular breach.³⁹ The figure inserted in the contract must be a careful and honest attempt to accurately calculate the loss or damage which will be suffered and it must be a pre-estimate in the sense that it must be an estimate at the time the contract is made, not at the time of the breach⁴⁰. However, it has been said:

‘In my view, a pre-estimate of damages does not have to be right in order to be reasonable. There must be a substantial discrepancy between the level of damages stipulated in the contract and the level of damages which is likely to be suffered before it can be said that the agreed pre-estimate is unreasonable.’⁴¹

The court’s view appears to be that the great advantage to the parties of having a definite figure outweighs any disadvantage caused by the figure being somewhat greater than the likely damages. It seems that the courts are disposed to accept a figure for liquidated damages which is unlikely provided it does not strain probability. In practice, most figures inserted in contracts to represent liquidated damages are substantially less than the likely level of damages.

³⁷ (1993) 61 BLR 41 at 54 per Lord Woolf.

³⁸ *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* (2005) 104 Con LR 39 at 50 per Jackson J. See also *Lordsvale Finance v Bank of Gambia* [1996] QB 752 and *Indian Airlines v GIA International* [2002] EWHC 2361 (Comm).

³⁹ *Philips Hong Kong Ltd v Attorney General of Hong Kong* (1993) 61 BLR 41PC.

⁴⁰ *Public Works Commissioners v Hills* [1906] All ER 919, [1906] AC 368.

⁴¹ *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* (2005) 104 Con LR 39 at 50 per Jackson J.

It appears that the courts will not strike down a sum which is less than that which would represent an accurate forecast of probable loss. Such a sum may have been inserted, because a party wished to limit its liability:

'I agree that it is not a pre-estimate of actual damage. I think it must have been obvious to both parties that the actual damage would be much more than £20 a week, but it was intended to go towards the damage, and it was all that the sellers were prepared to pay. I find it impossible to believe that the sellers, who were quoting for delivery at nine months without any liability, undertook delivery at eighteen weeks, and in so doing, when they engaged to pay £20 a week, in fact made themselves liable to pay full compensation for all loss.'⁴²

Clauses inserted as limitations of liability must now be examined in the light of the Unfair Contract Terms Act 1977. Section 3, in part, states that:

'This section applies as between contracting parties where one of them deals as a consumer or on the other's written standard terms of business As against that party, the other cannot by reference to any contract term . . . when himself in breach of contract, exclude or restrict any liability of his in respect of the breach . . . except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.'

Where it can be shown that the lower sum was inserted as a limitation of liability and where one party deals on the other's standard written terms of business, the term must satisfy the requirements of reasonableness set out in Section 11 and Schedule 2. In most building industry cases, the limitation of liability should be easily attributable to the application of sound business principles. It should not be ruled out that, in some instances, the limitation could be shown to be unreasonable and, therefore, unenforceable. In most cases, the liquidated damages are inserted into the contract by the employer and they are thought of as being for the employer's benefit. Therefore, if they are less than one might expect, a reasonable assumption is that the employer had good reasons for inserting the lower figure.

3.4 Sums greater than a genuine pre-estimate

It also seems that the courts are willing to countenance sums which are greater than that which would constitute a genuine pre-estimate in certain limited circumstances. The point was considered in *The Angelic Star*.⁴³ The case arose in connection with repayment of a substantial loan, on which the borrowers defaulted. A term of the agreement required immediate repayment of the whole sum of the outstanding balance on default. The Court of Appeal held that the provision was not a penalty, per Gibson LJ:

'Parties to a contract are free expressly to stipulate not only the primary obligations and rights under the contract but also the secondary rights and obligations,

⁴² *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd* [1933] AC 20 at 23 per Lord Atkin.

⁴³ [1988] 1 Lloyd's Rep 122.

i.e. those which arise upon non-performance of any primary obligation by one of the parties to the contract.⁴⁴

This was subject to the rule of public policy against enforcing sums which the court is not satisfied are genuine estimates of the loss likely to be sustained. The court appears to have looked upon the repayment provision as a form of liquidated damages. The decision is difficult to reconcile with the principle that it is a penalty when a larger sum is made payable on breach of an obligation to pay a smaller sum.

The principles of genuine pre-estimate also apply where the damages are expressed other than as money: for example, if a breach of obligations is to give rise to a transfer of property as liquidated damages.⁴⁵

3.5 *Liquidated damages as an exhaustive remedy*

3.5.1 *Liquidated damages as the only remedy*

A question often arises whether a party to a contract containing a liquidated damages clause can sue for actual damages suffered or whether the party is restricted to the sum expressed as liquidated damages. In principle, where parties enter into a contract, it must be assumed that they know what they are doing and that the contract is an expression of their intentions.⁴⁶ It follows that if parties agree that in the event of a particular kind of breach liquidated damages are payable by the party in breach, that agreement will be upheld by the courts and they will be allowed no other or alternative damages but the damages liquidated in the contract.

The sum expressed as liquidated damages was held to be exhaustive of the remedies available to the claimant for late completion in *Temloc Ltd v Errill Properties Ltd* where the amount of liquidated damages was stated to be '£nil'.⁴⁷ It was held that the parties had agreed that, in the event of late completion, no damages should be applied. Even if a rate had been stated, the court considered that the rate would have represented an exhaustive agreement as to damages which were or were not to be payable by the contractor in event of his failure to complete on time. That, of course, does not preclude the employer from recovering as unliquidated damages other losses not directly caused by the breach of obligation to complete, but which may be connected to such breach. In *Piggott Foundations Ltd v Shepherd Construction Ltd*⁴⁸ the court followed *Temloc* and held that liquidated damages were exhaustive of the damages which could be recovered for failure to complete the Works on time.

It should be noted that the CE contract and GC/Works/1(1998) both provide that if no rate of liquidated damages is inserted in the contract, the employer's remedy will revert to unliquidated damages. A difficult question sometimes arises under traditional forms of contract where there is space to insert a rate (e.g. in the Contract

⁴⁴ *The Angelic Star* [1988] 1 Lloyd's Rep 122 at 127.

⁴⁵ *Jobson v Johnson* [1989] 1 All ER 621.

⁴⁶ *Liverpool City Council v Irwin* [1976] 2 All ER 39.

⁴⁷ (1987) 39 BLR 30, referred with approval in *Biffa Waste Services Ltd & Another v Maschinenfabrik Ernst Hese GmbH & Another* (2008) 118 Con LR 104.

⁴⁸ (1993) 42 Con LR 98.

Particulars of SBC) and no rate is inserted, the space is left blank, but unlike the position under CE, the contract does not provide for that eventuality. Another variation is for the entry in the Contract Particulars to be crossed out. The intention may be that the liquidated damages clause is not to apply (why then not simply delete the clause itself?) or that it applies but no rate is to be charged. In other words that the employer does not intend to charge any kind of damages for late completion. That is unusual and it is suggested that the contract would have to indicate very clearly that such a situation was intended.

It is tentatively suggested that where the parties simply omit to insert any rate, they have rendered the clause inoperative and that liquidated damages cannot apply. The employer is left to recover whatever unliquidated damages can be proved. That may not necessarily be the case where the parties have crossed out the entry in the Contract Particulars. Where parties omit to insert any rate, the most likely explanation is that it was overlooked or that it was left to be inserted when a suitable figure was calculated, it does not suggest that the parties have deliberately omitted the figure so as to leave the rate at £Nil. If '£Nil' was intended, it could be inserted. However, where the parties have taken the trouble to cross out the entry (but not inserted any rate), the most likely explanation is that they did not want any rate to apply.

A recent Australian case considered the insertion of '\$00' as the rate and concluded that the parties intended that liquidated damages would not apply and the employer could seek unliquidated damages instead. The clause in question (clause 11.9) stated:

'If the Builder breaches sub-clause 11.1, it shall be liable to pay the Proprietor liquidated damages at the rate of NIL DOLLARS (\$00.00) per day for each day beyond the due date for practical completion until practical completion is deemed to have taken place.'

In considering the clause the court concluded:

'The insertion of "NIL DOLLARS (\$00.00)" in cl 11.9 in the contract does not, therefore, necessarily evince an intention that the respondents are to have no remedy in damages in the event of delay. It is consistent with an intention to make it clear that the provision in the standard form contract allowing for liquidated damages is to have no effect and that the respondents are to be left with the burden of proving such damage as they may be able to establish.'⁴⁹

It is difficult to see the logic behind that conclusion albeit the clause is substantially different from the one considered in *Temloc Ltd v Errill Properties Ltd*.⁵⁰ Although the *Temloc* case decided by the Court of Appeal is the precedent in this jurisdiction, it should not be discounted that on the basis of a different form of contract, an English court might come to a different conclusion.

In *M J Gleeson plc v Taylor Woodrow Constructions Ltd*⁵¹ the court refused to allow the set-off of sums for which a liquidated damages figure had been inserted in the contract and already deducted. This was on the straightforward principle that

⁴⁹ *J-Corp Pty Ltd v Mladenis & Another* (2009) 131 Con LR 188 at 201 per Newnes JA.

⁵⁰ (1987) 39 BLR 30.

⁵¹ (1989) 49 BLR 95.

damages cannot be recovered twice for the same breach of contract. This view is supported by earlier decisions.⁵²

This principle should be distinguished from the situation where the defendant is in breach of two or more obligations, for one of which the stipulated remedy is liquidated damages and for the other(s) the remedy is to sue for unliquidated damages. A related situation is where there is but one breach which gives rise to a loss which may be said to trigger a remedy in liquidated damages and a separate kind of loss for which other damages are appropriate.

The former situation is illustrated in *E Turner & Sons Ltd v Mathind Ltd*,⁵³ where a number of flats were to be completed in stages and there was a final completion date for the whole development. Liquidated damages were stipulated only for failure to meet the final completion date. Although expressed *obiter*, it was the view of the Court of Appeal that the liquidated damages clause, standing alone, was not an effective exclusion of any right to damages for earlier breaches of obligation. There was every reason to suppose that the parties intended the staging provisions to be contractual, possibly leading to a higher contract price. Without a specific overriding provision, breach of such provisions results in damages.

The decision was curious because the development was carried out on the basis of the Standard Form of Building Contract 1963 Edition (JCT 63). It had a provision in clause 12(1) which was similar to the current clause 1.3 of SBC to the effect that nothing in the bills of quantities was to override, modify or affect in any way whatsoever the application or interpretation of the 'Conditions'. This provision, although contrary to the normal rule that 'type prevails over print' has been upheld by the courts.⁵⁴ The staging provision was to be found mainly in the bills of quantities, but possibly also in other documents although the position was somewhat unclear. Therefore, it might be thought that the provisions in the bills of quantities were ineffective, because they attempted to override, modify or effect the single date for completion in the printed form. Clearly, in this instance, the court thought otherwise.

The only other case in point had been *M G Gleeson (Contractors) Ltd v Hillingdon Borough Council*,⁵⁵ where the argument really seems to have been about whether the single sum of liquidated damages could be distributed over the stages noted in the bills of quantities. The court had held that, on the basis of clause 12(1), such an interpretation could not be upheld. It is interesting to speculate whether the claimant in that case would have met with more success had it argued that there were two distinct breaches: breach of the obligation to complete the whole development on a fixed date for which the remedy was a sum set as liquidated damages; and breach or breaches of the obligation to comply with a set of intermediate dates for which the remedy was unliquidated damages. The court in *Turner* was referred to this case, but distinguished it on the basis that the *Gleeson* contract was a deed and it was not permissible to look outside the contract documents. Moreover, in the *Turner* case, the provisions for intermediate phasing were not only contained in the bill of

⁵² See *Diestal v Stevenson* [1906] 2 KB 345 and *Talley v Wolsey-Neech* (1978) 38 P & CR 45, where the courts prevented the claimants from recovering amounts greater than those stipulated by way of liquidated damages.

⁵³ (1986) 5 Const LJ 273 CA.

⁵⁴ See, for example, *English Industrial Estates Corporation v George Wimpey & Co Ltd* [1973] 1 Lloyd's Rep 51.

⁵⁵ (1970) 215 EG 165.

quantities but also in the construction sequence drawing and possibly in other documents which the court thought may have been incorporated (although not in the printed form).

In this context, it is useful to look at *Ford Motor Company v Armstrong*,⁵⁶ where the claimants agreed that the defendant should sell their motor cars. The defendant was to pay the claimants the sum of £250 if in breach of the agreement in any of the three following ways: by selling cars or parts at below the list price; by selling cars to persons or firms engaged in the motor car industry; or by exhibiting cars at any exhibition without the claimants' written permission. A majority of the Court of Appeal held the provision to be a penalty, and therefore unenforceable, on the basis that the breaches were not of the same kind. The claimants had argued that the reasoning behind the provision was to guard against damage to their business by the wholesale undercutting of the list prices. To that extent, the argument was the same as was put forward in *Dunlop v New Motor*.

The argument failed, because the breaches in *Dunlop*, although different in degree, were of the same type and each of the breaches could clearly be seen to have the same ultimate effect. In *Ford*, the breaches were quite different, in degree, type and result. The deciding factor appears to have been the fact that the same figure of £250 could not be considered as a genuine pre-estimate in respect of each of the three sets of breaches. On the basis of the judgment, it appears that the claimants could have avoided trouble by fixing different sums in respect of the three types of breaches. Alternatively, they could have fixed a sum of liquidated damages for the breach of selling below list price and sued in respect of the other breaches to obtain whatever damages they could prove.

3.5.2 Where there are two breaches

It is debatable whether there were two breaches or just one in the situation considered in *Aktieselskabet Reidar v Arcos*.⁵⁷ This concerned delay in loading cargo for which demurrage was stipulated. The meaning of demurrage has been stated thus:

‘The word “demurrage” no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention . . .’⁵⁸

This meaning is very close to liquidated damages, particularly as commonly encountered in a construction situation, i.e. for delay in completion. The court appears to have dealt with demurrage in exactly the same way as liquidated damages. The principles to be derived from this case are thought-provoking. In essence, the facts are simple. The defendants failed to load a cargo at the agreed rate and as a result the ship was detained beyond the time stipulated. The delay also meant that the ship was only allowed to carry a winter cargo instead of the heavier summer cargo and the

⁵⁶ (1915) 31 TLR 267.

⁵⁷ [1926] All ER 140.

⁵⁸ *Lockhart v Falk* (1875) LR 10 Exch at 135 per Cleasby B.

claimants suffered loss of freight. The claimants brought the action to recover demurrage (liquidated damages) for the period the ship was detained in port beyond the lay (allowed) days together with, as damages, the difference between the amount of freight the claimants would have earned if the defendants had loaded at the correct rate and the amount which they did earn.

The members of the Court of Appeal took different approaches to the problem. Banks LJ thought that the obligation to load a full and complete cargo and the obligation to load the cargo at a stipulated rate were separate obligations. He went on to say:

‘At one time I was inclined to think that, where parties had agreed a demurrage rate, the contract should be construed as one fixing the rate of damages for any breach of the obligation to load or discharge in a given time. On further consideration I do not think that such a view is sound. I can find no authority on the point, and it is noticeable that in the *Saxon Steamship Case*⁵⁹ it was not suggested that the claim for demurrage excluded the additional claim for special damage arising from the detention of this vessel.’⁶⁰

Atkin LJ held that the ‘provisions as to demurrage quantify the damages not for the complete breach, but only such damages as arise from the detention of the vessel.’⁶¹ Sargant LJ was of the opinion that ‘the same delay in loading, which might give rise to a claim for detention, also resulted in a breach of the obligation to load a full cargo,’⁶² but there was a definite separate loss. There is no doubt that the defendants were in breach of their obligation to load at a specified rate. The breach caused them to overrun their allotted time. The result of that was an obligation to compensate the claimants by liquidated damages. If, by overrunning the time period, the defendants had been able to load the agreed amount of cargo, the claimant’s only loss would have arisen from the overrun itself, and liquidated damages would have been adequate. That is clearly what the parties contemplated at the date of the charterparty. The overrun, however, resulted in the defendant’s failure to load the specified cargo in order to comply with the regulations for winter cargo which only applied as a result of the overrun. So the claimants suffered the additional loss due to a smaller cargo. If the cargo had been loaded at a rather quicker rate, it might have been possible for the full cargo to have been loaded before the winter rate applied.

The rate of loading is significant in that when it fell below a particular figure, it triggered the second breach. *Aktieselskabet Reidar* was considered in the House of Lords where it was thought that ‘There was a breach separate from although arising from the same circumstances as the delay . . .’⁶³ and that ‘there were in that case breaches of two quite independent obligations; one was demurrage for detention . . . the other was a failure to load a full and complete cargo . . .’⁶⁴

In *Total Transport Corporation v Amoco Trading Co (The ‘Altus’)*, the judge considered *Aktieselskabet Reidar v Arcos* and concluded:

⁵⁹ *Saxon Steamship Co Ltd v Union Steamship Co Ltd* (1900) 69 LJQB 907.

⁶⁰ *Aktieselskabet Reidar v Arcos Ltd* [1926] All ER 140 at 145.

⁶¹ *Aktieselskabet Reidar v Arcos Ltd* [1926] All ER 140 at 145.

⁶² [1926] All ER 140 at 147.

⁶³ *Suisse Atlantique, etc. v N V Rotterdamsche Kolen Centrale* [1966] 2 All ER 61 at 77 per Lord Hodson.

⁶⁴ [1966] 2 All ER 61 at 83 per Lord Upjohn.

'I must treat the ratio decidendi of the case as being that where a charterer commits any breach, even if it is only one breach, of his obligation either to provide the minimum contractual load or to detain the vessel for no longer than the stipulated period, the owner is entitled not only to the liquidated damages directly recoverable for the breach of the obligation to load (dead freight) or for the breach of the obligation with regard to detention (demurrage), but also for, in the first case, to the damages flowing indirectly or consequentially from any failure to load a complete cargo if there is such a failure.'⁶⁵

He proceeded to hold that where the charterer was in breach of his obligation to provide the minimum load, the owner was entitled to the damages flowing directly or indirectly from the failure in addition to liquidated damages for the breach of such obligation. On the facts of the case he was probably right. The probable consequences of the breach were known to both parties. It is difficult to accept his analysis of *Aktieselskabet*. The correct analysis must surely be that one default gave rise to two breaches because of the particular circumstances. Liquidated damages are certainly due as a result of the first breach and further damages may be due as a result of the second breach depending upon the facts.⁶⁶ The essential principle to be extracted from these cases is that although a breach for which liquidated damages are specified will give rise to such damages, they may not be the limit of a party's entitlement to damage resulting from the breach. This view appears to be supported by Nourse LJ:

'The damages payable in respect of late completion of the works are one head of the general damages which may be recoverable by an employer for the contractor's breach of a building contract.'⁶⁷

It is similar to the situation which sometimes occurs in building when a development must be completed by a particular date or it is ineligible for a grant. There, the failure to complete by the completion date would attract liquidated damages. Failure to complete by the further cut-off date for grant purposes would deprive the employer of the grant, but whether an employer could recover that amount from the builder would depend on whether it could be brought within the principles of special damages⁶⁸ i.e. whether the parties could reasonably be supposed to have contemplated such a result from the breach at the time they made the contract.

3.6 Injunction

Although a party cannot opt for unliquidated damages if liquidated damages have been set out in the contract, it seems that, if appropriate, a party may opt for an injunction instead. In *General Accident Assurance Corporation v Noel*,⁶⁹ it was held that where a party was in breach of a covenant in restraint of trade, the injured party

⁶⁵ [1985] 1 Lloyd's Rep 423 at 435 per Webster J.

⁶⁶ *Koufos v Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 HL.

⁶⁷ *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30 at 30.

⁶⁸ See the full discussion of special damages in Chapter 5, Section 5.2.

⁶⁹ [1902] 1 KB 377: a case dealing with a covenant in restraint of trade.

could not have both an injunction to restrain further breaches and liquidated damages in respect of the breaches already committed. The court concluded that the claimants had an option to elect between, but could not have both remedies. It is suggested that this is the correct answer to the problem posed when a party commits this kind of breach. If it is assumed that the breach must cause the innocent party undoubted but not readily quantifiable harm, liquidated damages appears ideally suited to the situation. But if the award of damages, as in this case, is expressed as a single sum, it may be argued that if the damages are paid, the party in effect has a licence to carry on committing the breach, because the injured party can recover no more. The answer to that argument seems to be that a party had the opportunity to make an appropriate bargain. An appropriate bargain in this case might well have been to have stipulated not a single sum as liquidated damages, but a sum for every week that the breach continued or, as in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*, for each separate breach. If a single lump sum is stipulated, it must be assumed that it is calculated on the basis that any breach, whether brief or protracted would have the same overall effect on the claimant's trade. Although that may be questioned in theory, in practical terms there is much to commend that approach.⁷⁰ It has been said, although probably *obiter*:

'Where there are different breaches and the agreement provides for a particular sum of liquidated damages to be payable for each and every breach, there is no bar to awarding the liquidated damages amount for each breach which has occurred to date of trial and also awarding an injunction to restrain future breaches.'⁷¹

The judge went on to say that there was no double recovery, because the two remedies were referable to different breaches. This contention seems to ignore two principles. The first is that where liquidated damages are stipulated they are exhaustive of the remedies available for a breach, and the second is that an injunction is normally refused if damages would be an adequate remedy. By agreeing a figure, be it a single sum or a sum for each breach, the parties are accepting that it is a complete remedy. This is the very foundation of the principle of liquidated damages. Under normal circumstances, the point has little application to a building situation. Liquidated damages are normally expressed as being payable for failure to complete by the contract completion date. Such a breach is not susceptible to easy remedy by injunction. Special constructional works, however, may require particular provisions to which these principles may apply.

⁷⁰ *English Hop Growers v Dering* [1928] 2 KB 174. The decision in *General Accident v Noel* should be compared to *The Imperial Tobacco Co Ltd v Parsley*. This case has been quoted as authority for the proposition that a party can recover liquidated damages and obtain an injunction where the sum stipulated as liquidated damages is graded according to the extent of the breach. The case concerned a price maintenance agreement by which the defendant undertook to pay the claimants £15 for every sale in breach of the agreement. The trial judge granted an injunction to restrain further breaches, but he refused to enforce the series of £15 payments on the basis that they were really penalties. As there was no appeal on the injunction, but only on the question whether the payments were penalties or liquidated damages, this case appears shaky ground on which to found any contention that both liquidated damages and an injunction are available remedies in certain instances.

⁷¹ *Lorna P Elsley, Executrix of the Estate of Donald Champion Elsley v J G Collins Insurance Agencies Ltd* (1978) 4 Const LJ 318 at 320 per Dickson J. This Canadian case concerned a covenant in restraint of trade on breach of which the defendant was to pay liquidated damages.

3.7 Liquidated damages in relation to loss

The next question is whether a claimant is entitled to recover the amount specified as liquidated damages if the damage actually suffered is less than the amount or nothing at all. Indeed, is a claimant able to recover liquidated damages though it can be demonstrated that it has actually gained from the breach? It is settled that a party can recover liquidated damages without being put to proof of actual loss.⁷² If that is correct, it seems obvious that in some instances the actual loss will be greater and sometimes less than the sum in the contract. Indeed, it follows that in certain instances there will be no loss whatever.

The principle was applied in *BFI Group of Companies Ltd v DCB Integration Systems Ltd*.⁷³ There, on an appeal from the award of an arbitrator, it was found that, although the claimants had suffered no actual loss as a result of being unable to use two vehicle bays, because they had, in any event, to execute fit out works after possession before being able to attract revenue, they were entitled to liquidated damages. The form of contract was on MW 80 terms and provided for the payment of liquidated damages if completion was delayed beyond the completion date. The claimants were given possession by the contractor on the extended date for completion although the arbitrator found that practical completion had not taken place. Had they not been given possession, they would have been obliged to wait until practical completion was certified before being able to execute the fit-out works. Unlike other forms of contract, such as SBC, IC or ICD, in MW and MWD there is no provision for possession of part of the Works before practical completion and the possession granted to the claimants in this case was a concession. Therefore, the claimants were able to carry out work during the period within which they were receiving liquidated damages. This represented a considerable advantage to the claimant.

A similar point arose in *Golden Bay Realty Pte Ltd v Orchard Twelve Investments Pte Ltd*,⁷⁴ an appeal to the Privy Council concerning liquidated damages in an agreement for the sale and purchase of commercial property. Lord Oliver, speaking of the calculation of the damages expressed the view of the Privy Council that it was

‘difficult to support as a genuine pre-estimate of the damage likely to be suffered from delay in completion in any case. Particularly this would be so in a case in which the building is complete at the date of the contract and the purchaser is let into possession under the terms of the contract.’⁷⁵

The purpose intended in this instance was to enable the claimant, among other things, to commence the fit-out works. It is difficult to fault the conclusion in *BFI v DCB* on the facts as found by the arbitrator. The clear words of most contracts allow liquidated damages for the period between the date when the Works should have reached completion until the date of practical completion. Unless possession is taken by the employer strictly in accordance with the contract terms, unlawful possession

⁷² *Clydebank Engineering Co v Don Jose Yzquierdo y Castenada* [1905] AC 6.

⁷³ (1987) CILL 348.

⁷⁴ [1991] 1 WLR 981.

⁷⁵ [1991] 1 WLR 981 at 986.

by the employer is not a trigger for the end of liquidated damages, despite what many adjudicators appear to think.⁷⁶

3.8 Where there is no breach of contract

It seems that the question whether a sum stipulated for payment on the happening of a particular event is a penalty or liquidated damages will be irrelevant if the event does not constitute a breach of obligation on the part of one of the parties. The situation has frequently arisen in connection with, but it is not confined to, hire purchase agreements. In *Associated Distributors Ltd v Hall and Hall*⁷⁷ the agreement provided that the hirer was entitled to determine the agreement. The owner was also entitled to determine if the hirer was in default with payments. On determination for any reason, the hirer must pay certain sums of money to the owners. Slesser LJ summarised the position in this way:

‘This is a case where the hirer has elected to terminate the hiring. He has exercised an option, and the terms on which he may exercise the option are those set out in clause 7. The question, therefore, whether these payments constitute liquidated damages or penalty does not arise in the present case for determination.’⁷⁸

This approach appeals as a very straightforward solution to the problem. *Lombard North Central PLC v Butterworth*⁷⁹ was a case dealing with the hire of computer equipment. The parties had stipulated that certain terms were to be treated as conditions. One of these terms was that on the hirer’s failure to pay any single instalment, the owner was entitled to recover the goods together with arrears of rentals, all further rentals which would have fallen due and damages for breach of the agreement. It was held not to be a penalty.

The right of parties to make their own bargain within specified limits has long been sacred and that seems to be the key to unravelling these decisions. It has been said:

‘. . . one purpose, perhaps the main purpose, of the law relating to penalty clauses is to prevent a plaintiff recovering a sum of money in respect of a breach of contract committed by a defendant which bears little or no relationship to the loss actually suffered by the plaintiff as a result of the breach by the defendant. But it is not and never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain.’⁸⁰

The case concerned a number of interlocking contracts of great complexity. In essence, the matter for consideration was whether breach of an obligation by one

⁷⁶ In *Impresa Castelli SpA v Cola Holdings Ltd* (2002) 87 Con LR123, the employer had occupied part of the Works, but not under the partial possession clause of WCD 98. It was held that such occupation did not amount to partial possession, there was no mechanism to reduce liquidated damages and, therefore, the full amount of liquidated damages could be recovered.

⁷⁷ [1938] 1 All ER 511 CA.

⁷⁸ [1938] 1 All ER 511 CA at 513.

⁷⁹ [1987] QB 527.

⁸⁰ *Export Credits Guarantee Department v Universal Oil* [1983] 2 All ER 205 at 222 per Lord Roskill.

party to another could give rise to payment by a third party or was such a payment to be considered a penalty and therefore unenforceable. A significant statement was made in the course of the appeal:

‘... the mere fact that a person contracts to pay another person, on a specified contingency, a sum of money which far exceeds the damage likely to be suffered by the recipient as a result of that contingency does not by itself render the provision void as a penalty.’⁸¹

The House of Lords concurred with this view. These and other similar cases give food for thought in the context of building industry contracts.⁸² In each of the cases, the sum of money is payable on the occurrence of an event. This event is the termination. The difficulties seem to have arisen due to the specified grounds for termination. In each case, termination may take place at the instance of either party and some of the grounds for termination by the owner are breaches by the hirer. In one of the cases, even trivial breaches were made conditions so as to enable the owner to terminate.

Lord Denning drew attention to what he termed the ‘absurd paradox’ that if a hirer under a hire purchase agreement lawfully terminated the agreement, he would not be able to say the sum then payable by him according to the terms of the agreement was a penalty, but he would be able to do so about the same term if the agreement was terminated as a result of his breach of contract.⁸³

The courts seem to be agreed that no question of liquidated damages or penalties arise unless a breach of contract is involved. A Hong Kong case put this line of reasoning into effect in a construction contract.⁸⁴ But where a sum is payable on one of several events, some being breaches and some simply options, the courts have been less sure. In some instances they have avoided the issue by concentrating on the precise matter before them and ignoring the wider connotations; such a case was *Associated Distributors* where only the hirer’s option to terminate was considered.

This point gives rise to interesting speculation with regard to the provision for liquidated damages in building contracts. It is common practice that a contractor, in pricing its tender, will take account of the stipulated amount of liquidated damages. If it considers that the period stated for completing the work is insufficient, the contractor may decide upon the period it requires and calculate the difference in liquidated damages, adding the amount to its tender figure (although almost certainly disguised). It could be said that such a contractor who completes the work in, say, ten months instead of nine months is exercising an option. In building contracts, time is not of the essence, because there is provision for extending time in certain specified instances. However, if the contractor fails to complete by the contract completion date, it is in breach of contract and there is now authority from the Court of Appeal that liquidated damages are not an agreed price to permit the contractor to continue its breach of contract.⁸⁵

⁸¹ [1983] 2 All ER 205 at 215 per Slade LJ.

⁸² See also *Cooden Engineering Co Ltd v Stanford* [1952] 2 All ER 915 CA; *Campbell Discount Co Ltd v Bridge* [1962] AC 600; *Re Apex Supply Co Ltd* [1941] 3 All ER 473; *Alder v Moore* (1961) 2 QB 57 CA.

⁸³ *Campbell Discount Co Ltd v Bridge* [1962] AC 600 at 629.

⁸⁴ *Icos Vibro Ltd v SFK Construction Management Ltd* (1992) APCLR 305.

⁸⁵ *Bath and North East Somerset District Council v Mowlem* (2004) 100 Con LR 1.

If an otherwise penal sum were to be inserted, the employer may be able to argue that the sum payable was not a penalty following a breach, but simply the figure agreed by the parties as payable on the contractor opting to complete later than the contract completion date. In the hiring cases, there is an express clause which permits either party to terminate. There is no express clause in building contracts to enable the contractor to exceed the stipulated contract period. Although the contractor cannot claim that liquidated damages is an agreed price enabling it to continue its breach of contract, there appears to remain the possibility that the employer could give the contractor that option. It is interesting to speculate that, on that argument, a single sum would not be struck out on the basis that it was 'extravagant and unconscionable'.⁸⁶

3.9 Calculation of liquidated damages

Pre-estimation of loss is seldom easy. The employer may have little idea how much loss he or she may suffer if the building is not completed by the due date, particularly if the contract period is to be counted in years rather than months. Although it has been held that liquidated damages are especially suited to situations where precise estimation is almost impossible,⁸⁷ the employer should try to calculate as accurate a figure as possible. The employer should include every item of additional cost which can be predicted will flow directly from the contractor's failure to complete on the due date; that is, the damages recoverable under the first limb of the rule in *Hadley v Baxendale*. It seems that the sum can be increased to include amounts which would normally only be recoverable under the second limb if the employer can show that special circumstances were involved.⁸⁸ It remains unclear whether, in the case of liquidated damages, the special circumstances must be known to the contractor when the contract is made. It seems appropriate to reveal such circumstances at tender stage although it could be argued that the higher figure for liquidated damages is itself a sufficient prior notification.

From a purely practical point of view, an employer will very often reduce such a figure in order to make the proposed damages more palatable to prospective tenderers. The Association of Consultant Architects Form of Building Agreement (ACA 3; see Chapter 16) is alone among standard forms of main contract in providing for unliquidated damages as an alternative. Some local authorities and other public bodies make use of a formula calculation which basically depends upon a percentage of the capital sum. Whether that would constitute liquidated damages will depend on the precise circumstances and particularly the difficulty with which a precise calculation could be made. Use of a formula is a perfectly sensible approach where it is obvious that substantial loss will be suffered in the event of a delay, but where it is virtually impossible to calculate precisely in advance what that loss would be.⁸⁹

⁸⁶ *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] All ER 739 at 742 per Lord Dunedin.

⁸⁷ *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] All ER 739.

⁸⁸ *Philips Hong Kong Ltd v Attorney General of Hong Kong* (1993) 61 BLR 41. A format/checklist for calculating liquidated damages is to be found in Chappell, Cowlin and Dunn's *Building Law Encyclopaedia* (2009) Wiley-Blackwell.

⁸⁹ *Philips Hong Kong Ltd v The Attorney General of Hong Kong* (1993) 61 BLR 41 PC.

In *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd & Another*⁹⁰ a specially drafted liquidated damages clause was held to be entirely valid and enforceable despite the absence of any specified sum. The damages were expressed as two parts. The first part was to be the interest calculated with reference to Trading Banks on daily balances of the total of items listed in the clause. The items included: 'Payments made by the Proprietor under any contract relating to the execution of the Works' and 'Reasonable costs and expenses incurred by the Proprietor in enforcing or attempting to enforce any contract relating to the execution of the Works'. The other items were equally imprecise. The second part was rates, statutory charges 'and other reasonable outgoings . . . '.

Although referred to in the contract and by the court as 'liquidated damages', it is difficult to see how such a clause can justify that description. An important aspect of liquidated damages is that it is a known amount at the time the parties enter into the contract. Although that does not preclude the damages being expressed as a method of calculation, such a method should be known to have a certain result in any given set of circumstances. In *Multiplex* the individual items could not always be ascertained. Works such as 'charges assessed', 'reasonable costs', 'reasonably necessary' and 'reasonable outgoings' introduce elements of judgment which have no place in the calculation of liquidated damages after the event. Employers introducing clauses of that kind are simply courting disputes.

Liquidated damages need not be expressed in monetary terms. It can be expressed in terms of a transfer of property. In *Jobson v Johnson*,⁹¹ the contract provided that shares in a football club were to be purchased by payment of a lump sum followed by six instalments. If there was a default in paying the instalments, the contract provided that the shares were to be transferred back and the lump sum only would be repaid. The Court of Appeal held that it was a penalty because the transfer of shares took no account of the valuation of the shares or the amount paid in instalments. The payment was the same irrespective of the consequences of the breach of obligation to pay instalments. However, the court confirmed that transfer of property could be liquidated damages and no distinction was to be drawn between transfer of property or payment of money.

3.10 *Where there is partial possession*

Provisions for the deduction of liquidated damages often run into trouble where the employer decides to take partial possession of the Works. In *M J Gleeson (Contractors) Ltd v Hillingdon Borough Council*,⁹² the contract for the construction of blocks of houses provided for liquidated damages at the rate of £5 per dwelling per week. Only one date in the contract was stipulated as the completion date, but the bills of quantities which formed part of the contract provided for the Works to be completed in sections. The employer attempted to deduct liquidated damages with reference to the sectional dates for completion set out in the bills. It was held that clause 12 in

⁹⁰ [1992] APCLR 252.

⁹¹ [1989] 1 All ER 621.

⁹² (1970) 215 EG 165.

the contract (to similar effect to clause 1.3 of SBC) prevented the bills from overriding the printed contract and, therefore, the contract completion date prevailed. Consequently, as soon as the employer started to take possession of the houses, liquidated damages were no longer deductible.

In *Bramall & Ogden v Sheffield City Council*⁹³ the council required the construction of 123 houses. There was no sectional completion in the JCT 63 contract being used. There was provision for partial possession in clause 6 and the appendix stated the rate of liquidated damages as £20 per week for each uncompleted dwelling. The problem in that case was that the partial possession clause made provision for liquidated damages to be calculated by proportioning the liquidated damages in the same ratio as the value of the part taken into possession bore to the contract sum. That is straightforward and similar to current partial possession clauses. However, that provision assumes that the rate of liquidated damages in the appendix is one sum per week. In this case, the sum had already been split into a rate per dwelling. The court summarised the contractor's argument as follows:

'The works cover not only the houses but the other items above referred to. Clause 22 refers to a failure "to complete the works" by the extended date. As from that date the employer becomes entitled to liquidated damages until the works are completed. Clause 16 deals with the consensual taking of possession of part of the works. Clause 16(e) provides for the sum payable after taking possession in respect of the period during which the works remain incomplete. The way in which the liquidated damages are dealt with is set out in the appendix. This does not allow of the calculation to be made which is required by condition 16(e), and one cannot operate the appendix and condition 16(e) in the circumstances of this case. The inconsistency can only be reconciled if provision is made in the contract for sectional completion of those parts which are taken over and to which specific liquidated damages provisions are applied.'⁹⁴

Counsel for the employer suggested that the inconsistency could be overcome by the simple expedient of expressing the rate as $123 \text{ dwellings} \times £20 = £2,460$. The court rejected that approach.

The *Bramall* case has been followed in *Avoncroft Construction Ltd v Sharba Homes (CN) Ltd*.⁹⁵ Although the case was mainly concerned with an adjudicator's decision and a party's attempt to set-off against it, the court expressly stated that the liquidated damages clause failed according to the principle in the *Bramall* case. Partial possession was taken. The contract (JCT 98) had no provision for sectional completion and the liquidated damages could not apply. The *ratio* in the *Stanor* case noted earlier is a similar principle.

In SBC, IC and ICD, the partial possession clauses provide that the liquidated damages will be proportioned in the same way as the value of the part taken into possession bears to the contract sum. It has already been seen that this formula will work only if the rate of liquidated damages in the Contract Particulars is expressed as a single sum in respect of the whole of the Works. Any attempt to express it as a

⁹³ (1983) 1 Con LR 30.

⁹⁴ (1983) 1 Con LR 30 at 35 per Judge Hawser.

⁹⁵ (2008) 119 Con LR 130.

figure for various parts of the Works (as in the *Bramall* case) will render the liquidated damages clause unworkable.

There may still be difficulties even if the rate is expressed as a single, and therefore divisible, amount. The principal difficulty concerns the proportioning of the liquidated damages. Since the figure representing liquidated damages is for the whole of the Works, there is no problem, in principle, in dividing it up to represent the part of the Works not taken into possession. The problem may arise in the simplistic approach to the division. It is possible to envisage a situation where proportioning in the same ratio as the value taken into possession may not properly represent a genuine pre-estimate of the damage. The value is usually calculated by the quantity surveyor using the rates and prices in the bills of quantity. It could easily be the case that the proportionate value of a certain part of the Works is greatly in excess of its bill of quantities value. Take the case of a complex of buildings, one of which houses all the key parts of a central heating system or computer network serving the whole complex. The key building will have a substantial bill of quantities value, but it may not represent the true value of the building if, for example, it stopped working. The cost of getting in temporary services may be enormous. If the proportioning does not throw up realistic figures for liquidated damages, it may be argued that one or more of the figures are penalties. In which case, the whole of the liquidated damages would be rendered ineffective (see Section 3.2.1). Generally, modern courts are less inclined to interfere with liquidated damages provisions. Where the differences are trivial, it is unlikely that the courts will throw out the liquidated damages provisions, but they may be more inclined to do so if it can be shown that the differences are significant and the parties could have easily arranged to split the complex into sections.

3.11 *Maximum recovery if sum is a penalty*

A practical problem concerns the employer's position if liquidated damages are held to be a penalty. Is the employer restricted to recovery of such amount as can be proved up to, but not greater than, the amount of the sum held to be penal? Some commentators have come to the conclusion that the amount stipulated as a penalty is not a ceiling on the amount of damages recoverable, while another thinks the question is still open, at least in so far as building contracts are concerned.⁹⁶ In an early judgment in the Court of Appeal, Kay LJ traced the effect of courts of equity on sums stipulated as penalties and noted that if the actual damages could easily be estimated, 'the penalty would be cut down and the actual damage suffered would be assessed.'⁹⁷ No qualification is placed upon the statement and, at face value, it could be taken as authority for the assessment of damage of any amount, even greater than the penalty sum itself. It would probably be going too far to construe the remarks in that way, since removing a penalty in favour of actual

⁹⁶ Stephen Furst and Vivian Ramsey, *Keating on Construction Contracts* (2008) 8th edition, Sweet & Maxwell at 319.

⁹⁷ *Law v Redditch Local Board* [1892] All ER 839 at 895.

damages is hardly likely to have been equitable if it resulted in the sum payable being thereby increased.⁹⁸

A strong argument against the penal sum being a ceiling on possible damages is to be found in the following extract:

‘Now where a contract contains a clause which is in form indisputably a penalty clause the position of the parties was thus described by Lord Mansfield in *Lowe v Peers*⁹⁹: “There is this difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election. He may either bring an action of debt for the penalty, and recover the penalty; (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be in satisfaction for the whole;) or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty toties quoties”¹⁰⁰.

The effect of that appears to be that, where a sum is held to be a penalty, a party may take action on the penalty and obtain judgment, but the court will only allow execution of the judgment up to the penal sum. However, the party may opt to disregard the penalty, in which case, he may sue for and recover the full amount of damages suffered even if they exceed the penalty figure. Because one definition of a penalty is that it is ‘extravagant and unconscionable in comparison with the greatest loss which could conceivably be proved to have followed from the breach’, it will be rare that actual damages exceed the penalty figure.¹⁰¹

However, there will be some situations where a sum is held to be a penalty because it consists of one sum payable on the happening of a number of different breaches, some resulting in substantial and others in only trifling amounts of damage. The result of some of these breaches is that the actual damage will exceed the penalty. It is unlikely that these cases establish the power of a party to opt for or against the penalty and the possibility of no limit on the amount of damages recoverable, for two reasons. First, the judgment of Bailhache J in *Wall* (much relied upon in *Watts, Watts & Co Ltd v Mitsui & Co Ltd*)¹⁰² relies upon a very old case modified by the application of a now defunct Act.¹⁰³ Not only is the ratio in *Watts, Watts* easily distinguishable, it is open to question whether it now has any application at all. Second, both *Wall* and *Watts, Watts* were concerned with charterparties and with a very common type of penalty clause in contracts of that kind. Indeed, the main thrust of argument was whether a slight amendment which had been made to the clause was sufficient to change it into an enforceable provision for liquidated damages. There is

⁹⁸ *Diestal v Stevenson* [1906] 2 KB 345, at first sight appears to be authority that the penal sum is not a ceiling on what is recoverable, but in that case the judge used the words ‘it is agreed’; a clear indication that he was not deciding the matter but simply recording what the parties had already agreed. In the event, the sum was held to be liquidated damages, despite being referred to as a penalty, and the judge had no further need to refer to the point.

⁹⁹ (1768) 4 Burr 2225 at 2228.

¹⁰⁰ *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66 at 72 per Bailhache J, a judgment which was affirmed in glowing terms by the House of Lords in *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] All ER 501.

¹⁰¹ *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] All ER 742 per Lord Dunedin.

¹⁰² [1917] All ER 501.

¹⁰³ Statute of William III 1697, 8 & 9 Will 3 c 11, repealed by the Statute Law Revision Act 1948.

no such tradition regarding a penalty clause in common form in the building industry. More recently, it has been said:

‘Where the court refuses to enforce a “penalty clause” of this nature, the injured party is relegated to his right to claim that **lesser measure of damages** to which he would have been entitled at common law for the breach actually committed if there had been no penalty clause in the contract.’¹⁰⁴ (emphasis added)

and later, in the same case:

‘Again, it is by no means clear that “penalty clauses” are simply void, like covenants in unreasonable restraints of trade. There are dicta either way, and in *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd*¹⁰⁵ Lord Atkin expressly left open the question whether a penalty clause in a contract, which fixed a single sum as payable on breach of a number of different terms of the contract, some of which breaches may occasion only trifling damage but others damage greater than the stipulated sum, would be treated as imposing a limit on the damages recoverable in an action for a breach in respect of which it operated to reduce the damages which would otherwise be recoverable at common law.’¹⁰⁶

What Lord Atkin actually said was:

‘I desire to leave open the question whether, where a penalty is plainly less in amount than the prospective damages, there is any legal objection to suing on it, or in a suitable case ignoring it and suing for damages.’¹⁰⁷

Lord Atkin in refusing to pass an opinion on the principle held in *Wall* and affirmed in *Watts, Watts*, appeared to be indicating that the House of Lords was disengaging itself from its earlier decision by refusing to apply it in general terms to all penal sums.

3.12 Maximum recovery if liquidated damages do not apply

Where the amount inserted in the contract is held to be a penalty, invariably such a holding will be against the wishes of the employer who has inserted the sum in the hope and perhaps expectation of getting it. However, where liquidated damages are held not to apply, that is usually because the employer has taken, or omitted to take, some action which destroys the right to such damages; possibly in an effort to recover greater damages.

In *The Rapid Building Group Ltd v Ealing Family Housing Association Ltd*,¹⁰⁸ the court affirmed the judge’s holding that it was not open to the defendants to counterclaim the amount of liquidated damages. This was because they had been partly responsible for part of the delay in achieving the completion date. Since there was not adequate provision to allow the defendant to extend time for that particular

¹⁰⁴ *Robophone Facilities v Blank* [1966] 3 All ER 128 at 142 per Diplock LJ considering whether a sum was penal.

¹⁰⁵ [1932] All ER 567 at 570.

¹⁰⁶ *Robophone Facilities v Blank* [1966] 3 All ER 128 at 142.

¹⁰⁷ *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd* [1933] AC 20 at 570.

¹⁰⁸ (1984) 1 Con LR 1.

reason, the liquidated damages clause did not apply.¹⁰⁹ The court accepted that the defendant could pursue a claim for unliquidated damages, but it refused to be drawn on the proposition that the claim would have a ceiling equal to the amount of liquidated damages. However, the Supreme Court of Canada has said:

‘If the actual loss turns out to exceed the penalty, the normal rules of enforcement of contract should apply to allow recovery of only the agreed sum. The party imposing the penalty should not be able to obtain the benefit of whatever intimidating force the penalty clause may have in inducing performance, and then ignore the clause when it turns out to be to his advantage to do so. A penalty clause should function as a limitation on the damages recoverable, while still be ineffective to increase damages above the actual loss sustained when such loss is less than the stipulated amount.’¹¹⁰

This statement probably represents the modern approach to this problem where the stipulated sum is held to be a penalty rather than liquidated damages, but it is not clear whether it necessarily represents the position following the failure of the liquidated damages clause for any reason. Where parties have agreed a figure to represent estimated damages and the mechanism for putting their wishes into effect has been contractually disabled, can it be said that recovery of whatever damages can be proven should be allowed, even if they exceed the liquidated damages figure? A penalty is always a sum which is extravagant in relation to the damages likely to be incurred, but liquidated damages can operate as a limitation on damages.¹¹¹

In considering the question, it must be remembered that in the case of liquidated damages in a building contract, no default on the part of the contractor can prevent the application of the clause. The clause can only fail as a result of a default on the part of an employer. A contractor who enters into a contract with an employer which includes a relatively small sum for liquidated damages will have a valuable advantage. The employer will be equally and oppositely disadvantaged, but both parties will have agreed on the arrangement as part of the distribution of risk inherent in that particular contract.

Part of the employer’s implied obligations will be not to prevent the contractor from due performance.¹¹² Among the employer’s express obligations will be, personally or through the architect, to grant proper extensions of time at the right time. It is possible for an employer, who is so minded, to disable the liquidated damages clause by causing the architect to fail to grant an extension of time in appropriate circumstances and then the employer would be entitled to claim whatever amount of unliquidated damages could be proven.¹¹³ If the sum stipulated in the contract is not a ceiling on what can be claimed in those circumstances, it would be open to the employer to effectively alter the distribution of risk and, as a result of the employer’s own default, be entitled to a greater sum in damages than if the employer’s part of the bargain had been properly performed. Purely on the principle that a party cannot profit by its own contractual breach to the detriment of the other party, there is a

¹⁰⁹ *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114.

¹¹⁰ *Lorna P Elsley v J G Collins Insurance Agencies Ltd* (1978) 4 Const LJ 318 at 320 per Dickson J.

¹¹¹ *Cellulose Acetate Silk Co Ltd v Widnes Foundry* (1925) Ltd [1932] All ER 567.

¹¹² *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

¹¹³ *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114.

strong argument that the liquidated damages sum must be a ceiling on recovery.¹¹⁴ On this analysis, the argument for a ceiling on recoverable damages is probably stronger where the liquidated damages are irrecoverable due to the employer's default than because they are held to be a penalty.

3.13 Defences to liquidated damages in building contracts

Where a sum has been stipulated as liquidated damages in a building contract, it is usual for the sum to be deducted by the employer from monies owing to the contractor in the event of a breach to which the liquidated damages relate. The following defences may be advanced by the contractor in order to avoid payment:

3.13.1 The stipulated sum is actually a penalty

The grounds on which a contractor may put forward this contention are noted in section 3.2 of this chapter.

3.13.2 Time is at large

If the parties intend that liquidated damages are to be payable if the contractor fails to complete the Works, a date for completion must be stipulated in the contract. That is because there must be a definite date from which to calculate liquidated damages.¹¹⁵ There is an implied term in every contract that the employer will do all that is reasonably necessary to co-operate with the contractor¹¹⁶ and that the employer will not prevent the contractor from performing it.¹¹⁷ In the context of a building contract, the employer's co-operation probably extends to little more than that the employer should ensure that the contractor has all necessary drawings and instructions at the right time to enable it to carry out the work. In this respect, the employer also has a duty to ensure that any architect appointed properly carries out architectural duties.¹¹⁸

Alongside the implied term of co-operation, there must be in every contract an implied term that neither party will do anything to hinder or delay performance by the other.¹¹⁹ Such a term was upheld as generally applicable to building contracts in *London Borough of Merton v Stanley Hugh Leach Ltd*.¹²⁰ An employer who does hinder the contractor can no longer insist that the contractor finishes its work by the contractual date for completion. This principle has the weight of judicial authority behind it. In *Holme v Guppy* it was said:

¹¹⁴ *Alghussein Establishment v Eton College* [1988] 1 WLR 587.

¹¹⁵ *Miller v London County Council* (1934) 50 TLR 479.

¹¹⁶ *Luxor (Eastbourne) Ltd v Cooper* [1941] 1 All ER 33.

¹¹⁷ *Cory Ltd v City of London Corporation* [1951] 2 All ER 33.

¹¹⁸ *Perini Corporation v Commonwealth of Australia* (1969) 12 BLR 82.

¹¹⁹ *Barque Quilpué Ltd v Brown* [1904] 2 KB 261.

¹²⁰ (1985) 32 BLR 51.

‘... and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default.’¹²¹

That was a case where a builder agreed to construct a brewery in four and a half months subject to liquidated damages of £40 per week. Completion was late due to the default of the employer in failing to give possession of the site on the due date. It was said in a New Zealand judgment:

‘... no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; that a party is exonerated from the performance of a contract when the performance is rendered impossible by the wrongful act of the other contracting party; or more emotively, that a party cannot take advantage of his own wrong.’¹²²

It is clearly not an immutable rule; it will depend on circumstances. For example, where a contractor has undertaken to carry out works including any alterations or additions which the employer might chose to make it can be bound to its undertaking. In *Jones v St John's College Oxford*¹²³ it was said:

‘... the plaintiffs undertake not only to do by a given time the works which were specified, and which they had the opportunity therefore of forming their own judgment upon, but they also undertake to do the alterations, that is to say, such alterations as are contemplated by the contract, within the time originally prescribed for the performance of the works.’¹²⁴

It is not clear whether the judge was referred to *Jones* in *Wells v Army and Navy Co-operative Society Ltd*¹²⁵ where the contractor was not liable to pay ‘penalties’ on account of exceeding the contract period. The key facts seem to have been that although the contract provided for the contractor to complete by the due date notwithstanding variations, strikes and weather conditions and subject only to any extension of time which the employer may, but was not obliged to grant, it was not wide enough to cover the employer’s own defaults. In general, the courts adopt the approach that ‘it is not to be inferred that the one party meant to bind himself so very stringently, unless it is so stated.’¹²⁶ In *Dodd v Churton*¹²⁷ it was held that an employer who prevents the contractor completing within the stipulated time cannot recover liquidated damages. *Jones* was distinguished, because although there was a term which empowered the ordering of additional work and this was done, the contractor had not agreed to complete within the original period despite the ordering of additional work. Very clear words will be needed in order to bind a contractor to a completion date if the employer is the cause of the delay. This principle is now well established.¹²⁸

¹²¹ (1938) 3 M & W 387.

¹²² *Canterbury Pipelines Ltd v Christchurch Drainage Board* (1979) 16 BLR 76.

¹²³ (1870) LR 6 QB 115.

¹²⁴ (1870) LR 6 QB 115 at 123 per Mellor J.

¹²⁵ (1902) 86 LT 764.

¹²⁶ *Roberts v Bury Commissioners* (1870) LR 5 CP 310 at 327 per Kelly CB.

¹²⁷ [1897] 1 QB 562.

¹²⁸ *Percy Bilton Ltd v Greater London Council* (1982) 20 BLR 1.

In the absence of any agreed contractual mechanism for fixing a new date for completion, no such new date can be fixed and the contractor's duty then will be to complete the Works within a reasonable time.¹²⁹ In such circumstances time is said to be 'at large'. In practice, very few building contracts are without a clause enabling the employer or the employer's agent to fix a new completion date after the employer has caused delay to the contractor's progress. All standard forms have clauses permitting the extension of time although not all of the terms are entirely satisfactory. Even where a building contract contains terms providing for extension of the contract period, time may yet become at large either, because the terms do not properly provide for the delaying event or, because the architect has not operated the terms properly. Extension of time clauses should be drafted so as to include all delays which may be the responsibility of the employer. Then, if the employer, either personally or through the agency of his architect, hinders the contractor in a way which would otherwise render the date for completion ineffective, the architect will have the power to fix a new date for completion and thus preserve the employer's right to deduct liquidated damages. The position was set out by Salmon LJ in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*:

'The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly *contra proferentem*. If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer. I am unable to spell any such provision out of . . . the contract [clause] in the present case.'¹³⁰

In that case, the extension of time clause, after referring to certain events of a neutral character, i.e. they could not be said to be the fault of either contractor or employer, made reference to ' . . . or other unavoidable circumstances . . . '. This was the phrase on which the employer relied, but 'delay due to the employer cannot be said to have been an unavoidable circumstance to anyone save the contractor.'¹³¹ A similar phrase is 'other causes beyond the control of the contractor'. It has been held that these words 'ought to be construed with reference to the preceding causes of delay, and ought not to receive such an extension as would make the defendants judges in respect of their own defaults.'¹³² This view was noted with approval in *Perini Pacific v Greater Vancouver Sewerage and Drainage District*.¹³³ The extension of time clause 2.7 in MW (2.8 in MWD) may suffer from a similar defect, but it has not been tested in the courts, probably because the relatively low value of contracts entered into under this form of contract discourages expensive litigation.

This clause can be contrasted with ACA 3 clause 11.5 Alternative 2. The material part of this clause (e) is very clear:

¹²⁹ *Wells v Army & Navy Co-operative Society Ltd* (1902) 86 LT 764.

¹³⁰ (1970) 1 BLR 111 at 121.

¹³¹ (1970) 1 BLR 111 at 126 per Edmund Davies LJ.

¹³² *Wells v Army & Navy Co-operative Society Ltd* (1902) 86 LT 764 at 765 per Wright J.

¹³³ (1966) 57 DLR (2d) 307 at 321 per Bull JA.

‘(e) any act, instruction, default or omission of the Employer, or of the Architect on his behalf, whether authorised by or in breach of this Agreement’.

The JCT series of contracts (other than MW and MWD) favour a list of events giving grounds for extension of time. Because the architect’s power to give an extension of time is circumscribed by the listed events, there is a danger that the employer may delay the Works in a way which does not fall under one of the events. In such a case, time would be at large. For example, the 1963 edition of the JCT Standard Form did not include power for the architect to extend time for the employer’s failure to give the contractor possession of the site on the due date. An employer’s failure in this respect resulted in time becoming at large and the contractor’s obligations being to complete the works within a reasonable time. This although it was acknowledged by the court that the contractor had himself subsequently contributed to the delay.¹³⁴ It used to be doubted whether or not, unless the contract specifically so provided the architect had the power to give an extension of time if the employer caused further delay when the contractor was already in delay through its own fault. But the court has confirmed that, certainly under the JCT standard form, the architect has such power.¹³⁵ Where the extension of time clauses are properly drafted, but the architect operates them incorrectly, time will become at large. An example of this would be if the architect was late in delivering necessary drawing information to the contractor, but failed to give any extension of time. This is a clear case of the architect not taking advantage of the available mechanism. Another example is where the contract provision sets out a timetable within which the architect must operate to give an extension of time. An architect who fails to observe the timetable may lose the power to give an extension and time will become at large.

3.13.3 Time has been extended

If the contractor fails to complete by the contract date for completion, it can escape liquidated damages if the architect gives an extension of time and/or fixes a new date for completion. The architect must strictly comply with the terms of the contract in fixing the new date.¹³⁶

3.13.4 Waiver

This is the relinquishment of a right or remedy. If one party indicates to the other, either by plain words or by conduct, that it intends to forego a right it may not thereafter insist upon that right if circumstances change. No consideration is required and if consideration is present, the situation is probably one of variation. Because there is no consideration, it is possible for the waiver to be withdrawn on the giving of suitable notice, but the waiver will be permanent if the party receiving the

¹³⁴ *Rapid Building Group Ltd v Ealing Family Housing Association Ltd* (1984) 1 Con LR 1.

¹³⁵ *Balfour Beatty Ltd v Chestermount Properties Ltd* (1993) 62 BLR 1.

¹³⁶ *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1976) 1 BLR 111.

waiver is led to believe that the waived right will never be enforced.¹³⁷ Waiver is closely related to estoppel, but there is no requirement for a party to alter its position to its detriment in order to constitute waiver. The employer may lead the contractor to believe that although liquidated damages have been stated in the contract, they will never be enforced, or the employer may say that the date for completion will not be enforced. In either case, if the contractor acts on that basis, it is doubtful whether such a waiver could be withdrawn.¹³⁸ In such an instance the true position may be one of promissory estoppel, because the contractor will have acted to its detriment upon a promise that the employer will not enforce its contractual right.

Normally, this kind of promise will not be permanent and the estopped party can terminate the arrangement by suitable notice: *Central London Property Trust Ltd v High Trees House Ltd*.¹³⁹ In that case, the promise not to demand a full rent could be withdrawn and the tenant obliged to pay future rents at the full rent without any real detrimental effect on the tenant. However, in the case of a promise not to enforce liquidated damages in a building contract, once the contractor has slowed its progress, it has performed an act in reliance of the promise, the consequences of which cannot be altered without further expenditure on the part of the contractor, if at all. There are two basic possibilities:

- (a) The contractor is, say, ten weeks from contract completion date when the employer promises not to enforce liquidated damages. The contractor, who was on target to complete on time using an optimum amount of labour, relaxes its progress, but the employer withdraws its promise five weeks before completion date when the contractor still has seven weeks work to carry out, working at the reduced rate of progress. If the contractor can complete on time, it will have expended more money than it originally expected, because it is less efficient to increase labour beyond an optimum point. If, despite its efforts, it finishes after the completion date, it will be liable to pay liquidated damages which, but for reliance upon the promise, would not have been incurred.
- (b) The facts as above except that the employer withdraws its promise two weeks after the contract completion date, but when the contractor still has three more weeks work to carry out working at the reduced rate. The contractor can do nothing but attempt to reduce the time to complete the work. Even if, by analogy with *High Trees*, the contractor is not liable to pay liquidated damages for the two weeks between the due date and the employer's withdrawal, there is nothing it can do to prevent a liability for up to three weeks liquidated damages from the time of withdrawal until actual completion.

It is doubtful that the employer would be entitled to terminate the arrangement once the contractor has taken any significant steps in reliance on it, such as paying its sub-contractors in full without deducting any damages for their failure to complete in time.¹⁴⁰

¹³⁷ *Brikom Investments Ltd v Carr* (1979) 2 All ER 753.

¹³⁸ *Charles Rickards v Oppenheim* [1950] 1 KB 616.

¹³⁹ (1947) KB 130.

¹⁴⁰ *London Borough of Lewisham v Shepherd Hill Civil Engineering* 30 July 2001, unreported.

3.13.5 Failure to observe the contract terms

Many of the JCT series of contracts set out a detailed procedure for dealing with the payment of liquidated damages. It is widely considered that there are two conditions precedent to the deduction of such damages by the employer: a certificate of the architect that the contractor has not completed the works by the contract date for completion and a written requirement by the employer. This view received support from the decision in *A Bell & Son (Paddington) Ltd v CBF Residential Care & Housing Association Ltd* considering JCT 80:

‘There can be no doubt that a certificate of failure to complete given under clause 24.1 and a written requirement of payment or allowance under the middle part of 24.2.1 were conditions precedent to the recovery of them under the latter part of Clause 24.2.1.’¹⁴¹

Doubt was thrown upon the words in *Jarvis Brent Ltd v Rowlinson Constructions Ltd* when the same form of contract was considered.¹⁴² It was held that although the architect’s certificate under clause 24 was a condition precedent, there was no condition precedent that the employer’s requirement must be in writing in spite of the clear words of the clause ‘. . . as the Employer may require in writing. . .’. The judge noted that it was ‘agreed’ that the passage in *Bell* was *obiter*. It seems that he did not consider himself called upon to decide the point. He went on to say:

‘But I am satisfied that there was no condition precedent that the employer’s requirement had to be in writing. What was essential was that the contractor should be in no doubt that the employer was exercising its power under 24.2 in reliance on the architect’s certificate given under 24.1 and deducting specific sums from monies otherwise due under the certificates as liquidated and ascertained damages under the contract.’¹⁴³

The question of whether the two stipulations were conditions precedent was part of the *ratio* of the *Bell* case. There, the judge had reminded himself that a contract was ‘to be construed according to the strict, plain, common meaning of the words themselves’¹⁴⁴ and that whether the plaintiffs succeeded depended on the proper construction of clause 24. A subsequent case appeared to strengthen that view: *Holloway Holdings Ltd v Archway Business Centre Ltd*.¹⁴⁵ There, considering IFC 84 clause 2.7 (terms to the same effect as the terms considered in *Bell* and *Jarvis*) the court held:

‘For Archway to be able to deduct liquidated damages there must be a certificate from the Architect and a written request to Holloway from Archway... In this context, I consider that a strict approach is appropriate (even if I have any

¹⁴¹ (1989) 46 BLR 102 at 107 per Judge Newey.

¹⁴² (1990) 6 Const LJ 292.

¹⁴³ (1990) 6 Const LJ 292 at 297 per Judge Fox-Andrews.

¹⁴⁴ *Shore v Wilson* (1842) 9 C & F 355 quoted in *A Bell & Son (Paddington) Ltd v CBF Residential Care and Housing Association Ltd* (1989) 46 BLR 102 at 107 per Judge Newey.

¹⁴⁵ (1991) ORB No 861 unreported.

discretion in the matter) as I do not want to encourage the cavalier attitude that Archway seems to have towards its contractual obligations.¹⁴⁶

A case which was not referred to in any of these judgments was *Ferrum GmbH v Owners of the Mozart*.¹⁴⁷ The court held that ‘due notice’ was such notice as was appropriate in the circumstances. The court added that ‘the law never compelled the doing of that which was useless and unnecessary’. It may have been this principle which the judge had in mind when coming to a decision in the *Jarvis Brent* case.

The weight of authority and the clear words of the contract favour treating both the architect’s certificate and the employer’s written requirement as conditions precedent.

3.13.6 The contract is terminated

In general, it appears that if a contract is terminated, the obligations of both parties under the contract are at an end in so far as future performance is concerned.¹⁴⁸ This seems to be perfectly in accordance with good sense, because if the Works are completed by another contractor, the original contractor can have no control over the completion. That is not to say that a party will avoid the payment of damages accrued up to the time of termination.¹⁴⁹

The decision in *Re Yeardon Waterworks Co & Wright* suggests that the courts will support a specific term in a contract which provides that in the event of termination of the employment of a contractor and the completion by another, damages could be deducted until the Works are completed.¹⁵⁰ In that case, however, the Works were completed by the guarantor of the contractor which was probably the deciding factor. The JCT series of contracts provide for termination of the contractor’s employment, following which the employer may engage another contractor to enter site and complete the Works. Such a clause was held to be incompatible with the right to liquidated damages in *British Glanzstoff Manufacturing Co Ltd v General Accident Fire & Life Assurance Corporation Ltd*.¹⁵¹ Where a contractor has left the site, wrongly thinking that it has completed the Works, it seems it will be liable for liquidated damages until the work has in fact been completed by a replacement contractor.¹⁵² The precise wording of the clause in the contract will be the deciding factor. In the New Zealand case of *Baylis v Mayor of the City of Wellington* liquidated damages were held to be deductible after termination, because the clause specifically excluded entitlement during the time taken by the employer to secure a replacement contractor.¹⁵³

In *Re White*,¹⁵⁴ the electric lighting contract contained what was held to be a liquidated damages clause. The court remarked that there was a clause in the contract

¹⁴⁶ (1991) ORB No 861 unreported at 12 per Tackaberry J.

¹⁴⁷ (1984) TLR 2 November 1984.

¹⁴⁸ *Suisse Atlantique Societ  d’Armement SA v N V Rotterdamsche Kolen Centrale* [1966] 2 All ER 61.

¹⁴⁹ *Ex parte Sir W Harte Dyke. In re Morrish* (1882) 22 Ch D 410 CA.

¹⁵⁰ (1895) 72 LT 832.

¹⁵¹ [1913] AC 143.

¹⁵² *Williamson v Murdoch* [1912] WAR 54.

¹⁵³ (1886) 4 NZLR 84.

¹⁵⁴ (1901) 17 TLR 461.

which gave the engineer power, if necessary, to employ other contractors to complete the Works, and provided that the defaulting contractor should be liable for the loss so incurred without prejudice to its obligation to pay the liquidated damages under the contract. It is not clear from the report whether the employer was seeking liquidated damages beyond the date of termination. However, the employer does not appear to have claimed anything other than liquidated damages, despite the words of the contract which appear to give the employer the right to claim liquidated damages for breach of obligation to complete on time until the date of actual completion together with all the additional costs associated with completion by another contractor.

The effect of termination on the right to recover damages was considered in *Photo Production Ltd v Securicor Transport Ltd*.¹⁵⁵ Speaking of *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd*¹⁵⁶ it was said:

‘that when in the context of a breach of contract one speaks of “termination” what is meant is no more than that the innocent party or, in some cases, both parties are excused from further performance. Damages, in such cases, are then claimed under the contract, so that what reason in principle can there be for disregarding what the contract itself says about damages, whether it “liquidates” them, or limits them, or excludes them?’¹⁵⁷

This seems to be a clear reinforcement of the view that there can be no continuing liability to pay liquidated damages, but damages already accrued, however, are recoverable. Standard forms of building contract normally state the grounds on which either party may terminate its employment under the contract. In a recent case dealing with a contract incorporating the JCT Minor Works Building Contract with contractor’s design (MWD), the court appears to have driven a coach and horses through previous decisions on this point. The court said:

‘If practical completion was not achieved when the defendant suspended the works in January 2008 then, given that it is common ground that the defendant never returned to site, it must follow that the defendant never achieved practical completion of the works. Practical completion of the works was only achieved once the remedial contractor, Voytex, had completed the outstanding works. That was not until 17th May 2008. It is not suggested that the claimants delayed unreasonably in engaging a replacement contractor. In the absence of any other contender, therefore, 17th May must be the date of practical completion.

Accordingly, on the analysis set out above, it seems to me clear that, after 3rd November 2007, the defendant was in culpable delay. That period of culpable delay extended beyond the defendant’s suspension of the works in mid January 2008 and could not be said to come to an end until 17th May 2008 when the works finally achieved practical completion . . .

I reject the suggestion that the defendant’s liability to pay liquidated damages somehow came to an end when his employment under the contract was terminated. There is no such provision in the contract. Any such term would reward

¹⁵⁵ [1980] 1 All ER 556 HL.

¹⁵⁶ [1970] 1 All ER 225 CA.

¹⁵⁷ [1980] 1 All ER 556 HL at 562 per Lord Wilberforce.

the defendant for his own default. Take the example of a contractor who has wholly failed to comply with the contract, is in considerable delay and is facing a notice of termination. The defendant's case would mean that such a contractor was only liable to pay liquidated damages for delay before the decision was taken to terminate, thereby penalising the employer for trying to get the works completed by another contractor and rewarding the contractor for sitting on his hands and failing to carry out the works in accordance with the programme. If the defendant was right, the contractor would be better off not coming back on site to carry out the works because, if he refused to do so, the contract would then be terminated and his liability to pay liquidated damages would automatically come to an end. That would not be a commonsense interpretation of this (or any) construction contract.

Accordingly, as a matter of principle, I reject the submission that the defendant's liability to pay liquidated damages came to an end when the employment was terminated.¹⁵⁸

Although it is tempting to follow this reasoning and it seems perfectly logical, it is thought unlikely that this view will prevail for the following reasons:

- During the trial, the defendant contractor was not present or represented. It seems that no legal arguments were presented on behalf of the defendant. In particular, the court does not appear to have been referred to the earlier cases from higher authority on this point noted above.
- Moreover, the court decided that practical completion was not achieved by the defendant and that it was not achieved until after a new contractor had been appointed. Clearly, once termination had taken place, practical completion could never take place under the original contract. The practical completion to which the court refers was practical completion achieved by a new contractor under a new contract. Therefore, it seems incorrect to refer to liquidated damages calculated under one contract to the date of practical completion of an entirely different contract albeit aimed at completing the same Works. Even on MWD's own terms, clause 2.9 refers to the calculation of liquidated damages between the date for completion and the date of practical completion in the same contract. Certification of practical completion is dealt with by clause 2.10 and it is clear that it is practical completion under the contract which is relevant. Therefore, since practical completion could never have been certified under the contract, because the contractor's employment had been terminated, either liquidated damages continued to accrue for an infinite period of time (which is obviously nonsensical) or the damages stopped accruing at the point at which the employer made it impossible for the original contractor to complete the Works.
- Although only briefly touched on by the judge, it seems that the fact that there was no suggestion of unreasonable delay in appointing the replacement contractor was a factor in the decision. Without that qualification, it would follow from his decision that the amount of liquidated damages chargeable is under the control of the employer who can decide when to put completion work in place.

¹⁵⁸ *Hall and Shivers v Van der Heiden (No 2)* [2010] EWHC 586 (TCC) at paragraphs 45, 46, 76 and 77 per Coulson J.

Although some commentators are already saying that, as a result of this case, contracts should be amended to expressly state that liquidated damages are to cease on termination, it is clear that current JCT contracts, if properly interpreted, already make the position clear.

Many of the grounds for termination under the provisions of the contract are not breaches which would entitle the employer to terminate save for the express provision. It is thought that an employer who terminated using the contract provisions is restricted to recovering the amounts stipulated in the contract.¹⁵⁹ Current building contracts do not appear to allow the continued deduction of liquidated damages after termination.

3.14 Bonus clauses

Few contracts make provision for bonus clauses as a standard option.¹⁶⁰ Bonus clauses are usually written into contracts if the employer wishes to provide an incentive for the contractor to finish early. They provide for the payment of a sum of money for every day or week difference between the date the contractor achieves practical completion, or the equivalent, and the contract completion date. It is the reverse of a liquidated damages provision. Bonus clauses need have no relation to liquidated damages. They may be greater or less than the liquidated damages sum or there may be no bonus clause at all. It is *not* true that where there is a liquidated damages clause there must also be a bonus clause for the same amount. Exactly how a bonus clause is structured depends on the requirements of the employer and the ingenuity of the draftsman. Commonly, such a clause may provide for a relatively modest payment if the contract completion date is beaten by a few days stepping up to significantly larger sums as the contractor succeeds in achieving earlier completion dates.

A disagreeable feature of bonus clauses is that lost opportunity to achieve a bonus will feature in many claims relating to contracts where a bonus is on offer. It is worthwhile considering the effect of a bonus clause on such clauses as 2.11 and 2.12 of SBC. The architect who, put broadly, provides information to the contractor in accordance with the information release schedule or otherwise in such time that the contractor is able to complete the Works by the contract date for completion will usually comply with clauses 2.11 and 2.12. However, if a bonus clause is inserted, the contractor will doubtless call for information much earlier than usual on the basis that it needs it earlier if it is to earn the bonus. It will be difficult to resist this argument and clauses 2.11 and 2.12 of SBC and clauses 2.10 and 2.11 of IC and ICD would require redrafting accordingly. Indeed, it is difficult to see how the information release schedule can sit happily beside a bonus clause or indeed at all.

What amounts to a bonus clause may perhaps arise without the parties being entirely aware of it. In *John Barker Construction Ltd v London Portman Hotels Ltd*,¹⁶¹ the parties entered into an acceleration agreement. Among other things, the

¹⁵⁹ *Thomas Feather & Co (Bradford) Ltd v Keighley Corporation* (1953) 52 LGR 30.

¹⁶⁰ A notable exception is the Engineering and Construction Contract (NEC), see Chapter 18.

¹⁶¹ (1996) 50 Con LR 43.

agreement stipulated that the contractor would be paid additional sums of £50,000 to be included in the valuation on 20 July 1994, £20,000 to be included in the valuation on 3 August 1994 and £20,000 on completion on 26 August 1994. Considering the final payment of £20,000 on 26 August 1994, Mr Recorder Toulson said:

'I conclude that the £20,000 was agreed to be a performance related payment if the plaintiffs completed by the 26 August 1994 . . .

It was also an express term of the acceleration agreement that the defendants would supply the plaintiffs with all outstanding information by the end of 12 July 1994, and I accept that there were implied non-hindrance terms as pleaded in paragraph 7 of the re-amended statement of claim.

By reason of the numerous changes made after the acceleration agreement the defendants were in breach of those implied terms, if not also of the express term. The latter point turns on whether the express duty was conditional upon receipt of a specific request for information from the plaintiffs. I doubt that it was, but the point is academic.

It is impossible to tell whether, as a matter of probability, the plaintiffs would or would not have finished by 26 August 1994, but for those changes. They would have had a reasonable opportunity of doing so, but they could easily have failed for all manner of reasons. In those circumstances I would hold that the plaintiffs are entitled to damages for loss of that chance equal to 50 per cent of the agreed performance bonus, or £10,000.¹⁶²

Although based on a specially worded acceleration agreement, nevertheless, this part of the judgment gives useful guidance on the way in which the courts may decide whether and to what extent a contractor has been deprived of the opportunity to earn a bonus by the actions or defaults of the employer and architect. In this instance the judge took a robust, if somewhat rough and ready, approach.

¹⁶² (1996) 50 Con LR 43 at 69 per Mr Recorder Toulson.

Chapter 4

Basis for common law claims

4.1 General

Most of the claims which are considered in this book are concerned with a claim by the contractor for additional time or financial reimbursement under particular contract clauses which provide that such time or reimbursement will be available under certain conditions. For example, the contractor's right to claim for direct loss and/or expense under SBC clause 4.23. However, the contractor may opt to claim damages at common law for breach of contract or, for example, under the law of tort. Such damages may be claimed instead of or in addition to any loss and/or expense available under the express terms of the contract. The contractor's rights in this regard are preserved by the terms of the contract itself. For example, SBC clause 4.26 makes clear that the provisions in loss and/or expense clauses 4.23–4.25 are without prejudice to any other rights or remedies which the contractor may possess (Clause 4.19 of IC and ICD is to the same effect).

In practice what this amounts to is that SBC, IC and ICD (and, indeed, probably other current standard forms) allow the contractor to make additional or alternative claims for damages based on the same facts as those which it has put forward as part of an application for loss and/or expense under the terms of the contract. This means that the contractor can look for a remedy under a contract term without thereby prejudicing its right to claim at common law on the same grounds.

This has a significant effect on the contractor's options. The contractor is not obliged to make a claim under such a clause in respect of those grounds specified in the clause which are also breaches of contract (e.g. the architect's failure to provide information in due time). Instead, the contractor may opt to wait until the Works are complete and make a claim for damages for all breaches of obligations under the contract. Common law claims are frequently based on implied terms in the contract. It is clear that the contractor can only recover its loss once. But where the contractor has failed to comply with particular requirements of the contract terms, such as an obligation to give notice within a reasonable time of becoming aware that regular progress is being or is likely to be affected, a common law claim may avoid the contractual restrictions imposed upon the contractual claim.¹ There is nothing to prevent a contractor from pursuing both claims in tandem provided that it can make good such claims.² Moreover, it should be noted that settlement of a claim made under

¹ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

² *Fairclough Building Ltd v Vale of Belvoir Superstore Ltd* (1990) 28 Con LR 1.

contractual terms will not preclude the contractor from pursuing a claim for damage arising from the same facts provided only that *additional* damages are claimed and that there is no element of double recovery.³

In that context, it is important to remember that not all the matters which under a standard form contract will trigger a claim for direct loss and/or expense are breaches of contract. For example, architect's instructions may entitle a contractor to loss and/or expense, but the giving of an instruction cannot be a breach, because it is expressly empowered by the contract. Therefore, a failure on the part of the contractor to properly operate the provisions of the clause giving a contractual remedy will sometimes leave it without any remedy at all.

Some of the most frequent common law claims are considered below. No standard form contract is a self-sufficient document; it must be read against the background of the general law, and common law claims can arise under any of the standard form contracts in current use. A claim made under the terms of the contract must be in accordance with those terms. Where the contractor makes a claim under a specific contract provision, such as SBC clause 4.23, it must comply with any conditions precedent relating to the timing of applications or the information to be provided. If it is compliant, the contract will be entitled to the remedy prescribed by the contract. It is important to understand that such a remedy may fall short of what the contractor might obtain by claiming at common law for breach of contract. Notably, the contract may exclude what tends to be referred to as 'consequential loss'.⁴

Under most standard form contracts, the architect has power only to ascertain and certify contractual claims; that is to say those claims which arise under the relevant contract clauses. The architect has no power to ascertain, much less certify, amounts due to the contractor in respect of common law claims. It is common for an architect to be expected to certify sums agreed by the employer in response to a contractor's common law claim. However, architects should decline to do so. Not only is the architect powerless to so certify (and therefore such a certificate would be worthless), but the act of purported certification would wrongly suggest that the architect has had a major part to play in arriving at the certified sum and in the event that such sum was later challenged by the employer, the architect would be placed in an unsupportable position. Under JCT terms of contract, it is plain that the arbitrator and probably the adjudicator may decide claims based on tort alone (as well as breach of contract) and the limitation is that the tort must arise out of the transaction which is the subject matter of the contract.⁵ Sometimes a contractor will submit a claim which relies partly on the contractual machinery and partly on damages for breach of contract. If the contractor has properly separated the contractual and common law parts of the claim, the architect will be able to deal with the one and decline the other. However, very often the two elements will be mixed together. In that case, the architect must request the contractor to disentangle its claim and submit only the contractual part.

³ *Whittall Builders Ltd v Chester-le-Street District Council* (1996) 12 Const LJ 356 (reporting the 1985 *Whittall* case).

⁴ *Saintline Ltd v Richardsons, Westgarth & Co Ltd* [1940] 2 KB 99.

⁵ *Re Polemis and Furness, Withy & Co* [1921] 2 KB 560; Arbitration Act 1996.

However, under ACA 3 (see Chapter 16) it is clear that the architect has power to assess what would otherwise amount to common law claims as well, albeit only those claims against the employer and not claims against the contractor. ACA 3 clause 7.1 refers specifically to claims resulting from ‘any act, omission, default or negligence of the Employer or of the Architect’, and the contractor is entitled to recover in accordance with the provisions of this clause. There are particular procedural requirements which the contractor must observe. However clause 7.5 makes clear that failure to comply with those provisions delays the time of settlement of the claim. Moreover, in such circumstances, the contractor would have no contractual claim for interest or financing charges. It is not entirely clear whether the contractor’s rights and remedies at common law would be preserved in respect of claims for breach of contract.⁶

Many if not all situations of employer default, which previously would have had to have been dealt with as common law claims for breach of contract, can now be considered as part of loss and/or expense. This has been made possible by the introduction of clause 4.24.6 into SBC (see Chapter 13, Section 13.1.7) and clause 4.18.5 into IC and ICD. Of course, as noted earlier, the architect only has such power under JCT and ACA 3 contracts if the contractor makes the claim under the terms of the contract and not as a common law claim for breach of contract.

The final certificates issued under SBC, IC and ICD (see clauses 1.9.4 in each contract) are conclusive evidence that any reimbursement of loss and/or expense under the contract terms is in final settlement of all the contractor’s claims arising out of any of the relevant matters whether breach of contract, duty of care or otherwise, thus precluding any common law claims for anything included in any of the relevant matters. Because the clauses noted in the previous paragraph are quite comprehensive, the issue of the final certificate under any of these contracts will effectively put an end even to common law claims unless presented with exceptional ingenuity. In the absence of a final certificate or in situations where the final certificate is not conclusive (such as MW and MWD) common law claims will be subject only to the Limitation Act 1980. Therefore, the contractor may pursue such common law claims at any time within the period of limitation, i.e. six years for actions based on simple contract or tort or 12 years if the contract is a deed. The limitation period is usually taken to run from practical completion so far as the contractor is concerned.⁷

4.2 *Implied terms*

4.2.1 **General principles**

The terms in printed or oral contracts to which the parties are deemed to have applied their minds and agreed are referred to as ‘express terms’. When one refers to

⁶ *Lockland Builders Ltd v John Kim Rickwood* (1995) 77 BLR 38; *Strachen & Henshaw v Stein Industrie (UK) Ltd* (1998) 87 BLR 52.

⁷ *Tameside Metropolitan Borough Council v Barlow Securities Group Services Ltd* [2001] BLR 113 CA. This part of the first instance judgment was not overturned on appeal.

‘implied terms’ it is understood that one is referring to terms which are not express, but which a court would imply into a particular contract. It is a somewhat complex topic which is comprehensively treated in the standard texts dealing with the law of contract. Implied terms usually fall into one of the following categories:

- By statute, for example under the Housing Grants, Construction and Regeneration Act 1996, the Supply of Goods and Services Act 1982 and the Defective Premises Act 1972.
- By local custom.
- Particular trade usage in a trade or profession where there is a long-standing practice in support. The usage must be certain, long-standing, well known in that trade or profession and it must be a practice which fair minded people would adopt.⁸
- At common law. In building contracts it is generally implied that a contractor will supply good and proper materials,⁹ construct the work in a good and proper manner and that the finished structure will be reasonably fit for its intended purpose so far as that purpose as been made known to the contractor and provided that there is no independent designer.¹⁰
- To give business efficacy, if the contract was not workable without the term.
- If a term is the presumed intention of the parties which ‘goes without saying’. This is often referred to as the ‘officious bystander test’. The idea is that if, when the parties were agreeing their terms, an officious bystander had been asked if a particular term was included, the bystander would have testily replied ‘Yes, of course’.
- If there is a ‘course of dealing’ between the parties, similar terms will be implied into a new contract made on the same basis.¹¹ This is a fairly rare occurrence although one which is argued by contractors where the parties have omitted to execute a contract. In order for there to be a course of dealing, the parties must have contracted together on identical terms on a large number of previous occasions and the contract for which it is contended the previous terms apply must be of the same type as the previous contracts. It is not sufficient to found a course of dealing if there are only two or three previous occasions or if previous contracts were different in nature.
- Where parties have used their own interpretation.

In practice, in the context of building contract claims, the concern is with those terms which will be implied into the contract by the courts, in order to make the contract commercially effective.¹²

A term will not be implied into a contract simply because the court thinks it would have been reasonable to insert it. There can never be an implied term to give business efficacy to a contract if there is an express term dealing with the same matter.¹³ It is sometimes erroneously thought that this principle applies to all implied terms. It

⁸ *Symonds v Lloyd* (1859) 141 ER 622.

⁹ *Young & Marten Ltd v McManus Childs Ltd* (1969) 9 BLR 77.

¹⁰ *Hancock v B W Brazier (Anerley) Ltd* [1966] 2 All ER 901; *Test Valley Borough Council v Greater London Council* (1979) 13 BLR 63; *Viking Grain Storage Ltd v T H White Installations Ltd* (1985) 3 Con LR 52.

¹¹ *McCutcheon v David McBrayne Ltd* [1964] 1 WLR 125.

¹² *The Moorcock* (1889) 14 PD 64.

¹³ *Les Affréteurs Réunis v Leopold Walford* [1919] AC 801.

does not apply to those terms which are to be implied by law, i.e. under statute or at common law. Moreover, the courts will not imply a term into a contract, which is otherwise perfectly clear, simply to sort out a problem for one or both parties. That is the case even where it is clear that the parties had not sufficiently applied their minds to the problem before executing the contract. That was the situation in *Trollope & Colls Ltd v North-West Metropolitan Regional Hospital Board*¹⁴ where a delay in a phased contract had unexpected results. The position has been aptly put in a well-known passage:

‘An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract . . .’¹⁵

4.2.2 Prevention and co-operation

Implied terms were considered in some detail in *London Borough of Merton v Stanley Hugh Leach Ltd*.¹⁶ One of the many points at issue concerned the implication of certain implied terms. The contractor was asking the court to agree that the following terms should be implied into a contract such as JCT 63:

- (i) that the employer would not hinder or prevent the contractor from carrying out its obligations in accordance with the terms of the contract and from executing the Works in a regular and orderly manner;
- (ii) that the employer would take all steps reasonably necessary to enable the contractor to discharge its obligations and to execute the Works in a regular and orderly manner.

The court was quite clear that the terms ought to be implied:

‘The implied undertaking not to do anything to hinder the other party from performing his part of the contract may, of course, be qualified by a term express or to be implied from the contract and the surrounding circumstances. But the general duty remains so far as qualified. It is difficult to conceive of a case in which this duty could be wholly excluded.’¹⁷

A somewhat older case is to the same effect:

‘There is an implied term by each party that he will not do anything to prevent the other party from performing the contract or to delay him in performing it. I agree that generally such a term is by law imported into every contract.’¹⁸

The principle was reiterated in *Cory Ltd v City of London Corporation*.¹⁹ So far as the second term which the contractor wished to imply in *Merton v Leach* is concerned, the court said:

¹⁴ (1973) 9 BLR 60

¹⁵ *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* (1973) 9 BLR 60 at 70 per Lord Pearson.

¹⁶ (1985) 32 BLR 51.

¹⁷ (1985) 32 BLR 51 at 80 per Vinelott J.

¹⁸ *Barque Quilpé Ltd v Brown* [1904] 2 KB 264 at 274 per Vaughan Williams LJ.

¹⁹ [1951] 2 All ER 85.

‘As regards the second of these two terms it is well settled that the courts will imply a duty to do whatever is necessary in order to enable a contract to be carried out.’²⁰

Other courts have reached much the same conclusion. In *Mackay v Dick* it was said:

‘Where in a written contract it appears that both parties have agreed that something should be done which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing though there may be no express words to that effect.’²¹

A well-known extract from *Luxor (Eastbourne) Ltd v Cooper* essentially says the same thing:

‘If A employs B for reward to do a piece of work for him which requires outlay and effort on B’s part . . . generally speaking, where B is employed to do a piece of work which requires A’s co-operation . . . it is implied that the necessary co-operation will be forthcoming.’²²

Therefore, it appears to be well settled that both employer and contractor must co-operate to the extent necessary to enable the contract to be performed. In many instances governed by modern sophisticated building contracts, co-operation by the employer may amount to little more than refraining from hindering the contractor in the execution of the Works. However, there are exceptions to these principles. More correctly, the principles should be applied with a degree of caution and with a view to what is necessary to make the contract work. The guidance set out in *Mona Oil Equipment Co v Rhodesia Railway Co* is useful:

‘I can think of no term that can properly be implied other than one based on the necessity for co-operation. It is, no doubt, true that every business contract depends for its smooth working on co-operation, but in the ordinary business contract, and apart, of course, from express terms, the law can enforce co-operation only in a limited degree – to the extent that it is necessary to make the contract workable. For any higher degree of co-operation the parties must rely on the desire that both of them usually have that the business should be done.’²³

None of the standard form contracts in current use displaces these two implied terms mentioned, and thus the employer is liable at common law for breach of them. This can have important practical implications, and consideration must be given to one of the most common grounds of common law claim arising under a building contract.

In *Holland Hannen & Cubitts v WHTSO*,²⁴ also in JCT 1963 form, a term was implied that ‘the employer would do all things necessary to enable the contractor to carry out and complete the works expeditiously, economically and in accordance with the contract.’ In *Thomas Bates & Son Ltd v Thurrock Borough Council*²⁵ a term

²⁰ (1985) 32 BLR 51 at 81 per Vinelott J.

²¹ (1881) 6 App Cas 251 at 263 per Lord Blackburn.

²² [1941] AC 108 at 118 per Lord Simon.

²³ [1949] 2 All ER 1014 at 1018 per Devlin J.

²⁴ (1981) 18 BLR 80.

²⁵ [1976] JPL 34.

was implied that where the employer is to provide goods for the Works, they will be supplied in time to enable the contractor to carry out the Works expeditiously and in accordance with the contractor's planned progress.

Every building contract contains an implied term that the employer will give possession of the site to the contractor in sufficient time to enable it to complete the Works by the due date.²⁶ All the standard form building contracts have express terms to the same effect. The employer's failure to give possession as provided in the contract is a breach for which the contractor will be entitled to damages in respect of any resultant loss.

The most usual implied term founding a claim from the contractor is the employer's duty not to carry out any acts of prevention and to do everything reasonably necessary to allow the contract to be properly performed. Where domestic work is concerned, employers are often guilty of interference with the contractor's work. In such circumstances, the employer may be relatively unsophisticated so far as building contracts are concerned and may require a great deal of support and guidance from the architect. In practice, the co-operation tends to be required between contractor and architect. The principal area is probably the supply of further information by the architect to enable the contractor to carry out and complete the Works in accordance with the contract. If that co-operation is lacking, the contract cannot be completed expeditiously.

4.2.3 Employer's liability for architect's breaches

The court in *Merton v Leach* was of the view that the employer's implied undertaking to do all things necessary to enable the contractor to carry out the work 'extends to those things which the architect must do to enable the contractor to carry out the work and that the building owner is liable for any breach of this duty on the part of the architect.'²⁷

Although most instances of co-operation will be between architect (rather than employer) and contractor, the employer will only be liable for the architect's breach of the duty to co-operate so far as those functions performed by the architect acting as the employer's agent are concerned and not usually when the architect is acting as certifier, because in the latter case the employer may not be vicariously liable. The architect's position under a JCT contract has been set out thus:

'Under the standard conditions, the architect acts as the servant or agent of the building owner in supplying the contractor with the necessary drawings, instructions, levels and the like and in supervising the progress of the work and ensuring that it is properly carried out . . . To the extent that the architect performs these duties the building owner contracts with the contractor that the architect will perform them with reasonable diligence and with reasonable skill and care. The contract also confers on the architect discretionary powers which he must exercise with due regard to the interests of the contractor and the building owner. The building owner does not undertake that the architect will exercise his

²⁶ *Freeman & Son v Hensler* (1900) 64 JP 260. Possession is dealt with in more detail in Section 4.6 of this chapter.

²⁷ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 81 per Vinelott J.

discretionary powers reasonably; he undertakes that although the architect may be engaged or employed by him, he will leave him free to exercise his discretion fairly and without proper interference by him²⁸

However, there may be instances when the employer does become liable for acts or omissions by the architect in the exercise of discretionary powers. There is an implied term that the employer will do all that can reasonably be done to see that the architect exercises certification duties properly.²⁹ More recently the following useful analysis has been given:

'[The contract administrator], although employed by [the employer], was given authority by the parties to the contract to form and express the opinions and issue the certificates as and when required by its terms. He was not the agent for [the employer] in so acting so that [the employer] was liable as principal to [the contractor] for what he did or did not do in his capacity as certifier. On the other hand [the employer] was the party who could control him if he failed to do what the contract required. Since the contract is not workable unless the certifier does what is required of him, [the employer] as part of the ordinary implied obligation of co-operation, was under a duty to call [the contract administrator] to book . . . if it knew that he was not acting in accordance with the contract. . . . the duty does not arise until the employer is aware of the need to remind the certifier of his obligations. . . . A mere failure by the certifier to act in accordance with the contractual timetable is not a failure on the part of the employer to discharge an implied obligation positively to co-operate and cannot be a breach of contract by the party whose employee is the certifier. On the facts set out in the award [the employer] could not therefore have been in breach of contract. In arriving at this conclusion I bear in mind the argument that the existence of an arbitration clause which confers on the arbitrator wide powers to open up etc means that a failure to issue a final certificate can be put right'³⁰

4.2.4 Implied terms in building contracts

The Sale of Goods Act 1893 contains terms which existed in common law before the law relating to the sale of goods was codified into statute. Until relatively recently, there were no similar terms to be implied in construction. This was partly due to the fact that the common law did not recognise buildings on land as anything separate from the land on which they stood.

Under s.12 of the Sale of Goods Act 1979, a condition is implied into the sales of chattels, that the seller has a right to sell the goods, that the buyer shall enjoy quiet possession of them and that they are free from any charge or encumbrance to a third party.

In *Test Valley Borough Council v Greater London Council*, it was held by the High Court that the question:

²⁸ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 78 per Vinelott J.

²⁹ *Perini Corporation v Commonwealth of Australia* (1969) 12 BLR 82; *Rees & Kirby Ltd v Swansea City Council* (1985) 5 Con LR 34 CA.

³⁰ *Penwith District Council v V P Developments Ltd*, 21 May 1999, unreported, at paragraph 36 per Judge Lloyd.

‘whether there were implied terms of the said agreement that the respondents would provide completed dwellings which were constructed (a) in a good and workmanlike manner; (b) of materials which were of good quality and reasonably fit for their purpose and (c) so as to be fit for human habitation.’³¹

was to be answered in the affirmative. This view was also confirmed by the Court of Appeal. The question of implied terms in construction work was considered by the House of Lords in *IBA v EMI and BICC*, when the principles set out above were approved. Two propositions were put forward in the course of that case:

‘It is now well recognised that in a building contract for work and materials, a term is normally implied that the main contractor will accept responsibility to his employer for material provided by nominated sub-contractors. The reason for the presumption is the practical convenience of having a chain of contractual liability from the employer to the main contractor and from the main contractor to the sub-contractor. . . . Accordingly, the principle that was applied in *Young and Marten* in respect of materials ought in my opinion to be applied here in respect of the complete structure, including its design.’³²

Contractors’ common law claims are often founded on breach of an implied term. There are many examples through the courts. In *Bacal Construction (Midlands) Ltd v Northampton Development Corporation*³³ the contractors recovered damages for the employer’s breach of an implied term or warranty that the ground conditions would accord with the basis on which they were instructed to design. The contract was substantially in JCT 63 form, and the Court of Appeal held that the necessary re-designing of the foundations and the additional work caused by the discovery of tufa did not rank as variations for the purposes of the contract. The court, in an analysis which was accepted by the Court of Appeal, said:

‘Bacal have submitted that there are strong commercial reasons for implying such a term or warranty in the contract as they have suggested. First, before designing the foundations of any building, it is essential to know the nature of the site conditions. Secondly, where the contract is for a comprehensive development of the kind here in question, the contractor must know the soil conditions at the site of each projected block in order to be able to plan his timetable and estimate his requirements for materials. These are matters which relate directly to the contract price. Thirdly, if the work is interrupted or delayed by unforeseen complications, the contractor is unlikely to be able to complete his contract in time.’³⁴

4.3 Variation of contract

Variation of the contract is commonly confused with variation of the contract Works. This is probably because the standard form contracts refer expressly to variations

³¹ (1979) 13 BLR 63 at 69 per Phillips J.

³² (1980) 14 BLR 1 at 44 per Lord Fraser.

³³ (1976) 8 BLR 88.

³⁴ (1975) 8 BLR 88 at 100 per Buckley LJ.

and variation clauses. Some architects and contractors have no understanding of the meaning of a variation of the contract and have never encountered the term. Variation, as a term encountered in the clauses of most standard form contracts, refers to the power of the architect to instruct the contractor to carry out either an addition or change in the Works which the contractor has undertaken to carry out. Such a clause is SBC clause 5.1 which defines 'Variation' as understood in that contract. However, when one refers to 'variation of the contract' reference is being made to a change in the terms of the contract itself.

Although, as in SBC clause 3.14.1, the architect is given power to issue instructions requiring variations of the Works, the architect has no power to vary the terms of the contract.³⁵ The parties to a contract may agree to change any of the terms of that contract, provided only that such changes are not actually unlawful or do not result in the contract becoming void or voidable. Where the parties agree to a change in the terms, what they are doing is to form another contract which varies the first. Therefore, unless the new contract is made as a deed, there must be consideration. Usually, there is sufficient evidence of consideration in such cases, but to avoid any doubt, it is wise for the contract varying the first to be executed as a deed. Perhaps the most common example of varying the contract is when the parties agree to bring a contract to an end after practical completion by an agreement which, not only settles various disputes but also varies several contract terms in order to achieve that position. Another common example is an agreement to accelerate where the contract does not provide for it.³⁶

All the standard form building contracts have variation clauses. However, not all of them (MW and MWD for example) have entirely comprehensive variation clauses and the architect is often limited in the variations which can be instructed. If an architect purports to issue an instruction requiring a variation which is not empowered under the terms of the contract, the contractor should not comply with the instruction, because compliance would amount to a breach of contract albeit the contractor in such circumstances may (but rarely) be able to found a claim against the architect in person. If variations are not specifically authorised by the terms of the contract, any change in the work will be a variation of contract which both parties to the contract must agree.

4.4 Omission of work to give it to others

It is beyond doubt that a contractor is entitled to carry out the whole of the Works in the contract. If the employer attempted to prevent the contractor carrying out any part of the Works, it would be a breach of contract. Most standard form building contracts provide that the architect may instruct the omission of parts of the Works. However, such clauses do not entitle the architect to omit work so that it can be carried out more cheaply by another contractor. If the contract so provides, the work may be omitted, but only if it is not to be done at all, not in order to give it to someone

³⁵ *Sharpe v San Paulo Railway* (1873) 8 Ch App 597.

³⁶ See Chapter 2, Section 2.5.2.

else. The usual quoted authorities are two Australian cases.³⁷ However, there are other cases to the same or similar effect. An American case³⁸ concerned a contract which provided for the omission of work. The American appeal court held that the ‘omission’ meant work which was not to be done at all and did not include work which was taken from the contractor and given to another contractor to carry out. There are now English cases to the same effect.³⁹ In *AMEC Building Ltd v Cadmus Investment Company Ltd* which concerned an appeal from an arbitration award on various matters, the court held that the architect’s power to omit a provisional sum cannot be exercised so as to omit work if the employer intends to have the omitted work carried out by another contractor.⁴⁰ The authorities were reviewed in a later case where it was said:

‘The justification for these decisions is in my judgment to be found in fundamental principles. A contract for the execution of work confers on the contractor not only the duty to carry out the work but the corresponding right to be able to complete the work which it contracted to carry out. To take away or vary the work is an intrusion into and an infringement of that right and is in breach of contract . . . reasonably clear words are needed in order to remove work from the contractor simply to have it done by somebody else; whether because the prospect of having it completed by the contractor will be more expensive for the employer than having it done by somebody else, although there can well be other reasons such as timing and confidence in the original contractor. The basic bargain struck between the employer and the contractor has to be honoured, and an employer who finds that it has entered into what he might regard as a bad bargain is not allowed to escape from it by the use of the omissions clause so as to enable it then to try and get a better bargain by having the work done by somebody else at a lower cost once the contractor is out of the way (or at the same time if the contract permits others to work alongside the contractor).’⁴¹

That puts the matter in a nutshell.

Where part of the Works are to be done and materials to be supplied by a nominated sub-contractor or materials are to be supplied by nominated suppliers, that allocation cannot be changed by the architect. The principle holds good that the contractor is entitled to do the work set out for him to do under the contract. Therefore, the architect cannot decide that work, previously measured as part of the work which the contractor must carry out, is to be carried out by a nominated sub-contractor. On the other hand, if work is stipulated to be carried out by a named sub-contractor, the main contractor cannot be forced to do it nor can he decide to do it itself.⁴²

³⁷ *Carr v J A Berriman Pty Ltd* (1953) 27 ALJR 273 and also *Commissioner for Main Road v Reed & Stuart Pty Ltd & Another* (1974) 12 BLR 55.

³⁸ *Gallagher v Hirsch* (1899) NY 45.

³⁹ *Vonlynn Holdings Ltd v Patrick Flaherty Contracts Ltd* 26 January 1988, unreported; *AMEC Building Ltd v Cadmus Investment Co Ltd* (1997) 13 Const LJ 50.

⁴⁰ (1997) 13 Const LJ 50 at 64–7.

⁴¹ *Abbey Developments Ltd v PP Brickwork Ltd* [2003] EWHC 1987 (TCC) at paragraphs 45 and 47 per Judge Lloyd.

⁴² *T A Bickerton & Son Ltd v North West Metropolitan Regional Hospital Board* [1970] 1 All ER 1039.

Difficult situations can arise where an employer wishes to omit work on the grounds that money is not currently available to carry it out or where an employer is uncertain about whether the work should be done and wishes to see the building in operation for a few months before proceeding or because there are technical reasons for the omission and giving the work to others. Sometimes an employer will feel that the contractor is not performing well and wants to give the work to another, more capable, contractor. The employer may omit work intending never to have it done at all. Subsequently, after practical completion and perhaps after the defects rectification period has ended, the employer may decide that the work should be carried out after all and instruct another contractor to do it. Although these possibilities have been suggested as being within the employer's discretion,⁴³ a court thought it unlikely:

'It remains to be decided (but it is very doubtful) that work could be omitted simply because the owner is dissatisfied with the performance of the contractor, since the contract itself could and should, and in many cases does, make provision for what is to happen if the contractor's performance is so poor that the employer, having lost confidence in the contractor's ability to complete the work in accordance with the contract, is entitled then to take the whole or part of the work then outstanding away from the contractor in order that it can be done by others more satisfactorily. But such a provision for termination, or partial termination, is something which must be the subject of clear words, because otherwise it would be an intrusion into the contractor's right to finish the work. . . . The editor of Hudson refers to the possibility that there may be "sound technical or commercial reasons for omitting the work" which would justify an otherwise unlawful omission. It is as difficult to see how that can be imported legitimately into a contract as it is to see how to give effect to the policy that you may not omit work but to have it done by someone else. Could it be implied – if so, does this mean that an employer would be liable to be interrogated as to its motives every time there was a variation by way of omission or which was seen as a prelude to or paving the way to an omission? . . . The test must therefore be whether the variations clause is or is not wide enough to permit the change that was made. If, with the advantage of hindsight, it turns out that the variation was not ordered for the purpose for which the power to vary was intended then there will be a breach of contract. So the motive or reason is irrelevant . . .'⁴⁴

In practice, it may be quite difficult to decide whether an employer requires the architect to issue an omission instruction to achieve a permanent omission of work or whether it is simply a way of having the work done by others at a cheaper cost. It can be particularly difficult if the work is actually carried out after practical completion when the original contractor has left site. The correct view seems to be that if the employer has engaged others to carry out previously omitted work, at any time

⁴³ I N Duncan Wallace, *Hudson's Building and Engineering Contracts*, 11th edition (1995) Sweet & Maxwell at paragraph 4.202.

⁴⁴ *Abbey Developments Ltd v PP Brickwork Ltd* [2003] EWHC 1987 (TCC) at paragraphs 48, 49 and 50 per Judge Lloyd.

before the issue of a final certificate which is conclusive about the finally adjusted contract sum, the original contractor ought to be able to mount a claim against the employer for any damages suffered as a result of the breach.

Where a main contractor brings others onto the site to supplement the labour of a sub-contractor, already lawfully on site, without that sub-contractor's consent, the main contractor is in breach of contract which may be repudiatory in nature so as to entitle the sub-contractor to leave site.⁴⁵

4.5 *Extra work*

The contractor is not entitled to payment simply because it carries out work which is additional to that which it originally contracted to execute. This is widely misunderstood. Moreover, a contractor will often claim extra payment on the grounds that it has provided better quality than the architect specified. It is not entitled to payment and indeed, in both instances, it is in breach of contract, because the contractor has done something different from that which it undertook to do under the contract.⁴⁶ Although the law will not allow an employer without payment to gain a benefit from work which has been instructed to be carried out, the contractor is not entitled to payment for work which has not been instructed.

Occasionally, there may be a dispute, because the architect insists that certain work is included in the contract but the contractor refuses to accept it and demands that it be treated as an extra. Groundworks sometimes fall into this category. If the architect refuses to issue an instruction requiring a variation and the work is substantial, the contractor's remedy may be to refuse performance unless an instruction is issued and, in the absence of such instruction, to treat the contract as repudiated and sue for damages.⁴⁷ This could be a dangerous course of action with the risk of huge losses if the contractor is wrong. If the contractor proceeds with the work and attempts to make a claim at a later date, it may find that a court or arbitrator will find that it has acted in accordance with the architect's view of the contract and that the contractor is not entitled to extra payment. It may be that the contractor can proceed under notice to the employer that it is proceeding without prejudice to its right to claim payment. Sometimes it may be held that the employer has implicitly promised to pay if the work is, as a matter of law, additional to the contract.⁴⁸

A contractor may contend that certain work is not included in the contract and refuse to carry it out unless the architect issues an instruction or the employer agrees to pay for it. This can be a very tricky situation. The architect may simply issue a letter requiring the contractor to comply with the contract and execute the work within, say, seven days. If the contractor fails to comply the employer may engage others to do the work and charge all the additional costs to the original contractor. Alternatively, the architect may issue the instruction or the employer

⁴⁵ *Sweatfield Ltd v Hathaway Roofing Ltd* (1997) CILL 1235.

⁴⁶ *Holland Hannen & Cubitts v Welsh Health Technical Services Organisation* (1981) 18 BLR 80.

⁴⁷ *Peter Kiewit Sons' Company of Canada Ltd v Eakins Construction Ltd* (1960) 22 DLR (2d) 465.

⁴⁸ *Molloy v Liebe* (1910) 102 LT 616.

may agree to pay, but if it is subsequently found that the work was included in the original contract, the architect's instruction will be valued at £nil, because it does not relate to extra work and the employer will not be obliged to pay the extra, because the employer will not have received consideration in return for the promise to pay.⁴⁹

Architects may only instruct such variations as the contract expressly provides. They have no automatic right to order variations.⁵⁰ Although an architect acts as agent for the employer, it is with only limited authority. So far as the contractor is concerned, the authority is limited to what is stated in the contract. Where the power to instruct is not expressed in precise terms; for example in MW and MWD, it will be implied that the architect can only issue instructions which are within the scope of the contract.⁵¹ If an architect issues instructions which are not empowered by the contract, the contractor should not comply. If, nevertheless, the contractor does comply with unauthorised instructions, it is in breach of contract. Moreover, if the contractor does comply, it is conceivable that the architect may become personally liable to the contractor for the price. How the contractor would make such a claim against the architect, however, is unclear, because, to the contractor's clear knowledge, the instruction would concern Works which are the property of the employer. Where the architect appears to have the employer's authority to order a variation, even if unauthorised by the employer, the employer will normally be liable to the contractor for the price and the employer may in turn look to the architect for reimbursement.

Where the contract (such as MW or MWD) does not precisely list the instructions which the architect has power to give, the contractor may have a real problem if the architect gives an instruction and the contractor is not sure whether it is empowered under the contract. Under MW and MWD, the architect is simply empowered to issue instructions, but the courts are apt to construe such clauses as narrowly as is consistent with a workable contract. If the contractor accepts an instruction which the architect is not empowered to give, it is a breach of contract as already noted. Some contracts have clauses which permit the contractor to require the architect to specify the empowering clause and this protects the contractor, even if the architect is wrong. However, neither MW nor MWD have such a clause.

If the employer gives a direct instruction to the contractor, it would not be authorised under most standard forms, which reserve the power to issue instructions to the architect or the contract administrator (of whatever discipline). It is often suggested that the giving and receiving of such an instruction would create a separate little contract by which the contractor would be entitled to payment on a *quantum meruit* basis. That, indeed, may be one analysis of the position. Another view is that the employer and the contractor have agreed to vary the original contract and the contractor would be entitled to payment in accordance with the existing contract terms. However, the latter construction would itself give rise to a difficulty in that the architect would be called upon to certify payment for something of which he or she had no detailed, or perhaps any, knowledge.

⁴⁹ *Sharpe v San Paulo Railway* (1873) 8 Ch App 597.

⁵⁰ *Cooper v Langdon* (1841) 9 M & W 60.

⁵¹ *Sir Lindsay Parkinson & Co Ltd v Commissioners of Works and Public Buildings* [1950] 1 All ER 208.

4.6 Possession of site

4.6.1 General position

There is an implied term in every building contract that the employer will give possession of the site to the contractor in sufficient time to enable the contractor to complete the Works by the contractual date stipulated for completion. Under the terms of JCT contracts, there is express provision for the contractor to be given possession on the date specified in the Contract Particulars.

4.6.2 Sufficient possession

The question often arises whether the contractor must have possession of the whole site or whether it is enough if it has possession of sufficient of the site to begin to carry out the Works. It has been said:

‘The contract necessarily requires the building owner to give the contractor such possession, occupation and use as is necessary to enable him to perform the contract, but whether in a given case the contractor in law has possession must, I think, depend at least as much on what is done as on what the contract provides . . .’⁵²

It is sometimes argued that this is authority for what is sometimes referred to as ‘sufficient possession’ and, therefore, the employer need give only that degree of possession which is necessary to enable the contractor to carry out work. However, the statement is clearly *obiter*, and must be treated with caution because Megarry J had already said at the beginning of the previous paragraph that ‘I do not think that I have to decide these or a number of other matters relating to possession.’ *Keating* is also often called in aid in this connection and it seems to support the view that the employer is not in breach of the obligation to give possession, if sufficient possession is given, all the circumstances having been taken into account.⁵³

Keating’s main authority seems to be a Canadian case.⁵⁴ However, that case does not appear to support the view. The contract referred to did not contain a clear possession clause:

‘. . . s. 52 merely stipulates that the site of the work is to be provided by the appellant; it does not provide for the degree of possession of the site that was to be afforded to the respondent. It is obvious that in order to be able to perform his obligations under a construction contract, the contractor must have access to the site of the work and must also have, at least to a certain extent, possession of that site.’⁵⁵

⁵² *London Borough of Hounslow v Twickenham Garden Developments Ltd* (1970) 7 BLR 81 at 107 per Megarry J.

⁵³ Stephen Furst and Vivian Ramsey, *Keating on Building Contracts* (2006) 8th edition, Sweet & Maxwell at 755.

⁵⁴ *The Queen v Walter Cabot Construction* (1975) 21 BLR 42.

⁵⁵ (1975) 21 BLR 42 at 50 per Pratte J.

Again:

‘... the appellant failed to observe an implied term that the respondent would have a sufficient degree of uninterrupted and exclusive possession of the site to permit it to carry out its work unimpeded and in the manner of its choice.’⁵⁶

In the context of a contract which does not contain a possession clause that may be a correct statement of the law. However, Canadian decisions are not binding in England and they may not even be persuasive, particularly when there is authority within the English jurisdiction. Moreover, most English building contracts contain express clauses requiring the employer to give possession of the site to the contractor on the date of possession written into the contract. The fact that some of the JCT contracts expressly allow the employer to have specific other contractors on the site indicates an acceptance under such contracts that, without such express terms, other contractors have no rights to enter onto the site, because the contractor has exclusive possession of the whole site.

It is difficult to see how an employer who fails to give possession of the whole site can rely on the ‘sufficient possession’ argument. As a practical necessity, sufficient possession will usually mean possession of the whole of the site. Without possession of the whole site, the contractor may be prevented from properly planning its work. The contractor may wish to do things on the site other than simply constructing the building. It will certainly need to check the condition of the site or to decide where materials should be stored or where to place site offices. Unless full possession is given, the contractor is deprived of the ability freely to organise the work: ‘a contractor is entitled to plan the work as it pleases.’⁵⁷ In *Freeman & Son v Hensler* it was stated:

‘I think there was an implied condition on the part of the defendant that he would hand over the land to the plaintiffs to enable them to carry out what they had contracted to do, and that it applied to the whole area.’⁵⁸

This concerned a contract in which nothing was said about possession. The court considered the matter so important that they were prepared to imply a term that possession of the whole site must be given. Obviously, a contract may contain express terms which restrict the contractor’s possession of the site, but in the absence of such terms, there is little doubt that in most cases possession means possession of the whole of the site.

4.6.3 Failure to give possession

If the employer fails to give possession on the date stated in the contract, it is a breach of contract and, indeed, if extended in time, it may be a repudiatory breach, because without possession of the site it is clear that the contractor cannot execute the Works. It is a breach not only of the express terms of the JCT contracts but also

⁵⁶ (1975) 21 BLR 42 at 50 per Urie J.

⁵⁷ *Greater London Council v Cleveland Bridge and Engineering Co Ltd* (1984) 8 Con LR 30 at 39 per Staughton J.

⁵⁸ (1900) 64 JP 260 at 261 per Collins LJ.

a breach of the term that would be implied at common law in the absence of an express term.

Such a repudiatory breach entitles the contractor to accept the repudiation, and to commence an action for damages. Such damages would normally amount to the loss of the profit that it would otherwise have earned,⁵⁹ but the contractor may have suffered other damage and it would be entitled to recover all the damages flowing directly from the breach under the usual principles.⁶⁰ It is seldom that a contractor would elect to treat the breach as an opportunity to bring its obligations to an end; it is more likely that a contractor in this position will rely on its common law right to claim damages, while keeping its employment under the contract alive. Indeed, JCT contracts now provide for the contractor to claim loss and/or expense (which amounts to damages) in the event of any act of prevention on the part of the employer (e.g. SBC clause 4.24.6). In short, where the employer is responsible for preventing the contractor from taking possession of the site on the due date, the contractor is entitled to damages for the breach as the least of its remedies.⁶¹ In practice, such damages may be slight if the failure lasts no more than a few days. The right to possession of the site on the date given in the Contract Particulars admits of no qualification.

In *The Rapid Building Group Ltd v Ealing Family Housing Association Ltd*,⁶² a case which arose under a JCT 63 contract, the employer was unable to give possession of the site on the due date. The north east corner was occupied by a man, woman and a dog. They were squatting in an old motor car with various packing cases attached in an area of some size. The employer took eviction proceedings, but it was at least 19 days before the site was cleared of squatters so as to enable the contractors to occupy the whole of the site. The Court of Appeal held that the employer was in clear breach of the contractual clause providing for possession of the site to the contractor, because of the employer's failure, for whatever reason, to remove the squatters until an appreciable time after possession should have been given. Although the contractors entered on the site, the trial judge found that they were unable to clear it and so the breach caused appreciable delay and disruption, which entitled the contractors to damages. The judge referred to the area as 'significant'.

This case should be contrasted with *Porter v Tottenham Urban District Council*,⁶³ another decision of the Court of Appeal, where the contractor was wrongfully excluded from the site by a third party for whom the contractor was not responsible in law and over whom it had no control. There was no possession clause, and the court held that there was no implied warranty by the council against wrongful interference by a third party – an adjoining owner – with the only access to the site. The *Rapid Building* case is also to be distinguished from *LRE Engineering Services Ltd v Otto Simon Carves Ltd*,⁶⁴ where the point at issue was whether main contractors were in breach of a sub-contract term requiring that 'access . . . shall be afforded', and this was denied to the sub-contractors because of unlawful picketing during a steel strike.

⁵⁹ *Wraight Ltd v P H & T Holdings Ltd* (1968) 13 BLR 27.

⁶⁰ See Chapter 5, Section 5.2.

⁶¹ *London Borough of Hounslow v Twickenham Garden Developments Ltd* (1970) 7 BLR 81.

⁶² (1984) 1 Con LR 1.

⁶³ [1915] 1 KB 776.

⁶⁴ (1981) 24 BLR 127.

The phrase ‘possession of the site’ was considered in *Whittal Builders v Chester-le-Street District Council*.⁶⁵ It was held that the phrase meant possession of the whole site and that, in giving piecemeal possession, the employer was in breach of contract so as to entitle the contractor to damages. The words of Mr Recorder Percival in the first *Whittal* Case, are also in point:

‘Taken literally the provisions as to the giving of possession must I think mean that unless it is qualified by some other words the obligation of the employer is to give possession of all the houses on 15 October 1973. Having regard to the nature of what was to be done that would not make very good sense, but if that is the plain meaning to be given to the words I must so construe them.’⁶⁶

These words appear to be a very clear and precise statement of the law. He proceeded to look at the contract and found that the Appendix (the forerunner of the current Contract Particulars) had been amended to refer to ‘. . . 18 dwellings at any one time’. The Appendix was, of course, part of the printed form which took precedence over other documents.

4.6.4 Deferring possession

Under JCT terms (both in 1963 and 1980 Editions, before the 1987 amendment) there used to be no power for the architect or the employer to postpone the giving of possession of the site. This problem is less likely to arise under SBC, IC and ICD contracts because these contracts contain a clause which provides that the employer, not the architect, may defer the giving of possession for a period not exceeding six weeks or whatever lesser period is stated in the Contract Particulars from the contract date of possession. There is an appropriate Contract Particulars entry and SBC clauses 2.29.3 and 4.24.6 contain an appropriate relevant event and relevant matter respectively. IC and ICD have similar provisions.

If the employer fails to give possession and the deferment provision is not stated to apply or if the employer fails to operate the provision or if the failure lasts longer than the period stipulated by the provision, the employer will be in serious breach as if the deferment provision had not been included.

The position is straightforward under the terms of ACA 3, because clause 11.1 provides:

‘. . . the Employer shall give to the Contractor possession of the site, or such part or parts of it as may be specified, on the date or dates stated in the Time Schedule . . .’

Failure to give possession under ACA 3 is, of course, a breach of contract on the employer’s part, but it seems that the architect’s powers under that contract are sufficiently wide to enable the architect to postpone the giving of possession. Moreover, under ACA 3 terms, the architect can give the contractor an extension of time for late possession under clause 11.5 (in either of its alternatives).

⁶⁵ (1987) 40 BLR 82 (the second case).

⁶⁶ (1985) 11 Con LR 40 at 51.

The wording is sufficiently wide to cover failure to give possession in accordance with clause 11.1 and disturbance to regular progress and loss and expense involved can be dealt with under clause 7.1, which again refers to 'any act' disrupting regular progress.

The position appears to be the same under GC/Works/1(1998): see clauses 34, 36(2)(b) and 46(1)(b) and the discussion of claims arising under GC/Works/1(1998) in Chapter 15.

4.7 Site conditions

4.7.1 Basis of claim

Essentially, there are two avenues for claims in respect of site conditions:

- if the contractor is given incorrect information about site conditions by the employer, and
- under the provisions of SBC clause 2.13 which requires that the bills of quantities have been prepared in accordance with the Standard Method of Measurement, 7th edition.

4.7.2 Provision of incorrect information

A statement, supposedly of fact, made by the employer or the architect or quantity surveyor on behalf of the employer and which it is intended that the contractor will act upon is a 'representation'. Such statements are commonly made in tender documents. If the statement is untrue, it is a 'misrepresentation'. A misrepresentation may be the basis of a claim if it is made part of the contract or if it was an inducement to the contractor to enter into the contract. Otherwise, contrary to popular belief, it has no relevance. A misrepresentation can be fraudulent, negligent, innocent or under statute. The significance lies in the remedies available. Misrepresentations made by or on behalf of the employer may entitle a contractor to a claim for negligent misrepresentation and/or breach of warranty and/or under the Misrepresentation Act 1967, as amended.

An important result of the Misrepresentation Act 1967 is that the remedies which were formerly restricted to cases of fraud or recklessness now apply to all kinds of misrepresentations unless the party who made the representation can prove 'that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true'.⁶⁷ The general common law rule that the employer does not warrant that the drawings, bills of quantities or specification are accurate or that the site is fit for the works or that the contractor will be able to construct on the site is thought not to excuse the employer from liability for misrepresentation.⁶⁸ Most of the cases on which such common law principles are founded

⁶⁷ Section 2(1) of the Misrepresentation Act 1967.

⁶⁸ *Appleby v Myers* (1867) LR 2 CP 651; *Thorn v London Corporation* (1876) 1 App Cases 120.

are based on nineteenth century cases which must be treated with caution in the light of the 1967 Act. Architects are liable at common law for any fraudulent or negligent misstatement or representation⁶⁹ and also liable under the 1967 Act and it is thought that the scope of such liability is increasing.⁷⁰ Section 3 of that Act restricts the employer's power to exclude liability for misrepresentation.

'If any agreement (whether made before or after the commencement of this Act) contains a provision which would exclude or restrict—

- (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
- (b) any remedy available to another party to the contract by reason of such a misrepresentation;

that provision shall be of no effect except to the extent (if any) that, in any proceedings arising out of the contract, the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case.⁷¹

A representation followed by a warning that the information given may not be accurate will not usually be sufficient to protect the employer, because it is a clear intention to circumvent section 3 of the Act. Indeed, such a statement may convert the representation into a misrepresentation.⁷² In many instances a representation is made in the preliminaries section of bills of quantities or specification, as a statement about the subsoil, underground services or aspects of the site. When the contract is executed, such representations become terms of the contract and if they are incorrect, the contractor may have a claim for damages for breach of contract or possibly for breach of warranty where it was not expressly made part of the contract.⁷³

If the representation is fraudulent, i.e. 'knowingly, without belief in its truth, or recklessly, careless whether it is true or false',⁷⁴ the contractor may be able to recover more substantial damages under section 2(1) of the 1967 Act, which probably entitle it to recover all losses even those which are unforeseeable so long as they are not too remote. A very clear example of fraudulent misrepresentation is to be found in the old case of *Pearson v Dublin Corporation*.⁷⁵ This concerned a complex project for the construction of an outfall sewer and associated works for a lump sum price. A key point was that an existing wall continued to a depth of 9 feet below a datum. This was shown on information provided by the employer's engineers. The true situation was that the wall scarcely reached 3 feet in depth. This caused the contractor considerably more expense than expected. It emerged that the engineers had carried out no proper survey and themselves doubted the accuracy of the information they provided. The court held that this amounted to fraud. The contract required the contractor to satisfy itself regarding the dimensions of the existing work and stated that the employer was not responsible for the accuracy of statements it had made about the existing structure. However, none of this was enough to provide a defence

⁶⁹ *Hedley Byrne & Co v Heller and Partners Ltd* [1964] AC 465.

⁷⁰ See the fuller discussion of this point in Chapter 1, Section 1.4.4.

⁷¹ Substituted by s. 8(1) of the Unfair Contract Terms Act 1977.

⁷² *Cremdean Properties Ltd v Nash* (1977) 244 EG 547.

⁷³ *Bacal Construction (Midlands) Ltd v Northampton Development Corporation* (1976) 8 BLR 88.

⁷⁴ *Derry v Peek* (1889) 14 App Cases 337.

⁷⁵ [1907] AC 351.

to the allegation of fraud. Had it not been fraud, it might have succeeded. Whether such a defence would be enough now is doubtful.

It is clear that, depending on the precise circumstances, the contractor may be able to found a claim against the employer on the ground of misrepresentations made during pre-contractual negotiations on the part of the employer or any person authorised by the employer with regard to the site and allied conditions. In *Morrison-Knudsen International Co Inc v Commonwealth of Australia*, the contractor claimed that the basic information provided at pre-tender stage regarding the soil at the site was false, inaccurate and misleading. The contractor alleged that the clays at the site, contrary to the information provided, contained large quantities of cobbles. The court had to consider a preliminary issue and concluded:

‘The basic information in the site document appears to have been the result of much technical effort on the part of a department of the defendant. It was information which the plaintiffs had neither the time nor the opportunity to obtain for themselves. It might even be doubted whether they could be expected to obtain it by their own efforts as a . . . tenderer. But it was indispensable information if a judgment were to be formed as to the extent of the work to be done . . .’⁷⁶

However, somewhat confusingly it has been held that a contractor is not entitled to rely on a ground investigation report if it was merely referred to on a drawing. The court held that it was not incorporated into the contract, but merely noted to identify a source of relevant information for the contractor. This was insufficient to override a clause in the contract which placed on the contractor the obligation to satisfy itself about the nature of the site and the sub-soil.⁷⁷ The general situation remains deeply unsatisfactory.

It is possible for a contractor to successfully found a claim for damages for negligent misrepresentation, breach of warranty or under the Misrepresentation Act 1967 on the basis of representations made or warranties given by the employer or on its behalf. Such things as statements made in the preliminaries section of the bills of quantities regarding the sequence of operations, statements in letters written by the architect and possibly by the quantity surveyor, and certainly statements made by representatives of the employer at meetings held prior to the contract being executed may all be called in aid in appropriate circumstances.⁷⁸

4.7.3 SBC clause 2.13

The second avenue also involves an important consideration: whether the employer has a duty to provide accurate information about the site as part of the duty to provide correct bills of quantities. The mere fact that negotiations take place before a contract is executed does not preclude a duty of care, but whether such a duty exists will be a matter of fact in each case. An important factor will be whether it is clear

⁷⁶ *Morrison-Knudson International Co Inc v Commonwealth of Australia* (1972) 13 BLR 114 at 121 per Barwick CJ.

⁷⁷ *Co-operative Insurance Society v Henry Boot Scotland Ltd*, 1 July 2002, partially reported (2003) 19 Const LJ 109.

⁷⁸ *Holland Hannen & Cubitts (Northern) Ltd v Welsh Health Technical Organisation* (1981) 18 BLR 80.

that the contractor relied upon the employer to provide accurate site information.⁷⁹ Bills of quantities commonly attempt to place all the risks associated with uncertain ground conditions on the contractor. This is despite the fact that an average tendering contractor is in no position to carry out the kind of investigations necessary to establish the true state of the ground. Where bills include clauses stating that tenderers should carry out their own investigations and carry all risks associated with dealing with unstable ground, the reality is that few contractors would seriously contemplate carrying out full scale investigations prior to tendering. Indeed, despite what the bills of quantities may state, it is doubtful whether an employer would be prepared to allow a succession of tenderers to excavate trenches and sink boreholes at will all over the site.

The position was explored by Dr John Parris in relation to clause 2.2.2.1 of the JCT Standard Building Contract 1980 which provided that ‘the Contract Bills . . . are to have been prepared in accordance with SMM6’.

‘This seems to require the employer to provide the contractor with information in his possession about potentially difficult site conditions. Other provisions require the employer to provide specific information. The contractor may have a claim against the employer, should site conditions not be as assumed . . . SMM7 states that information regarding trial pits or bore holes is to be shown on location drawings under “A. Preliminaries/General Conditions” or on further drawings which accompany the bills of quantities or stated as assumed. Rock is classified separately.’⁸⁰

It appears that, in such circumstances, the contractor may have a claim against the employer, if site conditions are not indicated in the tender documents and turn out to be different to what the contractor has assumed. In *C Bryant & Son Ltd v Birmingham Hospital Saturday Fund*,⁸¹ the contractor undertook to erect a convalescent home under an early version of the JCT standard form. Clause 11 of the contract provided:

‘The quality and quantity of the work included in the contract sum shall be deemed to be that which is set out in the bills of quantities, which bills, unless otherwise stated, shall be deemed to have been prepared in accordance with the standard method of measurement last before issued by the Chartered Surveyors’ Institution.’

The standard method of measurement in question provided that, where practicable, the nature of the soil must be described and that attention must be drawn to any existing trial holes and that details of excavation in rock must be given separately. Although the bills of quantities referred to drawings and the site conditions about which the contractor was to satisfy itself, excavation in rock was not shown separately. The court held that the contractor could treat the rock excavation as an extra.

⁷⁹ *Dillingham Construction Pty Ltd v Downs* (1972) 13 BLR 97.

⁸⁰ John Parris, *The Standard Form of Building Contract: JCT 80*, 2nd edition 1985, reproduced in the 3rd edition, p. 306 (2002) with the necessary changes, Blackwell Publishing.

⁸¹ [1938] 1 All ER 503.

Chapter 5

Direct loss and/or expense

5.1 Definition

In most standard form contracts, the clauses which entitle the contractor to apply for additional money, as a result of disruption or prolongation, use the phrase 'direct loss and/or expense'. It is essential to understand the meaning of the phrase, otherwise neither the party claiming nor the party claimed against will be in a position to understand their rights. The term is used in SBC clause 4.23, IC and ICD clause 4.17, MW and MWD clause 3.6.3 and DB clause 4.20. It is also used in related sub-contracts: SBCSub/C, SBCSub/D/C and DBSub/C clause 4.19, ICSUB/NAM/C, ICSUB/C and ICSUB/D/C clause 4.16 and in other contracts in the JCT suite.

Other standard form contracts use similar phrases such as 'direct loss and/or damage' or 'direct loss and expense'. It is thought unlikely that the slight differences in expression will result in any radical difference in meaning. Government Conditions use different wording. GC/Works/1(1998), clause 46(1) refers to the contractor 'properly and directly' incurring any expense which results in regular progress being materially disrupted or prolonged. Clause 46(6) defines 'expense' as being money expended by the contractor. However, it makes clear that it does not include a sum expended or a loss incurred by way of interest or finance charges. Loss and expense may be thought of as two sides of the same coin, but it is open to debate whether all, or indeed any, instances of loss would be covered by the word 'expense'. The point is examined below. Although expressed in varied ways, all the phrases used in the standard form contracts make clear that they refer to losses and/or expenses which the law regards as 'direct' in contrast with, and excluding, losses and/or expenses regarded as being indirect or too remote. This is a distinction of particular importance which will be considered later. The phrase 'direct loss and/or damage' has been judicially considered.¹

'what is its usual, ordinary and proper meaning in the law: one has to ask whether any particular matter or items of loss or damage claimed have been caused by the particular matter. . . . if it has been caused by it, then one has to go on to see whether there has been some intervention or some other cause which prevents the loss or damage from being properly described as being the direct consequence of the [matter].'²

¹ In *Wraith Ltd v P H & T (Holdings) Ltd* (1968) 13 BLR 27.

² (1968) 13 BLR 27 at 33 per Megaw J.

Reference to ‘direct loss and/or expense’ or similar phrases is clearly the same as a reference to damages claimable at common law and should be thought of as equivalent in terms of the measure of damages and the standard of proof required.³

The word ‘loss’ is often used to encompass, not only money which should have, but has not, been received, but also money which should not have, but has, been spent. Thus, the contractor is entitled to claim its losses or its expenses or both together. But the use of both words, ‘loss’ and ‘expense’ suggests a distinction between the two expressions. If that is correct, the use of the dual phrase gives the contractor two separate avenues of claim based on the same grounds:

- losses actually incurred as a direct result of particular circumstances
- expenditure actually occurring as a direct result of the same circumstances.

This is important, because although ‘loss’ may be held to encompass both loss and expense, ‘expense’ is not wide enough to include loss: ‘the primary meaning of the word “expense” is actual disbursement’.⁴

5.2 *Direct v indirect*

It is important to understand the difference between direct and indirect (or consequential) loss or damage. A party in breach is not liable to pay all the damage suffered by the injured party. The courts limit the damages to what is reasonable in the circumstances by ruling out all damage said to be too remote. It is only the remoteness of, or the entitlement of a party to, damages which is considered here, the amount of damages is a separate issue which will be considered later. The rule has been stated as follows:

‘Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.’⁵

The rule is said to have two ‘limbs’. The first limb refers to damages ‘arising naturally’. Such damages are often referred to as ‘general damages’. They are the kind of damages that anyone would expect to be the result of the breach. The second limb refers to damages ‘in the contemplation of both parties at the time they made the contract’.

³ See *F G Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 BLR 7 CA.

⁴ *Chandris v Union of India* [1956] 1 All ER 358 at 363 per Lord Justice Hodson.

⁵ *Hadley v Baxendale* (1854) 9 Ex 341 at 354 per Alderson B.

These kinds of damages depend upon the knowledge of the parties of special circumstances and they are often referred to as 'special damages'. For example, suppose Ms A buys a car from Acme Used Cars and drives it away intending to use it immediately to drive to Southampton; there to start a pre-booked cruising holiday. Further, suppose the car breaks down on the way to Southampton so that Ms A does not reach the ship in time before its departure. Ms A can certainly claim from Acme the cost of necessary repairs to the car, but she cannot claim the cost of the lost holiday, because Acme knew nothing of the projected holiday or the consequences of a mechanical breakdown. If all those facts had been made known to Acme before or at the time of the sale contract for the car, Ms A might have been able to claim the cost of the holiday also. In practice, it is unlikely that Acme would accept such a liability and there may well be clause in its sale contract to deal with that eventuality, but the principle remains good.

A useful explanation of this decision and of the authorities generally was given in *Victoria Laundry (Windsor) v Newman Industries, Coulson & Co.*⁶ It took the form of propositions which may be summarised as follows:

- (1) The purpose of damages is to put the injured party in the same position, so far as money can, as if its rights had been observed, but to pursue that purpose would provide the party with a complete indemnity and it is considered to be too harsh.
- (2) The injured party may only recover loss reasonably foreseeable at the time of the contract.
- (3) Foreseeability depends on the knowledge of the party committing the breach.
- (4) Knowledge is of two kinds: (a) all reasonable people are assumed to know the kind of loss which is liable to result from a breach in the ordinary course of things; (b) actual knowledge of special circumstances which may cause greater loss.
- (5) The contract breaker will be liable provided that, if it had asked itself, it would have concluded, as a reasonable person, that the loss was liable to result from that breach.
- (6) It is enough if the loss could be seen as likely to result.

These propositions were considered by the House of Lords in *The Heron II*.⁷ Although they rejected proposition 6 as being too broad, they did not agree the test which should be substituted. Taking their Lordships opinions together, *it is enough if the loss was a serious possibility* appears to be a reasonable consensus. The crucial point which lies at the foundation of the rule in *Hadley v Baxendale*, is the knowledge possessed by the contract breaker at the time the contract was entered into. The point is whether the party had just the ordinary knowledge of an average person in that situation or whether, if the party had considered the matter, its special knowledge would have led it to the conclusion that greater (or perhaps less) than the ordinary loss would result from the breach.

It seems that it is enough if the type of loss is within the reasonable contemplation of the parties even though the *extent* of such loss is far greater than they could have

⁶ [1949] 1 All ER 997 at 1002 per Asquith LJ.

⁷ *Koufos v Czarnikow Ltd (The Heron II)* [1969] 1 AC 350.

contemplated. The classic case is *Parsons (Livestock) Ltd v Utley Ingham & Co Ltd*.⁸ There, a bulk food storage hopper was installed, but the ventilator was closed and as a result the pig-nut feed became mouldy. A herd of pigs became ill with a serious disease and many of them died. The court held that it was foreseeable that in these circumstances the pigs would have suffered illness although the consequences would not have been expected to be so serious. However, the parties would have contemplated that if the hopper was defective, serious illness and death was a serious possibility.

5.3 Exclusion of consequential loss

In theory, the differences between types of loss are easy to understand. In practice, these concepts often lead to real difficulties of interpretation. In *Saintline Ltd v Richardsons, Westgarth & Co Ltd*,⁹ the court considered the difference between direct and consequential loss or damage. The manufacturers of engines for a ship were in breach of contract and the ship's owners brought an action for damages including loss of profit, wages and storage costs and other fees. The contract contained a clause providing that a manufacturer's liability should not 'extend to any indirect or consequential damages whatsoever'. The court held that all these items were recoverable as damages, because they were a direct and natural consequence of the breach of contract. In giving judgment the judge said:

'What does one mean by "direct damage"? Direct damage is that which flows naturally from the breach without other intervening cause and independently of special circumstances while indirect damage does not so flow. The words "indirect or consequential" do not exclude liability for damages which are the direct and natural result of the breaches complained of . . . What the clause does do is to protect the respondents from claims for special damages which would be recoverable only on proof of special circumstances and for damages contributed to by some supervening cause.'¹⁰

*Croudace Construction Ltd v Cawoods Concrete Products Ltd*¹¹ considered the same point. Croudace was the contractor for the erection of a school and it contracted with Cawoods for the supply and delivery of masonry blocks. Cawoods had attempted to restrict its liability by including a term in the contract that

'We are not under any circumstances to be liable for any consequential loss or damage caused or arising by reason of late supply or any fault, failure or defect in any materials or goods supplied by us or by reason of the same not being of the quality or specification ordered or by reason of any other matter whatsoever'.

Such clauses usually only exclude liability for damages under the second limb of *Hadley v Baxendale* and so it proved in this case.¹² Croudace made a claim against

⁸ [1977] 2 Lloyd's Rep 522.

⁹ [1940] 2 KB 99.

¹⁰ [1940] 2 KB 99 at 103 per Atkinson J.

¹¹ (1978) 8 BLR 20.

¹² *British Sugar plc v NEI Power Projects Ltd* (1987) 87 BLR 42.

Cawoods for breach of contract alleging late delivery and defects in materials. They sought to recover loss of productivity and various costs arising out of delay. The question which went before the Court of Appeal was whether such damages were to be regarded as ‘consequential’ loss. The Court held that the exclusion of consequential loss or damage did not apply to loss resulting in the ordinary course from late delivery of, and defects in, materials which were heads of direct loss. The Court quoted with approval: ‘on the question of damages, the word “consequential” has come to mean “not direct”. . .’¹³ An example of a case where the damage was held to be too remote is *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc*.¹⁴ Scottish Power had contracted to supply temporary power to Balfour Beatty’s concrete batching plant. Scottish Power was held to be in breach of contract after an interruption in the power supply. The facts were that Balfour Beatty was in the process of constructing an aqueduct by the system of continuous concrete pour. Therefore, when the supply was interrupted, the aqueduct had to be demolished and work re-commenced. A claim for the cost of the demolition and re-building failed, because the House of Lords held that Scottish Power could not be presumed to know of the practice of continuous pour construction. It was said:

‘It must always be a question of circumstances what one contracting party is presumed to know about the business activities of the other. No doubt the simpler the activity of the one, the more readily can it be inferred that the other would have reasonable knowledge thereof. However, when the activity of A involves complicated construction or manufacturing techniques, I see no reason why B who supplies a commodity that A intends to use in the course of those techniques should be assumed, merely because of the order for the commodity, to be aware of the details of all the techniques undertaken by A and the effect thereupon of any failure of or deficiency in that commodity. Even if the Lord Ordinary had made a positive finding that continuous pour was a regular part of industrial practice it would not follow that in the absence of any other evidence suppliers of electricity such as the Board should have been aware of that practice.’¹⁵

Croudace Construction Ltd, Saintline Ltd and Wraight Ltd were considered with approval by the Court of Appeal in *F G Minter Ltd v Welsh Health Technical Services Organisation*,¹⁶ which confirmed that, in JCT contracts, what is recoverable as direct loss and/or expense is the same as the damages recoverable at common law for breach of contract.

Although some of these cases are expressly referable to JCT contracts, it is probable that the principles also apply to claims under other contracts where phrases similar to ‘loss and/or expense’ are used. In *Robertson Group (Construction) Ltd v Amey-Miller (Edinburgh) Joint Venture*¹⁷ the court, after listening to many submissions regarding remoteness of damage, considered that the phrase ‘all direct costs and directly incurred losses’ permitted the recovery of reasonable sums by way of general corporate overheads and profit. In that instance, the phrase occurred in a letter which

¹³ *Millar’s Machinery Co Ltd v David Way & Son* (1934) 40 Comm Cas 204 at 210 per Maugham LJ.

¹⁴ (1994) 71 BLR 20.

¹⁵ *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* (1994) 71 BLR 20 at 29 per Lord Jauncey.

¹⁶ (1980) 13 BLR 7.

¹⁷ [2005] ScotCS CSOH 60.

was intended to form a temporary contract while the terms of a contract under JCT conditions were finalised.

However, it should be noted that, because the recovery of direct loss and/or expense is a procedure under a specific term of the contract, the recovery of certain heads of claim may be permitted under the express contract terms which might not be recoverable as a claim for damages at common law.¹⁸

¹⁸ Some of the grounds for such contractual claims are not breaches of contract as an examination of the 'Relevant Matters' in SBC clause 4.24 will confirm (see Chapter 13, Section 13.1.5).

Chapter 6

Points of principle

Although the legal principles involved in formulating and ascertaining claims for direct loss and/or expense are well settled, the application of those principles in practice is far from easy. There are many principles which are common to all claims and it seems convenient to gather them together in one place for ease of reference.

6.1 *Measure of damages*

Something has been said in the last chapter about the type or kind of damage and the problem of remoteness of damage. The measure of damages is the *amount* of damages. Reimbursement of loss and/or expense is simply a means of putting the contractor back in the position in which it would have been, but for the delay or disruption. Therefore, the loss and/or expense should not be some notional or estimated figure, but the actual amount lost or spent by the contractor.

The principal function of damages, assuming that the loss is not too remote, is to put the injured party into the same position, so far as money can, as if the contract had been performed without breach.¹ This is the basic principle – the right of the injured party to receive precisely what it paid for. If a party contracts to have six apple trees planted and only five are planted, it is clear that the party is entitled to have the additional tree delivered and planted. If, for some reason, the supplier cannot or will not supply and plant the remaining tree, it is open to the purchaser to take action to recover the reasonable costs of purchasing a tree and having it planted. That is a principle which is easy to understand, but it is not applied rigorously. An employer who tries to insist on a house being demolished and re-built, because there is a small error in the overall dimensions is likely to be disappointed. The courts have resisted applying the principle strictly, for example, if some other lesser remedy would suffice and if the cost of strict entitlement is out of proportion to the benefit to be gained thereby:

‘What constitutes the aggrieved party’s loss is in every case a question of fact and degree. Where the contract breaker has entirely failed to achieve the contractual objective it may not be difficult to conclude that the loss is the necessary cost of achieving that objective. Thus if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in

¹ *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 PC.

establishing that his loss is the necessary cost of reconstructing. Furthermore in taking reasonableness into account in determining the extent of loss it is reasonableness in relation to the particular contract and not at large. . . . However, where the contractual objective has been achieved to a substantial extent the position may be very different.²

The amount of damages recoverable where the contract has been substantially performed depends upon the particular circumstances of each case. It is sometimes said that the proper measure of damages in a building case is the diminution in value of the property. However, that will not always result in a just outcome. The position has been put like this:

‘It is a common feature of small building works performed on residential property that the cost of the work is not fully reflected by an increase in the market value of the house, and that comparatively minor deviations from specification or sound workmanship may have no direct financial effect at all. Yet the householder must surely be entitled to say that he chose to obtain from the builder a promise to produce a particular result because he wanted to make his house more comfortable, more convenient and more conformable to his own particular tastes: not because he had in mind that the work might increase the amount which he would receive if, contrary to expectation, he thought it expedient in the future to exchange his home for cash. To say that in order to escape unscathed the builder has only to show that to the mind of the average onlooker, or the average potential buyer, the results which he has produced seem just as good as those which he had promised would make a part of the promise illusory, and unbalance the bargain.’³

In general, there are no rules which can be applied in all circumstances in order to arrive at the amount of damages recoverable. Each case requires careful analysis.

6.2 *Burden of proof*

The burden of proof usually lies with the party making a claim. There are some instances where the facts supporting a claim appear so obvious that the burden shifts to the other party to, in effect, prove that the claim is valueless (e.g. see Section 6.3 below). Such instances are rare in building contracts and the general rule is that the contractor must prove its claim. Many architects and even contractors will state that the contractor’s task is to convince them that the claim is both viable and worth as much as the contractor states. There is an old adage that ‘he who asserts must prove.’⁴ That is clearly correct, however, the courts have clearly set down the standard of proof in different circumstances.

There is some misconception surrounding the standard of proof which a contractor must bring to its claim. Crucially, in criminal cases, the Crown must prove its case ‘beyond a reasonable doubt’. In civil cases, however, the claimant must prove ‘on

² *Forsyth v Ruxley Electronics and Construction Ltd & Others* (1995) 73 BLR 1 at 12 per Lord Jauncey.

³ *Forsyth v Ruxley Electronics and Construction Ltd & Others* (1995) 73 BLR 1 at 14 per Lord Mustill.

⁴ *Joseph Constantine Steamship Line v Imperial Smelting Corporation Ltd* [1942] AC 154 at 174 per Viscount Maugham.

the balance of probabilities⁷ – a very much less onerous standard. The latter is the standard required of a contractor in regard to its claim. In simple terms, the architect must be satisfied that it is more likely than not that the contractor has suffered the loss for the reasons it states.

6.3 Res ipsa loquitur

Literally: ‘the thing speaks for itself’. Although earlier it has been said that the onus of proving is on the party making a claim, there are some situations where the facts so clearly point one way that the burden of proof is placed upon the other party to show that it is not at fault.⁵ Such a case might be where scaffolding is erected next to a public highway and a passer-by is found on the floor with head injuries. A blood-stained brick of the type being stacked on the scaffolding is found beside the injured person. The facts clearly indicate that a brick has fallen from the scaffolding onto the head of the passer-by, causing the injuries. In any legal action by the injured person, the burden of proof would probably lie with the contractor to show that it was *not* responsible. Rarely, some elements of the contractor’s claim may fall into this category. For example, if the architect postpones all work for a period of a week, it is obvious that a delay to the completion date is inevitable. It would be for an architect who disagreed to prove otherwise.

6.4 Mitigation of loss

It is also known as mitigation of damage. The idea is to reduce waste. If water is dripping through a defective roof covering, the building owner is not entitled simply to leave it to drip in the knowledge that the cost of repairing or reinstating all the damage to the furnishings can be recovered from the contractor responsible. The building owner would, at the very least, be expected to put out a bucket to collect the drips and take steps to repair the leak.

There is much confusion about the principles of mitigation of loss. They are quite simply stated:

- (1) A party cannot recover damages resulting from the other party’s breach of contract if it would have been possible to avoid any damage by taking reasonable measures.
- (2) A party cannot recover damages which it has avoided by taking measures even if such measures were greater than what might be considered reasonable.
- (3) A party can recover the cost of taking reasonable measures to avoid or mitigate (reduce) its potential damages.

This is said to give rise to a duty to mitigate.⁶ Although a failure to mitigate will not give rise to a legal liability; it will simply reduce the damages recoverable to what they would have been had mitigating measures been taken.

⁵ *Scott v London and St Katherine’s Docks Co* (1865) 3 H & C 596.

⁶ *British Westinghouse v Underground Railways Company* [1912] AC 673.

That is not to say that the claimant must do everything possible. It need not do anything other than an ordinary prudent person in the course of his or her business would do.⁷ Moreover, the innocent party, if faced with different ways of mitigating, does not have to act reasonably in exercising a choice.⁸

The application of this principle is illustrated by the example of plant standing idle as a result of a variation order. The contractor would not be entitled simply to accept the situation, but would be obliged to make reasonable endeavours to use the plant productively elsewhere or to persuade the plant owner to accept an early return. In the first instance, the costs of, say, moving the plant to another site so that it might be used would be recoverable as a part of a direct loss claim, provided of course that this sum did not exceed the costs which would have been otherwise incurred. However, although the injured party must only take reasonable measures and not unreasonable measures, the courts usually will not look too critically in hindsight at his actions in attempting to mitigate. The crucial question is whether, in attempting to mitigate, the injured party acted reasonably.⁹ Even if the actions of the injured party resulted in an increase in loss, the cost will be recoverable if the party acted reasonably.¹⁰ Moreover, the injured party must be given a reasonable time in which to decide how to mitigate the loss.¹¹ The reasonable time may of course be immediately, as in a case where a contractor's piece of machinery develops a fault which causes it to do damage. The contractor must start to mitigate by immediately ceasing to use it. An example of mitigation of loss built into the standard form contracts is the provision in JCT contracts that the contractor is to be permitted to remedy, at its own cost, defects which arise in the Works during the rectification period. An employer who, for no good reason, refuses to allow the contractor to remedy such defects may only recover what it would have cost the contractor to do the remedial work.

It has been argued that the existence of a duty to mitigate losses favours the contract breaker. The effect of the duty to mitigate is that the party in breach of contract is not obliged to pay a sum to represent the whole of the loss, but only such sum as represents the loss after mitigating steps have been, or should have been, taken. Therefore, it is argued, it may sometimes be more cost efficient for a contractor to withdraw its resources from one contract in order to place them in another, more lucrative, contract. Although in breach of the original contract, the contract breaker may overall be better off when the effect of the duty to mitigate is taken into account.

A somewhat similar, but opposite, situation can arise where an employer wrongfully terminates the contractor's employment and the contractor claims damages for the repudiatory breach. It may be that the contractor's removal from site, although wrongful, allows the contractor to put more resources into another project or even to commence a new project which would otherwise have presented a serious problem for the contractor. The amount of damages which the contractor is able to claim for the repudiation would have to take these circumstances into account and may amount to nothing.

⁷ *London and South England Building Society v Stone* [1983] 1 WLR 1242.

⁸ *Strutt v Witnell* [1975] 1 WLR 870.

⁹ *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452.

¹⁰ *Melachrino v Nicholl & Knight* [1920] 1 KB 693.

¹¹ *C Sharpe & Co Ltd v Nosawa* [1917] 2 KB 814.

The position is, in fact, spelled out specifically in the extension of time clauses of many standard form contracts (e.g. see SBC clause 2.28.6) in relation to delay. The clause expressly requires the contractor to use its best endeavours to prevent delay occurring and to mitigate the effects of a delay once encountered. The position has been clarified in *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd* where the court addressed the question of mitigation in relation to delay:

‘It is difficult to see how there can be any room for the doctrine of mitigation in relation to damage suffered by reason of the employer’s culpable delay in the face of express contractual machinery for dealing with the situation by extension of time and reimbursement of loss and expense. However that may be as a matter of principle, what is plain is that there cannot be both an extension to the full extent of the employer’s culpable delay, with damages on that basis, and also damages in the form of expense incurred by mitigation, unless it is alleged and established that the attempt at mitigation, although reasonable, was wholly ineffective.’¹²

It is clear that clauses like SBC clause 2.28.6 only bite on the contractor’s own culpable delays and on delays caused by neutral events. So far as the money claims provisions are concerned, the general law, which imposes a duty to take all reasonable steps and prevents claims for damages which have resulted purely from a failure to take such steps, applies. It is for the party receiving the claim to show that the claimant has failed to mitigate.¹³ Therefore, when the contractor submits an application for direct loss and/or expense, it is for the architect to show that the contractor has not mitigated its losses. But although that burden falls on the architect, the architect is entitled to seek relevant information from the contractor in order to form an opinion about the matter.

6.5 Betterment

This is generally understood as being the situation when repair or restoration work results in something which is better in quality or standard than the quality or standard which existed before the repair or restoration was necessary. As a matter of general law, damages will not be awarded for the cost of reinstatement which results in betterment unless the party making the claim has no reasonable choice but to follow that course.¹⁴ Usually, if a party decides that it will re-build a damaged property to a better standard than before the damage took place, it will be unable to claim the total cost of such re-building. Instead it will have to make a claim excluding the cost of reaching the better standard. However, where a party is claiming the cost of rebuilding premises which are destroyed as a result of another party’s breach, the injured party is entitled to the full cost of rebuilding even though the effect will be to get new in place of old. In *Richard Roberts Holdings Ltd v Douglas Smith Stimson Partnership & Others*, the position was put like this:

¹² (2000) Const LJ 316 at 332 per Judge Hicks.

¹³ *Garnac Grain Co Inc v Fauré & Fairclough* [1968] AC 1130.

¹⁴ *Voaden v Champion* [2002] 1 Lloyd’s Rep 623.

'I think that the law can be shortly summarised. If the only practicable method of overcoming the consequences of a defendant's breach of contract is to build to a higher standard than the contract had required, the plaintiff may recover the cost of building to that higher standard. If, however, a plaintiff, needing to carry out works because of a defendant's breach of contract, chooses to build to a higher standard than is strictly necessary, the courts will, unless the new works are so different as to break the chain of causation, award him the cost of the works less a credit to the defendant in respect of betterment.'¹⁵

The question has been dealt with many times in the courts and it was considered again in *Witts & Others v Montgomery Watson Ltd.*¹⁶ Witts and Others were the owners of properties along the seafront at Putsborough Sands in Devon. The owners commissioned Montgomery Watson to produce recommendations for the construction of sea defences. The recommendations were accepted, a design was prepared and the defences were built, but they were subsequently badly damaged by storms. The owners took legal action against Montgomery Watson and liability was settled. The question remaining was the amount of damages payable to the owners. Clearly, the sea defences ought to have been extensive and it was agreed that the amount required to rectify them was more than £500,000 which was far more than the original cost. Montgomery Watson argued that they should only have to pay the original price. If the new defences were better than the old, the owners should pay the cost over and above the cost of reinstating to the original standard. The court considered the effect of Montgomery Watson's negligence. It was reasonably foreseeable that the result of negligent design of the defences would result in their failure. The damages would be the cost of rectifying the failure. The only practical way of doing that was much more expensive than the original scheme. The owners had no real alternative and, therefore, they were entitled to the whole cost. The court held that there was no element of betterment.

Where a party acts in reliance on proper legal advice, it will usually be assumed to have acted reasonably.¹⁷

6.6 Notices

6.6.1 Requirement for notice

Many contracts require the contractor to give a notice to the employer or the architect as part of the contractual procedure for extension of time and loss and/or expense. Where the contract provides for notice, a question which often arises is whether the architect is entitled or obliged to attend to matters concerning extension of time or loss and/or expense in the absence of a notice or where notice has not been given precisely in the form or manner or at the time prescribed in the contract. The answer to that depends on whether the requirement for notice is a condition precedent.

¹⁵ (1988) 5 Const LJ 223 at 227 per Judge Newey.

¹⁶ [1999] 11 BLISS 5.

¹⁷ *Lodge Holes Colliery v The Borough of Wednesbury* [1908] AC 323.

A condition precedent is a condition which makes the rights or duties of the parties depend upon the happening of an event. Where there is a condition precedent, the right or duty does not arise until the condition is fulfilled. It acts as a barrier. It is sometimes open to question whether or not a term is a condition precedent unless it is expressly stated to be such and even where expressly so stated, the courts may decline to hold that a term is a condition precedent if to do so would be contrary to commercial sense in a special situation.¹⁸ If a notice provision is to be a condition precedent, it has been held that it must state a time for service and make clear that a failure to serve will mean loss of rights.¹⁹ In practice this strict requirement is often not enforced. Clearly, where the requirement for notice is a condition precedent, the absence of a notice will be fatal to any claim.

6.6.2 Whether a condition precedent

Traditionally the requirement for the contractor to give notice of delay under JCT contracts has not been treated as a condition precedent. It has been held that the architect ought to give an extension of time if it seemed warranted, even where the contractor had not submitted a notice of delay, in order to avoid the possibility that time would become at large and the employer would be deprived of the opportunity to recover liquidated damages. The right to an extension of time was not to be unaffected by the contractor's failure to give notice. The architect was entitled to take the contractor's breach of obligation into account when deciding upon the extension of time by ensuring that the contractor did not get a greater extension of time than would have been the case if notice had been timeously given.²⁰

The idea that a contractor was entitled to an extension of time if the employer committed any act of prevention whether or not notice had been given came to a head in an Australian case;²¹ but subsequent courts in Australia and in England declined to follow the decision.

There seems to be no obstacle to making such a notice a condition precedent if that is what the parties agree in clear words. In *City Inn Ltd v Shepherd Construction Ltd*,²² the court considered JCT 80 with amendments. One such amendment, clause 13.8.5, stated:

'If the Contractor fails to comply with one or more of the provisions of Clause 13.8.1, where the Architect has not dispensed with such compliance under Clause 13.8.4, the Contractor shall not be entitled to any extension of time under Clause 25.3.'

Clause 13.8.1 required the contractor to submit within a specified timescale written details after receipt of an architect's instruction. It was somewhat like provision for a variation quotation in DB schedule 2, paragraph 4.2. It was argued by the defendants that clause 13.8.5 constituted a penalty. This was rejected by the court:

¹⁸ *Koch Hightex GmbH v New Millenium Experience Company Ltd* [1999] EWCA Civ 983.

¹⁹ *Bremer Handelsgesellschaft MBH v Vanden Avenue-Izegem PVBA* [1978] 2 Lloyd's Rep 109.

²⁰ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

²¹ *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] (2005) 21 Const LJ 71.

²² [2001] ScotHC 54; decision upheld on appeal: [2003] BLR 468.

‘It was perfectly legitimate for the employer to require and the contractor to accept that, in relation to architect’s instructions, the employer should be forewarned of anticipated consequential delay, and for it to be agreed that, in the event of the contractor failing to provide such forewarning in accordance with clause 13.8.1, the risk of loss through delay should shift from the shoulders of the employer to those of the contractor. Such provision did not constitute a penalty.’²³

A factor taken into account by the court was that the amount specified as liquidated damages was genuinely pre-estimated and could not be considered ‘extravagant, penal or oppressive’. In another case, the court considered whether the requirement for notice was a condition precedent:

‘... the principle which applies here is that if there is genuine ambiguity as to whether or not notification is a condition precedent, then the notification should not be construed as being a condition precedent, since such a provision operates for the benefit of only one party, i.e. the employer, and operates to deprive the other party (the contractor) of rights which he would otherwise enjoy under the contract.’²⁴

A heavily amended MF/1 form of contract was being used in which clause 6.1 required the sub-contractor to give written notice to the contractor within a reasonable period of any circumstance which entitled the sub-contractor to an extension of time. This requirement is similar to many standard extension of time clauses in building contracts. The court examined the clause and considered whether it was a condition precedent even though it did not set out all the criteria in the *Bremer Handelsgesellschaft* case. The judge had this to say:

‘Turning to the wording of the clause, in my judgment the phrase, “provided that the sub-contractor shall have given within a reasonable period written notice to the contractor of the circumstances giving rise to the delay” is clear in its meaning. What the sub-contractor is required to do is give written notice within a reasonable period from when he is delayed, and the fact that there may be scope for argument in an individual case as to whether or not a notice was given within a reasonable period is not in itself any reason for arguing that it is unclear in its meaning and intent. In my opinion the real issue which is raised on the wording of this clause is whether those clear words by themselves suffice, or whether the clause also needs to include some express statement to the effect that unless written notice is given within a reasonable time the sub-contractor will not be entitled to an extension of time.

In my judgment a further express statement of that kind is not necessary. I consider that a notification requirement may, and in this case does, operate as a condition precedent even though it does not contain an express warning as to the consequence of non-compliance. It is true that in many cases (see for example the contract in the *Multiplex Constructions (UK)* case itself) careful drafters will include such an express statement, in order to put the matter beyond doubt. It

²³ [2001] ScotHC 54 at paragraph 8 per Lord MacFadyen. decision upheld on appeal: [2003] BLR 468.

²⁴ *Steria Ltd v Sigma Wireless Communications Ltd* (2007) 118 Con LR 177 at 203 per Judge Stephen Davies.

does not however follow, in my opinion, that a clause – such as the one used here – which makes it clear in ordinary language that the right to an extension of time is conditional on notification being given should not be treated as a condition precedent. This is an individually negotiated sub-contract between two substantial and experienced companies, and I would be loathe to hold that a clearly worded requirement fails due to the absence of legal “boilerplate”.²⁵

In another case, the court considered whether another phrase, ‘provided always that’ was indicative of a condition precedent. It occurred in a standard trade contract (TC/C) which the parties had amended. It is notable that the phrase also occurs in SBC clause 4.23 (see Chapter 13, Section 13.1.4 *Timing of Application*) and in other contracts where such contracts stipulate that certain things may happen ‘provided always that’ other things are done:

‘This type of wording is often the strongest sign that the parties intend there to be a condition precedent. What follows such a proviso is usually a qualification and explanation of what is required to enable the preceding requirements or entitlements to materialise.’²⁶

As the court said, this is probably one of the clearest indications of the presence of a condition precedent.

There is a danger for architects which was referred to in the *London Borough of Merton* case. That was that if the architect wrongly decides that notice from the contractor is a condition precedent to some action of the architect and consequently does nothing, the employer might be severely disadvantaged, for example, by time becoming at large and liquidated damages being irrecoverable. The court was there considering whether the contractor was entitled to an extension of time even if it failed to give the required notice.

There is a suggestion that an architect who is at all unsure might simply proceed on the basis that notice is not a condition precedent. This is essentially good practical advice. However, it overlooks the fact that, if the notice is a condition precedent, the architect has no power under the contract to act if the condition is not satisfied. That leaves the architect open to the criticism, at the least, of acting outside his or her powers. It is suggested that where an architect is unsure whether the notice requirement is a condition precedent and, therefore, opts to treat it as if it was not a condition, the architect’s client should be informed and authority obtained to waive any condition which may exist. The position with regard to waiver is considered below.

The key message from these cases seems to be that where the giving of notice is a condition precedent to an extension of time, the failure to give such notice will prevent the giving of an extension of time, but time will not become at large. Unfortunately, there is no golden rule which can be automatically applied to these clauses in order to decide whether there is a condition precedent or not. However, it is tentatively suggested that where extension of time or loss and/or expense clauses

²⁵ *Steria Ltd v Sigma Wireless Communications Ltd* (2007) 118 Con LR 177 at 203 per Judge Stephen Davies.

²⁶ *WW Gear Construction Ltd v McGee Group Ltd* (2010) 131 Con LR 63 at 75 per Akenhead J.

are concerned, notice (and possibly other actions such as provision of information) will be a condition precedent:

- if a time for service of the notice is stated and the clause makes clear that a failure to serve will mean loss of rights, or
- if the requirement for notice is preceded by the words ‘it is a condition precedent that’, or
- if the requirement for notice is preceded by the words ‘provided always that’ or probably ‘provided that’, or
- if the language used makes clear that the parties intend the requirement to be a condition precedent.

It will be more likely to be a condition precedent where the contract is individually negotiated between parties who are experienced in the industry.

However:

If there is any ambiguity, it is unlikely to be a condition precedent.

6.6.3 Waiving the requirement for notice

Although the giving of notice may be a condition precedent, the party entitled to rely on the condition may waive it at its discretion. In a case not connected to the construction industry, the court had to consider an accident insurance policy that provided that it should be a condition precedent to recovery that notice should be given within 14 days of the accident, and, in the case of death, the representatives of the deceased should agree to a post-mortem examination, if required by the insurers. The insured met with an accident and died about a month afterwards, but notice of the accident was not sent to the company until three days before his death. After the death, the insurers wrote to the widow requesting a post-mortem examination of the deceased in accordance with the conditions of the policy. Nothing was said in the letter about reserving any objection to failure to give timeous notice. The widow gave her consent to the post-mortem examination. The court held that the insurers, by demanding a post-mortem examination, had waived the defence of want of timeous notice.

‘On the whole matter, I am of opinion, with the Lord Ordinary, that in making the demand upon the widow for a *post-mortem* examination, without giving her any notice of their intention to put forward the want of timeous notice as a preliminary defence to her claim, the company must be held to have waived their right to state that defence.’²⁷

And later:

‘But they made a demand for a *post-mortem*, and I think they must be taken to have done so on the footing of having waived any defence they had on the ground of notice. They were entitled to waive it. That is not doubtful.’²⁸

²⁷ *Donnison v The Employers’ Accident and Livestock Insurance Co Ltd* (1897) 24 R. 681 at 686 per Clerk LJ.

²⁸ *Donnison v The Employers’ Accident and Livestock Insurance Co Ltd* (1897) 24 R. 681 at 686 per Lord Young.

6.6.4 Essential elements of a notice

Whether or not any communication ranks as a notice for the purpose of the relevant clause is a question which can only be answered by reference to all the circumstances. However, it is possible to obtain some guidance from the cases. Clearly, the requirements for a notice will be satisfied if it is sent in the form of a letter which sets out everything which the clause requires. Usually, it is sufficient if a notice is sent by ordinary first class post to the last known or notified business address of the recipient. In the case of a limited company it is normally enough if it is sent to the registered office. However, some contracts stipulate that notices are to be given to certain addresses or sent in a particular way. If so, they must be sent in that way. For example, SBC clause 1.7.4 requires certain notices (for example, of termination) to be sent by recorded signed for, special delivery or to be delivered by hand.

It has been held that service by fax was sufficient in cases where the contract stipulated 'actual delivery'.²⁹ Service by e-mail may be sufficient if sent to an e-mail address which has been held out to be the address of the recipient.³⁰ Where the contract makes clear that only notices served in the manner and time prescribed will be considered valid, notices sent by any other method will usually be invalid. However, where a method is stipulated, but it is not said that it is the only method which will be valid, any other method which is not less advantageous to the recipient will be acceptable.³¹ The point has also been made in a case dealing with acceptance of an offer:

'Where, however, the offeror has prescribed a particular method of acceptance, but not in terms insisting that only acceptance in that mode shall be binding, I am of opinion that acceptance communicated to the offeror by any other mode which is no less advantageous to him will conclude the contract.'³²

and in a subsequent case:

'... in the absence of a very clear indication of a contrary intention, it would not be reasonable to construe a provision for service by registered mail as excluding the giving of notice by other equally expeditious means which do in fact result in the actual receipt of the notice by the offeror, e.g. personal delivery or unregistered mail, although of course in the latter event the offeree will run the risk of non-delivery.'³³

However, it is not necessarily relevant to the validity or otherwise of the notice that the person who needs to see it actually knows the notice has been served:

'If a claimant is required to serve X and, mistakenly purports to serve Y, the mere fact that Y informs X of the purported service so that X knows of it, cannot convert Y's receipt of the documents into good service upon X.'³⁴

²⁹ *Construction Partnership UK Ltd v Leek Developments* [2006] EWHC B8 (TCC).

³⁰ *Bernuth Lines Ltd v High Seas Shipping Ltd* (2006) 1 Lloyd's Rep 537.

³¹ *Yates Building Co Ltd v Pulleyn and Sons (York) Ltd* (1976) 237 EG 183.

³² *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593 at 1597 per Buckley J.

³³ *Spectra Pty Ltd v Pindari Pty Ltd* [1974] 2 NSWLR 617 at 623 per Wootten J.

³⁴ *Lantic Sugar Ltd v Baffin Investments Ltd* [2009] EWHC 3325 (Comm) at paragraph 40 per Gross J.

It is often asked whether mention of delay in the minutes of a site meeting is sufficient notice for the purposes of the contract? This question has been considered in relation to a sub-contract:

‘I also consider that the written notice must emanate from [the sub-contractor]. Thus for example an entry in a minute of a meeting prepared by [the consultant] which recorded that there had been a delay by [the employer] . . . and that as a result the sub-contract works had been delayed, would not in my judgment by itself amount to a valid notice under cl 6.1. The essence of the notification requirement in my judgment is that [the contractor] must know that [the sub-contractor] is contending that relevant circumstances have occurred and that they have led to delay in the sub-contract works.’³⁵

In another case, it seems to be suggested that a note in site meeting minutes recording an oral representation by the contractor during that meeting is not a valid notice.³⁶ That appears to be a correct view. The position may be different where a contractor, during the course of a site meeting hands a progress report to the architect which indicates delays and the reasons therefor.

What must be included in the notice depends entirely on what the contract clause requires. The courts will commonly interpret notices given by business people in a fairly broad way, in the sense that provided it is clear from the notice what is intended by the person serving, the form of wording used may not be important. Nevertheless, the starting point for the content of the notice must be the clause itself:

‘In my judgment, the requirement for [the sub-contractor] to give notice of the circumstances giving rise to the delay cannot be extended to include a requirement that the notice must make it clear that it is a request for an extension of time under cl 6.1, or to include a requirement that it gives an assessment of the delay. Both would involve reading into the clause words which are not there, and which do not meet the stringent requirements for implication of such terms. I do not however accept [the sub-contractor’s] argument that all that is required is a notification that particular relevant circumstances have occurred. In my judgment it is necessary for [the sub-contractor] to notify [the contractor] first that identified relevant circumstances have occurred and second that those circumstances have caused a delay to the execution of the sub-contract works. In my judgment the latter is required, either by a process of purposive construction or by a process of necessary implication, because otherwise it seems to me that the notice would not achieve its objective . . .’³⁷

6.6.5 Giving, issue and receipt of notices

Most building contracts refer to the giving of notices and the issuing of certificates. The word ‘issue’ suggests a more formal process than ‘giving’, but in each case there is the sense that something passes from the giver (or the issuer) and the recipient.

³⁵ *Steria Ltd v Sigma Wireless Communications Ltd* (2007) 118 Con LR 177 at 201 per Judge Stephen Davies.

³⁶ *John L Haley Ltd v Dumfries and Galloway Regional Council* (1988) 39 GWD 1599.

³⁷ *Steria Ltd v Sigma Wireless Communications Ltd* (2007) 118 Con LR 177 at 201 per Judge Stephen Davies.

However, to speak of a notice being ‘given’ is usually to say that it has also been received. Thus, if a contract provides that the employer shall give notice within 10 days of an event, it is clear that the notice must not only leave the employer but must arrive with the recipient within the 10 days.

On the other hand, if a contract refers to an architect issuing a certificate within 10 days of an event, it simply means that the certificate must leave the architect within 10 days. ‘Issue’ means ‘send forth’.³⁸ Therefore, it is wrong to use the words indiscriminately. The issue of a notice is not the same as the receipt of the notice, neither is it the date on which it was served.³⁹ If the contract refers to a notice being issued, it is the date when it was sent out which is the relevant date no matter what date is written on the notice itself.⁴⁰

A notice can neither be issued nor given if it does not leave the person issuing or giving it. Therefore, a notice which is properly made out, signed and dated, but put in a drawer, has no effect whatsoever. A court has held:

‘In the ordinary meaning of the word “issue”, it seems to me plain that something more is needed for a certificate to be issued . . . than the mere signature of the architect upon it, whether he be employed under a contract of service or as an independent agent.’⁴¹

6.7 *Categories of claim*

6.7.1 **Prolongation and disruption claims**

There is no limit to the categories of claim which a contractor may bring under the terms of the contract other than limits imposed by the ingenuity of the claimant. Therefore, in referring to prolongation and disruption claims, there is no intention to suggest that these are the only categories of claims which can be made. In practice, however, these are the two most common categories of claim and a contractor attempting to advance a claim under some other category will have to convince the architect that it is entitled to make such a claim under the terms of the particular loss and/or expense clause before starting the process of substantiating the claim itself. Many of the heads of claim dealt with later in this chapter could be applied to both categories.

Prolongation occurs when there is a delay in completion of the Works beyond the contract date for completion. Disruption may occur together with prolongation or it may be entirely separate. An example of disruption would be if delays are caused to non-critical activities which, therefore, do not affect the overall period of time required to carry out the Works. Not every such example will allow a contractor to recover loss and expense of course. Disruption claims are notoriously difficult (but not impossible) to prove and every case will depend on the surrounding circumstances.

³⁸ *The Concise Oxford Dictionary*.

³⁹ *Glen v The Church Wardens & Overseers of the Parish of Fulham* (1884) 14 QBD 328.

⁴⁰ *Cantrell & Another v Wright and Fuller Ltd* (2003) 91 Con LR 97.

⁴¹ *London Borough of Camden v Thomas McInerney & Sons Ltd* (1986) 9 Con LR 99 at 111 per Judge Esyr Lewis.

It is often contended that there is no such thing as a claim for disruption as part of loss and expense. Rather, it is said, such a claim is properly the subject of valuation of variations which standard form contracts provide for by adjustment of rates and even the creation of new rates to deal with changes of circumstances. There is some merit in such arguments, but they do not successfully deal with all types of disruption and especially cannot cover disruption which is not the result of a variation.⁴²

6.7.2 Prolongation

A prolongation claim is probably the commonest category of claim. It is also the simplest and most straightforward to prepare and to understand. In essence it simply states that the employer or architect has acted in such a way, or failed so to act, that the contractor has been unable to complete the Works by the contractual date for completion, but has been obliged to complete later, i.e. the contract period has been prolonged. Moreover, the actions or inactions fall under grounds set out in the loss and/or expense clause in the relevant contract (e.g. one of the matters in SBC clause 4.23). The claim then proceeds to quantify the loss and/or expense involved. Despite, or perhaps because of, its simplicity, many contractors are slovenly in its preparation. A 'claim' for extension of time is the usual precursor to a prolongation claim, to the extent that many contractors and architects believe that unless the contractor is given an extension of time first, it is not eligible for a prolongation payment. Nothing could be further from the truth.⁴³ Notwithstanding that, it is often convenient for the contractor to get its extension of time first, because the evidence in support of entitlements for extension of time will often be the same as the evidence required to establish an entitlement to loss and/or expense, although it will not establish the quantum.

Once the architect has been satisfied about the duration of the prolongation period, the contractor must establish the loss and expense suffered as a result. Because it is actual loss and actual expense which is to be ascertained, the practice of using the priced preliminaries in the bill of quantities to arrive at the figure is not acceptable (unless perhaps it is quite impossible to establish actual figures). The actual cost to the contractor of being onsite the extra period of time must be established. In considering the amounts due as a result of delays, a court has recently set out the important difference between a contractor's claim for damages for delay and a claim for extension of time on account of the delay as follows:

'When an extension of time of the project completion date is claimed, the contractor needs to establish that a delay to an activity on the critical path has occurred of a certain number of days or weeks and that that delay has in fact pushed out the completion date at the end of the project by a given number of days or weeks, after taking account of any mitigation or acceleration measures. If the contractor establishes those facts, he is entitled to an extension of time for completion of the whole project including, of course all those activities which were not in fact delayed by the delaying events at all, ie they were not on the critical path.

⁴² See also Chapter 14.

⁴³ *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106.

But a claim for damages on account of delays to construction work is rather different. There, in order to recover substantial damages, the contractor needs to show what losses he has incurred as a result of the prolongation of the activity in question. Those losses will include the increased and additional costs of carrying out the delayed activity itself as well as the additional costs caused to other site activities as a result of the delaying event. But the contractor will not recover the general site overheads of carrying out all the activities on site as a matter of course unless he can establish that the delaying event to one activity in fact impacted on all the other site activities. Simply because the delaying event itself is on the critical path does not mean that in point of fact it impacted on any other site activity save for those immediately following and dependent upon the activities in question.

It seems to me that [the contractor's] claim in respect of its prolongation costs has fallen between the two stools described above. The claim is put on the basis that the delays to the foundation works caused critical delay to the whole project of over 12 weeks and the whole project's general site costs are claimed on that basis. Those costs are evaluated as at October 2002 to January 2003 and not at the end of the project which occurred well over two years later in May 2005. But no evidence has been called to establish that the delaying events in question in fact caused delay to any activities on site apart from the RGF and IW. That being so, it follows, in my judgment, that the prolongation claim advanced by [the contractor] based on recovery of the whole of the site costs of the . . . site, fails for want of proof.⁴⁴

Here the court highlights a very important point: that non-critical activities may not be affected by a delay to the critical path and, therefore, no damages are claimable for them. This sets out a much stricter test for ascertaining loss and/or expense than has been common practice.

Although the period of prolongation tends, for obvious reasons, to be measured as starting from the contractual completion date and extending on as appropriate, this is not necessarily the time frame within which the costs should be ascertained, because the true costs resulting from a delay will usually follow the date the delay occurred. In the case of several delays, the relevant periods may be scattered throughout the contract period. The few weeks at the beginning and end of a contract will be characterised by a build up then a reduction respectively of site-related costs. Therefore, if the costs of prolongation were to be ascertained in respect of the final weeks of a contract, the contractor may get much less than its true entitlement.

Therefore, if a contract is prolonged for a period of six weeks which the contractor can establish is a direct result of some clause 4.24 relevant matters, the six weeks may be made up of several delaying occurrences taking place at differing times during the contract period. The task of identifying each delay and its monetary consequences is not always easy, but it must at least be attempted. Many architects will agree to take a representative slice of the appropriate number of weeks' prolongation from somewhere in the middle of the contract period. This seems, at first sight, to be a reasonably good empirical method of establishing appropriate costs, but it is not an

⁴⁴ *Costain Ltd v Charles Haswell & Partners Ltd* (2009) 128 Con LR 154 at 212 per Richard Fernyhough QC sitting as a Deputy Judge of the High Court.

ascertainment in the proper sense and it is difficult to substantiate if challenged. However, in practice, if both employer advised by the architect and quantity surveyor and the contractor find that or some other approximate system is acceptable, there is nothing more to be said.

An important restriction on recovery of loss and/or expense by the contractor was highlighted in a case which considered concurrent delay:

‘The general rule in construction and engineering cases is that where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the contractual completion date if there had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time), because he is entitled to have the time within which to complete which the contract allows or which the employer’s conduct has made reasonably necessary.

By contrast, the contractor cannot recover damages for delay in circumstances where he would have suffered exactly the same loss as a result of causes within his control or for which he is contractually responsible.⁴⁵

This is an important difference between concurrent responsibility for delay and concurrent responsibility for loss and/or expense.

6.7.3 Disruption

Disruption is usually claimed separately from prolongation. It may be present with or without prolongation. Disruption has always been very difficult to establish with any precision and even more difficult to ascertain in monetary terms. Traditionally, a contractor’s claim for disruption has relied both for substantiation of the fact of disruption and the ascertainment of its costs on the comparison of anticipated against actual labour costs. This bald approach does not bear consideration and it has been roundly condemned.⁴⁶ There may be many reasons for the actual costs of labour being greater than the costs anticipated by the contractor other than reasons for which the employer or the architect are responsible.

Commonly, disruption amounts to delays in non-critical parts of a project, but not to the extent that those parts become critical in programming terms. For example, the task of fitting external balcony railings on the front of a hotel project may not be critical. The contractor may have anticipated and priced for it to take three weeks during a five week available time slot. Therefore, if the work is delayed by one of the clause 4.24 relevant matters so that it takes four instead of three weeks, there will be

⁴⁵ *De Beers UK Ltd (Formerly: The Diamond Trading Company Ltd) v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC) at paragraphs 177 and 178 per Edwards-Stuart J.

⁴⁶ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

no resultant prolongation of the contract period, but the contractor will no doubt incur additional costs. That is a relatively simple example and, provided the contractor has kept proper records, there should be little difficulty in identifying the costs involved. Other instances are more complex.

The classic method of evaluating disruption is to compare the value to the contractor of the work done per man during a period of no disruption with the value per man doing the disrupted period and then to apply the ratio to the total cost of labour.⁴⁷ In order for the method to work, it must be possible to identify a period free from disruption and the compared outputs must relate to similar work.

⁴⁷ *Whittal Builders Co Ltd v Chester-le-Street District Council* (the 1985 case) [1996] 12 Const LJ 356.

Potential heads of claim

7.1 Foreshortened programme

7.1.1 Contractor's obligation to complete

SBC clause 2.4 requires the contractor to complete the Works 'on or before' the completion date. The completion date is the date for completion stated in the Contract Particulars or any later date fixed by the architect giving an extension of time under clause 2.28. Importantly, the contractor may, if it so chooses, complete the Works before the date fixed under the contract. Many employers, and some architects, believe that they can require the contractor to remain on site until the contract date for completion or any extension of that date. Indeed, it is sometimes said that under the terms of the contract the contractor has undertaken to stay on site until the completion date stated in the contract. That is clearly a wrong view, because clause 2.30 provides that the architect must issue a certificate of practical completion when, in the architect's opinion, practical completion has been achieved whether that occurs before or after the contractual date for completion. Therefore, the contractor does not undertake to stay on site until the contract completion date, but only until the Works have reached practical completion, which may be earlier. The employer's position is understandable, because it may be inconvenient for the employer to take possession of the building before the expected date. Staff to run the premises may not have been engaged, rentals may not have started, the employer may not have the necessary funding to pay the relevant interim certificate.

7.1.2 If the contractor could have completed earlier

The point becomes even more important in the ascertainment of loss and/or expense. Where a contractor is claiming for prolongation of the contract period, it will sometimes argue that the period of time on which the ascertainment will be based should not be measured from the contract completion date, but from an earlier date, i.e. the date when the contractor would otherwise have been able to complete. Therefore, the question is simply whether the contractor suffers loss and/or expense as a direct result of being kept on site longer than it needed to be on site. On that basis, it is

conceivable that if a contractor can show that, but for the relevant matter relied on under clause 4.24, it would have finished two months before the contract date for completion, it would be able to claim for the full length of the prolongation period, including the two months. That is the theory. In practice, the contractor would be put to proof that it had actually suffered the losses it claimed.

The arguments in favour of that contention are that, if it was not for the relevant matter, the contractor would have completed the Works by its intended date and made a certain profit. It was denied that profit by a relevant matter which under the terms of clause 4.23 entitles the contractor to reimbursement of loss and/or expense. Moreover, the relevant matters in clause 4.24 are in no way tied to a prolongation of the contract period beyond the contract completion date. The only criteria are:

- *whether regular progress has been materially affected*: there can be no doubt that it has been, because if it was not for the relevant matter the contractor would have finished by its earlier date.
- *whether the contractor has suffered direct loss and/or expense*: it must have suffered loss and/or expense by being kept on site longer than would otherwise have been the case.
- *whether it has been reimbursed under some other provision of the contract*: it has not been reimbursed under any other provision for the profit it would have made if it had finished at the earlier date.

The arguments against the contention are that, under the terms of the contract, the contractor is assumed to have allowed for being on site until the contract completion date. Its earlier date is not a contractually agreed date, but simply an attempt by the contractor to try to make more profit. Therefore, it has not suffered any loss and/or expense by staying on site until the completion date. The contractor has already been reimbursed under the provisions of the contract which provide for payment to the contractor of the agreed contract sum.

In *J F Finnegan Ltd v Sheffield City Council*,¹ where the contractor argued that prolongation costs should be calculated from a date worked out by reference to release of batches of houses rather than the contract completion date, the court held that the contract completion date prevailed. The date arrived at by reference to the release of houses was purely a programming date and it was not a date with which the contractor was obliged to comply.

This position is unaffected by the architect 'accepting' or 'approving' a programme from the contractor showing an earlier date for completion than that set out in the Appendix, because the architect has no power to vary the terms of the contract.² The situation may be complicated if the contractor has proposed a foreshortened programme at the commencement of the project and the employer, rather than the architect, has accepted or agreed the programme. In such a case, it may be convincingly argued that the parties have effectively varied the contract by agreeing a new completion date to which all are bound to work instead of the original date.

¹ (1988) 43 BLR 124.

² See the commentary to *Glenlion Construction Ltd v The Guinness Trust* at 39 BLR 93.

7.1.3 Late information

The position in respect of delay caused by late information from the architect is worthy of separate consideration. Under the previous suite of JCT contracts, late provision of instructions and information was listed as a separate relevant event and a separate matter (e.g. under JCT 98 clauses 25.4.6 and 26.2.2 respectively). The latest JCT suite of contracts has replaced these clauses (and some others) by a 'catch all' clause referring to acts of impediment, prevention or default on the part of the employer or the architect, among others. However, the principle remains the same and the contractor is entitled to an extension of time and loss and/or expense if the architect causes delay by not providing instructions and other information in accordance with the timescale set out in the contract.

The terms of the contract which govern the issue of information deserve careful study. Under SBC, the provision of information is governed by clauses 2.11 and 2.12. Clause 2.11 requires the architect to provide information in accordance with the information release schedule. This schedule should not be confused with the schedule of information said to be required which is often submitted by a contractor at the beginning of a project. Such 'information required' schedules have no particular contractual standing. It is comparatively rare for the architect to produce an information release schedule and where no such schedule is produced or where the schedule does not cover particular details, clause 2.12 provides that the architect must provide the contractor with such further details and drawings as are reasonably necessary to explain the contract drawings and to issue such instructions as are necessary to enable the contractor to complete the Works in accordance with the contract. Essentially, this means that the architect must provide the instructions in time to enable the contractor to complete the Works by the contract completion date. However, in this context there are two important qualifications to that obligation which are often overlooked. They amount to this:

- The architect must provide the information and instructions when reasonably necessary for the contractor to receive them, having regard to the progress of the Works. This means that if the contractor is making slow progress, the architect is no longer obliged to provide the instructions in time to enable the contractor to complete the Works by the contract completion date.
- However, if it seems that the contractor is likely to achieve practical completion before the contract date for completion, the architect may revert to providing instructions in time to enable the contractor to complete the Works by the contract completion date. Therefore, although the employer or architect must not actively prevent the contractor from meeting an earlier date, which it would otherwise have been able to meet, they are not obliged to make any special effort to assist the contractor to do so.

The current JCT provisions appear to have been drafted in response to the judgment in the case of *Glenlion Construction Ltd v The Guinness Trust*³ which considered a

³ (1987) 39 BLR 89.

term for the provision of information in JCT 63. One of the questions the court had to consider was:

'whether there was an implied term of the contract . . . that, if and in so far as the programme showed a completion date before the date for completion the employer by himself, his servants or his agents should so perform the said agreement as to enable the contractor to carry out the works in accordance with the programme and to complete the works on the said completion date.'

The court had no hesitation in answering this question in the negative:

'It is not suggested by Glenlion that they were both entitled *and* obliged to finish by the earlier completion date. If there is such an implied term it imposed an obligation on the Trust but none on Glenlion. It is unclear how the variation provisions would have applied. [The extension of time clause] operates, if at all, in relation to the date for completion stated in the appendix. A fair and reasonable extension of time for completion of the works beyond the date for completion stated in the appendix might be an unfair and unreasonable extension from an earlier date.'⁴

There was, therefore, no obligation on the Trust or its architect to provide information at any times earlier than necessary to enable the contractor to complete by the contract date. It is, therefore, clear that if the contractor intended to finish earlier than the contract date for completion, it would not have a claim for loss and/or expense associated with being kept on site longer than anticipated if the reason it could not finish on the earlier date was simply that the architect had provided information at such time as to allow completion by the contractual completion date. However, it is sometimes contended that if the contractor, as a matter of fact, had received all the information to allow it to finish at its earlier intended date, it may have a valid claim if it is prevented from finishing on that earlier date by one of the relevant matters in clause 4.24, even though it still finished before or on the contract completion date.

7.2 The 'knock-on' effect

This is often referred to as a 'winter working' claim, but although the principle is probably most commonly encountered in connection with winter working, it could apply to any other situation where a delay arises which inevitably causes the works to be carried out in a situation which is less felicitous than originally envisaged. In the case of winter working, the problem for the contractor is that something which causes it delay and which entitles it to loss and/or expense directly resulting from the delay may also move the programme of work so that site operations requiring good weather to execute may have to be carried out during a period of bad weather. At the extreme, activities programmed for the summer months have to be carried out in the winter. There will be occasions, of course, in which the contractor has had to

⁴ (1987) 39 BLR 89 at 103 per Judge Fox-Andrews.

allow in its tender for work to be carried out at a difficult time of year and a delay caused by the employer may actually improve the working conditions. The employer is not entitled to argue that the contractor should reimburse some money in consequence, but it may be appropriate for the architect to take it into account, depending on the facts, when ascertaining loss and/or expense for the delay.

Under SBC, IC and ICD standard forms, a contractor is entitled to an extension of time only for *exceptionally* adverse weather conditions. As a result of one relevant event, some work may be pushed into a period of poor weather. The weather conditions, although not what was envisaged, may not be exceptionally adverse in normal circumstances and may not merit an extension of time. Even if they are sufficiently bad to warrant an extension of time, bad weather is not in itself grounds for a claim for loss and/or expense.

Whether or not the contractor can found a claim for loss and/or expense in the circumstances will depend on whether the relevant causation can be established. In this respect it is important to remember that it is the originating delay which is crucial. It does not matter that the period of bad weather in which the contractor finds itself working is not exceptional. It may be quite normal for the time of year. The point is whether the period is worse than that for which the contractor allowed in its price.

The case which is much relied upon in this situation is the Canadian case of *Ellis-Don v The Parking Authority of Toronto*.⁵ The basic facts of the case were simply that a contract period of 52 weeks was delayed by a further 32 weeks. Of this delay, 7 weeks were caused by the employer who failed to obtain the appropriate permit so that the project commenced 7 weeks late. This led to further delay in starting up and a total of 17.5 weeks was laid at the door of the employer. Part of the work had to be carried out in winter and the contractor was successful in claiming additional payment.

In essence, however, the principle is simply damages for breach of contract.⁶ A court has accepted a winter working claim where a contractor was claiming in respect of the architect's repudiation of its contract with the contractor. The principle is just the same as if the contractor had been claiming under the building contract:

'The effect of working through the winter months was that the work was undertaken during extended periods of wet weather rather than in the significantly drier summer months. This was particularly so in the winter 2000–2001 which records showed was the wettest winter since 1766. The effect of this was to require [the contractor] to work in chalk ground conditions which had turned into slurry and in excavations where the sides had a tendency to collapse.

There were, in consequence, four additional heads of loss.⁷

The court went on to identify the heads of loss as:

- additional lean mix concrete required
- additional filling under slabs

⁵ (1978) 28 BLR 98.

⁶ See Section 5.2 above and the view of the House of Lords in *Koufos v Czarinkow Ltd (The Heron II)* [1969] 1 AC 350.

⁷ *CFW Architects (A Firm) v Cowlin Construction Ltd* (2006) 105 Con LR 116 at 161 per Judge Thornton.

- additional capping layer materials
- crushed concrete and stone materials.

In another case, the judge postulated a knock-on scenario thus:

'Assume the following facts: A contract is entered into in this form of contract in May for one year for completion on 31 July of the next. The work is of a tunnelling nature. No tunnelling can be carried out from 1 November to 31 March for seasonal reasons but during that period the contractor will have expensive equipment lying idle. In early April when the works were on course for completion on 31 July the architect issues an instruction under 11(1) requiring a variation the execution of which will add three months to the contract period. At the same time on the contractor's application he grants an extension of time for completion to 31 October. A fortnight before 31 October when the works as varied are on course for completion in due time a strike occurs which continues until 31 March. The contractor recommences work on 1 April but because he had no opportunity to protect his machinery during the six months period it then takes the contractor two months not two weeks to complete. There has been no fault on either party.

If the architect grants an extension of time of eight months only under 23(d) I can see no reason why the contractor under the contract cannot still recover all his direct loss and expense under 11(6).⁸

There are two things immediately to remark about this extract. The first is that the reference is to JCT 63. The principle, however, would be the same under SBC. The second thing is that the mathematics in the extract is wrong in a number of places. For example, it is surprising that a one year contract entered into in May is to be completed on 31 July the following year and the 'six months period' is actually five months. Despite the erroneous arithmetic, the principle remains unaffected.

In the commentary to this case, the editors of *Building Law Reports* note that it is a useful example to demonstrate why there is no necessary link between the grant or the refusal of an extension of time and the success of an application for loss and/or expense. They proceed, however, to disagree with the judge. In their view the contractor's costs flowed directly from the strike, not from the variation. They point out that a contractor takes the risk that a strike may occur not only during the original contract period, but also during any period of extension. They agree that the contractor would be entitled to an extension of the contract period for the strike. This example very clearly highlights the difficulties in considering knock-on claims. The question to be asked in each case is 'What is the direct cause of the winter working?'.⁹ If the contractor cannot show that there is a direct connection between the cause of the delay and the necessity to work in conditions which are less advantageous than anticipated at the time of entering into the contract and that there is no compensating saving, its claim will fail. *Bush v Whitehaven Port & Town Trustees* demonstrates the point.¹⁰

⁸ *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106 at 118 per Judge Fox-Andrews.

⁹ Causation is discussed in Chapter 8.

¹⁰ (1888) 52 JP 392. This case was disapproved in *Davis Contractors v Fareham Urban District Council* [1956] 2 All ER 145, and should be treated with caution.

Bush entered into a contract to lay a water main and carry out other work in Cumbria. The contract was made in June and it was understood that Bush would get possession of the site to allow it to proceed with the Works immediately. In fact, the whole of the site was not available until October. As a result of this delay, what should have been a summer contract became a winter contract and Bush incurred substantial extra costs. As a result it took action against the Trustees. The fact that Bush was successful may be considered surprising in view of an express term of the contract which stipulated that if there was delay in giving possession, the contractor would not be entitled to additional money. The Court of Appeal held that Bush was entitled to a *quantum meruit* (as much as it had earned). *Sir Lindsay Parkinson Ltd v Commissioners of Works and Public Buildings*,¹¹ explained the *Bush* judgment as based on an implied term regarding the circumstances in which the Works were to be executed.

Some of the difficulties in formulating a claim for winter working were highlighted in a case where a contractor was claiming against a specialist consulting civil engineer.¹² Part of the claim related to delays caused by winter working. The court quickly went to the heart of the problem when dealing with the conclusions of Costain's expert:

'Part of [the expert's] analysis maintains that an additional delay period of 14 working days should be added to the overall period of delay for which Haswell was responsible on account of winter working. The basis for this argument is as follows. [The expert] asserts that the critical delays to the RGF identified by him in the period October 2002 to January 2003 pushed all the works into delay. This meant that the pipework installation between and within the buildings, instead of being carried out and completed during the summer of 2003, as programmed by Costain, was pushed into October and November 2003, a period of winter working which caused further delays resulting from low productivity inherent in working outside during the short days and bad weather of winter. For this purpose [the expert] takes winter as commencing on 1 October 2003 and he opines that working after that date would take 1.33 times longer than working in the summer. It is this factor of 1.33 from which he derives the additional delay of 14 working days.

In cross-examination, [the expert] frankly accepted that this claim and his calculation of it was purely theoretical since he had done no research into the actual effect of winter working on the productivity of works such as pipework installation. He also accepted that 1 October 2003 was an arbitrary date to commence the calculation since, as we all know, the weather in October can be drier and more settled than in any of the summer months. [The expert] also accepted in evidence that the factor of 1.33 might be overstated since he had no solid basis upon which to make it.

I have no hesitation in rejecting this part of [the expert's] analysis. It is wholly theoretical and based on nothing but the meteorological records for the relevant period and [the expert's] experience and hunch. It seems to me to be unlikely that,

¹¹ [1950] 1 All ER 208.

¹² *Costain Ltd v Charles Haswell & Partners Ltd* (2009) 128 Con LR 154.

as a matter of course, productivity of outside building works in October and November is always measurably lower than for, say, the months of August and September. In this country the productivity of outside work depends to a great extent upon the weather which can be changeable at any time of year and there can be no presumption that it will be generally worse in October and November than in any other month. In the absence of hard facts and figures to support such a claim related to the facts of this case, which do not exist, in my judgment, this claim has not been established on the balance of probabilities.¹³

Essentially, a knock-on claim flows naturally from the breach, whatever it was, which caused the delay. It is by no means easy to identify the chain of causation correctly and contractors should not rely upon the kind of example put forward in the decision in *H Fairweather & Co Ltd v London Borough of Wandsworth*.¹⁴ In *Davis Contractors v Fareham Urban District Council*¹⁵ the contractor tendered on the basis that adequate supplies of labour would be available. Unfortunately, the letter containing this qualification was held by the court not to be part of the contract. Therefore, when shortages of labour caused the work to go slow causing substantial extra expense for the contractor, the court held that it was not entitled to any extra payment. It was said that ‘it by no means follows that disappointed expectations lead to frustrated contracts’.¹⁶ Generally, whatever the expectations of either party, it is wise to enshrine them in the contract so that in the event of a departure from the expectations, the appropriate remedy will be available. The foregoing cases indicate, perhaps more than anything else, the uncertainties inherent in this type of claim.

A contractor is obliged to take responsibility for those delays which it has caused, but it is not bound to take the unforeseeable into account. Prolongation of a contract which means working through an additional winter period almost inevitably results in ‘direct loss and/or expense’ to the contractor. There are occasions, of course, when a delay during the progress of the works may have the result of pushing work into a summer period to the contractor’s advantage.

7.3 *The more common heads of loss*

7.3.1 *General principles*

The following are not intended to be exhaustive heads of loss, but simply those that most generally apply. The basic principle to be borne in mind is that, subject to the restrictions of directness and foreseeability, the contractor should be put into the financial position which it would have been in had the delay or disruption not occurred. If this general principle is borne in mind, there should be no difficulty in judging or putting forward other heads of loss where the particular circumstances

¹³ *Costain Ltd v Charles Haswell & Partners Ltd* (2009) 128 Con LR 154 at 216 per Richard Feryhough QC sitting as a Deputy Judge of the High Court.

¹⁴ (1987) 39 BLR 106 at 118 per Judge Fox-Andrews. See the commentary at page 110 of the judgment.

¹⁵ [1956] 2 All ER 145.

¹⁶ [1956] 2 All ER 145 at 163 per Lord Simonds.

permit. There are no limits to the possible heads of loss other than the ingenuity of the contractor in putting together a valid claim.

Loss and expense is the equivalent of damages at common law. The measure of such damages can be quite complex, but the starting position is to put the injured party in the same position, so far as money can do it, as if the contract had been correctly performed.¹⁷ In recovering such damages, the law will allow only the recovery of losses actually suffered or expense actually incurred. The contractor should recover its actual costs if it has the records to substantiate them in preference to its tender costs, even though its tender costs are part of its tendered and accepted price.

In practice, there is no doubt that both contractors and professionals tend to approach the presentation and ascertainment of claims in a manner which is merely a loose approximation of what is required by law. This is probably a mixture of misunderstanding and an unwillingness to spend the requisite time to properly prepare the claim and to ascertain its value. Generally, a contractor will devote its energies to obtaining an extension of time. Having secured as long an extension of time as possible, the contractor will match the relevant events under which the extension was given to the relevant matters in the loss and/or expense clause. Having established how much of the extension of time is 'cost-related' (as commonly called), the contractor then seeks to obtain an amount of loss and/or expense based on multiplying the number of 'cost-related' weeks to the weekly amount of preliminaries in the bills of quantities.

In its favour, it has to be said that the system is simple and certain, once the extension of time has been given. Against it of course is that it results in the wrong amount being paid; whether that amount is greater or less than the amount to which the contractor is strictly entitled. Some parties are prepared to sacrifice a strictly correct result in favour of the economy in arriving at it. The courts recognise that such simple methods of arriving at the amount due are perfectly valid, albeit not in accordance with the contract, provided that both parties agree.¹⁸ However, architects and quantity surveyors who follow this route without the agreement of the employer run the risk that they may be held negligent if the quick system results in the employer paying more money to the contractor than would have been the case if the process had been properly observed. It is the difference between establishing precisely what is contractually due to the contractor and a very rough approximation.

7.3.2 On-site establishment costs

This is the correct term for what is often called site overheads or commonly simply 'preliminaries' or 'prelims', because the prices are normally found in the preliminaries section of the bills of quantities. As noted earlier, the bills of quantities prices are not normally to be used to calculate the loss and/or expense. Actual costs should be used. On-site establishment costs are perhaps the easiest head of claim to establish because

¹⁷ *Robinson v Harman* (1848) 1 Ex 850.

¹⁸ *Alfred McAlpine Homes North Ltd v Property & Land Contractors Ltd* (1995) 76 BLR 65.

all the relevant data should be readily accessible by the contractor in respect of the particular periods of delay. They will consist of the site accommodation, health and safety facilities, plant including vehicles, equipment, tools, telephone, and electricity charges, costs of welfare and sanitary facilities, light and heat where not covered by electrical charges, supervisory and administrative staff engaged upon the site of the particular contract.

Not all of these items are time-related. Some are clearly dependent on work or value and care must be taken that inappropriate items are excluded. For example, a crane or scaffolding may be held on site during a delay period; alternatively there may be equipment that is off site during a delay period. Care must be taken that the on-site staff are really necessary and not simply transferred to site during a period of delay, because there is no work for them elsewhere. Rather, the contractor should take steps to move unnecessary people and plant off-site. Relevant labour returns should be provided by the contractor to show what people were doing and why the particular resources were on site. It is always important that a contractor can demonstrate that what is on site during a delay period is necessary. On the other hand, the pattern of resourcing on a project is that there are some days or weeks at the commencement when the resources are being built up and probably a somewhat longer period at the end of the project when the site establishment will be running down. It would be wrong simply to take the costs from the date when the Works should have been completed to the date of practical completion.

7.3.3 Head-office overheads

The principle

It is important to understand that the contractor is not claiming that it has actually *lost* overheads. It has not been called upon to spend money. What is being claimed is the loss of the opportunity to contribute to head-office overheads by carrying out another contract or contracts immediately following the date when the contract, which is the subject of the claim, is supposed to be finished. Where a contractor was kept on site longer than the contract period, it used to be assumed as a matter of course that it would be able to recover its overhead costs for the period of delay. Although it is still possible for a contractor to recover head-office overheads as part of its claim for loss and/or expense, it is no longer an automatic presumption and recovery of head-office overheads has become far more difficult.

It is usually argued that the contractor must be able to show that it had other work which it could have done during the delay period, otherwise, even if the contract had finished on time, the contractor would have been unable to make any contribution during the period and, therefore, would suffer no loss under this head during any period of prolongation.¹⁹ An exception has been made where a contractor was able to show that it carried out one project at a time.²⁰

¹⁹ *J F Finnegan Ltd v Sheffield City Council* (1988) 43 BLR 124.

²⁰ *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd* (1995) 76 BLR 65.

Difficulties in proving loss of opportunity

It is inevitable that in regard to any contract, periods of delay or disruption will lead to an increase in direct head-office administrative costs dealing with the problems caused by the delay and disruption. Obvious examples are contract managers having to spend more time than usual in organising additional labour, ordering additional materials, re-scheduling supplies, re-arranging plant hire and revising programmes. The contractor may face difficulties in recovering some of such costs if the staff would not have been fully employed, but for the delay. It could be argued that it would have incurred such costs as part of its head-office costs whether or not there was a delay. It has been said:

‘... it is for [the contractor] to demonstrate that he has suffered the loss which he is seeking to recover . . . it is for [the contractor] to demonstrate, in respect of the individuals whose time is claimed, that they spent extra time allocated to a particular contract. This proof must include the keeping of some form of record that the time was excessive, and that their attention was diverted in such a way that loss was incurred. It is important, in my view, that [the contractor] places some evidence before the court that there was other work available which, but for the delay, he would have secured, but which, in fact, he did not secure because of the delay; thus he is able to demonstrate that he would have recouped his overheads from those other contracts and thus, is entitled to an extra payment in respect of any delay period awarded in the instant contract.’²¹

Significantly, the problem, identified by the arbitrator and confirmed by the judge, was that the delay was not sufficient to deter a building contractor of the size and standing of the contractor in this case from tendering for other work. The recovery of head-office overheads as part of prolongation costs is likely to be difficult in future where large contractors are concerned. Indeed, it is always difficult for a contractor to show that it has been prevented from using its workforce on another project, because the current project is delayed. In practice, few contractors nowadays keep a large permanent workforce on the books; much if not all of the workforce will be sub-contracted. In any event, the types of operatives engaged during a period of delay at the end of a contract are finishing trades and not the groundworkers and other early trades needed for a new project. Even the supervisors will often be finishing foremen. Therefore, it may be difficult to show that a contractor could not have carried out other work. It is usually only by being able to show that it actually turned work away that the contractor can prove its point. The smaller the contractor, the easier it should be for it to prove that a delay on one contract prevented it from earning a contribution to overheads on another contract. A slightly different approach was accepted by the court in *CFW Architects (a firm) v Cowlin Construction Ltd*²² and

²¹ *AMEC Building Ltd v Cadmus Investment Co Ltd* (1997) 13 Const LJ 50 at 56 per Mr Recorder Kallipetis. See also *City Axis Ltd v Daniel P Jackson* (1998) 64 Con LR 84, *Norwest Holst Construction Ltd v Co-operative Wholesale Society Ltd* (No 2) [1998] EWHC Technology 339 and *Beechwood Development Company (Scotland) Ltd v Stuart Mitchell (t/a Discovery Land Surveys)* [2001] ScotCS 30 where the criteria for head-office overheads are set out. The importance of the availability of other work is common to all.

²² (2006) 105 Con LR 116.

pushes the claims doors further ajar. This approach is considered under 'Use of formulae' below.

A more recent view was taken of this problem by the Court of Appeal in a case which did not concern construction but the damages resulting from flooding. However, the principles are applicable:

'I consider that the authorities establish the following propositions. (a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have not been established. (b) The claimant also has to establish that the diversion caused significant disruption to its business. (c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time.'²³

Efficient contractors will require their staff to keep time records and where this is done the direct costs involved should be readily ascertainable.

Head-office overheads include not only costs of staff engaged upon individual contracts but also such general ongoing and largely unchangeable items as rent, rates, maintenance, light, heating, cleaning, clerical staff, telephonists and general renewable costs such as stationery and office equipment. It is important to distinguish between these two elements of overhead costs however calculated. One set of overhead costs is costs which are expended in any event: rates, electricity and the like. The other is managerial time which is directly allocatable to the project and to no other.

In order to make a claim involving either overhead levels or profit levels (or both), it appears that actual overheads and profits must be identified – not merely theoretical or assumed levels. If direct loss and/or expense is the equivalent of what is claimable as damages for breach of contract at common law, the common law principles must apply. Force has been given to this argument by the courts:

'Managers are of course employed to sort out problems as they arise. If, however, the magnitude of the problem is such that an untoward degree of time is being spent on it then their costs are recoverable. Looking at the hours recorded, I am quite satisfied that is the position in this case. The costs of course go beyond those of managers and represent staff cost that would not have been incurred but for the defendant's breach. The plaintiffs might have provided an alternative quantification by reference to the additional costs to them of employing others but I do not consider that they are obliged to do so if they can satisfactorily demonstrate the cost to them of time unnecessarily spent and therefore lost. It is for the defendants to show that the losses *prima facie* incurred are not the correct measure of damage and this [the defendants] failed to do.'²⁴

²³ *Aerospace Publishing v Thames Water Utilities* (2007) 110 Con LR 1 at 30 per Wilson LJ.

²⁴ *Babcock Energy Ltd v Lodge Sturtevant Ltd* (1994) 41 Con LR 45.

There is some authority to the effect that, if all other methods of calculating loss fails, then provided that it is clear that some loss has been sustained, a court will accept an estimate which in some instances, may be little more than speculation.²⁵

Use of formulae

*Norwest Holst Construction Ltd v Co-operative Wholesale Society Ltd (No.2)*²⁶ was an appeal by the contractor against the award of an arbitrator in favour of a sub-contractor. Among the questions to be answered by the court was the question whether the arbitrator had correctly decided that the sub-contractor was entitled to overheads by using a formula. This was just one of a series of questions considered over several trials. The court set out the following findings of the arbitrator with which the court agreed:

- ‘1. The delay caused [the sub-contractor] some additional costs. This was represented by additional time being spent by senior management working on administrative tasks on this contract in the period of delay.
2. Some loss and/or expense in respect of Head Office costs occurred because of the delay on this contract. This loss and/or expense was a combination of rates, lighting, heating and the like.
3. A claim for a “loss of contribution to overhead recovery” would be justified if [the sub-contractor] could show that it had suffered loss.
4. The additional time spent on this contract would have been spent productively on other contracts had it not had to be spent on this contract.
5. [The sub-contractor] suffered a “loss of contribution to overhead recovery” caused by senior management spending less time on other contracts because, in the period of delay, they were working on this contract.
6. It was not possible to accept that the “loss of contribution to overhead recovery” was as much as would be provided for by the Emden formula.
7. The appropriate way of compensation for both types of loss was to award the sub-contractor a composite sum per week for the 19 weeks in question. This loss was calculated by taking one fifth of the Emden formula weekly recovery.²⁷

The use of the Emden formula is sanctioned by a court if used in appropriate circumstances albeit the arbitrator in the circumstances had felt it appropriate to reduce the effect of the formula substantially. His reason for the reduction was that he believed that the sub-contractor had suffered some loss, but not as much as would be recovered using Emden. The arbitrator had proceeded on the basis that that there was a significant likelihood, although not a certainty, that loss had been caused to the sub-contractor. That was because the sub-contractor had to prove that a number of third parties over which it would have had no control would have acted in a different way if the sub-contractor’s head-office management had been able to devote

²⁵ *Chaplin v Hicks* [1911] 2 KB 786. See also the Canadian case of *Wood v Grand Valley Railway Co* (1913) 16 DLR 361 and the more recent *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91.

²⁶ [1998] EWHC 339 (TCC).

²⁷ [1998] EWHC 339 (TCC) at paragraph 342 per Judge Thornton.

more of its time to other contracts. The sub-contractor did not need to prove such assumed actions on the balance of probabilities, but rather that there was a real or substantial chance of such actions.²⁸ It is the chance of such action which the arbitrator had to assess. The court's view was that these were findings of fact with which the court could not interfere.

The use of formulae for calculating head-office overheads and profit was not approved by the High Court in *Tate & Lyle Food and Distribution Co. Ltd v Greater London Council*²⁹ especially if other more accurate systems are available, but the contractor fails to take advantage of them. The court held that use of managerial time spent in remedying an actionable wrong committed against a trading company was claimable at common law as a head of special damage. It has been said that this case throws doubt on the legitimacy of charging a percentage to represent head-office or managerial time spent as a result of delay or disruption, unless there is clear proof. Although the court ruled on an important principle, the claim was unsuccessful, because no records had been kept of the amount of managerial time which had been actually spent on remedying the wrong and, therefore, there was no substantiating evidence. This was not a case involving a building contract, but it is suggested that the principles set out are of general application. The case was appealed to the House of Lords, but not on this point. In what has become a well-known paragraph, the court said:

'I have no doubt that the expenditure of managerial time in remedying an actual wrong done to a trading concern can properly form the subject-matter of a head of claim. In a case such as this it would be wholly unrealistic to assume that no such additional managerial time was in fact expended. I would also accept that it must be extremely difficult to quantify. But modern office arrangements permit of the recording of the time spent by managerial staff on particular projects. I do not believe that it would have been impossible for the plaintiffs . . . to have kept some record to show the extent to which their trading routine was disturbed . . . In the absence of any evidence about the extent to which this has occurred the only suggestion . . . is that I should award a percentage on the total damages . . . While I am satisfied that this head of damage can properly be claimed I am not prepared to advance into an area of pure speculation when it comes to quantum. I feel bound to hold that the plaintiffs have failed to prove that any sum is due under this head.'³⁰

In a further case, the judge has made observations of general importance, albeit there were some special circumstances which the arbitrator, from whom the case was heard on appeal, had taken into account on the basis that the claimants only carried out one major project at a time and, therefore, all their overheads were referable to that project. The judge noted with approval some 'clear and sensible conclusions' of the arbitrator:

'Efficient contractors normally require their staff to keep accurate time records which allow actual costs related to projects to be ascertained. This is a duty

²⁸ *Allied Maples Group Ltd v Simmons & Simmons* (1996) 46 Con LR 134.

²⁹ [1982] 1 WLR 149

³⁰ *Tate & Lyle Food and Distribution Co Ltd v Greater London Council* [1982] 1 WLR 149 at 152 per Forbes J.

commonly left to the respective quantity surveyors, although the use of a formula would perhaps be appropriate where no such records are available or where there is an agreement between the parties that the 'broad brush' approach would be acceptable. Practitioners are generally sceptical about the application of such formulae on the grounds that it is the actual loss and expense which is admissible and that the contractor must specify precisely the expense which has been incurred. It is clear in my mind that this was the intention of the JCT standard form in respect of clause 26.³¹

Later the judge added:

'The requirements that the loss or expense should be "direct", that it should not "be reimbursed by a payment under any other provision in [the] contract" and that the architect or quantity surveyor is to "ascertain the amount of such loss and/or expense", all suggest strongly that the amount of direct "loss and/or expense" will not exceed what might have been recoverable as damages. In particular the requirement that the amount should not be reimbursed under another provision of the contract is likely further to limit the occasions on which a formula might be appropriate, (although like the use of preliminaries to measure prolongation costs a formula is not infrequently agreed by the contracting parties to be a convenient short cut even though it would not otherwise have been legitimate). Furthermore "to ascertain" means "to find out for certain" and it does not therefore connote as much use of judgment or the formation of opinion had "assess" or "evaluate" been used. It thus appears to preclude making general assessments as have at times to be done in quantifying damages recoverable for breach of contract.³²

Therefore, it appears that the use of formulae cannot generally be justified as a method of ascertaining the contractor's entitlement under the contract terms unless supported by adequate evidence and provided that the principle has been clearly established. This reference to ascertainment was considered in a later case dealing with an appeal from an arbitrator's award where the duty to 'ascertain' was softened to allow some measure of judgment to be used:

'A judge or arbitrator who assesses damages for breach of contract will endeavour to calculate a figure as precisely as it is possible to do on the material before him or her. In some cases, the facts are clear, and there is only one possible answer. In others, the facts are less clear, and different tribunals would reach different conclusions. In such cases, there is more scope for the exercise of judgment. The result is always uncertain until the damages have been assessed. But once the damages have been assessed, the figure becomes certain: it has been ascertained. In my view, precisely the same situation applies to an arbitrator who is engaged on the task of 'ascertaining' loss or expense under one of the standard forms of building contract. Indeed, it would be strange if it were otherwise, since a number of the events which give rise to recover loss or expense under the contract would also entitle the claimant to be awarded damages for breach. I would hold, therefore,

³¹ *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd* (1995) 76 BLR 65 at 70 per Judge Lloyd.

³² *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd* (1995) 76 BLR 65 at 88 per Judge Lloyd.

that, in ascertaining loss or expense, an arbitrator may, and indeed should, exercise judgment where the facts are not sufficiently clear, and that there is no warrant for saying that his approach should differ from that which may properly be followed when assessing damages for breach of contract.

Thus in cases such as the present, the arbitrator must decide *inter alia* whether the costs built into the tender rates were realistic on the footing that the contract proceeded without delay or disruption. That decision inevitably involves an element of judgment, just as the tendering process itself involves an element of judgment. There is no place for pure speculation in the ascertainment of loss or expense, any more than there is in the assessment of damages. Moreover, I think that an arbitrator should not readily use typical or hypothetical figures, but it would be wrong to say that they can never be used.³³

It should be noted that, in *Ellis-Don Ltd v Parking Authority of Toronto*,³⁴ the court held that the overheads and profit would have been capable of being earned elsewhere had it not been for the delay caused by the employer. It also held that on this project, without taking into account the results of this law suit, Ellis-Don made 4 per cent of the contract price to be applied against overhead and as profit, the contractor having claimed that 3.87 per cent of the contract price had been included for these items.³⁵ The Hudson formula was applied without any great consideration of its merits.

It is essential to remember that formulae assume a healthy construction industry and that the contractor has finite resources so that, if delayed on a project, it will be unable to take on other work. In a period of recession, if workload for a particular contractor is not heavy, or if, as in the *AMEC* case noted above, the contractor is of significant size, it will have difficulty in showing that a delay caused it to lose the opportunity to carry out other work. Indeed, as noted earlier, there may be other reasons why being delayed on one project would not prevent the contractor undertaking another. When the construction industry is buoyant or booming at the material time, a formula approach may be acceptable.³⁶ It has been held that a formula such as Emden is sustainable in the following circumstances:

- ‘the loss in question must be proved to have occurred.
- the delay in question must be shown to have caused the contractor to decline to take on other work which was available and which would have contributed to its overhead recovery. Alternatively, it must have caused a reduction in the overhead recovery in the relevant financial year or years which would have been earned but for that delay.
- the delay must not have had associated with it a commensurate increase in turnover and recovery towards overheads.
- the overheads must not have been ones which would have been incurred in any event without the contractor achieving turnover to pay for them.
- there must have been no change in the market affecting the possibility of earning profit elsewhere and an alternative market must have been available. Furthermore,

³³ *How Engineering Services Ltd v Lindner Ceilings Partitions plc* [1999] 2 All ER (Comm) 374 at 383 per Dyson J.

³⁴ (1978) 28 BLR 98.

³⁵ See also *Shore & Horwitz Construction Co Ltd v Franki of Canada Ltd* [1964] SCR 589.

³⁶ *St Modwen Developments Ltd v Bowmer and Kirkland Ltd* (1996) 14 CLD-02-04.

there must have been no means for the contractor to deploy its resources elsewhere despite the delay. In other words, there must not have been a constraint in recovery of overheads elsewhere.³⁷

Before a decision is made to use a formula, it is essential to ensure that it does not overstate the actual loss to the contractor, and the formula should be backed up by supporting evidence such as the tender build-up or the audited accounts, showing actual overheads. Although it has generally been thought that formulae should be treated with suspicion, they are still accepted by the courts if other criteria can be satisfied:

‘The claim is based on the conventional application of Emden’s formula for a ten-week period. The sum is agreed, subject to proof that the loss was incurred. The loss is the loss of recovery of profit and head office overheads arising from the inability to earn these recoveries from other work in the relevant period because Cowlin’s resources were still employed on non-profitable, non-financial recovering work for DHE.

Mr Spiller gave evidence to the effect that the effects of the repudiation were that he and Mr Brown were much more heavily involved in the project than they should have been. This precluded them chasing other work, being involved in negotiations and tendering and otherwise generating financially rewarding new work.

I readily accept that the heavy additional involvement that these two senior members of Cowlin’s management team reasonably became involved in at Tidworth precluded significant additional earnings elsewhere. It follows that the conventional basis for assessing this loss, recourse to the Emden formula for a ten-week period, is appropriate.³⁸

The case concerned a contract on a design and build basis for the construction of houses for services families. Cowlin was the contractor and CFW was the architect which was engaged by Cowlin. CFW claimed against Cowlin for the return of a substantial sum which it said had been wrongly paid following a wrong adjudication decision. Cowlin put forward a substantial counterclaim. The claim was made by Cowlin for head-office overheads and profit in respect of a period of delay caused by its own sub contractor and was akin to a claim made under a building contract and the principle is precisely the same.

Care must be taken to avoid double-recovery in respect of directly engaged administrative staff if some kind of formula is used to deal with the element of general overhead costs. If some or all of the prolongation period is caused by additional work, the contractor will have recovered an appropriate proportion of overheads. Even if it has not actually been so recovered, the amount is reimbursable under the valuation of variation clause and, therefore, under JCT contracts cannot be recovered through the loss and/or expense clause which covers only loss and/or expense for which the contractor would not be reimbursed by a payment under any of the other provisions

³⁷ *Norwest Holst Construction Ltd v Co-operative Wholesale Society Ltd (No.2)* [1998] EWHC Technology 339 at paragraph 350 per Judge Thornton.

³⁸ *CFW Architects (a firm) v Cowlin Construction Ltd* (2006) 105 Con LR 116 at 169 per Judge Thornton.

in the contract. Note that the point is not whether the contractor has actually obtained the reimbursement, but whether it was entitled to it.

There is a use for formulae in certain situations, usually as a last resort where it is clear there has been a loss but where there is a complete lack of proper evidence to support the claim. However, the uncritical use of formulae without regard to available facts and without supporting evidence is to be avoided. It appears that there are two distinct situations so far as a claim for overheads is concerned:

- a disruption situation, where there is no prolongation of the contract period, in which the management time and overhead element are recoverable on the basis of proof of time spent as set out in the *Tate and Lyle* case.
- a prolongation situation, in which there is a delay to the contract period, in which case a formula approach may sometimes be used to calculate the amount provided that the entitlement to recovery in principle has already been established.

Whatever the situation, it is unlikely that any formula is suitable for general application and each formula must be carefully scrutinised in relation to its relevance.

Formulae in common use

(a) The Hudson formula

This used to be the best-known formula for calculating head-office overheads and profit although that is probably no longer the case. The formula is set out at page 1076 of *Hudson's Building and Engineering Contracts*.³⁹ The principle of the formula is to take the allowance which the contractor has made in respect of head-office overheads and profit in its original tender, then to divide this figure by the length of original contract period. The result is multiplied by the period of prolongation of the contract to produce the claimed overheads and profit. Loss of profit is dealt with as a separate head of claim (see Section 7.3.4). The formula is:

$$\frac{\text{HO/Profit percentage}}{100} \times \frac{\text{Contract Sum}}{\text{Contract period}} \times \text{Period of delay (in weeks)}$$

The formula combines head-office overheads and profit together on the reasonable basis that contractors normally add a single percentage to their prices to cover both. However, Duncan Wallace says of this calculation that 'in the case of a *delayed* contract, where the concern is to ascertain the "profit" which the delayed contract organisation might have expected to earn *elsewhere in the market on other contracts*, it is this necessary combined operating margin of profit and fixed overhead which, in appropriate market conditions, the contractor's enterprise will have lost as a consequence of the period of owner caused delay . . .'. This is not necessarily correct. If a contract has overrun, the contractor has not actually lost overheads or, indeed, profits. What it has lost is the opportunity to earn these two elements on other work during the overrun period.

³⁹ I N Duncan Wallace, *Hudson's Building and Civil Engineering Contracts* (1995) 11th edition, London, Sweet & Maxwell, where the strengths and some weaknesses of this and the Eichley formula are discussed.

The formula is not convincing, because the percentages are based upon the contractor's annual accounts prior to and during the contract 'or other available information'⁴⁰ and may never have been achievable on a particular project. In addition, there is a serious inaccuracy, because it allows the overheads and profit to be based on a figure including the amount of overheads and profit already included in the contract sum. If it is proposed to use the formula, the amount of overheads and profit already included should be excluded from the contract sum. Other criticisms have been levelled at the Hudson formula:

- It requires the total delay period to be reduced if appropriate to take account of various factors for which financial recovery is not permitted under most standard form contracts e.g. the contractor's own inefficiency or extensions of time on grounds which do not also permit recovery of loss and/or expense.
- It ignores the contractor's obligation to prove that it had to turn down the opportunity to earn a contribution to overheads and profits during any period of delay.
- It ignores the fact that the contractor should make realistic efforts to deploy its resources elsewhere during a period of delay.⁴¹
- The value of the final account may exceed the contract sum and any proper valuation for variations is likely to have included an element of reimbursement for overheads and profit while fluctuations may have the effect of reducing the percentage of overhead recovery on actual cost.
- The formula can also produce under-recovery for the contractor where inflation during the period of delay increases the overhead costs envisaged at the time of tender.

Some of these criticisms can be easily addressed if the period of delay in the formula is entered, not as the total delay to the project (which might include some contractor's culpable delay), but as the prolongation period which the architect has accepted as caused by the relevant grounds for recovery of loss and/or expense set out in the contract.

It is sometimes alleged that this formula has received judicial approval. That is incorrect. Invariably, the Emden formula has been used even though, as in *J. F. Finnegan Ltd v Sheffield City Council*⁴² the judge referred to the Hudson formula with approval. Notwithstanding what he said, he proceeded to apply the Emden formula without taking any submissions about its validity. The court also mistakenly referred to the Hudson formula in *Whittal Builders Co Ltd v Chester-le Street District Council*.⁴³

(b) *The Emden formula*

This is a formula which was published in a respected legal textbook, *Emden's Building Contracts and Practice*,⁴⁴ which considers the contractor's annual turnover as the basis for the percentage of overheads and profit. The formula is as follows:

⁴⁰ I N Duncan Wallace, *Hudson's Building and Engineering Contracts* (1995) 11th edition, London, Sweet & Maxwell, paragraph 8.179.

⁴² (1988) 43 BLR 124.

⁴¹ *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114.

⁴³ (1985) 11 Con LR 40.

⁴⁴ *Emden's Building Contracts and Practice*, 8th edition, [1980] vol 2, at page N/46.

$$\frac{h}{100} \times \frac{c}{cp} \times pd$$

'*h*' = the head-office percentage arrived at by dividing the total overhead cost and profit of the contractor's organisation by the total turnover.

'*c*' = the contract sum.

'*cp*' = the contract period.

'*pd*' = the period of delay.

'*cp*' and '*pd*' must be calculated using the same units, e.g. weeks.

This approach is open to some of the same criticisms as the Hudson formula. However, it is more useful than Hudson's formula if the actual costs of head-office personnel who were directly engaged in dealing with an individual contract are not obtainable. Sometimes the formula is changed slightly to substitute, for *h*, the proportion of the contractor's overall overhead costs which can be shown from its accounts to be spent on staff who are directly engaged on contracts. This gives an approximation of the cost of staff engaged on the particular contract during the period of delay. However, clearly this approach does not make an allowance for the cost of greater numbers of staff involved during the original contract period due to disruption.

This formula has been accepted in *J F Finnegan Ltd v Sheffield City Council*⁴⁵ and *Beechwood Development Company (Scotland) Ltd v Stuart Mitchell (t/a Discovery Land Surveys)*⁴⁶ where there was no practicable means of otherwise calculating the amount. In both instances, the court incorrectly referred to the formula as 'Hudson's'. More recently, the Emden formula has been accepted without adverse comment in *CFW Architects (a firm) v Cowlin Construction Ltd* where the judge referred to the 'conventional application of Emden's formula'.⁴⁷

(c) The Eichleay formula

This formula originates in the USA. It is a calculation in three stages and differs from the other formulae in that it applies daily rates. It is as follows:

- (1) $\frac{\text{Contract Billings}}{\text{Total contractor billings for contract period}} \times \frac{\text{Total HO overheads for contract period}}{\text{contract period}} = \text{Allocable overhead}$
- (2) $\frac{\text{Allocable overhead}}{\text{Days of performance}} = \text{Daily contract HO overhead}$
- (3) $\text{Daily contract HO overhead} \times \text{Days of compensable delay} = \text{Amount of recovery}$

All such formulae are subject to criticisms and this formula is no exception. Among the possible drawbacks to this one are:

⁴⁵ (1988) 43 BLR 124.

⁴⁶ [2001] ScotCS 30.

⁴⁷ (2006) 105 Con LR 116 at 169 per Judge Thornton.

- The formula gives only a rough approximation of the sum due.
- It does not require proof from the contractor of its actual increased overhead costs resulting from the delay.
- Double-recovery is possible. To deal with this possibility, it is necessary to deduct any head-office overhead recovery which can be achieved in the valuation of variations.

The Eichleay formula is widely used in USA Federal Government Contracts and has been adopted in some other non-government cases, but it has been subject to criticism in the courts and is not universally accepted⁴⁸. However, criticism of the formula is not criticism of the proposition that in a period of reduced activity on site a contractor will incur off-site overheads for which payment is not being recovered from revenue generated at site. It is simply that unintelligent use of the formula will demonstrate its inherent weakness.⁴⁹

7.3.4 Loss of profit

Loss of profit, which the contractor would otherwise have earned had it not been for some delay or disruption, is an allowable head of claim under the financial claims clauses of most standard form contracts. Loss of profit is also recoverable in principle as a head of damage for breach of contract at common law under the first part of the rule in *Hadley v Baxendale*.⁵⁰ The contractor is entitled to recover only the profit normally expected to be earned. If, a delay prevented the contractor from earning an extremely high profit on another contract, the extremely high profit element would not be recoverable unless, in accordance with the normal rules, the employer was aware of the exceptional profit at the time the delayed or disrupted contract has been executed.

This is the second part of the rule which governs special damages and has been referred to earlier.⁵¹ *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*⁵² is a case in point (although not in the construction industry) where Victoria Laundry (who unsurprisingly were launderers) agreed to buy a boiler from Newman. Newman knew that the boiler was wanted in order to be put to immediate use, but delivery of the boiler did not occur until five months after the date stated in the contract and it was said that Victoria Laundry lost some extremely profitable contracts as a consequence. The Court of Appeal held that the plaintiffs were entitled to recover the profit which might reasonably have been expected to result if the boiler had been available during the five months delay, but that no allowance could be made for the extremely profitable nature of some of the lost contracts, because it was not in the contemplation of the parties at the time the contract was entered into.

The foundation of a claim for loss of profit is similar to a claim for recovery of overheads based on lost opportunity. Whether the contractor is prevented from

⁴⁸ See the comments of the USA Court in *E Berley Industries v City of New York* (1978) 385 NE (2d) 281.

⁴⁹ 28 BLR at 103.

⁵⁰ (1854) 9 Ex 341.

⁵¹ See Chapter 5, Section 5.2.

⁵² [1949] 1 All ER 997.

earning a profit on the contract on which it is engaged or whether it is prevented from earning a profit on another contract, it is the loss of opportunity to earn a profit which is important. It does not automatically follow that a contractor can recover a percentage in respect of profit every time it can prove delay or disruption. Such a claim is permissible only in situations where the contractor can show that, as a direct result of the disruption or prolongation, it has been prevented from earning a profit elsewhere in the normal course of its business. The position is similar to that discussed above in Section 7.3.3 regarding overheads. Indeed, for convenience, claims for loss of profit are often grouped together with loss of overheads. However, there is a distinct difference in the two claims.

The success of a claim for loss of profit will usually depend on the general financial situation in the country as a whole, because the contractor is put to proof that it could have earned a profit. In some instances, the reality may be that the contractor could earn no profit at all. Indeed, it may be that a contractor is operating at no profit or even a small loss. This will particularly be the case where the economic climate is such that many contractors are 'buying' work. A claim for overheads may not be unaffected, because it may be difficult for a contractor to show when there is a shortage of work that any actual loss of this kind has been suffered and other work may not be obtainable. But it will also depend on the extent to which the prolongation is the result of additional work, the value of which contains an appropriate proportion of profit.

There is a possible argument to the effect that loss of the overhead and profit-earning capacity of additional resources devoted to a contract because of delay or disruption is to be assumed without necessity of proof. For the reasons stated earlier, this kind of argument is no longer acceptable.

In *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*,⁵³ work was suspended on a contract for 58 weeks. The contract used was not a standard form, but the comments apply to most standard form building contracts. The Court of Appeal also helpfully indicated what kind of substantiation was required to found the claim:

'The way in which the claim for loss of profit was dealt with below has caused me some anxiety. The basis upon which the claim was put in the pleadings was that for 58 weeks no work had been done on this site. Accordingly, a large part of the plaintiffs' head office staff, and what was described as their site organisation, was either idle or employed on non-productive work during this period, and the plaintiffs accordingly suffered considerable loss of gross profit . . . When the matter came before the court below the matter was put rather differently. The case was put on the basis that in the time during 1966 and 1967 when they were engaged in completing the construction of the East Lancashire Road project they were unable to take on any other work, which they would have been free to do had the East Lancashire Road project been completed on time, and they lost the profit which they would have made on this other work. When the case was argued in this court it seemed to me that the plaintiffs were a little uncertain about which basis they were opting for.

⁵³ (1970) 1 BLR 114.

In the end however I think they came down in favour of the second basis: that is, the one that was argued before the court below . . .

Possibly some evidence as to what the site organisation consisted of, what part of the head office staff is being referred to and what they were doing at the material times could be of help. Moreover, it is possible, I suppose, that a judge might think it useful to have an analysis of the yearly turnover from, say, 1962 right up to, say, 1969, so that if the case is put before him on the basis that work was lost during 1966 and 1967 by reason of the plaintiffs being engaged upon completing this block and, therefore, not being free to take on any other work, he would be helped in forming an assessment of any loss of profit sustained by the plaintiffs.⁵⁴

Later in the same case it was said:

‘Under this head (i.e., loss of profit) the plaintiffs were awarded the sum of £11,619. The defendants submit that this sum should be wholly disallowed, no loss of profit having been established. This outright denial is, in my judgment, probably untenable, it being a seemingly inescapable conclusion from such facts as are not challenged that the plaintiffs suffered some loss of profit. The sum awarded was arrived at on the basis of a gross profit calculated at nine per cent of the main contract figure of £232,000. Whether this was a satisfactory method of approach need not be decided now, though I have substantial doubts on the matter.’⁵⁵

In *Wraight Ltd v P H & T (Holdings) Ltd*,⁵⁶ a successful claim for loss of profit was made on a somewhat different basis. In that case, the contractors terminated their employment under clause 26 of JCT 63 and claimed, as part of the direct loss and/or damage, the profit they would have earned had they been able to complete the contract work. The judge had little hesitation in finding it to be a valid claim. He said:

‘In my judgment, the position is this: *prima facie*, the claimants are entitled to recover, as being direct loss and/or damage, those sums of money which they would have made if the contract had been performed, less the money which has been saved to them because of the disappearance of their contractual obligation.’⁵⁷

In referring to the sums of money which the contractors would have made, the judge went to the nub of the matter. What is recoverable is the actual profit on that contract. The profit which might usually be obtained in such circumstances is not relevant. This situation is different from a situation noted earlier where the contractor is prevented from earning a profit on another contract.⁵⁸ The difficulty here is in determining the level of profit the contractor would have made if it had been allowed to do the work. It is probably not enough for the contractor simply to demonstrate the profit it put into its tender, because such profit may not have been realisable. The

⁵⁴ (1970) 1 BLR 114 at 122 per Salmon LJ.

⁵⁵ (1970) 1 BLR 114 at 126 per Edmund Davies LJ.

⁵⁶ (1968) 13 BLR 27.

⁵⁷ (1968) 13 BLR 27 at 36 per Megaw J.

⁵⁸ See *Parsons (Livestock) Ltd v Utley Ingham & Co Ltd* [1978] 1 All ER 525.

Wraight case must also be distinguished from normal claims for direct loss and/or expense arising from delay or disruption, because the profit lost in this instance was that which would have been earned on work that the contractor was not permitted to carry out⁵⁹ rather than work which was delayed or carried out under different conditions than those originally anticipated.

7.3.5 Uneconomic working

Delay and disruption can lead to loss of productivity in two different ways. It may be necessary to employ additional labour and plant or the existing labour and plant may stand idle or be under-employed. The latter situation is often referred to as 'loss of productivity'. Although this is a permissible head of claim, it can be difficult if not impossible to establish the amount of the actual additional expenditure involved. Contractors commonly attempt to overcome this problem by presenting the claim on a total cost basis. In other words, they maintain an entitlement to be remunerated for all the work they have done and for all the resources they have expended. This type of claim has been roundly condemned.⁶⁰ It could only be sustained if the contractor could show that the labour forecast in the tender was strictly accurate, that it was absolutely blameless and that none of the resource time was occupied other than by carrying out the work. The problem is that contractors attempt to demonstrate loss of productivity by reference to original tender figures to establish the anticipated percentage productivity, then actual labour figures are used to show the fall in productivity. Usually a new percentage is calculated to form the basis of calculation of the claim. A contractor should be able to establish the actual costs incurred, but it will clearly be impossible to prove as a matter of fact what the costs would have been had the delay or disruption not occurred.

The tender breakdown is irrelevant. The contractor's intended use of labour and plant by reference to the original programme of work is unlikely to be an accurate forecast. The problem is that the intended use may be inadequate. Some of the additional labour and plant time may be the difference between the contractor's wrongly estimated proposed resources and what it would have had to use even if the contract had proceeded without delay or disruption. In appropriate cases it is possible to demonstrate the true loss by ignoring the tender breakdown showing intention and simply comparing a period of normal working with a period when disruption is present. Assuming that the building work is of a fairly repetitive nature, this method produces a fairly convincing ratio for application throughout the project.⁶¹

A further difficulty is that of relating particular items of additional expenditure under these or indeed other heads to particular events. Contractors seldom keep cost records in such a detailed form as to enable this to be done, particularly where there may be several concurrent causes of delay and disruption, some but not all of which may entitle the contractor to make a financial claim.⁶² Provided that the contractor

⁵⁹ See Chapter 4, Section 4.4: 'Omission of work to give it to others.'

⁶⁰ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 112 per Vinelot J.

⁶¹ The method was approved by Mr Recorder Percival in the 1985 *Whittal Builders v Chester-le-Street District Council* (the 1985 case) (1996) 12 Const LJ 356. There were two cases by this name (one in 1987).

⁶² Concurrence and the inherent difficulties are discussed in Chapter 2, Section 2.4.

submits whatever evidence there is, it is a matter for the architect and quantity surveyor to determine the amount due. It is reasonable to assume that some loss will have been suffered as a result of uneconomic working wherever delay or disruption has occurred. Although the contractor will be unable to prove in every detail the loss it has suffered the architect and the quantity surveyor cannot refuse to ascertain for that reason. Effectively, this is a type of global claim which is discussed in Chapter 9.

In *London Borough of Merton v Stanley Hugh Leach Ltd*⁶³ the court had to decide whether the contractor was entitled to recover direct loss and/or expense under the terms of a JCT 63 contract when it was impossible for it to attribute the amount of loss and/or expense to specific events. The court followed *J Crosby & Son Ltd v Portland UDC*⁶⁴ in answering the question affirmatively. The court held that, provided the contractor has not unreasonably delayed making the claim, if there is more than one head of claim to which the global amount is attributable, the architect or quantity surveyor must ascertain the global amount which is directly attributable to the various causes. However any loss or expense which would have been recoverable if the claim had been made under one head in isolation and which would not have been recoverable under the other head, also considered in isolation, must be disregarded. In other words, it must be clear that all the causes contribute to the loss. However, it is clear that the court was mindful that, before embarking on such an ascertainment exercise, all the criteria for a valid claim had to be satisfied and the loss and/or expense attributable to particular causes could not be separated.

7.3.6 Winter working

One other factor that can lead to a claim which is effectively one for loss of productivity is the carrying out of work in less favourable circumstances, e.g. excavation work carried out in winter rather than in summer. In such circumstances, there is potentially a claim in respect of the additional costs caused by working in winter when, but for the delay, the work would have been completed during the summer period. The principle behind this type of claim is discussed in Chapter 7, Section 7.2. Clearly there will be no, or at least little, chance of a claim on this basis where work scheduled to be carried out in winter is pushed into spring or summer.

7.3.7 Site supervision costs

Site supervision can take many forms: from the site agent or manager with several staff at one extreme to the site operative who also carries out supervisory duties at the other, with most instances falling somewhere in between. Site supervision has already been mentioned as part of on-site establishment costs. However, the position of supervisory staff is worth further consideration. If the contractor is to have any chance of claiming the cost of supervisory staff on site, it must be demonstrated that

⁶³ (1985) 32 BLR 51.

⁶⁴ (1967) 5 BLR 121.

such staff would not have been required on site at the time in question had it not been for the occurrence which the particular contract specified as a ground for loss and/or expense.

If the supervisor would have been on site in any event, there can be no claim. Moreover, the contractor must also show that there was a purpose in the supervisor's presence on site at the relevant time. It is not unknown for a contractor to put additional supervision on site on the pretext that the problems on site make it necessary, when actually the reason is that the contractor has no other project suitable for the supervisor at that particular time.

On the other hand, it sometimes happens that some disrupting event for which the employer is responsible does not result in any prolongation of the contract period, but it does require additional supervision for the particular activity. It is essential that both contractor and architect are at pains to establish, in every instance, that the attendance on site of a supervisor or an additional supervisor is a necessary result of the disrupting event.

Where small projects are concerned, it is common for the supervision to be in the hands of a working person-in-charge. Care must be taken that additional supervisory costs are not claimed unless strictly necessary.

It is important to establish the number and quality of supervisors the contractor envisaged at the time the contract was executed and, most important, whether the contractor's assumptions in this regard were well founded and reasonable at the time they were made.

7.3.8 Plant

There are certain important factors which must be taken into account when considering costs related to prolongation. It is necessary to identify plant which the contractor has hired and separate it in the reckoning from its own plant.

Plant hired in

If the plant is hired from an external source there is no great problem. In that situation, the amount which the contractor is entitled to claim is the loss which it has actually incurred. That will be the actual sum which the contractor has paid to the owner of the plant under terms of the hire contract.

If the contractor is claiming for a period in excess of the period for which the plant was in use on the basis that there is a minimum period of hire, it is for the contractor to prove that there is such a minimum period by reference to the terms of hire. Obviously if it is clear that the disruption will be prolonged, rather than allowing the plant to stand idle, the contractor has a duty to mitigate its loss by either trying to use the plant elsewhere or by terminating the plant hire contract and returning the plant to its owner in accordance with the terms of the hire. If the contractor is thereby in breach of the plant hire terms, that is entirely a matter for the contractor unless perhaps it can be shown that the damages for the breach are less than the contractor would claim for leaving the plant idle on site. In such circumstances, the

contractor probably has a claim for the amount of damages it has had to pay on the grounds that it amounts to mitigation of loss.

Questions often arise if the contractor is part of a group and one of the companies in the group hires out plant and equipment to the others. Once it is established that there is a claim in principle, the question to be answered refers to the amount actually lost or expended by the contractor in hiring the plant. Does the plant hire sister company hire out plant to the contractor at the same rates as it would apply to other contractors? It is likely that there would be a discount. It is for the contractor to prove that it actually has to pay the hire charge. If the contractor is a separate limited company, in other words a separate legal entity, whatever charge has been paid will be claimable unless there is some arrangement between the companies which allows the contractor to recover the outlay in another way. If the contractor and the hirer are actually separate divisions of the same company (i.e. not separate legal entities) it will be difficult for the contractor to show a loss.

Sometimes a contractor will argue that it is entitled to claim hire charges even though it is its own plant, because it operates a plant hire business, hiring out spare plant to other contractors. In such circumstances, the contractor would have to show that, if the particular plant was not being used by the contractor, it would have been able to hire it out. The contractor must prove that it had an opportunity to do so.

Contractor's own plant

If the contractor is using its own plant, it will often attempt to claim based on a notional hiring charge. That is not a valid claim for the simple reason that the money claimed is not money actually expended. Arriving at the true cost of its plant standing idle is more difficult. *B Sunley & Co Ltd v Cunard White Star Ltd*⁶⁵ is relevant. There, an excavating machine had to be transported to Guernsey to be used on a building contract, but it was delayed by one week at port. During the delay it worked for one day and earned £16. The contractor claimed £577 for loss of profit, but no evidence was produced. The cost of the machine was £4,500 and its life was said to be three years. The Court of Appeal held that the measure of damage was:

- depreciation
- interest on money invested
- cost of maintenance
- value of wages thrown away.

£30 was awarded less the £16 earned while in port. In arriving at that figure, the Court took account of the fact that the machine would not depreciate as much while standing idle as it would when working. At first instance⁶⁶ the court held that the proper measure of damages was the amount the contractor would have made by the use of the machine during the period it was idle, but the Court of Appeal took the view that, without proof of special damages, the contractor could only recover nominal damages based mainly upon a calculation of the rate of depreciation of the

⁶⁵ [1940] 2 All ER 97. See also the Canadian case *Shore & Horwitz Construction Co Ltd v Franki of Canada Ltd* [1964] SCR 589 which followed the same principles.

⁶⁶ [1939] 3 All ER 641.

machine: There is 'no authority for the proposition that if the owner of a profit-earning chattel does not prove the loss he has sustained the judge may make a fortuitous guess and award him some arbitrary sum.'⁶⁷

In a more recent case (under JCT 80, but the principle is applicable to other contracts), the position was largely upheld where the court has held that ascertainment should take into account the substantiated cost of capital and depreciation, but not the elements normally included in hire rates on the basis that plant will only be profitable for some of the time:

'. . . in ascertaining direct loss or expense under clause 26 of the JCT conditions in respect of plant owned by the contractor the actual loss or expense incurred by the contractor must be ascertained and not any hypothetical loss or expense that might have been incurred whether by way of assumed or typical hire charges or otherwise.'⁶⁸

A contractor may be able to show that its own plant, kept idle on site by factors which would normally entitle the contractor to recover loss and/or expense, would have been able to be used to earn profit elsewhere. The contractor would have to show that there was other work it could have done with the plant. To that extent, such a claim is one of lost opportunity, rather like a contractor's claim for overheads and profit. It appears that if a contractor can prove its actual loss by submitting detailed calculations based on cost records, it is entitled to recover the proven amount of loss in the normal way.

However, if a contractor cannot prove or evidence actual damage, it is entitled to recover only an amount which is normally limited to depreciation. The absence of real evidence in *Sunley* led the Court of Appeal to take the view that the depreciation for the claim period would be £29 for the week. However, because it had been said that the working life of the machine was only three years, the Court said that it would not depreciate as much when idle as it did when working and they thought that £20 for the week was all that should be allowed for depreciation. As noted earlier, there are intermediate positions between the two extremes of hired in and contractor's own plant. Each of these positions must be examined carefully, it being remembered that the key point is that a contractor can only recover, as direct loss and/or expense, what it has actually lost or spent.

7.3.9 Increased costs

Additional expenditure on labour, materials or plant due to increases in cost is an allowable head of claim provided that the increase was an inevitable result of a delay for which the contractor has an entitlement in principle to loss and/or expense. Increases in the cost of labour, materials or plant which may take place over the contract period unconnected to any entitlement to loss and/or expense may or may not be claimable depending on the terms of the contract. For example, a fluctuations clause may be applicable. A claim may be sustainable in situations where disruption

⁶⁷ [1940] 2 All ER 97 at 101 per Clauson LJ.

⁶⁸ *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd* (1995) 76 BLR 65 at 93 per Judge Lloyd.

has resulted in labour-intensive work being delayed and carried out during a period after an increased wage award. It should be noted that, where a claim of this kind is being made in respect of a delay in completion, it is not only the work carried out during the period of delay that should be considered. The correct measure would be the difference between what the contractor would have spent on labour, materials and plant and what it has actually had to spend over the whole period of the work as a direct result of the delay and disruption concerned. However, detailed proof is necessary and, in making this calculation, proper allowance must be made for any recovery of increased costs under any applicable fluctuations clauses in the contract. Moreover, it is what the contractor *should* have spent excluding expenditure due to its own defaults, which must be considered.

Contractors may often seek to make such calculations easier by using some kind of formula or notional percentage to produce a result. That approach is not acceptable. The contractor must show that the increases in costs have been the inevitable consequence of the cited occurrence. This can be quite complicated in the case of materials, because the contractor must demonstrate that it could not reasonably have placed its order earlier to avoid the increases. Above all, it must not be assumed that all work and all materials after the period of delay or during a prolongation period after the contract completion date, will automatically suffer a price increase. In order to have any chance of success, this kind of claim must be made on an item-by-item basis and each step must be properly evidenced. This head of claim, whether for increases in labour, goods or materials costs, is itself very laborious to prepare; which is probably why the use of formulae or notional figures is so attractive albeit wrong.

7.3.10 Financing charges and interest

(a) *Financing charges*

This is a topic which tends to be skated over, because it is sometimes difficult to understand, particularly the difference between finance charges and interest. In practice there is little or no difference because they are two sides of the same coin. Finance charges are the financial burden borne by a contractor, because it has received payment later than it should have been received under the terms of the contract. It is the charge or notional charge by a bank to enable the contractor to borrow the amount of money which it has wrongfully not received. Whereas interest is the sum payable by the employer to compensate the contractor from being kept out of its money. Looked at slightly differently, it is the loss of interest that the contractor could have had the opportunity of earning on the money wrongfully unpaid. In other words, it amounts to compensation (damages) for the loss of use of money. That is the position quite irrespective of the entitlement or otherwise of a contractor to interest at common law on outstanding debts and claims. The point was decided by the decision of the Court of Appeal in *F G Minter Ltd v Welsh Health Technical Services Organisation*,⁶⁹ which recognised the problems associated with financing

⁶⁹ (1980) 13 BLR 7.

construction operations and produced a businesslike and sensible interpretation to the claims provisions in JCT 63:

‘[In] the building and construction industry the cash flow is vital to the contractor and delay in paying him for the work he does naturally results in the ordinary course of things in his being short of working capital, having to borrow capital to pay wages and hire charges and locking up in plant, labour and materials capital which he would have invested elsewhere. The loss of the interest which he has to pay on the capital he is forced to borrow and on the capital which he is not free to invest would be recoverable for the employer’s breach of contract within the first rule in *Hadley v Baxendale*⁷⁰ without resorting to the second, and would accordingly be a direct loss, if an authorised variation of the works, or the regular progress of the works having been materially affected by an event specified . . . has involved the contractor in that loss.’⁷¹

It is worth examining the circumstances of that case in greater detail in order to understand the reasoning of the Court. The plaintiff was a contractor which was engaged to construct a hospital in Wales. The contract was in JCT form. Substantial variations were instructed during the progress of the Works. Regular progress of the contractor and a nominated sub-contractor was materially affected because certain instructions were delayed. The contractor submitted claims under the provisions of JCT 63 under the equivalent clauses (11(6) and 24(1)) to SBC 4.23. The contractor challenged the amounts paid because they had not been certified until a considerable time after the loss and expense had been incurred. It claimed, as part of its direct loss and/or expense, the finance charges which it had incurred on borrowed capital and the interest it could have earned if it had been paid at the right time, because it had been kept out of its money. However, the employer contended that such charges were not direct loss and/or expense; they were simply a claim for interest. The Court disagreed with the employer’s argument and held that the contractor’s claim for finance charges was indeed a claim for loss and/or expense. The Court’s decision is an unambiguous statement of the law.

The Court first looked at the words ‘direct loss and/or expense’ and decided that there were no grounds for giving these words any other meaning than they have in a case of breach of contract in a legal context.⁷² It said that they must be interpreted as covering those losses and expenses which flowed naturally and in the usual course of things from a breach of contract.⁷³ The Court decided that it should apply the distinction between direct and indirect, commonly referred to as ‘consequential’ losses. It had to be recognised that, in the construction industry, loss of profit and expenses lost on wages and stores may be recoverable as direct loss and/or expense. A contractor which has to finance construction operations has to spend money. A contractor may either borrow the money from a bank and pay the borrowing charges or use its own money. In the latter instance, the contractor will be unable to invest the money and gain interest. The court concluded that financing charges are

⁷⁰ (1854) 9 Ex 341.

⁷¹ (1980) 13 BLR 7 at 15 per Stephenson LJ.

⁷² *Wraith Ltd v P H & T (Holdings) Ltd* (1968) 13 BLR 27.

⁷³ *Saintline Ltd v Richardsons, Westgarth & Co Ltd* [1940] 2 KB 99.

implicitly part of the recoverable direct loss and/or expense or what was being claimed 'is not interest on a debt, but a debt which has as one of its constituent parts interest charges which have been incurred.'⁷⁴

Interpreting clauses 11(6) and 24(1) of JCT 63, the Court agreed that the architect could only ascertain and certify the amount of interest charges lost or spent at the date of the contractor's application. That amounts to the period between the direct loss and/or expense being incurred and date of the written application for reimbursement. Further losses and charges would only be recoverable, if at all, by means of further applications. Therefore, under JCT 63, if the contractor subsequently incurred charges, they were recoverable only by making further applications. That was because JCT 63 did not permit claims for continuing or future losses. It referred only to direct loss and/or expense which have already been incurred.

There is no such limitation under SBC, IC or ICD, where only one application from the contractor is required to cover loss and/or expense that has been incurred or is likely to be incurred. Indeed, if the provisions of SBC, IC and ICD are properly observed, there should be few finance charges payable by the employer although no doubt the same can be said about all building contracts. The court considered circumstances in which finance charges were not payable:

'The architect under all forms of this contract has to investigate and compute values and expenditure from time to time and to adjust the contract price by adding certified amounts as a consequence of action taken or not taken by himself and or his employer. It is only if the duties which these two clauses on their true construction put upon him are so unreasonable, if they cover investigating and ascertaining and certifying interest charges of this kind, as to have gone beyond the contemplation of the parties to this contract that a court would be driven to hold that they are no part of the claimants' direct loss or expense.'

It is unlikely that the duties imposed on the architect and the quantity surveyor under any of the JCT 2005 suite of contracts or most other standards forms would be beyond the contemplation of the parties. The question of interest as part of direct loss and/or expense was examined still further by the Court of Appeal in *Rees & Kirby Ltd v Swansea City Council*⁷⁵ where the Court considered and extended the *Minter* principles. The Court decided that finance charges should be calculated on a compound interest basis.

'There remains to be considered the question whether [they] are entitled to recover their financing charges only on the basis of simple interest, or whether they are entitled to assess their claim on the basis of compound interest, calculated at quarterly rests, as they have done. Now here, it seems to me, we must adopt a realistic approach. We must bear in mind, moreover that what we are considering is a debt due under a contract; this is not a claim for interest as such . . . but a claim in respect of loss or expense in which a contractor has been involved by reason of certain specified events. [The contractor] like (I imagine) most building contractors, operated over the relevant period on the basis of a substantial over-

⁷⁴ (1980) 13 BLR 7 at 23 per Ackner LJ.

⁷⁵ (1985) 5 Con LR 34.

draft at their bank, and their claim in respect of financing charges consists of a claim in respect of interest paid by them to the bank on the relevant amount during that period. It is notorious that banks do themselves, when calculating interest on overdrafts, operate on the basis of periodic rests: on the basis of the principle stated by the Court of Appeal in *Minter's* case, which we here have to apply, I for my part can see no reason why that fact should not be taken into account when calculating the [contractor's] claim for loss or expense . . .'⁷⁶

Again, the detail of this case is worth examination. In 1972 the contractor was engaged to construct a housing estate for Swansea Corporation. The contract was on JCT 63 terms for a fixed-price contract. The date for completion of the Works was 6 July 1973. Instructions were given for a large quantity of variations under clause 11 and there were delays in the issue of instructions and information. The Works were not in fact practically completed until 4 July 1974. The contractor gave notice to the Council of the causes of delay, giving further particulars and applied for reimbursement of loss and/or expense under clause 24.

However, during 1972 there was a severe increase in wage rates in the construction industry and it soon became clear that the contractor would lose substantial amounts of money. Relationships were good at this point. Moreover, in October 1973, the Minister for Housing and Construction issued a statement that local authorities could in appropriate cases consider making *ex gratia* payments to contractors working on fixed-price contracts who suffered losses. With that in mind, the parties left the contractor's claims aside and they tried to negotiate an *ex gratia* payment or alternatively that the contract be varied into a fluctuating price contract. It took until the end of 1976 for the contractor to conclude that no settlement on either of these bases was going to take place. Accordingly, the contractor wrote to the Council pointing out that its losses were being aggravated by interest charges on monies outstanding in respect of its contractual claim.

The contractor submitted a detailed formal claim with full particulars in June 1978. There followed a succession of letters from the contractor, but the architect did not respond until February 1979. The architect gave an extension of time for the full period claimed (52 weeks) and also certified sums of money in February, April and August, but said that the interest claim was not a matter for the architect's decision and none of the certificates included any element of interest. The contractor expressly reserved its right to claim interest as part of its loss and/or expense and the final certificate was issued without prejudice to the contractor's right to press that outstanding claim. In its subsequent action through the courts, the contractor was claiming interest for various periods but, importantly, also for compound interest until the date of judgment. The ruling of the Court of Appeal was important and worth consideration in some detail. The following points can be derived from it:

- (1) The contractor's application for loss and/or expense need not be in any particular form, but it must make clear that the claim includes direct loss and/or expense resulting from the contractor being deprived of its money. Lord Justice Robert Goff said that, under JCT 63:

⁷⁶ (1985) 5 Con LR 34 at 51 per Robert Goff LJ.

‘... we must, I consider, proceed on the basis that some reference is necessary. Even so I do not consider that more than the most general reference is required, sufficient to give notice that the contractor’s application does include loss or expense incurred by him by reason of his being out of pocket in respect of the relevant variation or delayed instruction, or whatever may be the relevant event giving rise to a claim under the clause.’⁷⁷

The position is, it seems, different under SBC, IC and ICD, because of the revised wording. However, it is always prudent for a contractor to include clear reference to its claim for finance and interest charges as part of its claim for direct loss and/or expense.

- (2) Under JCT 63 and indeed under SBC, IC and ICD the contractor’s application must be made within a reasonable time of the loss or expense having been incurred as the clause makes plain. The Council argued that the contractor had failed to do so and pointed to the long period between practical completion in 1974 and the formal claim in 1978. However, on the facts of this case the Council could not rely on the delay between practical completion and the formal application of June 1978 as showing that the application had not been made within a reasonable time, because they were prevented from enforcing their strict legal rights under the principle of promissory estoppel.⁷⁸ This is an important point, but if negotiations for a settlement are taking place, it is sensible practice for the contractor expressly to reserve its legal rights, both as to interest or otherwise.
- (3) There is no cut-off point for interest at the date of practical completion:

‘As I read the clauses, given that (on the clauses in the form which they take in the contract now before us) successive applications are made at reasonable intervals, I can see no reason why the financing charges should not continue to constitute direct loss or expense in which the contractor is involved by reason of, for example a variation, until the date of the last application made before the issue of the certificate issued in respect of the primary loss or expense incurred by reason of the relevant variation. At the date of the issue of the certificate, the right to receive payment in respect of the primary loss or expense merges in the right to receive payment under the certificate within the time specified in the contract, so that from the date of the certificate, the contractor is out of his money by reason either (1) that the contract permits time to elapse between the issue of the certificate and its payment, or (2) that the certificate has not been honoured on the due date, but I can for my part see no good reason for holding that the contractor should cease to be involved in loss or expense in the form of financing charges simply because the date of practical completion has passed.’⁷⁹

Under modern contracts, the need for successful applications is not necessary to secure interest payments.

- (4) A delay in payment occurred while the parties attempted to negotiate an *ex gratia* payment. This delay extended from the date of practical completion in July 1974

⁷⁷ (1985) 5 Con LR 34 at 48 per Robert Goff LJ.

⁷⁸ As stated by Lord Cairns LC in *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439.

⁷⁹ (1985) 5 Con LR 34 at 49 per Robert Goff LJ.

to 11 February 1977 when it became clear to both parties that the contractor would have to claim strictly in accordance with the terms of the contract. It was a delay which, in the view of the court, was attributable to an independent cause, the negotiation, not to the ordering of variations or the giving of late instructions. The financing charges incurred by the contractor during this period were not direct loss and/or expense for the purposes of the contract. This part of the reasoning of the Court of Appeal is beset with difficulties and it has been the subject of some comment. It raises potential legal and practical difficulties when scrutinised carefully.⁸⁰

It is always prudent for the contractor to reserve its rights to finance charges if negotiations are taking place with a view to settlement or, alternatively, to give notice of arbitration. While negotiations are in progress, it is good policy for both parties to continue to act as though there were no such negotiations, so that where, as in this case, the negotiations fail one party is not left at a disadvantage. 'Hope for the best, but prepare for the worst' is a good adage. The best that can be said in this instance is that the particular facts of *Rees & Kirby Ltd* were unique.

- (5) The period within which the contractor was entitled to recover finance charges extended from 11 February 1977, when the architect notified it that the claim had to be dealt with strictly in accordance with the terms of the contract, until 10 August 1979 when the contractor signed the draft final account.
- (6) The contractor had a substantial overdraft at its bank and, therefore, the finance charges should be calculated on a compound interest basis with quarterly rests.

It has now become settled law that under the direct loss and/or expense provisions of JCT contracts and probably under similar provisions in other forms, finance charges are allowable as a head of claim. It is crucially important to understand that when a contractor is claiming in this situation, it is not claiming interest on a debt but rather claiming what is a constituent part of the loss and/or expense.

A connected, but rather different, question concerns the date at which finance charges start to run. Is it the date on which the contractor makes application and the architect has the first intimation that there is a matter to consider under the terms of the contract? Is it rather the date by which the architect has sufficient information to consider the point? Consider, for example, the situation where the contractor makes the briefest of applications and, despite a detailed and precise request from the architect, the contractor is very slow in providing the information reasonably necessary to enable the architect to ascertain the amount of loss and/or expense. Who is to bear the financing charges for the intervening period?

One view is that, whatever may be the reason for the architect's inability to ascertain, if the claim is found ultimately to be valid, the contractor is bearing the financing charges, while the money remains in the employer's pocket and, therefore, the contractor is entitled to reimbursement. Another approach is to say that the period commences when the architect has received all the information reasonably required; before that the contractor is the author of its own misfortune. On balance, it is thought that the latter is the better view and receives some support from the

⁸⁰ See the commentary on this case in 30 BLR 5.

reasoning in *Rees & Kirby Ltd*. In any particular case it will be a matter of fact to be taken into account how much of the delay between making application and providing full information is the responsibility of the contractor. In *Rees & Kirby Ltd* although the period of negotiation was omitted from the reckoning, it was not the fault of any party.

It appears that the principles enunciated in *FG Minter Ltd v Welsh Health Technical Services Organisation* and *Rees & Kirby Ltd v Swansea Corporation* are to be followed as a general rule and that the resulting additional financing charges must be considered to result directly from the delay and disruption concerned, and consequently are recoverable. Before moving on, mention must be made that this approach as well as the *Minter* decision seems to be in conflict with an old decision of the House of Lords in a case known as *The Edison*.⁸¹

‘... the appellants’ actual loss, in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents’ acts, and, in my opinion, was outside the legal purview of the consequences of these acts.’⁸²

This particularly harsh view has been overtaken by the realities of high inflation in subsequent years. Dr Parris has observed ‘this decision of the House of Lords has in fact long been ignored by the courts, if it has ever indeed been followed’⁸³ and cites in support *Dodd Properties (Kent) Ltd v The City of Canterbury*.⁸⁴ It, therefore, appears that *The Edison* has no application to the type of situation envisaged above⁸⁵ and most authorities have ceased to consider it to be good law, certainly on the relevance of impecuniosity. It used to be thought that, in assessing damages, the fact that the injured party was put to greater expense due to its impecuniosity was something which could not be taken into account. It was considered to be too remote. The possibility and consequences of impecuniosity is now considered to be within the contemplation of the parties at the time they execute the contract. For example, in certain circumstances an impecunious party may be unable to take immediate action to mitigate its losses. In an interesting development, it has been held that interest is recoverable as damages since it was within the parties contemplation at the time the contract was entered into that such charges might be incurred.⁸⁶

The *Rees & Kirby Ltd* case has concluded the debate about financing charges as a proper head of claim under contracts in JCT terms. There is no doubt that such charges are claimable as part of the direct loss and/or expense which a contractor is entitled to claim. The principle established by *Minter* and *Rees & Kirby Ltd* are applicable to other forms of construction contract such as GC/Works/1(1998). The principle was re-affirmed in the Scots Court of Session following legal argument

⁸¹ (1933) AC 449.

⁸² (1933) AC 449 at 460 per Lord Wright.

⁸³ John Parris, *The Standard Form of Building Contract*, 2nd edition 1985, Blackwell Science, Section 10.05 Interest as ‘direct loss and expense’.

⁸⁴ (1979) 13 BLR 45.

⁸⁵ (1979) 13 BLR 45 at t 54 per Megaw LJ and at 61 per Donaldson LJ.

⁸⁶ *Amec Process and Energy Ltd v Stork Engineers & Contractors BV (No 3)* [2002] EWHC B1 (TCC).

which essentially proceeded from first principles.⁸⁷ In an interesting passage the Court said:

‘There may have been a tendency in the past to treat such claims as claims for impecuniosity and I think practitioners may have, when possible, preferred to plead a claim for such items in terms of the second branch of the rule in *Hadley v Baxendale*. That is understandable. But that is not to say that such claims must be pleaded under that branch, or fail. . . . what at one point in time may be considered to be an extravagant proposition . . . is not necessarily to be considered so for all time. These things are not cast in tablets of stone. . . . it seems to me to be perfectly compatible with sound financial strategy in the construction industry that the pursuers should incur these financing charges. . . . Financing strategy is not to be confused with impecuniosity. . . . Even if I am wrong in my view that the word “directly” is to be equiparated with “naturally” in the sense used in the first branch of the rule in *Hadley v Baxendale*, I am of the opinion that the pursuer’s claim for financing charges could still come within the phrase “direct loss and/or expense”.’⁸⁸

(b) Rate of interest

Although the principle of charging interest is established, there remains the question of the rate of interest which is recoverable. It may appear simple. For example, many contractors in this situation will simply rely upon published rates of interest in order to claim. Where a contractor is, in fact, operating on the basis of borrowed money, it should be straightforward to obtain from the contractor’s bankers the necessary supporting evidence about the amount and rate of finance charges incurred. If the contractor’s claim is for loss of opportunity to invest capital, it will be necessary for the contractor to show the way in which it normally invests its money and the interest that it usually earns.⁸⁹ The rate at which an ordinary commercial borrower can borrow or invest money is probably the safest approach.

The reality of the situation introduces several problems. The position is that the contractor is only entitled to the rate of interest or finance charges which was in the contemplation of the employer as a foreseeable consequence of the matter in regard to which the contractor is claiming. In other words, the contractor has to demonstrate that the rate at which it had to borrow money was the kind of rate which the employer would have known would be applicable in the given circumstances. It would have to demonstrate that the interest which it would have expected to receive was again something which the employer would have expected.

Different problems will arise where a contractor alternates between a credit and a debit situation during the contract period. It may become very difficult to establish at any particular point in time whether what it is entitled to claim is interest on borrowed money or loss of investment opportunity. In practice, it is likely that the percentages will differ very little from each other. If all parties agree, it may be sensible

⁸⁷ *Ogilvie Builders Ltd v The City of Glasgow District Council* (1994) 68 BLR 122.

⁸⁸ *Ogilvie Builders Ltd v The City of Glasgow District Council* (1994) 68 BLR 122 at 139 per Lord Abernathy.

⁸⁹ *Tate & Lyle Food and Distribution Co Ltd v Greater London Council* [1982] 1 WLR 149.

simply to calculate the average percentage to be applied. Often in these cases, the time and cost needed to establish precise figures is not justified by the difference between precise figures and averages. The financial pages of the good quality daily newspapers and, of course, the internet will be a useful source of reference and, in practice, it may well be acceptable to average-out rates of interest over a period rather than to go through the tedious mathematical exercise of detailed calculation on the basis of rates from day to day.

Overdraft rates will fluctuate throughout a contract. Moreover, different contractors will be able to achieve different rates. The particular circumstances of a contractor may dictate that a bank will only lend money on what might be described as a penal rate of interest. In such circumstances, if an exceptional rate of interest is being charged to the particular contractor, its recovery as part of direct loss and/or expense will be limited to a rate which the employer had in contemplation when executing the contract. The same thing may apply to the loss of opportunity to invest. Some contractors may have an exceptionally rewarding chance to invest, but if that cannot be said to have been in the employer's contemplation at the time the contract was executed, it will be disallowed. Therefore, that any interest or finance charges should be assessed at a rate equivalent to the usual cost of borrowing (or usual investment return), disregarding any special position of the contractor. There is authority for this view. One looks

‘ . . . at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for example, the fact that a particular plaintiff could only borrow money at a very high rate or, on the other hand, was able to borrow money at specially favourable rates. The correct thing to do is to take the rate at which plaintiffs in general could borrow money. This does not, however . . . mean that you exclude entirely all the attributes of the plaintiff other than that he is a plaintiff . . . [It] would always be right to look at the rate at which plaintiffs with the general attributes of the actual plaintiff in the case (though not, of course, with any special or peculiar attribute) could borrow money as a guide to the appropriate interest rate . . . ’⁹⁰

This seems to be the correct approach, certainly under JCT terms. However, although the contractor is not usually entitled to claim anything other than ‘normal’ interest and financing charges, the situation may be changed if it can be shown that the employer was perfectly well aware that a particular contractor could only obtain a loan at a rate which was notably higher than normal or that the contractor had access to especially good investment rates. The recovery would then fall under the second limb of *Hadley v Baxendale*; effectively special damages of which the employer had due notice.

The interest allowable on an overdraft is that actually payable by the contractor (subject to what has been said above) and would therefore be compounded at the normal intervals adopted by the contractor's bank, e.g. quarterly or half-yearly.

⁹⁰ *Tate & Lyle Food and Distribution Co Ltd v Greater London Council* [1981] 3 All ER 716 at 722 per Forbes J.

(c) Interest

The law relating to interest payments is complex and it is still developing. It still retains some of the medieval abhorrence of usury which seems strange in today's commercial environment. There is a legal presumption that late payment of money does not ordinarily cause the recipient to suffer any loss for which interest is payable so that, *London, Chatham and Dover Railway Co v South-Eastern Railway Co* held that a person who pays late on an invoice discharges the obligation by paying the sum certified without interest.⁹¹ The House of Lords has affirmed this rule⁹² but at the same time they considered that the rule was not satisfactory, and their Lordships expressed the view that the position should be altered by statute, as had been recommended by the Law Commission in its report on Interest in 1978.⁹³

The general position, when considering the position of a contractor who is trying to recover interest, is that the recovery may fall into one or more of five categories:

(i) If there is an express term of the contract providing for interest in specific circumstances

Where applicable, this category is generally unmistakable. The JCT standard forms and the ICE Conditions of Contract do have such provision under which the employer must pay interest on overdue payments, for example SBC clause 4.13.6.

(ii) If the contract can be construed as giving a contractual right to interest payment

Interest and financing charges as part of direct loss and/or expense fall into this category. These have been discussed earlier in this chapter.

(iii) If interest is awarded by the court on judgment for a debt

There has to be a debt – more than a mere assertion that money is due – before judgment will be given and interest will be awarded. The court is empowered to award interest provided the money was outstanding at the time proceedings were commenced although it may have been paid subsequently.⁹⁴ Arbitrators have a like power which provides:

- '(1) The parties are free to agree on the powers of the tribunal as regards the award of interest.
- (2) Unless otherwise agreed by the parties the following provisions apply.
- (3) The tribunal may award simple or compound interest from such dates and with such rests as it considers meets the justice of the case –

⁹¹ *London, Chatham and Dover Railway Co v South-Eastern Railway Co* [1893] AC 429.

⁹² *President of India v La Pintada Cia Navegacion SA* [1984] 2 All ER 773.

⁹³ Cmnd 7229. Eventually, this was put into effect, at least in part, by the Late Payment of Commercial Debts (Interest) Act 1998, see point (v).

⁹⁴ See s. 15 of the Administration of Justice Act 1982 (amending s. 35A of the Supreme Court Act 1981).

- (a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;
- (b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.

(4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including the award of interest under subsection (3) and any award as to costs).

(5) References in this section to an amount awarded by the tribunal include an amount payable in consequence of a declaratory award by the tribunal.

(6) The above provisions do not affect any other power of the tribunal to award interest.⁹⁵

The normal practice is that interest will be awarded from the date on which payment should have been made, but there may be reasons why a lesser period will be awarded for example, unreasonable delay on the part of the claimant.

Both judgment debts and sums directed to be paid by an arbitrator's award carry interest at the prescribed statutory rate as from the date of judgment or the award.

(iv) *If it can be shown that there are special circumstances*

This is a promising category for interest seekers. Where it is established that a creditor has suffered special damage, for example by incurring debts of interest on overdrafts as a result of being out of funds as a result of the debtor's late payment of a debt, the creditor is entitled to claim that special damage, provided that the situation can be brought within the second part of the rule in *Hadley v Baxendale*.⁹⁶ This follows from the decision of the Court of Appeal in *Wadsworth v Lydall*,⁹⁷ which was approved by the House of Lords in *La Pintada*.⁹⁸

In *Wadsworth v Lydall*, Wadsworth entered into a contract to sell a piece of land to Lydall for £10,000 and, expecting to receive the purchase price from Lydall by the agreed date, entered into a contract to buy more land. Unfortunately, Lydall failed to pay the purchase price, but paid only £7200 to Wadsworth late. This resulted in Wadsworth being unable to pay his vendor and, therefore, having to pay interest on the unpaid purchase price of the other plot of land. In addition, Wadsworth also incurred the cost of raising a mortgage to meet the balance owing. In due course Wadsworth sued Lydall claiming, among other things, interest which he had to pay his vendor for late completion of the purchase and the costs of the mortgage.

In allowing these two items as special damage under the second limb of the rule in *Hadley v Baxendale*, the Court of Appeal said:

'The defendant knew or ought to have known that if the £10,000 was not paid to him the plaintiff would need to borrow an equivalent amount or would have to

⁹⁵ Section 49 of the Arbitration Act 1996.

⁹⁶ (1854) 9 Ex 341.

⁹⁷ [1981] 2 All ER 401.

⁹⁸ *President of India v La Pintada Cia Navegacion SA* [1984] 2 All ER 773.

pay interest to his vendor or would need to secure financial accommodation in some other way. The plaintiff's loss in my opinion is such that it may reasonably be supposed that it would have been in the contemplation of the parties as a serious possibility, had their intention been directed to the consequences of a breach of Contract.⁹⁹

The *London Chatham and Dover Railway Co* case which was authority that interest was not recoverable on a debt paid late was distinguished as follows.

'In my view the Court is not constrained (i.e. in relation to interest) by the decision of the House of Lords. In *London Chatham and Dover Railway Co v South-Eastern Railway Co* the House of Lords was not concerned with a claim for special damages. The action was an action for an account. The House was concerned only with a claim for interest by way of general damages. If a plaintiff pleads and can prove that he has suffered special damage as a result of the defendant's failure to perform his obligation under a contract, and such damage is not too remote, on the principle of *Hadley v Baxendale*, I can see no logical reason why such special damage should be irrecoverable merely because the obligation on which the defendant defaulted was an obligation to pay money and not some other type of obligation'¹⁰⁰

This case clears the way for parties to recover interest as 'special damage' in claims under building contracts. It has been held that where a civil engineering contract did not include provision for the payment of interest on late payment, a contractor may still be entitled to interest or financing charges if he is able to demonstrate that they are special damage.¹⁰¹

It is worth mentioning what appears to be an application of the principle of *Wadsworth v Lydall* in the Northern Ireland decision *Department of the Environment for Northern Ireland v Farrans (Construction) Ltd.*¹⁰² The dispute arose under JCT 63 and seems to be a wrong view of the interest position. Under JCT 63 clause 22 (similar to SBC clause 2.32.1), once the architect has issued what would now amount to (and which will be referred to below as) a certificate of non-completion, the employer is entitled to deduct liquidated and ascertained damages at the stated rate from money due or to become due to the contractor. The question which arose was whether, if subsequently the architect grants an extension of time so that the employer must refund some of the liquidated damages, is the contractor entitled to interest or financing charges in respect of the repaid amounts? For the purposes of the case, the parties agreed that the architect had the power to issue more than one certificate. In the Ulster case, four such certificates had been issued following grants of extension of time.

The court decided that where several certificates were issued, with the result that sums previously deducted as liquidated damages had to be repaid, the contractor was

⁹⁹ *Wadsworth v Lydall* [1981] 2 All ER 401 at 405 per Brightman LJ.

¹⁰⁰ *Wadsworth v Lydall* [1981] 2 All ER 401 at 405 per Brightman LJ.

¹⁰¹ *Holbeach Plant Hire Ltd v Anglian Water Authority* (1988) 14 Con LR 101. The court was applying the proposition laid down in *President of India v Lips Maritime Corporation* [1987] 3 All ER 110 at 116 per Lord Brandon. The position under JCT Forms is dealt with under '(a) Financing charges' earlier in this Section.

¹⁰² (1982) 19 BLR 1.

entitled to interest on the sums repaid. Clause 22 was to be construed as meaning that when the employer received a certificate of non-completion the employer was entitled to deduct liquidated damages. This was at the employer's own risk that a later certificate might vitiate the earlier certificate leaving the employer without any defence against a claim for breach of contract in failing to pay the amounts shown in the relevant interim certificates by the due dates. The employer ought to have been aware that there was a chance that further extensions of time would be issued which would result in the employer being in breach of contract. In those circumstances the contractor was entitled to the remedy appropriate for a common law claim for breach of contract. The court applied *Wadsworth v Lydall* and held that the arbitrator in the case had power to award damages, which could include interest incurred or lost as a foreseeable consequence of the employer's breach of contract. It is a mystery how the employer could be in breach by operating the express provisions of the contract and this is a decision of which all concerned with administering building contracts should be aware, but which it could be unwise to follow.

Whether that decision was right or wrong, and it has been criticised by the editors of *Building Law Reports*¹⁰³ and others, the wording of the SBC clause makes it plain, that the employer is not making good an earlier breach of contract. SBC clause 2.32.1 confers on the employer the right to deduct liquidated damages once the architect has issued a certificate under clause 2.31 and the employer has given written notice of intended deduction to the contractor. Once these two conditions are satisfied the employer has a contractual right to deduct liquidated damages – and clause 2.32.2 deals with what is to happen if the completion date is later altered in the contractor's favour. The employer cannot be in breach of contract by doing that which is expressly empowered by the contract.

(v) *If it is a commercial debt*

The Late Payment of Commercial Debts (Interest) Act 1998 has been fully in force since November 2002. As the name implies, it only deals with commercial debts; consumers are excluded. Broadly, if invoices are outstanding for longer than the prescribed period (usually about 30 days), the creditor is entitled to claim interest at 8% above the Bank of England Base rate current at the previous end of June or end of December as the case may be. In addition and depending upon the size of the debt, a modest lump sum is to be added to the amount of interest.¹⁰⁴

7.4 *Cost of a claim*

Invariably, a contractor submitting a claim to the architect will have, among the heads of claim, an item for fees paid to a claims consultant. The contractor is not entitled to be reimbursed for any costs incurred in preparing the claim for the simple reason that none of the standard form building contracts requires the contractor to submit

¹⁰³ (1982) 19 BLR 1.

¹⁰⁴ The Late Payment of Commercial Debts Regulations 2002.

a claim. The contractor is simply required to make a written application to the architect, and to provide supporting evidence as required by architect and/or quantity surveyor in order to reasonably enable them to form an opinion and ascertain the amount due. Some confusion has been caused because it has been said that the case of *James Longley & Co Ltd v South West Regional Health Authority*¹⁰⁵ is authority that a claims consultant is entitled to be paid for work in preparing the claim. The case decided no such thing. The facts are that, following an arbitration which was settled during the hearing, taxation of costs were reviewed and the fees of a claims consultant were allowed in respect of work done in preparing the contractor's case for arbitration (the preparation of three schedules annexed to the Points of Claim). His fees for preparing the contractor's claim for presentation to the architect were not allowed. The fees which were allowed were fees of a potential expert witness in the arbitration.

The principle is that if the claim is prepared as part of arbitration or litigation, the costs can be recovered as part of the costs of the action. The employment of a claims consultant by a contractor is, at least in theory, unnecessary. In practice, of course, many contractors do need assistance in presenting their documents in the best possible way. Evidencing a claim is not something that every contractor knows how to do without such assistance. But whether a contractor employs a claims consultant or a solicitor to give advice, or even takes counsel's opinion on the matter, the fees involved are not recoverable unless incurred as part of arbitration or legal proceedings. It has been held that managerial time spent in dealing with a problem may be claimable as a claim for 'special damages' in an action at common law.¹⁰⁶ It may be that there can in principle be a claim for the cost of managerial time spent on preparing a claim, if not already included in a claim for head-office overheads. The contractor would be put to proof that it had to devote time and that such time would otherwise have been spent on productive work. It is arguable that a contractor could recover the cost of employing an outside expert if there was no one available in the contractor's firm to do the work.

¹⁰⁵ (1984) 25 BLR 56.

¹⁰⁶ *Tate & Lyle Food and Distribution Co Ltd v Greater London Council* [1982] 1 WLR 149.

Chapter 8

Causation

8.1 Theory

Causation has already been mentioned. It is the relationship between cause and effect. It is an extremely important concept in the context of liability. A wrongful act may trigger a series of events which eventually results in damage being suffered. This is called the 'chain of causation' (see Figure 8.1).

The loss and/or expense must be direct in the sense of remoteness and also in the sense of the chain of causation, that is, the relationship between cause and effect. The matter on which the contractor seeks to rely must be linked, without interruption, to the loss suffered. Therefore if the cause is not the matter, but some intervening event,¹ there will be no liability and no claim. To put the situation another way, the loss and/or expense must have been caused by the breach or act relied on and not merely be the occasion for it.²

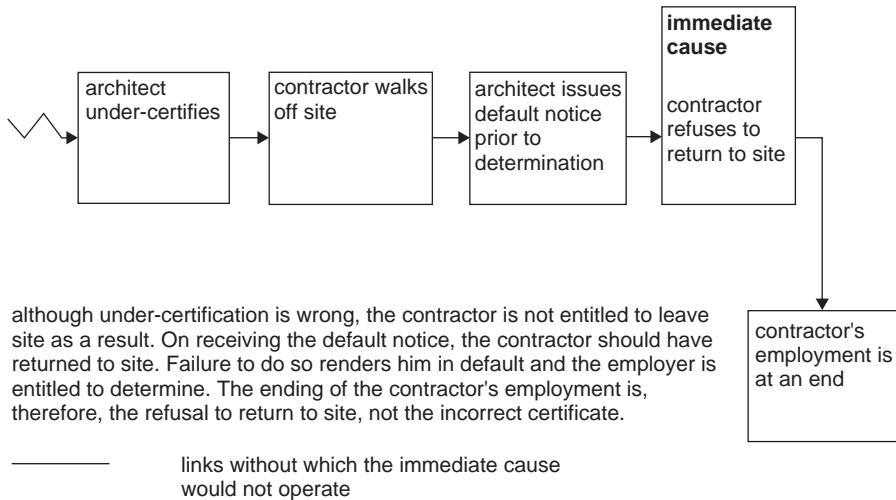
Two simple examples may be contrasted. In the first one, a variation is ordered which necessitates plant lying idle for some days. The plant is needed for the original work, but at a very late stage the work is varied and so the plant is not needed. Suppose the plant is hired in. The contractor's hire charges, subject to any re-letting or the plant owner accepting an early return, would be a direct loss and, therefore, reimbursable. In the second example, a variation substitutes slates for roof tiles. After the contractor has ordered the new slates, problems are encountered at the slate quarry, which mean that the supply of slates is interrupted so that the supplier is in breach of the supply contract. The delay and disruption to the contract works consequent upon the interruption of supply is clearly a direct consequence of the supplier's breach of the supply contract and only an indirect consequence of the variation. It is in fact the direct consequence of an intervening event – the supplier's breach. In such a case, it is for the contractor to look, if to anyone, to the supplier for recompense. The principles of causation have been set out in classic statements:

'It seems to me that there is no abstract proposition, the application of which will provide the answer in every case, except this: one has to ask oneself what was the effective and predominant cause of the accident that happened, whatever the nature of that accident may be'³

¹ The legal term used to be expressed as *novus actus interveniens* – a new act coming in between.

² *Weld-Blundell v Stevens* [1920] AC 956.

³ *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691 at 698 per Viscount Simon LC.



although under-certification is wrong, the contractor is not entitled to leave site as a result. On receiving the default notice, the contractor should have returned to site. Failure to do so renders him in default and the employer is entitled to determine. The ending of the contractor's employment is, therefore, the refusal to return to site, not the incorrect certificate.

Figure 8.1 The chain of causation

‘This choice of the real or efficient cause from out of the complex of facts must be made by applying commonsense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it.’⁴

‘Causation is a mental concept, generally based on inference or induction from uniformity of sequence as between two events that there is a causal connection between them The common law, however, is not concerned with philosophic speculation, but is only concerned with ordinary everyday life and thoughts and expressions’⁵

Causation has been held to be purely a question of fact to be decided on the basis of common sense.⁶ In *P & O Developments Ltd v Guy's & St Thomas' National Health Service Trust*, Judge Bowsler aptly summarised the position so far as the building industry was concerned:

‘The test is what an informed person in the building industry (not the man in the street) would take to be the cause without too microscopic analysis but on a broad view.’⁷

Everything depends on the facts and circumstances. Some situations are very complex and it will be important to identify the damage from which it was intended to protect a party.⁸ A graphic example of the concept of causation is to be found in a case where negligent architects issued defective interim certificates and the contractors withdrew from site.⁹ The contractor lost its claim against the negligent architects, because it

⁴ *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691 at 706 per Lord Wright.

⁵ *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (AB)* [1949] AC 196 at 228 per Lord Wright.

⁶ *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.

⁷ [1999] BLR 3 at 9 per Judge Bowsler.

⁸ *Skandia Property (UK) Ltd v Thames Water* [1999] BLR 338.

⁹ *Lubenham Fidelity & Investment Co v South Pembrokeshire District Council and Wigley Fox Partnership* (1986) 6 Con LR 85.

broke the chain of causation by persisting in suspension of the Works despite the service by the employer of a preliminary notice of default prior to determination. The contractor alone, not the architects, was responsible for the termination of the contract. Although the architect's negligence was the source of the events, it was overtaken and overwhelmed by the contractor's serious breach of contract.

A somewhat more subtle example concerned a claim against insurers.¹⁰ This followed the Hatfield train disaster in 2000. The disaster was caused by a broken rail which itself was caused by a particular form of cracking. Speed restrictions were imposed by Railtrack as an emergency measure at sites where that particular form of cracking was known to exist. Various train companies alleged that they had suffered losses as a result of the speed restrictions. The insurers relied upon a clause in the policies which excluded damage caused by wear and tear. The court had to decide what was the actual cause of the losses. The matter finished in the Court of Appeal. The court at first instance had held that the wear and tear was simply the occasion for the loss, but that actual cause was the speed restrictions. The Court of Appeal disagreed and held that the cause of the speed restrictions was the wear and tear. There was no break in the chain of causation and no intervening event. The wear and tear caused the speed restrictions which, in turn, caused the losses. Therefore, the insurers were entitled to rely on the exclusion clause.

In *Balfour Beatty Ltd v Chestermount Properties Ltd* the court commented on causation as applied to extensions of time:

‘There may well be circumstances where a relevant event has an impact on the progress of the works during a period of culpable delay but where that event would have been wholly avoided had the contractor completed the works by the previously-fixed completion date. For example, a storm which floods the site during a period of culpable delay and interrupts the progress of the works would have been avoided altogether if the contractor had not overrun the completion date. In such a case it is hard to see that it would be fair and reasonable to postpone the completion date to extend the contractors’ time.’¹¹

Where there appear to be concurrent causes, one being the responsibility of one party and the other being the responsibility of the other party, the correct test to apply is not whether one of the causes is the sole cause or the dominant cause. The correct test has been held to be whether a cause is an effective cause.¹² Where there are several possible causes, the burden of proof on the contractor is to show that one cause is more likely than the others.¹³

8.2 Use of networks

Computers are very commonly used to generate graphical information to assist in presenting a claim. Such graphics cannot usually be said to ‘support’ the claim in the same way as hard evidence, such as correspondence and site minutes, will support

¹⁰ *Midlands Mainline Ltd & Others v Eagle Star Insurance Co Ltd* [2004] EWCA Civ 1042.

¹¹ *Balfour Beatty Ltd v Chestermount Properties Ltd* (1993) 62 BLR 1 at 34 per Coleman J.

¹² *Loftus-Brigham v Ealing LBC* (2004) 20 Const LJ 82.

¹³ *Plater v Sonatrach* (2004) CILL 2073.

it, but if the graphics are used sensibly, they can pictorially represent what the documentary evidence proves happened on site so as to make it easier to understand. Architects, trained to visualise, usually find that such things as histograms, graphs and pie charts explain what the contractor is trying to say better than thousands of words. A particularly useful tool is the computer planning program. There are many versions on the market. Both architects and contractors will find it helpful in preparing programmes for construction works and in analysing the programmes and the effects of delays. They also have a part to play in extensions of time and the analysis of loss and expense, whether prolongation or disruption. However, it is important to remember that 'it is merely a tool which must be considered with the other evidence . . . The evidence of Programming Experts may be of persuasive assistance.'¹⁴

The courts have shown themselves ready to accept such analysis if properly carried out.¹⁵ Of course, there is nothing magical about computers. They simply do at great speed what would take the ordinary mortal a considerable time to achieve. The particular tool used to programme and analyse is the network or the precedence diagram also called the PERT (Performance Evaluation and Review Technique) chart. All these charts provide a way of connecting together the operations on site in a series of logic links (e.g. pouring concrete cannot commence until trenches are dug, etc.). They also provide the means of delaying some activities and bringing forward others. For example, pouring concrete can start before trench digging is entirely completed. They enable the critical path or paths to be identified and delays to be introduced. Not least, resources can be added. This is not the place to venture even a brief description of the preparation of a network and there are many excellent books on the topic. Particularly to be commended are those books published to assist in understanding unfathomable official software 'help'. Most of them include excellent explanations of the theory behind programming.

All architects and project managers should use computerised programmes to monitor progress and assist in analysing claims. Contractors should routinely submit detailed programmes on disk as well as in hard copy. If this was done, all parties would be assisted in making prompt claims and speedy responses, claim making and understanding would be eased and disputes avoided or at least made less frequent. Programmes could be prepared to show as-built compared to intended progress and known employer-generated delays could be taken out to examine the likely situation had those delays not occurred. The reverse operation can be tried. These techniques are sometimes known as the 'subtractive' or 'additive' methods. Provided accurate records are available, the only limit to possible methods of analysis are the limits to the architect's or the contractor's ingenuity.

Often, all that is required is to take the computerised version of the contractor's original programme, input all the delays and check the result. This is the 'impacted as-planned' technique which is arguably the simplest form of critical path based analysis. Although it is not very sophisticated, it is very useful where the total delays are quite extensive. The result shows what would have happened if the contractor had continued to progress the Works exactly as shown on its original programme without taking any mitigating steps. It will readily be appreciated that it represents

¹⁴ *Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup and Partners International Ltd* [2007] EWHC 918 (TCC) at paragraph 575 per Judge Toulmin.

¹⁵ *John Barker Construction Ltd v London Portman Hotels Ltd* (1996) 50 Con LR 43.

the maximum extension of time to which the contractor could conceivably be entitled. As such it forms a useful baseline. Because the logic links will determine effect, the most important part is to ensure they are properly represented.

On the other hand, it should be borne in mind that computer programmes are not the solution to all the ills which afflict contractor's claims and it is easy to be seduced by the slick visuals in a typical software package into thinking otherwise. Moreover, networks are susceptible to even the slightest change in logic to produce vastly different results. The activities in the programme are linked in various ways, generally referred to as 'Start start', 'Start finish', 'Finish start' or 'Finish finish'. For example, 'Start start' means that the start of one activity is dependent on the start of another while 'Finish start' means that the start of activity is dependent on the finish of another. Each link may be qualified by periods of lead or lag time. Obviously, to link the starts of a number of activities will result in a different conclusion than if finish and start dates are linked in the same activities when a delay is inserted into the programme.

It is possible to minimise or exaggerate the effect of any future delay by the way in which the activities are linked. It should not need saying that the links should, so far as reasonably possible, reflect the true position and architects must check the relationships for possible errors. A court has recently questioned whether certain assumptions in regard to a critical path were necessarily accurate in all circumstances and emphasised the need to check carefully that critical path delays did in fact translate to delays to the completion date.

'The experts have agreed that the delays to [certain structures] were critical delays since those buildings were on the critical path of the project at the relevant time. Ordinarily therefore one would expect, other things being equal, that the project completion date would be pushed out at the end of the job by the same or a similar period to the period of delay to those buildings. However, as experience shows on construction sites, many supervening events can take place which will falsify such an assumed result. For example, the Contractor may rearrange his programme so that other activities are accelerated or carried out in a different sequence thereby reducing the initial delays. Or the Contractor may apply additional resources to the delayed activities in order to accelerate them and thereby reduce the delay to those activities. Or, as in the present case, where the Employer was itself responsible for critical delays prior to the failure of the ground treatment works, it may be that extensions of time granted by the Employer cover part of the same period as delays under consideration. All of these are possibilities which need to be investigated in order to establish whether the assumption that a critical delay locked into the project in January 2003 does in fact lead to a delay to the completion of the whole project some 16 months later.'¹⁶

*Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth*¹⁷ concerned an application for summary judgment following an adjudication decision. Its interest lies in the references to the use of programmes for estimat-

¹⁶ *Costain Ltd v Charles Haswell & Partners Ltd* (2009) 128 Con LR 154 at 234 per Richard Fearnough QC sitting as a Deputy Judge of the High Court.

¹⁷ [2002] BLR 288.

ing extensions of time. As part of its submission to the adjudicator, Balfour Beatty referred to the ‘most widely recognised and used’ delay analysis methods:

- (I) *Time Impact Analysis* (or “*time slice*” or “*snapshot*” analysis). This method is used to map out the impacts of particular delays at the point in time at which they occur permitting the discrete effects of individual events to be determined.
- (II) *Window analysis*. For this method the programme is divided into consecutive time “windows” where the delay occurring in each window is analysed and attributed to the events occurring in that window.
- (III) *Collapsed as-built*. This method is used so as to permit the effect of events to be “subtracted” from the as-built programme to determine what would have occurred but for those events.
- (IV) *Impacted plan* where the original programme is taken as the basis of the delay calculation, and delay faults are added into the programme to determine when the work should have finished as a result of those delays.
- (V) *Global assessment*. This is not a proper or acceptable method to analyse delay.¹⁸

Later the judge said:

‘By now one would have thought that it was well understood that, on a contract of this kind, in order to attack, on the facts, a Clause 24 certificate for non-completion (or an extension of time determined under Clause 25), the foundation must be the original programme (if capable of justification and substantiation to show its validity and reliability as a contractual starting point) and its success will similarly depend on the soundness of its revisions on the occurrence of every event, so as to be able to provide a satisfactory and convincing demonstration of cause and effect. A valid critical path (or paths) has to be established both initially and at every later material point since it (or they) will almost certainly change. Some means has also to be established for demonstrating the effect of concurrent or parallel delays or other matters for which the Employer will not be responsible under the contract.’¹⁹

Although it is possible to agree in principle with this statement, it does not mean that a programme, adjusted as indicated, must be used in just that way on every occasion. It is perfectly possible to determine a critical path in words and to deduce the effect of delays by applying reason rather than computer technology. That has been made very clear in a Scottish case:

‘In my opinion the pursuers clearly went too far in suggesting that an expert could only give a meaningful opinion on the basis of an as-built critical path analysis. For reasons discussed below (at paragraphs [36]–[37]) I am of opinion that such an approach has serious dangers of its own. I further conclude, as explained in those paragraphs, that [the pursuer’s expert’s] own use of an as-built critical path analysis is flawed in a significant number of important respects. On that basis, I conclude that that approach to the issues in the present case is not helpful. The

¹⁸ [2002] BLR 288 at 292 per Judge Lloyd.

¹⁹ [2002] BLR 288 at 302 per Judge Lloyd.

major difficulty, it seems to me, is that in the type of programme used to carry out a critical path analysis any significant error in the information that is fed into the programme is liable to invalidate the entire analysis. Moreover, for reasons explained by [the defender's expert] (paragraphs [36]–[37] below), I conclude that it is easy to make such errors. That seems to me to invalidate the use of an as-built critical path analysis to discover after the event where the critical path lay, at least in a case where full electronic records are not available from the contractor. That does not invalidate the use of a critical path analysis as a planning tool, but that is a different matter, because it is being used then for an entirely different purpose. Consequently I think it necessary to revert to the methods that were in use before computer software came to be used extensively in the programming of complex construction contracts. That is essentially what Mr Whitaker did in his evidence. Those older methods are still plainly valid, and if computer-based techniques cannot be used accurately there is no alternative to using older, non-computer-based techniques.²⁰

At appeal the Inner House of the Court of Session reinforced that position:

‘the decision-maker is at liberty to decide an issue of causation on the basis of any factual evidence acceptable to him. In that connection, while a critical path analysis, if shown to be soundly based, may be of assistance, the absence of such an analysis does not mean that a claim for extension of time must necessarily fail.’²¹

Computer technology is very useful in calculating delays to a construction programme but, whatever its adherents may say, it is not foolproof. Great care must be taken in applying the principles and drawing conclusions. One has only to look at the reported cases where experts for both sides hold widely differing views and obtain completely different results after feeding in to the computer what appears to be identical data. In *Skanska Construction UK Ltd v Egger (Barony) Ltd*,²² the court was dismissive of the analysis carried out by a very experienced expert in this field acting for Egger, but appreciative of a planning consultant for Skanska with ‘hands on’ experience of the particular project:

‘He impressed me as someone who was objective, meticulous as to detail, and not hide bound by theory as when demonstrable fact collided with computer programme logic.’²³

In contrast, Egger’s expert produced many hundreds of pages of report supported by 240 charts. The court remarked that the reliability of the expert’s sophisticated impact analysis was only as good as the data put in. This is self-evidently true of course, but it is refreshing to hear a court say so. The danger is that parties are beguiled by what appears to be the unarguable science of programme planning. In fact, what strongly emerges from any consideration of this approach is that, like much

²⁰ *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190 at paragraph 29 per Lord Drummond Young upheld on appeal [2010] ScotCS CSIH 68.

²¹ *City Inn Ltd v Shepherd Construction Ltd* [2010] ScotCS CSIH 68 at paragraph 42 per Lord Osborne.

²² [2004] EWHC 1748 (TCC).

²³ *Skanska Construction UK Ltd v Egger (Barony) Ltd* [2004] EWHC 1748 (TCC) at paragraph 415 per Judge Wilcox.

else in life, conclusions drawn from an examination of computer simulations have to be treated with a degree of scepticism.

It is very easy for a contractor to make a mistake in calculating elements of its claim, whether it be a matter of extra time or money or a combination of both. In *McAlpine Humberoak Ltd v McDermott International Inc (No 1)*, the Court of Appeal identified flaws in the methodology adopted by the very experienced civil engineer engaged by the contractor to prepare its claim. The engineer's approach assumed that if one man was working for one day on a particular variation order, the whole contract was delayed for that day. Thus in one instance an inspection took no more than an hour and £39 was claimed, but the engineer allowed a day's delay to the whole of the work. A more serious defect was that the claim assumed that the whole of the workforce planned for a particular activity was engaged continuously on that activity from start to finish although that situation was hardly likely.²⁴

8.3 Float

This is a term often used in connection with programming, especially with network analysis. Essentially, it is the time difference, if any, between the time required to perform a task and the time available in which to do it. If an activity has five days of float, it means that the activity could be extended by up to five days without affecting the completion date of the project. Alternatively, the activity could start up to five days late without any overall delaying effect. One of the definitions of a 'critical activity' is that it has no float. In other words, there is no scope for any delay at all before the completion date of the project is affected.

Much debate rages about the 'ownership' of float in a programme. Contractors will usually claim it for themselves, sometimes to the disadvantage of sub-contractors.²⁵ A contractor may argue that an extension of time is due even if a non-critical activity is delayed. The argument is sometimes extended to the effect that if a contractor programmes to complete a ten week contract in nine weeks, the extra week is the contractor's float and if the project is delayed by a few days, an extension of time will be due, even if the contractor finishes before the completion date. That is manifestly wrong. The better view is that no one owns the float. If an activity has a float of three days and this float is used, because the architect is late in providing information, the contractor has no entitlement to an extension of time. That is not to say, of course, that the contractor has no claim to loss and/or expense due to disruption, but that is a different matter.

In *Ascon Construction Ltd v Alfred McAlpine Construction Isle of Man Ltd* the judge made a very useful analysis of the concept of float:

'Before addressing those factual issues I must deal with the point made by McAlpine as to the effect of its main contract "float", which would in whole or in part pre-empt them. It does not seem to be in dispute that McAlpine's programme contained a "float" of five weeks in the sense, as I understand it, that had work started on time and had all sub-programmes for sub-contract works and for

²⁴ (1992) 58 BLR 1 at 25 per Lloyd LJ.

²⁵ *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd* (2000) 16 Const LJ 316.

elements to be carried out by McAlpine's own labour been fulfilled without slippage the main contract would have been completed five weeks early. McAlpine's argument seems to be that it is entitled to the "benefit" or "value" of this float and can therefore use it at its option to "cancel" or reduce delays for which it or other sub-contractors would be responsible in preference to those chargeable to Ascon.

In my judgment that argument is misconceived. The float is certainly of value to the main contractor in the sense that delays of up to that total amount, however caused, can be accommodated without involving him in liability for liquidated damages to the employer or, if he calculates his own prolongation costs from the contractual completion date (as McAlpine has here) rather than from the earlier date which might have been achieved, in any such costs. He cannot, however, while accepting that benefit as against the employer, claim against the sub-contractor as if it did not exist. That is self-evident if total delays as against sub-programmes do not exceed the float. The main contractor, not having suffered any loss of the above kinds, cannot recover from sub-contractors the hypothetical loss he would have suffered had the float not existed, and that will be so whether the delay is wholly the fault of one sub-contractor, or wholly that of the main contractor himself, or spread in varying degrees between several sub-contractors and the main contractor. No doubt those different situations can be described, in a sense, as ones in which the "benefit" of the float has accrued to the defaulting party or parties, but no-one could suppose that the main contractor has, or should have, any power to alter the result so as to shift that "benefit". The issues in any claim against a sub-contractor remain simply breach, loss and causation.

I do not see why that analysis should not still hold good if the constituent delays more than use up the float, so that completion is late. Six sub-contractors, each responsible for a week's delay, will have caused no loss if there is a six weeks' float. They are equally at fault, and equally share in the "benefit". If the float is only five weeks, so that completion is a week late, the same principle should operate; they are equally at fault, should equally share in the reduced "benefit" and therefore equally in responsibility for the one week's loss. The allocation should not be in the gift of the main contractor.

I therefore reject McAlpine's "float" argument. I make it clear that I do so on the basis that it did not raise questions of concurrent liability or contribution; the contention was explicitly that the "benefit", and therefore the residual liability, fell to be allocated among the parties responsible for delay and that the allocation was entirely in the main contractor's gift as among sub-contractors, or as between them and the main contractor where the latter's own delay was in question.²⁶

This supports the view that float is owned by no one. A useful and neat summary of the position has been set out by Nicholas Carnell:

'In fact consideration of the role of float from first principles shows that the debate is less complex than might be supposed.

(1) In the majority of standard form contracts, the programme is not a contract document. The contractor's obligation is to carry out and complete the works by the completion date, rather than by any specific activity date.

²⁶ (2000) 16 Const LJ 316 at 338 per Judge Hicks.

(2) Accordingly, unless the effect of delaying a particular activity is to cause delay to the completion date of the works, the programme is to be regarded as a planning tool and no more.

(3) Within the constraints of the need to complete the works by the date for completion, the contractor can programme the works as he wishes.

(4) Similarly, if the employer's conduct causes the contractor to use up some or all of the float without causing delay to the works, the consequences may be disruption if the contractor can identify the need to deploy additional resource, but it will not entitle him to any extension of time.²⁷

The judgment in *How Engineering Services Ltd v Lindner Ceilings Partitions plc* gives support to this view.²⁸

A more recent case appears to have thrown some doubt on that interpretation:

'Under the JCT conditions, as used here, there can be no doubt that if an architect is required to form an opinion then, if there is then unused float for the benefit of the contractor (and not for any other reason such as to deal with pc or provisional sums or items), then the architect is bound to take it into account since an extension is only to be granted if completion would otherwise be delayed beyond the then current completion date. This may seem hard to a contractor but the objects of an extension of time clause are to avoid the contractor being liable for liquidated damages where there has been delay for which it is not responsible, and still to establish a new completion date to which the contractor should work so that both the employer and the contractor know where they stand. The architect should in such circumstances inform the contractor that, if thereafter events occur for which an extension of time cannot be granted, and if, as a result, the contractor would be liable for liquidated damages then an appropriate extension, not exceeding the float, would be given. In that way the purposes of the clause can be met: the date for completion is always known; the position on liquidated damages is clear; yet the contractor is not deprived permanently of 'its' float.'²⁹

The rationale behind this statement is not immediately apparent. It is certainly *obiter*, because the judge said later that it was not certain that there was any float in the programme under consideration. It seems that the judge was referring to the kind of float which a contractor may put in its programme at the end of all activities, to give itself a cushion if it takes it rather longer than expected to complete the Works. Where it is clear that the contractor has placed that kind of float in its programme, it is difficult to discern the difference in law from the situation where the contractor simply attempts to finish early. That situation has already been considered in Chapter 7, Section 7.1.

Essentially float is simply the space before or after individual activities when a group of activities is put together in the form of a programme. Whether it actually exists at all depends on the extent to which the programme mirrors reality.

²⁷ Nicholas J Carnell, *Causation and Delay in Construction Disputes* 2nd edition (2005) Blackwell Publishing pp 212–13.

²⁸ 17 May 1995, unreported.

²⁹ *Royal Brompton Hospital NHS Trust v Hammond & Others (No 8)* (2002) 88 Con LR 1 at 187 per Judge Lloyd.

Chapter 9

Global claims

9.1 *Basic principles of global claims*

In general, it is necessary for the contractor to establish each and every head of claim, by means of supporting documentation and other evidence. However, often a contractor will attempt to form its claim on a global basis. *London Underground Ltd v Kennington Ford Plc & Others*¹ concerned, among other things, a claim for delay due to the alleged excessive number of requests for information (RFIs) which had to be made. The judge neatly summarised the position:

‘In the manner of pointing a blunderbuss at a target it is maintained that there were many RFIs, and there was considerable delay. The delay in part can be explained by other causes but a balance is left which must be caused by the volume of RFIs. And by reason of the volume of them negligence must be concluded. It is termed a global claim. It can properly be described as a global claim in the sense that it is the antithesis of a claim where the causal nexus between the alleged wrongful act or omission of the defendant and the loss of the plaintiff has been clearly spelt out and pleaded.’²

In another case, not concerned with construction, such claims were termed ‘total-total’, where the totality of the losses is attributable to the totality of misrepresentations, breaches of contract and acts of negligence. This is compared to a ‘cumulative-total’ case where the cumulative effect of all the breaches led to the totality of the losses claimed.³ This concept was explained later in an extract from the particulars of claim:

“Accordingly, it is not primarily the plaintiff’s case that particular aspects of the losses are individually attributable to any particular misrepresentation, breach of contract or act of negligence. The plaintiff’s case is that in respect of each of the allegations of misrepresentation, breach of contract and negligence the cumulative effect thereof led to the totality of the losses claimed in the action. Further, as set out in more detail hereunder, some of the individual acts of misrepresentation, breach of contract and negligence were sufficient to cause the entirety of the plaintiff’s losses.

¹ (1998) 63 Con LR 1.

² (1998) 63 Con LR 1 at 4 per Judge Wilcox.

³ *GAB Robins Holdings Ltd v Specialist Computer Centres Ltd* (1999) 15 Const LJ 43.

Generally, however, it is not possible directly to attach individual losses to individual allegations of misrepresentation, breach of contract or negligence in the manner implied by the form of request. The plaintiff's case is that the totality of the losses claimed arise from the totality of the wrongful acts established to have been committed by the defendant. This is not to be taken as advancing a case that no loss is shown unless all the pleaded wrongful acts are proved but as advancing a case that all of the claimed losses resulted from the deficiencies shown to have existed in the defendant's conduct and the resultant software . . ."

The last two paragraphs in those particulars seek to establish a comprehensive claim on the part of the plaintiff which seeks to cover every eventuality and ensure out of an abundance of caution that no aspect of the claim is lost in support of the overall claim for damages of £2.8 million. One can understand how the defendant is somewhat alarmed by this approach. However, bearing in mind that this is a general statement of the plaintiff's claim, I do not consider that a case has been made out which would warrant the striking out of either paragraph 31 in its original form, or any part of the particulars under headings (A), (B) and (C).⁴

It is clear that, in some circumstances, a global approach to formulating a claim may be admissible whether the claim is for an extension of time or for loss and/or expense. The case most often cited in support is *J Crosby & Sons Ltd v Portland UDC*⁵ a dispute under the ICE Conditions of Contract (4th edition) and which is recognised as establishing the acceptable criteria for a global claim. The contract concerned the laying of a water main. The case arose because an arbitrator proposed to award a lump sum whereas the employer contended that the contractor should only recover in relation to specific claims where losses could be separately proved and that the arbitrator must necessarily build up the sum by finding amounts due under each of the individual heads of claim upon which the contractor relied in support of its overall claim for delay and disruption. The contractor had made a broad claim for delay and disruption. A large number of disparate matters had delayed completion, some of which entitled the contractor to extensions of time or loss and/or expense, but some of the matters gave no such entitlement. The court upheld the opinion of the arbitrator that the contractor was entitled to be paid on a global basis and rejected the employer's contention that the arbitrator must find what amounts were due under each head of claim in order to establish the total sum due.

The case set out guidelines for this approach which have formed the basis for assessing global claims ever since. Essentially, the global approach is only justified where a claim depends 'on an extremely complex interaction in the consequences of various denials, suspensions and variations' and where 'it may well be difficult or even impossible to make an accurate apportionment of the total extra cost between the several causative events'. In those clearly defined circumstances it seems that there is no reason why an architect, engineer or arbitrator 'should not recognise the realities of the situation and make individual awards in respect of those parts of individual

⁴ *GAB Robins Holdings Ltd v Specialist Computer Centres Ltd* (1999) 15 Const LJ 43 at 47 per Otton LJ.

⁵ (1967) 5 BLR 121.

items of the claim which can be dealt with in isolation and a supplementary award in respect of the remainder of those claims as a composite whole.⁶

The fact that the courts are prepared to accept global claims in certain very clear circumstances does not relieve the contractor from producing substantiating evidence and proving each head of claim. What it does is to enable the architect or quantity surveyor to adopt a sensible method of ascertaining certain complex claims where it is either impossible or totally impracticable to prove the cost resulting from each individual item. It has been rightly said:

‘It is implicit [in *Crosby*] that a rolled-up award can only be made in a case where the loss or expense attributable to each head of claim cannot in reality be separated and secondly that a rolled-up award can only be made where apart from that practical impossibility the conditions which have to be satisfied before an award can be made have been satisfied in relation to each head of claim’⁷.

In a useful commentary to the case, the basic position has been well put as follows:

‘The events which are the subject of the claim must be complex and interact so that it is difficult if not impossible to make an accurate apportionment. It is very tempting to take the easy course and to lump all the delaying events together in order to justify the total overrun or total financial shortfall. That argument is justifiable only if the alternative course is shown to be impracticable.’⁸

9.2 Unacceptable global claims

What is clear is that the global approach is the ‘when all else fails’ approach and it should not be adopted as a standard method of formulating a contractual claim. A contractor may sometimes be misled into believing that the decision in *Crosby* allows a claim to be made when a contractor cannot actually demonstrate a valid claim but can only show a shortfall in its income. The well-known American case *Bruno Law v US*,⁹ illustrates the danger in that approach. There, a contractor claimed a substantial sum, apparently on the basis that it was enough to take the overrun between the original and actual completion dates, point to a number of individual delays for which the employer was allegedly responsible, and which contributed to the overall delay, and then arrive at the conclusion that the entire overrun time was attributable to the employer. Unfortunately, many contractors still claim on that basis. The trial commissioner pointed out that, upon the evidence:

‘Many of the incidents relied on by plaintiff were isolated and non-sequential and therefore could not possibly have caused any significant delay in the overall progress of the contract. Furthermore, with respect to the great bulk of such incidents, plaintiff has failed to prove, or indeed even to attempt to prove, the

⁶ (1967) 5 BLR 121 at 136 per Donaldson J.

⁷ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 102 per Vinelott J.

⁸ (1967) 5 BLR 121 at 123.

⁹ (1971) 195 Ct C1 370.

crucial factors of the specific extent of the alleged wrongful delay to the project operations caused thereby.¹⁰

The same point was made again, quite forcibly, in *London Borough of Merton v Stanley Hugh Leach Ltd*¹¹ which was considering an arbitrator's award. The arbitrator, in a passage quoted by the court, dismissively described the contractor's claim as follows:

'The calculation commences with the "direct site costs", which I can only interpret as being the total expenditure incurred by [Leach] on all labour, plant and materials involved in the construction works. From the very limited information available to me I can interpret the word "direct" as indicating that the costs relate to [Leach's] own expenditure and that of his direct sub-contractors to the exclusion of expenditure through nominated sub-contractors and suppliers.

From this total site cost, [Leach] deduct the assessment for fluctuations which under clause 31A of the conditions are to be adjusted on a net basis. A percentage for profit and overheads is then added to the total site costs excluding fluctuations and finally the net fluctuations are added back to arrive at the alleged remunerable total cost to the contractor of £3,721,970.

If one could imagine a building contract which proceeded to completion without any hitch, delay or variation whatsoever this calculation would provide [Leach] at line (5) with a direct comparison with his tender figure. However as that ideal situation is rarely, if ever, met and certainly was not met in the instant contract, the figures in line (1) (and so those in lines (4) and (7)) must include the costs to [Leach] of all the "hitches" of whatever nature that occurred on the site.'

The judge commented on that in this way:

'I find it impossible to see how [this calculation] can be treated as even an approximation for a claim, whether or not rolled up (as in *Crosby*), under clause 11(6) or 24(1) [of JCT 63]. As the arbitrator points out in the passage I have cited, the calculation in effect relieves Leach from the burden of additional costs resulting from delays in respect of which Leach is not entitled to any extension of the completion date'¹²

This kind of claim (a claim in that case for a sum in seven figures and contained on one side of a sheet of A4 paper albeit backed up with a vast mass of other material) is quite common, but should stand no chance of success if architect and quantity surveyor are taking their professional responsibilities seriously.

Contractors are faced with difficult problems where the facts are truly interconnected in such a complex way that to unravel them into the classic approach of particularised cause and effect is impossible. On the other hand, it is clearly inequitable if an employer responsible for just one occurrence giving rise to a delay, and for which a clear causal nexus can be demonstrated, is more likely to be made to suffer the consequences than an employer guilty of a large number of interconnected occurrences.

¹⁰ (1971) 195 Ct C1 370.

¹¹ (1985) 32 BLR 51.

¹² (1985) 32 BLR 51 at 112 per Vinelott J.

9.3 The current position

Despite the fact that the Committee stated quite categorically that the judgment involved no question of general importance, the Privy Council decision in *Wharf Properties Ltd v Eric Cumine Associates*¹³ was seized upon by some commentators as ringing the death knell on global claims. The case was brought against a firm of architects and the question was whether the pleadings as presented by the plaintiffs established an essential link between the breaches and the damages claimed. It was asserted by the defendants that the pleadings disclosed no reasonable cause of action or that they were so embarrassing as to warrant them being struck out as an abuse of the court process. The Committee held that, although the plaintiffs would face ‘extraordinary evidential difficulties’, there were no grounds for saying that the pleadings disclosed no reasonable cause of action, but they were an abuse of the process. The most useful part of the decision is as follows:

‘... the pleading is hopelessly embarrassing as it stands and their Lordships are wholly unpersuaded by Counsel for Wharf’s submission that the two cases of *J Crosby and Sons v Portland Urban District Council* and *Merton v Leach* provide any basis for saying that an unparticularised pleading in this form ought to be permitted to stand. Those cases establish no more than this, that in cases where the full extent of extra costs incurred through delay depend upon a complex interaction between the consequences of various events, so that it may be difficult to make an accurate apportionment of the total extra costs, it may be proper for an Arbitrator to make individual financial awards in respect of claims which can conveniently be dealt with in isolation and a supplementary award in respect of the financial consequences of the remainder as a composite whole. This has, however, no bearing upon the obligation of a Plaintiff to plead his case with such particularity as is sufficient to alert the opposite party to the case which is going to be made against him at the trial. ECA are concerned at this stage not so much with quantification of the financial consequences – the point with which the two cases referred to were concerned – but with the specification of the factual consequences of the breaches pleaded in terms of periods of delay. The failure even to attempt to specify any discernible nexus between the wrong alleged, and the consequent delay, provides, to use the phrase of Counsel for ECA, “no agenda” for the trial.’¹⁴

This decision does not overturn *Crosby* and *Merton*, quite the reverse, it upholds them. Essentially, it was the link between cause and effect – the liability – with which the Privy Council was concerned. The decision was followed in *Mid Glamorgan County Council v J Devonald Williams and Partner*¹⁵ although in that case the pleadings were not struck out on the facts. There, the position was analysed as follows:

¹³ (1991) 52 BLR 1.

¹⁴ (1991) 52 BLR 1 at 20 per Lord Oliver.

¹⁵ (1993) 8 Const LJ 61. See also *Imperial Chemical Industries PLC v Bovis Construction Ltd, GMW Partnership and Oscar Faber Consulting Engineers* (1992) 8 Const LJ 293.

- ‘56.1 A proper cause of action has to be pleaded.
 56.2 Where specific events are relied upon as giving rise to a claim for moneys under the contract then any preconditions which are made applicable to such claims by the terms of the relevant contract will have to be satisfied, and satisfied in respect of each of the causes of events relied upon.
 56.3 When it comes to quantum, whether time based or not, and whether claimed under the contract or by way of damages, that proper nexus should be pleaded which relates each event relied upon to the money claimed.
 56.4 Where, however, a claim is made for extra costs incurred through delays as a result of various events whose consequences have a complex interaction that renders specific relation between event and time/money consequence impossible and impracticable, it is permissible to maintain a composite claim.’¹⁶

The logic of a ‘total cost claim’ has been explained like this:

- ‘(a) the contractor might reasonably have expected to perform the work for a particular sum, usually the contract price;
 (b) the proprietor committed breaches of contract;
 (c) the actual reasonable cost of the work was a sum greater than the expected cost.

The logical consequence implicit in this is that the proprietor’s breaches caused that extra cost or cost overrun. This implication is valid only so long as, and to the extent that, the three propositions are proved and a further unstated one is accepted: the proprietor’s breaches represent the only causally significant factor responsible for the difference between the expected cost and the actual cost . . . The unstated assumption underlying the inference may be further analysed. What is involved here is two things: first, the breaches of contract caused some extra cost; secondly, the contractor’s cost overrun is this extra cost . . . It is the second aspect of the unstated assumption . . . which is likely to cause the more obvious problem because it involves an allegation that the breaches of contract were the material cause of all of the contractor’s cost overrun. This involves an assertion that, given that the breaches of contract caused some extra cost, they must have caused the whole of the extra cost because no other relevant cause was responsible for any part of it.’¹⁷

The problems inherent in this kind of analysis are obvious. Nevertheless, the courts have continued to allow claims to be made on a global basis.¹⁸ Duncan Wallace provides a useful, if slightly provocative, summary of the global claim position,¹⁹ but his conclusion that global claims are always embarrassing has been questioned in some

¹⁶ *Mid Glamorgan County Council v J Devonald Williams and Partner* (1993) 8 Const LJ 61 at 69 per Mr Recorder Tackaberry.

¹⁷ *John Holland Construction & Engineering Pty Ltd v Kvaerner R J Brown Pty Ltd* (1996) 82 BLR 83 at 85 per Byrne J.

¹⁸ See for example *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical and Electrical Engineers Pty Ltd & Another* (1992) 10 BCL 178; *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd & Others* (1994) 72 BLR 102; *Bernard’s Rugby Landscapes Ltd v Stockley Park Consortium Ltd* (1997) 82 BLR 39; *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2002] BLR 393.

¹⁹ I N Duncan Wallace, *Hudson’s Building and Engineering Contracts*, 11th edition, 1995, Sweet & Maxwell, vol. 1, pp.1086–9.

cases.²⁰ It seems that it may be enough if the contractor sets out the claim in sufficient detail that the employer knows what is being claimed and, in some instances, it may be that the employer is in a perfectly good position to calculate the amount the contractor should be paid without the contractor being obliged to separate the claim into its various parts for the purpose of allocating value.²¹ The position seems to be that the contractor is entitled to put its claim in any rational way albeit that putting forward a claim on a global basis may present particular evidential difficulties.²² A particular difficulty is the establishment of a definable connection between the alleged wrong and the consequent delay and damage.²³ The position was re-emphasised in an Australian case. It held that where the connection between cause and loss is not apparent, each aspect of the connection must be set out unless the probable existence of the connection can be demonstrated by evidence or argument, or unless it can be shown that it is impossible or impracticable for it to be itemised further.²⁴

In *Petromec Inc v Petroleo Brasileiro SA (Petrobras) & Another*²⁵ the Court of Appeal had to consider a preliminary issue in regard to a claim in respect of a large number of variations carried out to a semi-submersible oil platform. The claimant argued that a global approach was permissible, because all the work had been carried out to the instruction and under the supervision of the defendant. Moreover, it had already been held that the claimant was not responsible for any delay or defective work. The Court held that it made no difference whether multiple breaches or multiple variations were being considered, the overall principle was the same. The Court of Appeal approved the view of the trial judge when he said:

‘For the reasons set out above, on the proper construction of the supervision agreement, the sum due to Petromec pursuant to cll 12.1 and 12.2 cannot be ascertained by calculating the difference in the manner which Petromec proposes. Petromec must specify the instructions, the work required to comply with those instructions (or the amended specification under cl 11) and the cost attributable to that work. The changes and causal nexus must be pleaded. It can contend that the work and the cost is reasonable and wait for any challenge to that but its own methodology is not what cl 12 envisages, not what the law allows, nor what the rules of court require for it to put and establish its case. Petromec is not compelled to do so by reference to the VOs it has previously put forward, which do not correspond to the requirements of cl 12, although the material in them refers to work which Petromec alleges to be work done for cl 12 purposes. By one means or another, it must, with sufficient particularity, plead the work done and the cost thereof by reference to the amended specification or the instructions given.’²⁶

²⁰ See *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd & Others* (1994) 72 BLR 102 and *Inserco Ltd v Honeywell Control Systems Ltd*, 19 April 1996 unreported.

²¹ *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd & Others* (1994) 72 BLR 102.

²² *GMTC Tools and Equipment Ltd v Yuasa Warwick Machinery Ltd* (1994) 73 BLR 102.

²³ *Ralph M Lee Pty Ltd v Gardner and Naylor Industries Pty Ltd* (1997) 12 Const LJ 125.

²⁴ *John Holland Construction & Engineering Pty Ltd v Kvaerner R J Brown Pty Ltd* (1996) 82 BLR 83. This judgment was considered with apparent approval in *Bernard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd* (1997) 82 BLR 39.

²⁵ (2007) 115 Con LR 11.

²⁶ (2007) 115 Con LR 11 at 33 per Cooke J.

The Court acknowledged that it would not be easy to prove the connection between each instruction requiring a variation and its cost, but the fact that it was difficult was not sufficient in itself not to require such proof. However, the Court accepted that for much of the direct work, the causal nexus would be obvious and need not be spelled out.

The topic of global claims was examined again from first principles by the Scottish courts in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* and it is instructive to read what was said:

‘The logic of a global claim demands, however, that all the events which contribute to causing the global loss be events for which the defender is liable. If the causal events include events for which the defender bears no liability, the effect of upholding the global claim is to impose on the defender a liability which, in part, is not legally his. That is unjustified. A global claim, as such, must therefore fail if any material contribution to the causation of the global loss is made by a factor or factors for which the defender bears no legal liability . . .

. . . The point has on occasions been expressed in terms of a requirement that the pursuer should not himself have been responsible for any factor contributing materially to the global loss, but it is in my view clearly more accurate to say that there must be no material causative factor for which the defender is not liable . . .

. . . Failure to prove that a particular event for which the defender was liable played a part in causing the global loss will not have any adverse effect on the claim, provided the remaining events for which the defender was liable are proved to have caused the global loss. On the other hand, proof that an event played a material part in causing the global loss, combined with a failure to prove that the event was one for which the defender was responsible, will undermine the logic of the global claim. Moreover, the defender may set out to prove that, in addition to the factors for which he is liable founded on by the pursuer, a material contribution to the causation of the global loss has been made by another factor or other factors for which he has no liability. If he succeeds in proving that, again the global claim will be undermined.²⁷

This thoughtful judgment emphasises the necessity for the employer to be responsible for all the major causative factors before a global claim can succeed, a point that is often overlooked when such claims are made. This change in emphasis starkly highlights the difficulties involved in successfully making such claims. This judgment was affirmed on appeal. The Inner House of the Court of Session added some useful observations about how a party should plead causation when making a global claim. The paragraph is worth quoting in full:

‘All that is required is that a party’s averments should satisfy the fundamental requirements of any pleadings, namely that they should give fair notice to the other party of the facts that are relied on, together with the general structure of the legal consequences that are said to follow from those facts. In doing that, the pleadings of one party should disclose sufficient to enable the other party to prepare its own case and to enable the parties and the court to determine the

²⁷ [2002] BLR 393 at 407 per Lord McFadyen.

issues that are actually in dispute. The relevancy of pleadings must always be tested against these fundamental requirements. In a case involving the causal links that may exist between events having contractual significance and losses suffered by the pursuer, it is obviously necessary that the events relied on should be set out comprehensively. It is also essential that the heads of loss should be set out comprehensively, although that can often best be achieved by a schedule that is separate from the pleadings themselves. So far as the causal links are concerned, however, there will usually be no need to do more than set out the general proposition that such links exist. Causation is largely a matter of inference, and each side in practice will put forward its own contentions as to what the appropriate inferences are. In commercial cases, at least, it is normal for those contentions to be based on expert reports, which should be lodged in process at a relatively early stage in the action. In these circumstances there is relatively little scope for one side to be taken by surprise at proof, and it will not normally be difficult for a defender to take a sufficiently definite view of causation to lodge a tender, if that is thought appropriate. What is not necessary is that averments of causation should be over-elaborate, covering every possible combination of contractual events that might exist and the loss or losses that might be said to follow from such events.²⁸

The approach set out in this case has been expressly accepted by a trial judge in a later case when rejecting an application for leave to appeal an arbitrator's award on a question of law.²⁹ A somewhat earlier excellent judgment usefully set out in some detail what is required of the contractor when making a claim.³⁰ A summary of the court's findings can be expressed as follows:

- The claimant must set out an intelligible claim which must identify the loss, why it has occurred and why the other party has an enforceable obligation recognised at law to compensate for the loss.
- The claim should tie the breaches relied on to the terms of the contract and identify the relevant contract terms.
- Explanatory cause and effect should be linked.
- There is no requirement that the total amount of loss must be broken down so that the sum claimed for each specific breach can be identified. But an 'all or nothing' claim will fail in its entirety if a few causative events are not established.
- Therefore, a global claim must identify two matters:
 - The means by which the loss is to be calculated if some of the causative events alleged have been eliminated. In other words, what formula or device is put forward to enable an appropriate scaling down of the claim to be made?
 - The means of scaling down the claim to take account of other irrevocable factors such as defects, inefficiencies or events at the contractor's risk?

This still seems to be an exceptionally clear exposition of the current position.

²⁸ *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2004] Sc LR 872 at paragraph 20 per Lord Drummond Young affirming [2002] BLR 393.

²⁹ *London Underground Ltd v Citylink Telecommunications Ltd* (2007) 115 Con LR 1.

³⁰ *How Engineering Services Ltd v Lindner Ceilings Partitions PLC* 17 May 1995 unreported.

Preparation and substantiation of claims

10.1 *Preparing a claim*

10.1.1 Principles

It is recognised that there will be many occasions when a contractor is not adequately reimbursed by payment of the contract sum or by valuation of variations in the normal way. Variations for example, are often disruptive and they may give rise to prolongation of the contract period. As part of the overall scheme of payment, virtually all standard form contracts make provision for the contractor to recover money which it has either lost or expended as an essential part of carrying out the contract. All such provisions place conditions upon the right to recovery and they generally allow additional or alternative claims for damages for breach of contract at common law. So far as the contract machinery is concerned, the parties must take note of and observe the precise wording of the clause if the contractor is to be properly reimbursed.

In essence the contractor must show not only that it suffered loss or expense due to certain proven events but also that the events are such as to entitle the contractor to be recompensed. This can often be a tricky task. It is common for contractors to simply take the difference between the contract date for completion and the date of practical completion of the Works and to base detailed calculations of loss upon that period without ever trying to prove that the reason for the delay was one of the grounds listed in the loss and/or expense clause. At the other extreme, some contractors wrongly assume that an extension of time is a pre-requisite to claiming financial reimbursement. Yet again, a contractor may spend many pages of the claim document showing that certain things happened which caused substantial delays and other problems, but fail to bring them within the list of grounds in the loss and/or expense clause. Claims for disruption are particularly difficult and, for that reason, they are often either ignored or treated in casual fashion almost as though the contractor is acknowledging that it is unlikely such a claim will succeed. What is certain is that a claim submitted by a contractor in a half-hearted fashion will not succeed. It is probably in regard to claims for disruption that the detailed interrogation of computer-generated programmes is most useful.

10.1.2 The architect's and quantity surveyor's requests

Many architects, quantity surveyors and contractors are uncertain about the way in which to approach the reimbursement of loss and/or expense. If the contractor does not submit adequate supporting information when it makes its application for reimbursement, it is helpful if the architect and in turn the quantity surveyor, if so instructed by the architect, in exercising their powers to request information also take the opportunity to correct any inconsistencies or errors in the contractor's approach. Information should be requested as precisely as circumstances allow.

On no account should the contractor simply be requested to provide 'more information' or 'better proof'. It leaves the contractor unclear as to the kind of information which will satisfy the architect or quantity surveyor. It also gives an unscrupulous contractor the opportunity to submit less information than necessary on the basis that the contractor thinks that is sufficient and it has received no clear indication to the contrary. It is so easy for a contractor, on being requested to supply more information to substantiate a claim, to say that in the contractor's opinion the information already provided does substantiate the claim. Then, unless the architect or quantity surveyor is prepared to specify exactly what is required, there is a stand-off. Better for all concerned if the required information is clearly stated at the outset. The following list, which is not exhaustive, includes some of the points which might be raised with the contractor:

- The architect's and the quantity surveyor's powers are limited by the terms of the contract.
- The contractor must strictly comply with the contract machinery.
- Loss and/or expense does not follow automatically from an extension of time.
- A written application should have been made as soon as it has become, or should reasonably have become, apparent that the regular progress of the Works has been or is likely to be affected.
- Each cause should be linked to its effect.
- Amounts claimed should be linked to the relevant matters in the contract.
- Substantiation in the form of invoices, labour returns, pay slips, detailed schedules of plant and equipment, etc. is required of amounts to which the contractor thinks it is due.
- Where prolongation is involved, the actual dates of the events causing the prolongation are required and the sums claimed must relate to those dates not to the period of prolongation at the end of the contract period.
- Only actual costs are acceptable. Notional, provisional or formulaic amounts are not acceptable unless there is a very good reason why actual costs are unavailable.

10.1.3 Setting out the claim

It is quite impossible to set out a detailed sample claim which a contractor can complete by simply filling in the blanks and which is suitable for every occasion. The

reason is that every claim is different and the way it is set out must reflect that difference. However, it is possible to highlight some important issues and an outline claim is shown in Section 10.1.4 below. The key points are as follows:

- The contractor must set out the facts which it alleges gives rise to its entitlement to reimbursement and provide any necessary evidence of the facts.
- It must reference the particular contract term which gives the entitlement and set out the financial basis of its claim together with substantiating material.
- Importantly, the contractor must satisfy any conditions precedent to its claim such as the timely submission of an application and the provision of any further details of the loss and/or expense incurred for the purpose of deciding the validity in principle of the claim and to enable the architect or quantity surveyor to carry out the ascertainment.

Although standard form contracts do not expressly require the contractor to submit a comprehensive claim document, setting out in detail and with evidence what the contractor considers to be its entitlement, most contractors do adopt this approach or at least they attempt to do so. The sound reason is that a properly set out claim which is correctly argued and supported by irrefutable evidence is the best way for the contractor to recover the amounts being claimed. It should always be drafted on the assumption that the reader knows nothing about the project. The document will require little alteration to become the key part of a claim document in any subsequent dispute resolution proceedings. If a contractor confines itself simply to providing exactly what is required in the particular contract, it may be all too easy for the architect and quantity surveyor to find gaps in information and issue request after request for clarification. That is not to suggest that all architects and quantity surveyors deliberately adopt a defensive stance, but there is no doubt that many do so. The position is not helped by the fact that some of the grounds for loss and/or expense in standard form contracts may leave the architect open to claims from the employer at a later date.

It may be useful to consider what a contractor is required to do if claiming loss and/or expense for a variation under SBC clause 4.23. Where there is a claim for direct loss and/or expense arising under the relevant matter in clause 4.24.1 in respect of a variation, in order to succeed the contractor must establish the following:

- An instruction amounting to a variation has been properly issued and carried out by the contractor or that some other matter has occurred or some other instruction has been issued which under the terms of the contract is to be treated as a variation.
- The variation is not one for which loss and/or expense has been included in a confirmed acceptance of a variation quotation under the provisions of schedule 2.
- The date of issue and receipt of the variation instruction or of any other instruction which is to be treated as a variation or the date of the occurrence of the matter which is to be so treated. This is an important point because the length of notice of the variation which the contractor is given will have a bearing upon the contractor's ability to reasonably programme it into the Works. There is an obvious and considerable difference between a variation of which the contractor has two

months' notice and one where the architect expects it to be executed immediately. There is nothing in the terms of most standard form contracts which require the contractor to put more operatives on the site in order to carry out an instruction without delaying the progress of the Works. It is unlikely that the obligation to use best endeavours extends to that extent.

- The subject matter of the variation instruction or deemed variation.
- When it was necessary to carry out the work contained in the variation. The key word is 'necessary', because the contractor must be able to show that it did not unnecessarily carry out the variation at a time which caused it to incur more than the amount of any direct loss and/or expense which would otherwise be reasonable. With plenty of notice, the contractor ought to be able to execute the variation at minimum overall cost, because it can pick the most suitable time. If the contractor was obliged, perhaps by the timing of the instruction, to carry out the work at an inconvenient time, the amount of loss and/or expense might be increased and the contractor should give details.
- The carrying out of the variation has directly affected regular progress of the Works. The contractor must establish that the effect upon regular progress was a direct result of the instruction and not the consequence of some intervening event.
- The affect has been more than trivial. SBC provides in clause 4.23 that the regular progress must be 'materially' affected. In other words, substantially and not trivially.
- The way in which, and the extent to which, the work was affected as a direct result of the carrying out of the variation. It is obviously essential to show how and to what extent regular progress was affected by the variation. This is at the very heart of the claim.
- The date on which the contractor made a proper and timely written application to the architect in respect of the direct loss and/or expense being claimed is of great importance, because for sound practical as well as legal reasons, which have been set out elsewhere, the contractor's entitlement to reimbursement under the contract provisions depends upon the administrative machinery of the contract having been satisfied.

Appropriate evidence must be provided to substantiate all the above points and it is clearly in the contractor's interests to provide it, whether requested or not and, as previously indicated, a fully calculated document (backed up by supporting evidence) is desirable. The points may all seem straightforward, but the contractor in *M Harrison & Co (Leeds) Ltd v Leeds City Council*,¹ had problems establishing even the apparently simple fact that a variation instruction had been issued. The architect had issued a piece of paper which was headed 'Variation Order No. 1' and the paper contained what to most people would seem to be an instruction. It said that the contractor was authorised to execute work involving a variation to the contract, by omitting a PC sum and instructing the contractor to place an order with a firm for the supply and erection of structural steelwork. Notwithstanding what appeared to be extremely clear words, the court held that it did not amount to a variation under clause 11 of JCT 63 (now SBC clause 5.1) because the definition of variation in that

¹ (1980) 14 BLR 118.

clause was held to be narrow. The court held that, on the facts of the case, it necessitated the suspension of work and, therefore, it amounted to a postponement instruction, not a variation.

Although no particular form is prescribed for a claim (because building contracts do not require a fully detailed claim to be submitted) it is clearly prudent to prepare every claim with the possibility of eventual adjudication, arbitration or litigation in mind. It is therefore good practice to set out the claim in such a form that it can readily be used for the purpose of formal proceedings. Not only will that save time if the matter does eventually come before a tribunal, but the discipline involved in preparing formal claim documents for legal proceedings (formerly and sometimes still referred to as 'pleadings') is aimed at clarifying the basis and logic of the claim together with its supporting evidence.

10.1.4 Outline of a claim document

The following outline is offered with some hesitation to illustrate some of the important, but fairly humdrum matters, which must be addressed in any claim. It assumes that the claim is being made under SBC clause 4.23 for loss and/or expense.

- Table of contents (most important. it should contain page numbers. That seems obvious, but page numbers are often omitted).
- The main facts, e.g.:
 - project title
 - address
 - employer
 - architect
 - quantity surveyor, etc.
 - contract documents including name and edition of contract and any special amendments
 - brief description of work
 - any contractor's designed portion
 - amount of the contract sum
 - date of possession
 - date for completion
 - etc.
- General introduction (not a detailed narrative – see below under Section 10.2.2)
- Unless it is a global claim (check Chapter 9) each relevant matter under clause 4.24 must be dealt with separately. Set out:
 - description of occurrence (refer to evidence)
 - date, time and place of occurrence (refer to evidence)
 - the relevant matter by clause number
 - the effect of the occurrence (refer to evidence) and any relevant facts such as ordering or sub-contract arrangements, requests for information, etc. (refer to evidence)
 - the delaying effect on the activity immediately affected (ignoring knock-on effects to activities leading to the completion date) (refer to evidence).

- Indicate what mitigating action has been taken in respect of each occurrence (refer to evidence).
- If this is a claim for the costs of prolongation, the cumulative effects of all the relevant matters on the completion date must be explained. (If few delays are involved on a simple contract, it may be easy to do this by reference to the contractor's programme and by explaining the way in which the relevant matters affect the completion date. If there are many delays or if the project is complex, the delay to the completion date may be best demonstrated by use of computer analysis of delays).
- Set out the financial heads of claim relating to the period of prolongation such as:
 - on-site establishment costs (refer to evidence)
 - head-office overheads (refer to evidence)
 - loss of profit (refer to evidence)
 - inefficient/increased use of labour/plant (refer to evidence)
 - plant (refer to evidence)
 - increased costs (refer to evidence)
 - winter working (refer to evidence)
 - foreshortened programme (refer to evidence).
- If this is a claim for the costs of disruption, identify the additional costs associated with the occurrence, for example:
 - extra scaffolding, crane or other plant (refer to evidence)
 - additional labour hours (refer to evidence)
 - out-of-sequence working (refer to evidence)
 - compare periods of undisrupted and disrupted working (refer to evidence)
 - etc.
- Indicate that a claim is being made for interest and financing charges.
- Create a collection sheet showing the individual amounts and the total amount being claimed.

10.2 Types of evidence required to support a claim

10.2.1 Introduction

Just because the contractor is quite unable to provide substantiation will not necessarily deprive it of the right to some reimbursement for loss and expense and some estimate must be made.² In practice, however, without proper evidence it is likely to receive substantially less than it might think is its due.

Many claims submitted by contractors lack adequate supporting evidence. What is insufficiently understood is that the contractor is making the claim and it is, therefore, a matter for the contractor to prove that the claim is valid. A claimant must proceed on the basis that everything which is said must be authenticated unless is self-evidently correct. The contractor need not prove what are referred as 'notorious' facts. That is, facts which are common knowledge and which it would be absurd to

² *Chaplin v Hicks* [1911] 2 KB 786.

prove. However, it is always better to provide proof of everything than to omit to prove something which is important. The old adage 'he who asserts must prove' is very relevant. Some claims consist merely of broad and sweeping assertions of disruption and loss without any hard attempt at proof. Too often, a contractor will simply refer to events which occurred during the progress of the Works and then submit a stack of contemporary correspondence. Although, most standard form contracts do not require the contractor to make a detailed claim as if it was a submission in arbitration, neither do they require the architect to put together the contractor's claim. In any event, despite what the contract may require, the prudent contractor will take pains to put together a convincing claim rather than expecting the architect to piece it together from an unexplained pile of papers.

A contractor who is to provide substantiating evidence must have adequate records. The contractor's obligation is to provide the architect and the quantity surveyor, if instructed, with all the information necessary for them to validate and ascertain the direct loss and/or expense. The information needed will obviously vary according to the project and the claim, but might well include cost records, labour returns, time sheets, salary records, delivery notes and receipts, computer-generated programmes showing actual progress compared with the original programme for the Works, proof of the intended head-office overheads and profit, probably profit and loss accounts and balance sheets, and sometimes a report from a potential expert witness. These requirements place a heavy burden upon the contractor, but unless considerable evidence and detail of this kind is provided it will be difficult for architect and quantity surveyor to properly carry out their duties to form an opinion and to ascertain the amount due. That is a practical consideration as well as a contractual requirement. The point received comment in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*,³ when the court was dealing with the kind of evidence necessary to substantiate a claim for head-office overheads and loss of profit. The court made the point that not only was the evidence of the contractor's auditor as to profitability relevant, but also

'some evidence as to what the site organisation consisted of, what part of the head-office staff is being referred to, and what they were doing at the material times . . .'.⁴

The court suggested in connection with a claim for loss of profit that it would be useful to have an analysis of the contractor's yearly turnover for a period of some seven years in order to establish the level of profitability and the effect of the particular contract disruption and overrun upon it. It is of course very much in the interest of the contractor to keep detailed records of all cost factors related to individual contracts and to be ready to abstract them if necessary for the purpose of substantiating any contract claim.

Contractors sometimes use averages or generalisations or even figures plucked out of the air (typically percentages for lack of productivity). It is the *actual* loss and/or *actual* expense which is required and not figures taken from the bills of quantities or from government or other indices.

³ (1970) 1 BLR 114.

⁴ (1970) 1 BLR 114 at 122 per Salmon LJ.

The evidence required to substantiate a claim will obviously depend on what is being claimed and the type of claim, but in almost every case detailed cost records and relevant programmes will be necessary, together with references to relevant correspondence, records of site meetings and site diaries. The phrase ‘contemporary records’ was considered in a Falkland Islands case⁵ which was concerned with the FIDIC Conditions of Contract 4th edition which contained a clause (53) requiring contemporary records to be produced. The court concluded that it meant original or primary documents or copies of them. Importantly, they should have been prepared at or about the time the claim arose. The court considered that it would be perverse to allow a contractor who failed to comply with the terms of the contract to introduce non-contemporary records including witness statements to support a claim. However, a witness statement may be used to clarify contemporary records. The courts analysis is generally applicable to all contractual claim situations.

In putting together a claim, the contractor or its advisers often paraphrase parts of such correspondence, site meetings, etc., the better to make their point. Naturally, the best possible gloss is put on such evidence. However, it is essential that such paraphrasing is done with complete accuracy. The recipient of the claim will certainly refer to the original documents and, if it is found that the paraphrasing represents what the contractor wishes was in the documents rather than what is actually there, the whole basis of the claim is compromised. Unfortunately, this scenario is fairly common to a greater or lesser degree in many claims. Substantial misrepresentations of evidence of this kind came to light in a recent adjudication, in which the contractor was claiming nearly £1,000,000. The result was disastrous for the contractor who recovered nothing.

10.2.2 The narrative

At one time every claim used to start with a ‘narrative’ telling the story of the claim – a piece of writing of dubious value, because it tended to be loosely assembled and worded and poorly substantiated. It is still encountered from time to time. It attempts to compensate for lack of hard evidence by the use of emotive language and wild accusations many times repeated on the basis, presumably, that if something is said often enough, it will eventually be believed. Such text cannot stand up to rigorous examination and it may give entirely the wrong impression that the contractor has no real grounds for its claim. A characteristic of this kind of claim is that much energy is expended on proving that the contractor has had various kinds of difficulties resulting in the loss of substantial sums of money, for example by having to work out of sequence or by having to carry out the same work several times. Notably missing from this approach is any proof that the initial cause lies with the employer or that the contract provides the opportunity to recover the losses. A phrase which is often used to sum up the effects of a serious of events is:

‘The work was becoming increasingly complex’

⁵ *Attorney General for the Falkland Islands v Gordon Forbes (Falklands) Construction Ltd* (2003) 19 Const LJ T149.

That kind of vague statement invites the following questions which immediately reveal the inadequacies of the statement:

- How complex was the work originally?
- How do you measure complexity?
- At what rate did the complexity increase?
- How complex was it when it had stopped increasing?

to say nothing of such questions as:

- What made it more complex?
- Whose responsibility was that?

Another phrase in common use, but of no assistance whatever to a contractor is: 'Factors outside our control'. Unless the contract expressly states that factors outside the contractor's control will entitle it to claim loss and/or expense, the use of the expression is not helpful. Many things are outside the contractor's control and most of them have to be taken on board as risk items when pricing a tender.

Many contractors seem to approach contract claims in this way and many a potentially valid claim comes to nothing, because it lacks proper substantiating evidence and the contractor is unable to establish a direct link between cause and effect and provide sufficient relevant particulars of the resulting loss and/or expense.

Regrettably, narratives are still employed in order to achieve, by emotive means, what really needs detailed evidential substantiation. If a narrative is used at all, it should be concise and merely for the purpose of setting the scene or perhaps to explain more clearly something which has already been sufficiently evidenced. In such an instance, the narrative is merely assisting the recipient in understanding what the contractor is asserting.

The putting together of a claim requires all the discipline of legal argument or a piece of scholarly research, analytical in nature, leaving nothing out, taking nothing for granted and citing appropriate authority or evidence for every statement.

10.2.3 Cost records

Cost records are the building blocks of the contractor's claim, certainly the financial part. Without adequate records, the contractor will have tremendous difficulties to overcome. Although the advent of computers and the ability to scan material onto an electronic filing system makes the task of sorting information much easier than before, most contractors will have files of material in paper form which must be made available. Items such as signed daywork sheets or delivery notes are included in this category. It will still remain the fact that the adequacy and accuracy of cost records will in great measure depend upon the keeping of detailed time-sheets by operatives and particularly by site supervisory staff.

There are still many small to medium-sized contractors who do not make adequate use of the power of the computer and some, sadly, who are incapable of carrying out competent filing. Such contractors face an uphill struggle when making a claim and probably find that it costs them as much to make a satisfactory and successful claim as the claim is worth. This kind of contractor will often submit a substantial

document composed mainly of copy letters and site meeting minutes and hope to force some kind of reasonable offer. This approach rarely succeeds or at least rarely succeeds to the point of making it worthwhile.

However, an effective contractor with records mostly on computer should not find the calculation of its financial entitlement too traumatic. The idea is that the records should be capable of isolating the precise cost effects of particular events. This is a counsel of perfection, which rarely happens in practice. Despite the impossibility of assembling perfect records, it is important that all time-sheets for site operatives and other forms to be completed in connection with the Works are carefully designed so that they are in a form which enables relevant information to support a particular claim to be readily abstracted. For example, the relevant forms should be structured so that it is easy for operatives to keep work done in connection with a variation entirely separate from the rest of the Works covered by the contract. This also applies to the execution of work which is not itself varied, but nevertheless affected, by the introduction of the variation. Records of plant time and other resources must be similarly apportioned for ready extraction. Records of materials and goods should not present any particular problems. The essential point to be borne in mind is that the cost records relied upon to support a claim must be clearly referable to the particular prolongation or disruption.

10.2.4 Programmes and similar documents

The usefulness of a construction programme in substantiating a time or monetary claim depends on the way in which the programme was prepared. If the contractor has employed a professional programmer to prepare the initial programme, not when a claim is envisaged but at the beginning of the work, it will considerably add to the authority of the programme. The more detail which can be incorporated: the better. Details of plant and labour resources are always helpful. Essentially, the contractor's original programme, the 'master programme' referred to in SBC clause 2.9.1.2 should be a network containing all the logic links, showing the critical path and be provided to the architect on a computer disc.⁶ It is this programme which should be the basis of any consideration of progress. Although under most standard forms, the contractor's programme is not a contract document, it does clearly indicate the contractor's intentions. These intentions are important, because it is established that the contractor is entitled to plan and perform the work as he pleases, provided that it is finished by the completion date in the contract. In *Wells v Army and Navy Co-operative Society* it was said:

'The plaintiffs were entitled to do the work in what order they pleased.'⁷

Many contractors still supply only a Gantt or bar chart without any indication that it is substantiated by a full network. That is a mistake. Gantt charts are very useful as the base on which to plot actual as against proposed progress, but they give no

⁶ *John Barker Construction Ltd v London Portman Hotels Ltd* (1996) 50 Con LR 43.

⁷ *Hudson's Building Contracts* (1902) 4th edition 346 at 352 per Wright J quoted with approval by Staughton J in *Greater London Council v Cleveland Bridge & Engineering Co Ltd* (1984) 8 Con LR 30.

indication of the effects of delays on succeeding activities. After any extension of time, SBC clause 2.9.2 requires the contractor to provide the architect with two copies of any amendments and revisions to the master programme to take account of that decision. It is essential that such amendments are done on the network before generating the new Gantt chart. The contractor's programme is unlikely alone to be sufficient to substantiate a claim without more evidence. Nevertheless, subject to the reservations expressed in Chapter 8, Section 8.2, it is powerful persuasive evidence that the contract has turned out to be entirely different to what the contractor planned.

The architect can make life very much simpler for all concerned if the master programme to be provided under SBC clause 2.9.1.2 is required by the preliminaries to the contract bills to be in network form, fully resourced and indicating the logic links. Although other contracts do not expressly require that a programme be provided, there is nothing to prevent the architect inserting a requirement for a construction programme into the preliminaries part of the specification of any contract. It should state full details of the information required to be shown on the programme. If all architects requested this kind of information and if all contractors submitted such programmes without being asked, the process of analysing delays and their effect on the completion date would be easier and to the benefit of both architect and contractor. The architect should make full use of every modern aid in dealing with claims and an architect has been criticised for failing in this respect:

‘[The architect] did not carry out a logical analysis in a methodical way of the impact which the relevant matters had or were likely to have on the plaintiffs’ planned programme.

He made an impressionistic, rather than a calculated, assessment of the time which he thought was reasonable for the various items individually and overall’.

The judge continued:

‘I recognise that the assessment of a fair and reasonable extension involves the exercise of judgment, but that judgment must be fairly and accurately based.’⁸

10.2.5 Correspondence and similar documents

Copies of any letters, e-mails, memoranda, etc. relevant to the claim should be attached to the claim, together with copies of the relevant applications, etc. required by the terms of the contract. In passing, it is worth noting that many architects, contractors and others conduct virtually the whole of their business by e-mail. When putting the claim documents together, the task of locating relevant e-mails on several PCs and laptops is formidable and can greatly increase the cost of assembling the evidence to support a claim. To avoid this, all significant e-mails should be printed out as they are sent and filed in the normal way. That may not be seen as environmentally friendly, but there is no realistic alternative.

⁸ *John Barker Construction Ltd v London Portman Hotels Ltd* (1996) 50 Con LR 43 at 67 per Mr Recorder Toulson.

Particular paragraphs in the correspondence can be referenced by numbers and referred to in the claim document and cross-referenced to cost records, progress schedules and so on. However, it should be noted that the inclusion of large amounts of copy correspondence is no substitute for careful linking of cause and effect. Letters must be read with care and always in the context of other letters and documents. They may have been written especially to support a future claim. They may not mean what they appear to mean at first sight. Moreover, correspondence may be supportive or it may tend to discredit the claim. There is always some correspondence which is less than supportive of the claim. Careful thought must be given to the best way of dealing with such correspondence. It is fatal for the contractor simply to ignore it, because inevitably the architect will have a copy on file and will raise awkward questions.

10.2.6 Records of site meetings

Notes, records or so-called ‘minutes’ of site meetings may provide useful supporting evidence. Usually, such records are prepared by one party without reference to the other. On that basis, their value may be no more than the internal notes of a meeting taken by one of the participants. However, as they are usually produced by the architect or other contract administrator, they can be very helpful if they support a contractor’s case, because the author of the records will have difficulty refuting his or her own statements. Usually, the records will be taken as a good record of what transpired at the meeting, because on receipt of their copies, all parties will check it carefully and challenge any alleged inaccuracies, ambiguities or misrepresentations at that time and ensure that the relevant corrections are recorded both in correspondence and in the record of the next meeting. If such inaccuracies are not challenged contemporaneously, with the passage of time it will become increasingly difficult (though not impossible) to establish that they are not an accurate record of what actually happened. Such records form the mainstay of many claims, because matters are recorded there which are not referred to elsewhere. Moreover, they usually contain very useful progress reports. A contractor who is recorded as regularly reporting a project as being on time may find it difficult to argue later that it was in delay, when seeking an extension of time. Minutes that are not recorded as agreed in later minutes have a reduced value, somewhat similar to personal notes.

10.2.7 Site and other diaries

Diaries are useful, but often the diaries kept by the contractor and the clerk of works will differ in what they say about the same events. One such situation was considered by the court in *Oldschool v Gleeson (Construction) Ltd*, where the conflict was between the diaries kept by a consulting engineer and the site agent. The judge said:

‘I found [the agent’s] diary entries unsatisfactory, in the sense that they do not record warnings and complaints when, as I believe, these were given. I cannot believe that the district surveyor could have written in these terms on 21 March if [his assistant] had not in fact given the same warning, and yet not a hint of it appears in [the agent’s] diary; which, together with other instances, leads me to

think that he was not anxious to record criticisms or complaints when they were made, and where such appear in [the engineer's] diary and not in the diary of [the agent], I am bound to say that I have no hesitation in accepting [the engineer's] contemporaneous record as being the accurate one.⁹

Diaries can be very helpful if one of the parties is trying to prove that the architect was or was not on site at a particular time on a certain day. If it can be shown that the site agent's diary regularly and as a matter of course noted down when the architect was on site, the fact that there is no note of the architect on a particular day will tend to substantiate an allegation that the architect was not on site. It is less likely that the site agent has simply forgotten to log the architect in the diary if the contractor can show a pattern of entries on past occasions. Usually an entry showing that someone was on site on a particular day is unlikely to be deliberately entered incorrectly at the time, because there is always the danger that the particular person can prove beyond doubt that he or she was elsewhere.

The evidence of the diary may be quite crucial if there is no other evidence and it may be tempting for a party to manufacture certain diary entries only when a claim is contemplated. Sometimes attempts are made to erase an inconvenient entry. Forensic science is very sophisticated and, depending on the value of the alleged claim, diary entries are sometimes subjected to forensic analysis. It is possible to identify later additions, erasures and changes without too much difficulty. It hardly needs to be said that the submission of what amounts to a fraudulent diary, as part of what otherwise would be a set of convincing evidence, can fatally damage a contractor's chances of recovery of the amount claimed.

10.2.8 Labour returns

Labour returns or time sheets are invaluable as a record of the amount of labour and other resources used on a project. This is particularly the case where a claim for disruption costs is being made. Many contractors are in the habit of providing such sheets to the architect or the quantity surveyor on a regular basis and sometimes the preliminaries section of the contract bills or specification requires such sheets to be provided by the contractor every week. Obviously, if they are to have value, they must be accurate. A file full of labour returns provided by the contractor with the claim and each one bearing the same handwriting and with every indication that they were all written at the same time (long after the event) is not likely to assist a claim. However, a contractor that regularly and contemporaneously submits sheets without adverse comment ought to be in a strong position if wanting to rely on those sheets to back up a subsequent claim.

10.3 'Scott schedules'

A Scott schedule is a document which is often used in litigation or arbitration and to a lesser extent in adjudication. Where it is necessary for the judge or arbitrator to

⁹ (1976) 4 BLR 103 at 117 per Sir William Stabb J.

decide a large number of issues, such as where an arbitrator is being asked to decide the value of the final account, it sets out the issues in dispute in the form of a table. There is no particular format prescribed, but the object is to present the issues in dispute as clearly and concisely as possible. The Scott schedule was invented by Mr G A Scott QC almost 100 years ago.

It has become common practice for any schedule listing a series of issues in dispute to be referred to as a Scott schedule. That is to use the term wrongly. The key thing about a Scott schedule is that, not only are all the issues listed but that columns are provided to allow the parties to state their summarised cases. It is good practice to agree the headings for the various columns at an early hearing before the judge or at the preliminary meeting before the arbitrator. For example, if the dispute is about the final account, it might be agreed that the Scott schedule will list all the items in the final account and the first column will list what the claimant thinks the items are worth, while the third column will brief state the reasons in each instance. The fourth and fifth columns will contain the same type of information, but this time what the respondent thinks each item is worth and the respondent's reasons. The final columns might be left for the arbitrator, judge or adjudicator to fill in with the amounts as decided with reasons if appropriate. It is usual for some of the issues to be resolved at this stage, as the parties realise that in many cases there is little or nothing between them, leaving just the key items and thus simplifying and shortening the dispute resolution process.

Obviously, the main part of any claim and the response to that claim in an arbitration or litigation environment will be set out in considerable detail with proper supporting evidence. The purpose of the Scott schedule is merely to summarise the position. The way in which the parties to a dispute should approach the completion of a Scott schedule was considered by the Court of Appeal in *Petromac Inc v Petroleo Brasileiro SA (Petrobras) and Another*.¹⁰ The Court was considering some preliminary issues and the question arose regarding the particulars which must be provided. The Court said:

‘What then are the proper particulars? That in detail is a matter for the judge or whichever other judge carries the resolution of this dispute forward. The structure of the particulars should, I think, be determined in detail by the court ordering the structure and headings to the columns of the Scott schedule.’

In considering whether a party had given sufficient particulars in the schedule, the Court said:

‘The giving of particulars of this kind is always burdensome. If it becomes necessary for the judge to determine whether essentially compliant particulars are adequate, it will be appreciated that oppressive requests for yet further particulars should not be used by the requesting party as a means of excusing themselves from completing their part of the Scott schedule. The practical reality of litigation such as this is that disputes are usually compromised when both parties have completed their parts of a Scott schedule, if not before.’¹¹

¹⁰ (2007) 115 Con LR 11.

¹¹ (2007) 115 Con LR 11 at 47–8 per May LJ

Reference Number	Nature of Variation	Claimant's		Respondent's		Amount in dispute	Arbitrator's comments	Arbitrator's amount
		Details	Amount claimed	Comments	Amount agreed			

Figure 10.1 A typical Scott schedule

The judgment makes clear that it is not sufficient for the arbitrator or judge simply to require the parties to produce a Scott schedule. The requirement must set out in detail what the schedule must contain. Moreover, a party cannot avoid completing its part of the schedule by claiming that it needs more particulars from the other party first. Although it is probably inappropriate to submit a claim in such a form initially, the claim should be prepared so that the factual information in it can, if necessary, easily be transferred to such a schedule. Particularly where a claim is based on a large number of variations or even the final account, a simplified version of the schedule can be useful to give an overview and keep control over which parts of the claim are agreed and which disputed. There is no standard form for a Scott schedule and every case will generate its own schedule. Figure 10.1 is an example of a typical schedule relating to a contractor's claim resulting from variations arising under SBC clause 3.14.

PART II

Chapter 11

Extension of time under JCT standard form contracts

11.1 Standard Building Contract (SBC)

The current JCT Standard Building Contract is the 2005 version (Revision 2 2009).

11.1.1 Clauses 2.26–2.29

These clauses deal with extension of the contract period and are now headed 'Adjustment of Completion Date'. Schedule 2 'Variation and Acceleration Quotation Procedures' also includes provisions for fixing a new date for completion. The Guide published to accompany the contract states that the change in heading from the straightforward 'Extension of time' of clause 25 of the 1998 edition of the form is a more open recognition of agreements to accelerate the Works under the Schedule 2 Quotation procedure. 'Pre-agreed Adjustment' is a defined term used in clauses 2.26–2.29 when referring to a revised completion date fixed by acceptance by the architect on behalf of the employer of a variation or acceleration quotation. It should be noted that references to extending time and fixing a new date for completion is taken to mean the date for completion of the Works or, if the Works are divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.1.2 Commentary

The current extension of time clauses contain some significant and many minor changes to clause 25 of JCT 98.

Clause 2.27.1

This clause is much misunderstood or more accurately, it is not read properly, but it is the key clause in the extension of time provisions. The contractor is required to give notice to the architect of every delay. It should be noted that the contractor is to give notice not only when the progress of the Works is being delayed, but also

when it becomes reasonably apparent that it is likely to be delayed in the future. It has to be obvious to a contractor, acting in a reasonable manner, that the progress of the Works is being or is likely to be delayed. The reference to progress must refer to actual progress. Clearly, measuring whether it has been delayed should be a straightforward matter of fact. It is probably relevant to compare the contractor's actual progress to the progress indicated in the contractor's programme although a failure to comply with the programme would be unlikely, without more, to conclusively demonstrate delay to progress. Strange as it may seem, the contractor has no obligation to comply with its own programme and it may, for example, progress the Works faster than shown on the programme.¹ 'Apparent' means that something is clearly seen or understood and that is the criterion which will determine whether or not the contractor has complied with its obligation to notify. Once it becomes reasonably apparent that the progress is actually being delayed or is likely to be delayed, the contractor must notify the architect. The contractor is to give the notice 'forthwith'. 'Forthwith' has been variously defined as: as soon as it is reasonable to do so² or 'without delay or loss of time'.³ It appears that the meaning will be adjusted depending on the context. In most building contracts it conveys the fact that the action required must not be delayed. It does not necessarily mean 'immediately'.⁴ Clause 1.7.1 states that all notices must be in writing.

The contractor's notice must specify the cause of delay. Although often overlooked, it is important for the contractor to identify the precise activity (or activities) which is delayed together with its relation to the project's critical path and it is certainly in the contractor's interest to do so. This notice was held not to be a condition precedent to giving an extension of time by the architect under JCT 63⁵ and the decision may apply to SBC also.⁶ In any event under SBC wording (clause 2.28.5), the architect has power to give an extension in the absence of such written notice once the date for completion has passed; failure by the contractor to give written notice merely means that the architect does not need to make a decision on extensions until a later date, i.e. on the review of the completion date not later than the expiry of 12 weeks from the date of practical completion whether or not the contractor has notified the relevant event. It is less clear whether the architect is entitled to give an extension of time before practical completion in the absence of written notice. On balance, that the architect cannot do so appears to be the better view.

The contractor's notice is to state not just the cause or causes of the delay; it must also state the material circumstances. It is important that the notice should go into some detail regarding why the delay is occurring or is likely to occur and the form of such delay. The cause of the delay should be interpreted as meaning all the factors giving rise to the delay. The 'material circumstances' will include such things as the progress and the proposed order of Works and anything else which might affect progress at the time of the delay. The knock-on effect of the delay, with consequent

¹ *Glenlion Construction Ltd v The Guinness Trust* (1987) 39 BLR 89.

² *London Borough of Hillingdon v Cutler* [1967] 2 All ER 361.

³ *Roberts v Brett* (1865) 11 HLC 337.

⁴ 'Immediately' normally means that an action must be performed with all reasonable speed: *Alexiadi v Robinson* (1861) 2 F & F 679.

⁵ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

⁶ But see the discussion on 'Notices' in Chapter 6, Section 6.6.

likely further disruption, would also be a material circumstance. It is not sufficiently appreciated that the duty is not limited to notifying the causes of delay listed as relevant events; it is a duty to give notice of delay, however it is caused. What that means in practice is that the contractor must notify all delays and their causes even if the delay is entirely of the contractor's own making. It must notify breakdowns of machinery, shortage of labour and delays in supplies. The idea is that the architect is in possession of all the information required to monitor the progress of the Works.

The information must be provided even if it is uncertain whether the current completion date will be affected. Further, if the contractor fails to give notice of a delay which it clearly should have been able to anticipate, the architect can in fact say that the contractor has not used its best endeavours to prevent delay in progress, which it is bound to do by the terms of clause 2.28.6.1. Anecdotal evidence suggests that it is rare, virtually unknown, for a contractor to give notice of delays unless it believes that a relevant event giving rise to an extension of time is involved. The purpose of the notice is simply to warn the architect of the situation, and it is then up to the architect to monitor it.⁷ It may be possible for the architect to take some action which may eradicate the delay completely.

In short, the contractor must give prior notice of all delays which it is reasonable for it to expect. The architect then has sufficient time to take appropriate steps to rectify the situation and provide the contractor with the opportunity to bring the contract back on programme. This may be by way of omitting work under clause 3.14 if it is practicable to do so and if, of course, the employer agrees. If the contractor fails to give notice (even of its own delays), it is in breach of contract and the architect is entitled to take such a breach into account when giving a future extension of time.⁸

A simple example will make clear how the principle works. Take the case of an architect who has been given a specific written request for information by the contractor at the right time, neither too early nor too late. The architect has overlooked the request. A week before the information is required, it is reasonably apparent to the contractor that it is not likely to arrive, but it does nothing. On the day it is required, it has still not arrived, but it is not until a week later and the job is seriously delayed that the contractor sends the architect a notice of delay. By the time the architect has diverted staff onto the task and the information is produced, a further two weeks have passed making a total of three weeks delay. The contractor is clearly in breach, because it failed to notify the architect that the work was likely to be delayed a week before the delay occurred. In fixing a new completion date, the architect is entitled to take the contractor's breach into account by asking the question: what would have been the length of delay had notification been received at the correct time? It would still have taken two weeks to produce the information, but the preparation would have been able to start a week before it was required. The contractor would have been delayed one week and that is all the architect need consider in fixing a new completion date. Events are rarely quite as straightforward as that and, in practice, there may be numerous other factors to be considered.

⁷ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

⁸ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

The contractor must identify in its notice of delay any event which it believes is a relevant event. If it does not do so, the architect's duty to consider the notice does not commence. This requirement acknowledges and reinforces the point that the notice of delay may contain causes of delay which are not relevant events. The notice must state the causes of delay which, the contractor believes, entitle it to an extension of time. The relevant events identified must be listed in clause 2.29.

Clause 2.27.2

The Contractor has a quite onerous obligation under this clause. It must give particulars of the expected effects of each relevant event notified (but not of other delaying factors). Either in its original notice or, where that is not practicable, as soon as possible after the notice, the contractor must state in writing to the architect, particulars of the expected effects on progress. Each relevant event must be assessed by the contractor separately as if no other event had occurred. The contractor is expressly required to give its own estimate of the expected delay in completion of the Works beyond the completion date. This is a particularly onerous task. The contractor must address each delay separately and its effects even if two or more delays are acting together. Contractors will commonly, indeed invariably, promote their views of the delay, but rarely split so as to deal with each delay as a separate item. The contractor must give enough information to enable the architect to form an opinion. So it is not sufficient for the contractor merely to estimate the effect on the completion date, it must also show the effect on every relevant activity between the event and the completion date. It is arguable that a contractor cannot properly comply with this requirement without providing before and after print outs of its computerised programme.

Clause 2.27.3

The contractor is required to inform the architect of any material (i.e. significant) change in any of the submitted particulars and estimate of delay and give whatever further information the architect may reasonably require. The contractor must keep the architect up to date with developments on site which are relevant to the notified delay. For example, it may be an ongoing delay for which the contractor must update the architect on a regular basis. The contractor's duty is not dependent upon the architect's request. Failure to so update the architect will amount to a breach of contract on the part of the contractor which the architect is entitled to take into account in estimating any extension of time. The architect's time limit for dealing with applications for delay only begins when the required particulars have been received from the contractor. The intention of these provisions is to provide sufficient information to allow the architect reasonably to arrive at an informed opinion. Although the architect may not have been on the site at the time of the delay, there is no doubt that an architect must use whatever records are available from any source.⁹ The architect cannot avoid dealing with the contractor's delay notices

⁹ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

because the contractor has failed to provide information which the architect already has or of which the architect is well aware.

Importantly, it should be noted that it is expressly stated that the architect may require the further information at any time. It has been held in relation to adjudication proceedings that the phrase 'at any time' must be given its plain and natural meaning¹⁰ and there is no restriction as to time.¹¹ The question under consideration was whether adjudication could take place concurrently with legal proceedings about the same matter. Because adjudication was stated to be available 'at any time', the words meant what they said even though the same issue was being decided by the court. In this instance, it is suggested that the words must also be given their plain meaning within the context of the clause. The effect of that appears to be that the architect may require further information at any time up to the date on which the architect gives a definitive decision on extensions of time. The architect is required to review the extension of time position up to 12 weeks after the date of practical completion (clause 2.28.5). Therefore, the architect may require further information up to that time. There is an important qualification – that the architect's requirement must be reasonable.

Clause 2.28.1

The architect's duty to form an opinion about extension of time does not arise until the contractor has provided both the notice of delay and the particulars including an estimate of expected delay in completion. If the particulars are received before the date for completion, the architect must consider them. The architect has to decide two important things:

- whether any of the causes of delay specified by the contractor in the notice is in fact a relevant event, and
- whether completion of the Works is in fact likely to be delayed by the specified relevant event beyond the completion date.

Obviously, the architect may disagree that the cause specified by the contractor is a relevant event. If that is the case, the architect need not consider the next point. It is remarkable how often contractors fail to refer to any relevant event at all, presumably on the basis that they are entitled to an extension of time if they are delayed for any reason. Alternatively, contractors often specify relevant events by clause number without specifying any occurrence on site in relation to it. Where a contractor fails to identify the correct, or indeed any, relevant event, it is doubtful that the architect has any duty to identify it. There is nothing in the contract which suggests that the architect has such a duty. Rather, the architect's duty seems to be simply to check whether the contractor has named the correct relevant event and whether the notified cause falls under that relevant event.

An architect who concludes that the delay, however long it may be, has no effect on the completion date, must decide that no extension of time is applicable. That

¹⁰ *Herschel Engineering Ltd v Breen Property Ltd* (2000) 16 Const LJ 366.

¹¹ *A & D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd* (2000) 17 Const LJ 199.

situation can occur when a delay occurs to an activity which is not on the critical path and which has a considerable amount of float to absorb the effects of the delay without the non-critical activity becoming critical. It is very easy for an architect to fall into the trap of thinking that a delay of two weeks equals two weeks extension of time. It is difficult to over-emphasise the importance of the completion date. A delay which does not affect the completion date does not entitle the contractor to an extension of time. Delay to an activity which may or may not have an effect on the completion date must be differentiated from delay to the completion date. The question was considered in a case where the architects and project managers were alleged to have been negligent in relation to some of the extensions of time given to the contractor. The case against the project managers failed because the court held that it was no part of the duty of the project managers to second guess the architect's decisions. Moreover, there was no evidence to show that, if the project managers had expressed a contrary view to that of the architects, the architects would have taken any notice. The architects were not generally held to be negligent in the giving of extensions of time except in one particular concerning a delay which did not affect the date for completion. The court summed up the situation as follows:

‘... had [the architect] directed its mind, when considering the question whether to grant a second extension of time on the Hydrotite Ground, to the issue whether the progress of the Works, as opposed to the activity “Wall and Floor Finishes”, had been further delayed since the grant of the first extension of time on the Hydrotite Ground, it could only have concluded that it had not. It is thus, in my judgment, clear that in relation to the second grant of an extension of time on the Hydrotite Ground [the architect] negligently failed to direct its mind to the correct issue, and, if it had directed its mind to the correct issue, it could only have concluded that no further extension of time was appropriate.’¹²

It is entirely a matter for the architect's opinion whether a delay in the contract completion date is likely to occur or has occurred and also whether the cause of delay falls into the category of a relevant event and therefore something for which the architect should grant an extension. However, the architect does not have completely free rein in the matter and must exercise his or her opinion according to law. As soon as the architect is notified by the contractor of a delay, either occurring or predicted to occur, it is for the architect to carefully monitor the position. The situation has been summarised in this way:

‘Clause 23 imposes on the architect the duty of considering whether completion of the works is likely to be or has been delayed beyond the date for completion by way of the causes there set out and if it has whether any and if so what extension should be granted. That duty is owed both to the contractor and the building owner. The architect is entitled to rely on the contractor to play his part by giving notice when it has become apparent to him that the progress of the works is delayed. If the contractor fails to give notice forthwith upon it becoming so apparent he is in breach of contract and that breach can be taken into account by the

¹² *The Royal Brompton Hospital National Health Service Trust v Frederick Alexander Hammond & Others (No 7)* (2001) 76 Con LR 148 at 214 per Judge Seymour.

architect in deciding whether he should be given an extension of time. But the architect is not relieved of his duty by the failure of the contractor to give notice or to give notice promptly. He must consider independently in the light of his knowledge of the contractor's programme and the progress of the works and of his knowledge of other matters affecting or likely to affect the progress of the works . . . whether completion is likely to be delayed by any of the stated causes. If necessary he must make his own inquiries, whether from the contractor or others.¹³

The extension of time clause under the form of contract being considered there was clause 23 of JCT 63. If the contractor feels that the architect has been unreasonable in reaching an opinion, its recourse is to adjudication or arbitration. On receipt of the contractor's written notice the architect must decide if the cause of delay is covered by clause 2.29. If in the architect's view it is not then, subject to the contractor's right to challenge that opinion by adjudication or arbitration, that is the end of the matter.

Of course, the architect must not arrive at the decision on a whim. The position should be carefully analysed and the effect of individual delays must be considered.¹⁴ However, having reached a decision, that decision has a considerable status under the contract as indicated in the judgment in *Balfour Beatty v London Borough of Lambeth*:

'Lambeth was in my view entitled to criticise BB's case without putting forward an alternative. Since BB had not justified its case Lambeth was not obliged to justify the architect's extensions of time or certificates of non-completion. It was entitled to rely on them as they were apparently valid decisions by the architect and the parties by adopting the JCT conditions have agreed to be bound by them (subject to review by an Adjudicator or arbitrator). BB had to persuade the Adjudicator that the architect's decisions were wrong. Lambeth were not obliged to prove that they were right (although it is often prudent to do so).'¹⁵

The architect must then decide whether or not the delay is going to mean a likely failure to complete by the date for completion. The architect is entitled to consider clause 2.28.6.1, which provides that the contractor shall constantly use its best endeavours to prevent delay. The contractor's duty is to prevent delay, so far as it can reasonably do so, e.g. a delay in progress of the Works at an early stage may be reduced or even eliminated by the contractor using its best endeavours.

An interesting situation arises if the contractor is actually ahead of its own programme when a delay occurs. The correct position appears to be as follows:

'Provided the contractor has given written notice of the cause of delay, the obligation to make an extension appears to rest on the architect without the necessity of any formal request for it by the contractor. Yet he is required to do this only if the completion of the works "is likely to be or has been delayed beyond the Date for Completion", or any extended time for completion previously fixed. If a

¹³ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 93 per Vinelott J.

¹⁴ *John Barker Construction Ltd v London Portman Hotels Ltd* (1996) 50 Con LR 43.

¹⁵ [2002] BLR 288 at 303 per Judge Lloyd.

contractor is well ahead with his works and is then delayed by a strike, the architect may nevertheless reach the conclusion that completion of the works is not likely to be delayed beyond the date of completion. Under condition 21 (1), the contractor is under a double obligation: on being given possession of the site, he must “thereupon begin the works and regularly and diligently proceed with the same”, and he must also complete the works “on or before the Date for Completion”, subject to any extension of time. If a strike occurs when two-thirds of the work has been completed in half the contract time, I do not think that on resuming work a few weeks later the contractor is then entitled to slow down the work so as to last out the time until the date for completion (or beyond, if an extension of time is granted) if thereby he is failing to proceed with the work “regularly and diligently”.¹⁶

Although these observations were *obiter*, it is thought that this sensible analysis accurately represents the law. It appears that the architect may take account of where the contractor actually is in terms of progress when compared with its programme and that if the contractor is ahead of its programme, the architect may take account of that in estimating the appropriate extension of time. The passage also reinforces the point that the contractor does not own the float element in the programme.¹⁷ In a situation where causes of delay overlap or where they are concurrent (in the broad sense), the architect must consider each cause separately. The cumulative effect on progress must be taken into account: it is delay to progress and the completion date which are the important factors.¹⁸

An architect who decides that one or more causes are relevant events and that the completion date is likely to be delayed as a result must give an extension of time to the contractor. The following extract is still useful in putting the architect’s task in perspective:

‘Perhaps the greatest difficulty which may be encountered will be in deciding whether or not the notice, particulars and estimates, which the contractor is required to provide, are sufficient for the architect to make his decision on extending the completion date. This requires close co-operation between contractor and architect and architects ought to be decisive in the matter and not use alleged insufficiency of particulars and estimates as an excuse for delaying the issue of extensions of time.’¹⁹

The architect will have to consider matters of concurrency caused by delays resulting from different relevant events and from the contractor’s own culpable delay. In estimating extensions of time under JCT 98 it was said:

‘where optional clause 5.3.1.2 is not deleted, the architect will be assisted by the contractual obligation on the contractor to provide and keep up to date a master programme for the execution of the works.’²⁰

¹⁶ *London Borough of Hounslow v Twickenham Garden Developments Ltd* (1970) 7 BLR 81 at 113 per Megarry J.

¹⁷ *How Engineering Services Ltd v Lindner Ceilings Partitions PLC* 17 May 1995 unreported; *Ascon Contracting Ltd v Alfred McAlpine Construction of the Isle of Man Ltd* (2000) 16 Const LJ 316 at 338.

¹⁸ See Chapter 2, Section 2.4 – Concurrency, for a detailed consideration of this point.

¹⁹ The Aqua Group, *Contract Administration for the Building Team* (1996) 8th edition, Blackwell Science, p.114.

²⁰ The Aqua Group, *Contract Administration for the Building Team* (1996) 8th edition, Blackwell Science, p.114.

Precisely so, but there is no contractual obligation to provide a master programme. The relevant clause in SBC is 2.9.1.2. As noted elsewhere, it is a sensible practice for the architect to include such a requirement, and to specify the type of programme required, even where the contract does not expressly require one. It would seem reasonable that, as a minimum, the architect should require a programme in bar chart *and* in network form with key dates and resources clearly shown.

The architect is required to grant the extension of time by fixing as a new completion date for the Works a later date which the architect estimates to be fair and reasonable. It should be noted that the architect is only expected to estimate the length of extension and not to ascertain. Ascertainment would be impossible. 'Fair and reasonable' is a difficult concept to pin down. It has been examined by the court in *City Inn Ltd v Shepherd Construction Ltd* when considering the extension of time clause in the JCT 80 Standard Form of Contract as follows:

'The architect is not expected to use a coldly logical approach in assessing the relative significance of contractor's risk events and non-contractor's risk events; instead, as the wording of both clause 25.3.1 and clause 25.3.3.1 makes clear, the architect is to fix such new completion date as he considers to be "fair and reasonable". That wording indicates that the architect must look at the various events that have contributed to the delay and determine the relative significance of the contractor's and non-contractor's risk events, using a fairly broad approach. Judgment is involved. It is probably fair to state that the architect exercises discretion, provided that it is recognized that the architect's decision must be based on the evidence that is available and must be reasonable in all the circumstances of the case.'²¹

Clause 2.28.2

The architect must inform the contractor whether or not an extension is given. That is important. The architect cannot simply sit back and say nothing if there is no extension. In respect of each notification of delay and provision of particulars, the architect must notify the contractor in writing where the decision is not to fix a later completion date as a new completion date. It is important, because the architect's decisions are required before the provisions restricting the level of fluctuations or formula adjustment can be operated if the contractor is in default over completion, a point which should not escape those using SBC. The architect is allotted the same time period in which to make the decision whether it is positive or negative.

The architect must inform the contractor in writing of the decision as soon as 'reasonably practicable'. This term has a narrower meaning than whether something is actually physically possible. It is narrower even than 'practicable' alone. In essence the obligation is to inform the contractor within a time period which is not delayed, but which takes all the circumstances into account and applies the test of reasonableness. In any event, the architect has a maximum of 12 weeks in which to notify the decision. The 12 weeks runs from receipt by the architect of the required particulars.

²¹ [2007] CSOH 190 and paragraph 13 per Lord Drummond Young.

The correct operation of these provisions really depends upon both architect and contractor being of one mind as to whether the information supplied by the contractor is sufficient to enable the architect to form an opinion. From the employer's point of view it is important that the architect should decide in due time, because of the fluctuations provisions: see schedule 7, paragraphs A.9.2.2, B.10.2.2 and C.6.2.2, the effect of which is that, unless the architect carries out his or her duties promptly, the right of the employer to freeze the contractor's fluctuations on the due date for completion is lost.

However, if there are less than 12 weeks left between receipt of the contractor's particulars and the completion date, the architect must endeavour to reach a decision and fix a new date for completion no later than the current completion date. The intention clearly is that the contractor should always have a date for completion towards which it can work. Contractors sometimes attempt to intimidate architects by waiting until the last moment to provide the required particulars and then maintaining that the architect is obliged to come to a decision before the completion date no matter how little time is left. That kind of contractor is seriously misguided. The contract is clear. Clause 2.28.2 states that the architect must *endeavour* to notify the contractor of the new date for completion before the current completion date. The obligation to endeavour to do something means that the architect must strive or attempt to do it. If there is a very short period left before the completion date, it may not be reasonably practicable for the architect to come to a decision in time no matter how strong the endeavour. It appears that the architect has no power under clause 2.28 to make the decision after the completion date and the decision will have to be made as part of the review under clause 2.28.5. The contractor may be disappointed, but it is the author of its own misfortune.

If it seems that the architect would be able to make a decision if a further week or so were available, he may decide to make the best decision practicable (which may well be conservative) before the completion date and then use the additional period thus created to come to a more considered decision. Thus, an architect faced with making a decision just one week before completion date may be able to give two weeks extension of time and the extra two weeks may enable the architect, on mature reflection, to give a further one week. However, the architect is not obliged to act in this way.

Some architects have adopted the practice of amending clause 2.28 so as to do away with the time limits. This is not a wise idea, if only because of the fluctuations provisions. Fluctuations are only to be frozen at completion date if the printed text of clause 2.26–2.29 is unamended and forms part of the conditions: see schedule 7, paragraphs A.9.2.1, B.10.2.1 and C.6.2.1. In the absence of a fixed period, an adjudicator or arbitrator, if called upon, may decide that the architect ought to come to a decision in less than 12 weeks.

Clause 2.28.3

If the architect's decision is that an extension of time is to be given, the architect, in fixing the new completion date, must state two things. The first thing is the amount of extension of time given in respect of each relevant event and the second thing is the reduction in time attributed to each relevant omission. Previous JCT contracts

(e.g. see JCT 98 clause 25) did not require the architect to state the period of time attributable to each relevant event. That was sensible, because to allocate time periods against relevant events is generally not in the employer's interests. The contractor always, of course, demands these details, because without them it is difficult to challenge the architect's decision unless it is grossly wrong. Moreover, the contractor often mistakenly believes that an extension of time is a pre-requisite to claiming loss and/or expense.

It used to be the case that an architect, in giving an extension of time, would set out the reasoning behind it in considerable detail. Of course this merely encouraged the contractor to respond, pointing out where the architect was wrong, in equal detail. The exchange would never come to an end while the architect continued to respond. Fortunately, very few architects now provide the contractor with such details of the reasons for an extension of time (or for its rejection). The contract does not require it and it is doubtful whether it actually assisted the contractor. Obviously, the architect would be obliged to reveal calculations during an adjudication or arbitration if the decision had to be defended, but by that time the contractor must have already made its decision to challenge, based on its own opinion and perhaps that of its expert.

From the new wording, it seems that the architect must list all the relevant events notified by the contractor even if the architect has discounted some of them. Presumably the architect then has to allocate the extension of time among the notified relevant events, allocating 'nil' to relevant events which have been notified but for which the architect has not given any extension of time. Any reductions in time must be allocated to each relevant omission. Note the allocation of reductions is not to relevant events, but to relevant omissions. These are presumably architect's instructions requiring omissions.

A clause which appeared to give some credence to the argument that the period of time should be stated was clause 26.3 of JCT 98. However, that has been judicially questioned.²² It is good to see that the JCT have now omitted any equivalent to JCT 98 clause 26.3, but unfortunate that the opportunity has been taken to require the allocation of weeks to relevant events which can only strengthen the common misconception that a contractor must secure an extension of time before seeking loss and/or expense.

Clause 2.28.4

Under JCT 98 it was clear that the architect could take account of omissions when deciding on the first extension application, because of the wording of the equivalent of the current clause 2.28.3.2. That is no longer the case. Under SBC the architect's powers under this clause may be exercised only after the first extension of time that the architect gives or after a revision to the completion date stated in a confirmed acceptance of a schedule 2 variation or acceleration quotation (pre-agreed adjustment).²³ It is unclear why this limitation has been imposed, because it made perfect

²² *Methodist Homes Housing Association Ltd v Messrs Scott & McIntosh* 2 May 1997 unreported; considered in Chapter 13, Section 13.1.2.

²³ See Chapter 14, Section 14.5.5.

sense that, in deciding the first extension of time, the architect should be able to take into account any omissions. The term used in the contract is 'Relevant Omission' which is defined in clause 2.26.3 as omissions of work or obligations whether by instruction for variations or provisional sums for defined work. Under clause 2.28.4 the architect can only reduce extensions of time on account of omissions of work, etc. instructed since an extension was last given.

It is important to understand that each extension is deemed to take into account all omissions instructed from the date of the previous extension up to the date of the new extension. The architect cannot, in any event, fix any earlier date than the original completion date: clause 2.28.6.3. But if the architect has issued instructions which result in the omission of work or obligations under clause 3.14 such instructions may be taken into account and a completion date earlier than that previously fixed may be fixed if in the architect's opinion the fixing of such earlier completion date is fair and reasonable having regard to those instructions. The architect can, under this clause, reduce extensions previously granted and even extinguish them completely so as to return to the original date for completion but no earlier date than that can be fixed, no matter how much work or how many obligations are omitted. It should be noted that the architect's powers under clause 2.28.4 are not dependent upon the contractor giving a notice of delay. The architect can simply issue an instruction requiring an omission and then fix a new date for completion earlier than previously fixed, taking the omission instruction into account.

It is suggested that architects desiring to exercise the power to reduce extensions previously granted by taking into account the omission of work or obligations should fix the new date and notify the contractor as soon as possible. Experience suggests that architects are often somewhat parsimonious in giving extensions of time, because they know that they have the review period up to 12 weeks after practical completion in which to redress any under allowance: see below. Although that approach is understandable, especially if the architect believes that the client is litigious, it is not good practice. The ideal time is when issuing the relevant omission instruction. It is not sensible to leave it until the next extension of time.

Clause 2.28.5

This clause sets out the extension of time regime after the completion date which is quite separate from what has gone before. It gives the architect the opportunity to make a final decision on extensions of time. Some commentators believe that in *Temloc Ltd v Errill Properties Ltd* the Court of Appeal held that the requirement to do so within 12 weeks after practical completion is not mandatory. This is a wrong view of the judgment. What if the contractor provides no information at all to the architect until after the 12 weeks has expired? Strictly, the architect has no power to consider the submission and must so inform the contractor. There may, of course, be circumstances where the architect believes that, for various reasons, a further extension should be given after the deadline. It seems, at first sight, that the only way this can be achieved is if the employer and contractor together agree to waive the contractual limitation. This is best done in writing. Before the architect advises the employer to follow that route, there must be a clear advantage to the employer in so

doing. Whether in any particular case there will be such advantage depends on the surrounding circumstances. Whether or not the architect can validly make the final decision after the end of the 12 week period has not yet been definitively settled.²⁴

This clause requires the architect to review the completion date. The review may be carried out after the completion date has passed, but it *must* be carried out after practical completion. In conducting the review the architect must take account of any known relevant events, whether or not specifically notified to the architect by the contractor. It is clear that the architect must take account of any relevant events which have occurred since the commencement of the contract. It is the architect's final opportunity to consider extensions of time and possibly prevent time becoming at large. It is at least arguable, on a strict reading of clause 2.28.5, that the architect can exercise this power only once. Therefore, if the architect chooses to do so after the completion date, but before practical completion, it may be that the power cannot be exercised again afterwards. In practice, an architect will usually wait until after practical completion to act under this clause. When the architect writes to the contractor, the contract now makes clear that the details required by clause 2.28.3 (allocation of extensions of time to each relevant event and reduction in time for each relevant omission) must also be given. It is common for architects to simply notify a new date under the previous clause (25.3.3) of JCT 98. In carrying out the review, the architect must do one of three things:

- Fix a completion date later than any date previously fixed. It may be argued that a strict reading of this clause precludes the architect from fixing a later completion date if time has not already been extended, because an unextended date for completion cannot be considered as a date 'previously fixed' and it is not so described in the definitions clause 1.1. In JCT 98, the completion date was defined as the date 'fixed and stated', but in SBC it is simply defined as 'as stated'. It is difficult to believe that the JCT actually intended that result. It does not make any commercial sense and most architects will, and probably should, be prepared to fix a later date under this clause even if no previous extension of time has been given. Indeed that interpretation sits perfectly well with the requirement that the architect must fix the later date whether that is as a result of reviewing a previous decision or otherwise. The 'otherwise' can only sensibly refer to the situation where there was no previous decision and the date being reviewed is the original completion date. In a subtle variation of clause 2.28.1, where the architect is required to give a fair and reasonable extension of time, the architect under clause 2.28.5 must fix a new date if in his opinion it is fair and reasonable to do so. Thus in this clause the architect must decide if the action is fair and reasonable rather than the extension of time itself. One wonders if this interpretation is really what was intended. The architect must have regard to any of the relevant events and it matters not whether any relevant event has been notified by the contractor. Therefore, if one ignores the slight inconsistencies noted above, the architect has a very wide scope to fix a new date for completion.
- Fix a completion date earlier than previously fixed. For the purpose of clause 2.28.5, it makes sense that the definition of completion date in clause 1.1 does not

²⁴ See the discussion in Chapter 2, Section 2.2.4.

make reference to any fixing of such date. Notwithstanding that, clause 2.28.6.3 prohibits the architect from fixing a date earlier than the completion date in the contract. The architect must have regard to any omission instructions issued since he or she last granted an extension of time. Once again, the architect must decide if the action is fair and reasonable rather than the extension of time itself.

- Confirm to the contractor the completion date previously fixed.

In practice, the architect should write to the contractor soon after practical completion, reminding it of the 12 week period and that the architect has no power to make any extension of time after the expiry of the period. The contractor should be given a date by which any final submissions should be made; this is not the time for the submission of large numbers of weighty lever arch files.

Clause 2.28.6

This clause contains a number of important provisos as sub-clauses. The first two apply to the contractor and the second two apply to the architect. The introductory wording strongly suggests that compliance with the first two provisos (the use of best endeavours and the doing of everything reasonably required) is a condition precedent to the issue of valid extensions of time.

Clause 2.28.6.1

This clause places a substantial obligation upon the contractor. It must use its best endeavours to prevent delay to progress and to the completion date. This is a matter which the architect must take into account when deciding upon extension of time. It has been said that when a contractor undertakes to use its best endeavours, it undertakes to do everything within its power to prevent delay to the progress of the works irrespective of extra cost. Supporters of this point of view point to the use of the phrase obliging the contractor to do 'all that may reasonably be required' in the second part of the proviso, which is in contrast to the obligation to use best endeavours.²⁵ There appears to be no relevant construction industry case, but in other contexts 'using best endeavours' has been held to mean doing everything prudent and reasonable to achieve an objective.²⁶ The Court of Appeal held, in connection with the obtaining of planning permission, that 'best endeavours' obliged a person to take 'all those reasonable steps which a prudent and determined man, acting in his own best interests and desiring to achieve that result would take.'²⁷

Clearly, it is a lesser obligation than to 'ensure' or to 'secure', which words impart an absolute liability to perform the duty set out.²⁸ Likewise, an obligation to use 'reasonable endeavours' is less onerous than an obligation to use 'best endeavours'. Where there are a number of courses of action that it would be reasonable for the contractor to take, an obligation to use reasonable endeavours requires it to take any one of the reasonable courses. In contrast, an obligation to use best endeavours prob-

²⁵ *Transfield Pty v Arlo International* (1980) 30 ALR 201.

²⁶ *Victor Stanley Hawkins v Pender Bros Pty Ltd* (1994) 10 BCL 111.

²⁷ *IBM (UK) Ltd v Rockware Glass Ltd* [1980] FSR 335.

²⁸ *John Mowlem & Co v Eagle Star Insurance Co Ltd* (1995) 62 BLR 126.

ably requires the contractor to take all the reasonable courses available.²⁹ In practice it is likely that ‘best endeavours’ means simply that the contractor must continue to work regularly and diligently and nothing more. Provided the contractor is working regularly and diligently and has not contributed to the delay through its fault, the contractor can be said to have used its best endeavours. The addition of the word ‘constantly’ clearly increases the contractor’s obligation to the extent that it must never cease to use its best endeavours. It is likely that that the contractor’s failure to constantly use its best endeavours will disqualify it from any extension of time for the particular relevant event.

Clause 2.28.6.2

The previous proviso applies to the contractor at all times. This second proviso applies if there is a delay. In the case of a delay the contractor must do everything reasonably required to the satisfaction of the architect in order to proceed with the Works. This is probably the contractor’s obligation as part of its duty to proceed regularly and diligently in any event. However, the architect has no power to order that acceleration measures be taken either under this provision or any other provision in the contract. Schedule 2 provides a procedure by which the Works may be accelerated if the contractor’s quotation is acceptable, but that is a far cry from giving the architect power to accelerate. If this or the previous proviso obliged the contractor to accelerate, there would be little need for an extension of time clause. Indeed, it is doubtful whether a contractor has any obligation at all to increase resources on a project over and above the level necessary to complete the work for which the contractor originally tendered. There would be no necessity for a relevant event dealing with architect’s instructions requiring additional work if the contractor was obliged to increase its labour to carry out the additional work. The key word in this proviso is ‘reasonably’. It is thought that it would be completely unreasonable for the architect to require the contractor to expend large additional sums in order to comply with this proviso. However, it does seem to cover such things as the architect requesting the contractor to adjust its programme of work or to move operatives from one part of the building to another.

Clause 2.28.6.3

This clause makes clear that the architect cannot fix a completion date earlier than that stated in the Contract Particulars. What that means is that, no matter how much work is omitted, the contract period as set out by reference to the date of possession and the date for completion in the contract cannot be shortened.

Clause 2.28.6.4

This is a complex little clause necessitated by the schedule 2 provisions to extend or reduce the contract period. Under paragraphs 1.2.2 and 2.1.1 of schedule 2, dealing

²⁹ *Rhodia International Holdings Ltd & Another v Huntsman International LLC* [2007] EWHC 292.

with quotations for a variation or for acceleration respectively, the contractor is required to identify any adjustment to the contract period or any time which can be saved. After acceptance by the employer the architect issues a confirmed acceptance stating the adjustment of time and the resulting revised completion date. This is then the pre-agreed adjustment defined in clause 2.26.3 and noted earlier. What clause 2.28.6.4 does is to make plain that the architect cannot make a decision under clauses 2.28.4 or 2.28.5.2 (both dealing with omissions) which alters the length of a pre-agreed adjustment. There is an exception to that and it is in the case of a variation quotation in which the variation is the subject of an omission.

11.1.3 Grounds for extension of time

SBC, clause 2.29 lists the grounds (relevant events) on which the architect is entitled to revise the date of completion by the contractor. The corresponding provision in IC and ICD is clause 2.20. Similar provisions are to be found in DB (clause 2.26), PCC (clause 2.21) and MP (clause 18.1). They divide into two groups:

- *those which are the responsibility of the employer or the architect:*
SBC clauses 2.29.1–2.29.6 inclusive.
- *those which are the fault of neither party:*
SBC clauses 2.29.7–2.29.13 inclusive.

The grounds for extending time are as follows:

Variations: clause 2.29.1

This ground includes anything else, including architect's instructions which are to be treated as requiring a variation, whether or not so intended. Architect's instructions requiring a variation are empowered by clause 3.14 and are clearly covered by this ground. In addition, departures from the stipulated method of preparation of the contract bills, errors or omissions in the same and inadequacies in design in the Employer's Requirements (if used) and the correction of discrepancies in those Employer's Requirements are to be treated as variations under clause 2.14.3 and clause 2.16.2 respectively.

Architect's instructions: clause 2.29.2

The instructions referred to are:

- (i) Clause 2.15 – Discrepancies in drawings, contract bills, etc.
- (ii) Clause 3.15 – Postponement of any work to be executed under the contract.
- (iii) Clause 3.16 – Expenditure of provisional sums (except in connection with defined work).
- (iv) Clause 3.17 – Inspections and tests.
- (v) Clause 3.18.4 – Opening up after discovery of defective work.
- (vi) Clause 3.22.2 – Action to be taken concerning antiquities following an architect's instruction. Unlike the position under PCC the action expected of the

contractor under clause 3.22.1, is not a relevant event. Actions under clause 3.22.1 include using best endeavours not to disturb the find, ceasing work if appropriate, taking necessary steps to preserve the object and its location and informing the architect of its discovery and whereabouts.

(vii) Clause 5.3.2 – In connection with a variation quotation.

Compliance with an architect's instruction for the expenditure of a provisional sum for defined work is expressly excluded.³⁰ That is because the contractor has been given sufficient information to enable it to make an appropriate allowance in planning its work at tender stage.

Deferment of possession of site: clause 2.29.3

This ground was added to JCT 80 in July 1987. The addition was in response to a substantial demand because failure by the employer to give possession of the site by the date of possession was, and still is, quite common. The clause dealing with possession of the site was amended accordingly so as to enable the employer to defer giving the contractor possession of the site for a period of up to six weeks unless a shorter period was stipulated in the appendix (now the Contract Particulars). Presumably to achieve greater clarity, the deferment clause has now been separated from the clause requiring the employer to give possession as clause 2.5.

It is important to emphasise that the employer only has this power if it is expressly so provided in the Contract Particulars. The deferment is stated to be 6 weeks or whatever shorter period is stipulated by the employer. In view of the often unpredictable nature of demolition, site clearance works and tenants, to say nothing of unlawful squatters, it seems risky to reduce this period. Indeed, in some instances, employers would be wise to increase the six weeks and make the necessary amendment to references to six weeks in order to state the extent of the deferment power. Where the employer does defer the giving of possession, there will be entitlement to extension of time. It is considered that deferment is a positive activity which the employer should signal by giving written notice although clause 2.5 does not expressly so state. It should be noted that, on a strict reading of clauses 2.5 and 2.29.3, the extension can only be given where the employer has actually exercised the right to defer. This relevant event probably does not apply if the employer, without formally deferring possession, has simply failed to give possession on the due date.

Approximate quantity not a reasonably accurate forecast: clause 2.29.4

This ground was added by Amendment 7 (issued July 1988) as part of the incorporation of reference to the 7th edition of *Standard Method of Measurement (SMM7)*. It proceeds on the perfectly reasonable basis that a contractor will plan its work using, among other things, the quantities in the bills of quantities. Where such quantities are described as 'approximate', it is because the architect and/or the quantity surveyor

³⁰ See Chapter 14, Section 14.5.4 under the sub-heading: *Valuation of approximate quantities, defined and undefined provisional sums.*

either does not know, or has not quite decided upon, the amount required. All the contractor can do is to use the approximate quantities as if they gave a reasonably accurate forecast of the quantities required. If they give a significantly lower forecast, it will presumably need additional time to carry out the work.

The question that inevitably arises in these circumstances is: what is a reasonable forecast? Although the reference in the relevant event is to 'work' and so impliedly excludes materials, the answer is likely to depend to a large extent upon the nature of the materials measured in the contract bills and the likely effect of a difference in quantity, because changes in quantity will invariably lead to changes in the amount of work required. It will be an unusual situation if the contractor is entitled to an extension of time because the actual quantities are less than the forecast. However, the wording of the clause leaves that possibility open. If 20 tonnes of mass concrete approximately are measured in foundations, it may be considered trivial if a further 2 tonnes of mass concrete have to be placed at the same time. Concrete in reinforced beams or other materials, such as slate wall cladding may be susceptible in cost to comparatively small increases in amounts of additional work required.

Suspension by the contractor of performance of his obligations: clause 2.29.5

This ground is included to comply with the last part of s.112 of the Housing Grants, Construction and Regeneration Act 1996 which entitles a contractor to suspend performance of its obligations on seven days written notice if the employer does not pay a sum due in full by the final date for payment. The suspension part of s.112 is dealt with by clause 4.14. This relevant event covers s. 112(4) which states:

'(4) Any period during which performance is suspended in pursuance of the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.'

The relevant event is more generous than the Act which apparently provides that if a party suspends performance for six days, the effective extension to the period for completing the work is to be six days. This ignores any time the contractor may need to get ready to recommence. The wording of clause 2.29.5, read with clause 4.14 clearly requires the architect to consider all the delay including remobilisation and not just the actual period of suspension. The relevant matter in clause 4.24.4 includes the proviso that the suspension must not be frivolous or vexatious. Although that is perfectly reasonable, it does suggest, by the deliberate absence of those words in the relevant event that even a frivolous or vexatious suspension may entitle the contractor to an extension of time. Of course that would be an argument entirely without merit and could be demolished fairly easily by reference to the contractor's obligation to use its best endeavours to prevent delay. Clearly, a frivolous or vexatious suspension would be in breach of that obligation. This is probably an oversight by JCT and it is suggested that the additional words should be added to the relevant event.

Impediment, prevention or default by the employer: clause 2.29.6

This was added to JCT 98 by Amendment 4 in January 2002. It is obviously intended as a catch all clause to avoid any possibility of time becoming at large due to an act of prevention or the like on the part of the employer. It excludes such part of any act or omission of the employer as was caused or contributed to by the default of the contractor, its servants, agents or sub-contractors. The key words in this relevant event seem strange bedfellows. To 'impede' is to 'retard' or 'hinder'. To 'prevent' is to 'hinder' or 'stop'. A 'default' has been variously defined. It certainly covers a breach of contract, but it may go further than that in some circumstances.³¹ The JCT has taken the opportunity to reduce the number of relevant events, because many are now covered by clause 2.29.6. It will be useful to list the former relevant events so covered since they are likely to be the most common reasons why a contractor will cite this relevant event. They are:

Late instructions and drawings

There are two parts to this former relevant event. The first part is where an information release schedule is used, and the architect fails to comply with what is now clause 2.11. This means that if the architect does not provide the information as set out in the schedule, the contractor has a ground for extension of time provided other criteria are met. That is very straightforward, easy to understand and to operate.

The second part of the relevant event refers to the failure of the architect to comply with what is now clause 2.12. Clause 2.12 deals with the situation if an information release schedule has not been provided or if information is required which is not listed on the schedule. Assessing delays under this ground is less easy than when considering the architect's failure to comply with the information release schedule, because there are no dates to act as benchmarks on which information should have been provided. It is rather a matter of judgment by the architect who must decide when the information should have been provided under clause 2.12 and whether or not it was done. To make matters more difficult, the architect's obligation is to provide the information to the contractor to enable it to carry out and complete the Works by the completion date, but there are two qualifications:

- If the contractor's rate of progress is such that it will not finish by the due date, the architect may have 'regard' to this fact. It appears that this means that the architect is entitled to slow down the rate of provision of information to match the contractor's progress. That is not a practice to be advocated, not least, because months later it may be unclear whether the contractor's slow progress provoked the slower delivery of information or if it was a result of it.
- If the contractor looks likely to finish before the completion date, the architect is not obliged to furnish information to allow this to happen.³²

³¹ See Chappell, Cowlin and Dunn, *Building Law Encyclopaedia* (2009) Wiley-Blackwell p.146 for a fuller consideration of the term.

³² This echoes the judgment in *Glenlion Construction Ltd v The Guinness Trust* (1987) 39 BLR 89.

The question of terms to be applied as to the time within which further drawings, details or instructions are to be given have been considered by the courts although not in relation to a JCT contract. It has been stated that such information must be given within a reasonable time, but it has been made clear that this is a limited duty. Although the case was concerned with the duty of an engineer, it is thought that the principle applies equally to architects:

‘What is a reasonable time does not depend solely upon the convenience and financial interests of the [contractors]. No doubt it is in their interest to have every detail cut and dried on the day the contract is signed, but the contract does not contemplate that. It contemplates further drawings and details being provided, and the engineer is to have a time to provide them which is reasonable having regard to the point of view of him and his staff and the point of view of the employer as well as the point of view of the contractor.’³³

This is a sensible approach to the matter. On the one hand, the architect must take into account the time necessary to enable the contractor to organise sufficient labour, goods, materials, plant and other resources and to carry out any necessary prefabrication so as to have everything ready on site when needed to complete the Works in accordance with the contract. On the other hand, the contractor cannot expect to ask for information one day and to receive it the next. The contractor must allow the architect time to produce the information, bearing in mind that this is not the only project with which the architect is concerned.

The current date for completion must always be borne in mind when analysing the particular circumstances. Mr Justice Vinelott had this to say of the provision of information clause in JCT 63 with its rather more substantial clause calling for a ‘specific written application’ to be made:

‘What the parties contemplated by these provisions was first that the architect was not to be required to furnish instructions, drawings, etc., unreasonably far in advance from the date when the contractor would require them in order to carry out the work efficiently nor to be asked for them at a time which did not give him a reasonable opportunity to meet the request. It is true that the words “on a date” grammatically govern the date on which the application is made. But they are . . . capable of being read as referring to the date on which the application is to be met. That construction seems to me to give effect to the purpose of the provision – merely to ensure that the architect is not troubled with applications too far in advance of the time when they will be actually needed by the contractor . . . and to ensure that he is not left with insufficient time to prepare them. If that is right then there seems . . . to be no reason why an application should not be made at the commencement of the work for all the instructions etc which the contractor can foresee will be required in the course of the works provided the date specified for delivery of each set of instructions meets these two requirements. Of course if he does so and the works do not progress strictly in accordance with this plan some modification may be required to the prescribed timetable and the subsequent furnishing of instructions and the like . . . It does not follow that

³³ *Neodox v Borough of Swinton & Pendlebury* (1958) 5 BLR 34 at 42 per Diplock J.

the programme was a sufficiently specified application made at an appropriate time in relation to every item of information required, more particularly in light of the delays and the rearrangement of the programme for the work.³⁴

This is another sensible analysis and, although it refers to JCT 63 and the wording is now somewhat different, it gives a useful pointer to the way the courts are likely to deal with this kind of question. Clause 2.12.1 requires the architect to provide further drawings or details which are reasonably necessary to explain and amplify the contract drawings and to enable the contractor to carry out and complete the Works in accordance with the contract, i.e. by the completion date. If there were not express terms of the contract requiring timely provision of information, there would be an implied term to the same general effect.

However, clause 2.12.3 stipulates that if the contractor has reasonable grounds for believing that the architect is not aware when the contractor should receive information, it must inform the architect, giving sufficient time to prepare the information. The contractor need only notify the architect so far as is reasonably practicable, but it is difficult to envisage many circumstances when it would not be practicable. To that extent, the fulfilling of this requirement by the contractor may prove a hurdle to some claims for delays under this head.

Work not forming part of the contract

The meaning of 'work not forming part of the contract' has been defined as follows:

'For some purposes the work does form a part, literally, of the contract; but for other purposes it does not. It is not work which the employer can require the Contractor to do. All that he can require is that the Contractor affords attendance etc. on those who do the work . . . [and that] I take the pragmatic view that the relevant work is work not forming part of the contract.'³⁵

Clause 2.7 is a strangely worded clause. There are two separate situations. The first is covered by clause 2.7.1, where the employer engages others to carry out part of the Works and the contract bills contain information to enable the contractor to understand the extent and nature of the work concerned. The work could be anything, but in practice it is usually more convenient if such work is easy to identify and preferably separate from other work. The clause used to refer to 'artists and tradesmen'; a reference to the fact that it could be used if a building was to receive a special work of art at a late stage in the project and the artist was to personally install it. The clause was also called the 'Epstein clause' after the famous sculptor. The contractor must permit the employer to carry out the work.

The second situation under clause 2.7.2 is where the employer engages others to carry out part of the Works and the contract bills do not contain information to enable the contractor to understand the extent and nature of the work concerned. In that instance, the employer may only arrange for the work to be done after

³⁴ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

³⁵ *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* (1980) 15 BLR 8 at 19 per Judge Fay.

obtaining the contractor's consent. However, the contract is clear that the contractor's consent must not be delayed or withheld unreasonably. It used to be the subject of a specific relevant event, because the employment of two contractors on the same site had a great deal of potential for causing delay to the Works as a whole. The delay is arguably less likely where the main contractor knows at time of tender exactly what another contractor will be called upon to carry out. That is because the contractor will be deemed to have taken cognisance of the likely effect on the Works. However, where the main contractor has not been pre-warned about the size and scope of the work to be carried out by directly employed labour, there is considerable scope for claiming that the directly employed contractor caused delay.

Provision of materials by the employer

Unlike the execution of work by others, there is no contractual term which entitles the employer to provide materials or goods. There was no such term under JCT 98. Nevertheless, JCT 98 had a relevant event to deal with the eventuality. Invariably the supply will be initiated by the employer, possibly in the belief that a source of supply has been located that will result in a financial saving. An interesting scenario would be created if the materials subsequently were found to be defective. It can reasonably be argued that the supply of materials and goods can only refer to materials and goods which are in accordance with the contract. Therefore, the supply by the employer of materials and goods which are not in accordance with the contract amounts to a failure to supply, because they should not be used by the contractor (who should reject them).

However, if the employer has elected to supply, the election will almost certainly have been taken prior to tendering and certainly prior to executing the contract. Other than stating that the employer will supply stated materials and goods, it is unlikely that they will be specified in detail. In the absence of a specification and if they were to be supplied by the contractor, there are certain terms which would be implied, such as that such materials and goods will be appropriate for their purpose. Where the employer is responsible, through the architect, for specification and if no specification is given, it is considered that the contractor would not be liable if an inferior product was supplied, because the employer would be relying on the architect, not the contractor, in such matters.³⁶ Clearly, if the materials or goods supplied were obviously so inferior that they would seriously jeopardise the project or even become a danger, the contractor would have a duty to warn the employer.

But a difficult problem would arise if either the materials and goods appeared to be in accordance with the contract or, if there was no specification, they appeared to be satisfactory and were built into the construction and subsequently they were found to be defective and required replacement causing delay and additional expense. The employer could not require the contractor to supply replacement materials or goods without first issuing an instruction through the architect which would have the effect of adding these items to the contract at a very late stage. The cost of the materials or goods could be dealt with by the variation clause (5) and all the other

³⁶ *Rotherham Metropolitan Borough Council v Frank Haslam Milan and Co Ltd* (1996) 59 Con LR 33.

costs would amount to direct loss and/or expense under clause 4.23. An appropriate extension of time would be indicated under the category of architect's instructions requiring a variation or possibly late instructions. If there was a specification and the employer's materials or goods were shown not to comply, an extension under this ground would be appropriate. That would certainly be the situation if the employer did not require the architect to issue an instruction, but simply supplied replacement materials or goods. Alternatively, the contractor could bring a common law claim against the employer for breach of contract and simply recover all its loss and/or expense as damages.

Failure to give ingress or egress

Under the current SBC this would certainly rank as prevention. The former clause was not as extensive as appeared at first sight. An extension of time could only be granted under the clause where there is failure by the employer to provide access to or exit from the site of the Works across any *adjoining or connected* land, buildings, way or passage which was in the employer's own *possession and control*. It did not, therefore, cover failure to obtain a right of way across an adjoining owner's property, or where access to the highway was obstructed. It did not extend to the situation where protestors impeded access to a site.³⁷

There was a further limitation in the clause which referred to access in accordance with contract bills or the contract drawings. There was a very strong presumption that the undertaking to provide the access must be stated in the bills or drawings, and in that case any extension of time would be dependent upon the contractor giving whatever notice was required by the provision in the bills of quantities before access was to be granted. The clause was unusual, because it apparently extended the architect's powers as agent to act for the employer in agreeing access. A delay notified under the current relevant event 2.29.6 would simply specify the delay and that it was caused by the employer's failure to provide ingress to or egress from the site. Whereas the former relevant event might be seen as limiting the circumstances in which an extension of time could be given, it is likely that claims for lack of ingress or egress are now possible on a much broader basis.

Compliance or non-compliance with the forerunner to clauses 3.23 and 3.24

Clause 3.23.1 refers to the employer's obligation to ensure that the CDM co-ordinator carries out his or her duties under the *CDM Regulations 2007* and, if the contractor unusually is not the principal contractor under the regulations, to ensure that it carries out its duties also. The employer's obligation to ensure is onerous. It should be noted that the ground encompassed both compliance and non-compliance so that the proper carrying out of duties could also attract an extension of time if a delay was caused thereby. The problem for the employer was (and is) that the CDM co-ordinator has duties under the regulations which may have to be carried out after the issue of any architect's instruction. Therefore, each instruction could attract an

³⁷ *LRE Engineering Services Ltd v Otto Simon Carves Ltd* (1981) 24 BLR 127.

extension of time under this ground even if it did not qualify under another clause. Under SBC, the question for the contractor will be simply whether the employer has complied with clauses 3.23 and 3.24 and, if not, has any delay to progress of the Works resulted.

Change in statutory requirements necessitating alteration or modification of performance specified work

Provision for performance specified work and hence this relevant event was added to the 1980 version of the contract by Amendment 12 (issued July 1993). SBC has dispensed with performance specified work and, therefore, an extension of time under this ground cannot now arise.

Statutory undertaker's work: clause 2.29.7

This ground deals with delay caused by the carrying out by a statutory undertaker of work under its statutory obligations in relation to the Works, or its failure to do so. In JCT 98, the equivalent relevant event referred to work carried out by a local authority or statutory undertaker. The reference to a local authority has now been omitted. Statutory authorities are organisations such as water, gas and electricity suppliers which are authorised by statute to construct and operate public utilities. Although it is not beyond doubt, it is unlikely that a local authority could be classed as a statutory undertaker except, perhaps, when carrying out certain specific activities in relation to roadworks.

In *Henry Boot Construction Ltd v Central Lancashire Development Corporation*,³⁸ the court was concerned with a forerunner to this clause and the question of whether or not statutory undertakers were artists, tradesmen or others engaged by the Employer for the purpose of JCT 63, clauses 23(h) and 24(1)(d) (in SBC simply referred to as 'work not forming part of the contract' in clause 2.7). The court was bound by the decision of an arbitrator that, in that instance, the statutory undertakers carrying out particular work under special circumstances were carrying it out under a direct contract with the employer. In other words, they were not executing the work because relevant legislation obliged them to do so, but because they had contracted with the employer to carry it out. Therefore, the court held that the undertakers were engaged by the employer to carry out work which did not form part of the main contract. Having reached that decision, it followed that extensions of time should be granted to the contractor on the basis of delays by artists and tradesmen engaged by the employer in respect of delays on the part of the undertakers. That enabled the contractor to claim direct loss and/or expense from the employer under the same grounds.

The case is mentioned, not because it brought about any change to the meaning of this clause, but because it has often been thought to do so. Statutory undertakers often carry out work other than under statutory obligation. Where that occurs, if they have been directly engaged by the employer, any extension of time would be

³⁸ (1980) 15 BLR 8.

made under clause 2.29.6. A claim for direct loss and/or expense could be made on the same grounds under clause 4.24.6. Obviously, no extension of time would be applicable if the statutory undertakers had been engaged directly by the contractor other than in pursuance of their statutory obligations. Therefore, whether or not, or under which particular clause an extension of time should be given for delays caused by statutory undertakers depends on the nature of the work being done and the surrounding circumstances.

If a statutory undertaker lays electricity supply cables in the road which provides access to the site, not for the purposes of the contract Works but for another site nearby, there would be no grounds for extension of time. It makes no difference that the statutory undertaker concerned might be under a statutory obligation to lay the service, because it would not be carrying out the work in relation to the Works. Any suggestion that such activities amount to *force majeure* and, therefore, could be grounds for an extension of time on that basis does not bear scrutiny.

Exceptionally adverse weather conditions: clause 2.29.8

It is not unknown for architects and contractors to disagree over this ground. The change in wording in the 1980 Form from 'inclement' to 'adverse' was intended to make it clear that the ground was intended to cover any kind of adverse conditions including unusual heat or drought. Notwithstanding that, it is common to hear the ground being referred to as 'inclement weather'. When one hears the ground so described, it raises the serious thought that the person speaking does not really understand the purpose of the ground, having omitted the key words: 'exceptionally' and 'adverse'. Adverse weather is any kind of weather that impedes the progress of the Works. For example, where tall cranes are being used on site, any wind at all is adverse and after a certain wind speed is reached it will be positively dangerous to operate the cranes at all.

A crucial factor is the kind of weather that ought to be expected at the site at the time when the delay occurs. Architects will often request the contractor to provide meteorological reports for the previous 10 or 15 years. Reference to such weather records are normally used to show that the adverse weather was 'exceptional' for that area or for the time of year. In that instance exceptional refers to exceeding what may be reasonably expected based on the evidence of past years. Even if it can be demonstrated with reference to appropriate historical records that the weather is exceptionally adverse for the time of year it must also be such that it interferes with the Works at the particular stage they have reached. It matters not that the Works have been affected only because they have been delayed through the contractor's own fault.³⁹

If despite the weather, work could continue then it cannot be successfully maintained that the Works have been delayed by the exceptionally adverse weather. For example, there may be torrential downpour lasting several days, but if all the contractor's work is inside the building and if the building is watertight, the downpour will have little or no effect on progress. The contractor is expected to programme the Works making proper allowance for normal adverse weather, i.e. the sort

³⁹ *Walter Lawrence v Commercial Union Properties* (1984) 4 Con LR 37.

of weather which is to be expected in the area and at the time of year during the course of the Works. The contractor's programme for those parts of the Works which may be affected by adverse weather, whether in the form of excessive heat, rain, wind or frost should acknowledge the fact that interruptions are likely to occur, and should allow for them. If the contractor is aware at the time of tender that it is tendering for a project which is to be constructed during the winter and if it is constructed in the winter, it is no use it complaining to the architect and requesting an extension of time on the ground of exceptionally adverse weather when the Works are delayed on account of snow. The contractor will be expected to have allowed for snow and ice in winter and for higher, occasionally hot, temperatures in the summer. However, if the contractor can show that the winter weather was more severe than it could have reasonably anticipated, an extension of time should be given. That is always assuming that the date for completion was delayed as a result.

On a strict reading of the relevant event, it is only the 'exceptional' aspect of the adverse weather which will attract an extension of time. Thus, if 10 days of snow in January is just on the borderline between usual and exceptional and a project suffers 15 days adverse weather, the contractor is not entitled to an extension of time for the consequences on the completion date of the whole 15 days, but only for the extra five days. On any view, the common practice whereby clerks of works keep records of 'wet time' so that every couple of months the architect can give an extension of time covering the total period of wet time is insupportable.

Loss or damage occasioned by one or more of the specified perils: clause 2.29.9

The purpose of this ground appears to be to give the contractor sufficient additional time to fulfil its obligations to repair damage caused by one of the specified perils: fire, lightning, explosion, storm, flood, escape of water from a water tank, apparatus or pipe, earthquake, aircraft or other aerial devices, or articles dropped therefrom, riot and civil commotion, but excluding what are called the Excepted Risks: Definitions are contained in clauses 1.1 and 6.8.

An important question which follows from this definition is whether or not the contractor is entitled to an extension of time if the events are caused by the default or negligence of the contractor's own employees. On a plain reading of the wording it would appear that the contractor is still entitled to an extension.

Civil commotion or terrorism: clause 2.29.10

'Civil commotion' means, for insurance purposes, 'a stage between a riot and a civil war'.⁴⁰ There must be an element of turbulence and it is thought that the activities of protesters in public places may amount to civil commotion. It used to be referred to as one of the excluded risks if the contract was to be carried out in Northern Ireland. That is no longer the case and Northern Ireland has its own Adaptation Schedule to deal with the matter.

⁴⁰ *Levy v Assicurazioni Generali* [1940] 3 All ER 427 at 431 per Luxmore LJ, approving an extract from Welford and Otterbarry's *Fire Insurance* (1932) 3rd edition at p. 64.

There are three possibilities in relation to terrorism. The first is that the Works are delayed because terrorism has been experienced. For example, part of the Works may be damaged by an explosion.

The second is that terrorist action may be threatened and, as a result, the area of the site may have to be cleared. It is thought that the threat of terrorism would have to be more substantial than just the fact that other terrorist incidents have occurred in the area. A specific terrorist threat directed at the project or a threat to an area which, if it were carried out, would affect the project would qualify. It seems that an extension of time would be applicable where the contractor or its operatives received direct threats of injury if work did not cease and the contractor stopped work accordingly.

The third is that terrorist action may have been carried out or threatened and the relevant authorities (government, police or army) may cause delay to the works as a direct result of the way in which the act or threat is dealt with. The activities of the relevant authorities which would qualify under this ground would include such measures as evacuation of premises and restriction of access. For example, there may be a threat to a particular building and the police may evacuate the surroundings for a period. If the building site is part of the evacuated area, there will be a delay to the Works and, to the extent that the date for completion is affected, an extension of time must be given. This ground is not restricted to the site of the Works and, therefore, it is likely that any such threat or action which affected the execution of the Works in any way (such as the forced evacuation or destruction of the contractor's offices) would give entitlement to extension of time.

Strikes and similar events: clause 2.29.11

The full list of events is given in the clause. So far as strikes are concerned, extension of time may be given for any delaying circumstance which affects the contractor and its work on the site or persons preparing design for the contractor's designed portion including a strike affecting any trade involved in preparing or transporting any goods and materials which are required for the Works. The reference to design is a new insertion in this relevant event necessitated by the inclusion in SBC of the contractor's designed portion option. It is not immediately obvious how a strike might affect designers employed in the contractor's office or, indeed, an independent firm of architects engaged by the contractor to provide such services. The clause is drafted to cover all strikes whether official or unofficial, but it does not cover 'working to rule' or any other obstructive practice which is not actually a strike. An unofficial strike has been described as any strike or other industrial action which is not authorised or endorsed by a trade union.⁴¹ A strike or other event referred to in the sub-clause must be one in which the trades mentioned in it are directly involved. It was held that a strike by workers employed by statutory undertakers which are directly engaged by the employer to execute work which did not form part of the Works was not covered by the forerunner of this clause in JCT 63.⁴² The reference to

⁴¹ Section 237(2) of the Trade Union and Labour Relations (Consolidation) Act 1992.

⁴² *Boskalis Westminster Construction Ltd v Liverpool City Council* (1983) 24 BLR 83.

local combination of workmen is an antiquated phrase which may possibly be held to cover activities which fall short of a strike and occur in a specific area. However, it is thought more likely to refer to a small localised strike.

It is probable that a situation where deliveries to site are delayed, not due to a strike, but due to some form of secondary picketing does not fall under this relevant event.

This relevant event has been considerably shortened from its predecessor in JCT 98. References to availability of labour and delay in securing goods or fuel have been omitted. The result is that the event is potentially much broader in its application.

Government action: clause 2.29.12

The action must be taken by the government after the base date. The 'Base Date' is that date written into the Contract Particulars. In the case of JCT 80 before its amendment of 11 July 1987, the reference was to the 'Date of Tender' which referred to 10 days before the date fixed for receipt of tenders by the employer (clauses 38.6.1 and 39.7 in their original form), which did not always in practice provide a firm date if the date for receipt of tenders was amended.

This provision might, for example, be relied upon wherever the British Government exercises any statutory power as set out in this ground, for example the closure of some access roads during the foot and mouth epidemic to the extent that such roads were essential means of access to the site of the Works. The action must directly affect the execution of the Works. In deciding whether the exercise of statutory power has a *direct* effect, it is suggested that the architect should use the same approach as when considering *direct* loss and/or expense (see Chapter 5). Essentially, this amounts to the exercise of common sense.

A particular significance of this ground is that this relevant event prevents the contract being brought to an end by frustration. The matter is simply dealt with by an extension of time. Since the event is taken out of the realm of *force majeure*, even a long suspension of work on this ground would not entitle the contractor to terminate its own employment under clause 8.11.

Force majeure: clause 2.29.13

Force majeure is a term originating in French law. It is wider in meaning than 'Act of God', which has been described as 'an overwhelming superhuman event'.⁴³ It seems that the event relied upon as *force majeure* must make the performance of the contract wholly impossible. In this sense, there are marked similarities to the doctrine of frustration of contract. In practice, however, all the surrounding circumstances must be taken into account. The dislocation of business caused by the general coal strike of 1912 has been held to be covered by the term and also covered the breakdown of machinery, but not delay caused by bad weather, football matches or a funeral.

⁴³ *Oakley v Portsmouth & Ryde Steam Packet Co* (1856) T1 Exchequer Reports 6 1F.

‘These are the usual incidents interrupting work and the defendants, in making their contract, no doubt took them into account.’⁴⁴

There seem to be no reported cases which deal expressly with *force majeure* in the context of JCT contracts although there are cases which simply consider the term itself. The most useful English authority is *Lebeaupin v Crispin*, which throws light on the way in which this term should be interpreted. Mr Justice McCardie said:

‘This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control. . . . Thus war, inundations and epidemics are cases of *force majeure*; it has even been decided that a strike of workmen constitutes a case of *force majeure* . . . [But] a *force majeure* clause should be construed in each case with a close attention to the words which precede or follow it and with due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument.’⁴⁵

On that authority, it seems that care must be taken when interpreting *force majeure* in JCT contracts, particularly having regard to the other relevant events. Where the term *force majeure* is used in contracts such as SBC, IC, ICD and DB, its meaning will effectively be restricted, because many things which would normally fall under the category of *force majeure* are included under specific headings. Such matters as strikes, fire and exceptional weather are examples.

11.1.4 A ground no longer included

A ground which has now disappeared from SBC is the *Inability to obtain labour and goods*. Under JCT 98 the clause was mandatory and not merely an optional ground for extension. The date at which any shortage was to be unforeseeable was the base date. There were two sub-clauses. One dealing with labour, the other dealing with materials. In order to qualify as a relevant event, not only was the shortage to have been unforeseeable, the inability to obtain labour or materials must have been for reasons which were beyond the contractor’s control. Although there were certain fairly rare instances when the contractor would not be able to obtain certain materials no matter what measures it took or what price it was prepared to pay, it will always be able to obtain labour. Sometimes it would have to pay a grossly inflated price or it may have been obliged to bus them in to site from some distance away, but it would always have been able to secure labour.

On that basis, this clause could never bite and it was effectively redundant. However, a contract must be construed so as not to defeat the parties’ intentions.⁴⁶ The parties clearly intended the inability to obtain labour to be grounds for an extension of time. Therefore, in order to make sense of this particular event it was necessary to make some implication regarding the availability of labour or materials at prices which could reasonably be assumed by the parties at the base date. This was a peculiarly difficult event to consider in practice. The clause was popular with contractors, even

⁴⁴ *Matsoukis v Priestman & Co Ltd* [1915] 1 KB 681.

⁴⁵ [1920] 2 KB 714.

⁴⁶ *Hydrocarbons Great Britain v Cammel Laird Shipbuilders* (1991) 53 BLR 84.

if the ability to activate it was restricted. The clause was never popular with employers, who saw it as an easy way for contractors to gain extra time, or with architects, who had severe difficulties in operating it. It was commonly deleted even though this prevented the fluctuations clauses being frozen during a period of culpable delay, something of which most architects seemed blissfully unaware.

11.2 Intermediate Building Contract (IC and ICD)

The current JCT Intermediate Building Contract is the 2005 version (Revision 2 2009) and the JCT Intermediate Building Contract with contractor's design (Revision 2 2009).

11.2.1 Clauses 2.19 and 2.20

These clauses deal with extension of the contract period and, as under SBC, they are now headed 'Adjustment of Completion Date'. The content of the clauses is virtually identical in IC and ICD; therefore, reference will be made to IC only. It should be noted that references to extending time and fixing a new date for completion is taken to mean the date for completion of the Works or, if the Works are divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.2.2 Significant differences

These provisions are effectively a shortened version of clauses 2.26–2.29 inclusive of SBC, but there are significant differences set out below:

- (1) In clause 2.19.1, the requirement for the contractor to provide particulars of the expected effects of delays and its own estimate of the resulting delay in completion which is set out in detail in SBC has been omitted. It is replaced by an obligation under clause 2.19.4.2 to provide information required by the architect as is reasonably necessary. This is a broader provision. Therefore, although there remains an obligation upon the contractor to provide the architect with the information needed in order to give a proper extension of time, there is no obligation on the contractor to provide its own estimate of the extension to which it believes it is entitled. Because the contract refers to information 'reasonably necessary', it leaves the door open for the contractor to argue that certain information for which the architect might ask is not reasonably necessary. The word 'required' (by the architect) is used, but it does not appear to place an obligation on the architect to ask for the information or to specify what is needed in this instance, although 'required' can be used in that sense; if that had been intended the word 'requested' would presumably have been used.
- (2) The specific time limit within which the architect must deal with extensions of time is omitted and IC reverts to the old form of words used in IFC 98 which

require the architect to estimate the length of the delay beyond completion date as soon as he or she is able to do so. It is unfortunate that IC continues some of the old unsatisfactory wording of IFC 98, particularly the use of the words to describe the period of time within which the architect must estimate the length of the delay and give extensions of time. The requirement that the architect is to give the extension as soon as he or she is able might be thought, wrongly, by architects to allow them effectively to take as long as they wish to give an extension. It would have been better to have a more precise wording used.

However, if the contractor promptly fulfils its obligation to provide the architect with all the information reasonably necessary in order for the architect to make a decision the architect will have no excuse for failure to estimate the length of the delay in completion and make a decision quickly. In arbitration or adjudication, the question of when the architect was 'able' to form an opinion so as to give an extension of time would be subjected to severe scrutiny. Certainly, an architect who exceeded the time allowed under SBC (12 weeks) would be expected to make out a very good case for the time taken.

Delays may be said to fall into two classes: those that are a single definable cause of delay with a finite result, which is immediately apparent, and those that are a continuing cause of delay extending over a considerable period or even over the whole currency of the contract. An example of the first case may be a single major variation, which must be carried out before further work can continue. The architect must, in such a case and provided that the contractor has given a written notice of delay, give an extension of time, if not immediately, then within a reasonable time, and failure on the architect's part to do so may lead to the contract being considered 'at large' so far as time is concerned with the consequent forfeiture of the employer's right to deduct liquidated damages. An example of the second case might be a continuing stretch of exceptionally adverse weather such as one might experience occasionally during the winter months. In some instances, the adverse weather may extend up to, or nearly up to, completion of the Works. In that case the architect would not be unreasonable in maintaining an inability to estimate the extent of the delay until the whole of the relevant work was completed. The true position is, probably, as follows:

'I think it must be implicit in the normal extension clause that the contractor is to be informed of his new completion date as soon as is reasonably practicable. If the sole cause is the ordering of extra work, then in the normal course extensions should be given at the time of ordering, so that the contractor has a target for which to aim. Where the cause of delay lies beyond the employer, and particularly where its duration is uncertain, then the extension order may be delayed, although even then it would be a reasonable inference to draw from the ordinary extension clause that the extension should be given a reasonable time after the factors which will govern the exercise of the [architect's] discretion have been established. Where there are multiple causes of delay, there may be no alternative but to leave the final decision until just before the issue of the final certificate.'⁴⁷

⁴⁷ *Fernbrook Trading Co Ltd v Taggart* [1979] 1 NZLR 556 at 568 per Roper J. See also *Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC* [1952] 2 All ER 452.

These principles are sound common sense and good contract practice.

When the architect is considering the grant of an extension of time, the effect of the cause of delay is to be assessed at the time when the Works are actually carried out and not when they were programmed to be carried out. This appears to be so even if the contractor is in culpable delay during the original or extended contract period.⁴⁸

- (3) The architect is not required to fix a completion date but simply to give an extension of time. In other words, the architect must specify a period of extension and not a date for completion. It is not thought that this is of significance on the current wording of the clause.
- (4) There is no express requirement for the architect who decides not to grant an extension of time, to notify the contractor. Obviously it is good practice to do so.
- (5) The architect has no power to reduce extensions previously granted even if work has been omitted since the previous extension of time. It seems this would not affect the architect's right to take such omissions into account when next granting an extension of time, but there is no power equivalent to the power contained in SBC actually to withdraw or reduce an extension already made.
- (6) In clause 2.19.2, the architect is expressly given power to extend time if any delays which are the responsibility of the employer or of the architect occur after completion date, but before practical completion. It seems likely that the architect may have that power in any event, but this provision puts the matter beyond doubt so far as this contract is concerned.⁴⁹
- (7) The provision for review of extensions following practical completion of the Works has been made discretionary and not mandatory, as in SBC, by the use of the word 'may' instead of 'shall' in clause 2.19.3. It will usually be in the employer's interest for the architect to carry out such a review, but it must be carried out within 12 weeks of practical completion. Although it has been noted above that the architect may not give an extension of time if a neutral event occurs after the completion date but before practical completion, it is clear that, during the 12 week review period under clause 2.19.3 the architect must be able to take into account all grounds for extension of time. That makes the restriction inherent in clause 2.19.2 rather pointless.
- (8) The complex nomination procedures found in JCT 98 have been omitted from SBC. However, IC retains its provisions for naming sub-contractors (clause 3.7 and schedule 2). Sub-contractors may be 'named', either in the contract documents or by instructions for the expenditure of provisional sums. Except that the sub-contract must be on a prescribed standard form entered into after specified procedures, such sub-contractors become virtually domestic sub-contractors. There are no provisions for the certification of payments by the architect or for direct payment by the employer if the contractor defaults and there is no provision entitling the contractor to an extension of time for delay on their part. However, if the sub-contractor defaults in the performance of its work to the extent that its employment is terminated the contractor is to notify the architect

⁴⁸ *Walter Lawrence & Son Ltd v Commercial Union Properties (UK) Ltd* (1984) 4 Con LR 37.

⁴⁹ *Balfour Beatty Ltd v Chestermount Properties Ltd* (1993) 62 BLR 1, in which an amended JCT 80 was under consideration.

who must then issue instructions either, (a) naming a replacement sub-contractor, or (b) instructing the contractor to make its own arrangements for the completion of the work, or (c) omitting the remaining work, in which event the employer may make other arrangements for completion. Whichever instruction the architect issues, the contractor will be entitled to an extension of time for the delaying effect of the instruction. If the sub-contractor terminates its own employment because of the contractor's default the architect must still issue an instruction, but such an instruction will not entitle the contractor to an extension of time.

Similarly, if the contractor finds that it cannot enter into a sub-contract with a sub-contractor named in the contract documents because of some problem over the particulars of the sub-contract as set out in those documents, the architect is to issue instructions either changing the particulars so as to remove the problem, or omitting the work or by substituting a provisional sum.

Where a sub-contractor is named in an instruction for the expenditure of a provisional sum, such an instruction will have been issued under clause 3.13 of the contract. Therefore, if the instruction causes delay to the completion date for any reason, the contractor will be entitled to an extension of time under clause 2.20.2.1.

- (9) The relevant events in clause 2.20 are virtually identical to the relevant events in SBC and the commentary to SBC applies. The only difference is the addition of reference to instructions in connection with named sub-contractors in clause 2.20.2.2. It should also be noted that the 'strike' provisions (clause 2.20.11) in ICD contain reference to persons engaged in design for the contractor's designed portion while IC does not, of course, have that reference.

11.3 Minor Works Building Contract (MW and MWD)

The current JCT Minor Works Building Contract is the 2005 version (Revision 2 2009) and the JCT Minor Works Building Contract with contractor's design (Revision 2 2009).

11.3.1 Clause 2.7 (MW) and 2.8 (MWD)

These clauses deal with extension of the contract period. The content of the clauses is virtually identical in MW and MWD; therefore, reference will be made to MW only.

11.3.2 Significant differences

The most striking thing about the extension of time clause under this form is that it is very brief. The main differences are as follows:

- (1) The contractor is not obliged to give notice of every delay. It need only, and it must, give notice of such delays as will prevent completion of the Works by the current completion date and resulting from reasons beyond the control of the

contractor. The contract uses the word 'thereupon'. The ordinary meaning of thereupon is soon or immediately after. If the contractor fails to notify the architect that the completion date will not be met, the contractor is in breach of contract and it is suggested that the contractor's failure to give notice is a matter which may be taken into account by the architect in determining the extension of time. In taking account of the failure, the question to be asked is whether the contractor's failure prejudiced the employer in any way. In other words, if the architect had been informed immediately, could any measures have been taken to reduce or eliminate the delay? The critical date is the date it became apparent that the Works would not be completed on time.

- (2) The contractor must give notice in writing, but there is no provision for it to provide supporting information. Common sense dictates that the contractor must give sufficient information to allow the architect to understand what the delay entails, and probably a term would be implied to that effect. The architect is probably entitled to ask for particular further information. In practice, an architect will ask for any information required and if the contractor refuses to provide it, it seems that the architect must make the best of it. That does not mean that the architect is obliged simply to accept whatever the contractor may say. Almost the reverse is true. The architect must still be satisfied that what the contractor states in its notification of delay is more likely to be correct than otherwise. Unless the architect is satisfied on that point, the contractor's notice, at least insofar as that delay is concerned, must be rejected. It is thought that the contractor's refusal to provide information which the architect reasonably required would, not only severely disadvantage it so far as obtaining a sufficient extension of time is concerned but also, effectively preclude it from making any substantial criticism of the extension of time thereafter.
- (3) No time limit is set on the exercise of the architect's duty to give an extension of time. It is reasonable to suppose that the duty must be performed as quickly as practicable, bearing in mind that the nature of this contract suggests that projects executed under it will be of short duration, and a term would probably be implied to that effect to give business efficacy to the contract. Two questions arise in relation to timing: can the contractor request, and can the architect give, an extension of time after the date for completion or the date of practical completion? As noted in (1) above, the contract seems to oblige the contractor to serve notice very promptly after the qualifying delay becomes apparent. It has been held that the contractor must do so before the current date for completion, but that notification after completion date will not necessarily invalidate any extension of time.⁵⁰

Notification of an extension of time by the architect after the current date for completion or after practical completion is undesirable and clearly an extension of time is to be given as soon as practicable. However, it is clear that there will be occasions when the architect may give a valid extension although late by normal standards. It is suggested that the validity or otherwise of such extensions will depend, not on whether the extension was notified late as considered in isolation, but rather whether it was late in the context of the prevailing circum-

⁵⁰ *Terry Pincott v Fur and Textile Care Ltd* (1986) 3-CLD-05-14.

stances. These would include how soon the extension was given after the date on which the contractor notified the delay, whether the delay was ongoing and whether the delay was caused by something within the control of the employer or the architect.

- (4) The architect's extension must be 'reasonable'. Other forms refer to 'fair and reasonable', but it is not thought that anything significant turns on the distinction.
- (5) There is no list of delaying events. There is merely reference to reasons beyond the control of the contractor including compliance with any architect's instruction provided it is not issued as a result of the contractor's default. That should be broad enough to encompass almost anything. However, it is fundamental that the architect only has power to make extensions of time for the reasons set out in the contract and that those grounds will be interpreted very strictly particularly in regard to delays which are due to the employer or architect.⁵¹

The phrase '. . . other causes beyond the contractor's control . . .', which is not dissimilar to the phrase in MW, has been held, under another earlier form of contract, not to be specific enough to include employer delays.⁵² That raises the possibility of a successful challenge by a contractor that the architect's inability to extend time for employer delays other than architect's instructions renders time at large whenever such a delay becomes apparent. The fact that no such challenge has appeared in the law reports probably says more for the low value of work intended to be carried out under Minor Works Contracts than for the drafting of the clause. It is another reason why MW should never be used for projects whose parameters are broader than set out in the guidance note.

- (6) It is certain that in some respects the extension of time clause in MW is wider than the equivalent clauses in SBC or IC. For example, SBC allows an extension of time if the Works have been delayed beyond the completion date by exceptionally adverse weather. In contrast, MW's reference to reasons beyond the contractor's control seems to allow an extension of time for any kind of adverse weather, even if not exceptional, because clearly the weather is beyond the contractor's control. If that is correct, any kind of delaying event outside the contractor's control will give grounds for an extension of time. But, is it implied that weather conditions, and other things, which the contractor could reasonably foresee would be deemed to be within its control? That seems to be an unlikely conclusion. It is more likely that the words will be given their ordinary meaning, i.e. what a reasonable person would understand the meaning to be in the light of the contract as a whole.⁵³ MW and MWD are simple contracts for relatively low value Works. The whole contract is written in straightforward terms without the use of overtly legal phraseology. There appears to be nothing to suggest that the plain words in this clause should be interpreted in any other than their ordinary sense. Therefore, when the contract refers to events outside the contractor's control, there is no reason to strain the meaning or to attempt to introduce some particular sophistication. In short, there is no need for any implication of terms

⁵¹ *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114.

⁵² *Wells v Army & Navy Co-operative Society* (1902) 86 LT 764.

⁵³ *Harbinger UK Ltd v GE Information Services Ltd* [2001] 1 All ER (Comm) 166.

because the contract is perfectly workable (albeit perhaps very generous to the contractor) without such implication. Although it is a basic principle of law that a party who is permitted to sub-contract retains full responsibility for the performance of such sub-contractors, the point has not been without doubt and, surprisingly, it has been held (but not under MW or MWD) that sub-contractors were not within the contractor's control.⁵⁴ The last sentence of this clause was inserted to clarify the position that sub-contractors under these contracts are considered to be under the control of the contractor and that position has since been upheld.⁵⁵

- (7) There is no provision for the architect to carry out any review of extensions of time after the date of practical completion and it appears that, unless the delay is ongoing almost to practical completion, the architect has no general power to do so.

11.4 Design and Build Contract (DB)

The current JCT Design and Build Contract is the 2005 version (Revision 2 2009).

11.4.1 Clauses 2.23–2.26 inclusive

These clauses deal with extension of the contract period and are now headed 'Adjustment of Completion Date'. Schedule 2 'Supplemental Provisions' also includes provisions for fixing a new date for completion in paragraph 4. 'Pre-agreed Adjustment' is a defined term used in clauses 2.23–2.26 when referring to a revised completion date fixed by agreement between employer and contractor of a variation quotation under paragraph 4.4. It should be noted that references to extending time and fixing a new date for completion is taken to mean the date for completion of the Works or, if the Works are divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.4.2 Significant differences from SBC

These clauses closely follow the extension of time provisions in SBC. The principal differences are as follows:

- (1) What are referred to as 'variations' in SBC are referred to as 'changes' in DB.
- (2) Reference is to the employer fixing a new completion date not to the architect, because there is no architect named as such under DB. An architect can, of course, act as employer's agent and this arrangement is quite common, but an architect acting as agent is not acting in an independent capacity.⁵⁶ Under article 3 the employer's agent acts for the employer except to the extent that the employer

⁵⁴ *Scott Lithgow Ltd v Secretary of State for Defence* (1989) 45 BLR 1.

⁵⁵ *John Mowlem & Co v Eagle Star Insurance Co Ltd* (1995) 62 BLR 126.

⁵⁶ *J F Finnegan Ltd v Ford Seller Morris Developments Ltd* (1991) 53 BLR 38.

specifically notifies the contractor in writing. It will be rare for the employer to act personally under this clause, particularly if the employer's agent is an architect or other professional with experience of dealing with extensions of time.

- (3) There are no references to defined work or approximate quantities, because except in the unlikely event that paragraph 3 of the supplemental provisions has been operated, there will be no bills of quantities and, therefore, no SMM7. If the employer has prepared bills of quantities to which paragraph 3 applies, paragraph 3.1 requires the employer to state the applicable method of measurement and paragraph 3.2 makes clear that errors in description or quantity in the bills must be corrected by the employer and the correction is to be treated as a change in the Employer's Requirements. Such a change would be ground for an extension of time if the completion date was delayed thereby. It is possible that the Employer's Requirements may stipulate that the Contract Sum Analysis must be in the form of bills of quantities and it is possible that SMM7 has been used, but errors in the contractor's own documents cannot form grounds for an extension of time.
- (4) Clause 2.26.2 refers to employer's instructions. Among other things, this relevant event covers instructions in regard to the correction of discrepancies or divergences in or between various contract documents (excluding contractor generated documents), changes, the postponement of design or construction, provisional sums and antiquities. WCD 98 included a change in the statutory requirements after the Base Date as one of the relevant events. This refers to changes under clause 2.15.2 and it is now stated to be included under 2.26.2. Essentially this relevant event quite reasonably entitles the contractor to an extension of time if it has to make some alteration to its proposals due to events outside either party's control. However, clauses 2.15.2.1 and 2.15.2.2 both refer to amendments and modifications which are to be 'treated' as a change and, strictly, one would have expected them to be included in clause 2.26.1 which deals with changes and other matters which are to be 'treated' as changes. It is uncertain from the wording whether they are to be dealt with under 2.26.1 or 2.26.2.

The employer's power to give an extension of time for an employer generated delay should be clearly specified in relation to any particular event and it may be thought arguable that the employer has no such power where there is an element of uncertainty, as here. Although it is to be hoped that the JCT takes the next opportunity to clarify the position, it is unlikely that an extension of time could be challenged on this ground, because it is not a question of it being likely that the employer has no power to issue such extensions, but rather that the employer may have been given the power to give an extension of time for the same event under two separate relevant events. It is thought that the employer should be prepared to accept submissions under either relevant event. Clause 2.15.2.3 clearly refers to an instruction issued by the employer and, therefore, plainly falls under relevant event clause 2.26.2.

- (5) Clause 2.26.10, referring to strikes and the like, adds a reference to persons who are engaged in the preparation of the design of the Works. This is an extension of the equivalent SBC clause to provide for an extension of time if the design element in this contract is affected by strikes and other occurrences in

this relevant event although it would be unusual for strikes to affect an independent consultant engaged by the contractor to design the Works.

- (6) Clause 2.26.12 introduces a new relevant event dealing with delay in the receipt of any necessary permission of any statutory body. There is a requirement that the contractor must have taken all practicable steps to reduce the delay and it must be taken seriously. Realistically, this will probably amount to little more than requiring the contractor to make any necessary applications in good time, to reply promptly to queries and use best endeavours to obtain permissions or approvals. An architect in the position of making applications to statutory bodies cannot guarantee the result and neither can the contractor. The contractor will be entitled to an extension of time under this relevant event if it can show that the delay was not its fault. This relevant event refers to any kind of statutory permission or approval. Virtually all buildings require planning permission and they must satisfy the Building Regulations. There are, however, many other possible controls over such things as fire, water and entertainment.

11.5 Prime Cost Building Contract (PCC)

The current JCT Prime Cost Building Contract is the 2005 version (Revision 2 2009).

11.5.1 Clauses 2.18–2.21 inclusive

These clauses deal with extension of the contract period and are now headed 'Adjustment of Completion Date'. It should be noted that references to extending time and fixing a new date for completion is taken to mean the date for completion of the Works or, if the Works are divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.5.2 Significant differences

In structure and wording this extension of time provision is clearly based on clauses 2.26–2.29 of SBC. Indeed, it is more closely based than was the equivalent clause in PCC 98 on clause 25 of JCT 98. However, there are some important differences as follows:

- (1) Under clause 2.19.4, the contractor must review the progress of the Works whenever the architect considers it to be reasonably necessary. This clause is very similar to clause 2.5.5 of PCC 98. It is not quite clear what is intended and the clause goes into no detail. The architect's right to have a review carried out does not depend on the contractor's notice of delay under clause 2.19.1. The clause stipulates that the review must be carried out with the architect. Therefore, there is no question of the contractor simply submitting a progress report. They must sit down together. During the review the architect may come to a conclusion

about the amount of additional resources necessary to main progress. This clause does not actually give the architect power to accelerate the Works. Indeed, it simply states that the cost of such additional resources *would* (presumably if used) be included in the prime cost. The key to this strangely worded provision lies in the philosophy of this particular contract. It is based on a rough estimate of cost for known work and contractors tender on the basis of recovery of the whole of the prime cost of the Works together with a sum to represent overheads and profit. The architect must issue instructions for the carrying out of all work including work in the original specification and/or drawings. It seems that, under clause 3.14, the architect can instruct the contractor to employ additional resources on the job. Clause 2.19.4 makes clear that, in such an instance, the employer pays in the usual way. This clause must be read in conjunction with clause 2.1.2 which requires the contractor to carry out the Works as economically as possible in all the circumstances, taking care not to engage more personnel than reasonably required. Seen in context, clause 2.19.4 provides a useful tool to enable the architect to review and improve the progress of the Works if the contractor's original allowance is thought to be too low.

- (2) Unlike the position under SBC, there is no separate relevant event for variations. Clause 2.21.1.2 makes instructions issued under clauses 3.15 a relevant event. This clause empowers the architect to issue instructions requiring what this contract refers to as 'changes', but which other contracts (including SBC) refer to as variations.
- (3) Although compliance with architect's instructions is a relevant event, instructions given to carry out work described in the specification or shown on the contract drawings are excluded to allow for the fact that the architect must instruct all work (see (1) above). If they were not excluded, the contractor would be entitled to an extension of time for carrying out the whole of the Works as though they had been added into the Works which are the subject of the contract.
- (4) Compliance with clause 3.22.1, which deals with the action required of the contractor on discovery of antiquities and subsequent architect's instructions, are given a separate relevant event under clause 2.21.3. SBC only makes the architect's instructions the subject of a relevant event.

11.6 Management Building Contract (MC)

The current JCT Management Building Contract is the 2008 version.

11.6.1 Clauses 2.16–2.20

These clauses deal with extension of the contract period and are now headed 'Adjustment of Completion Date'. Schedule 6 'Acceleration Quotation Procedure' and Works Contract schedule 2, part 2 'Variation Quotation' also includes provisions for fixing a new date for completion. 'Pre-agreed Adjustment' is a defined term used in clauses 2.16–2.20 when referring to a revised completion date fixed by acceptance of a variation or acceleration quotation. It should be noted that references to extending

time and fixing a new date for completion is taken to mean the date for completion of the project or, if the project is divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.6.2 Significant differences

The wording of these clauses reflects the structure of the management contract. However, it is now structured much more closely to the SBC extension of time provisions, than the previous 1998 edition was to JCT 98. This clause refers to the project as a whole, but demonstrates the relationship with the works contracts which together form the project. The procedures for notifying delays and giving extensions of time are virtually identical to SBC. The relevant events are termed 'Relevant Project Events' as follows:

- (1) There are only two grounds, but the first one is so broad that it could be argued that the second is superfluous:
 - (i) The first ground encompasses any cause which impedes the proper discharge by the management contractor of its obligations. This is stated to include compliance or non-compliance by the employer with clause 3.23 dealing with the CDM Regulations, any impediment, prevention or default, whether by act or omission of the employer or persons for whom the employer is responsible (the consultant team is expressly stated) and the deferment of possession (if applicable). This ground could hardly be wider and it certainly includes all those employer-generated occurrences which could result in time becoming at large if the architect had no power to deal with them.⁵⁷
 - (ii) The second ground is any relevant event under the works contract conditions (referred to as a 'Relevant Works Contract Event') which entitles any works contractor to an extension of time. The exception is the relevant works contract event in clause 2.19.8 which entitles a works contractor to an extension of time due to impediment, prevention or default of the management contractor. Clearly, the management contractor cannot be entitled to an extension of the project completion date due to its own default. Included in that event would be delay by other works contractors which, being employed by the management contractor fall into the category of management contractor's persons as defined under clause 1.1 of the Management Works Contract (MWC) and the Management Building Contract.

There is an interesting proviso that no cause or relevant works contract event must be considered as a relevant project event *to the extent* that it is caused or contributed to by any default of the management contractor or management contractor's persons. It is rather difficult to unravel the precise nuances of this clause, particularly in the light of judicial opinion that an architect should not

⁵⁷ *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114.

take into account the contractor's own delays.⁵⁸ It appears, however, that the architect is not to entirely discount a ground, just because the management contractor has contributed to it by its default; rather the architect must still consider so much of the ground as is unaffected by the default. This promises to be a skilful balancing task.

Judicial pronouncements which consider what effect is to be given to contractor's own delays focus on situations where there may be several grounds for delay, some originating from the employer or which are acceptable neutral events and some which are entirely the responsibility of the contractor. This clause is concerned with individual grounds and whether a default of the management contractor had any influence on the ground. Therefore, if it is clear that there was a delay of five days caused to an activity by some act of prevention by the employer, it is to be reduced if it can be shown that the management contractor was responsible for part of that delay. The effective delay may then be, say, three days. It is the three day period which is taken into account in reckoning the appropriate project extension. The best way to look at this is to consider it as being part of the basic calculation to see the values of the individual delays before considering all the delays applied to the whole project.

- (2) Clause 2.20 is a very curious clause indeed. It obliges the management contractor to notify the architect of any decision which the management contractor proposes to make in regard to an extension of time for a works contractor. The notice must give the architect sufficient time to disagree in writing before the management contractor has to notify the works contractor. What then? Although MCWC clause 2.18.1 requires the contractor to consult with the architect after receiving notice from the works contractor, that is not the same as requiring agreement. To consult is to seek advice or an opinion and sufficient information must be provided and sufficient time must be allowed for the advice to be given.⁵⁹ However, the opinion or advice need not be followed. There is nothing to prevent the management contractor proceeding to give the extension of time as originally proposed.

It is difficult to see what purpose is served by this clause. It does not invariably follow, of course, that an extension of time under the works contract confers a right to an extension under MC. However, clause 2.19.2 states that such a relevant event becomes a relevant project event and, therefore, the management contractor has a basic case for an extension of time for the project whether the architect dissents or not. As with every delay, the management contractor has to decide whether it is convinced that it is correct. If so, it must give the extension of time to the works contract and notify the architect, if appropriate under clause 2.20. It is then for the architect properly to carry out the duty to extend time.

11.7 Construction Management Trade Contract (CM/TC)

The current JCT Construction Management Trade Contract is the 2008 version.

⁵⁸ *John Barker Construction Ltd v London Portman Hotels Ltd* (1996) 50 Con LR 43.

⁵⁹ *Fletcher v Minister of Town and Country Planning* [1947] 2 All ER 496.

11.7.1 Clauses 2.25–2.28

These clauses deal with extension of the contract period and are now headed 'Adjustment of Completion Period'. Schedule 2 'Acceleration Quotation and Variation Quotation' also includes provisions for fixing a new date for completion. 'Pre-agreed Adjustment' is a defined term used in clauses 2.25–2.28 when referring to a revised completion date fixed by acceptance of a variation or acceleration quotation. It should be noted that references to extending time and fixing a new date for completion is taken to mean the date for completion of the Works or, if the Works is divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.7.2 Significant differences

The structure and wording of this extension of time clause is clearly derived from SBC. That is to be expected, because each trade contractor is in direct contract with the employer. The functions carried out by the architect in the SBC clause are carried out by a construction manager whose role is essentially to manage all the consultants and trade contractors. Items to note are:

- (1) Under clause 2.26.1, written notice must be given by the trade contractor whenever it becomes reasonably apparent that the commencement, progress or completion of the Works is likely to be delayed. It is, therefore, clear that the trade contractor must give this notice even if it has not started on site, provided only that its start is delayed. It is unlikely that the completion will be delayed without a corresponding delay to either commencement or progress and it is difficult to see what the insertion of the word 'completion' achieves.
- (2) Reference is made throughout to the 'Completion Period' rather than to the completion date. That is because, although the period for carrying out the work is fixed, the commencement and completion dates may change. The result is that this contract makes no express provision for extending the completion date if the commencement date is delayed. Effectively, all the construction manager can do in any given circumstance is to extend the period available for carrying out the work. In practice, a delayed commencement may have no effect on the length of the contract period, the whole period being merely moved back in time.

The relevant events echo those in SBC, except that for obvious reasons there is no reference to deferment of possession. The commentary on SBC is generally applicable here.

11.8 Major Project Construction Contract (MP)

The current JCT Major Project Construction Contract is the 2005 version (Revision 2 2009).

11.8.1 Clause 18

MP is expressed to be intended for use by employers who have in-house contractual procedures and undertake major projects on a regular basis. The contract is less detailed than some other standard forms, such as SBC. Essentially, this is a contract in which the contractor carries out any design which is required beyond what is contained in the employer's requirements. The contractor is also expected to take on more risk than usual. Whatever may be the intention of the draftsman, it is the intentions of the parties as expressed in the contract to which a court must give effect.⁶⁰ It should be noted that references to extending time is taken to mean the date for completion of the project or, if the project is divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.8.2 Significant differences

The extension of time clause bears a passing resemblance to the equivalent clause in DB. However, there are some significant differences which should be noted:

- (1) The grounds for extension of time are briefer than under DB clause 2.26. Missing are exceptionally adverse weather conditions, strikes, lockouts and civil commotion, and delays caused by statutory undertakers.
- (2) Although there is a requirement that the contractor must notify the employer of delays due to any cause, therefore including delays which are due to the contractor's own inefficiencies, the method of notification is not specified in the clause. That is because clause 5 provides that all communications between the parties must be in writing.
- (3) The contractor is called upon to form an opinion about whether the delay is one of those in clauses 18.1.1–18.1.8. If the opinion is positive, the contractor must supply supporting information. The clause does not specify when this information must be provided, but if it is to be workable, the information must be provided at the same time or very shortly after the notice. Once the contractor has reached a positive conclusion, it has no choice in the matter. Clause 18.3.1 is quite specific that the information must demonstrate to the employer the effect upon progress and completion. Therefore, if the information, viewed objectively, does not do that, the contractor is in breach of its obligations.
- (4) Clause 18.4 is important. On receipt of the clause 18.2 notification, the employer has 42 days in which to notify the contractor of an adjustment to the completion date or state why the employer considers there should be no adjustment. Unlike the position under DB clause 2.25.1, the trigger for action by the employer is not the receipt of sufficient information, but receipt of the original notice. However, the employer must calculate the adjustment by reference to the information from the contractor and *may* take other information (e.g. the employer's

⁶⁰ *Schuler A G v Wickman Machine Tool Sales Ltd* [1974] AC 235.

own knowledge), into account. Therefore, it seems that in stating why the completion date is not to be adjusted, it may be sufficient for the employer to state that the supporting information did not demonstrate any effect upon progress or completion or indeed that it was not received. This clause is an improvement upon DB, because the employer must do something on receipt of the notice, even if it is merely to refuse an extension of time, whereas under DB the employer could theoretically do nothing until after the completion date if the supporting information supplied was not sufficient.

- (5) The most significant clause is 18.5. This states that any notification by the employer under clause 18.4 may be reviewed by the employer 'at any time' if further documentation is received from the contractor or if the effects of an identified cause of delay become more apparent. It can be compared with the right to refer a dispute to adjudication 'at any time' under s. 108(2)(a) of the Housing Grants, Construction and Regeneration Act 1996 which was held to mean that there was no restriction as to time.⁶¹ Therefore, it appears that if the contractor submits further information, even after the clause 18.6 review, the employer can review a previous decision.
- (6) Clause 18.6 divides the review process into two parts. First, the contractor must provide any further information within 42 days after practical completion. The employer has 42 days from receipt of the information to carry out the review of previous extensions of time. The employer must either notify further adjustment or the fact that there is no adjustment.
- (7) When considering an adjustment to the completion date, the employer must put into effect any agreements about acceleration, cost savings and value improvements and changes. The employer must also 'have regard to' any breach of clause 15.3 by the contractor. Clause 9.3 is a 'reasonable endeavours' clause. This is less onerous than the usual JCT 'best endeavours' and the contractor is entitled to have regard to its own financial interests.⁶²
- (8) The contract seems to have adopted one of the principles of the SCL extension of time protocol⁶³ in clause 18.7.3 by requiring the employer to give the contractor an extension of time even if the project is delayed concurrently by an unlisted cause or something for which the contractor has agreed under the contract to take the risk, such as exceptionally adverse weather. It is thought that such an approach is generally not supported by legal authority where the concurrent causes are operating on the same activity.⁶⁴ Nevertheless, the principle is enshrined in this contract and the employer must comply.

11.9 Measured Term Contract (MTC)

The current JCT Measured Term Contract is the 2005 version (Revision 2 2009).

⁶¹ *A & D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd* (2000) 17 Const LJ 199.

⁶² *UBH (Mechanical Services) Ltd v Standard Life Assurance Co* (1990) BCLC 865; *Phillips Petroleum Co UK Ltd v Enron Europe Ltd* (1997) CLC 329.

⁶³ See Chapter 2, Section 2.7.2.

⁶⁴ The point is considered in Chapter 2, Section 2.4.

11.9.1 Clause 2.10

This contract is for use by employers who have a regular flow of maintenance and minor works. Work is instructed from time to time and valued on the basis of a schedule of rates. The contract assumes that a contract administrator will administer the contract. The work is to be instructed by order and, under clause 2.6, each order must state a commencement and completion date.

11.9.2 Significant differences

The extension of time clause in MTC is very short and entirely different to SBC and other JCT contracts:

- (1) Clause 2.10.1 combines a requirement that the contractor must give notice forthwith in regard to anything causing or likely to cause delay with an obligation that the contractor must use its best endeavours to complete the order by the completion date. The clause does not expressly state that the notice must be in writing and clause 1.6 which deals with notices does not require all notices to be in writing. In practice, it is very much in the interests of the contractor that it gives all notices in writing whether or not expressly so required by the contract. There is no provision for the contractor to provide supporting information. It will be implied that the contractor must give sufficient information to allow the contract administrator to understand what the delay entails. The contract administrator is probably entitled to ask for particular further information.
- (2) Clause 2.10.2 gives the grounds which will entitle the contractor to an extension of time:
 - (i) Suspension by the contractor resulting from non-payment.
 - (ii) Reasons beyond the contractor's control (including compliance with an instruction not necessitated by the contractor's default).

These grounds are similar, except for suspension, to the grounds in MW and MWD. Although such grounds appear to be extremely wide, and in one sense they are, it is likely that those grounds will be interpreted very strictly particularly in regard to delays which are due to the employer or architect.⁶⁵
- (3) The contract administrator is required to fix a fair and reasonable date for completion.
- (4) It is likely that most of the periods fixed by the contract administrator, when issuing orders, will be relatively short and it makes sense that the extension of time provisions are quite short also. However, a point which should not be overlooked by a contractor looking to maximise any extension of time is that the dates for commencement and completion are imposed upon the contractor. This is in contrast to most contracts where the contract period is agreed and entered into the contract documents before execution. Clause 2.1 states that on receipt of the order, the contractor must carry it out. There is no restriction on

⁶⁵ *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114. See the discussion on this point in regard to MW and MWD in Section 11.3.2 above.

the contract administrator's power to fix the completion date in the order other than the completion date must be reasonable. It is in the contractor's interests to submit a formal written objection to the completion date in an order as soon as it is received if the contractor believes that it is not reasonable in all the circumstances. Whether or not such a date is reasonable or indeed whether an extension to the period is fair and reasonable is something which either party may refer to adjudication or arbitration.

- (5) Clause 2.10.2 makes clear that the contractor must complete by the completion date even if an extension of time places the date for completion after the end of the contract period set out in the Contract Particulars.

11.10 Constructing Excellence Contract (CE)

The current JCT Constructing Excellence Contract is the 2006 version (Revision 1 2009). Clauses 5.7–5.16 are relevant.

11.10.1 Comments

This contract is said to be appropriate for use for the procurement of construction work and related services, for use throughout the supply chain, if the parties wish to produce collaborative and integrative working or for partnering. It may be used for procuring professional services. The terms 'Purchaser' and 'Supplier' are used instead of the more familiar 'Employer' and 'Contractor' respectively. There is no named architect or contract administrator, but there is provision for a purchaser's representative under clause 3.5 who has the power to act for the purchaser in relation to the project. It can be used if the supplier is to carry out design and if it is desired to complete the work in sections.

A key provision is the 'Overriding Principle' set out in clause 2.1. In essence, this clause states that the parties' intention is to work together in collaboration, co-operation, good faith and in a spirit of mutual trust and respect. The clause specifically states that the parties must give each other, and welcome, feedback on performance. The idea is to create a spirit of openness and co-operation and each party agrees to deal with lapses and to support behaviour which complies with the requirements. Clause 2.9 takes the position further and states as the parties' intention that a court, adjudicator or other forum must take account of the overriding principle when making an award. The effect on the courts of such a clause is largely unknown. For the purposes of this book the CE contract will be considered purely in the context of procurement of construction work from a building contractor.

This contract is prepared on an entirely different basis from SBC or other JCT traditional contracts. The contract provides for the insertion of dates for commencement and completion of the services and for liquidated or unliquidated damages. What the contractor carries out is termed 'Services' rather than the 'Works'. Clause 5.3 provides that a risk allocation schedule may apply. If so, it is to be completed (schedule A or B) and the contractor particulars completed accordingly.

- (1) The relevant provisions are based on a set of 'Relief Events'. These events operate to relieve the supplier, in appropriate instances, in respect of both time and money. Clause 5.9 makes clear that if one of the relief events occurs or is likely to occur and either the purchaser or the supplier becomes aware of the fact, whoever becomes aware must notify the other. Clause 1.5.1 stipulates that all notices must be in writing. The notification must be carried out immediately; that is, with all reasonable speed depending on the surrounding circumstances.⁶⁶ Under this form, the duty to mitigate the effects is placed on both parties equally. Both parties are expected to co-operate in agreeing what to do.

It is almost inevitable that it will be the supplier who is in a position to mitigate any effect, although it is clear that if the purchaser is able to do something, it must be prepared to do it. However, it is a matter for agreement and the contract cannot compel the parties to agree.⁶⁷ There is a further stipulation in clause 5.10 in that if either the purchaser or the supplier is a member of the project team, they must promptly notify the team also if it appears that the relief event will affect any member. Any information as to the effect of the event and any supporting information must also be provided to the team in these circumstances so that they can consider the effect on any other project participant.

The purchaser and the supplier are required to give serious consideration to any recommendations which the team may make. That, of course, is a far cry from stating that the recommendations have to be followed or even that they must be taken into account. They must simply be considered. It is suggested that the consideration will be much the same as the consideration required to be given to tenderers who have submitted a valid tender in accordance with the invitation to tender.⁶⁸

If the purchaser was not aware of an event, because of late notification by the supplier, clause 5.16 provides that the parties must take account of the supplier's delay by ignoring the additional effect of such delay. If the supplier fails to notify at all or does not provide a clause 5.11 statement (see (2) below), the purchaser must, so far as possible, make its own assessment of the effect of an event and notify the supplier. The parties must then use reasonable endeavours to agree the effect, presumably the effect notified by the purchaser and if either considers it to be appropriate, they must meet to discuss their differences.

- (2) Whichever of the parties notifies the other, it falls to the supplier, under clause 5.11, to provide a statement showing the effect of the event on the completion date and/or on the cost of carrying out the services. This statement must be provided no later than 10 business days from the notification unless that parties otherwise agree. A 'Business Day' is defined in clause 1.1 as any day which is not a Saturday, Sunday or public holiday. In view of the reference to 'notification', it is thought that the operative date is the date the notice is received rather than the date on which it is issued. The supplier must also provide the purchaser with whatever other information it reasonably requests to support the statement.

⁶⁶ It is not sufficient if the action is performed within a reasonable time: *Alexiadi v Robinson* (1861) 2 F&F 679.

⁶⁷ *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* (1974) 2 BLR 100.

⁶⁸ *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83.

- (3) In conformity with the underlying spirit of this contract, the purchaser and the supplier must use reasonable endeavours to agree the effects of any notified event and to agree the action to be taken to minimise such effects. Clause 5.13 somewhat unnecessarily states that they must meet to discuss any differences if they think it appropriate. If they do agree, or as the clause says if the effects are 'decided', they must, presumably jointly, provide written confirmation of any change to the target cost, the guaranteed maximum cost, the contract sum and/or to any date for completion. They may also alter the risk allocation schedule. The reference to agreeing or deciding the effects is not particularly clear. To agree suggests, as here, that two parties are involved whereas, to decide suggests a view taken by one party.
- (4) Clause 5.14 raises problems. It appears that it is a matter for the purchaser to decide whether the effect of any event is too uncertain so that it cannot be forecast reasonably accurately. In so deciding, it seems that the purchaser can override the procedure in clause 5.13. However, the clause proceeds to require the parties to agree what assumptions must be made in order to estimate the effect. There is provision for subsequently amending a wrong assumption.
- (5) Although they are not particularly difficult to understand individually, these are somewhat complex clauses when viewed as a whole. In summary the position seems to be this:

As soon as either purchaser or supplier is aware that there is a relief event, they must notify the other and if either is a member of the project team, the team must be notified. The supplier must provide a statement of the effect of the event in terms of cost and time and provide any information which the purchaser reasonably requests. The parties must try to agree what can be done to reduce the effect of the event, but then they must try to agree on the effect on cost and on time. The contract is silent on the position if the parties fail to agree. The whole contract is predicated on the basis that the parties will agree. However, if the supplier fails to notify or is late in notifying the event, the purchaser can make its own assessment which it must try and agree with the supplier.

- (6) The relief events are limited. They are dealt with in clause 5.7 as follows:
- *instructions*
These are purchaser's instructions requiring the equivalent of a variation to the services or the project.
 - *act or omission of the purchaser*
This is intended to be a catch-all clause similar to the impediment and prevention clause in SBC. The wording is very broad, but whether it will be judged too broad to cover all acts of purchaser prevention which might give rise to a claim is something to be decided by the courts in due course.
 - *risk in the risk allocation schedule*
This is more complex. It will qualify as a relief event if a risk occurs which is mentioned in the risk allocation schedule, but only so far as the consequences of the particular risk are not said to be the supplier's responsibility. There are yet more provisos:
 - the supplier can only recover costs if the consequences of the risk are greater than any amount which the risk allocation schedule shows as included in the target cost or contract sum, and

- the supplier can only seek an extension of time if the time consequences of the risks are greater than any period in the risk allocation schedule stated as the responsibility of the supplier.

- *other risks*

The difficulty in interpreting this provision will vary depending on the particular circumstances. It appears to provide that any risk which is not in the risk allocation schedule may qualify as a relief event if it was not reasonably foreseeable at the time the contract was executed (this is the normal proviso for recovery of damages for breach of contract). The risk must also be beyond the supplier's control. Excluded, presumably on the basis that they are within such control, are the supplier's act, omission or insolvency or of any member of the supply chain or any sub-supplier. The risk constitutes a relief event only to the extent set out in the Contract Particulars, where the percentage of cost or time which is allowable is to be inserted. This is in accordance with the spirit of this contract which sets out to clearly allocate risks between the parties. Whether it is successful in so doing will become clearer as more projects are carried out using this form of contract.

Liquidated damages under JCT standard form contracts

12.1 *Standard Building Contract (SBC)*

12.1.1 Clauses 2.31 and 2.32

In the previous JCT Standard Form of Building Contract (JCT 98) the clause was 24. The current clauses are quite difficult to understand at first reading and architects and contractors must read them carefully several times.

12.1.2 Commentary

Conditions precedent to recovery

In a break from previous contracts, reference is made simply to ‘liquidated damages’ rather than ‘liquidated and ascertained damages’ (hence the common reference to ‘LADs’). There is no difference in meaning and the shorter version is to be preferred. Four conditions must be satisfied before the employer is entitled to recover liquidated damages.

- (1) The contractor must have failed to complete the Works by the date for completion in the contract or any extended time.
- (2) The architect must have properly performed the duty to decide extensions of time under clause 2.32.
- (3) The architect must have issued a certificate under clause 2.31 to the effect that the contractor has failed to complete by the completion date (a non-completion certificate).
- (4) The employer must give a written notice to the contractor that liquidated damages may be deducted or may be required to be paid.

So far as the contract clause 2.32.1 is concerned, there are two contractual requirements which must be satisfied: the issue of the non-completion certificate and the employer’s notice stating that liquidated damages may be deducted or payment may be required.

The case of *Token Construction Co Ltd v Charlton Estates Ltd*¹ is instructive. An architect sent a letter to the employer some time after contract completion which said 'with 13 weeks extension of time the adjusted completion date would have been 30.1.68 . . . Details of the 13 weeks' extension of time are being prepared and will be forwarded to you . . . liquidated damages ought to be calculated from 30 January 1968 to 15 July 1968, a period of 24 weeks.' The Court of Appeal held that the letter did not amount to either a certificate of delay or an extension of time. The Court found that the architect was not able validly to certify delay until having first considered and made decisions on all the contractor's applications for extensions of time. Although this was a decision on a special form of contract, it is thought that the decision also applies to SBC.

Certificate of non-completion

Contrary to popular belief, the architect may issue the non-completion certificate at any time prior to the issue of the final certificate. In practice, of course, most architects will issue the certificate immediately the completion date has passed in order to allow the employer the maximum possible time and maximum available funds for deduction of liquidated damages. An employer may have a cause of action against an architect who delays the issue of the certificate until just before the issue of the final certificate if by that time it is impossible to recover the liquidated damages. However, once the architect has issued the final certificate under clause 4.15, if no notice of adjudication, arbitration or legal proceedings has been given by either party in accordance with clause 1.9, the architect becomes *functus officio* and is excluded thereafter from issuing any valid certificate under clause 2.31 or indeed from taking any further action under the contract.²

The architect's non-completion certificate issued under clause 2.31 is not a condition precedent to arbitration on the question of recovery of liquidated damages although because the certificate is a condition precedent to recovery under the terms of the contract, the absence of such a certificate may well be decisive.³ The architect cannot avoid issuing the certificate of non-completion if the contractor has failed to complete by the due date. It is not a matter for the architect's discretion. If the architect fixes a new date for completion after the issue of the certificate, the fixing of a new date is said to cancel the existing certificate and the architect must issue a further certificate (clause 2.31.3). If the employer is then found to have deducted too much by way of liquidated damages, the extra amount must be repaid.

Some problems with deductions

It has been, faintly, suggested by some commentators that the contractor would be entitled to interest on the money deducted and repaid. That suggestion is obviously misconceived. In recovering liquidated damages in the first instance, the employer

¹ (1973) 1 BLR 48.

² *H Fairweather Ltd v Asden Securities Ltd* (1979) 12 BLR 40.

³ *Ramac Construction Co Ltd v J E Lesser (Properties) Ltd* [1975] 2 Lloyd's Rep 430.

was simply complying with an entitlement clearly set out in the contract. In repaying after a further non-completion certificate, the employer is again complying with the contract. In neither instance can the employer be said to be in breach of contract and, therefore, liable in damages. Therefore, it is difficult to see any justification for requiring interest to be paid unless the contract expressly so states. None of the JCT contracts give the contractor any entitlement to interest in such circumstances. The reason why the clause refers to the architect fixing a new date where it is necessary is because, if the architect fixes a new date which is the same as, or later than, the date the contractor actually completes the Works, a further certificate is unnecessary.

In *Reinwood Ltd v L Brown & Sons Ltd*⁴ a decision of the House of Lords on JCT 98, the problem was that, on 14 December 2005, the architect issued a certificate of non-completion. On 11 January 2006, the architect issued an interim certificate. The final date for payment was 25 January. Two notices were served by the employer on the 17 January, one stating that it intended to deduct liquidated damages and the other stating the amount proposed to be paid. The balance was paid on the 20 January. However, on the 23 January, the architect issued an extension of time fixing a new date for completion as 11 January. Despite being notified by the contractor that liquidated damages were thus reduced and that the amount payable under the interim certificate had increased, the employer made no further payment before 26 January and the contractor served a default notice prior to termination and the employer paid the excess liquidated damages on the 1 February. Subsequently, the employer failed to pay a later certificate on time and the contractor, relying on the earlier notice, gave notice of termination of its employment.

The employer issued proceedings alleging repudiation on the part of the contractor. One of the contractor's crucial arguments was that, because the architect gave a further extension of time *before* the final date for payment of the interim certificate, the previous non-completion certificate was invalid and the employer should have paid the whole of the amount certified. In dismissing this view, the Lords held that, although the effect of the architect issuing a further extension of time was to invalidate the certificate of non-completion, the extension was issued after the certified sum excluding liquidated damages had been paid. Therefore, at the time of payment, the employer was correct and all its notices were valid. On the issue of the extension of time, the employer was obliged to repay the liquidated damages up to the new completion date within a reasonable time. The employer had paid promptly and was not in default.

The Lords briefly considered the position if the extension of time had been given after the withholding notice was served, but before the employer had paid. The Lords thought that there was a case for saying that the employer could not have relied on a withholding notice issued on the basis of a certificate of non-completion once the certificate had been cancelled by a fresh extension, but they acknowledged that there was also an argument that a withholding notice once validly served should be able to be relied upon even if the certificate on non-completion has become inoperative. Although a case on JCT 98, it is suggested that the principles apply to SBC also.

⁴ (2008) 116 Con LR1.

Notice requiring payment

Clause 2.32.4 makes clear that the employer need only serve one notice requiring payment. It remains effective, unless the employer withdraws it, despite the cancellation by the architect of previous non-completion certificates and the issue of further non-completion certificates. Since the decision to deduct liquidated damages rests with the employer, it is unlikely that the notice would ever, in practice, be withdrawn. If the employer decided not to deduct damages, the matter would simply be allowed to rest.

The timing of the written notice sometimes causes difficulty. The wording seems to suggest that liquidated damages may be deducted provided that the written requirement is served before the date of the final certificate. That is the plain statement in clause 2.32.1. Thus it may appear that damages might be deducted from an interim certificate several months before a notice is served just before the issue of the final certificate. That, of course, would be nonsense and the purpose of the clause does not permit such a construction, because it uses the words 'has issued' and 'has notified'. It is perhaps unfortunate that the wording did not make clearer that the date of the final certificate is stated as the deadline for the written requirement and that the requirement must always pre-date the deduction.

Thus, it is good practice for the employer to issue the notice as soon as the architect has issued a non-completion certificate and that notice will serve for any future deductions. But it should be noted that failure to serve the written requirement at all before the final certificate will not only prevent deduction, it will also preclude recovery of the liquidated damages as a debt.

Some doubt has been thrown on the precise form to be taken by the employer's written requirement for payment under earlier versions of the standard form. Judge John Newey stated:

'There can be no doubt that a certificate of failure to complete given under clause 24.1 and a written requirement of payment or allowance under the middle part of clause 24.2.1 were conditions precedent to the making of deductions on account of liquidated damages or recovery of them under the latter part of clause 24.2.1.'⁵

This seems perfectly clear, but another Official Referee thought:

'... that there was no condition precedent that the employer's requirement had to be in writing. What was essential was that the contractor should be in no doubt that the employer was exercising its power under 24.2 in reliance on the architect's certificate given under 24.1 and deducting specific sums from monies otherwise due under the contract.'⁶

The court, surprisingly, went on to hold that the written requirement was satisfied by a letter, written by the quantity surveyor and forwarded to the contractor, which stated the amount which the employer was entitled to deduct, alternatively, that the cheques issued by the employer from which liquidated damages had been deducted

⁵ *A Bell and Son (Paddington) Ltd v CBF Residential Care and Housing Association* (1990) 46 BLR 102.

⁶ *Jarvis Brent Ltd v Rowlinson Construction Ltd* (1990) 6 Const LJ 292.

constituted such written requirements. In *Holloway Holdings Ltd v Archway Business Centre Ltd*⁷ a similar clause in IFC 84 was considered and it was again held:

‘For (the employer) to be able to deduct liquidated damages there must both be a certificate from the Architect and a written request to (the contractor) from (the employer).’

The matter was finally clarified by a decision of the Court of Appeal in *J J Finnegan Ltd v Community Housing Association Ltd*⁸ where the Court held that the decision in *Bell* was correct and that the employer’s written requirement was a condition precedent to the deduction of liquidated damages. Only two things must be specified in the requirement and they are:

- whether the employer is claiming a payment or a deduction of the liquidated damages; and
- whether the requirement relates to the whole or part of the total liquidated damages.

SBC clause 2.32.1 leaves the matter in no doubt. Clause 2.32.4 emphasises that a requirement which has been stated in writing remains effective even if the architect issues further non-completion notices. Once the other conditions have been satisfied, the employer has until five days before the final date for payment to serve a notice on the contractor under clause 2.32.2.1 requiring payment and the employer may recover the amount as a debt (i.e. in the same way as any other debt) or the employer may serve notice, under clause 2.32.2.2 that the amount will be withheld from any sums due to the contractor. These clauses make clear that the employer is entitled to deduct liquidated damages at a lesser rate than the rate in the Contract Particulars. A footnote to the clause reminds the reader that if the employer is intending to withhold from the next certificate, the clause 2.32.2 notice must comply with the provisions of clauses 4.13.4 or 4.15.4 which deal with withholding notices either in respect of interim certificates or the final certificate respectively.

Summary

The conditions which must be satisfied before liquidated damages can be withheld are:

- The contractor must fail to complete by the contractual completion date or any extended date.
- The architect must have decided all extensions of time.
- The architect must have issued a non-completion certificate.
- The employer must serve a written requirement for payment or deduction.
- The employer must serve an effective written withholding notice.

The amount which the employer may deduct is to be calculated by reference to the rate stated in the Contract Particulars. The employer is free to reduce the rate, but

⁷ 19 August 1991, unreported.

⁸ (1995) 65 BLR 103.

not to increase it. Clause 2.32.1 makes clear that the employer need not wait until practical completion before deducting liquidated damages. Deduction may start as soon as the clause 2.31 certificate has been issued and the requirement for payment has been made. In practice, such deductions usually commence from the first payment thereafter.

12.2 *Intermediate Building Contract (IC and ICD)*

12.2.1 Clauses 2.22–2.24

In the previous JCT Intermediate Building Contract (IFC 98) the clause was 2.7. The current clause is quite difficult to understand at first reading and architects and contractors must read it carefully several times. Although there are two versions of this contract (IC and ICD) the liquidated damages clause is worded the same in both contracts.

12.2.2 Significant differences

This clause is very similar to SBC clause 2.32 in wording and in effect although here unaccountably spread over three numbered clauses. There is no express reference to the employer's right to require payment at a lesser rate than the one stated in the appendix, but in principle such a right must be implied. In any event, it is unlikely that a dispute would arise on the basis that the contractor insisted on paying the full rate.

12.3 *Minor Works Building Contract (MW and MWD)*

12.3.1 Clause 2.8 (under MW) or clause 2.9 (under MWD)

In the previous JCT Agreement for Minor Building Works (MW 98) the clause was 2.3. Although there are two versions of this contract (MW and MWD) the liquidated damages clause is identical in both contracts. References to clauses are to the clauses in MW. It is easy to transpose the clause numbers by changing clause 2.8–2.9 for MWD. Thus MW 2.8.2 becomes MWD 2.9.2.

12.3.2 Significant differences

The MW and MWD provision is much simpler than the clauses in SBC, IC and ICD. These provisions mark a very significant departure from the SBC, IC and ICD regime. There is no certificate of non-completion required from the architect which removes the necessity to state what must happen if a further extension of time is given and a further certificate is issued. The trigger is simply that the contractor fails to complete

the Works by the completion date or any extended date. Once that date is passed and the contractor is not finished, the employer may recover the amount of liquidated damages as a debt or may deduct it from any money due to the contractor under the contract.

It is common practice for architects to certify non-completion under this contract in any event. As it is not a certificate required by the contract, it has no particular standing. It merely represents the architect's opinion which the contract does not require the architect to give. Under clause 2.8.3, a written requirement by the employer has been introduced, once again with the date of issue of the final certificate as the deadline. However, as was noted in the commentary to SBC, common sense and implication of law would ensure that the notice must pre-date the deduction. In practice, the architect, complying with a general duty to advise the employer, will usually send a letter reminding the employer that the completion date has passed, that the contractor has not completed and that liquidated damages are deductible.

The normal withholding notices under the contract must also be served. Unlike SBC, IC and ICD, nothing is said about the need for the employer to repay liquidated damages if a further extension of time is given after damages have been deducted or paid. However, in such a case, the conditions which entitle the employer to liquidated damages (clause 2.8.2) would not be satisfied or at least varied and repayment would be an unavoidable consequence.

12.4 Design and Build Contract (DB)

12.4.1 Clause 2.29

In the previous JCT Standard Form of Building Contract with Contractor's Design (WCD 98) the clause was 24. The current clause is quite difficult to understand at first reading and architects and contractors must read it carefully several times.

12.4.2 Significant differences

There is a very distinct family resemblance between this form and SBC. The differences spring from the absence of an architect and the obligation of the contractor to complete the design of the Works. The main difference in this clause is that it is the employer, or, usually, the employer's agent acting on behalf of the employer, who issues a written notice of non-completion to the contractor (clause 2.28). Such a notice is intended to be a statement of fact. It is not the expression of an opinion such as would be the case if a certificate were to be issued.⁹ The courts have refused to give a notice under this contract the same status as the certificate of an independent architect.¹⁰

⁹ *Token Construction v Charlton Estates* (1973) 1 BLR 48.

¹⁰ *J F Finnegan Ltd v Ford Seller Morris Developments Ltd* (1991) 53 BLR 38.

12.5 Prime Cost Building Contract (PCC)

12.5.1 Clauses 2.23 and 2.24

In the previous JCT Standard Form of Prime Cost Contract 1998 the clauses were 2.2–2.4.

12.5.2 Comments

Clauses 2.23 and 2.24 of PCC are virtually identical to the equivalent clauses 2.31 and 2.32 of SBC and the comments on SBC apply to PCC also.

12.6 Management Building Contract (MC)

12.6.1 Clauses 2.22 and 2.23

In the previous JCT Management Contract 1998 the clauses were 2.9–2.11.

12.6.2 Significant differences

The clause refers to the management contractor failing to secure completion of the project. This simply reflects the management contractor's obligation to secure the completion of the project by the completion date as set out in clause 2.3, i.e. its task is to arrange that others complete rather than to physically complete itself. Since the previous edition, these clauses have been significantly amended and the comments on SBC apply to MC also.

12.7 Construction Management Trade Contract (CM/TC)

12.7.1 Clause 2.32

There is no liquidated damages provision under this form of contract. Instead there is provision for recovery of unliquidated or actual damages. This is similar to the position under sub-contract forms. Although the client may suffer a loss as a result of delay on the part of a trade contractor, it is impossible to insert a liquidated sum, because several trade contractors may contribute to the loss.

12.7.2 Key points

Clause 2.32.1 contains two provisos. First, the trade contractor must have failed to complete within the completion period and, second, the construction manager must

have given all decisions on all extensions of time for which the contractor has submitted an application. It should be noted that clause 2.26.1 does not actually require the trade contractor to submit an application for extension of time but merely, as under SBC, to submit a notice of delay and the surrounding circumstances. There is unlikely to be much misunderstanding on the point, but there may be circumstances when the inconsistency in terminology between clauses becomes important. The trade contractor is obliged to 'pay or allow' direct loss and/or expense, but, in *Hermcrest plc v G Percy Trentham Ltd*,¹¹ a similar phrase was considered and the right to set-off the amount claimed by the party asserting the right to payment was expressly restricted to what was set out in the contract. Such set-off was limited to amounts agreed. Therefore, although there is an obligation to pay or to allow the sum properly due, it can be allowed only insofar as it is agreed and not if it is disputed.

Clause 2.32.2 provides for a cap on the amount if previously so agreed by the parties and written into the Contract Particulars. This is very useful for the trade contractor when the possible liability might be totally out of proportion to the value of the trade contract. This provision sets out formally what many trade and sub-contractors already include as part of their routine qualification of quotations and tenders.

12.8 Major Project Construction Contract (MP)

12.8.1 Clause 16

In the previous Major Projects Form of Contract (MPF 03) the clause was 10.

12.8.2 Significant differences

This is a liquidated damages clause at its simplest. There is no requirement for a non-completion certificate, therefore, no need to provide for its cancellation and re-issue after as a further extension of time. The trigger is the contractor's failure to complete by the completion date, the rate is stated in the Contract Particulars and further extensions trigger repayment of any liquidated damages overpaid. Clause 16.1 refers to the contractor being liable to pay the employer liquidated damages. There is no express provision for the employer to deduct liquidated damages from payments to the contractor but, in this instance, that does not appear to preclude the employer from setting-off such damages from payments due to the contractor provided that the relevant withholding notices are served.

12.9 Measured Term Contract (MTC)

The current Measured Term Contract is the 2005 version (Revision 2 2009).

¹¹ (1991) 53 BLR 104.

12.9.1 Comments

There is no liquidated damages clause under this form of contract. Therefore, the employer is left to common law rights if the contractor fails to complete by the date for completion specified in an order or by any extended date. It would have been impossible to include a liquidated damages provision that is generally applicable to all orders, because the orders will relate to different kinds and values of work and different time periods. Any attempt to impose a general liquidated damages clause would result in the sum specified being a penalty and unenforceable under the principles set out in Section 3.2 of Chapter 3. The contractor's failure to complete is a breach of contract and the employer is left to prove the breach and the amount of damages suffered.¹²

12.10 *Constructing Excellence Contract (CE)*

The current JCT Constructing Excellence Contract is the 2006 version (Revision 1 2009).

12.10.1 Clause 7.27

The rate of liquidated damages is to be inserted in the Contract Particulars. If liquidated damages are stated to apply, but nothing is entered, the damages are to be unliquidated. That is to say, the purchaser will be left to its own devices to recover whatever damages it can prove it suffered as a result of late completion. The contract is silent about the position if the parties have not stated whether liquidated damages are to apply, but it ought to follow that in that instance also the damages would be unliquidated. Although these provisions avoid the purchaser being without a remedy if no rate is inserted, the purchaser will be without remedy if it inserts '£nil' as the rate. Liquidated damages will apply, but the rate will be £nil.¹³

Clause 7.27 is extremely brief, but none the worse for that. It simply states that the supplier is liable for liquidated damages at the rate in the Contract Particulars if it fails to complete the services by the date for completion. There is no requirement for a non-completion notice or certificate and the clause leaves it to the purchaser whether to deduct the damages or recover them as a debt. Obviously, if the purchaser intends to deduct the damages from a future payment a withholding notice will be necessary. However, unlike SBC, there is no requirement for a preliminary warning notice of the intention to deduct or seek payment.

¹² The damages principles in *Hadley v Baxendale* (1854) 9 Ex 341 apply.

¹³ *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30.

Loss and/or expense under JCT standard form contracts

13.1 *Standard Building Contract (SBC)*

13.1.1 Background

The provisions in SBC that may give rise to loss and/or expense claims by the contractor are contained in clauses 4.23–4.26 inclusive. They deal with loss and/or expense caused by matters materially affecting regular progress of the Works. Once the contractor decides to trigger this clause, it imposes specific obligations, not only on the contractor but also on the architect and quantity surveyor which is something that is not always appreciated. Once the claims machinery has been triggered by the contractor, the architect and/or quantity surveyor must carry out the duties imposed upon them. The clause confers on the contractor a clear and enforceable right to financial reimbursement for ‘direct loss and/or expense’ suffered or incurred as a direct result of certain relevant matters provided that the contractor strictly complies with the procedures laid down by the provisions. That proviso cannot be over-emphasised. The contractor’s entitlement to recovery under the clause depends on two things:

- (1) the correct operation of its machinery
- (2) deferment of possession or that regular progress of the Works has been materially affected by one or more of the relevant matters in clause 4.24.

It is therefore vitally important that all those concerned, contractors, architects and quantity surveyors, should fully understand the way in which these clauses are intended to work. It must always be borne in mind that the detailed provisions in clauses 4.23–4.26 are not simply a matter of meaningless procedure. There is a very clear purpose behind them. The clauses are both procedural, in the sense of instructing the parties what they should do at each stage of the process, and contractual, in the sense that they set out the respective rights and obligations which the parties have assumed in respect of one another.

For example, the contractor must make application if it wishes to recover the amount of loss and/or expense it believes is due. This application must be submitted within a relatively strict time frame. The purpose is so that the architect and the quantity surveyor can carry out contemporary investigations and, if thought appro-

priate, require the contractor to keep specific records. In addition, it is important that the employer knows the likely extent of any additional expenditure at the earliest possible moment so that measures can be taken to secure additional finance or reduce the cost of the project.

In addition there is provision in schedule 2, which deals with variation and acceleration quotations, which allows the contractor's estimate of the amount of loss and/or expense it will incur in carrying out an instruction to be accepted. This provision is considered in Chapter 14, Section 14.5.5.

Although most of these clauses deal with the contractor's rights to financial reimbursement for relevant matters which are breaches of contract by, or which are within the control of, the employer or the employer's persons (as defined in clause 1.1 which of course includes the architect), it is important to note that many of the matters to which the clause refers are not breaches of contract by the employer or by the employer's persons. For example, the following grounds for loss and/or expense are expressly empowered under the contract:

- 4.23 deferment of possession (if clause 2.5 applies)
- 4.24.1 variations
- 4.24.2.1 architect's instructions under clause 3.15 and 3.16 (postponement and provisional sums)
- 4.24.2.2 architect's instructions under clause 3.17 (opening up and testing)
- 4.24.2.3 architect's instructions under clause 2.15 (discrepancies or divergences)
- 4.24.3 clause 2.22 (antiquities)
- 4.24.4 contractor's suspension under clause 4.14.

Therefore, it follows that none of these relevant matters are breaches of contract which would entitle the contractor to recover damages at common law. It is clear that these clauses constitute the only right to reimbursement for such matters. Therefore, if the contractor should lose its right to reimbursement under these clauses, it will be unable to recover any money at common law despite clause 4.26 which expressly preserves all the contractor's other rights and remedies.

The loss and/or expense provisions consist of four important clauses:

- 4.23 This is the engine room of the provisions. The machinery which must be operated if the contractor wishes to recover direct loss and/or expense is set out together with responses required from the architect and/or quantity surveyor. Failure to operate this clause correctly and in due time will preclude the contractor from recovery of loss and/or expense under the contract.
- 4.24 This clause lists the relevant matters which are the grounds that may entitle a contractor to loss and/or expense.
- 4.2.5 This clause is highly significant and requires amounts to be added to the contract sum as they are certified. The architect and quantity surveyor are not entitled to wait until the whole of the contractor's claim has been ascertained. This has an important effect when read with clause 4.4 which provides for certification and payment of amounts found due to the contractor as soon as the amount is ascertained.

- 4.26 This clause preserves all the contractor's rights and remedies so that it is not confined to the rights and remedies expressly stated in the contract.¹ As noted above, the contractor may not be able to claim at common law in respect of some of the relevant matters.

13.1.2 Relationship to extensions of time

There is no connection between extensions of time and loss and/or expense other than that some of the grounds for extending time are echoed in the provisions for loss and/or expense. It by no means follows that an extension of time is necessary before an application for loss and/or expense can be made. However, there is the common but mistaken belief that there is some automatic connection between the giving of an extension of time and the contractor's entitlement to reimbursement. There is not, and there never was, any such connection.² An extension of time has only one effect. It extends the period allowed to the contractor for carrying out and completing the Works. Obviously, in so doing, it also defers the date from which the contractor becomes liable to pay liquidated damages to the employer. Contrary to popular belief, an extension of contract time does not in itself entitle the contractor to any extra money. The correct position is still the following:

'JCT 80 clause 25 entitles the contractor to relief from paying liquidated damages at the date named in the contract. It does not in any way entitle him to one penny of monetary compensation for the fact that the architect has extended the contractor's time for completion. He is not entitled to claim even items set out in "Preliminaries" for the extended period.'³

The reference to 'Preliminaries' is very relevant, because many contractors wrongly imagine that an extension of time gives an automatic entitlement to a continuation of their preliminary costs.

The JCT 98 contract used to have a clause (26.3) which provided that if and to the extent that it was necessary for the purpose of ascertainment of direct loss and/or expense, the architect must state in writing to the contractor what extension of time, if any, has been granted in respect of those events which are also grounds for reimbursement under the loss and/or expense clause. There was no logical justification for the inclusion of this provision, which appeared to give support to the idea that loss and/or expense was irretrievably linked to extensions of time. The informa-

¹ This is important in view of the Court of Appeal decision in *Lockland Builders Ltd v John Kim Rickwood* (1995) 77 BLR 38, which seems to suggest that in the absence of express provision, contract machinery and common law rights can co-exist only in circumstances where the contractor displays a clear intention not to be bound by the contract. The more recent Court of Appeal decision in *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd* (1998) 87 BLR 52 takes a different view and, in any event, clause 4.26 puts the matter beyond doubt.

² See *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106; *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190 upheld on appeal [2010] Scot CS CS1H 68.

³ John Parris, *The Standard Form of Building Contract* (1985) 2nd edition, Blackwell Science, in Section 10.03: The relationship of JCT 80 clause 25 to clause 26.

tion was of no relevance to the contractor and could not have any relevance to the ascertainment of direct loss/or expense. An extension of time looks ahead and produces what is at best an estimate of what the architect believes is likely to occur some weeks or even months ahead, i.e. the effect of delays upon a future completion date. In contrast, the ascertainment of direct loss and/or expense is an exercise in looking back, sifting evidence to determine what occurred in the past. Plainly, that is why the architect's duty in giving extensions of time is simply to estimate it whereas in determining loss and/or expense the duty is to ascertain it.

However, although it is good to see that SBC has abandoned the content of the old clause 26.3, it is disturbing to see that the extension of time provisions of SBC provide in clause 2.28.3.1 that the architect, in giving an extension of time, must state the length of extension of time attributed to each relevant event. It is not the contractor's task to ascertain the amount of loss and/or expense, that is a matter for the architect or quantity surveyor. It is impracticable to require the architect to provide the contractor with a breakdown of extensions of time between causes of delay, because this information does not affect the extension of time. If, as so often happens, there are a number of concurrent causes of delay, to apportion the overall extension between those various causes will often be impossible as well as unnecessary.⁴ The former clause 26.3 apparently merely required the architect to specify the relevant events taken into account without apportioning them. The clue was in the words 'If and to the extent it is necessary for ascertainment'. It is difficult to think of any situation where that would have applied. The views of the court in *Methodist Homes Housing Association Ltd v Messrs Scott & McIntosh* are relevant.⁵ The judgment was very short, but to the point. The judge said that the action was founded on a claim by the contractors for loss and/or expense due to disruption under clause 26 of the JCT 80 form. He upheld the essential argument of the claimants that a certificate of extension of time under clause 25 had no bearing on a claim based on disruption under clause 26. He went on to consider clause 26.3, which was very similar to clause 26.3 of JCT 98, in these terms:

'It is true that clause 26.3 provides that in certain circumstances the Architect shall state in writing to the Contractor what extension of time has been made under clause 25 but it is instructive that this provision only operates "if and to the extent that it is necessary for ascertainment under clause 26.1 of loss and/or expense".'

In the end, [Counsel] for the pursuers, was, I think constrained to accept that there was no essential link between clause 25 and clause 26, but he nonetheless sought to persuade me that if reference was made to the Notification Certificates themselves and to the claim document (all of which were lodged in processes and incorporated in the pleadings) it could be seen that the extensions of time granted and the claim proceeded on exactly the same "Architect's Instructions". Having looked at these documents with [Counsel], however, I regret that I am quite unable to take that view. And even if they did, I am not sure that I fully understand

⁴ *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106.

⁵ 2 May 1997, unreported.

the significance bearing in mind the distinct purposes of Clause 25 and Clause 26 respectively.

13.1.3 Clause 4.23: The key clause

It is always dangerous to try to put the words of any document in simple terms, because, inevitably some of the meaning is lost and parts are rendered imperfectly. However, in the interests of providing the general meaning of this sub-clause, it is useful to set it out in fairly broad but simple words before discussing the clause in detail. Having read the following simplified explanation, the reader must then turn to the words in the contract itself in order to understand the commentary:

If, in carrying out the Works, the contractor suffers loss or expense, or believes it is likely to do so, due to deferment of possession or because regular progress is substantially delayed or disrupted by any of the relevant matters, the contractor may apply to the architect if there is no other term in the contract by which it can receive payment.

If the contractor makes an application, the architect must form an opinion about it and if the architect agrees that regular progress has been or will be substantially affected, either the architect or the quantity surveyor (if the architect gives the instruction) must calculate the amount of loss or expense suffered. There are three conditions: the contractor must apply as soon as it should have been aware of the likely affect on progress; the contractor, if requested, must provide the architect with information; and the contractor, if requested by the architect or the quantity surveyor, must provide cost information.

13.1.4 Detailed commentary on the clause

The contractor's application

Although it is in the employer's interests that the architect gives the contractor an extension of time where the contractor has been delayed by one of the relevant events, the same is plainly not true so far as loss and/or expense is concerned. The architect has no duty to advise the contractor to apply for loss and/or expense and, indeed, an architect giving such advice may be in breach of duty to the employer. Whether or not the contractor decides to make such application is entirely its affair. However, the contractor is not entitled to any loss and/or expense whatsoever unless it makes an application under clause 4.23. Two aspects of the application deserve careful consideration: its content and timing.

Content of application

What must be included in the application is set out in clause 4.23. There is no set format and it is left to the contractor to devise a format to suit itself. The contractor's application must be in writing. It should state that the contractor has incurred or is likely to incur direct loss and/or expense as a result of deferment of possession of

the site or regular progress being materially affected by one or more of the matters listed in clause 4.24. It may be that the application is sufficient if it refers to the general grounds and identifies the occurrence, stating that loss and/or expense is being or is likely to be incurred.

The first notice that many architects have that there is likely to be a claim is often tagged onto the end of a notification of delay and claim for extension of time. The contractor will often simply include additional words to the effect that it is also seeking loss and/or expense on the same grounds. Occasionally, clause 4.23 will be mentioned. Although it can be argued with some force that such a casual approach on the part of the contractor is woefully insufficient to comply with the obligation to make application under clause 4.23, in practice the prudent architect will decide whether the notice, inadequate though it is, is enough to alert the architect to the fact that the contractor is, or will be, seeking to recover loss and/or expense in respect of particular occurrences.

The key question is whether the contractor's notice contains enough information to enable the architect to understand the occurrences and decide whether to require records to be taken at an early stage. Notices from the contractor giving no information save that a claim for loss and/or expense is to be expected should be rejected by the architect, because they neither comply with clause 4.23 nor provide the architect with any useful information.

A bare notice, that a contractor is likely to be claiming loss and/or expense, should be countered by a letter from the architect, pointing out that the letter does not contain sufficient information to constitute an application under clause 4.23 and asking if the contractor wishes to add anything further. If the contractor opts not to provide further information, the contractor's bare notice will have no contractual standing and should be ignored when the architect has to consider in the future whether the contractor has made application in due time.

The application should clearly specify on which of deferment of possession or the relevant matters listed in clause 4.24 reliance is being placed. The contractor ought to provide as much information as possible about the surrounding circumstances. At the very least, the architect should expect to receive details of the actual events which are the grounds for the claim. The application will not comply with clause 4.23 if it merely refers to the clause numbers as in: 'We are suffering loss and/or expense as a result of prolongation of the Works caused by clauses 4.24.1, 4.24.5 and 4.24.6 relevant matters.' That kind of wording, all too common, will leave the architect entirely ignorant of what occurrences lie behind the application. Specific written applications must be made in respect of each occurrence. Some contractors make a practice of issuing a standard letter of delay, extension of time and loss and/or expense application every time something which might fall under one of the relevant matters occurs. If the standard application contains the information required by clause 4.23, it must be considered, however many such standard applications are received. However, if the standard letter does not satisfy the requirements of clause 4.23 it must be rejected. Where such an application does not satisfy clause 4.23, submitting it is a fruitless exercise. It is necessary to make only one written application for loss and/or expense arising out of any single occurrence. Past, present and future loss and/or expense arising from that one occurrence will be covered. The former JCT 63 clause was re-drafted:

‘to require applications to be made “as soon as it has become, or should reasonably have become apparent to him [the contractor] that the regular progress of the works or any part thereof has been or is *likely to be affected*” by specified events . . . and to state “that he has incurred *or is likely to incur* direct loss and/or expense” . . .’⁶

The contractor’s written application must refer to genuine and sustainable grounds for its submittal. Although the point unaccountably seems to be ignored in the construction industry, the making of an application under clause 4.23 for large sums of money which is not genuine and which the contractor knows not to be genuine is nothing short of attempted fraud.

Timing of application

Clause 4.23 contains a proviso which requires compliance with three sub-clauses before the clause takes effect. Application at the right time is clearly a condition precedent to the contractor’s entitlement to payment.⁷ Architects must not forget that they owe a duty to employers to reject claims which do not fulfil the time criterion. It is not that they may ignore such claims; rather that they have no power to consider them. Clause 4.23.1 requires that the contractor’s written application should be made as soon as it has become, or as soon as it should reasonably have become, apparent to the contractor that regular progress of the Works or any part of the Works has been or was likely to be materially affected. Therefore, the application must be made as early as possible and, except in exceptional circumstances, before regular progress of the Works is actually affected.

Read strictly, clause 4.23.1 allows application to be made after regular progress has been affected. However, a contractor who deliberately delays until that point will be in breach of the clause. The intention which lies behind the clause is that the architect should be kept informed at the earliest possible time of all matters likely to affect the progress of the Works and which the contractor is citing as grounds for claiming loss and/or expense. It is obvious that if the contractor notifies the architect in good time, the architect will be able to take any available action to minimise or completely eradicate the loss and/or expense and the contractor may find it difficult to establish a convincing reason why it could not give earlier notice.

In a case dealing with the standard trade contract (TC/C) in which the loss and/or expense clause (4.21) was broadly similar to that in SBC save that a long stop of two months had been inserted, a court came to the surprising conclusion that the obligation to make application timeously was not so strict:

‘It does seem however that the wording is such that the two-month long-stop period and indeed general periods run from one of two stages, namely either when

⁶ *F G Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 BLR 7 at 20 per Stephenson LJ; (italics in judgment).

⁷ *Hersent Offshore SA and Amsterdamse Ballast Beton-en-Waterbouw BV v Burmah Oil Tankers Ltd* (1979) 10 BLR 1; *Diploma Constructions Pty Ltd v Rhodgkin Pty Ltd* [1995] 11 BCL 242; *Wormald Engineering Pty Ltd v Resource Conservation Co International* [1992] 8 BCL 158; *Opat Decorating Service (Aust) Pty v Hansen Yuncken (SA) Pty* [1995] BCL vol 11, 360, *City Inn Ltd v Shepherd Construction Ltd* [2001] Scot HC 54; decision upheld on appeal: [2003] BLR 468, see also Chapter 6, Section 6.6 for a discussion on this point.

it has become apparent or when it should reasonably have become apparent that the progress of the works was or was likely to be affected. There is no reason to construe this part of the sub-sub-clause in any way other than in effect giving the contractor the option of making its application under cl 4.21 at the later of the two alternative stages, if as a matter of fact they turn out to be different. Thus, the date when the regular progress of the works was actually affected may well be later than the date when it became reasonably apparent that the regular progress of the works was likely to be affected. Depending on the facts, it may be that the time for making any given application under cl 4.21 can await a time when actual delay to the relevant part or the whole of the works has materialised.⁸

It is suggested that these words cannot be applied to the provisions dealing with time of application in SBC. Indeed, the decision is surprising even in its own context. The primary purpose of the whole machinery of application is to bring to the architect's attention that regular progress of the Works is likely to be affected by specific causes and that it will be costly to the employer, so that the architect can take some action to avoid it. Therefore, it seems, despite the conclusion in this case, there can be no excuse if the contractor's written application is made after the regular progress has been disrupted if it was reasonable for the contractor to make the application earlier. Even if it was not reasonable for the contractor to apply before the occurrence began to affect progress, the application must be made as soon as the trouble occurs, and not just within a reasonable time of it occurring. The words 'reasonable time' are conspicuously absent from this clause.

The making of an application under clause 4.23 should be the result of a considered decision made by the contractor and it should not be simply an automatic response to every architect's instruction and every occurrence on site. Obviously, in some instances, it will be difficult for the contractor to determine whether progress is likely to be affected. That is particularly the case if progress has already been disrupted and it may seem that the fresh occurrence has not added to the effect. The basic criterion is that when it has become apparent to the contractor that regular progress has been or is likely to be affected that is when the application should be made. There may also be other factors:

'Notice of intention to claim, however, could not well be given until the intention had been formed . . . [and] it seems to me that the contractors must at least be allowed a reasonable time in which to make up their minds. Here the contractors are a limited company, and that involves that, in a matter of such importance as that raised by the present case, the relevant intention must be that of the board of management [i.e. directors] . . . in determining whether a notice has been given as soon as practicable, all the relevant circumstances must be taken into consideration . . . One of the circumstances to be considered in the present case is the fact that it was not easy to determine whether the engineer's orders . . . did or did not involve additional work . . .'⁹

⁸ *WW Gear Construction Ltd v McGee Group Ltd* (2010) 131 Con LR 63 at 75 per Akenhead J.

⁹ *Tersons Ltd v Stevenage Development Corporation* (1963) 5 BLR 54 at 68 per Wilmer LJ. It should be noted that the court was there concerned with the ICE Conditions (4th edition, 1955) and the question of whether certain notices were given 'as soon as practicable'.

Similar circumstances can be envisaged in relation to architect's instructions although it is doubtful whether a contractor will need to consult its board of directors before every application for loss and/or expense. If the architect is in doubt whether the contractor's application has been made in due time, a useful test is for the architect to consider whether the alleged lateness of the application prejudices the employer's interests in any way.

Loss and/or expense

The clause refers to the contractor incurring direct loss and/or expense. Consequential losses are not covered by the clause. What the contractor is claiming under this clause may be equated with the common law right to damages. There must be a cause, which is probably not a breach of contract, and a loss or some expense suffered or incurred by the contractor. This is a relatively simple concept but not fully understood by many contractors or architects. (This matter is fully discussed in Chapters 5 and 8).

Reimbursement under other contract provisions

Clause 4.23 refers to the loss and/or expense as something for which the contractor would not be reimbursed by a payment under any other provision of the contract. The purpose is to prevent double payment as might arise, for instance, where increased costs of labour and materials during a period of delay to completion are already being recovered under the fluctuations provisions of the contract.

Where the claims arise as a result of architect's instructions requiring a variation, care must be taken to distinguish between the costs which are included in the quantity surveyor's valuation under clause 5 and those for which reimbursement may be obtained under this clause.¹⁰ There is, however, another aspect to this phrase which is often overlooked. Contractors often claim on a 'this or that' basis, hopeful that what they miss under one clause they will recover under the other. This strategy may be successful, but the use of 'would not' rather than 'has not' before 'reimbursed' is significant. The effect is that if the contractor is entitled to be reimbursed under any other clause, it is not entitled to be reimbursed under clause 4.23 whether or not it has actually received reimbursement under any other clause. It seems that if the contractor is entitled to recover under clause 5, it must persevere in its attempts for it cannot recover as loss and/or expense what amounts to a shortfall in clause 5.

Effect on regular progress

The whole basis of the loss and/or expense clause is that deferment of possession has given rise to loss and/or expense or that the regular progress of the Works or any part has been or is likely to be materially affected by any one or more of the relevant matters listed in clause 4.24. In other words, it is the effect of the stated matter upon

¹⁰ See clause 5.10.2 and the full discussion of variations under JCT standard form contracts in Chapter 14.

the regular progress of the Works, i.e. any delay to or disruption to the regular progress of the contract which is important. Some commentators suggest that the effect of this clause is to confine the contractor's entitlement to the loss and/or expense resulting from delay to progress but that it does not cover disruption or such things as loss of productivity. If that is correct, it is only prolongation costs which a contractor is able to claim under this clause.

This view may be doubted and it is important to address this point directly. What such commentators appear to be saying is that it is only when the completion date is delayed that a claim is possible, but that is not what the clause says. For example, regular progress can be affected other than by delay alone. To exclude other effects pays no attention to the words used and offends against common sense and the straightforward commercial intention of the contract. There can be a disturbance to regular progress, resulting in loss of productivity in working, without there being any delay as such either in the overall progress or in the completion of the Works. There may well be a delay to the particular activity, but if it is not critical, it will not affect the completion date. However, regular progress in that activity will be affected and the contractor is entitled to reimbursement of loss and/or expense to the extent that it can demonstrate the loss.

It would have been simple to use express words to confine the entitlement to delay to regular progress affecting the completion date. The draftsman chose not to do so, preferring the broader expression actually used. The clause cannot be interpreted so as to confine the contractor's right to reimbursement to circumstances that delay the completion date. It covers circumstances that may give rise, for instance, to reduced efficiency of working without progress as a whole being delayed.

It should be noted, however, that this is not the same as saying that merely because the work has proved to cost more or to take longer to complete than was anticipated entitles the contractor to additional payment. It must be possible for the contractor to demonstrate that the cause is directly attributable to one or more of the relevant matters set out in clause 4.23 and the effect upon regular progress of the Works.

The words 'regular progress' have caused difficulty. They are obviously related to the contractor's obligation under clause 2.4 to proceed with the Works regularly and diligently. This requirement has been the subject of considerable judicial comment:

'These are elusive words on which the dictionaries help little. The words convey a sense of activity, of orderly progress, of industry and perseverance; but such language provides little help on the question of how much activity, progress and so on is to be expected. They are words used in a standard form of building contract and in those circumstances it may be that there is evidence of usage among architects, builders and building owners or others that would be helpful in construing the words. At present, all I can say is that I remain somewhat uncertain as to the concept enshrined in those words.'¹¹

This is not particularly helpful to the contractor. So far as the related phrase 'due diligence' is concerned, a court had this to say:

¹¹ *London Borough of Hounslow v Twickenham Garden Developments Ltd* (1970) 7 BLR 81 at 120 per Megarry J.

‘If there had been a term as to due diligence, I consider that it would have been, when spelt out in full, an obligation on the contractors to execute the works with such diligence and expedition as were reasonably required in order to meet the key dates and completion date in the contract.’¹²

However, ‘regularly and diligently’ has been defined more comprehensively by the Court of Appeal:

‘What particularly is supplied by the word “regularly” is not least a requirement to attend for work on a regular daily basis with sufficient in the way of men, materials and plant to have the physical capacity to progress the works substantially in accordance with the contractual obligations.

What in particular the word “diligently” contributes to the concept is the need to apply that physical capacity industriously and efficiently towards the same end.

Taken together the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work.’¹³

Whether or not the contractor has progressed regularly and whether or not such progress has been, or is likely to be, materially affected is a matter for the opinion of the architect in each case. This judgment must be exercised objectively and according to principles laid down by law. In carrying out this duty, the architect will be greatly assisted by the contractor’s programme provided that it was submitted at the beginning of the project and that it is comprehensive. It is not enough, however, to simply request a programme. If it is to be of maximum assistance, the programme should be in the form of, or at least demonstrate, a critical path network, showing all activities, logic links and the associated resources.

The contractor’s progress may already not be regular, due to factors within its control or which do not give it any entitlement to claim. That is not fatal to its claim under this clause although it will present severe evidential problems. Among other things, the contractor will have to demonstrate what regular progress should have been and further prove that, irrespective of its own failures in this respect, regular progress would have been affected by the matter specified.

The reference to any part of the Works clearly emphasises the distinction between the extension of time and loss and/or expense clauses. Extensions of time must relate to delay in completion of the contract as a whole or, where sections are used, to any defined section. Financial reimbursement for the effect on regular progress under clause 4.23 may relate to circumstances affecting any part of the Works, even down to individual operations. The essential difference between the clauses has been neatly summed up in a Scottish case:

‘Although it took various forms the essential argument presented by counsel for the pursuers, as I understood it, was that a certificate of extension of time issued

¹² *Greater London Council v Cleveland Bridge & Engineering Co Ltd* (1984) 8 Con LR 30 at 40 per Staughton J. At appeal, the court affirmed the judgment at first instance.

¹³ *West Faulkner Associates v London Borough of Newham* (1995) 11 Cost LJ 157 CA at 161 per Simon Brown LJ.

under clause 25 had no direct bearing on a claim based on disruption under clause 26. While there might, indeed, be many situations on the ground which would result in both clauses being invoked, the purpose of an extension of time certificate was to avoid a claim for liquidate damages rather than found a claim for disruption.

In my opinion one has only to look at the terms of the two clauses to see that this argument is self evidently correct. The operation of clause 25 depends on the occurrence of a “Relevant Event”, as there defined whereas the operation of clause 26 depends on whether “*the regular progress of the Works or any part thereof has been or is likely to be materially affected by any one or more of the matters referred to in clause 26.2...*”¹⁴

Regular progress must have been, or be likely to be *materially* affected. ‘Materially’ has been defined as, among other things, ‘significant or important’,¹⁵ and it is suggested that this definition is applicable here. Trivial disruptions such as are bound to occur on even the best-run contract are clearly excluded. The circumstances must be such as to affect regular progress of the Works in a significant or important degree. The affectation must be of some substance. A more recognisable and serviceable word is ‘substantially’, although perhaps less precise. The particular point at which disruption becomes significant or important is impossible to define in general terms. It must depend upon the circumstances of the particular case.

Provision of further information

Clause 4.23.2 requires the contractor to supply such further information as should reasonably enable the architect to form an opinion about the effect on regular progress. It is clear that the clause does not come into effect until the architect makes a request for the information. It is in the contractor’s own interest to provide as much relevant information as possible at the time of its written application and not to wait until the architect asks for it under this sub-clause. The information which the architect is entitled to request is that which should reasonably enable him or her to form an opinion. The clause does not refer to reasonable information. Therefore, the point is not strictly whether the information is reasonable, but whether whatever is provided will reasonably enable the architect to form an opinion. In many instances it will amount to the same thing so that if the information is not reasonable, the architect cannot reasonably form an opinion. Importantly, an architect is not entitled to delay matters by asking for more information than is reasonably necessary.

In requesting further information it is thought that the architect must attempt to specify the precise information required, for example pages 3 and 4 of the site agent’s diary or the time sheets for 27 and 28 July 2011, rather than simply requiring the contractor to ‘prove’ its claim. The contractor is entitled to know what would satisfy the architect and enable the architect to form a view. This appears to be the position in law, it certainly should be the aim of the architect, who otherwise might be accused of delaying tactics.

¹⁴ *Methodist Homes Housing Association Ltd v Messrs Scott & McIntosh* 2 May 1997, unreported.

¹⁵ *The Concise Oxford Dictionary*.

Provision of details of loss and/or expense

Clause 4.23.3 requires the contractor to submit to the architect or the quantity surveyor (if so instructed) details of the loss and/or expense which are reasonably necessary for ascertainment. This does not necessarily mean the submission of an elaborately formulated and priced claim, although it may well be in the contractor's interest to provide it, particularly if it is expected that the matter may move to adjudication or arbitration. Clause 26.1 of JCT 98 expressly allowed the contractor to submit a quantified claim if it so wished, but although that express provision has now gone, there is nothing to prevent the contractor from doing so. It is the duty of the architect or the quantity surveyor to ascertain the amount of the direct loss and/or expense and it is necessary for them to look to the contractor to provide the relevant factual information. The clause does not come into effect until a request is made to the contractor. It is suggested that such details might include comparative programme/progress charts in network form pin-pointing the effect upon progress, together with the relevant extracts from wage sheets, invoices for plant hire, etc.¹⁶

Contractors should think carefully before rejecting requests for further information from the architect or the quantity surveyor. The architect's or the quantity surveyor's requests for further information must be reasonably precise. When it receives the request, the contractor should be able to understand with a fair degree of accuracy what it must provide. It is not thought to be sufficient if the architect or the quantity surveyor simply asks for 'proof' or says that the contractor must provide 'more details'. Endless vague requests of this kind are all too common as a delaying tactic. Although it should be obvious, it bears repeating that neither the architect nor the quantity surveyor should ask the contractor for information which they already possess. As a basic rule, the contractor should be requested to provide no more than is strictly necessary, indeed clause 4.23.3 states as much, and the necessary information must be particularised by the architect or the quantity surveyor. On receipt of the request the contractor should know that when it is provided, ascertainment of the whole claim can be completed without delay.

It is probable that the contractor is entitled to expect the requests to be properly structured and to relate to the contractor's application (if sufficiently detailed). Therefore, it is probably unreasonable for an architect to ask for further information in a piecemeal fashion. Thus if the architect asks for and receives information, the contractor can expect the architect to make further detailed requests regarding some of the information provided, but not usually for information completely unrelated to what has been produced. Of course, the contractor may get to a point when it sincerely believes that it has provided everything the architect reasonably ought to need and, at that point, the contractor may refuse to provide anything further. However, there is a serious danger associated with that approach and the contractor should be sure of its ground and not simply be tired of digging out old records. It has been said:

'If [the contractor] makes a claim but fails to do so with sufficient particularity to enable the architect to perform his duty or if he fails to answer a reasonable

¹⁶ The documentation side of claims is considered in Chapter 10.

request for further information he may lose any right to recover loss or expense under those sub-clauses and may not be in a position to complain that the architect was in breach of his duty.¹⁷

These are sensible words which highlight not only the contractor's responsibility, but also the consequences if it refuses to help itself. In such a case it is left with only itself to blame. A question that often arises is whether there is any time limit on the provision of information by the contractor; essentially whether a contractor, dissatisfied with the results of the ascertainment can continue to submit further information right up to the issue of the final certificate and expect it to be considered by the architect and the quantity surveyor. It appears that there is no express restriction on the provision of information. In *Skanska Construction UK Ltd v The ERDC Group Ltd*, the court, when considering a similar JCT contract provision, said:

'I cannot accept that the contract terms, properly construed, prohibit the provision and receipt of further information, documentation or details about direct loss and expense after the six month period following practical completion. Such a stringent time-bar would in my view require to be expressed in clear and unambiguous language, which I have been unable to find in the contract terms. On the contrary, the wording of [the clause] suggests that the [contractor] are correct in their contention that the contractual provisions simply provide a time table to which the parties are expected to adhere.'¹⁸

This suggests that, although the provisions in clause 4.5 generally requiring information to be submitted no later than six months after practical completion are not to be strictly enforced in the face of the submission of important new information, a commonsense view must be taken. That would include considering whether the contractor has already had adequate notice and opportunity to submit more information, whether the information is truly fresh or simply a rehash of information already submitted and whether it is new information which is being submitted or simply a new argument based on existing information. If the architect was obliged to wait until the contractor acknowledged that it had submitted all its arguments, it would be unlikely that the final certificate would ever be issued.

Formation of architect's opinion

The contractor initiates the process by submitting a written application in accordance with clause 4.23. If the application is correctly made in accordance with the terms of the contract, the architect must act by forming an opinion. If the architect forms the opinion that the contractor has suffered or is likely to suffer direct loss and/or expense due to deferment of possession or, because regular progress has been substantially affected by matters as stated in the contractor's application, then as soon as that is done, the architect must start the next stage: the ascertainment of the resulting direct loss and/or expense.

¹⁷ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 104 per Vinelott J.

¹⁸ [2003] SCLR 296 at paragraph 29 per Lady Paton.

Some contractors argue that the architect's opinion must be reasonable, but that is not what the contract says. The only reference to 'reasonable' in this context, is in clause 4.23.2, but that clause refers to the contractor's obligation to submit information that should reasonably enable the architect to form an opinion. This has been noted above. It is not the opinion nor the information which must be reasonable. It is the enabling which must be reasonable.

It should be noted that it is the architect's opinion which is of prime importance. The making of an application in itself does not entitle the contractor to money if, in the architect's opinion no money is due. The process of ascertainment by architect or quantity surveyor cannot begin unless the architect has formed the opinion that deferment of possession has resulted in direct loss and/or expense or that one or more of the relevant matters have materially affected regular progress.

It is often said that the contractor is not obliged to make a claim under this clause, but merely to provide information to the architect which will found a claim. If what is being suggested is that the contractor is entitled simply to provide the architect with large bundles of documents and expect the architect to effectively produce the claim, that suggestion is misconceived. It has already been seen that the contractor must identify the occurrences on which it relies and also the relevant matters under which it alleges the occurrences fall. That is the basis, the nub, of the claim. Without that, the architect can do nothing. In *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd and Others* the position of a party receiving pleadings in litigation from another party was considered:

'The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare an answer to it.'¹⁹

The architect is in a somewhat similar position on receiving an application under clause 4.23. The basic purpose of the application may accurately be characterised as to enable the architect to know what case the contractor is making in sufficient detail to enable the architect to form an opinion. In *F G Minter Ltd v Welsh Health Technical Services Organisation*,²⁰ both the High Court and the Court of Appeal analysed the contractual machinery of the claims provisions of JCT 63 by arranging the steps in chronological order. It is possible to relate the stages to SBC as follows:

- (1) deferment of possession or a relevant matter under clause 4.24
- (2) incurring of direct loss and/or expense
- (3) written application by the contractor under clause 4.23
- (4) the forming of an opinion by the architect about whether the direct loss and/or expense would or would not have been reimbursed under another provision and whether there has been or is likely to be a material effect on regular progress (to assist this process the architect may require further information from the contractor)
- (5) the ascertainment of loss and/or expense
- (6) certification of the amount properly due
- (7) payment by the employer.

¹⁹ (1994) 72 BLR 26 at 33 per Saville LJ.

²⁰ (1980) 13 BLR 7.

Because the timeous submission of the contractor's application is a condition precedent to the contractor's entitlement under these provisions, if the contractor's application is not made at the proper time, then the architect must reject it, whatever its merits may be, and the architect has no power under the terms of the contract to form an opinion about it. Moreover, an architect who proceeds to consider a late application by the contractor may be liable to the employer, particularly if the relevant matters being considered are not such as the contractor could use to formulate a claim at common law for breach of contract. The architect can deal only with the relevant matters which are included in the contractor's application; the architect has no authority to deal with any things affecting regular progress that are not included in a written application from the contractor albeit the architect may be fully aware of them.

Matters within the architect's knowledge

Depending on circumstances (such as the presence of a permanent clerk of works), the architect may not have more than a general knowledge of what is happening on site. This view has some judicial support:

'the architect is not permanently on the site but appears at intervals, it may be of a week or a fortnight . . .'.²¹

However, there are occasions when the architect may have substantial information and must make use of such information in forming an opinion, because the architect is not a stranger on the Works.²² Nevertheless, it is the contractor who is responsible for progressing the Works in accordance with the requirements of the contract and the architect's instructions. The practical effect of the contractor's obligation to notify as soon as the regular progress is likely to be materially affected is quite significant.²³ The architect is entitled to assume, unless notified to the contrary, that work is progressing smoothly and efficiently and that there are no current or anticipated problems. For instance, if the architect issues an instruction requiring extra work and the contractor carries it out without comment, the architect is probably entitled to assume that the effects of that instruction can be absorbed by the contractor into its programme of work without any consequential delay or disruption.²⁴ That is not invariably the case. In *London Borough of Merton v Stanley Hugh Leach Ltd* it was said:

'Although I accept that the architect's contact with the site is not on a day to day basis there are many occasions when an event occurs which is sufficiently within the knowledge of the architect for him to form an opinion that the contractor has been involved in loss or expense.'²⁵

²¹ *East Ham Corporation v Bernard Sunley & Sons Ltd* [1965] 3 All ER 619 at 636 per Lord Upjohn when speaking of the architect's duty to 'supervise' work.

²² *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

²³ *Jennings Construction Ltd v Birt* [1987] 8 NSWLR 18.

²⁴ *Doyle Construction Ltd v Carling O'Keefe Breweries of Canada* (1988) *Hudson's Building and Civil Engineering Contracts* (1995) Sweet & Maxwell at 4.133.

²⁵ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 96 per Vinelott J, quoting the interim award of the arbitrator.

That is undoubtedly true and it is particularly so where the architect has personal knowledge of the problem. A clear example of that is when an architect is late providing important information to the contractor, knowing that it will create a delay to a critical activity. Other examples are if the architect instructs substantial variations in the Works or issues postponement instructions.

Ascertainment

The word 'ascertainment' is defined as meaning 'find out (for certain), get to know'.²⁶ Ascertainment is not simply something which can be left to the unfettered judgment of the architect or the quantity surveyor. They have a duty to find out the amount of the direct loss and/or expense for certain, not to estimate or best guess it. The loss and/or expense that has to be found out must be that which is being, or has been actually incurred.²⁷ Many applications for loss and/or expense are settled by the quantity surveyor on the basis of figures included in the contract bills. Such figures have no relationship to the actual costs and if they are used, it flies in the face of what the contract clearly sets out. In many instances, claims settled on this basis give the contractor somewhat less recompense than that to which it is entitled, because the figures in the contract bills may well be wildly inaccurate forecasts.

Obviously, there may be instances where the contractor has poor records and an assessment is the best that can be done. However, such instances should be the last resort. It is thought that the architect cannot refuse to certify anything at all to the contractor on the ground that proper information is not available if it is clear that the contractor has incurred loss and/or expense, but the precise evidence is not available. In such circumstances, the architect should be careful and conservative in certification.

Clause 4.23 makes clear that the architect may carry out the ascertainment or may instruct the quantity surveyor to ascertain the direct loss and/or expense. In these circumstances it will be difficult for the architect to certify anything other than the amount ascertained by the quantity surveyor. However, responsibility for certification of the amount lies with the architect who may be held to be negligent if certifying without taking reasonable steps to be satisfied of the correctness of the amount.²⁸ What such steps may be will depend on all the circumstances, but the architect should, at least, go through the basis of ascertainment with the quantity surveyor to be satisfied that the correct principles have been put into effect. There is nothing in the contract which suggests that the architect is bound to accept the quantity surveyor's opinion or valuation when exercising certifying function.²⁹

It is essential that the architect's instruction to the quantity surveyor is precisely set out in writing. The quantity surveyor's agreement to assist must also be in writing

²⁶ *The Concise Oxford Dictionary*.

²⁷ *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd* (1995) 76 BLR 65. See the consideration of this point in Chapter 7, Section 7.3.

²⁸ *Sutcliffe v Thackrah* [1974] 1 All ER 859.

²⁹ *R B Burden Ltd v Swansea Corporation* [1957] 3 All ER 243.

so as to establish the quantity surveyor's responsibility to the employer should the ascertainment be carried out negligently. In any event, the employer must be informed of this arrangement, since fees will be involved and, although the contract speaks of the architect instructing the quantity surveyor, the reality is that it can only be done with the agreement of the employer. It is not unknown for an employer, anxious to avoid paying the quantity surveyor the fees for carrying out the ascertainment, to refuse to sanction the instruction and to demand that the architect carries out the ascertainment without assistance. The architect's response to that will depend on the architect's terms of engagement. Usually, an architect's terms of engagement expressly exclude the ascertainment of the contractor's claims. Therefore, the architect might well point out that ascertainment of the claim is not included in the list of architectural services and that dealing with complex cost calculations of that kind is outside the average architect's expertise.

13.1.5 Commentary on the relevant matters

What is often thought of as the classic statement of the interrelationship of time and money was set out in *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* it was said of JCT 63 provisions equivalent to those now found in SBC, clauses 2.26–2.29 and 4.23–4.26:

“The broad scheme of these provisions is plain. There are cases where the loss should be shared, and there are cases where it should be wholly borne by the employer. There are also those cases which do not fall within either of these conditions and which are the fault of the contractor, where the loss of both parties is wholly borne by the contractor. But in the cases where the fault is not that of the contractor the scheme clearly is that in certain cases the loss is to be shared; the loss lies where it falls. But in other cases the employer has to compensate the contractor in respect of the delay, and that category, where the employer has to compensate the contractor, should, one would think, clearly be composed of cases where there is fault upon the employer or fault for which the employer can be said to bear some responsibility.”³⁰

This is sometimes pointed to as a masterly exposition of the position and so it is, but only if the reader accepts the premise that extension time and loss and/or expense clauses are linked. Of course they are not linked and it is clear that they are for different purposes. The paragraph, therefore, although much quoted is not very helpful or, at least, must be treated with caution.

There are now seven broad categories in clauses 4.23 and 4.24 which set out grounds for entitlement to loss and/or expense. The JCT has taken the opportunity to reduce the number of relevant matters, because many are now covered by clause 4.24.6 which contains the catch all impediment, prevention or default. Starting with deferment and then in the order in which the relevant matters appear in clause 4.24, they are as follows:

³⁰ (1980) 15 BLR 8 at 12 per Judge Edgar Fay.

Deferment of possession of site: clause 4.23

The employer is entitled to defer giving the contractor possession of the site for a period of up to six weeks unless a shorter period was stipulated in the Contract Particulars. The deferment is stated to be six weeks or whatever shorter period is stipulated by the employer. It is probably unwise to reduce the period. It is considered that deferment is a positive activity which the employer should signal by giving written notice although that is not expressly stated in clause 2.5. On a strict reading of clauses 2.5 and 2.29.3, this ground can only apply where the employer has actually exercised the right to defer. It should be noted that clause 4.23 refers to the contractor incurring loss and/or expense due to deferment of possession. In order for the relevant matters to apply, they must be the cause of a material effect on regular progress. Obviously, deferment will have an immediate effect on regular progress. But, it may be that the contractor will have to use a considerable degree of ingenuity to found a successful claim for loss and/or expense resulting from deferment of possession. That is because deferment does not extend the contract period; it simply moves it in time with dates for possession and completion continuing to bear the same relationship to each other. If the contractor is given early notice of deferment, it is likely to incur far fewer costs than if the deferment is only notified a few days before start on site. Issues to be considered are plant hire for site, the possibility of using operatives elsewhere, delivery dates and key dates for various sub-contractors and the possibility of increased costs and interest charges.

Variations: clause 4.24.1

This ground includes all variations, including architect's instructions and other things which are to be treated as requiring a variation, whether or not they are so intended. Architect's instructions requiring a variation are empowered by clause 3.14 and they are clearly covered by this ground. In addition, departures from the stipulated method of preparation of the contract bills, errors or omissions in the same and inadequacies in design in the Employer's Requirements (if used) and the correction of discrepancies in the Employer's Requirements are to be treated as variations under clause 2.14.3 and clause 2.16.2 respectively. Expressly excluded are variations which are the subject of a confirmation acceptance of a variation quotation. These are variations under schedule 2, paragraph 4. Valuations of variations and instructions are dealt with in clause 5, which is discussed in Chapter 14. In considering entitlement to payment under this ground, it must be remembered that clause 4.23 does not cover a situation where the contractor would be reimbursed under any other clause. Particular care must be taken when considering entitlement under this ground, because clause 5.6.3.3 includes provision for the quantity surveyor to adjust the preliminary items. It is sometimes difficult to decide whether a relevant matter should be reimbursed as additional preliminaries or as loss and/or expense. However, the practice, which is prevalent among some contractors, of submitting a claim in the alternative (variation or loss and/or expense) is prohibited by the distinction referred to above in 'Reimbursement under other contract provisions'.

Architect's instructions: clause 4.24.2

The instructions referred to are:

- (i) clause 2.15 – Discrepancies in drawings, contract bills, etc.
- (ii) clause 3.15 – Postponement of any work to be executed under the contract
- (iii) clause 3.16 – Expenditure of provisional sums (except in connection with defined work)
- (iv) clause 3.17 – Inspections and tests.

They are briefly discussed below:

- (i) The discrepancies or divergences referred to in clause 2.15 are those which occur in or between the contract drawings and/or the contract bills and/or architect's instructions and/or any of the further information issued by the architect. It should be noted that discrepancies in the printed form or between the printed form and any other document are not grounds for recovery of loss and/or expense. This is probably because clause 1.3 makes clear that the printed form takes precedence over the other documents in any event.

The main ground for reimbursement of loss and/or expense is likely to be discrepancies in or between the contract documents (other than the printed form). Architect's instructions and further drawings and documents are issued during the progress of the Works. Therefore, if they differ from each other or from the contract documents, the discrepancy is likely to be discovered virtually on issue and will be promptly corrected by an architect's instruction under clause 2.15 with little or no effect on the progress of the Works. The contractor's obligation is not to find discrepancies, but merely to notify the architect if it does find them.³¹ Therefore, the contractor may not discover a discrepancy until after that portion of the work has been constructed. That does not prevent the contractor from claiming on this ground, provided it complies with the requirements of clause 4.23.

- (ii) The postponement clause 3.15 is sometimes misinterpreted. What it does is to give power to the architect to issue instructions for the postponement of any work to be executed under the provisions of the contract. So it refers to postponement of work, nothing else. Clause 3.15 does not empower the architect to issue an instruction postponing the date in the Contract Particulars for possession of the site.

Before the introduction of clause 2.5 allowing the employer to defer possession for up to six weeks, the contractor's right to possession of the site on the date in the Contract Particulars was absolute.³² Possession refers to the whole of the site and, in the absence of sectional possession, the employer is not entitled to give possession in parcels.³³ It is sometimes thought that the employer can get away with giving the contractor what is referred to as

³¹ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

³² A fuller consideration of this topic is to be found in Chapter 4, Section 4.6.

³³ *Whittall Builders v Chester-le-Street District Council* (1987) 40 BLR 82.

‘sufficient possession’. In other words, enough possession of the site to enable the contractor to start work and to proceed for a period until possession of more of the site is necessary. This view must be treated with caution. The contractor’s right to possession is an express term of the contract (see clause 2.4) and in any event there is at common law an implied term in any construction contract that the employer will give possession of the site to the contractor in time to enable it to carry out and complete the work by the contractual date for completion.³⁴

In *London Borough of Hounslow v Twickenham Garden Developments Ltd*,³⁵ Mr Justice Megarry said ‘The contract necessarily requires the building owner to give the contractor such possession, occupation or use as is necessary to enable him to perform the contract’. Even if the ‘sufficient possession’ argument has any validity, sufficient possession will usually mean possession of the whole of the site. That is because the contractor may wish to do very many things on the site other than simply constructing the building. He may wish to check the condition of the site or decide the best place to store materials or place site offices. Unless full possession is given, the contractor is deprived of the ability to consider the site as a whole.

Accordingly, subject to the employer’s right to defer possession, if activated, any failure by the employer to give possession on the due date is a breach of contract, entitling the contractor to bring a claim for damages at common law in respect of any loss that it suffers as a consequence.³⁶ In an Australian case it was held that, where there was failure to give possession of the building site to a contractor, this constituted a breach of contract, and on the facts the contractor was entitled to treat the contract as repudiated.³⁷ Although clause 4.24.2 refers to instructions issued under clause 3.15, such instructions have also been held to arise as a matter of fact.³⁸

Whether a postponement instruction gives rise to any loss and/or expense at all or to what extent it does so must be the subject of careful investigation by the architect or, if so instructed, the quantity surveyor. For example, if the instruction is issued relatively early, so that the contractor can use its best endeavours to prevent any delay, if it is of short duration and if, most importantly, it applies to non-critical activities, the effect upon regular progress may be negligible.

- (iii) This deals with instructions for the expenditure of provisional sums. This usually entails adding work and/or materials. Essentially, the contract treats this as an instruction for additional work and it is dealt with accordingly. Compliance with an architect’s instruction for the expenditure of a provisional sum for

³⁴ *Freeman & Son v Hensler* (1900) 64 JP 260.

³⁵ (1970) 7 BLR 81.

³⁶ *London Borough of Hounslow v Twickenham Garden Developments Ltd* (1970) 7 BLR 81. See Chapter 4 for claims at common law.

³⁷ *Carr v Berriman Pty Ltd* (1953) 27 ALJR 273.

³⁸ See *M Harrison & Co (Leeds) Ltd v Leeds City Council* (1980) 14 BLR 118, where an instruction expressed as a variation order was held to be in fact an order for postponement and *Holland Hannen & Cubitts (Northern) v Welsh Health Technical Services Organisation* (1981) 18 BLR 80, where a notice which was apparently intended to notify the contractor of defective work was held to instruct postponement.

defined work is expressly excluded.³⁹ That is because the contractor has been given sufficient information to enable it to make appropriate allowance in planning its work at tender stage. A further type of architect's instruction, regarding antiquities, is included in the next relevant matter.

- (iv) This former 'matter' under JCT 98 is now partly dealt with in clause 4.24.2.2 dealing with architect's instructions and, to the extent to which that relevant matter does not cover the point, it will be swept up in the impediment and prevention clause. Clause 3.17 empowers the architect to require work to be opened up for inspection and to instruct the contractor to arrange for or to carry out the testing of materials and work to ensure that they comply with the contract. It should be noted that under the former JCT 98 clause 8.3 and under the present SBC clause 3.17, the default position is that the cost of such opening up and testing is to be added to the contract sum unless the inspection or tests show that the materials or work are not in accordance with the contract. The wording appears to lay the burden of proving that materials or work are not in accordance with the contract on the architect. Normally, that should not be a problem, because such things ought to be matters of fact. However, it emphasises the need to have representatives of both contractor and architect on site when the opening up takes place.

An interesting situation arises if the specification or bills of quantities direct that work must not be covered up until after inspection by the architect. Failure to observe that provision will clearly place the contractor in breach of contract and, therefore, the architect may instruct that the work is to be opened up. However, the contractor will still be entitled to payment under this relevant matter if the work is found to be in accordance with the contract. The solution to this problem lies in the employer's ordinary entitlement to damages for the contractor's breach. The damages are clearly the money that the employer has to pay out under clauses 4.23 and 3.17. Although there is no machinery in the contract to enable the employer to recover such money, there seems to be no reason why the employer cannot do so, after giving the relevant notices, by setting-off the amount paid out against the amount payable under the certificate after giving the necessary notices. A contractor which failed to comply with a requirement to allow inspection before covering up would be ill-advised to seek loss and/or expense under this ground.

Antiquities: clause 4.24.3

This ground concerns the action to be taken in regard to the discovery of antiquities on the site. It is worthy of note that the action expected of the contractor under clause 3.22.1, which is likely to be prior to any instruction issued by the architect, is not a relevant event although it is a ground for loss and/or expense in this relevant matter. The architect's instructions under clause 3.22.2 regarding dealing with

³⁹ See Chapter 14, Section 14.5.4 under the sub-heading: *Valuation of approximate quantities, defined and undefined provisional sums.*

antiquities are included here rather than under the relevant matter 4.24.2 devoted expressly to architect's instructions.

Clause 3.22 generally provides for what is to happen if fossils, antiquities and other interesting objects are found on site or during excavation. The contractor is required to use its best endeavours not to disturb the object and to cease work as far as is necessary and to take all necessary measures to preserve the object in its position and condition. The contractor must inform the architect or the clerk of works. The architect is then required to issue instructions and the contractor may be required to allow a third party, such as an expert archaeologist, to examine, excavate and remove the object. All this will almost undoubtedly involve the contractor in direct loss and/or expense. In JCT 98, provision for recovery of such loss and/or expense was not dependent on the contractor's application. That has now been changed and, sensibly brought under clause 4.23.

Claims under this ground are not uncommon and are likely to increase. Modern technology, and especially aerial survey, is constantly revealing new archeological sites. The provisions of the Ancient Monuments and Archaeological Areas Act 1979, which came into force in 1982, affect contractors working in 'areas of archaeological importance', which is a concept introduced by Part II of the Act. Moreover, if an 'ancient monument' was suddenly discovered in the course of contract Works, where one was unexpected, the possibility of its being scheduled under the Act (and thus protected) could not be completely discounted. In fact, this has happened only rarely. Instead, the relevant government department might make financial help available for the relocation of piling or the rafting-over of the remains, and in such a case the contractor would obviously have a claim.

Suspension by the contractor of performance of his obligations: clause 4.24.4

This ground is almost identical to relevant event clause 2.29.5 and the remarks there are equally applicable here. However, there is a notable difference or addition. This relevant matter includes the proviso that the suspension must not be frivolous or vexatious. This addition has been discussed under relevant event 2.29.4. The words are not necessary, because a frivolous or vexatious suspension would be unlikely to fall under the criteria set out in clause 4.14. Therefore, the words should be added to the relevant event also.

The contractor may suspend performance of its obligations after seven days written notice if the employer does not pay it sums due. It is noteworthy that the Housing Grants, Construction and Regeneration Act 1996, from which the power to suspend derives, does not expressly entitle the contractor to recover any losses resulting from the suspension.⁴⁰ Nor is such recovery to be easily implied. It is virtually certain that a contractor which resorts to suspension, in an attempt to recover money owed, will be put to expense by the suspension and also by the re-organisation and mobilisation of resources necessary if the suspension comes to an end on payment of the amount due. This matter allows the contractor to be paid such sums as might otherwise be difficult to recover.

⁴⁰ This is due to be amended by the *Local Democracy, Economic Development and Construction Act 2009* to give the contractor the right to recover reasonable costs. At the time of writing the Act has yet to come into force.

***Approximate quantity not a reasonably accurate forecast of the quantity of work:
Clause 4.24.5***

This matter was introduced with the use of the Standard Method of Measurement edition 7 (SMM7). Quite simply, it is intended to cover the situation where an approximate quantity has been included in the bills of quantity, but the quantity of work actually executed under that item is different; either greater or less. As long as the approximate quantity is reasonably accurate, the contractor has no claim. What is 'reasonably accurate' will depend upon all the circumstances, but as a rule of thumb an approximate quantity which was within 10% of the actual quantity probably would be difficult to demonstrate as unreasonable. The contractor's entitlement will usually be based on the extra time it requires over and above the time it has allowed for doing the quantity of work in the bills.

The approximate quantity may be an unreasonable estimate, because the actual quantity is substantially less than in the bills. Theoretically, the contractor will also have grounds for a claim under this head, but it will take considerable ingenuity to put together. It should be noted that this clause expressly refers to 'work'. The conclusion is that increases in materials will not entitle the contractor to claim. Generally, it is only an increase in work or labour which will require extra time to execute, but there may be circumstances where increases in the quantity of materials may result in additional off-site and un-quantified work, such as in the drawing office or the fabrication shed. It appears that the contractor will have no claim for such matters, at least under this head. It must be claimed under clause 4.14 and treated as a variation.

Impediment, prevention or default by the employer: clause 4.24.6

This ground is identical to relevant event clause 2.29.6 and the remarks there are generally applicable here. Because this ground is very broadly drafted to include breaches of contract on the part of the employer, it brings within the contractual machinery, and therefore, within the powers of the architect to deal with under this clause, many occurrences for which the contractor formerly would have had to mount a common law claim. However, such claims are still subject to any provision as to notice, etc., which are imposed by the contract. The JCT has taken the opportunity to reduce the number of relevant matters, because many are now covered by this clause 4.24.6. It will be useful to consider the former matters so covered since they are likely to be the most common reasons why a contractor will cite this relevant matter. They are:

Late instructions drawings, details or levels

This ground deals with the failure of the architect to provide the contractor with information in due time in accordance with the provisions of the contract. There are two parts to this ground. One covers the situation if there is an information release schedule; a situation so rare as to be virtually non-existent. The other covers the general and usual situation where the architect is obliged to provide information to

enable the contractor to complete the Works in accordance with the contract. Among the important terms of the contract with which the contractor must comply is the date for completion.

There are two parts to this ground in another sense, because the architect's obligation is not only to provide correct information, but also to provide it at the correct time. The 'matter' simply concerns a failure of the architect to comply with what is now clauses 2.11 and 2.12 and, therefore, embraces the failure with regard to time or correct information. Either failure may cause a delay which may affect the completion date. The commentary on this ground under SBC in Chapter 11, Section 11.1.3 is relevant.

Work not forming part of the contract

The former matter dealt with by clause 26.2.4 of JCT 98 covered two situations. The first was where the employer carried out work not forming part of the contract or arranged for such work to be done by others while the contract works were being executed by the contractor. In addition it covered the situation where the employer had undertaken to provide materials or goods for the purposes of the Works. This situation is now covered by SBC clause 2.7 which provides that, where the work in question is properly described in the contract bills, the contractor must permit such work to be done.

In that situation, it will probably only be if the work concerned causes an unforeseeable delay or disruption to the contractor's own work that any claim will be possible under this relevant matter. That is because the contractor, having had due warning in the contract bills, will have been able to make proper provision in the contract sum and in its programme for the effect on the Works of such work by others. However, clause 2.7.2 provides that if the work in question is not adequately described in the contract bills but the employer wishes to have such work executed, the employer may arrange for it to be done with the consent of the contractor, which is not to be unreasonably withheld. In that event, it is almost inevitable that a claim will arise under this ground, because the contractor will not have been able to make proper allowance in its programme or in its price.

Occasionally, but comparatively rarely, the contractor may be able to found a claim on work carried out by statutory undertakers. This will only be possible if such work is carried out by them as a matter of contractual obligation, rather than under statutory duty.⁴¹ The usual legal position of statutory undertakers is that they are under a statutory duty to carry out certain work and, when so doing, their obligation, if any, 'depends on statute and not upon contract.'⁴² When statutory undertakers are acting in accordance with their statutory duties, the contractor is precluded from making any claim for loss and/or expense under the contract terms even if their work does adversely affect the contractor's progress. Obviously, such work may entitle the

⁴¹ This follows from the decision in *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* (1980) 15 BLR 8, which is of relevance to SBC regarding the meaning of words in this subclause 'Work not forming part of the contract'.

⁴² *Clegg Parkinson & Co v Earby Gas Co* (1896) 1 QB 56.

contractor to an extension of time under clause 2.26. However, in one case a dispute arose and the arbitrator found as a fact that in the circumstances of that contract the statutory undertakers were engaged under contract and that most, if not all, of the work being carried out by the statutory undertakers was not being performed as part of their statutory duties, but was being executed by them expressly at the employer's request and expense and under contract. The court remarked of the situation:

'These statutory undertakers carried out their work in pursuance of a contract with the employers; that is a fact found by the arbitrator and binding on me In carrying out [their] statutory obligations they no doubt have statutory rights of entry and the like. But here they were not doing the work because statute obliged them to; they were doing it because they had contracted with the [employers] to do it.'⁴³

The second part of clause 26.2.4.2 of JCT 98 was very odd. It referred to the supply or failure to supply materials and goods which the employer had agreed to supply for the Works. But the contract made and makes no such provision, although perhaps it should. Therefore, any such agreement would have to be the subject of a separate contract, preferably committed to writing and by both parties. A further point is that, as a supply only contract, it would not fall under the Housing Grants, Construction and Regeneration Act 1996.⁴⁴ The ground was not simply the employer's failure to carry out the work or supply materials. The contractor was also entitled to claim if the employer executed the work or supplied the materials perfectly properly and at the right time. The criterion was whether the execution of work or the supply of materials and goods, whether or not at the correct time, materially affected regular progress of the Works. This placed a considerable burden on the employer and made the employer's decision to employ others upon the Works something akin to writing a blank cheque.

Failure to give ingress to or egress from the site

Under the current SBC this would rank as prevention. The former clause was not as broadly drafted as first appeared. It echoed the relevant event and merely provided for failure by the employer to provide access to or exit from the site of the Works across any *adjoining or connected* land, buildings, way or passage which was in the employer's own *possession and control*. It did not cover failure to obtain a right of way across an adjoining owner's property, or in cases of obstruction of the highway. Neither did it extend to the situation where protestors impeded access to a site.⁴⁵ It covered the situation where either there was a provision in the contract bills and/or drawings, or an agreement had been reached between the contractor and the architect, permitting the contractor means of access to the site. The contractor was obliged to comply with any notice provisions.

⁴³ *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* (1980) 15 BLR 8 at 20 per Judge Edgar Fay.

⁴⁴ See s. 105(2)(d) of the Act.

⁴⁵ *LRE Engineering Services Ltd v Otto Simon Carves Ltd* (1981) 24 BLR 127.

The clause did not apply where the employer may have undertaken to obtain access across land which is not in the employer's possession and control. In such a case failure by the employer to obtain access would probably give rise to a claim at common law, but not under the terms of the contract. There was a further limitation in the clause which referred to access in accordance with contract bills or the contract drawings. It is doubtful that the former 'matter' will act as a limitation on the circumstances in which the contractor might successfully apply for loss and/or expense. It appears that claims for lack of ingress or egress are now likely to be possible on a broader basis than formerly.

Compliance or non-compliance with duties in relation to the CDM Regulations

Clauses 3.23 and 3.24 provide, among other things, that the employer will ensure that the CDM co-ordinator carries out all duties under the Construction (Design and Management) Regulations 2007 and, where the contractor is not the principal contractor for the purpose of the Regulations, that the principal contractor carries out all its duties under the CDM Regulations. It will be usual for the main contractor to be the principal contractor for the purposes of the Regulations and the employer's duty will just relate to the CDM co-ordinator. The obligation placed upon the employer to 'ensure' is virtually to guarantee that the CDM co-ordinator will carry out the CDM co-ordinator's duties.⁴⁶ It should be noted that the contractor's entitlement to recover loss and/or expense did not depend on the employer's failure to comply with the relevant obligations. Compliance could also be a ground, provided of course that the other conditions were satisfied.

13.1.6 Certification of direct loss and/or expense

So far as the contractor is concerned, clause 4.25 is very important. It provides for any amounts which are ascertained to be added to the contract sum. It refers to amounts being ascertained from time to time. Clearly, the clause does not envisage that the architect is entitled to wait until the whole of the contractor's application has been dealt with before certifying anything. As parts of the total application are ascertained, the architect or the quantity surveyor must add them to the contract sum. Even if clause 1.3 of the contract did not expressly provide that the contract must be read as a whole, it would be implied⁴⁷ and clause 4.25 must be read in conjunction with clause 4.4 which makes clear that as soon as any amount is ascertained in whole or part, it must be taken into account in the next interim certificate. Not only is this an excellent provision from the point of view of the contractor's cash flow, it also acts as a means of reducing the employer's possible liability for financing

⁴⁶ That has been the view of the court where a party has an obligation to 'ensure' or 'secure' the doing of something: *John Mowlem & Co Ltd v Eagle Star Insurance Co Ltd* (1995) 62 BLR 126 CA, confirming the judgment of the Official Referee. The court made clear their view that 'to ensure' meant exactly what it said and amounted to more than an obligation to use best endeavours.

⁴⁷ *Brodie v Cardiff Corporation* [1919] AC 337.

charges.⁴⁸ It should be noted that loss and/or expense amounts are expressly stated not to be subject to retention in clause 4.16.2.2.

13.1.7 Contractor's other rights and remedies

Clause 4.26 acts to preserve the contractor's common law and other rights.⁴⁹ This is in addition to the rights expressly given under clause 4.23 which provide a particular remedy or set of remedies for deferment and the relevant matters in clause 4.24, but subject to the contractor complying strictly with the provisions set out in clause 4.23. In particular, the contractor's right to claim damages for breach of contract on the same grounds are preserved.⁵⁰ The right to claim reimbursement for direct loss and/or expense under the terms of the contract is not connected to any rights or remedies which the contractor may possess in law. If it were not for clause 4.23, there would be many instances when the contractor would certainly suffer loss and expense but be quite unable to recover it. Occasionally it may be that because of the limitations imposed by the contract machinery the contractor will be advised to pursue remedies outside the contract.⁵¹ However, it has already been remarked that many of the relevant matters do not fall into the category of breaches of contract.⁵²

13.2 Intermediate Building Contract (IC and ICD)

13.2.1 Main points

The provisions in IC and ICD that may give rise to loss and/or expense claims by the contractor are contained in clauses 4.17–4.19 inclusive. It will be seen that these clauses are essentially based on SBC clauses 4.23–4.26. They are identical in wording under IC and ICD. The main features are:

- The contractor's entitlement to reimbursement under the contract is limited to deferment of possession of the site or specified relevant matters materially affecting the regular progress of the Works.
- The contractor must submit a written application to trigger the process.
- The contractor must provide supporting information reasonably necessary to achieve the end envisaged by the clause.

⁴⁸ See *F G Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 BLR 7, and the discussion in Chapter 7, Section 7.3.10.

⁴⁹ The Court of Appeal decision in *Lockland Builders Ltd v John Kim Rickwood* (1995) 77 BLR 38, suggested that where a party's common law rights were not expressly reserved, they could co-exist with the contractual machinery only where the other party displayed a clear intention not to be bound by the contract. This view seems to ignore earlier contrary authority: *Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) Ltd* (1974) 1 BLR 73; *Architectural Installation Services Ltd v James Gibbons Windows Ltd* (1989) 46 BLR 91. The more recent Court of Appeal decision in *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd* (1998) 87 BLR 52 appears to set the matter straight.

⁵⁰ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

⁵¹ See Chapter 4.

⁵² Chapter 1, Section 1.2.2.

- The architect must form an opinion about whether or not the contractor has incurred or is likely to incur direct loss and/or expense.
- The architect, or the quantity surveyor if so instructed, must ascertain the amount of the loss and/or expense.

13.2.2 Significant differences

Contractor's application

It is probable that the timely submission of the contractor's application is not a condition precedent to the recovery of loss and/or expense although there is a requirement for submission within a reasonable time of it becoming apparent that the contractor will incur loss and/or expense. It is likely that late application under this contract is something which the architect is entitled to take into account in forming an opinion. For example, a very late application may mean that there is an absence of good records and the architect cannot form a realistic view of the claim. It is thought that, in such circumstances, the architect is entitled to discard unreliable information and consider only what is capable of substantiation.

Provision of information by the contractor

Unlike the position under SBC, it is not clear whether or not the obligation of the contractor to provide information in support of its application is subject to any request from the architect or quantity surveyor. The words 'required by' at first sight may appear to mean 'needed by', but the words may also mean 'demanded by'. It is thought that, in the circumstances surrounding the making of an application, this latter interpretation is the correct one. The point is not without doubt and the best that can be said is that the point is ambiguous and in the absence of clear words, it behoves the architect or the quantity surveyor to set out the request for information as precisely as possible. If the contractor is to recover under the clause it must provide whatever information is 'reasonably necessary' to enable the architect and/or the quantity surveyor to carry out their own obligations. The wording strongly suggests that it is a condition precedent and, indeed, it is difficult to see how any validation or ascertainment can be carried out without the necessary information. The contractor is advised to provide all the information it judges to be necessary without waiting for the request.

Certification

Unlike the SBC, there is no express provision that sums ascertained must be added to the contract sum as the ascertainment proceeds rather than waiting until the process is complete nor is there any equivalent to SBC clause 4.4 which provides for inclusion of ascertained sums in the next interim certificate in the same way. Nevertheless, it will probably be implied that the architect cannot simply sit on a large sum ascertained for want of completing the ascertainment of a substantially

lesser sum. Clause 4.9.2 which provides for the issue of interim certificates at intervals after practical completion at intervals of two months reinforces that view.

Discrepancies

It is merely to be noted that this ground has been made virtually identical to the corresponding ground in SBC. There was a significant difference between the equivalent provisions in JCT 98 and IFC 98.

Named persons as sub-contractors

This is a complex topic. The effect of certain architect's instructions, regarding named sub-contractors, upon regular progress is made a ground for claim. The special position of named sub-contractors in IC and ICD is a subject for another book.⁵³ In short, the contractor must engage, as sub-contractors, any persons or firms who are named either in the contract documents or in an architect's instruction for the expenditure of a provisional sum, to carry out specified parcels of work. The naming process is a complex process, involving the use of a standard form of invitation to tender, tender and articles of agreement (Form ICSUB/NAM) and standard conditions of sub-contract incorporated into the sub-contract by reference (Form ICSUB/NAM/C), together with an optional form of Named Sub-Contractor/Employer Agreement (ICSUB/NAM/E).

Named sub-contractors under IC and ICD effectively become domestic sub-contractors to the main contractor. Once the naming procedure has been completed it is unusual for the architect to have any further involvement with the administration of the sub-contract. The architect does not direct the main contractor as to the payments to be made to the named sub-contractors nor is the architect required to certify practical completion of their work. Matters such as extensions of time for the sub-contractor and settlement of its account are matters between the sub-contractor and the main contractor and neither the architect nor the quantity surveyor under the main contract will be involved. The times when the architect may become involved and may be required to issue instructions are when particular problems occur as specified in schedule 2. In certain circumstances the main contractor may be entitled to reimbursement of any direct loss and/or expense arising from the effect of such instructions on the regular progress of the Works. However, schedule 2 sometimes expressly precludes any loss and/or expense. Therefore, it should be noted that the instruction will amount to a relevant matter only to the extent stated in clause 3.7 and schedule 2. These are the principal situations:

- (i) Where a sub-contractor has been named in the contract documents but the contractor is unable to enter into a sub-contract with the named firm in accordance with the particulars in the contract documents, the contractor must notify the architect immediately, specifying the problem with the particulars.

⁵³ Readers are referred to David Chappell, *JCT Intermediate Building Contracts 2005* (2006) 4th edition, Blackwell Publishing.

An architect who is reasonably satisfied with the reason given may issue an instruction to the contractor to do one of three things:

- change the particulars in order to remove the problem, or
- omit the work from the contract, in which case the employer may have the work carried out by another contractor under a separate contract, or
- omit the work from the contract documents and substitute a provisional sum, which would then allow the architect to name another sub-contractor.

Instructions issued by the architect under either of the first two options are variation instructions which entitle the contractor to the direct loss and/or expense arising from the effects of the instruction on the regular progress of the Works. Such effects would include the employment by the employer of others to do the work and any impact upon the contractor's regular progress. If the third option is followed the 'naming' of a replacement sub-contractor involves a provisional sum and the position is as set out in (ii), following.

- (ii) If a sub-contractor is named in an architect's instruction for the expenditure of a provisional sum, any direct loss and/or expense caused to the contractor by the effect of the instruction on regular progress of the Works is recoverable under clause 4.18.2.1 which expressly refers to clause 3.13. For example, if the named sub-contractor's availability does not fit the main contract programme, it is almost inevitable that the contractor will suffer disruption and/or delay to progress. The main contractor may make a 'reasonable objection' to entering into the sub-contract under schedule 2, paragraph 5.3. It appears that if the contractor lodges such an objection, the architect will be obliged to instruct a different sub-contractor unless the employer is inclined to test whether the contractor's objection is reasonable before an adjudicator. There is no provision which allows the architect to nevertheless instruct the contractor to proceed.

If the contractor does not object, but simply enters into the appropriate sub-contract, it is open to question whether the contractor is still entitled to recover under this clause any loss and/or expense suffered or whether the contractor must forego any losses not claimable under the sub-contract. On balance, the wording of the contracts suggests that the latter is the better view. There may be an implied term that if the contractor is obliged to accept a sub-contractor, an appropriate extension of time will be granted.⁵⁴

- (iii) If the employment of a named sub-contractor is terminated by the main contractor because of the sub-contractor's default or insolvency, the contractor must to notify the architect who may then issue an instruction as follows:
- to name another sub-contractor to complete the work, or
 - to require the contractor to make its own arrangements for completion of the work, in which case the contractor may sub-let the remaining work to a sub-contractor of its own choice, or
 - to omit the remainder of the work from the contract, in which case the employer may employ another contractor to carry it out.

If the original sub-contractor was named in the contract documents the exercise of the first option by the architect will entitle the contractor to an extension of time for any resulting delay, but the contractor will not be entitled to recover

⁵⁴ *Fairclough Building Ltd v Rhuddlan Borough Council* (1985) 3 Con LR 38.

any direct loss and/or expense. Architects' instructions issued under the other options entitle the contractor to an extension of time if appropriate and to recovery of direct loss and/or expense if incurred as a result of the effect on regular progress. Entitlement to both extension of time and loss and/or expense would apply to the first option also if the sub-contractor was named in an instruction regarding the expenditure of a provisional sum.

If the first option is adopted, the contract sum is to be adjusted to take account of the increase or decrease in price between what would have been payable to the original sub-contractor and what is now payable to the replacement sub-contractor if one is appointed. However, the cost of rectifying the defects in the work of the original named sub-contractors is to be excluded.

If the second option is pursued, the contractor will be entitled to be paid in accordance with the valuation of variations. Provided the employer is prepared to indemnify the contractor against reasonable legal costs, the contractor must pursue the original sub-contractor under the dispute resolution procedures in order to recover the additional expense which the employer is required to meet. In the absence of such indemnities, the contractor is still obliged under paragraph 10.2.1 to take whatever other reasonable action is available to recover such expense.

The named sub-contractor provisions in IC and ICD are quite complicated to understand. The principle is that the architect is entitled to name a sub-contractor. Once the contractor has entered into a contract with that sub-contractor, it is, to all intents and purposes, a domestic sub-contractor and the architect is no longer involved except through the contractor. This arrangement is only upset if the sub-contractor ceases to perform for any reason. It is at that point that the contract has to make complicated provision for dealing with the problem. The complications in this form stem from the contradictory position which arises when one party tries to dictate to another party, not only that it will use a particular sub-contractor but also, that it will take complete responsibility for it. This is what bedevilled the JCT 63 attempt to incorporate nominated sub-contractors and ultimately resulted in a nine-page clause in JCT 98. It is clear that the courts disliked nomination and naming under IC and ICD is similar in principle.

13.3 Minor Works Building Contract (MW and MWD)

13.3.1 Main points

Neither MW nor MWD contain the equivalent of SBC clauses 4.23–4.26 or IC and ICD clauses 4.17–4.19. There is no clause which entitles the contractor to apply to the architect for recovery of loss and/or expense. The reason may be because the simple work content, low value and short contract periods for which the forms are intended are unlikely to result in major loss and/or expense claims. That may be the theory, but in practice MW and MWD generates claims as frequently if not to the same extent as more complex forms. MW and MWD are very popular forms of contract; no doubt due in part at least to their brevity compared with other forms.

It is essential, however, that the forms should be used as intended. It is not unknown for these contracts to be employed for projects with contract sums far in excess of the recommended limit.⁵⁵ In such cases, the likelihood of substantial claims is greatly increased.

Although there are two versions of the contract (MW and MWD), the only relevant clause is the same in both contracts. For simplicity's sake reference will be to MW only from here onwards in this Section. Despite the fact that the contract does not allow the contractor to instigate a claim for loss and/or expense, it states in clause 3.6.3 that the architect must include, in the valuation of an instruction regarding an omission, addition or change in the Works, the amount of direct loss and/or expense incurred by the contractor provided that the regular progress of the Works has been affected. It cannot be emphasised too much that the loss and/or expense must result from the issue of what might normally be termed a variation instruction. Instructions about other things do not fall to be valued under this clause. The clause makes no specific reference to 'ascertainment', but the reference to 'incurred' clearly means that it is the actual amount and not some theoretical or formulaic figure which is intended.

The practice of some architects who include the contractor's preliminary costs in certificates following an extension of time is wrong. The contractor is not entitled under the contract to recover these costs and an architect who certifies them may be negligent. However the practice is very common and contractors will often claim 'prelims' as a matter of course under these contracts after an extension of time is given for any reason.

There is no provision for the architect to request information nor is there a stipulation that the contractor must provide it although it is clearly in the contractor's interests to provide whatever information the architect needs. Provided that the instruction requires a variation, the calculation of the amount due to the contractor under these contracts will follow the same route as loss and/or expense under any other JCT contract. Although the contractor is not entitled to initiate the claim, once the architect requests information to permit the ascertainment of loss and/or expense, in practice, it will allow the contractor to effectively submit a claim for the money to which it believes it is entitled.

Clause 3.6.2 requires architect and contractor to endeavour to agree a price prior to carrying out any instruction. It is only if they fail to agree that clause 3.6.3, requiring the architect to value, is triggered. Therefore, it is plain that any price agreed under clause 3.6.2 is deemed to include any loss and/or expense and the architect has no power to add further amounts or indeed to interfere with any agreed price. It seems that neither party can revisit the agreement in the future even if it becomes clear that the contractor seriously underestimated the amount of loss and/or expense it would incur.

From time to time, it has been stated that, other than the very limited recovery allowed by clause 3.6, the contractor cannot recover and loss and/or expense it incurs due to matters such as failure by the architect to provide information or give instructions at the right time or postponement of part of the work. Such a view is misconceived. The contractor may always exercise its right to claim damages for breach of contract. However, the exercise of such right is outside the machinery of the contract

⁵⁵ See David Chappell, *The JCT Minor Works Building Contracts 2005* (2006) 4th edition, Blackwell Publications.

and, therefore, the architect has no power to consider a claim made on that basis. The contractor cannot claim at common law in respect of the full range of relevant matters included in clause 4.24 of SBC, because some of those relevant matters are not breaches of contract. In practice, architects often do consider common law claims on behalf of their clients, but an architect in this position is exceeding the architect's contractual duties and specific authorisation from the client must first be obtained, preferably in writing.

The architect's power to issue instructions is enshrined in clause 3.4. The clause is very broadly drafted, but it is likely that the courts will interpret the provisions quite narrowly. Nevertheless, the clause should be interpreted to allow the architects to issue all instructions necessary to enable the architect to administer the contract efficiently. It is likely that the architect has power under this clause to issue instructions for the postponement of work. Although such an instruction would almost inevitably entitle the contractor to an extension of time, it is difficult to see on what ground the contractor would be entitled to any costs involved. The instruction does not require a variation and, therefore, it would not rank as an instruction for which the architect must include loss and/or expense. Moreover, no empowered instruction is a breach of contract and, therefore, the contractor would be unable to mount a claim at common law. The same could be said of an instruction to open up the work for inspection if the inspected work was found to be in accordance with the contract.

Even if an architect is authorised by the employer to consider common law claims, any amounts which the architect may consider to be due cannot be included in the certification process, because it is not money due under the terms of the contract. Instead, it must be paid directly by the employer to the contractor preferably after correspondence between the parties recording their agreement.⁵⁶

13.3.2 The provision summarised

- The architect is the instigator of the process when valuing a variation instruction.
- Regular progress of the Works must be affected by compliance with the instruction.
- There is no express requirement that the contractor must provide information to enable the architect to form an opinion or ascertain the amount.

13.4 *Design and Build Contract (DB)*

13.4.1 Main points

The provisions in DB that may give rise to loss and/or expense claims by the contractor are contained in clauses 4.20–4.23 inclusive. The JCT Design and Build Contract

⁵⁶ See Chapter 4 for a consideration of certain common law claims.

is superficially very like SBC. Indeed, it is obviously based on that contract. The superficial resemblance is misleading, because the form is based on a different philosophy. Put shortly, the contract is contractor driven like its predecessor WCD 98. That means that some of the important actions carried out by the architect or the quantity surveyor under a traditional contract are carried out by the contractor. The architect, or to be precise the employer's agent appointed under DB, simply checks to make sure that the contractor is correct. For example, the contractor is responsible for valuation, determining the amount of payment and ascertainment of loss and/or expense.

This difference of approach is very marked when comparing SBC clauses 4.23–4.26 and clauses 4.20–4.23 in DB. The first part of the clause is identical with the substitution of 'employer' for 'architect' and the contractor may if it wishes make an application to the employer in writing. It will be seen, however, that the second part of the clause is quite different. There is no requirement for the architect or anyone else to form an opinion or to ascertain the amount of loss and/or expense. There is simply the bald statement that the loss and/or expense incurred must be added to the contract sum. Since it is the contractor's responsibility to make application for interim payment under clause 4.9, it must also calculate the actual loss and/or expense it has suffered. Effectively, the burden of proving that the ascertainment is wrong is laid on the employer under clauses 4.10.3 and 4.10.4. This position is emphasised by the wording of clause 4.20.2 which is not quite an amalgam of clauses 4.23.2 and 4.23.3 of SBC, but which simply obliges the contractor to provide in support of its application the information requested by the employer which the employer reasonably requires. There is no reference to the purpose for which it is required. Contrast with the equivalent clause in SBC wherein it is made very clear that the information and details are required to reasonably enable the architect to form an opinion or as are reasonably necessary for the quantity surveyor to ascertain. The proviso as to timing of the application is identical to SBC. It is thought that both clauses 4.20.1 and 4.20.2 are conditions precedent to the contractor's entitlement to loss and/or expense, following as they do the words: 'provided always'.⁵⁷

13.4.2 Other significant differences

Development control requirements

A very significant clause 4.21.5 is inserted which provides grounds for entitlement if there is any delay in receipt of permission or approval for the purposes of development control requirements. An important qualification in the entitlement is that the permission must be necessary for the Works to start or to be carried out. In addition, the contractor must have taken all practicable steps to avoid or reduce the delay. What steps a contractor can in practice take are severely limited. Probably all it can do is to make the appropriate development control requirements submission as soon as possible. Development control requirements has a broader meaning than simply

⁵⁷ Whether or not the notice provisions in contracts should be considered conditions precedent is considered in Chapter 6, Section 6.6.

planning requirements, but the phrase is not so broad as to encompass all kinds of statutory requirement. The contractor will usually formulate its application under this head when it has been left to make the planning submission and approval has been delayed. Planning approval may be delayed for many reasons and it is always safer for the employer to secure the approval before letting the contract. Attempts to avoid the problem by deleting this ground can be fraught with difficulty, because several clauses refer to this topic and there is a danger that the matter may be dealt with inadequately.⁵⁸ Under DB, as under SBC, the effect of finding antiquities is dealt with in a separate relevant matter.

Discrepancies

There is no ground which is equivalent to SBC clause 4.24.2.3 dealing with discrepancies in or between documents. The logic is inescapable: if the contractor is responsible for the whole of the documentation, it cannot blame the employer if there are discrepancies. The contractor may of course be able to seek redress from the consultants it directly employs. Dealing with discrepancies in the Employer's Requirements should be treated as a 'change' in accordance with clause 2.14.2.

Changes

Clause 4.21.1 is similar to the equivalent clause in SBC (4.23.1) except for the terminology: 'variation' in SBC, 'change' in DB. A change under DB has a very restricted meaning and refers only to a change in the Employer's Requirements. The employer has no power under the contract to change the design or the construction directly – a point frequently overlooked by employers and their agents. More importantly, this clause is the vehicle by which the contractor can recover if there is a delay in statutory requirements in general and particularly where, under clause 2.15.2, a change in statutory requirements after base date is to be treated as an instruction of the employer requiring a change.

Instructions

The most significant ground is probably the employer's instruction requiring the expenditure of a provisional sum. It is only the expenditure of provisional sums included in the Employer's Requirements which may be instructed, but they are often provided with little explanation about their purpose. It follows, therefore, that although the contractor must programme the Works with reasonable skill and care so that completion by the due date can be achieved, in practice it may be unable to judge the amount of work included in a provisional sum with any confidence. In such circumstances, it is entitled to make only such allowance in the programme as can be justified; which may be nothing at all in many instances. The practical consequence may be that an employer's instruction requiring the expenditure of a

⁵⁸ *Update Construction Pty Ltd v Rozelle Child Care Ltd* (1992) 9 BLM 2.

provisional sum will have effect on the programme as though it was a simple addition of work and/or materials.

Decisions, information and consent

Under SBC, the former clause included in JCT 98 to cover the situation where the architect has failed to provide instructions and information in due time has been omitted, because it is now covered by the catch-all prevention and impediment clause. The equivalent clause in WCD 98 has also been removed for the same reason. Key differences of approach are that under DB, the employer is not obliged to provide drawings, details or levels and of course there is no reference to an information release schedule, but the employer must provide decisions, information and consent under the contract. This restricts the contractor's opportunities to claim, because not only is it rightly prevented from claiming because it has not obtained drawings at the right time, but it cannot claim if the employer is late in giving a decision which the employer is not strictly obliged to give under the contract.

13.4.3 Supplemental provisions

There is additional provision for loss and/or expense in paragraph 5 where the supplemental provisions in schedule 2 are stated in the Contract Particulars to apply. It should be noted that clauses 4.20–4.23 are modified, but not superseded, by this provision and that any loss and/or expense which is recoverable under paragraph 4 (valuation of changes) is not recoverable under this provision. If the supplemental provisions are stated in the Contract Particulars to apply, the contractor will be expected to initiate this procedure without further prompting. The consequences for a contractor who should do so, but who fails to proceed in accordance with this clause, are severe.

The procedure is triggered as soon as the contractor becomes entitled to have some loss and/or expense added to the contract sum. The contractor must include the amount in the next application for payment. The amount claimed must be referable to the period immediately prior to the application and since the previous application. The contractor must act quickly. It must include an estimate of the amount in the next application for payment. Use of the word 'estimate' acknowledges that it may not be a precise figure. With each successive application, the contractor must continue to submit estimates until the loss comes to an end and each estimate must refer only to the period prior to the application. On receipt of each estimate, the employer must give a written notice to the contractor within 21 days. The notice must state either:

- that the employer accepts the estimate; or
- that he wishes to negotiate the amount; or
- that the provisions of clause 4.20 apply.

The clause does not stipulate a time limit for the negotiations, but there is no reason why a suitable time limit should not be inserted by the parties. Before sending the notice, the employer may request information reasonably required to support the

contractor's estimate, but both request and receipt of the information must take place within the 21 days.

When agreement is reached or, failing agreement, the amount of loss and/or expense has been determined by another stipulated method, the sum must be added to the contract sum. No further amount may be added for loss and/or expense in respect of the same time period. If the contractor fails to submit estimates in accordance with the timetable, paragraph 5 ceases to apply and loss and/or expense is dealt with under clause 4.20. However, the amounts are not payable until the final account and final statement are agreed. Moreover, the contractor is not entitled to any interest or financing charges incurred before the issue of the final account and final statement.

There is much to commend in paragraph 5. If the employer is well-organised and sensible, the contractor should have few opportunities to claim. The provision provides a kind of fast track claims procedure which ensures the contractor will receive loss and/or expense quickly if it provides estimates quickly. The parties are encouraged to agree on the amount and it is in their interests to do so. The similarity to claims provisions in the Association of Consultant Architects Form of Building Agreement (ACA 3) form of contract should be noted.

13.5 Prime Cost Building Contract (PCC)

13.5.1 Differences

General

The provisions in PCC that may give rise to loss and/or expense claims by the contractor are contained in clauses 4.16–4.19 inclusive. The layout and wording of the first of these clauses are now very similar to the equivalent provisions in SBC and the same comments apply. There are some differences in PCC clause 4.17 as set out below:

Variations

There is no relevant matter dealing separately with variations or as PCC terms them: changes.

Instructions

Instructions are issued by the architect for all work to be carried out. Therefore, there is no reference to instructions requiring the expenditure of provisional sums. The issue of instruction under clause 3.14 is a relevant matter, but qualified by the proviso that the clause does not extend to instructions to carry out work in the specification and/or the drawings. This might be thought to be a clumsy piece of drafting, but nonetheless it is clear in meaning. Other instructions closely follow the pattern in SBC except that instructions under clause 3.15 requiring changes are included.

13.6 Management Building Contract (MC)

13.6.1 Comments

Schedule 2 of MC allows the management contractor to recover, in addition to the management fee, reimbursement of all its expenditure in connection with the contract. Therefore it has no need of a claims clause as traditionally understood. Clause 8.5 simply provides for the contractor to pass the works contractor's written application for reimbursement of direct loss and/or expense to the architect. Borrowing something from standard JCT wording, the clause goes on to make clear that it is for the architect alone to form an opinion about the application and then, if appropriate, to ascertain or instruct the quantity surveyor to ascertain the amount. Unlike traditional JCT contracts, the ascertainment must be carried out in collaboration with the contractor. To 'collaborate' is to work in combination with another. It appears, therefore, that although the architect alone will decide in principle if the works contractor is entitled to payment under this clause, the architect must agree the amount to be paid with the contractor. In general, that is not likely to cause immense problems, but there may be occasions when they cannot agree. The contract is silent on that point and presumably the parties would be left to try and resolve the difference by reference to one of the dispute resolution procedures in the contract.

13.7 Construction Management Trade Contract (CM/TC)

13.7.1 Significant differences

The loss and/or expense provisions are contained in clauses 4.23 and 4.24. These provisions are strikingly similar to clauses 4.23, 4.24 and 4.26 of SBC and the comments on that clause are also applicable here.

13.8 Major Project Construction Contract (MP)

13.8.1 Main points

The provisions in MP that may give rise to loss and/or expense claims by the contractor are contained in clause 27. This clause is not like SBC clauses 4.23–4.26 either in general structure or wording. The first notable thing is that in two clauses (27.1 and 27.8) it is made abundantly plain that no loss and/or expense can be claimed or paid under this clause in connection with a change or variation.

The grounds for loss and/or expense (referred to as 'matters') effectively fall under the heading of employer defaults. There are only three grounds and the first deals expressly with breach or act of prevention by the employer, the employer's representatives, advisors, etc. The second deals with interference with regular progress by others on the site. Such others, by definition, are those for whom the employer, and

not the contractor, is responsible. The third ground simply brings a rightful suspension by the contractor, under s.112 of the Housing Grants, Construction and Regeneration Act 1996 due to lack of payment, into a category of events giving right to entitlement. Without that inclusion, a contractor which properly suspends performance of its obligations would have great difficulty in obtaining financial recompense.⁵⁹ Clause 27.8 expressly excludes from ascertainment of loss and/or expense, any element to the extent that it has been contributed to by a cause other than a change or the three grounds expressly set out in clause 27.2. It should be noted that clause 27.8 has been re-worded from the 2003 version. A strict interpretation of the previous wording led to the conclusion that if loss and/or expense had been caused by two things, one of which was an acceptable ground under clause 21.2 (now clause 27.2) and another which was not an acceptable ground under clause 21.2 (27.2), the whole of such loss and/or expense was excluded from calculation of any amount due to the contractor. It was a potentially onerous clause. The new wording makes clear that the exclusion operates only to the extent that it has been contributed to by a cause other than a change or the three grounds set out in clause 27.2. That is almost certainly what was originally intended and it is a good example of the way in which a relatively simple clause can cause difficulties.⁶⁰

There is the usual provision for the contractor to notify the employer as soon as it becomes aware that regular progress is or is likely to be affected by one or more of the grounds, but it is significant that it is not made a proviso or condition (clause 27.3). Therefore, the contractor's failure to notify the employer strictly in accordance with this clause is unlikely to prevent the employer from ascertaining loss and/or expense. This clause contains a requirement for the contractor to mitigate its losses by taking all practicable steps. This is probably more onerous than the ordinary duty to mitigate.

Unlike the position under most JCT forms, the contractor is required to make its own assessment of the loss and/or expense it has incurred and it must present this with supporting information to the employer. The supporting information is such as is reasonably necessary to enable the employer to ascertain the loss and/or expense. The contractor is responsible for updating this package on a monthly basis until it has provided information relating to the whole of the loss and/or expense. There appears to be no sanction if the contractor fails to provide the information monthly other than that it will not receive the relevant loss and/or expense which is probably sanction enough. Ascertainment is intended to be a fast track process. The employer must respond to the contractor within 14 days of receiving the information and notify the contractor of the amount ascertained. It is expressly stated in clause 27.5 that the ascertainment must be made by reference to the contractor's information. The clear message here is that if the contractor fails to provide adequate information, the employer will be unable to properly ascertain the amount due and the contractor may receive less than it expects. However, the ascertainment must be in sufficient detail to allow the contractor to identify the differences.

⁵⁹ At the time of writing, the Local Democracy, Economic Development and Construction Act 2009 which amends the Housing Grants, Construction and Regeneration Act 1996 to overcome this omission, has not yet come into force.

⁶⁰ The difficulty is similar to what lay behind the development of what is now SBC clauses 6.1 and 6.2 and which originally were missing the all important 'to the extent'.

The extension of time review procedure is echoed in clause 27.6 which requires the contractor to provide any documentation in support of further ascertainment no later than 42 days after practical completion. That does not mean that the contractor who is dissatisfied with an ascertainment has to wait until after practical completion to submit more information. It is simply stating the latest date by which the contractor must have made such submission. The employer must respond within 42 days of receipt of the new material. Thus, the contractor may make its initial submission in week 30 of a 70 week project. The employer must respond within 14 days. If the contractor is dissatisfied, it may submit new material and the employer must now respond within 42 days. The process can be repeated until 42 days after practical completion after which the contractor may not submit further information and the employer must make a final assessment within a further 42 days.

Clause 27.7 makes the employer liable to pay to the contractor any loss and/or expense ascertained in accordance with this clause.

13.9 Measured Term Contract (MTC)

13.9.1 Main points

The nearest to a loss and/or expense clause in this contract is clause 5.8. This clause merely provides that, if the contractor is instructed by the contract administrator to interrupt the work contained in an order so as to carry out other work first, agreed lost time or other costs must be valued as daywork. There are two things to note about this clause. The first is that only the time that is agreed will be eligible and the second is that no other cause of interruption or delay will entitle the contractor to additional payment. No doubt it is assumed that there will be few or no instances of loss and/or expense of such a substantial nature that they would warrant a complex ascertainment procedure. If the order periods are generally short, that may well be true. However, if the contractor does incur substantial losses, its recourse would appear to be to the common law, provided that the contractor can bring the cause of the loss into the category of employer's breach of contract or some other default.

13.10 Constructing Excellence Contract (CE)

13.10.1 Main points

There is no separate provision for the recovery of direct loss and/or expense under this contract. It is all dealt with under the relief event procedure in clauses 5.7–5.16 inclusive. This has been fully considered in Chapter 11, Section 11.10.1.

Chapter 14

Variations

14.1 Introduction

Use of the word ‘variations’ in building contracts usually refers to a change in the Works instructed by the architect, contract administrator or the employer as the case may be (but see the quite different ‘variation of contract’ considered in Chapter 4, Section 4.3). There are clauses permitting variations in all standard form contracts. If there was no such clause in lump sum contracts, the contractor could not be compelled to vary the Works and it could insist upon completing precisely the work and supplying precisely the materials for which it has contracted. No power to order variations would be implied.¹ Although standard contracts contain a clause permitting variations, the power is not unfettered. A variation may not be ordered if it changes the whole scope and character of the Works. To determine whether this has been done in any particular case, reference must be made to the recital which sets out the work to be done. As a broad rule of thumb, if the variation does not invalidate the description in the recital, it is unlikely to be a variation which changes the whole scope and character of the Works. To a large extent the point is academic, because a contractor will usually welcome the opportunity to carry out additional work and thereby earn money in the valuation of the variation and possibly in the formation of a claim for disruption or prolongation.

Variations will happen in every contract and the chances of any contract being completed without any variation to the Works whatsoever, is so small as to be negligible. The problem is the innate complication of the building process and the fact that it is almost impossible for any employer to finally decide on every part of a building before it is constructed. There are, of course, other instances where variations are virtually imposed upon the employer in buildings with a high technical content such as hospitals, media studios and concert venues. No employer wants to feel that the finished building is already out of date so the instructing of often substantial variations will continue throughout the life of the project. In addition, there are many employers who are just incapable of visualising the finished building until it is actually or very nearly completed. The building as tendered will bear a general resemblance to the finished product in these instances, but no more. As the building

¹ *Stockport MBC v O’Reilly* [1978] 1 Lloyd’s Rep 595.

begins to take shape, so the employer has second thoughts about almost everything. The construction process becomes a nightmare for all concerned. Other reasons for variations include questions of timing of the project. Often an architect is asked to achieve a start on site long before it is realistic to do so. Unless the architect is firm in those circumstances, the scene is set for disputes over costs at a later date.

Sometimes a contractor will argue that it is not prepared to carry out an instruction requiring a variation unless the price is agreed first. Although most standard forms provide for the cost of a variation to be agreed first if the employer or architect so desires, the contractor is usually required to comply with any architect's instruction forthwith subject only to the right of reasonable objection in certain circumstances. It would not be classed as a reasonable objection if the contractor objected to carrying out the instruction until the price had been agreed. The scheme of most standard forms is that, unless the employer or architect wish to agree the price first, the contractor must comply with the instruction and the valuation is whatever (usually) the quantity surveyor decides. If the contractor dislikes the valuation and subsequent certification, its remedy lies in the dispute resolution procedures in the contract.

14.2 *The baseline*

Before there can be a variation, it is essential to know what is being varied. Although this sounds trite, it is of fundamental importance. Given that a particular contract allows the architect or the employer as the case may be to instruct variations, a baseline must be established which amounts to the total amount of work which the contractor agreed to do by executing the contract. Although it is blindingly obvious that a variation cannot be instructed unless it is clear what is being varied, it is surprising how often that point is overlooked in administering the contract. In some instances, it may be unclear whether or not an instruction amounts to a variation or whether the contractor has already agreed to do what is instructed by the variation as part of the contract.²

The position can be uncertain where the contract documents consist only of the printed contract form and a set of annotated drawings. This was sometimes encountered when MW and its predecessors were being used with drawings only, but is thankfully now relatively rare. The use of MW, MWD, IC or ICD with drawings and specifications or schedules of work make it easier to decide what is included in the contract. However, where contracts incorporate bills of quantities, the accuracy of which is guaranteed by the employer, anything involving a change from what is included in the bills will involve a variation.

It is important to consider more closely the position where there are bills of quantities. SBC and, since the 2005 edition, IC and ICD all guarantee that where there are bills of quantities, they will have been produced in accordance with the Standard Method of Measurement (SBC clause 2.13.1 and IC and ICD clause 2.12.1). Moreover SBC, IC and ICD state that the quality and quantity of the work included

² *Sharpe v San Paulo Railway* (1873) 8 Ch App 597.

in the contract sum will be what is in the contract bills or, in the case of a contractor's designed portion, what is in the CDP documents (clauses 4.1 and 4.1.1 respectively).

Although SBC clause 2.14.1 and IC and ICD clause 2.12.2 are similar in intent, the wording is somewhat different. SBC clause 2.14.1 provides that errors in the contract bills are to be corrected and treated as variations. The errors include an unstated departure from the method of preparation of the bills or errors in description, quantity or omissions and include errors or omissions in the information to be provided in the case of a provisional sum for defined work. IC and ICD clause 2.12.2 is to similar effect. However, whereas SBC provides in clause 2.14.3 that any such correction is to be treated as a variation, IC and ICD allow no such 'treating' provision. Clause 2.13.1 requires the architect to issue instructions and then clause 2.14, perhaps unnecessarily, states that such instructions are to be valued as variations. The effect of these clauses is that the employer has guaranteed the accuracy of the bills of quantities to the extent of agreeing that the contract sum shall be adjusted to take account of any errors of the kind listed. Obviously, the errors described do not include errors in the pricing of the contract bills. SBC, IC and ICD clause 4.2 make clear that errors in calculating the contract sum are accepted by the parties.

Thus, even before the employer decides that something needs changing, the contract itself may generate an instruction requiring a variation. What this means is that the contractor has contracted, for the contract sum, to carry out only what is shown in the contract bills, and not necessarily, for instance, what is shown on the contract drawings if they differ from the bills. However, the wording of SBC, IC and ICD make clear that the contractor has contracted to construct what is in the contract documents, therefore, the contractor cannot refuse to carry out any work which is different from that shown in the bills if it is shown on the drawings and if it is instructed to be constructed in accordance with the drawings rather than the bills, it will amount to the correction of a discrepancy and amount to a variation. Discrepancies are dealt with by SBC clause 2.15 and IC and ICD clause 2.13 (IC and ICD refer to 'inconsistencies'). These clauses state that if the contractor becomes aware of any discrepancy or divergence in or between the contract drawings, the contract bills, architect's instructions (excepting of course instructions requiring variations) and any further drawings or documents issued by the architect to it must immediately notify the architect in writing and the architect must then issue instructions. Any such instruction must be of a kind that is expressly empowered by other clauses of the contract conditions and it must have regard to the discrepancy.

14.3 *Bills of quantities*

There are perceived disadvantages in using bills of quantities. The perception probably originates in the old legal principle that, unless there are express provisions in the contract to the contrary, a contractor will be expected to do everything necessary in order to complete the contract Works, quite irrespective of whether the necessary work is expressly referred to in the contract documents and even if it is not possible

to foresee the necessity for the work at the time of tender.³ Many old cases deal with the contractor's duty under certain circumstances to carry out work which is not shown in documents provided at the time of tender.⁴ An example is *Williams v Fitzmaurice*⁵ where the specification did not mention floorboards. The specification did say:

'the whole of the materials mentioned or otherwise in the foregoing particulars, necessary for the completion of the work, must be provided by the contractor'.

It was held that the provision (and therefore the laying of the floor boards) was included in the contract and the contractor was not entitled to recover for them as an extra.

Most of these cases date from the nineteenth century. The common law has moved on and it may well be that some or, indeed, all such cases would have a different outcome on the same facts before a modern court. Generally, if a document is provided to a contractor in the knowledge that it is obliged to rely on it in the preparation of its tender, such as a modern contract with bills of quantities, the courts will require very clear words in a contract or in the document itself before it will hold that an employer should not be responsible for errors or omissions in it.⁶ However, where there are no bills of quantities guaranteed to be accurate, the decisions in some of the old cases may still have relevance. In the *Williams* case, the general clause noted above appears to have been the key factor in the decision. Moreover, following developments in the reliance doctrine set out in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,⁷ a contractor tendering on the basis of documents provided which state that errors will not be adjusted and paid for, may be able to bring an action in the courts directly against the person who prepared the quantities if it can be shown that they were negligently prepared.⁸

In *Bowmer and Kirkland Ltd v Wilson Bowden Properties Ltd*⁹ the bills contained the following paragraph:

'where and to the extent that materials, products and workmanship are not fully specified they are to be:

- (1) suitable for the purpose of the Works stated in or reasonably to be inferred from the Contract Documents
- (2) in accordance with good building practice, including the relevant provisions of current BSI documents.'

The court concluded that the paragraph meant that if the materials and workmanship were fully specified, the contractor had carried out its obligation by doing what

³ *Thorn v London Corporation* (1876) 1 App Cas 120.

⁴ See for example *Tharsis Sulphur & Copper Company v McElroy & Sons* (1878) 3 App Cas 1040; *Jackson v Eastbourne Local Board* (1886) *Hudson, Building Contracts*, (4th ed) vol 2, p. 81; *Re Nuttall and Lynton and Barnstaple Ry* (1899) 82 LT 17.

⁵ (1858) 3H & N 844.

⁶ *Bacal Construction (Midlands) Ltd v Northampton Development Corporation* (1976) 8 BLR 88.

⁷ [1964] AC 465.

⁸ *Auto Concrete Curb Ltd v South Nation River Conservation Authority* (1994) Const LJ 39; *Henderson v Merritt Syndicates* (1994) 64 BLR 26.

⁹ 11 January 1996, unreported.

was specified. If they were not fully specified, the contractor had the duties set out in sub-paragraphs (1) and (2). This is clearly a valuable paragraph to include in the bills of quantities from the employer's point of view.

Bills of quantities give a very precise correlation between the amount of work and materials and the price to be paid for the Works. Therefore, the risks borne by contractors in some of the old cases no longer apply. Risks such as the accidental mis-measurement or omission of work are borne by the employer. For example, if 20 metres of paving are measured in the bills and actually 40 metres are required, it is clear that under SBC, IC and ICD, the contractor will be automatically entitled to payment for the extra paving. The same outcome would be unlikely under an MW contract where drawings and specification were included as the only contract documents, and the paving was accurately shown or could be reasonably implied from the drawing. This is something imperfectly understood by many contractors engaged on small Works. It is wrong to say that the bills of quantities system has many disadvantages. If there is no doubt about the extent of the work which the contractor has undertaken that is actually a very considerable advantage to both employer and contractor. That must be to everyone's benefit in the long run, because it removes a substantial area of possible dispute. Indeed, it is thought likely that if a modern ICE contract had been used, *Sharpe's case*¹⁰ would probably never have reached the courts at all. The employer would have had to pay for the extra two million cubic yards of earthworks, but that would have been, on the facts, the correct price for the work. If the employer had been disgruntled by that outcome, there may have been a remedy against the engineer.

Where there are no bills of quantities, a contractor may be required to allow for something which is difficult to estimate in its tender. For example, the contractor may be asked to include in its price for all foundation work whatever the sub-soil may be. Unless the contractor has had the opportunity to carry out extensive site investigations in putting together the price, it will obviously price for the severest conditions it may encounter. The employer will then be in a position of having to pay for the severest conditions even if, in reality, the contractor encounters ideal conditions. In practice, most contractors will price for something between the two extremes, but the principle remains the same. The employer is paying for the worst conditions even if the best are encountered. The merit of bills of quantities is clearly that the employer simply pays for what the contractor actually does. A provisional quantity can be included in the bills for difficult excavation, albeit not necessarily very accurate. If rock or other obstructions are discovered they can be measured. The use of bills of quantities allows a very precise allocation of risk. The Standard Method of Measurement clearly shows where those risks lie – sometimes with the employer and sometimes with the contractor – but generally on the basis of a specified amount of work against which can be set a realistic price. Bills of quantities are not suitable where the employer is seeking a firm cost for the project. Such an employer may be better using a design and build contract where virtually the whole of the risk falls on the contractor, but where the contractor effectively controls the Works. That is suitable if it is most important to the employer that a stated price for the Works will not be exceeded: cost certainty rather than cost economy.

¹⁰ See Chapter 4, Section 4.5.

14.4 *Functions of the architect and the quantity surveyor*

The provisions for the valuation of variations now set out in most standard form contracts have, among other things, the advantage of clearly defining the relative responsibilities of architect and quantity surveyor in respect of variations. It is clear that, under the standard form, once the architect has issued an instruction requiring a variation or requiring the contractor to carry out work against a provisional sum, responsibility for defining the financial effect of the work covered by the instruction now passes entirely to the quantity surveyor. This, of course, is subject to the architect's right and duty to be satisfied regarding the financial content of certificates.¹¹

The quantity surveyor's valuation will be required to cover *all* the effects of the variation up to the point at which it becomes necessary for the contractor to make an application to the architect stating that the introduction of the work in question has affected or is likely to affect the regular progress of the Works in some material respect. At that point responsibility passes back to the architect. It is the architect who bears the responsibility for determining questions concerning the progress of the Works and, although the quantity surveyor may be brought into the matter again when ascertainment of the resulting direct loss and/or expense becomes necessary, this will only be at the discretion of the architect who still bears primary responsibility for that aspect. Although some JCT contracts include provision for the contractor to submit its own calculation of the valuation, the quantity surveyor is still responsible for checking that valuation. It has been said, of the quantity surveyor under JCT 63 that his

‘function and his authority under the contract are confined to measuring and quantifying. The contract gives him authority, at least in certain instances, to decide quantum. It does not in any instance give him authority to determine any liability, or liability to make any payment or allowance.’¹²

The judge went on to deal with the words ‘the valuation of variations . . . unless otherwise agreed shall be made in accordance with the following rules’ in clause 11 (4), JCT 63, which counsel had submitted meant ‘agreed by or with the quantity surveyor’. He said:

‘I reject that submission. In my view the word agreed can only mean “agreed between the parties”, although it may well be that on occasion a quantity surveyor may perhaps be given express authority by the employer to make such an agreement.

But the JCT contract does not give him the authority.

There are few express references to him in the contract. He is defined in Article 4 of the Articles of Agreement. By clause 11(4), he is given the express duty of measuring and valuing variations.

By 11(6), he is given the duty of ascertaining loss and expense involved in variation – but only if so instructed by the architect.

¹¹ *R B Burden Ltd v Swansea Corporation* [1957] 3 All ER 243.

¹² *County and District Properties Ltd v John Laing Construction Ltd* (1982) 23 BLR 1 at 14 per Webster J.

By 24(1), he is given a similar duty in respect of loss or expense caused by disturbance of the work etc – but again only if instructed by the architect.¹³

The position appears to be largely the same under SBC.

14.5 JCT Standard Building Contract (SBC)

14.5.1 Definition

Clause 5.1 sets out the definition of ‘variation’ as used in the Standard Building Contract (SBC). When referring to building contracts, there are essentially two types of variation. The first is the variation of the contract terms which has already been considered in Chapter 4, Section 4.3. The second is variation of the Works which the contractor has undertaken to carry out under the contract terms. Clause 5.1 defines variations to the Works, but it also deals with the imposition of any obligations and restrictions upon the contractor or any addition, alteration or omission of them if they are already imposed in the contract bills or in the Employer’s Requirements related to contractor’s designed portion work. Such obligations and restrictions are not the Works and more in the nature of contract terms. Some implications of that are discussed below.

14.5.2 Variations

Scope

It may appear that clause 5.1.1 defines variation in an almost unlimited way, so that anything and everything is included. For example, clause 5.1.1.1 refers to addition, omission or substitution of any work. If that were strictly correct, the architect would be able to instruct virtually anything. However, a single phrase in the contract must not be taken out of context. Indeed the contract must be read as a whole (clause 1.3) and in this instance the key provision which governs the whole of clause 5.1.1 is the general meaning of the reference to alteration or modification of the design, quality or quantity of the Works. Clause 5.1.1 states that the sub-clause referring to ‘any’ work is included within the governing meaning. Therefore only the Works described in the contract documents are subject to variation. The architect has no power to instruct, as a variation to the contract Works, work to property outside the site boundary. Thus, an employer may own property near the site and may think it more economic to get the contractor carrying out one project to do some other work at this property while carry out the contract Works. The architect has no power to instruct any variations, whether by way of additions, omissions or changes requiring the contractor to execute work clearly not contemplated by the original contract.¹⁴

The Works are defined as the works in the first recital, the contract documents, including any contractor’s designed portion and any changes made in accordance

¹³ *County and District Properties Ltd v John Laing Construction Ltd* (1982) 23 BLR 1 at 14 per Webster J.

¹⁴ *Sir Lindsay Parkinson & Co Ltd v Commissioners of Works* [1950] 1 All ER 208.

with the contract. Therefore, if an architect issues an instruction adding some work, that immediately becomes part of the Works which the architect may vary by further instruction. The architect cannot substantially alter the nature of the Works, for example by changing a traditionally constructed building into a building constructed from a kit of parts. The contractor may be entitled to argue that it was a building substantially different from that for which it tendered. It is probable that the architect cannot validly instruct the contractor to build something substantially in excess of, or substantially less than, what was envisaged under the contract. In essence, the guiding principle is that the Works as completed must still be capable of identification as the Works set out in the first recital.

On a casual reading, the wording of clause 5.1.1.3 might appear to rank an instruction issued by the architect under clause 3.18.1 as a variation. It requires careful reading in its new abbreviated form to see that the removal from site of work and materials constitutes a variation except where they are removed because they are not in accordance with the contract. It could be confused in practice with 3.18.1 which empowers the architect to issue instructions to the contractor to remove from site work and materials not in accordance with the contract. Obviously, that would not rank as a variation and the contractor would not be entitled to extra money. However, this clause is at pains to highlight the difference and relates to specific instructions for work or materials which are in accordance with the contract, but which for some reason the architect wishes to remove from the site of the Works either temporarily or permanently.

Obligations or restrictions

Clause 5.1.2 allows the imposition of obligations and restrictions upon the contractor and to change obligations and restrictions already imposed through the medium of the contract bills in respect of five specific matters, that is:

- (1) access to the site;
- (2) use to be made of specific parts of the site;
- (3) limitations of working space available to the contractor;
- (4) limitations of hours to be worked by the contractor; and
- (5) requirements that the Works be carried out or completed in any specific order.

There are some curious features about this clause. First, it is strangely worded. Effectively, it seems to be varying the contract. It is certainly not varying the Works. Perhaps that is why the draftsman refers to the employer. At first sight it appears to be the only variation which the contract expressly authorises the employer to make.

Second, reading clauses 5.1.1 and 5.1.2 together makes clear that the term 'variation' means the imposition by the employer of any obligations in regard to the matters set out in clauses 5.1.2.1–5.1.2.4. However, clause 3.14.1 expressly states that the architect may issue instructions requiring a variation. There is no qualification on that power in the rest of the clause or, indeed, in the rest of the contract. It is true that clause 3.14.2 states that such an instruction is subject to the contractor's right of reasonable objection in clause 3.10.1, but that does not qualify the architect's power to issue such instructions, it merely gives the contractor the right to reasonably

object to such instructions when properly issued. Therefore, the architect may issue instructions in regard to clause 5.1.2 matters. The conclusion to be drawn from this is that if the employer imposes obligations or restrictions or changes them, as set out in clause 5.1.2, it clearly ranks as a variation under the terms of the contract and is to be valued accordingly. In view of the particular wording of clause 5.1.2, it is thought that, in giving an instruction requiring a variation under this clause, the architect should always refer to the imposition of obligations or restrictions by the employer.

It is doubtful whether, in practice, employers often, if ever, avail themselves of the powers apparently given to them under this clause; which is fortunate in view of the confusion which could result. What follows assumes that it will be the architect acting.

The architect's powers are limited to only those specific obligations and restrictions under clause 5.1.2, and there is no equivalent power in respect of obligations or restrictions of any other kind. It is clear that the architect's power is not confined to varying obligations and restrictions already imposed through the medium of the contract bills but extends to imposing fresh obligations or restrictions – but only of the kinds listed in clauses 5.1.2.1–5.1.2.4 and subject to the contractor's right of reasonable objection discussed below.

These five matters appear to attract little attention in practice. Imposing any of them will inevitably give rise to additional costs to the contractor; some of the restrictions may be far-reaching and it is surprising that more claims have not been founded on them. The reason is possibly because employers have adopted a sensible approach and declined to impose obligations in any of these categories unless absolutely unavoidable. Restricting access to the site or the times of such access could be quite catastrophic and where there is a need for such restriction, it should be included in the contract documents. It is more likely that architect's instructions issued under this head will be concerned with the relaxation of previously imposed restrictions.

Much the same comment can be made for the other categories. Where the architect issues instructions about the use to be made of various parts of the site, it must not be confused with failure to give possession of the whole of the site on the date of possession in the contract. Possession must be given on that date, but the architect can restrict the use. It is doubtful that this allows the architect to postpone work, because the contract must be read as a whole and the architect already has that power under clause 3.15. The architect may wish to restrict the contractor from storing certain materials, erecting cranes, siting cabins and the like. Limiting working space probably falls into the same category while limiting hours might be necessary in response to complaints and visits from local authority inspectors when the project is in progress.

The final matter gives rise to most difficulty. The correct method for conveying the employer's wishes in regard to sequence of work and completion is for the Works to be divided into sections. A strict reading of the clause suggests that although the order of completion and of carrying out the work may be varied, there is no power under this clause to require the contractor to complete parts of the Works by any specific dates if there is just one completion date in the contract. In any event, this power must be exercised with great care where the employer has also opted to divide the Works into sections and to set out individual dates for possession and completion

in the Contract Particulars. The sections must take precedence. The architect cannot alter the content of any of the sections by using clause 5.1.2.4, because to do so might invalidate the liquidated damages clause. There is no mechanism in the contract to amend liquidated damages and it may be argued that a substantial change in work content would invalidate the clause. It is thought that an instruction to carry out the work in any particular order may relate to any work if the Works as a whole are not divided into sections. Where the Works are divided into sections, the instruction can only relate to the work within any particular section and, for the reasons noted above, the work content of the sections cannot be restructured.

Clause 3.10.1 refers to the contractor's right of objection only to the extent that it is an objection to an instruction. Therefore, if the obligations or restrictions have been imposed in the contract, no objection is possible. That makes perfect sense, because the contractor would be aware of the restrictions at the time of tender or, at the latest, when it executed the contract. What is puzzling is that although clause 3.10.1 plainly allows the contractor to refuse compliance to the extent that it notifies a reasonable objection, reading clause 3.10 with clause 3.14 the inescapable conclusion is that the contractor's objection to compliance with a instruction related to clause 5.1.2 is only possible if the instruction is an architect's instruction. The real difficulty in deciding what constitutes reasonable or unreasonable objection is that the contract provides for the variation to be valued and, therefore, the contractor should be properly recompensed no matter what restrictions are imposed or altered.

By what criteria is 'reasonable objection' to be measured? It is thought that an objection would only be considered reasonable to the extent that compliance would make the Works much more difficult to achieve. Clearly, if the restriction actually made the Works impossible to complete, the contractor would be relieved of its obligations. Therefore, the clause must envisage a lesser consequence, but nevertheless a consequence which caused significant difficulties. For example, a neighbour may threaten to seek an injunction against the employer to prevent work outside certain hours, resulting in an average two hours lost every day. The architect may issue an instruction restricting the hours accordingly. Obviously, no contractor could lodge a reasonable objection to compliance with such an instruction, because although it would inevitably cause a delay, the contractor would receive payment for the variation and also an appropriate extension of the contract period. Therefore the contractor would be suitably protected and the alternative would be that the neighbour may get an injunction in any event and the contractor would be faced with the same restriction to which no objection could be termed 'reasonable'. On the other hand, if an architect had instructed that a contractor could not make full use of the site and that a certain area should not be used a contractor could make reasonable objection if the result was that the contractor had insufficient working space to store essential goods and erect suitable site accommodation. In practice there appear to be few disputes based on this clause, because common sense prevails.

Provisional sums

Provisional sums are sums of money which are included in the contract bills to cover work which was uncertain in nature and/or scope at the time the bills were prepared.

They must not be confused with prime cost (PC) sums which are included to cover work to be executed by nominated sub-contractors or materials to be supplied by nominated suppliers where they survive in some contracts. Nominated sub-contractors and suppliers, although included in JCT 98, have been omitted from SBC.

Clause 3.16 obliges the architect to issue instructions for the expenditure of such sums whether included in the contract bills or in Employer's Requirements associated with a contractor's designed portion of the Works. There is no express limitation on the instructions that the architect may issue in this regard, and often an instruction may, indeed, be simply to omit the sum altogether and to do no work or spend no money against it. It used to be the fashion for architects to issue an instruction at the commencement of a contract omitting all provisional sums and then adding back various corresponding amounts of work at intervals throughout the contract. Although it is arguable that the contract permits that, it does not appear to comply strictly with clause 3.15 which expressly requires the architect (as a duty rather than a power) to issue instructions about the expenditure of provisional sums. Simply to omit the sum cannot be construed as an instruction to expend it. Better practice is for the architect to issue instructions about provisional sums as and when they are necessary, so that if it becomes clear that a sum is not required, it may be omitted; otherwise the instruction will instruct the sum to be omitted and a particular parcel of work to be added.

The Standard Method of Measurement and the contract divide provisional sums into defined and undefined provisional sums. The concepts of defined and undefined provisional sums and approximate quantities were introduced into what was then JCT 80, in July 1988. Briefly, the situation is this.¹⁵ Where work can be described in items in accordance with the Standard Method, but accurate quantities cannot be given, an estimate, called 'approximate quantity' must be given. If the work cannot even be described in accordance with the Standard Method, it must be listed as a provisional sum. Provisional sums are either defined or undefined. If 'defined', the bills must state the nature and construction, how and where the work is fixed to the building and any other work fixed to it, quantities giving an indication of the scope and extent of the work and any specific limitations. If any of this information cannot be given, the work is 'undefined'. The distinction is of particular significance in regard to extension of time and claims for loss and/or expense and when valuation is necessary (see below).

14.5.3 Instructions requiring a variation

Clause 3.14.1 empowers the architect to issue instructions requiring a variation as defined in clause 5.1. Clause 3.14.4 is important because it empowers the architect to sanction any variation made by the contractor even if the variation is not the result of an instruction. The sanction must be in writing. The architect can use this power to ratify instructions which have been given but never confirmed by either architect or contractor (clause 3.12.3 also permits this) or it may be used to sanction instructions given on site by the employer or by a consultant without the architect's

¹⁵ A full description is to be found in General Rules 10.1 – 10.6 of SMM7.

knowledge. Whether it is wise for the architect to sanction instructions of that kind given by other parties is another question. The architect cannot be obliged by the employer to ratify the employer's instructions and the architect is entitled to deal only with instructions properly issued under the terms of the contract. It has already been seen that, with the possible exception of clause 5.2 restrictions and obligations, the only person authorised by the contract to issue instructions is the architect.

It is a pity that the JCT still include, in clause 3.14.5 the otiose provision that no variation shall vitiate the contract. Although the statement is perfectly correct, it is unnecessary, because the exercise of a power expressly conferred upon the architect by the terms of the contract cannot vitiate the contract in any circumstances. The contract cannot be brought to an end by the doing of something which the contract itself expressly permits, unless of course that something is itself for the purpose of bringing the contract to an end.

Clause 3.16 states that the architect shall issue instructions in regard to the expenditure of provisional sums in the contract bills or in the Employer's Requirements.

Clause 3.10 requires the contractor forthwith to comply with any instruction issued by the architect which is expressly empowered by the contract conditions. Clauses 3.14.1 and 3.16, therefore, set out this express power of the architect to issue instructions requiring variations and in regard to the expenditure of provisional sums. The issuing of instructions about the expenditure of a provisional sum is a duty rather than a right. Therefore, the contractor must comply with any such instructions forthwith, subject to the proviso regarding reasonable objection to instructions about variations in obligations or restrictions imposed upon the contractor. 'Forthwith' in this context does not necessarily mean 'immediately', because the instruction may vary work not yet done, but it imposes an obligation upon the contractor to carry out the work as soon as it reasonably can.¹⁶

By clause 1.7.1 all architects' instructions must be issued in writing; any instruction of the architect not issued in writing is therefore not issued in accordance with the contract and is of no effect. By clause 3.12, however, any instruction of the architect issued otherwise than in writing is to be confirmed in writing by the contractor to the architect within 7 days, and if not dissented from in writing by the architect within a further 7 days from receipt (not despatch) is to take effect from the expiry of the second 7 days. Because the time runs from receipt, a prudent contractor will send such confirmation by special delivery post or some other system which guarantees delivery on the next business day. If the architect confirms the instruction in writing within the first 7 days, the contractor need not confirm it itself, but it will take effect from the date of the architect's confirmation. If neither the contractor nor the architect confirms the instruction within the time limit, but the contractor nevertheless complies with it, then the architect may confirm it himself at any time prior to the issue of the final certificate, and the instruction will then, strangely, be deemed to have taken effect from the date it was originally given. That provision could result in interesting problems of interpretation.

Therefore, the contractor is under no obligation to comply with an architect's instruction which is not issued in writing. Usually, that means orally. The situation is that if a contractor complies with an architect's oral instruction and there is no

¹⁶ *London Borough of Hillingdon v Cutler* (1967) 2 All ER 361.

written confirmation by either party, the contractor is actually at risk if it does so, because the architect may withdraw it or even forget or deny that such an instruction was ever given. The contractor's duty to comply with an instruction only arises when the instruction is properly given under the terms of the contract. If not in writing, it is usually when the contractor has itself confirmed the instruction within 7 days of issue and has allowed a further 7 days for any written dissension by the architect, a total period of at least 14 days from the actual date upon which the instruction was issued orally. Alternatively, the instruction is properly given if issued orally, but confirmed in writing by the architect within 7 days.¹⁷ The architect may, but is not obliged to, confirm an instruction after it has been carried out. However, if for any reason the architect declines to ratify an instruction, the contractor may be unable to recover any cost involved. Although, in theory, a contractor which carries out an instruction which has not been properly issued is in breach of contract by executing something not in accordance with the contract, a contractor's compliance with an unconfirmed instruction of the architect has been held to be a good defence against a breach of contract.¹⁸ Obviously, it would be necessary for the contractor to be able to prove that such an instruction had been issued and the issue would be a technical one, not about whether the instruction had been issued or if it had been carried out, but whether the instruction was a valid instruction. The point seems to be that, although the instruction may be invalid, simply because the contractual procedures have not been carried out correctly, the instruction having been issued albeit incorrectly, has been carried out and the compliance is not treated as a breach.

Clause 3.14.3 makes clear that an instruction with regard to the contractor's designed portion must be issued as an alteration or modification to the Employer's Requirements. There are important qualifications concerned with such instructions which are similar to those which apply to instructions issued in connection with the DB contract. Where a contractor's designed portion is used for part of the Works, a set of Employer's Requirements must be produced and the contractor responds in its tender by submitting Contractor's Proposals and an analysis of the part of the contract sum which relates to the contractor's designed portion (the CDP analysis). The Employer's Requirements are in the form of a performance specification and it is the Contractor's Proposals which identify the actual work to be done and materials to be supplied.

It should be noted that the only type of instruction possible in regard to the contractor's designed portion is an instruction to change the Employer's Requirements. The architect has no power to issue an instruction to change the actual work or materials. For example, if the CDP was the heating system, the architect would be empowered to issue an instruction changing the required temperatures, but unable to specify precisely how this was to be achieved. Clause 3.16 makes clear that instructions for the expenditure of provisional sums must relate to such sums in the contract bills or in the Employer's Requirements. If the contractor inserts a provisional sum

¹⁷ In the absence of any special definition in the contract, a day is a 24 hour period extending from midnight to midnight. In SBC, 'Business Day' is defined, but other days are not. Although a 'Business Day' is not a Saturday, Sunday or public holiday. Clause 1.5, dealing with reckoning periods of days, refers to days only excluding public holidays.

¹⁸ *G Bilton & Sons v Mason* (1957), unreported.

in the Contractor's Proposals or in the CDP analysis, no instruction can be issued about such a sum and it remains unexpended. It is arguable that the contractor remains entitled to the sum, but without any obligation to provide anything in exchange. In practice, such niceties tend to be ignored. However, they become very important when disputes arise.

The architect may also issue what are referred to as 'directions' for the integration of the design of the contractor's designed portion with the design of the rest of the Works. The word 'directions' is not defined. Since the contract uses both 'instruction' and 'direction', it is appropriate to believe that a somewhat different meaning is intended, otherwise one word could have been used. The distinction is not clear in ordinary usage, but one definition of 'direction' is 'guidance' which probably approximates to the intended meaning. Under clause 3.4, the architect may issue directions to the clerk of works who may issue directions to the contractor. Clearly something less than instructions is intended here. There is a presumption that a contract has been drafted so that use of the same word will convey the same meaning wherever it is used. Likewise use of a different word will be presumed to convey a different meaning.¹⁹ Therefore, the meaning of 'direction', wherever it occurs in the contract, should be the same and the use of 'direction' instead of 'instruction' must be assumed to convey a different meaning.

Integration with the rest of the Works is a fruitful area for claims. The contractor may contend that the architect's directions for integration unavoidably result in additional work and, therefore, cost. The situation tends to be misunderstood. The principles are straightforward even though particular circumstances may need careful consideration. There are four basic situations:

- If the invitation to tender is supported by clear documents showing the rest of the design and especially any likely interfaces with CPD work, it is a matter for the contractor to allow in the Contractor's Proposals for the proper integration of the CDP with the rest of the design. If the rest of the design, so far as it affects the CDP, remains unchanged and if the architect does not instruct a variation under clause 3.14.3 requiring an alteration in the Employer's Requirements, the contractor can have no claim for any additional cost.
- If the invitation to tender is not supported by sufficient information to enable the contractor to properly design the interface between the CDP and other work and the contract documents are executed without the ambiguity being clarified, the contractor ought to have a claim for any additional cost resulting from the architect's directions on integration.
- If the architect subsequently issues instructions regarding either the rest of the work which affects the CDP or regarding the CDP by instructing through the Employer's Requirements, the architect must issue directions on integration and the contractor ought to have a claim for additional cost.
- If the contractor is obliged to alter the CDP in order to correct its own error, the contractor must bear those costs itself even though the architect will probably have to issue some directions about the integration of the corrected CDP.

In two of the circumstances outlined above, it is said that the contractor ought to have a claim for additional costs. Those words have been chosen with care, because

¹⁹ *John Jarvis Ltd v Rockdale Housing Association* (1986) 36 BLR 48.

common sense suggests that, where the contractor is put to additional cost due to circumstances which it could not foresee nor for which it is required to make provision in the contract, the contractor ought to be able to recover the cost from the employer. However, the contract does not provide for the architect to *direct* a variation. Therefore, it seems that directions issued by the architect under clause 2.2.2 will not give rise to variations as defined in the contract and it is only variations as defined in the contract which fall to be valued under clause 5. It is not clear how the contractor will be able to recover the cost of what would otherwise amount to a variation except, perhaps, by seeking to make an application for direct loss and/or expense under relevant matter 4.24.6.

All instructions issued in regard to contractor's designed portion work are subject to the contractor's right of reasonable objection under clause 3.10.3.

14.5.4 Valuation

Clause 5.2 sets out how valuations of variations are to be achieved.

Valuation by measurement

The contract makes clear that all variations instructed by the architect, anything which the contract provides is to be treated as a variation, work carried out in compliance with an architect's instruction to expend a provisional sum in the contract bills or in the Employer's Requirements, and any work for which an approximate quantity has been included in the contract bills or in the Employer's Requirements must be valued, as a first option, by agreement between the employer and the contractor. Note that it is the employer and not the architect or even the quantity surveyor who must agree. Of course, in practice, such agreement between the two parties to the contract is very rare, certainly where valuation is concerned, if for no other reason than that the employer seldom has the necessary expertise. If the parties do not agree on a valuation, they are still free under the contract to decide on a system of valuation. It is only if they neither agree a value nor a system of valuation that clause 5.2.1 states that the value is to be calculated by the quantity surveyor in accordance with the valuation rules in clauses 5.6–5.10 or, if a variation to CDP work, clause 5.8. It is only variations which are the subject of variation quotations under clause 5.3 and schedule 2 which are not subject to the measurement rules.

In respect of each individual item of measured Work, but only to the extent that it is capable of being measured, there are three criteria to be considered in relation to the work measured in the contract bills: whether the work is of similar character to that work; whether it is executed under similar conditions; and whether it significantly changes the quantity of work. The rules provide that:

- If all three criteria are the same as those related to an item of work already set out in the contract bills – i.e. if the character and conditions are similar and the quantity is not significantly changed by the variation – the rate or price set out in the contract bills against that item must be used for the valuation of the variation.
- If the character is similar to that of an item of work set out in the contract bills, but the conditions are not similar and/or the quantity is significantly changed

from the contract bills, the rate or price in the contract bills against that item must still be used as the basis of the valuation of the item but must be adapted so as to make a 'fair allowance' (more or less money), to allow for the changed conditions and/or quantity.

- If the work is not of similar character, it must be valued by the quantity surveyor at fair rates and prices and the rates and prices in the contract bills are no longer relevant.

It is clear that, if the character of the work to be measured is similar to that of an item which is already in the contract bills and to which a rate or price is fixed the quantity surveyor must use the rates set out in the bills in order to carry out the valuation. A change to those rates can be made only if there is a change in the conditions in which the work is carried out or if there is a significant change in its quantity. The quantity surveyor's discretion only comes into play if the character of the measured work is not similar to anything in the bills. Then the quantity surveyor may make a fair valuation of the work. Therefore, the key word in these rules is 'similar' and it is important that the meaning of the phrase 'similar character' should be properly understood. The JCT has not seen fit to formally define it, presumably relying on its ordinary English meaning. Unfortunately, it is this phrase which seems to have caused a great deal of difficulty in practice. Various commentators have interpreted it in different ways. One view is this (referring to IFC 98, but the principle is the same):

'If the instruction requiring a variation alters in any way [the] description of the work, it must therefore become different and may well in fairness be deserving of a different rate. To interpret the words in any other way will be to prevent the quantity surveyor from applying a fair valuation where the varied description of the item, although arguably remaining of a similar character to the original, justifies a different rate. Furthermore, the last few lines of clause 3.7.4 [*similar to the last few lines of SBC clause 5.6.1.2*] makes it clear that due allowance for any change in conditions is made only where the work has not been modified other than in quantity so that the character of the work itself must remain unchanged.'²⁰

That appears to be taking the meaning too far. The passage is suggesting that 'similar' means 'the same' or even 'identical'. That cannot be correct. The ordinary meaning of 'similar' would be 'almost but not precisely the same' or 'identical save for some minor particular'.²¹ The words 'similar character' when applied to an individual measured item of work probably mean that the item is virtually identical to an item in the contract bills. If the item is of 'similar character' the only grounds upon which the quantity surveyor can vary the price for the item from that which is set out in the bills is that the conditions are not similar or the quantity has significantly changed, otherwise the quantity surveyor must use the price in the bills as it stands. 'Similar' must be read in context. It appears that very little change in description would be needed to render the character of work dissimilar for the purpose

²⁰ Neil F Jones & Simon Baylis, *Jones & Bergman's JCT Intermediate Form of Contract* (1999) 3rd edition, Blackwell Science at p.172.

²¹ David Chappell, Michael Cowlin and Michael Dunn, *Building Law Encyclopaedia* (2009), Wiley-Blackwell p. 494.

of this clause. Then, the rules set out in clauses 5.6.1.1 and 5.6.1.2 cannot be applied and the quantity surveyor is given the unfettered discretion under clause 5.6.1.3 to value the item at a 'fair' rate or price. It is probably necessary to look beyond the straightforward description or measurement in determining whether the rates and prices in the bills are to be set aside and a valuation at 'fair rates and prices' substituted.

The word 'similar' is also used to qualify 'conditions'. Again, it is thought that the word does not mean identical or the same, but that its meaning is unchanged from the meaning when it is used to qualify 'character'. However, there are different considerations. It is possible to precisely define the 'character' of an item by its description in the contract bills. It is not possible to closely define the conditions under which it is to be carried out. Therefore, whether the conditions are 'similar' is to be decided by considering what conditions the contractor ought to have reasonably anticipated in light of the available information when the contract was executed. Therefore, the 'conditions' referred to in the valuation rules are the conditions to be derived from the express provisions of the contract bills, the drawings and other documents. The quantity surveyor is not entitled to take into account the background against which the contract was made.²²

The word 'similar' is not used to qualify 'quantity', the criterion used here being whether or not the quantity had been 'significantly changed' by the variation. A small change in quantity may be significant for some items (especially if the original quantity was small) but a very large change may not be significant in other circumstances. There are no precise rules and it is a matter for the quantity surveyor's experience and judgment in each particular case. It is normal to assume that large increases in quantity require reductions in the rate and vice versa. However, that may not always follow.

It is not always appreciated that the rate or price in the contract bills must be used as the basis of calculation of price and it can be adjusted only to take account of changed conditions and/or significantly changed quantity. Where a contractor puts in a rate which is obviously far too low or far too high, there is no means of altering it. Clause 4.2 states that the contract sum can be adjusted only in accordance with the express provisions of the contract. Therefore, if the contractor has made a mistake and no one notices until the contract is executed, the contractor is left with the consequences. It is often thought that, if a rate is clearly erroneous, the quantity surveyor, when valuing variations, is entitled to correct the rate and change it to a reasonable rate before using it as a basis for the valuation. That is incorrect. The contractor has agreed under the terms of the contract to carry out variations to the Works, and the employer has agreed to pay for them on the basis of clause 5. The valuation rules do not say that the rates and prices shall form the basis of valuation after the quantity surveyor has accepted that they are reasonable rates. The quantity surveyor may only work with the rates and prices in the bills and has no power to change them. Neither employer nor contractor can avoid the consequences of bill rates being too high or too low.²³

²² *Wates Construction (South) Ltd v Bredero Fleet Ltd* (1993) 63 BLR 128.

²³ *Dudley Corporation v Parsons & Morrin Ltd*, 8 April 1959 CA, unreported; *Henry Boot Ltd v Alstom Combined Cycles Ltd* [1999] BLR 123.

A contractor will sometimes take a gamble by putting a high rate on an item of which there is a small quantity or a low rate on an item of which there is a large quantity in the expectation that the quantities of the items will be considerably increased or decreased respectively. If the contractor's gamble succeeds, it will make a nice profit. Quantity surveyors checking priced bills at tender stage will be alert to such pricing, but there is little to be done about it. It is not unlawful, but rather part of a contractor's commercial strategy.²⁴

So far as the quantity surveyor's duty to determine 'fair rates and prices' is concerned, under clause 5.6.3, it is likely that the word 'fair' is to be read in the context of the contract as a whole. It is arguable that a 'fair' price for varied work in a contract where the contractor has inserted keen prices in the bills of quantities should be a similarly keen price.²⁵ In general, the quantity surveyor will be expected to determine 'fair rates and prices' following a reasonable analysis of the contractor's pricing of the items set out in the bills, including its allowances for head-office overheads and profit.

The rule for the valuation of omissions from the contract Works could scarcely be simpler. Clause 5.6.2 states that they are to be valued at the rates set out in the contract bills. There are certain circumstances where this may not appear to be a fair way of valuing omissions. This is particularly the case where the architect, with the consent of the employer, has instructed the contractor not to make good under clause 2.38. That is presumably why that clause makes provision for an 'appropriate deduction' to be made from the contract sum rather than leaving it to the quantity surveyor to simply omit the rate against the item in the contract bills. However, the operation of clause 5.9 must not be overlooked and, if the omissions substantially change the conditions under which other work is executed, it must be valued accordingly.

Clause 5.6.3 is important. It makes clear that, in carrying out valuation, the quantity surveyor must take into account several factors other than the prices in the contract bills for individual items or valuation at fair rates and prices as the case may be. When considering the valuation of additional or substituted work or the omission of any work or an instruction for the expenditure of a provisional sum for undefined work, the quantity surveyor must make allowance for any percentage or lump sum adjustments in the contract bills (clause 5.6.2). The sums referred to are any such percentages or lump sums which are usually to be found in the general summary at the end of the bills. They must be applied pro rata to all prices for measured work and, therefore, to all variations.

Clause 5.6.3 stipulates that the quantity surveyor is also required to make allowance, when valuing and where appropriate for any addition to or reduction of preliminary items of the type referred to in the Standard Method of Measurement, 7th edition, Section A (Preliminaries General Conditions). The clause does not actually oblige the quantity surveyor to use the rates and prices set out in the bills against such items, but simply to make allowance for any addition to or reduction of such items. However, the quantity surveyor must be able to justify the method of calculat-

²⁴ *Convent Hospital v Eberlin & Partners* (1988) 14 Con LR 1. The case went to appeal, (1989) 23 Con LR 112, but not on this point.

²⁵ Some support for this view may be extracted from the judgments in *Cotton v Wallis* [1955] 3 All ER 373 and *Phoenix Components v Stanley Krett* (1989) 6-CLD-03-25.

ing the allowance and, in practice, most quantity surveyors will use the rates and prices in the contract bills.

It must not be assumed that clause 5, taken as a whole, amounts to a broad power for the quantity surveyor to value variations. It can be seen that the quantity surveyor's power is carefully controlled and the prudent quantity surveyor will carefully read the whole of clause 5 before proceeding to value. A particular restriction is set by clause 5.10.2. This clause is often, and surprisingly, misread as though it gave the quantity surveyor the power to include something in respect of direct loss and/or expense when valuing variations. The reverse is true. Clause 5.10.2 stipulates that no allowance must be made under the valuation rules for any effect upon the regular progress of the Works or for any other direct loss and/or expense for which the Contractor would be reimbursed by payment under any other provision in the contract. The reference here is to clause 4.23. That is the only other provision in the contract under which the contractor can recover loss and/or expense. It follows that, in making any allowances in respect of preliminary items, the quantity surveyor must not make allowance for the material effect of the particular variation on the regular progress of the Works. This permits the quantity surveyor to make allowance for the less than material effect of the variation upon regular progress. It should be noted that, in stating that an allowance must be made, the contract is deliberately giving the quantity surveyor scope to do rather more, or less, than would be the case if the word 'ascertainment' had been used.

Clause 5.10.2 is quite complex. It would have been simple for the clause to state that no allowance for loss and/or expense must be made in any valuation under clause 5. The clause actually restricts the addition of loss and/or expense to the valuation only if the contractor would be reimbursed elsewhere. It does not restrict only if the contractor *has* been reimbursed, but if it *would* be reimbursed. Therefore, it is sufficient to block the addition of loss and/or expense if the contractor would (i.e. is entitled to be) reimbursed even if no reimbursement has been made. The reason for the lack of reimbursement may be because the contractor has not made application under clause 4.23. Its remedy is to do so, or because the architect or the quantity surveyor has refused or failed to ascertain under clause 4.23: the remedy is to use the dispute resolution procedures. The clause does leave open the possibility, albeit slim, that if the contractor is not entitled to reimbursement of loss and/or expense under clause 4.23, the quantity surveyor has power to address the matter in an allowance under clause 5.6.3.3. It is a matter for the ingenuity of the contractor to convincingly argue the case for loss and/or expense as part of an allowance. It is notable that clause 5.10.2 refers to *other* direct loss and/or expense and to any *other* provision in the contract. The inclusion of the word 'other' is a clear indication that the contract envisages that loss and/or expense is recoverable under clause 5.6.3.3 although to a strictly limited extent, especially where there is no material effect on the regular progress of the Works.

Clause 5.10.1 requires the quantity surveyor to make a fair valuation of any liabilities directly associated with a variation, if the valuation cannot reasonably be carried out by the application of clauses 5.6–5.9. There is no other restriction and the clause appears to oblige the quantity surveyor to make a fair valuation in such cases. Such liabilities might include the loss to the contractor where a variation to the work results in materials already properly ordered for the Works, as included in the

contract, becoming redundant. It will also include the valuation of the effect of any instruction which does not require the addition, omission or substitution of work, i.e. obligations or restrictions (see below).

Clause 5.9 takes account of the fact that a variation to part of the work can have an effect on the way in which other work, including the contractor's designed portion, must be carried out. It states that, where the introduction of a variation changes the conditions under which other work, which is not varied, is executed, the quantity surveyor must value that other work as if it had been varied. In practice, this will mean that it must be re-valued under clause 5.6.1.2: that is, on the basis of the rates and prices in the contract bills against the appropriate items adjusted in respect of the changed conditions. It may also be necessary for the quantity surveyor to make allowance for other factors such as consequential changes in preliminary items or lump sum adjustments.

Valuation of approximate quantities, defined and undefined provisional sums

Provisional sums for defined work are deemed to have been taken into account in the contractor's programming and pricing preliminaries. There will be no adjustment unless measured work in the same circumstances would be adjusted. If the work is undefined, the contractor is deemed not to have made any allowance for it in programming and pricing preliminaries.

This addresses a difficulty which contractors have and which is often misunderstood. The fact is that a contractor will be unable to make any sensible attempt to programme or price preliminaries to deal with a provisional sum which may be little more than a title and a figure. For example, 'mechanical installation = £10,000' is almost meaningless. It used to be common, however, for architects to demand that the contractor made some allowance in its programme for provisional sums of this kind. Setting aside the difficulty of complying with such a request, the request itself demonstrates a lack of understanding that the 'bar' on the bar chart is, or should be, simply the result of a series of complicated calculations taking into account the way in which the work will be integrated into other work and the way in which it will be priced. General Rules 10.1–10.6 of SMM 7 usefully set out the minimum information which the contractor must know before it can plan and price the effects of the item in question.

Where work can be described in items in accordance with the Standard Method, but accurate quantities cannot be given, an estimate, called an 'approximate quantity' must be given. The valuation of work for which an approximate quantity is included in the contract bills is covered by clauses 5.6.1.4 and 5.6.1.5. Where the approximate quantity is a reasonably accurate forecast, the valuation must be in accordance with the rates for the approximate quantity. If it is not a reasonably accurate forecast, the rate forms the basis for the valuation, but the quantity surveyor is to make a fair allowance for the difference in quantity.

No allowance for either addition to or reduction of preliminaries can be made under clause 5.6.3 if the valuation relates to an architect's instruction to expend a provisional sum for defined work.

Under clause 5.9, if the contractor's compliance with an architect's instruction to expend a provisional sum:

- for undefined work; or
- for defined work to the extent the instruction is different from the description in the contract bills; or
- the execution of work for which an inaccurate approximate quantity is in the contract bills

substantially changes the conditions under which other work is carried out, the other work is to be treated as though it was the subject of an architect's instruction for a variation. This clause simply brings this kind of item under the same rules as variations to measured work. The differences highlight the extent of the contractor's knowledge about the kind of work and the amount at the time the contract was made.

Valuation of the contractor's designed portion

Clause 5.8 deals with valuation of contractor's designed portion work. There is an overall stipulation that clauses 5.6.3.2 (percentage or lump sum adjustments), 5.6.3.3 (adjustment of preliminary items), 5.7 (daywork) and 5.9 (change in conditions for other work) will apply to CDP work if relevant. However, the nature of this work makes necessary the inclusion of specific provisions. Therefore, clause 5.8.1 requires an allowance to be made for the addition or omission of design work. A prudent contractor will include an hourly rate for design work in its CDP analysis. In addition, the valuation of any variations to the CDP work must be consistent with similar character of work in the CDP analysis. Echoing clause 5.6.1.2, allowance is to be made for any change in conditions or significant change in quantity. The comments already made with regard to 'similar' and significant change in quantity also apply here. If there is no work of a similar character, the quantity surveyor is to make a fair valuation. Echoing clause 5.6.2, valuation of omissions is to use the values in the CDP analysis.

Valuation on a daywork basis

If additional or substituted work cannot be valued under clauses 5.6 (general rules) or 5.8 (CDP work), it must be valued as 'daywork', that is to say on the basis of prime cost plus percentages as set out in clause 5.7. This is likely to be an acceptable method of valuation to the contractor since it ensures that it will, at least, recover its costs of the work subject only to the limitations set out by the relevant 'Definition of Prime Cost' defined in the clause plus percentages to cover supervision, overheads and profit. However, the employer is unlikely to be happy with it, because there is no incentive for the contractor to work efficiently. Therefore, it is very much a tool of last resort only to be used if measurement in other ways is impossible.

The machinery set out in the contract for the submission of daywork sheets (the contract refers to 'vouchers') and the associated timescale is not ideal. The

clause states that the daywork sheets must be delivered to the architect or authorised representative for verification not later than seven business days after the work has been executed. A business day is defined in clause 1.1 as excluding Saturdays, Sundays and public holidays. Therefore, if the work is carried out on a Monday, the last date for submitting the daywork sheet will be Wednesday of the following week. That is a small improvement on the timescale set out in JCT 98 which stipulated that daywork sheets should be submitted not later than the end of the week following that in which the work has been executed. Nevertheless, it is not really workable. If the architect or representative is required to verify what is set out on the daywork sheet, in other words to vouch for its truth, it is difficult to see how the architect can do that two days later let alone in the following week. Realistically, a person can only verify something was done by actually seeing it. The presence of an operative working on a particular part of the Works can only be verified if the person verifying stays with the operative throughout the whole period. No completely satisfactory solution has been proposed for this problem.

It is usually assumed that, if there is a clerk of works, the clerk of works will be the architect's authorised representative for this purpose. That is probably because there is no other reference in the contract to the architect having a representative. However, despite the fact that the clerk of works is often referred to as 'the eyes and ears of the architect on the site', clause 3.4 states that the clerk of works, far from being a representative of the architect, is an inspector on behalf of the employer. Therefore, it is clear that the clerk of works has no authority to verify daywork sheets unless the architect specifically gives that authority. It is of course open to the architect to give that authority to anyone. In giving such authority, the architect should make quite clear in writing to the contractor and any other affected party the extent of such authority.

The straightforward and sensible way of dealing with the verification of daywork sheets, is for the contractor to give notice to the architect of its intention to keep daywork records of a particular item of work, for the architect or authorised representative to attend the site and to take records of the time spent and materials used and for the daywork sheets to be submitted for verification at the end of each day. In that way, at least, the quantity surveyor can be reasonably certain that the sheets or vouchers do represent an accurate record of time and materials. In order for this system to work properly, the quantity surveyor must notify the contractor in advance of any intention to value using daywork. It must not be forgotten that the quantity surveyor need not value using daywork; the work can be measured using one of the other methods in clause 5. Verification is normally carried out by signing the sheets. Often the magic formula 'For record purposes only' is added. However, where daywork is to be the method of valuation in any particular case, the addition of those words has little practical value and certainly does not prevent the contents of the sheets being used for calculation of payment.²⁶ In these circumstances it appears that the quantity surveyor has no right to substitute his or her own opinion for the hours and other resources on the sheets.²⁷ It has been held that where the employer has set

²⁶ *Inserco v Honeywell* 19 April 1996, unreported.

²⁷ *Clusky (t/a Damian Construction) v Chamberlain, Building Law Monthly*, April 1995, p.6.

out a system of verification by signing, but has neglected to do so, the sheets will stand without further proof as evidence of the work done unless they can be shown to be inaccurate.²⁸

Valuation of 'obligations and restrictions'

Clause 5.10.1 is a curious clause. It must relate to the valuation of obligations or restrictions imposed by the employer or variations to obligations or restrictions already imposed in the contract bills as defined in clause 5.1.2 and to liabilities directly associated with a Variation, already dealt with above. That is because the valuation of variations in the work to be executed under the contract or of work to be executed against provisional sums is clearly dealt with in detail by clauses 5.6–5.9; indeed the clause expressly excludes variations that can be so valued.

Clause 5.10.1 provides that a fair valuation of such variations must be made. How that is to be achieved is not stated. In the last edition dealing with the situation under JCT 98, it was thought that there was no real answer to the question. However, reflection on the new provisions in clause 5 of SBC suggests the way forward, albeit the clause itself could have been redrafted to make the intention clearer. It has already been noted that clause 5.10.2 prohibits any allowance for the effect on the regular progress of the Works or for any loss and/or expense for which reimbursement would be obtained under any other clause. The content of clause 5.1.2 is defined as variations. As such, they could fall under the relevant matter in clause 4.24.1 provided that they materially affect the regular progress of the Works. If there is no material effect or if regular progress is not affected at all, the valuation of clause 5.1.2 variations is to be carried out under clause 5.10.1, i.e. a fair valuation. However, to the extent that there is a material effect on regular progress, it falls to be ascertained under clause 4.23 provided that the contractor has made application. The contractor's prompt application is a condition precedent to the operation of the clause.

It seems likely that limiting working space or hours will have an effect on regular progress and possibly an instruction to vary the sequence of work will have a similar effect. It is less easy to see that variations to access will effect regular progress, but all the clause 5.1.2 variations will have cost implications.

14.5.5 Variation and acceleration quotation

The methods of valuation by the quantity surveyor can be bypassed if a quotation under clause 5.3 is requested from the contractor.

In order to trigger clause 5.3, clause 5.3.1 provides that the architect must state in an instruction that the contractor is to provide a quotation in accordance with schedule 2. However, nothing in clause 5.3 expressly empowers the architect to make such a statement. The only clue is to be found in clause 5.2.2 which states that the valuation provisions will not apply to a variation for which the contractor has submitted a quotation and, importantly, the architect has issued a confirmed acceptance.

²⁸ *JDM Accord Ltd v Secretary of State for the Environment, Food and Rural Affairs* (2004) 93 Con LR 133.

If necessary, a term would probably be implied empowering the architect to make such a statement to avoid the clause becoming inoperative.

Under clause 5.3.1, the contractor can indicate disagreement within 7 days or such other period as agreed and the instruction is not then to be carried out unless the architect issues a further instruction to that effect. In such a case the instruction will be valued in accordance with clause 5.6 as usual. Provided that the contractor has received sufficient information with the instruction, it must provide a 'Variation Quotation' not later than 21 days from the date of receipt of the instruction. Although the instruction is to be issued by the architect, the quotation must be sent to the quantity surveyor where it is open for acceptance for at least 7 days. Unusually, it appears that the contractor cannot withdraw the quotation before acceptance as it could in the course of ordinary negotiations, because in this instance, the contractor is bound by the contract terms to keep its offer open. The quotation must contain:

- The value of the adjustment to the contract sum which must include the effect on any other work. Calculations must be provided and must refer to the contract bill's rates and prices as relevant.
- Adjustment to the contract period including fixing a new, possibly earlier, completion date.
- The amount of loss and/or expense.
- The cost of preparation of the quotation.

If the architect specifically so states, the contractor must also include:

- additional resources required
- a method statement
- a base date in accordance with clause 4.22 for fluctuation purposes.

The employer has an important role to play in this process, probably because the contractor will be asked to quote particularly where it is likely that the instruction will have some significant effect on the contract in terms of additional expenditure or time. It is for the employer to accept the quotation or otherwise and, if the employer accepts, the architect must confirm the acceptance in writing to the contractor. The purpose of this acceptance is so that the architect can formally confirm that the contractor is to proceed, that the adjustment to the contract sum can be made, that a new date for completion (if applicable) can be fixed and the base date referred to in paragraph 1.2.6 is confirmed. The status of the adjustment to the completion date is acknowledged in clause 2.26 and 2.28 and the architect should not issue a separate extension of time for the same instruction. The adjustment to the completion date noted in the confirmed acceptance is to be taken into account by the architect in the normal way when considering further extensions of the contract period.

If work carried out under a confirmed acceptance is subsequently varied by the architect, clause 5.3.3 requires the quantity surveyor to value it on a fair and reasonable basis, but having regard to the figures in the quotation. That means that the quantity surveyor must take the figures into account, not that they must necessarily be followed. The clause now includes a requirement that the quantity surveyor must

include in the valuation any direct loss and/or expense resulting from compliance with such instruction. It is not clear why that is included, because this type of variation would seem to be a relevant matter under clause 4.24 which only excludes the confirmed acceptance and not any subsequent variation of it.

The provision that if the employer does not accept, the architect must either instruct that the variation is to be carried out and valued under clauses 5.6–5.10 or instruct that the variation is not to be carried out, is remarkable in one particular. There seems to be no provision for the employer or the quantity surveyor on behalf of the employer to negotiate on the quoted price. It is either to be accepted or rejected. If it is not accepted, schedule 2, paragraph 5.2 provides that a fair and reasonable amount must be added to the contract sum to represent the cost of preparation. Although the description of a ‘fair and reasonable amount’ is identical to what the contractor is to include in the quotation to represent its costs of preparation, it is not expressly stated that the quantity surveyor must add that same amount and it seems that the quantity surveyor has discretion to add less (but probably not more) than that amount if that appears to be fair and reasonable. However, it is thought that if the quantity surveyor did include a lesser sum, the grounds for doing so would have to be clearly stated and could be challenged by one of the dispute resolution procedures. The power of the quantity surveyor to value the cost of preparation is subject to the quotation having been prepared on a fair and reasonable basis. Demonstrating an understanding of human nature, paragraph 5.2 makes clear that the mere fact that the employer has decided not to accept the quotation is not evidence that it has not been prepared on a fair and reasonable basis.

Clause 5.3 is most important. It makes plain that, if the employer does not accept the quotation, the quotation cannot be used for any purpose at all. It must be treated as though it had never been submitted. This is to avoid the situation which could arise where the quantity surveyor uses the submitted quotation to assist in valuing an instruction issued by the architect under paragraph 5.1.1.

14.5.6 Payment problems

Clause 5.5 provides that an agreement under clause 5.2.1 or a valuation or confirmed acceptance under clause 5.3.3 must be given effect by adding to or deducting from the contract sum. Clause 4.4 then requires that the amount of the valuation must be taken into account in the computation of the next interim certificate. Read strictly, it might be thought that this could pose a difficulty if the amount was taken into account in the next interim certificate after the valuation has been made, but before the work has been carried out. One answer is to ensure that such valuations are not completed until the work is executed. In any event, clauses 4.10 and 4.16 state that what is to be included in interim certificates is the total value of work properly executed by the contractor. If the valuation is made before the work is properly executed, it may be taken into account in the sense of being considered, but it would not be included, because not properly executed. If the formal valuation has not been made by the time the work has been properly executed, a reasonably accurate allowance should be made for it in the next interim certificate.

14.5.7 Contractor's rights

The contractor has the right to make reasonable objection to carrying out certain instructions as already noted above. If the contractor and the employer do not agree the valuation and the architect does not require a variation quotation under clause 5.3, the valuation of variations is solely the function of the quantity surveyor. Neither the contractor nor the employer nor the architect has the right to be consulted during the process. The contractor's only right, under clause 5.4, is that it must be given the opportunity of being present at the time of any measurement and of taking such notes and measurements as it may require. It may be tempting to some to assume that the quantity surveyor may simply notify the contractor of the intention to take measurements on a particular date, but that if the contractor has a prior appointment the quantity surveyor, having given it the opportunity of being present, can proceed without it. However, it is thought that there must be an implied term that the opportunity given to the contractor must be a reasonable opportunity to be present and the unavoidable absence of the contractor suggests that, if possible, a new date should be fixed.

14.5.8 Function of the quantity surveyor

By clause 5.2.1, the default position is that all variations and all work executed by the contractor in accordance with the architect's instructions for the expenditure of provisional sums shall be valued by the quantity surveyor named in the contract. Therefore, save for any agreement between the contractor and the employer or for any variation quotation, it is entirely a matter for the quantity surveyor to determine the price to be paid or allowed in respect of a variation. During the process of valuing the results of measurement, the quantity surveyor has no duty to consult the contractor, but may proceed without it and at the end of the contract, as required by clause 4.5.2, may simply, through the architect, present the contractor with the statement of all the adjustments to the contract sum which would include a list of the variation valuations. The contractor has the option of accepting it or, in due course, to refer the matter to adjudication or arbitration at the point when it becomes enshrined in an architect's certificate.

In practice, the situation is usually quite different. The quantity surveyor will usually consult the contractor on an ongoing basis as measurement and valuation takes place. Generally, the quantity surveyor will attempt to reach agreement with the contractor, so far as that is possible, on all matters concerning measurement and valuation in order to minimise potential areas of dispute. It is obviously useful if the contractor has agreed the whole of the content of the statement of adjustments of the contract sum. It is common practice for the quantity surveyor to send the statement to the contract with a sheet inviting the contractor to sign, indicating agreement. From this practice has grown up the false assumption by some architects and quantity surveyors alike that the contractor's agreement to the statement is necessary.

On the contrary, the quantity surveyor is not obliged to obtain this agreement and can simply act alone to arrive at the statement of adjustments of the contract

sum. Indeed, the quantity surveyor probably has a duty to do so and certainly has that duty if there is a danger of missing an express contract timetable.²⁹ The architect does not require the contractor's agreement before issuing the final certificate.

The architect has no power to determine the valuation or indeed to influence it in any way. Occasionally, an architect will include in an instruction requiring a variation, details of the method of valuation, for example: 'the work carried out under this instruction is to be valued at the rate for brickwork in the contract bills'. That part of the instruction would be of no effect and the quantity surveyor must ignore it and strictly follow the contract rules for valuation. Whether such an instruction issued by the architect is rendered void is not clear. It probably remains valid save for the part regarding valuation, which is an instruction which the architect is not empowered to give.

Whether the architect certifies the amount valued by the quantity surveyor is another matter. Financial certification is an onerous burden and the architect must be reasonably satisfied regarding the quantity surveyor's valuation before certifying. The architect will usually do that by requiring the quantity surveyor to provide a simple breakdown with each monthly valuation. It is no part of the architect's duty to re-value the work, indeed it has been said above that an architect has no such power. But the architect must at least carry out some simple checks. If, perhaps rarely, the architect believes that the valuation is too high or too low, the architect's duty is to certify what the architect believes to be the correct amount.

14.6 JCT Intermediate Building Contract (IC and ICD)

14.6.1 General

For simplicity, the position has been considered under ICD. It is identical to IC except for the addition of clauses and other references to the contractor's designed portion. Clause 5 under ICD is very similar to clause 5 of SBC. The provisions of ICD are slightly shorter than SBC and one or two provisions are omitted. Significant features are indicated below.

The definition of a variation in work in clause 5.1.1 of ICD is identical to that in clause 5.1.1 of SBC. The only difference in the definition of a variation in obligations and restrictions in clause 5.1.2 is that, under ICD, reference is made to imposition of obligations and restrictions in the contract documents and the definition of contract documents in clause 1.1 includes Employer's Requirements and Contractor's Proposals among other things.

14.6.2 Variations

The comments under this head for SBC are generally applicable to ICD.

²⁹ *Penwith District Council v VP Developments Ltd*, 21 May 1999, unreported.

14.6.3 Instructions requiring variations

Clause 1.7.1 of ICD states that all architect's instructions, which obviously include those requiring variations or relating to the expenditure of provisional sums, must be in writing. However, it is notable that ICD does not contain any provision similar to SBC clause 3.12 allowing instructions other than in writing to be confirmed by the contractor. Therefore, it is evident that the contractor is not obliged to comply with any instruction unless actually issued by the architect in writing. If the architect purports to confirm an oral instruction in writing, the effect probably amounts to no more than if the instruction had been issued for the first time at the date of the purported confirmation. Effectively, the purported confirmation is the instruction and the contractor ought not to act until the confirmation/instruction is actually received. It seems, however, that where a contractor confirms an oral instruction, it is contractually obliged to do the work described in such confirmation and it will be held to have waived its right to rely upon clause 1.7.1.³⁰ It is also probable that, where an architect is in the habit of issuing oral instructions without confirmation, the employer will be unable to rely on the absence of a written instruction as an excuse for non-payment.³¹

14.6.4 Valuation

Contract documents

The contract documentation available under ICD is extremely flexible. This is evident from the recitals. They make clear that a contract under ICD may be entered into in two ways. It may be on the basis of drawings and a document which has been provided to the contractor by the employer at the time of tendering so that it may be priced by the contractor to form the basis of its tender and ultimately of the contract sum (alternative A of the fifth recital). Alternatively it may be on the basis of drawings and an unpriced specification only (alternative B of the fifth recital). In addition, where the contractor's designed portion is operated, the Employer's Requirements, the Contractor's Proposals and the CDP analysis will form part of the contract documents in each case.

A document to be priced by the contractor under alternative A of the fifth recital may be one of three kinds:

- a full bill of quantities prepared in accordance with a specified method of measurement
- a priceable specification of Works, i.e. one set out in such a way that the contractor may attach a price to each item
- work schedules; these are schedules which have been provided by the employer and priced by the contractor (as mentioned in the fifth recital) – i.e. any document

³⁰ *Bowmer and Kirkland Ltd v Wilson Bowden Properties Ltd*, 11 January 1996, unreported.

³¹ *Redheugh Construction Ltd v Coyne Contracting Ltd and British Columbia Building Corporation* (1997) 29 CLR (2d) 39–46; *Ministry of Defence v Scott Wilson Kirkpatrick and Dean and Dyball Construction* [2000] BLR 20.

which is neither a specification nor a bill of quantities but which in some way describes the Works and is set out so that it may be priced by the contractor to form the basis of its tender and of the contract sum.

These three documents, when priced, are referred to in the contract as the 'Priced Document'.

Work included in the contract sum

Firmly at the root of the valuation procedure is clause 4.1 which states the work that is included in the contract sum. In a system of valuation which depends largely upon rates and prices set against specific items, it is essential that all parties are clear about the kind and amount of work which the contractor is undertaking to carry out for the contract sum. Where the priced document is a full bill of quantities, clause 4.1.1 provides that the quality and quantity of work included in the contract sum is that which is in the contract bills and the CDP documents. This clause gives the contract bills in ICD the same standing, so far as defining the work which the contractor has agreed to do for the contract sum is concerned, as bills of quantities have under SBC with Quantities (see the consideration of this point in Section 14.2 above).

However, where the document is not a bill of quantities prepared in accordance with a specified method of measurement, clause 4.1.2 is more complex. It provides that, if there are no bills of quantities and no quantities in either the specification or the work schedules, the way of deciding the quality and quantity of the work is to look at all the documents together. That would be fruitful ground for claims if it were not for the proviso that if there is any inconsistency between drawings and the other document (specification or work schedules), what is shown on the drawings will prevail. However, if there are quantities in the specification or work schedules, the quality and quantity of work in the contract sum is what is in the specification or work schedules.

The clause is qualified by the words 'to the extent'. So that the quality and quantity of work is that shown in the specification or work schedules *to the extent* that quantities are included. If those words were not there, the mere existence of one or two quantities in the specification or work schedules would be enough to make them the priority documents. Put simply, the clause amounts to this. If there are no quantities for a particular item, the contract documents must be read together. If there is conflict between the documents, the drawings prevail. Where quantities are shown, they prevail. That seems to be a sensible position although the JCT could perhaps have expressed it more succinctly.

Previous editions of this book have suggested that this approach to the priority of documents seemed illogical (i.e. situations where a full bill of quantities is not used but where the priced document is a specification or work schedules which has formed the basis of the contractor's tender). The nub of the criticism was that, where an employer had provided a contractor with a document on which to tender and where that tender had become the contract sum, the contents of the document ought to be recognised as the amount of work for which the contractor had priced. That should be the case irrespective of the form the document took, whether in words or

quantities. That document ought to take priority over the contract drawings so far as the priced amount of work was concerned.

On reflection, that view is probably too harsh. As noted in the previous paragraph, the omission of the words 'to the extent' would be sufficient to render the priced document containing only a few quantities the priority document. Realistically, the most accurate description of what the employer wants is probably contained in the drawings, a fact recognised by clause 4.1.2. Therefore, the clause, as it stands, means that, in the absence of a full bill of quantities, the priority documents will be the drawings and it is only where quantities have been inserted in the priced document that the quantified items take precedence. Far from being illogical, that appears to be the most accurate way of identifying the work included in the contract sum.

Contract sum analysis and schedule of rates

Alternative B of the fifth recital does not require the contractor to price either specification or work schedules. It requires the contractor to supply the employer with the contract sum it requires for carrying out the Works in accordance with the drawings and specification and either a contract sum analysis or a schedule of rates on which the contract sum is based. A contract sum analysis is a type of breakdown of prices which was first introduced as a pricing document in the Standard Form of Contract with Contractor's Design 1981 (CD 81 – the forerunner of WCD 98 and DB). The analysis breaks down Works and places a sum stated against each, the whole adding up to the contract sum. It is to be provided by the contractor in accordance with the stated requirements of the employer. Therefore, it is clear that the employer must specify the form the analysis is to take when inviting tenders. There is nothing to stop the employer requiring the analysis in the form of bills of quantities. If the employer fails to specify the form, it seems that the contractor can provide the analysis in any way it wishes. However, although the contract sum analysis is a priced document for the purposes of valuing work, it does not become a contract document. As an alternative to a contract sum analysis, the employer may require the contractor to submit a schedule of rates. That is simply a list of items with prices attached. There are no measurements of work or materials, it is just the basic rates used to calculate the contract sum. However, it is not possible to add up the total of the rates to produce the contract sum. Therefore, there is no means of checking that the prices shown in the schedule actually are the prices used by the contractor in producing the contract sum. In order to check that, the architect or quantity surveyor would have to go through the process of measuring the whole project and then applying the rates. Needless to say, if the architect intended to embark on that exercise, it would be better to have bills of quantities in the first place. There is very little the architect can do to check that a contractor has not calculated its contract sum and then increased some or even all of the rates before setting them down in the schedule of rates. The contractor runs the risk that if work is omitted, the artificially increased rates will be used to value the omission to its disadvantage, but by judicious planning, likely omissions can be identified and increased rates avoided in those instances.

From the employer's point of view, therefore, the schedule of rates is an unsatisfactory document as the basis for valuing variations.

Valuation rules

In IFC 98, the wording of the valuation rules requires that the valuation of work of similar character to that set out in the priced document should be 'consistent' with the relevant values set out in that document. This wording has now been amended so that the valuation rules under ICD clause 5.3 (and IC) are virtually identical to the equivalent provision in clause 5.6 of SBC and the comments under SBC are applicable here.

Variation and acceleration quotation

There is no provision for the architect to invite a quotation from the contractor for a variation instruction or for the employer to invite an acceleration quotation as under SBC. However, although there is no express mechanism to govern the invitation, submission and acceptance of a variation quotation, clause 5.2 expressly makes provision for the employer and the contractor to agree the amount of a variation and there is no reason why such agreement should not be reached by way of a quotation from the contractor and acceptance by the employer.

Contractor's rights

The contractor has the right to make reasonable objection to carrying out certain instructions as already noted above. Under this contract, there is no express right for the contractor to be present during measurement. Nevertheless, the general comments under SBC are applicable here. Most quantity surveyors will want the contractor to be present in order to substantiate the measure. A contractor who was not notified or allowed to be present during measurement would be able to argue that the reason for its exclusion was that the measurement was not correct.

Function of quantity surveyor

Neither IC nor ICD envisage that a quantity surveyor will be appointed as a matter of course. Article 4 makes provision for such appointment and the contract refers to the quantity surveyor in clause 5.2 but, if bills of quantities are not included in the contract documents, a quantity surveyor may not be appointed and the function may be exercised by the architect. Indeed a footnote to article 4 expressly states that if the architect is to exercise the functions of the quantity surveyor, the architect's name should be entered in article 4. Few architects have a quantity surveying qualification and an architect intending to exercise this function should make sure that appropriate professional indemnity insurance is in place to cover the risk.

14.7 JCT Minor Works Building Contract (MW and MWD)

14.7.1 General

For simplicity, the position has been considered under MWD. It is identical to MW except for the addition of clauses and other references to the contractor's designed portion. Clauses 3.6 and 3.7 under MWD is much shorter than valuation clauses under SBC, IC or ICD. Significant features are indicated below.

14.7.2 Instructions requiring variations

The architect's power to issue written instructions is contained in clause 3.4 which gives the architect general power to issue instructions. The contractor's duty is to comply with any such instructions forthwith. Oral instructions must be confirmed by the architect within two days. There is no provision for the contractor to confirm oral instructions. Therefore, if the contractor is given an oral instruction which is not confirmed, the contractor should not try to confirm it in writing. Instead, it should simply notify the architect that, under the provisions of clause 3.4, it is not a formal instruction with which the contractor need comply until confirmed by the architect in writing. The variations provisions in MWD clause 3.6, like all the other provisions, are very brief. Essentially, it empowers the architect to order:

- an addition to the Works
- an omission from the Works
- a change in the Works
- a change in the order in which the Works are to be carried out
- a change in the period in which the Works are to be carried out
- a change in the Employer's Requirements necessitating a change in the design of the CDP work (ICD only).

Clause 3.7 places a duty on the architect to issue instructions regarding the expenditure of provisional sums. Under ICD clause 3.4.2, the contractor has the right to reasonably withhold consent to the issue of an instruction by the architect which affects the design of the CDP work. What may be considered reasonable will depend on all the circumstances. In practice, it is likely that the occasions when such objections may be considered reasonable will be rare, because the effect of most, and probably all, instructions can be dealt with adequately by valuation.

14.7.3 Valuation

The architect is charged with valuing all the types of variation noted in the clause. Former editions of this contract made provision for the name of a quantity surveyor to be inserted in the fourth recital even though there are no duties expressly

allocated to a quantity surveyor. If the name of a quantity surveyor was not inserted, the employer would not have any implied authority to appoint a quantity surveyor and in any event it remains the architect's duty to value.³² ICD no longer makes such provision. The architect, of course, like everyone else, can take whatever advice, from whomever appears appropriate. It is not unusual for a quantity surveyor to be appointed to assist the architect to carry out valuations and to give other cost advice, but the wording of the valuation clause makes clear that it is the architect who is responsible for valuation. This means that, even an architect who seeks advice on the valuation must understand precisely how the valuation has been carried out and it will be no defence later to say that the architect simply adopted the quantity surveyor's valuation, however eminent the quantity surveyor may be.

Clause 3.6.2 requires the architect and the contractor to endeavour to agree a price before the contractor carries out the instruction. Indeed it is clear that, to be effective, the price must be agreed before the contractor complies with the instruction. If the price is not agreed, valuation must be carried out in accordance with clause 3.6.3.

In carrying out the valuation, the architect must use, where relevant, the prices in the priced specification or the priced work schedules or the contractor's own schedule of rates. Unlike the position under IC and ICD, the contractor's own schedule of rates is a contract document. However, the criticisms of using a schedule of rates under IC and ICD are applicable to these contracts also. The valuation must be done on a fair and reasonable basis, which gives the architect scope for the exercise of discretion. It is for the architect to decide whether the prices in the contract documents are relevant. It seems, therefore, that unless the work to be valued is exactly the same and carried out under the same conditions, the architect is free to ignore the prices in the priced document. This is because a very slight change in the conditions under which work is carried out or in the character of the work may have a major impact on the contractor's costs.

An important point is that the valuation must include any direct loss and/or expense incurred by the contractor due to regular progress of the Works being affected by compliance with the variation instruction. The previous edition of this form (MW 98) also made provision for loss and/or expense to be included as a result of compliance or non-compliance by the employer with the CDM Regulations. That has now been omitted.

There is no express requirement that the contractor must submit documentary evidence to help the architect carry out the valuation. No doubt many contractors will do that as a matter of course in any event. The valuation must include allowance for profit, overheads and so on, as usual. A fair and reasonable valuation must include the effect of the instruction on other work not expressly included in the instruction.

Clause 3.7 very simply allows the architect to issue instructions regarding the expenditure of provisional sums. The architect must omit the sum and value the instruction in accordance with the principles in clause 3.6. It is possible to use the provision to nominate a sub-contractor, but it is not particularly wise.

³² *Beattie v Gilroy* (1882) 20 Sc LR 162.

14.8 JCT Design and Build Contract (DB)

14.8.1 General

It will be noted that the wording of clause 5 is very similar to, although shorter than, that of clause 5 in SBC. In administrative terms, however, there is a significant difference – the lack of an independent administrator and certifier. Effectively, in this form of contract the employer and contractor stand facing each other without the benefit of an intervening architect. The employer's agent is exactly that: an agent of the employer and it is probable that the agent owes no duty to the employer to act fairly between the parties. The notices issued by the employer's agent do not have the status of the certificate of an independent architect.³³ It seems, however, that the agent must demonstrate a very high duty of good faith.³⁴

The control documents for the contract Works generally which are in place of the contract drawings and the contract bills are the Employer's Requirements and the Contractor's Proposals. A question which often arises is which takes precedence, if there is a discrepancy between the Employer's Requirements and the Contractor's Proposals? It is sometimes argued that the employer *accepts* the Contractor's Proposals and that forms the contract and, therefore, the Contractor's Proposals take precedence. That is to view the formation of the contract as a simple matter of offer and acceptance. Although, no doubt, much negotiation may take place, the formation of the contract occurs when the contract documents are executed by both parties. Essentially, those documents consist of the printed form DB, the Employer's Requirements, the Contractor's Proposals and the Contract Sum analysis.

The whole philosophy of this contract is that the contractor is charged with satisfying the Employer's Requirements. The Employer's Requirements clearly must be the principal document. Clause 2.2 of the contract makes it the prime determinant of the kind and standard of materials and workmanship and only if it does not indicate workmanship or materials does the contractor turn to the Contractor's Proposals. Under clause 5, a 'Change' can refer only to a change in the Employer's Requirements and the employer must instruct the expenditure of a provisional sum under clause 3.11 only if it is in the Employer's Requirements. Reference is sometimes made to the third recital which, it is argued, suggests that the employer accepts the Contractor's Proposals. A close reading of the clause indicates that it is of little practical or legal effect. It is a principle of construction of contracts that if words in the main part of the contract are ambiguous, one may turn to the recitals to discover the true meaning of the words. But if the words in the main part of the contract are clear, the recitals cannot change them.³⁵ In the case of DB, the words in clauses 2.2, 3.11 and 5.1 are unambiguous. In any event, the third recital simply records the employer's general satisfaction with the Contractor's Proposals. The employer, even if in receipt of professional advice, cannot be expected to check the Contractor's Proposals in detail.

³³ *J F Finnegan Ltd v Ford Seller Morris Developments Ltd* (1991) 53 BLR 38.

³⁴ *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (1996) 78 BLR 42.

³⁵ *Leggott v Barrett* (1880) Ch D 306; *Royal Insurance Co Ltd v G & S Assured Investments Co Ltd* [1972] 1 Lloyd's Rep 267.

Any approval or acceptance which the employer gives must be understood in that context.³⁶

For obvious reasons, there is no provision equivalent to SBC clause 5.4 which gives the contractor the right to be present at measurement.

14.8.2 Definition

The term 'Change' is used instead of 'Variation'. The definition of a change is virtually identical to the definition of a variation in SBC clause 5.1 except in one very important particular. It does not refer to the alteration or modification of the design, quality or quantity of the Works, but to a change in the Employer's Requirements which makes those things necessary. This is absolutely fundamental to this contract. The employer has no power to directly alter the design of the Works. That cannot be emphasised too much. The employer can only alter the requirements on which the contractor has based its design. The contractor is free to respond to that change in any way it wishes and there is no provision for the employer to be consulted other than when construction drawings are to be submitted. For example, if the employer requires an auditorium to be capable of seating 1,500 instead of 1,000 people, the contractor may satisfy that change, if not precluded by some other requirement, by making the auditorium longer, wider, a combination of the two or by introducing a gallery.

14.8.3 Instructions requiring changes

The employer's power to issue instructions is contained in clauses 3.5–3.15. The power to instruct changes is in clause 3.9. Where an architect is employed as employer's agent, it is still common for a change instruction to be issued in the form of a detailed drawing showing the precise alteration to the design which the architect believes will satisfy the employer's changed requirements. In such circumstances, the contractor may not even be given details of such changed requirements. The employer's agent appears to have no power to issue instructions in that form and the contractor may refuse to comply. Alternatively, the contractor may choose to consider the drawing to be the employer's changed requirements in particularly detailed form. It is probable that the responsibility for such design rests with the employer, because the instruction is technically an instruction to change the Employer's Requirements and, by clause 2.12, the contractor has no responsibility for verifying the adequacy of any design in the Employer's Requirements.

In any event there is an important restriction on the employer's power to require changes. Clause 3.9.1 states that the employer cannot instruct the contractor to carry out a change requiring an alteration or modification in the design without the consent of the contractor. Although the contractor cannot withhold or delay its consent unreasonably, it still leaves plenty of scope for the contractor to refuse

³⁶ *Hampshire County Council v Stanley Hugh Leach Ltd* (1991) 8-CLD-07-12.

consent if it wishes. This provision is entirely consistent with the philosophy of the form which assumes that the employer has set out all its requirements when inviting tenders and that the employer is generally satisfied with the contractor's response as embodied in the Contractor's Proposals. Changes must be possible, but they are not encouraged.

The word 'design' of course does not simply mean the drawings, but also the written part of the Contractor's Proposals such as specifications and schedules of work.³⁷ Every change will involve an amendment to some item in one of these documents. This clause, therefore, effectively gives the contractor the right of veto over any change if it cares to use it. The contractor has the right under clause 3.5 to make reasonable objection to instructions varying the obligations and restrictions under clause 5.1.2.

Clause 2.9, with admirable brevity, states that the employer must define the boundaries of the site. The employer has no power to change the definition once it is made, but clause 2.10.1 makes clear that if there is a divergence between the definition and the Employer's Requirements, the employer must issue an instruction to correct it. The instruction is then deemed to be change under clause 5.1 for the purposes of adjustment to the contract sum.

Clause 2.10.2 states that if the employer or the contractor finds a divergence, either must give the other a written notice. It may be argued, therefore, that if the contractor fails to spot a divergence and fails to give notice, it will be unable to recover any resultant expense incurred in correcting the divergence. However, it is clear from the wording of the clause that the contractor has no obligation to look for or find divergences, merely to give notice if it finds any.³⁸ In this instance, the contractor's obligation is expressly the same as that of the employer. A better view is that it is for the employer to provide a correct definition.

14.8.4 Valuation

Valuation method

There is no provision in this contract for the valuation of changes by a quantity surveyor. Under clause 4.9, it is for the contractor to submit interim applications for payment and, under clause 4.12 it is for the contractor to submit its final account and final statement at the end of the project setting out the valuation of changes in accordance with the rules set out in clause 5. Valuation in the first instance is carried out by the contractor, but the contractor must carry out the valuations strictly in accordance with the rules set out in clause 5. The provision for valuation of changes by agreement instead of by the strict rules set out in clause 5.2 remains as in clause 5.2 of SBC. Prior agreement between employer and contractor regarding the valuation of changes is strongly recommended.³⁹

³⁷ *John Mowlem & Co Ltd v British Insulated Callenders Pension Trust Ltd* (1977) 3 Con LR 63.

³⁸ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

³⁹ But see the provisions of supplemental provision 4 in Section 14.8.5 below.

Valuation rules

The control document for valuation of changes is the Contract Sum Analysis. This is a document which forms part of the contract documents. It is referred to in the second recital and in the Contract Particulars where there is provision for the identification of the documents which comprise it. No practice note has been issued by JCT specifically for DB at the time of writing, but JCT Practice Note CD/1B (originally issued for CD 81) contains valuable notes about the Contract Sum Analysis and anyone embarking upon a contract under this form, whether as employer, contractor or as advisor to either, would be well advised to read it carefully.

The rules for valuation of changes are contained in clauses 5.4–5.7. They are strikingly different from the rules in SBC, IC or ICD. The first consideration is that valuations must include allowance for the addition or omission of relevant design work. It appears that only design work related to a variation can be valued. This emphasises the importance, not only of making sure that there is a clear rate for design work in the Contract Sum Analysis but also that there is a variation with which the design work can be associated. The contractor should be on its guard against carrying out design work for changes which may be aborted. The contractor may be unable to claim the cost of such work, because it will not be ‘relevant’ or connected to any change.

The second rule is contained in clause 5.4.2. Although it similar in general approach to the basic rules in SBC, IC and ICD, there is a striking difference. The clause states that the valuation of additional or substituted work must be consistent with work of similar character in the Contract Sum Analysis. Allowance must be made for change in conditions and significant changes in quantity and if there is no work of similar character a fair valuation must be made.

The comments about the similar rules in SBC are relevant here. However, it should be noted that the valuation must be ‘consistent’ with work of similar character whereas in SBC, IC and ICD, the rates and prices for work of similar character must ‘determine’ the valuation. The word ‘consistent’ was used in the valuation rules under IFC 98, but the latest edition of the Intermediate Building Contract (IC and ICD) replace ‘consistent’ with ‘determine’ as under SBC and JCT 98 before it. Therefore, the problem of interpretation is simply the meaning to be given when a valuation is to be consistent with certain rates rather than a valuation where the rates determine the valuation.

The words in question have no particular meaning confined to the construction industry and their ordinary English meanings must be used. Therefore, where it is said that rates and prices must determine a valuation, it is clear that the valuation must be carried out strictly in accordance with the rates and prices and that there is no room for adjustment. However, where it is said that a valuation must be consistent with rates and prices, it means that the valuation must not conflict with⁴⁰ the rates and prices which leaves scope for interpretation of the rates and prices and the way in which they are to be applied. It is by no means clear why it is thought appropriate to allow this flexibility in the valuation which, at least in the first instance, must be

⁴⁰ *The Concise Oxford Dictionary.*

carried out by the contractor, while imposing strict conformity where a quantity surveyor's valuation is concerned.

Clause 5.4.3 refers to the valuation of omissions and requires the values in the Contract Sum Analysis to be used. Clause 5.4.4 requires that an allowance must be made for changes in site administration, site facilities and temporary works.

Valuation of provisional sums

The employer may include provisional sums in the Employer's Requirements to cover works for which the contractor is not required to make proposals at tender stage. This may be because it is not practicable to do so or because the employer wishes to keep control of some significant part of the work or for some other reason. The issue of instructions regarding the expenditure of such sums is an obligation. It should be noted that there is no provision for the inclusion of provisional sums in the Contractor's Proposals and any such sum must be transferred to the Employer's Requirements before the contract is executed or the employer will be powerless to deal with them and it is arguable that the contractor will be entitled to payment of the sum without carrying out the relevant work.

Valuation on a daywork basis

The provision for valuation of changes by daywork where valuation by measurement is not reasonably practicable is identical to that in SBC and the comments under that contract are applicable. The relevant percentage additions to prime cost must be set out in the Contract Sum Analysis.

Valuation if there are Bills of Quantities

Perhaps surprisingly, where supplemental provision 3 in schedule 2 is stated in the Contract Particulars to apply, it makes provision for the Works to be described in the Employer's Requirements by means of bills of quantities. Since the whole idea of a design and build contract is that the contractor not only takes responsibility for building, but also for completing the design (clause 2.1.1), the scope for describing the Works by means of a bill of quantities might normally be expected to be small, since the bill cannot, or at any rate should not, be prepared until the design is completed. However, it does sometimes happen that the employer requires a virtually complete building design before seeking tenders. This may be partly explained by the current prevalence of 'novation' or 'consultant switch' of the design team⁴¹.

The dangers to the employer of having most of the design completed before tendering were thought to have been lessened following the recent decision dealing with the similar wording in the JCT Designed Portion Supplement which held that

⁴¹ These practices and other aspects of DB are considered in David Chappell *The JCT Design and Build Contract 2005* (2007) 3rd edition Blackwell Publishing.

the contractor's obligation to complete the design required it to check the adequacy of the preliminary design of others.⁴² However, whatever may have been the effect of that judgment on WCD 98, DB clause 2.11 has been expressly introduced to overcome the effect of the judgment and provides that the contractor is not responsible for whatever is in the Employer's Requirements or for verifying any design. Therefore it seems that there can be no advantage to the employer in having the whole of the design carried out and bills of quantities prepared under DB. The result would be broadly that the contractor would be undertaking a design and build contract where its liability for design was almost wholly extinguished. If, for whatever reason, full bills of quantities are used, provision 3 sets out the following stipulations:

- The Employer's Requirements must state the applicable method of measurement.
- Errors in description or quantity must be corrected and treated as a change in the Employer's Requirements.
- Clause 5.4 valuations must use rates and prices in the bills of quantities instead of those in the Contract Sum Analysis.
- Fluctuation option C must be amended to refer to the bills of quantities instead of the Contract Sum Analysis and an amendment made in paragraph 2.

The net result of using provision 3, bills of quantities, appears to be to place the financial responsibility for errors firmly on the employer.

14.8.5 Supplemental provision 4

Clauses 2.23–2.26, 4.20–4.23 and clause 5 are modified, but not superseded, by this provision. If supplemental provision 4 is stated in the Contract Particulars to apply, the contractor will be expected to operate these provisions without prompting. It is very easy to overlook the supplemental provisions.

The procedure is triggered when the employer issues an instruction under clause 3.9. If either the employer or the contractor is of the view that the instruction will involve either valuation or extension of time or loss and/or expense, the contractor must submit certain estimates (noted below) within a particular timescale. The timescale is 14 days from the date of the instruction or within any period agreed or, if no agreement, within such period as may be reasonable in all the circumstances. On the face of it, there is an obvious problem, because the clause calls for the contractor to act on the basis of an opinion which may be held by the employer alone and which the contract provides no mechanism for transmitting to the contractor. Thus if the employer believes that an instruction issued will give rise to an extension of time, but which the contractor thinks will have no effect, the contractor is obliged to submit estimates within the prescribed period although the employer may not have communicated this opinion. This drafting flaw, which was present in WCD 98, is made tolerable only by the fact that, in practice, it will be rare that a contractor does not believe an instruction will result in valuation, extension of time or loss and/

⁴² *Co-operative Insurance Society Ltd v Henry Boot Scotland Ltd*, 1 July 2002, unreported on this point.

or expense and even rarer that this lack of belief will be countered by the opposite belief on the part of the employer.

A similar clause (referred to as 'clause 13.8') was considered in the Scottish case *City Inn Ltd v Shepherd Construction Ltd*.⁴³ There, as in this instance, there were consequences if the contractor failed to operate the provisions of the clause. There it was loss of entitlement to extension of time under clause 13.8.5; here it is loss of entitlement to early payment and to interest or finance charges. The contractor contended that the clause imposed no obligation on it to address its mind to whether the instruction would have the contemplated effects and, therefore, the contractor could not be said to have failed to comply unless it had formed an opinion that the instruction would have those effects, but had not acted accordingly. Lord MacFadyen dismissed this approach:

'I am therefore of the opinion that on a sound construction of Clause 13.8.1 the contractor, on receipt of an architect's instruction, was obliged to consider whether it would require adjustment of the contract sum and/or an extension of time, so as to place himself in a position (if he formed the opinion that it would have that effect) to comply with his obligations to defer executing the instruction and to provide the requisite details to the architect. The wording of the clause is, it seems to me, less than perfect. It does not expressly address the eventuality of the contractor reasonably and in good faith forming the opinion that the contemplated consequences will not follow from the instruction, and consequently not doing what Clause 13.8.21 required, and the need for an extension of time later becoming evident. It is unnecessary, however, for the purposes of this case to decide whether in that event the contractor would have lost his entitlement to an extension of time.'⁴⁴

The question left unanswered by the court in this instance is important. Would the contractor lose entitlement to early payment and to interest or financing charges if it had formed the opinion that the instruction had no consequences, but subsequently that opinion was found to be a wrong conclusion? In such circumstances, it is thought that, upon the contractor making that contention, the burden of proof would switch to the employer to show that no reasonably competent contractor could have formed such an initial conclusion.

The way the provision works is that after every instruction, the contractor considers whether it can produce the necessary estimates within 14 days and, if not, the contractor suggests a longer period. If the employer disagrees, the contractor prepares estimates within a period which is reasonable in all the circumstances and, if the employer feels strongly or, more likely, if the extra time in producing estimates has caused some delay, the employer may, of course, refer the matter to one of the dispute resolution procedures.

The provision makes clear that the employer may state that estimates are not to be submitted. The employer may do this either with the instruction or, rather

⁴³ [2002] ScotCS 187. The case went to appeal to the Scottish Court of Session [2003] BLR 468 but the original decision was upheld and subsequently approved in the Outer House of the Court of Session [2007] CSOH 190.

⁴⁴ *City Inn Ltd v Shepherd Construction Ltd*, [2002] ScotCS 187, at paragraph 23.

bizarrely, within 14 days, therefore conceivably on the thirteenth day just before, or after, the contractor submits estimates. Whether the draughtsman has considered this possibility is not clear. In such circumstances, the contractor should be reimbursed for its costs and it is thought that such reimbursement would not be restricted to payment for necessary design work as is the case under provision 4.5 if the employer withdraws the instruction. In this instance, reimbursement would be part of the valuation of the instruction under clause 5. The contractor may raise reasonable objections to the provision of estimates, either for itself or on behalf of a sub-contractor, within 10 days of the issue of an instruction.

Provision 4.3 provides that the estimates replace valuation under clause 5.2 and ascertainment under clause 4.20. The estimates required are:

- the value of the instruction with supporting calculations referable to the Contract Sum Analysis
- any additional resources required
- a method statement
- any extension of time and consequent change to the completion date
- the direct loss and/or expense, not included in any other estimate.

Provision 4.4 refers, perhaps optimistically, to the employer and contractor taking all reasonable steps to agree the estimates. If they are successful, the estimates are binding on both parties. Therefore, even if subsequently it is found that the contractor's estimate is wildly wrong, both parties are bound by it. Surprisingly, there is no procedure to record so important an agreement. A brief document setting out the instruction and (possibly revised) estimates with two signatures and the date would appear to be the very minimum requirement if subsequent disputes are to be avoided.

If agreement is not reached within ten days of receipt of estimates on, effectively, all matters, the employer may do one of two things:

- instruct compliance with the instruction and that provision 4 will not apply, thereby reverting to clauses 2.23–2.26, 4.20–4.23 and clause 5 in full; or
- withdraw the instruction.

Withdrawal of the instruction is not to cost the employer anything other than additional design work which the contractor undertook purely and necessarily to prepare its estimates and for no other reason. Such design work is to be treated as if it were the result of a change instruction.

There is a sting in the tail of this clause. If the contractor does not comply with provision 4.2 and fails to submit estimates or to make reasonable objection, provision 4.6 states that clauses 2.23–2.26, 4.20–4.23 and clause 5 will be applicable, but that any resultant addition to the contract sum will not be included in interim payments, and must wait until the final account and final statement. Moreover, the contractor will not be entitled to any loss of interest or any financing charges for the intervening period. The contractor's obligation to form an opinion has been considered above. The wording of the clause does not preclude any deduction from the contract sum being taken into account in interim payments.

14.9 JCT Prime Cost Building Contract (PCC)

14.9.1 Commentary

Since all the work carried out under this kind of contract is uncertain, the architect must issue instructions under clause 3.14 for *all* the work required to be carried out even if it is already shown on drawings and specifications. Clause 3.15 empowers the architect to issue instructions requiring changes (variations) in the Works. They are defined in very much the same terms as variations under SBC clause 5.1 and the comments there are generally applicable here also. There is no express provision for the valuation of changes. That is because payment for the whole of the Works is calculated under clause 4. 'The Works' is defined in clause 1.1 as the works described in the first recital and the contract documents including any changes. Therefore, in calculating payment for the Works, payment for any properly instructed changes are also included. The contractor is entitled to be paid the prime cost and the contract fee which are defined in considerable detail in schedules 1 and 2 respectively.

Clause 3.10 entitles the contractor to refuse to comply with an architect's instruction in two specific situations. The first is similar to clause 3.10.1 of SBC. It covers instructions imposing obligations or restrictions on access or use of the site, working space, hours or sequence of work or changes to any such obligations or restrictions which are already in the specification. The second, clause 3.10.2 deals with any situation where the architect issues an instruction which alters the scope of the Works as stated in the specification, contract drawings and any other documents which are so identified in the Contract Particulars. The contractor is only entitled to refuse to comply to the extent that, a) it makes reasonable objection in writing as soon as reasonably practicable or b) that it makes application in writing for a revision of the contract fee. A reasonable objection might be an instruction restricting the contractor's use of the site which might seriously hinder the progress of the Works.

The second part of the clause gives the contractor the power to apply to the employer with a copy to the architect requesting a revision to the contract fee. There is nothing remarkable about that, because there is nothing to prevent the contractor from applying to the employer about anything at all at any time. However, the purpose of this clause is to overcome a situation which would ordinarily allow the contractor to refuse performance of the instruction or treat it as a separate contract for which it could either negotiate its own terms or receive reasonable remuneration. Under this clause, the contractor must apply within 14 days of the issue of the instruction in question. Paragraph 1.1 of schedule 2 addresses instructions which alter the scope of the Works. Although the application is made to the employer, it is the architect who is charged with considering whether it is fair and reasonable to revise the fee. If the architect does consider a revision to be fair and reasonable and the employer, presumably after receiving the architect's decision, confirms it to the contractor, the architect makes an appropriate revision to the fee and decides the date from which it applies. The architect may delegate this task to the quantity surveyor. It should be noted that the architect is to have a 'consultation' with the contractor; there is no requirement for agreement. Since 'to consult' merely means to seek advice or information, the contractor is in no position to influence the outcome.

14.10 JCT Management Building Contract (MC)

14.10.1 Commentary

Instructions are dealt with in a rather similar way to SBC. Clause 3.9. The management contractor must comply or secure compliance by the works contractors with all empowered instructions issued by the architect. Clause 3.13 provides that the architect may issue instructions which require project changes or works contract variations. Clause 3.15 places a duty on the architect to issue instructions about the expenditure of provisional sums in the works contracts (MCWC/C).

The definition of project change contained in clause 1.1 is very wide. It refers to the alteration or modification of the scope of the project as set out in the project drawings and specification. This definition gives the architect tremendous scope to change the project. In particular, it goes beyond the usual understanding of the architect's power to issue variations. It is difficult to say precisely where the architect's power to change the project ends and one is driven to the conclusion that the overriding consideration may simply be that the project remains capable of description by the entry in the first recital. The definition of works contract variation is in similar terms to the definition of variation found in SBC clause 5.1, but it is defined in the general definitions clause 1.1, no doubt, because there is no variations clause in MC to deal with it.

The valuation of variations is dealt with in MCWC/C, but there is no provision to value project changes in MC. The rationale is presumably that project changes will be reflected either in the individual works packages or in the works contract variations. Although the architect may give instructions about the expenditure of provisional sums in MCWC/C, such sums are not defined. Clause 3.9 provides that the management contractor need not secure compliance with an instruction to vary the works contract if the works contractor has made a reasonable objection under clause 3.5 of MCWC/C. The purpose of the second part of clause 3.13 is not entirely clear. It records that if the works contractor has not disagreed with an instruction being dealt with under the variation quotation procedures of MCWC/C within the stipulated time (four days or other agreed time from receipt of the management contractor's direction), the management contractor must ensure that the procedure is carried out. Valuation of works contract variations is carried out by the quantity surveyor under clause 5 of MCWC/C which closely resembles SBC clause 5 and the comments under that clause are generally applicable here also.

14.11 JCT Construction Management Trade Contract (CM/TC)

14.11.1 Commentary

The construction management form is significantly different from the management contract (MC). In the case of MC, the management contract (MC) is the contract between employer and contractor. The MCWC/C governs the relationship between management contractor and works contractor which is sub-contractual. Under

construction management, however, the trade contractor contracts directly with the client under the trade contract (CM/TC). The construction manager is also contracted directly with the client, but more like an organising and administering consultant and certainly with substantial differences from a management contractor.

In general terms, the variation clause (5) is very similar to the equivalent clause in SBC. The definition of 'variation' is almost identical to the definition in SBC. If article 2B applies, however, the definition is modified to omit reference to 'quantity' of the Works. This is because article 2.2 is used where complete re-measurement of the Works is required. It is the construction manager, not the architect who may issue instructions requiring a variation. Instructions requiring a variation are to be issued under clause 3.12 and the trade contractor has the usual rights of objection under clause 3.8, including the right to object to an instruction requiring a variation which in the trade contractor's opinion adversely affects the design of the trade contractor's designed portion. The trade contractor must specify the adverse effect on design within seven days of receiving the instruction and the instruction is thereby deprived of any effect until such time as the construction manager confirms it. It seems that, on confirmation, the trade contractor must carry out the instruction and it matters not whether the objection was reasonable. Valuation is to be in accordance with clauses 5.6–5.12 unless the construction manager and the trade contractor agree a price or the variation instruction is the subject of a confirmed agreement.

The construction manager may sanction variations which the trade contractor has made without instruction and there is the usual, unnecessary proviso that no instruction issued or sanctions given by the construction manager will vitiate the trade contract.

Clause 5.3 provides for the trade contractor to provide, if requested, a variation quotation in accordance with part 2 of schedule 2 on very similar terms to SBC. Clause 3.14 provides that the construction manager must issue instructions regarding the expenditure of provisional sums.

14.12 JCT Major Project Construction Contract (MP)

14.12.1 Commentary

Three clauses deal with what this contract refers to as 'Changes', but which are more commonly known as variations. The clauses are 19 (acceleration), 25 (cost savings and value improvements) and 26 (changes). Clause 26 is the main variation clause and the one under consideration here.

There is just one method of valuing changes: by fair valuation. But there are two ways of setting about it. The first is if the employer under clause 26.3 provides the contractor with details of the change before issuing an instruction and asks the contractor to submit a quotation. The contractor has 14 days to do so unless the employer has stated a longer period in the request. Clause 26.4 states that the quotation must value the change in accordance with the principles in clause 26.6. A slight ambiguity is present here, because clause 26.6 refers to making a fair valuation. It provides that the valuation must have regard to a set of principles. To 'have regard'

to something is quite different from calculating in accordance with something. To 'have regard' has the sense that notice must be taken and the principles must be read and considered. However, having read and considered the principles, they need not be strictly observed.

The quotation must also identify any adjustment to the completion date, it must be in enough detail so that the employer can carry out an assessment of amounts and periods, loss and/or expense should be stated separately and, finally, the quotation must state the period of not less than 14 days when it will remain open for acceptance. Unlike the position under the general law when a tender, stated to be open for a period, can be withdrawn without notice at any time if no consideration has been given for keeping it open, once a period has been stated under clause 26.4.4, the quotation cannot be withdrawn, because the procedure of stating a period is part of the contract for which both parties have already provided ample consideration.

Having received the quotation, the employer, under clause 26.5, may either accept it or request a revised quotation. Evidently, no reasons need be given for requesting a revised quotation, but the contractor can probably refuse to provide it. It is clear from clause 26.3 that, on the initial request for a quotation, the contractor must provide it. However, it is certainly arguable that it does not apply to a request for a revised quotation. If the contractor was not able to refuse, there seems to be no end to the number of revised quotations it could be asked to provide.

To signify acceptance, the employer must issue an instruction noting the quotation, the amount and the adjustment to the completion date (if any). If there is no acceptance, it is for the employer to make a fair valuation under clause 26.6. On this occasion the valuation is not to be made in accordance with the principles, but the lesser obligation of having regard to them. The principles are the nature and timing of the change, its effect on other parts of the project, prices and principles in the pricing documents, but only to the extent that they are applicable, and any loss and/or expense resulting from the change. However, no loss and/or expense of any kind can be included if anything other than a change contributed to it, because in that case, it will be dealt with under clause 27.⁴⁵

Clauses 26.7 and 26.8 deal with the situation which arises if the change is instructed without any request for a quotation. In that instance the contractor has 14 days from the date that either party identified the change in which to give the employer details of the contractor's proposal to value the change with supporting information to permit a fair valuation. Use of the word 'identified' is curious. No doubt in most cases a pre-instruction quotation will be requested. Presumably, the contract is attempting to give the contractor the opportunity of submitting a valuation, not only after receipt of an instruction (one way of identifying a change?), but also if it is of the view that a change has occurred in some other way.

The contract is silent about the position if the contractor fails to produce proposals within 14 days. Is any valuation after that date invalid or simply a late valuation? It is thought that it would require clear words before a failure on the part of the contractor to submit a valuation within the prescribed 14 days would invalidate or prevent any future valuation of the change. The 14 day requirement would have to be a condition precedent to a failure to prevent a valuation from being carried out.

⁴⁵ See Chapter 13, Section 13.8.

It is likely that the contractor would not be precluded from providing a late valuation provided that it is submitted in time to be included in the final payment advice under clause 28.6.⁴⁶ It is not easy to precisely identify that date despite clause 26.9.

After receipt of the contractor's valuation, the employer has a further 14 days in which to carry out its own valuation. Again the contract is silent about whether the employer can make a valuation if the contractor does not produce its valuation within the original 14 days or indeed whether the employer's late valuation would be valid. Presumably, business efficacy would require the employer to proceed to make a valuation even if late. Assuming the employer's valuation proposal is produced in due time, it must be in sufficient detail to allow the contractor to be able to note the differences. It is likely that, in the absence of a valuation by the contractor within the 14 days, the employer would have the right and probably the duty to proceed to value the change.

Clause 26.9 is a review clause. Its purpose appears to be to set a timetable for the final consideration of change valuations. The contractor has 42 days from practical completion in which to give particulars to the employer if the contractor considers that a change should have some additional value. The employer has a further 42 days in which to review previous valuation of the changes notified by the contractor and to notify the contractor of any further valuation considered appropriate. It is arguable whether or not these deadlines are mandatory so as to deprive the contractor of the valuation of changes which are objectively due.

Although there are one or two loose ends, this clause is relatively simple to understand, but it may be somewhat woolly in application.

14.13 JCT Measured Term Contract (MTC)

14.13.1 Definition

Variations are defined in clause 5.1. Variations relate to variation to the work contained in any order issued by the contract administrator and comprise alterations to or modifications of design quality or quantity of the work, any omission and the removal of inconsistencies. It should be noted that there is no provision for variations in restriction on access, hours of work and the like as occurs in SBC.

14.13.2 Instructions requiring variations

Clause 3.5.1 empowers the contract administrator to instruct variations. The instructions must be in writing and unusually clause 3.5.1 specifies that the issue of further drawings, details, directions⁴⁷ or explanations rank as variations. Although no doubt the intention was to make the situation clear, the inclusion of a set of other actions

⁴⁶ *Cantrell and Another v Wright & Fuller Ltd* (2003) 91 Con LR 97.

⁴⁷ See Section 14.5.3 for a discussion on the meaning of 'direction'.

which will result in variations, but which are apparently not to be considered as instructions, merely serves to muddy the water. Clause 5.2 stipulates that the contractor must not vary the work in an order except as required in writing under clause 5.1, but the contract administrator has the power to sanction uninstructed work. Clause 3.5.4 requires that soon as the value of a variation is ascertained, it must be included in the estimated value of the order for the purpose of interim and final payments.

14.13.3 Valuation

The provisions for valuation are fairly standard, but with some interesting features. Clause 5.2 states that the contract administrator and the contractor may agree the valuation of any order including variations to that order. Otherwise valuation must take place in accordance with clauses 5.3–5.8. However, the clause then proceeds to state that the valuation is to be undertaken, not automatically by the contract administrator, but by whoever is designated in the contract particulars. The contract particulars provide three options, one of which must be chosen. One option permits the contract administrator to value all orders; another option permits the contractor to value all orders. Predictably, the third option is for the contract administrator to value orders at or above a stipulated estimated value and for the contractor to value all other orders. If no option is chosen, the contract administrator must carry out all valuations.

Clause 5.3 states that the valuation of an order must be carried out by measurement and valuation in accordance with the schedule of rates as adjusted by the adjustment percent, but only to the extent that the rates are applicable. There is no similar provision for using the rates as a basis for valuation where the conditions change as is the case under SBC. It also seems that the same rates apply, irrespective of any change in quantity. However, clause 5.5 deals with rates derived from the schedule of rates. The clause rather baldly states that, if the rates do not apply, the contract administrator is entitled to fairly deduce rates from the schedule of rates. If that is neither practicable nor fair and reasonable, the value may be agreed between the parties (i.e. between contractor and employer, not the contract administrator), but if that cannot be achieved, the contractor is entitled to calculate the valuation on a fair and reasonable basis. The contractor must be consulted first, but the effect of consultation has already been found to be minimal.⁴⁸ The contractor must be given the opportunity to be present during any measurement. Overtime working is covered by clause 5.7 and applies when the contract administrator in an order specifically requires overtime working.

Clause 5.4 provides for measurement at daywork rates if the contract administrator so decides and there is the usual stipulation about delivery of returns (daywork sheets) within seven days.

Clause 5.6 gives details of the circumstances in which the rates are to be revised.

⁴⁸ See Chapter 11, Section 11.6.2.

14.14 JCT Constructing Excellence Contract (CE)

14.14.1 Commentary

Clause 4.14 requires the supplier to comply with all reasonable instructions of the purchaser which relate to the project. This must include instructions requiring a change to the services or the project, because such instructions are included in clause 5.7 as part of the relief events. There is no particular provision for valuation. Instead, the valuation of changes is made part of the general agreement of the effects of relief events under clause 5.13.⁴⁹ In the event of a failure to agree, it seems that the purchaser is empowered to fix any additional cost.

⁴⁹ See Chapter 11, Section 11.10.1.

PART III

Claims under the General Conditions of Government Contracts for Building and Civil Engineering Works (GC/Works/1(1998))

15.1 Introduction

GC/Works/1(1998) is a form of contract which is much used by many government departments and by some private organisations for construction work. The current version was first published in 1998 and the latest impression is the fourth published in 2003. The conditions can be used in various forms: as a full bill of quantities form of contract, without quantities and in varying design and build formats. They are substantially different from SBC. A significant point is that, unlike SBC and other JCT contracts, GC/Works/1(1998) is not a contract which is freely negotiated between the parties. It is drafted specifically on behalf of the relevant government departments and with the employer's interests as a primary concern. Therefore, it is to be classed as an employer's 'written standard terms of business' for the purposes of section 3 of the Unfair Contract Terms Act 1977 which limits the extent to which liability for breach of contract, negligence or breach of duty can be avoided or restricted by contract terms. This can have a serious impact on the construction of the contract. Although the Act does not apply to the Crown, GC/Works/1(1998) is often used by employers who are not technically the Crown. Indeed, the contract is often used by private clients who appreciate its drafting. Because it is a contract put forward by the employer, any unresolved ambiguities in GC/Works/1 will be construed *contra proferentem* against the employer.

The general principles involved in making and considering claims under GC/Works/1(1998) are identical to those already considered in connection with claims under SBC, IC and ICD as discussed in earlier chapters. The role taken under JCT contracts by the architect or the contract administrator are here taken by the project manager who is indicated by the initials 'PM' throughout. Particular differences between this contract and the JCT series are discussed below.

15.2 Extension of time and liquidated damages

Clauses 36 and 55 deal with extensions of time and liquidated damages respectively.

15.2.1 Extension of time

Clause 36 deals with adjustments to the date for completion. The 'Date for Completion' is the date calculated from the date of possession of the site. The date of possession must be notified by the employer to the contractor within the period or periods specified in the abstract of particulars.

15.2.2 Commentary

Either the contractor or the PM can initiate action under this provision. Usually, the contractor will request an extension of time, but it is not entitled to do so after completion of the Works. Clause 36(1) stipulates that such a request must include grounds for the request. The degree of detail is not specified, but at the very least it must contain sufficient information to enable the PM to understand why the contractor considers it is entitled to an extension of time. In practice, a contractor will be wise to submit a very detailed request. This clause does not expressly empower the PM to require further information but, if such power is needed, it can probably be implied from the wording of clause 25 requiring the contractor to keep records required by the PM.

Clause 36(1) makes clear that a PM who considers that there has been or is likely to be a delay which will prevent or has already prevented completion of the Works by the date for completion can take unilateral action. It is very important that the PM understands that, because failure to make an extension of time in appropriate circumstances may result in time becoming at large.¹ GC/Works/1(1998) is the only building contract which sets out the PM's power in this respect in such clear terms.

The PM must notify the contractor of the decision about extending time as soon as possible, but no later than 42 days from the date notice is received from the contractor. It is worth giving this provision careful consideration. The PM cannot simply assume that 42 days are available from the date of receipt of notice in which to decide on the extension of time. If it is possible to come to a decision earlier than 42 days, the PM must do so or be in breach of the provision. It should be noted that the PM has power under this clause to extend time for any section.

In giving an extension, the PM must state whether the decision is final or merely interim. Doubtless most of the decisions taken during the progress of the Works will be interim. Where a decision is interim, the PM must review it regularly until in a position to give a final decision. The PM has just 42 days from the date when the Works are actually completed to come to a final decision about all outstanding (i.e. those not already decided) and interim extensions of time. The PM cannot withdraw any extension already given nor can the period of extension be reduced unless it is done purely to take account of an omission which has been instructed and which has not already been taken into account in arriving at previous extensions of time. It appears, therefore, that, unlike the position under JCT 98, the PM is not confined

¹ See Chapter 2, Section 2.2.

to omissions instructed since the last extension was given; the final decision can take account of an omission which the PM instructed, but failed to consider when giving earlier extensions. It is clear that the final decision under clause 36(4) is intended to be the PM's opportunity to sweep up all outstanding or ill-considered delays.

Clause 36(5) provides what the contractor must do if it believes any decision is insufficient. It has 14 days from receipt of the decision within which to submit what the clause refers to as a 'claim' to the PM. The claim must specify the grounds which the contractor thinks entitle it to an extension of time. On receipt, the PM has 28 days in which to respond and it is clear from the wording that the PM must respond, whether or not the decision is that a further extension is warranted. The contractor's right to submit a claim under this clause cannot extend to a final decision given by the PM after the date of completion under clause 36(4). The decision under clause 36(4) is an opportunity for the PM to review all matters and express a final decision which the contractor may challenge only by adjudication or arbitration. If clause 36(5) extended to embrace a final decision by the PM, it would not be the final decision.

Clause 36(6) requires the contractor to endeavour to prevent delays and to minimise unavoidable delays and to do everything required to proceed with the Works. This is very much to the same effect as JCT 'best endeavours' provisions.² It goes on to say, in clause 36(2)(b), that the contractor is not entitled to an extension of time if the delay is caused by its negligence, default, improper conduct or lack of endeavour. After considerable reflection on this clause, it appears that, read strictly, the contractor can be denied an extension under this clause only if the reasons stated are the cause of the whole of the particular delay being examined. If the contractor's default is the cause of only part of the delay, the contractor must be given an extension for the whole delay. This is the straightforward meaning of the words used. In practice, of course, an extension of time is often reduced (in the sense of part of the delay being discounted) for these reasons. In order for that approach to be valid, it is suggested that the clause should have included the words 'to the extent that'. As the clause currently stands, it is thought that the contractor is entitled to an extension of time unless the default is the cause of the whole of the delay in question.

The grounds for extension of time are expressed broadly:

Execution of modified or additional work

An instruction under clause 40(2)(a) would qualify as this ground. The same ground may, of course, give rise to a money claim under clauses 41(2), 42(2)(b) and 42(6).

Act, neglect or default of the employer or the PM (excluding contractor's fault)

This ground would extend to cover the acts, etc. of those for whom the employer or the PM were vicariously responsible in law. A probably unnecessary proviso has been added to make clear that the original cause must not be any default or neglect of the contractor or any of its employees, agents or sub-contractors. At first sight, this kind

² See the comments in Chapter 11, 'clause 2.28.6.1', in Section 11.1.2 on this topic.

of proviso might appear designed to get around the ordinary rules of causation³ and that appears to be the case. On its ordinary meaning, the phrase ‘not arising because of’ is the same, or nearly so, as ‘not arising as a result of’. This is to remove from the scope of this clause any situation where the default or neglect of the contractor has created a situation following which the employer or PM might perform some act, neglect or default which will cause the contractor to be delayed. The phrase ‘not arising because of’ is much broader than ‘not caused by’. The former envisaging a situation which, created by the contractor, permits or probably invites action by the employer or the PM; the latter being a situation which inevitably leads on to the employer’s or the PM’s actions.

Strike or industrial action outside the control of the contractor or its sub-contractors and which delays or prevents the carrying out of the Works

This ground includes any strike or any other kind of industrial action. It is probably worded broadly enough to encompass a work to rule. There are only two stipulations: it must delay or prevent execution of the Works and it must be outside the control of the contractor or its sub-contractors.

Accepted risks or unforeseeable ground conditions

The definition of the term ‘Accepted Risks’ in clause 1(1) means the risks of pressure waves caused by the speed of any aerial machine, ionising radiations or contamination by radioactivity from any nuclear fuel or from its combustion, hazardous properties of any explosive nuclear assembly and war, hostilities, civil war and the like. Unforeseen ground conditions are the conditions referred to in clause 7.

Any other circumstances outside the control of the contractor or its sub-contractors and which could not have been reasonably contemplated, excluding weather conditions and contractor’s fault

The wording is wide, although it is probably aimed at what is usually called ‘acts of God’, which is an overwhelming superhuman event, and also at circumstances covered in other forms of contract by the term *force majeure*. This is a French law term which in English law ‘is used with reference to all circumstances independent of the will of man, and which it is not in his power to control’⁴ The term *force majeure* has been held to apply to dislocation of business caused by a nationwide coal strike and also accidents to machinery. It did not cover delays caused by bad weather, football matches or a funeral, on the basis that these were quite usual incidents interrupting work and the contractors ought to have taken them into account in making the contract.⁵

³ Causation is considered in Chapter 8.

⁴ *Lebeaupin v Crispin* [1920] 2 KB 714.

⁵ *Matsoukis v Priestman & Co Ltd* [1915] 1 KB 681. See also Chapter 16, Section 16.2.3 on the subject of *force majeure*.

Delays caused by persons with whom the employer contracts directly under clause 65 fall under this ground. It should be noted that weather conditions are expressly excluded from this ground, therefore, long spells of very hot weather or excessively cold weather conditions are at the contractor's risk. Even if a circumstance would otherwise be eligible for consideration under this ground, it will be excluded if it could reasonably have been contemplated. This ground has a similar proviso to the one included in clause 36(2)(b) and the commentary is also applicable.

Failure by the planning supervisor to carry out duties under the CDM Regulations

This is straightforward but it should be noted that, under the CDM Regulations 2007, the name has been changed to the CDM co-ordinator and the relevant duties are also changed. It is assumed that users of the contract will amend this clause accordingly. This ground only applies if the CDM co-ordinator fails to carry out the relevant duties under the Regulations. There may be many occasions when proper operation of the CDM co-ordinator's duties may cause a delay, but the contractor has accepted that risk.

Exercise of the contractor's rights to suspend performance of its obligations

This ground complies with s. 112 of the Housing Grants, Construction and Regeneration Act 1996 which provides for extension of the contract period or the fixing of a new date for completion if the suspension provision has been operated correctly.

15.2.3 Liquidated damages

Liquidated damages are dealt with by clause 55 which provides for the payment of such damages by the contractor if it fails to complete the Works or a section, if appropriate, before the date for completion or any extension of that date included in a decision by the PM under clause 36.

15.2.4 Commentary

The liquidated damages clause under this form is very straightforward. There are no certificates of the PM or written requirements of the employer made conditions precedent to recovery of the damages as found in JCT forms of contract. Instead, it is sufficient that the contractor fails to complete by the appointed date for completion or any extension of the contract period. In practice, no doubt the PM will always notify the employer that the time has arrived when liquidated damages can be charged. The rate is to be the rate stated in the abstract of particulars and it should be noted that, under the provisions of clause 55(1), clause 55 only applies if a rate is inserted. This overcomes the uncertainty which may prevail if no figure is inserted and there is a dispute whether the liquidated damages is nothing or whether the

clause has no effect.⁶ The effect of clause 55(1) is that if the employer omits to insert any rate for liquidated damages, the clause will not apply at all and the employer will be free to revert to unliquidated damages to the extent that they can be proved. However, clause 55(1) will not assist an employer who puts any rate at all (even '£nil') in the abstract of particulars.⁷

Liquidated damages may be deducted by the employer from any money paid as advance under clause 48. Where there is insufficient money to achieve a deduction of the total amount, the contractor must pay the difference. If the contractor fails to pay, the sum is said to be recoverable under clause 51. Clause 51 purports to allow set-off across contracts, but it is doubtful whether it would be effective if challenged. That is because s. 10 of the Unfair Contract Terms Act 1977 makes any term in a contract ineffective if it attempts to exclude liability on another contract. Although the point does not appear to have been tested in the courts, it seems likely that clause 51 would be such a term. A term purporting to give the employer power to set off across contracts is capable of being viewed as an exclusion of liability.

Clause 55(5) is inserted for the avoidance of doubt. It makes clear that the employer will waive its rights to recover liquidated damages, if at all, only by formal notice. Therefore, the contractor will be unable to argue that the employer's conduct led it to believe that the employer was waiving its rights in this respect. That is what happened under ICE 6th edition terms where an employer stated to the contractor during site meetings, that liquidated damages would not be imposed so that the contractor, in turn, did not seek damages from its sub-contractors, the employer was estopped from subsequently changing its mind and attempting to impose damages after all.⁸ It is doubtful whether that situation could arise under GC/Works/1(1998).

However, by going on to state that neither payments, concessions nor instructions to the contractor nor any other act or omission of the employer will operate to affect the employer's rights and they will not be deemed a waiver of rights, the clause seems to go too far. It appears unlikely that what it seems to be saying is what was intended. It seems to be saying that the employer's right to recover liquidated damages will not be affected by acts or omissions of the employer. That is clearly wrong. Liquidated damages will not be recoverable by the employer if the employer is at all responsible for failure to achieve the completion date unless there is power to give an appropriate extension of time and that extension has been given:

‘[The] cases show that if completion by the specified date was prevented by the fault of the employer, he can recover no liquidated damages unless there is a clause providing for extension of time in the event of delay caused by him.’⁹

What this means is that if completion of the Works or any section (if the Works are divided into sections) by the contract date or dates for completion has been prevented by any act or default of the employer, the employer cannot recover liquidated damages from the contractor, unless the PM has in a decision given an extension of

⁶ *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30.

⁷ *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30.

⁸ *London Borough of Lewisham v Shepherd Hill Civil Engineering* 30 July 2001, unreported.

⁹ *Astilleros Canarios SA v Cape Hattera Shipping Co Inc and Hammerton Shipping Co SA* [1982] 1 Lloyd's Rep 518 at 526 per Staughton J.

time on the ground of that act or default: see clause 36(2)(b). This is also the situation if there is power to extend time but it has not been properly exercised.¹⁰

It has already been noted that GC/Works/1(1998) is not a negotiated contract, but is a contract which has been drawn up on behalf of the government departments that use it and that, therefore, it is to be construed *contra proferentem* against the employer, whose document it is. It has been said:

‘The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly *contra proferentem*. If the employer wishes to recover liquidated damages for failure by the contractor to complete on time in spite of the fact that some of the delay is due to the employer’s own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer . . .’¹¹

The court held that if the contract had provision for time to be extended on the grounds of employer default and there was such default, a failure to extend on that ground would be fatal to a claim for liquidated damages. Liquidated damages are not recoverable where the PM, who should have extended time, has failed to do so.

In *Miller v London County Council*,¹² a building contract not on the same terms as modern JCT or GC/Works/1 contracts, provided that the whole of the Works should be completed by 15 November 1931. Clause 31 of the contract was important. It provided that

‘it shall be lawful for the engineer, if he shall think fit, to grant from time to time, and at any time or times, by writing under his hand such extension of time for completion of the work and that either prospectively or retrospectively, and to assign such other time or times for completion as to him may seem reasonable’.

Clause 37 provided that should the contractor fail to complete the Works in due time, it should pay liquidated damages for delay at a specified rate. The order to commence was given on the 16 April 1931 and the contractor had seven months in which to finish. In fact the work was not completed until 25 July 1932. On 17 November 1932, the engineer issued a certificate granting an extension of time to 7 February 1932, and subsequently certified a sum of £2,625 as payable by the contractor to the employer under clause 37 for the delay period from 7 February to 25 July 1932. The court considered the words of clause 31 and the effect of the contract being put forward by London County Council:

‘The question of construction with which I am faced is not, to my mind, a simple one. “Prospectively” means, “as one looking forward”; “retrospectively” means, “as one looking backward.” It is plain that the engineer is entitled to defer the grant of an extension of time to a stage when he is looking backward at something. The question is—at what? . . .’

¹⁰ *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114.

¹¹ *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114 at 121 per Salmon LJ.

¹² (1934) 50 TLR 479.

I have come to the conclusion that the words of clause 31 do not give to the engineer the power for which the defendants contend. The words “to assign such other time or times for completion as to him may seem reasonable” are not, in my opinion, apt to refer to the fixing of a new date for completion *ex post facto*. I should rather paraphrase them in some such words as “to fix a new date by which the contractor ought to complete the work.” If I am right, this phrase, coming after the word “retrospectively,” throws some light upon its meaning. Next, it is important to observe that, without words in the contract to make the matter clear, it might be a matter of dispute whether the engineer was or was not bound to grant each extension of time at the time of the delay.

In my judgment, the word “retrospectively” may well have been intended to make it clear that an extension granted (in the words of Mr. Hudson’s book) “within a reasonable time after the delay has come to an end” is a valid extension. It may also be read as empowering the engineer to grant an extension after the contract date for completion has gone by, but I do not read it as meaning that the engineer may fix a new date for completion and grant extensions of time at some date subsequent not only to the contract date, but to the substituted date. In my opinion, clause 34, which clearly contemplates that the engineer will be in a position to give a certificate of completion as soon as or very shortly after the work is complete, supports the view that it was the intention of the parties that all extensions of time should be granted before the substituted date for completion arrived. I also think that the language of clause 37 is more consistent with the view which I have adopted than with that put forward on behalf of the defendants

If I am wrong in thinking that the clause cannot properly be interpreted in the sense contended for by the defendant Council, it is, in my judgment, at least ambiguous, and . . . upon this view, it must be construed according to that one of two possible meanings which is more favourable to the plaintiff, on the ground that it was the defendant Council who prepared – and put forward the contract. It follows from the view which I have expressed that the power to extend the time was not in this case exercised within the time limited by the contract and the defendants are not in a position to claim liquidated damages.¹³

GC/Works/1(1998) clause 37 provides for early possession of any part of the Works which the PM has certified as completed if it is either a section or some other part of the Works agreed by the parties or the subject of the PM’s instruction regarding early possession. In a similar way to the provisions for ‘partial possession’ under JCT contracts, there is provision in clause 37(4) for a reduction in the rate of liquidated damages where early possession is taken of a part of the Works or section. The rate of damages is to be reduced pro rata the value of the part taken into possession in proportion to the remaining part. Therefore, if liquidated damages are expressed as £1,000 per week for the whole of the Works and early possession is taken of, say, 30% of the value of the Works, the employer must reduce the liquidated damages by 30%. Without such provision, the employer would not be entitled to simply reduce the rate of liquidated damages pro rata.¹⁴

¹³ (1934) 50 TLR 479 at 482–3 per Du Parcq J.

¹⁴ *Stanor Electric Ltd v Mansell Ltd* (1988) CILL 399.

15.3 Prolongation and disruption

15.3.1 Introduction

There is no direct equivalent of SBC, clause 4.23, because in this contract, provisions for recovery of disruption and prolongation expenses are scattered over a number of clauses. Very sensibly, recovery of expense associated with instructions is to be recovered, broadly speaking, with the valuation of such instructions. This overcomes a potential grey area familiar to all users of SBC. Clauses specifically dealing with expense associated with instructions are: 41(2), 42(2)(b), 42(6) and 43(1)(a). The principal clause for recovery of expense is clause 46. Its objective is to reimburse the contractor for any *expense* in performing the contract as a result of regular progress of the whole or part of the Works being materially disrupted or prolonged as an unavoidable result of one or more of the specified matters.

15.3.2 Clauses 46 and 47

Clauses 46 and 47 deal with prolongation and disruption, and finance charges respectively.

15.3.3 Commentary

Prolongation and disruption

Although clause 46 is not long, it is not drafted as simply as might be desired and careful reading is required before its full implications are clear. A point to note is that the clause refers only to 'expense'; and it must be an expense which is more than is actually provided for in the contract or which the contract reasonably contemplates. The wording makes plain that this is an objective test. It might be paraphrased as 'the expense which is beyond what the wording of the contract reasonably contemplates.' It is important to understand that the contemplation of the contractor is not relevant. The question whether or not the contract contemplated the test is to be answered by an objective test. A qualifying expense must be an expense which the contractor would not have incurred in some way other than one of the matters listed and, like the provision for loss and/or expense under JCT contracts, it must have been 'properly and directly' incurred by the contractor. Therefore, consequential loss is excluded. There is a proviso that the expense must not be a consequence of any default or neglect on the contractor's part or on the part of any of its employees, agents or sub-contractors. That would have been implied in any event.

Although not easy to identify, there are six matters that may give rise to a claim for prolongation and disruption expenses under the clause, three of which are grouped together. They are:

- (1) The carrying out of work under clause 65 (other works).
- (2) Delay in being given possession of the site. If this ground was not included, the contractor would be left to claim damages for breach of contract and, if the delay

was long enough, it may be able to accept delay in receiving possession as a repudiatory breach. The inclusion of the ground in clause 46 does not, of course, preclude the contractor from exercising its common law remedies in any event.¹⁵

- (3) Delay in respect of
- decisions, agreements, drawings, levels etc. or any other design material to be provided by the PM
 - the carrying out of any work or the supplying of any thing by the employer or obtained from anyone except the contractor
 - any instruction from the employer or the PM about the issue of a pass to a person or any instruction from the employer or the PM under clause 63(2) (nomination). There is a proviso that the employer and the PM must be entitled to a reasonable time for consideration and decision and that their discretion is not to be fettered. Inevitably, this ground will operate to fetter their discretion to some extent and, because of the nature of discretion, this proviso is unlikely to change that.
- (4) Advice, other than required by the CDM Regulations, given by the planning supervisor.

It has already been noted that the CDM Regulations 2007 require the appointment of a CDM co-ordinator, not a planning supervisor and it is assumed that the necessary contractual amendments will have been made.

A further stipulation is that one or more of these matters must unavoidably result in the regular progress of the Works being materially disrupted or prolonged. Strictly, this means that there can have been no other outcome no matter what action the contractor took. However, it is thought that ‘unavoidably’ should be given the commercial meaning of unavoidably in the context of the ordinary nature of construction operations and not unavoidable in a strict sense. For the contractor to be successful in contending that regular progress has been disrupted or prolonged, it must first be prepared to establish that it was, as a matter of fact, making regular progress.¹⁶

The contractor must satisfy two conditions before it is entitled to payment:

- (1) The contractor must give notice to the PM immediately it becomes aware that regular progress of any part of the Works has been or is likely to be disrupted or prolonged. ‘Immediately’ in that context means that the contractor must act with all reasonable speed.¹⁷ Obviously, a commercial interpretation must be given to ‘immediately’, but it is certainly a matter of days rather than weeks. It is likely that the courts will apply notice provisions of this kind strictly.¹⁸ Contrast this with words such as ‘as soon thereafter as is practicable’, when a broad interpreta-

¹⁵ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

¹⁶ Some guidance on the contractor’s obligations in working regularly and diligently has been given in *West Faulkner Associates v London Borough of Newham* (1995) 11 Cost LJ 157. See the discussion in Chapter 13, ‘Effect on regular progress’ in Section 13.1.4.

¹⁷ *Hydraulic Engineering Co Ltd v McHaffie, Goslet & Co* (1878) 4 QBD 670 CA.

¹⁸ There is little judicial authority in the English courts other than *Hersent Offshore SA and Amsterdamse Ballast Beton-en-Waterbouw BV v Burmah Oil Tankers Ltd* (1979) 10 BLR 1, but there are two Commonwealth cases on the topic: *Jennings Construction v Birt* [1987] 8 NSWLR 18 and *Wormald Engineering Pty Ltd v Resources Conservation Co International* [1992] 8 BCL 158. See also the discussion in Chapter 13, ‘Timing of application’ and ‘Matters within the architect’s knowledge’ in Section 13.1.4.

tion can be expected.¹⁹ The only difficulty in this instance is establishing that the contractor has become 'aware' on a particular date. It is important that the contractor does give notice immediately from the purely practical standpoint that the PM may want to give instructions so as to reduce any possible claim. If the notice is given only after the event, the PM will be powerless to influence matters. In addition, clause 25 provides for the contractor to keep such records as may be necessary for the QS, PM or employer to ascertain claims. It seems that the contractor must comply with the PM's reasonable instructions regarding the particular records to be kept. If the notice is given late, the PM will be unable to give instructions in that regard. All notices must be in writing (clause 1(3)). The notice must specify the causes or likely causes and it must include a statement that the contractor is entitled to an increase in the contract sum. The information which the contractor must provide to the PM is not precisely stated, but it is clear that it must be set out in sufficient detail so that the basis of its claim is readily identifiable (clause 46(3)(a)).

- (2) The contractor must provide to the QS full details of all expenses incurred and evidence that they *directly* resulted from one of the occurrences in clause 46(1). He is to provide the details as soon as reasonably practicable, but in any event within 56 days of incurring the expense (clause 46(3)(b)).

The respective duties of the PM and the QS can be deduced from this without too much difficulty.

The PM need take no action until the notice referred to in clause 46(3)(a) is received from the contractor. The notice triggers the process and it is then for the PM to verify that the notice has been correctly served. The notice must specify the circumstances and it must state that the contractor is, or expects to be, entitled to an increase in the contract sum under clause 46(1). Applying these criteria, it should be relatively easy to decide whether the contractor has complied.

If the contractor complies with clause 46(3) in its entirety, it is for the QS to notify it within 28 days from receipt of all the details and evidence of the amount due. The ascertainment of expense is placed in the hands of the QS under clause 46(1).

'Expense' is defined in clause 43(6) as money expended by the contractor, but it does not include interest or finance charges. It has sometimes been argued that what is to be included in 'expense' is limited to money paid out. On that view, loss of profit would clearly be excluded. It is not thought that this is a correct view, because in law the word 'expense' is not necessarily restrictive to the extent of excluding loss. That was the view in *Re Stratton's Deed of Disclaimer*²⁰ where the phrase under consideration was 'at the expense of the deceased'. That phrase has marked differences, of course, from the phrase in GC/Works/I(1998) 'incurs any expense'. Different wording was considered in a charterparty case where the Court of Appeal took a more restrictive approach when considering the phrase 'any expense in shifting the cargo' was at issue.²¹ There were several clauses in the charterparty which drew a distinction between 'expense' or 'expenses' on the one hand and 'time occupied' on the other. In

¹⁹ *Tersons v Stevenage Development Corporation* (1963) 5 BLR 54. In *Hersent Offshore v Burmah Oil* (1979), 10 BLR 1, four months was held to be outside the period envisaged by those words.

²⁰ [1957] 2 All ER 594.

²¹ *Chandris v Union of India* [1956] 1 All ER 358.

the circumstances, the then Lord Justice Denning was firmly of the opinion that 'expense' in the context meant 'money spent out of pocket and does not include loss of time'.²² It is thought that expenses actually incurred would include any true additional overhead costs to the contractor, for example, the cost of additional supervision, and the cost of keeping men on site, and on the wider interpretation the amount recoverable would extend to fixed overheads such as head-office rent and rates and so on.²³

Although these clauses expressly exclude interest or finance charges however they are described, clause 47 deals with the circumstances in which the contractor may recover finance charges.

Finance charges

There are two circumstances in which the employer must pay finance charges to the contractor. They are that money has been withheld from the contractor because:

- (1) either the employer, the PM or the QS has not complied with a time limit set out in the contract or any agreed variation to it; or
- (2) the QS varies a decision after already having notified the contractor.

An example of item (1) would be a failure to pay within a prescribed time period. An example of (2) would be a decision by the QS concerning the amount of expense by which the contract sum was to be increased. In the latter case, if it did not result in money withheld, there would be no liability for finance charges. Therefore, a mistake which gave the contractor too much money and was subsequently varied, would not qualify. This position is dealt with in clause 47(4) which expressly requires the QS to take any overpayment into account. Therefore, the QS is entitled to set-off interest earned on overpayment against charges on underpayment.

Clause 47(5) provides that the employer is not liable to pay finance charges resulting from acts, neglect or default of the contractor or sub-contractors, any failure by the contractor or sub-contractors to supply relevant information or any disagreement about the final account. This is a most important and sensible clause which put the onus on the contractor, among other things, to provide appropriate back-up information and to do it promptly. The finance charges are set in accordance with the percentage to be inserted in the abstract of particulars compounded quarterly on set dates above Bank of England rate to the clearing banks.

Clause 47(3) is unusual. It singles out failure to certify money as a trigger for finance charges provided that it results from one of the circumstances set out in clause 47(1). The applicable period for the charges is between the date on which the certificate should have been issued and the date when, in fact, it was issued under clause 50. Clause 47(6) is noteworthy. It is an attempt to exclude liability for interest and finance charges under the guise of what are usually termed special damages.²⁴ Whether it would be effective if challenged under the Unfair Contract Terms Act 1977 is uncertain.

²² *Chandris v Union of India* [1956] 1 All ER 358 at 360 per Denning LJ.

²³ See also the discussion in Chapter 5, Section 5.1 in relation to 'loss and expense'.

²⁴ See the consideration of damages in Chapter 5, Section 5.2.

15.4 Valuation of instructions

15.4.1 Commentary

For the purpose of these clauses, instructions are considered to encompass variation instructions (VI) and other instructions. Clause 40(1) helpfully makes clear that if the PM issues further drawings, details, instructions, directions and explanations, they must be treated as instructions for the purposes of the contract. The variation or modification of all or any of the specification, drawings or bills of quantities or the design, quality or quantity of the Works is dealt with under clause 40(2)(a). Clause 40(5) allows the PM in any VI to require the contractor to submit a quotation for the cost of compliance. Valuation of VIs is dealt with under clause 42 and other instructions are valued under clause 43. Clause 41(2) places an obligation on either the PM or the QS to include the cost of any disruption to or prolongation of both varied and unvaried work in the valuation of an instruction. There is no provision for the cost of such disruption or prolongation to be dealt with under clause 46. Therefore, unless the cost is included in the valuation under clause 41(2), the contractor cannot claim it elsewhere.

Alternative systems of arriving at the value of a VI are prescribed by clause 42(1):

- acceptance of a lump sum quotation; or
- valuation of the variation by the QS.

Where the PM has required a quotation, the quotation must show how it has been calculated, but the calculation apparently need not be very detailed. All that is required is that it shows the direct cost of compliance and the cost (not described as 'direct') of any disruption or prolongation resulting from compliance. However, although that may simply amount to two lump sum figures, the contractor is obliged to include sufficient other information to enable the QS to 'evaluate' the quotation. Evaluation involves ascertaining an amount²⁵ while to 'value' is to estimate a value or to appraise.²⁶ It seems, therefore, that the QS's duty is more onerous when a quotation has been required and that is precisely right of course. Clause 42(3) allows 21 days from receipt for the PM to notify the contractor whether or not a quotation is accepted. If the QS is not prepared to agree the contractor's quotation, the QS may negotiate and agree some other figure. Clause 42(4) makes clear that if either the contractor fails to provide the lump sum quotation or the parties fail to agree, the PM must instruct the QS to proceed to value the VI. It appears, however, that clause 42(1) gives the QS the option of accepting a quotation or valuing the variation as though no quotation had been given.

The principles of valuation of variations are very similar those under the JCT contracts as explained in chapter 13. Clause 42(5) states that where a QS who is required to value a VI must do so in accordance with the following rules:

²⁵ *The Concise Oxford Dictionary.*

²⁶ *The Concise Oxford Dictionary.*

- By measurement and valuation at the rates and prices for similar work in the bills of quantities.
- If it is not possible to value by measurement and valuation, at rates and prices deduced from the rates and prices.
- By measurement and valuation at fair rates and prices having regard to current market prices, if it is not possible to value by the rates and prices for similar work.
- Where it is not possible to value alterations or additions by any of the foregoing methods, then it must be valued by value of materials used and the plant and labour used following the basis of charge for daywork in the contract. Clause 42(12) deals with the contractor's obligation to produce vouchers, but there is no obligation for the QS formally to verify the vouchers. Nevertheless, the contemporary vouchers or daywork sheets will usually be the best evidence of the time and resources spent by the contractor.

Where a VI results in a saving to the contractor, the saving must be passed onto the employer by decreasing the contract sum to the amount determined by the QS. It is clear that the QS is given considerable discretion. In the case of a variation which would normally be valued in accordance with options 42(5)(a) or 42(5)(b), clause 42(11) permits the QS to ascertain the value by measurement and valuation at fair rates and prices if the QS is of the opinion that the VI was issued at a time or is of such content that it is unreasonable to value it in the normal way.

The QS must take account of any disruptive effect on work which is not within the direct scope of the VI. Strictly this must be done by adjusting the rates of the work which has been disrupted not by adding to the value of the VI itself.

Useful deadlines are imposed. Clause 42(7) stipulates that no later than 14 days after the QS requests it, the contractor must provide any information the QS requires to enable the valuation of a VI or to determine any expense in complying with any other instruction. There is a corresponding requirement on the QS who must respond with the valuation not later than 28 days after receiving the information requested. Cynics may say that the QS can delay the valuation by the simple expedient of requesting more and more information. Although no provision can be foolproof, the draughtsmen of this contract seem to have devised a quite subtle method of avoiding common abuses by imposing deadlines on both parties. The contract ensures that if a valuation has not been notified to the contractor within 42 days of a request for information by the QS, either the contractor or the QS must be in breach. It seems that clause 41(4) read in conjunction with clauses 42(7) and (8) does not entitle the QS to request information on more than one occasion in respect of each VI. Moreover, the quantity surveyor has a duty to value if the contractor fails to provide the information. Such valuation, of course, will be based on whatever information is available. It is no part of the quantity surveyor's duty to guess what the contractor could have provided.

If the contractor disagrees with the valuation under clause 42(5) it must give reasons and its own valuation to the QS within 14 days of receipt of notification otherwise it is to be treated as having accepted the QS valuation and the contractor is precluded from any further claim for the same VI.

Clause 43 provides for the adjustment of the contract sum in two sets of circumstances, as follows.

Clause 43(1)(a)

This is effectively a provision for the recovery of additional expense. The contract sum must be increased by the amount of any expense which is more than what is actually provided for in the contract or which the contract reasonably foresees as a result of any instruction other than a VI. The expense must be incurred by the contractor properly and directly.

The scope of this clause is broad. Expense incurred consequent on complying with an instruction under many headings set out in clause 40(2) would be reimbursable. Clause 40(2) authorises the PM to issue instructions in regard to:

- (a) Variation of the specification, drawings or bills of quantities, or the design, quality or quantity of the Works.
- (b) Discrepancies within the specification, drawings and bills of quantities or between any of them.
- (c) Removal from the site of any things intended to be incorporated and the substitution of such things by any other things.
- (d) Removal of work and the carrying out of replacement work.
- (e) Order in which the Works should be carried out.
- (f) Hours of working, overtime or night work.
- (g) Suspension of carrying out of the Works in whole or in part.
- (h) Replacement of operatives.
- (i) Opening up of work for inspection.
- (j) Making good of defects.
- (k) Clause 38 cost savings.
- (l) The carrying out of emergency work.
- (m) Use or disposal of excavated material.
- (n) Actions after discovery of antiquities and the like.
- (o) Actions for the avoidance of nuisance and pollution.
- (p) Contractor's quality control accreditation.
- (q) Any other matter which the PM thinks necessary.

It is easy to see that the contractor could incur expense following an instruction to change the hours of working or to suspend part or the whole of the Works. Indeed every instruction issued by the PM could potentially involve the contractor in expense. The expense must be directly incurred. In other words it must be akin to damages at common law.²⁷

The contract mechanism (clause 43(2)) does not require the contractor to make a claim or even an application for reimbursement as would be the case under the JCT contracts. The trigger is the compliance on the part of the contractor with an instruction. The straightforward meaning of the words of the clause are that the operative date is the date on which the instruction has been entirely complied with rather than the date on which compliance begins. The contractor is to submit the information referred to in clause 41(4) within 28 days of compliance. There are two points of note. The first is that nothing prevents the contractor submitting information before compliance is completed except for the second point which is that the

²⁷ See also Chapter 5, Section 5.2 on the meaning of 'direct'.

information referred to in clause 41(4) is the information required by the QS so that valuation etc. can take place. 'Required' is a curious word. It can have an active or passive connotation. If the information must be actively required by the QS, the provision becomes a nonsense, because the contractor cannot know what information to provide until the QS has informed it. If the QS does not inform the contractor until after 28 days from compliance, the contractor cannot possibly comply with the timetable. The only sensible interpretation to give to 'required' in clause 41(4) is passive. In other words, the contractor must provide the information which, viewed objectively, the QS will need (require) in order to determine the expense.

The contractor has 14 days, from receipt of the notification by the QS of the expense which has been determined, in which to notify the QS of the reasons for any disagreement with the amount and to submit the contractor's own estimate of what the amount should be, otherwise the contractor will be taken to have accepted the QS determination. Clause 43(4) shares exactly the same wording as clause 46(6) and the comments on that clause are also applicable here.

Clause 43(1)(b)

This deals with the situation where the contractor makes a saving in the cost of the execution of the Works as a result of complying with an instruction (excluding a VI). The contract sum is to be decreased by the amount of that saving. Whether the instruction results in an addition or reduction to the contract sum, the amount is to be calculated by the QS. The QS would be expected to do this in accordance with the usually recognised principles discussed elsewhere in this book.

Claims under the ACA Form of Building Agreement (ACA 3)

16.1 Introduction

The first edition of a *Form of Building Agreement* (ACA) and a matching Form of Sub-Contract was published in October 1982 by the Association of Consultant Architects. It was drafted by one of the original co-authors of this book, Professor Vincent Powell-Smith who also authored a guide to the Form. The first edition received some criticism, some of which it must be said was probably due to unfamiliarity of the commentators with the radically simple structure and language. The second edition of the Agreement (ACA 2) was published in 1984 with considerably revised text taking valid criticisms into account. It was revised again in relatively minor aspects in 1990, more significantly in 1995 and in 1998 the third edition (ACA 3) was published to take account of the Housing Grants, Construction and Regeneration Act 1996. Further revisions have been made, the latest at the time of writing being in 2003. ACA 3 can be used for design and build contracts, as well as the usual traditional contracts where the architect produces all the design and construction information. It can be used with various combinations of drawings, schedules of rates, specification and bills of quantities. A particular feature is the inclusion of alternative clauses and the option to amend time periods for carrying out various duties. Although still not immune to criticism, the contract is relatively easy to understand, and it is very flexible in use.

Its most vociferous critics have been contractors who have tended to look upon ACA 3 as an onerous contract. Such criticism and the reluctance of some contractors to tender on the basis of this contract has resulted in it being less widely used than anticipated or indeed than as merited given the quality of the drafting. In fact, it is a useful contract form and the powers and duties of the parties are clearly set out. It should pose fewer problems for contractors than some other contract forms, because the drafting leaves the parties in no doubt about their responsibilities. Hence, contractors can identify the risks very clearly and price accordingly.

From an employer's point of view it has a disadvantage, which it shares with GC/Works/1(1998) and any independently drafted contract, in that the ACA Form is not a negotiated document (unlike the JCT Forms) and will be construed by the courts *contra proferentem*. The effect of that is that any ambiguities in it which are not capable of being resolved by any other method of construction may be construed

against the party putting it forward, usually the employer. Moreover, ACA 3 will be construed as the employer's 'written standard terms of business' for the purposes of s. 3 of the Unfair Contract Terms Act 1977. The Act limits the extent to which liability for breach of contract, negligence or breach of duty can be avoided or restricted by contract terms. The JCT Forms are not so affected, because they are agreed by the whole industry; the ACA Form is not agreed by all sides of industry; it is simply an independently drafted contract.

The provisions of ACA 3 differ from the corresponding JCT provisions and, indeed, the provisions of other standard forms and, therefore, they will be considered in some detail. For example, the extension of time provision under clause 11.5 is available in two options, one of which is very narrow and excludes adverse weather, strikes and unforeseeable shortages in the availability of labour and materials. It merely covers events which are the responsibility of the employer either directly or through agents and which would set time at large in the absence of a provision to extend time. The second option is on more traditional lines and includes risks which are the fault of neither party; thus the employer is voluntarily taking the risks in those instances.

Claims for money arising as a result of acts, omissions or defaults of the employer or of the architect are covered in clause 7 and roughly equate to claims for loss and/or expense under JCT forms although arguably less inclusively than under SBC, IC or ICD. The basic principles involved in assessing such claims under ACA 3, whether for time or for money, are the same as when dealing with claims under SBC.

Damages claimable as a result of the contractor failing to complete the Works by the completion date or any extended date are available either as the usual liquidated damages or as unliquidated damages, which is quite unusual. Valuation of the architect's instructions is fairly straightforward, but with a few minor twists.

16.2 Extension of time and liquidated damages

The related matters of extensions of time and liquidated damages are included in clause 11. Both the grounds for extension of time and the calculation of damages are available in two options. The same clause gathers together all the provisions about time including provisions for postponement and, very unusually, for acceleration of the Works. Acceleration measures, where available under JCT contracts are subject to quotation and agreement.

16.2.1 Extension of time

This is dealt with in clauses 11.5–11.7.

16.2.2 Commentary

Clause 11.1 states that the employer must give the contractor possession of the site on the dates set out in the time schedule. This is said to be subject to clauses

11.6 and 22.4 and to anything in clause 1.3. Clause 11.6 is a procedural clause dealing with the granting of extensions of time and it is difficult to see any relevance to the employer's obligation to give possession of the site. Clause 22.4 certainly refers to possession of the site and stipulates that the contractor must give up possession upon service of notice of termination by either party. However, since this is dealing with the contractor's obligation to give up possession (after having received it), the clause does not directly affect the employer's duty to give possession in the first place. Making some action 'subject to' something else has the effect of modifying the first action or the right to take it in the light of something else. In this instance, the conclusion is that neither clause 11.6 nor clause 22.4 can give rise to restrictions on the first sentence of clause 11.1 except in the unlikely event that contractual termination takes place before the employer is due to give possession of the site.

The reference to clause 1.3 is more understandable, because clause 1.3 allows bespoke provisions to be inserted. It is possible that one of these provisions may affect the employer's duty although in light of the fundamental nature of the employer's duty to give possession, it is difficult to envisage a provision being inserted in clause 1.3 which affected the employer's duty while yet allowing possession to be given. If the employer is in breach of the requirement to give possession, the contractor may have a claim under clause 11.5 in either alternative or at common law. The contractor's duty is to immediately commence and proceed with the Works 'regularly and diligently and in accordance with the Time Schedule' until they are fit and ready for taking-over. If the Works (or a section of them) are not ready by the date shown in the time schedule (or as extended under clause) the architect is to certify to that effect in writing under clause 11.2. This is equivalent to the non-completion certificate in SBC, IC and ICD.

16.2.3 Grounds for extension of time

The grounds are given in clause 11.5 which is set out in alternative forms.

Alternative 1

This alternative provides for extremely restricted grounds for extension of time; restricted in fact to such grounds as would be likely to set time at large if there was no provision for extending time. The grounds on which extension of time can be claimed are, broadly speaking, all defaults of the employer or the architect. Usually, a failure on the part of the architect properly to exercise the duty to extend time for an employer act or default will result in the date fixed for completion ceasing to be applicable. The contractor's obligation will be to complete the Works within a reasonable time; usually referred to as time becoming 'at large'.¹

Alternative 1 provides that an extension of time shall be granted to the contractor only in two sets of circumstances:

¹ *Percy Bilton Ltd v Greater London Council* (1982) 20 BLR 1.

- in the case of a failure by the CDM co-ordinator, the principal contractor (unless the contractor acts in either or both roles) or a designer to comply with all reasonable diligence with the CDM Regulations, or
- where there is 'any act, instruction, default or omission of the Employer, his servants or his agents, or of the Architect on his behalf, whether authorised by or in breach of this Agreement'. The contractor's entitlement to an extension of time on these grounds is qualified: the act, etc. relied on must in the reasonable opinion of the architect prevent the taking-over of the Works by the date stated in the time schedule. Obviously this is a limiting factor since the contractor must not only establish that there is a cause of delay, i.e. some act, etc., but also that this is causing delay in the architect's reasonable opinion. However, the reasonableness or otherwise of the architect's opinion is open to review in adjudication or arbitration and, indeed, in litigation as appropriate. It is thought that the inclusion of the word 'reasonable' means that the opinion must be objective and that, in forming the opinion, the architect must carry out a logical analysis in a methodical way.²

The clause also contains procedural provisions for the giving of notices by the contractor. Immediately it is reasonably apparent that the taking-over is being or is likely to be prevented by one of the acts specified in the clause, the contractor must serve written notice on the architect. The notice must specify the particular act, instruction, default or omission relied on. It is uncertain whether the wording is effective to include failures in respect of the CDM Regulations. Clearly, such failures are intended to be the subject of notice and it is likely that a court would assume that the parties expected the contractor to issue a notice in respect of such failures also even if not expressly included in the wording. In any event, the contractor must submit to the architect full and detailed particulars of the extension of time to which it believes it is entitled.

The contractor is under a further duty to keep the particulars up to date, by submitting such further particulars as necessary or requested by the architect, to enable the architect to carry out the duty to consider what extension of time is due. It should be noted that the architect is entitled to request the information 'from time to time', therefore, there is no limit placed on the timing of the requests. In turn, the provision of information by the contractor will have an effect on the timing of the architect's decision under clause 11.6. It is clear, as under other standard forms, that the architect may be in the position of deciding whether or not the architect's own actions or inactions have contributed to a delay. This is a very difficult position for the architect, because the more extension of time given to the contractor, the less damages the employer is entitled to recover and the contractor may well have grounds for seeking financial recompense. An architect who gave an extension of time on the grounds that the architect failed to provide information in due time may subsequently face legal action by the employer seeking to recover the amount of damages that otherwise, without such extension, would be recoverable from the contractor.

This option is limited in extent, because it does not cover events outside the control of the employer, the architect or the contractor. No extensions of time are possible for exceptionally adverse weather conditions, strikes and unforeseeable shortages in

² *John Barker Construction Ltd v London Portman Hotel Ltd* (1996) 50 Con LR 43.

the availability of labour or materials. No doubt contractors invited to tender under ACA 3 incorporating this option will adjust their tender prices accordingly. Contracts, after all, are about the distribution of risk and provided that the risk is known, it can usually be priced.

It used to be contended that the clause did not cover default, etc., by anyone (other than the architect) for whom the employer is vicariously responsible in law. However, that argument has little chance of success on current wording.

Alternative 2

The second alternative in clause 11.5 is drafted more widely and it has much more in common with JCT contracts although it has marked differences. It is more traditional and more likely to find favour with contractors. Whether that will translate into a lower tender is open to question.

There are eight grounds for extension of time in this alternative. Where they are similar to grounds already dealt with under JCT contracts, they are not explained in detail again here. The grounds are:

- (a) *Force majeure*. This must relate to some matter which is not within the control of the person relying on it and it is certainly wider than the English law term ‘act of God’. It has been said that:

‘This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control. . . . Thus, war, inundations and epidemics are cases of *force majeure*; it has even been decided that a strike of workmen constitutes a case of *force majeure*.³

It seems that any direct legislative or administrative interference would, of course, come within the term: for example, an embargo.

Force majeure in the context of ACA contracts has a rather more restricted meaning that might seem to be the case at first sight because many matters – such as war, governmental delays, etc., which are otherwise dealt with in the term – are covered expressly by the provisions of this clause. It seems that severe weather conditions are not within the term *force majeure* although major strikes probably are.⁴

- (b) Loss or damage to the Works by a list of events which are usually categorised as insurance risks.
- (c) War, hostilities (whether war be declared or not), invasion, act of foreign enemies, rebellion, revolution, insurrection, military or usurped power, civil war, riot, commotion or disorder. These are self-explanatory risks not specifically included in JCT contracts.
- (d) Delay or default by governmental agency, local authority or statutory undertaker in carrying out work in pursuance of its statutory obligations in relation to the

³ *Lebeaupin v Crispin* [1920] 2 KB 714, in which McCardie J quoted with approval the definition of the French writer Goirand.

⁴ *Matsoukis v Priestman & Co* [1915] 1 KB 681, where *force majeure* was held to include the general coal strike and the breakdown of machinery.

Works. It should be noted that there are no grounds for extension of time if a statutory undertaker, such as a water supplier, is carrying out its work as part of contractual obligations.⁵ The only delay that will qualify for extension of time under this head is that caused by a statutory undertaker carrying out work in pursuance of its obligations in relation to the Works.

- (e) Any act, instruction, default or omission of the employer or of the architect acting for the employer, whether authorised by or in breach of the contract. For example, failure to give possession of the site (which is a breach of contract) is within this provision. This is included in alternative 1.
- (f) Failure of the CDM co-ordinator, the principal contractor (if not the contractor), or a designer to comply with their duties under the CDM Regulations. A sub-contractor or supplier carrying out design functions is expressly excluded.
- (g) Any instruction issued following the discovery of antiquities.
- (h) Determination of a named sub-contract as a result of its breach or repudiation by the sub-contractor. This is a valuable right for the contractor which is not applicable to ordinary domestic sub-contracts.

The contractor will certainly prefer this alternative in preference to the more restricted alternative 1.

There is an important limitation on the contractor's right to an extension of time under this alternative: the onus of proof is on the contractor. It is stated to be entitled to an extension of time on one or more of the grounds only to the extent that it proves to the satisfaction of the architect that the taking-over of the Works by a specific date stated in the time schedule is prevented. The change in wording is noteworthy. The contractor is required to prove 'to the satisfaction of the Architect'. There is no mention of the architect's 'reasonable opinion'. The standard of proof required in this instance the balance of probabilities. On the face of it, it is arguable that where the second alternative is used the architect's satisfaction need not be reasonable.

The proviso to the clause is important and governs all those events listed above except in respect of delays caused by acts or omissions of the employer or the architect acting on the employer's behalf. (The reason for the exception is clear: without the exception it might be argued that the employer would be liable to forfeit any right to liquidated damages if the contractor failed to give notice.⁶)

Except in that excepted situation, no account is to be taken of any of the other listed grounds unless the contractor gives written notice to the architect immediately it becomes reasonably apparent that the taking-over is being or is likely to be prevented. It follows that no notice is required where the delaying cause is acts or omissions of the employer or the architect acting on the employer's behalf. For the other causes, the notice must be specific. It must specify the circumstance or circumstances relied on and must be followed up as soon as possible by full and detailed particulars of the extension of time to which the contractor believes itself entitled. Again, the contractor must keep the particulars up to date as necessary or as requested by the architect may require to enable the full and proper discharge of the architect's duties

⁵ *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* (1980) 15 BLR 8.

⁶ *Dodd v Churton* [1897] 1 QB 562.

under this clause. An important question is whether the giving of notice is a condition precedent to the granting of an extension of time in all but the excepted case. A strict interpretation of the wording suggests that it is a condition precedent in this instance.⁷ In any event, the contractor must not delay the giving of notice in all cases.

Clause 11.6 deals with the exercise of the architect's duty in granting an extension of time and it applies to both alternatives. There are two situations. The first case is dealt with in clause 11.6(a) and it is the normal situation. After the architect has received the contractor's particulars referred to in clause 11.5 the architect must make a decision about an extension of time. The architect is to do so 'so soon as may be practicable, but in any event not later than 60 working days after receipt' of the contractor's particulars. It is open to the parties to insert a different time period at the time the contract is executed. It appears that the period of 60 working days does not begin to run until the receipt of the last particulars referred to in clause 11.5, i.e. those submitted on the architect's request, or which are necessary to update the position. As noted earlier, the wording of clause 11.5 appears to allow any number of requests at any time if the architect is so minded. Given a difficult architect, the commencement of the 60 day period could be very flexible.

The second situation concerns act, instruction, omission, etc. where the contractor has failed to provide the particulars referred in clause 11.5. The contractor's failure to submit the required particulars is not fatal to its claim for an extension. In this case, the architect may exercise duties to extend the contract period at any time, i.e. until the architect becomes *functus officio*, which is the case after the issue of the final certificate under the contract. The architect must act if the contractor fails to give the necessary particulars in order to preserve the employer's right to liquidated damages and prevent time becoming at large. The giving of initial notice is made a proviso under alternative 2 of clause 11.5 except in respect of acts, instructions, omission, etc. Therefore, whatever may be the true position in regard to the other seven grounds, the giving of a notice under this ground is not a condition precedent. Under alternative 1 of 11.5, the giving of notice is not made a proviso and it is thought that it is not a condition precedent either although it is accepted that, since the other alternative would be struck out, a court would not be entitled to look at it to assist in the construction of the remaining clause.⁸

The clause proceeds to set out the architect's duty to grant the contractor such extension of time as the architect estimates to be fair and reasonable. The duty is similar to the duty of an architect under SBC. There are two provisos. The first proviso is important. Where the Works are divided into sections, an extension of time given for the taking-over of one section does not necessarily entitle the contractor to an extension for the taking-over of another section or of the Works as a whole. There is a common misconception that an extension of time for one section has a knock-on effect on other sections. That is particularly the case where the employer has unwisely specified specific dates for possession of subsequent sections which are actually dependent on the first section. In order to achieve a practical outcome,

⁷ This question is discussed in Chapter 6, Section 6.6.2.

⁸ There is some authority to say that deleted words may be examined as an aid to the construction of words left in, but the weight of authority seems to favour the contrary view that words crossed out may not be considered. See *Wates Constructon (London) Ltd v Franthom Property Ltd* (1991) 7 Const LJ 243.

dependent sections should have their dates for possession expressed as related to the relevant takeover dates.⁹

The second proviso is to the effect that the contractor cannot rely on delays attributable to negligence, default or improper conduct by the contractor itself or by its 'sub-contractors or suppliers at any tier' or its or their servants or agents in order to secure an extension of time. That would be the case in any event under the general law, but it is useful to have the position set out clearly to put the matter beyond doubt. Note that the contractor is not entitled to any extension of time for delays caused by sub-contractors or suppliers (named or domestic) even to the limited extent laid down by the House of Lords in *Westminster Corporation v J Jarvis & Sons Ltd*,¹⁰ as regards nominated sub-contractors under the 63 JCT Form. The words 'at any tier' are sufficient to enlarge the scope of this clause to include sub-sub-contractors.

The final sentence of clause 11.6 makes clear that the architect is empowered to take into account any omission instructions which have been issued when deciding upon the length of extension of time. An omission instruction may, of course, and usually will, if issued early enough, effect a saving of time; and the architect can take account of any such instructions provided only that they are issued before taking-over of any section or of the Works. It is doubtful that an instruction issued after taking-over would rank as an instruction properly issued under the terms of the contract in any event.¹¹ Therefore, an omission instruction may have the effect of discounting what would otherwise be an extension of time. For example, the architect may have decided that certain instructions and other events entitle the contractor to 15 days extension of the contract period. However, the effect of an omission instruction may be to remove 5 days from the time necessary to complete the Works. Therefore, the architect would be entitled to grant an extension of time of only 10 days.

Clause 11.7 deals with a review of extensions of time granted. The architect has a duty to confirm the dates for the taking-over of the Works or any section which have been previously stated, adjusted or fixed. Alternatively, the architect may fix a later date than previously fixed, whether as a result of reviewing any clause 11.6 decisions or because there has been some act, instruction, default or omission of the employer or the architect which has occurred after the date stated in the clause 11.2 certificate. The architect must then notify the contractor of the final decision. The reference to a 'final decision' indicates that the architect has power to act only once under this clause. No deadline is specified for the exercise of this duty. The architect must act 'within a reasonable time after the taking over of the Works'. What is a reasonable time is always a vexed question. At one extreme the power must be exercised before the architect is *functus officio* (which would be the case on the issue of the final certificate). However, that appears to be a time greater than is reasonable. In deciding a reasonable time, the architect must take all the factors into account; for example, the availability of necessary information to allow the carrying out of the review. As a matter of practicality, the contractor cannot be allowed a limitless period in which

⁹ See Chapter 2, Section 2.6 for a discussion on the effect of dividing the Works into sections.

¹⁰ (1970) 7 BLR 64.

¹¹ *New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd* [2001] BLR 74.

to supply information. This provision differs from the similar provision under SBC, because under this clause the architect cannot reduce an extension of time already granted but only confirm the date previously stated, or fix a date which is later than previously stated. Moreover, SBC stipulates 12 weeks from practical completion in which the architect must act.

Clause 11.8 is unusual in being an acceleration clause. Where so-called acceleration clauses occur in other contracts, they tend to amount to no more than a provision which allows the employer to seek a quotation from the contractor for accelerating the progress of the Works. Essentially, under other contracts, acceleration is by agreement only. Naturally the parties (employer and contractor) can always opt to agree acceleration measures whether or not expressly included in the contract provisions. The unique character of clause 11.8 is that it empowers the architect, at any time, to issue an instruction to bring forward or postpone dates shown on the time schedule for the taking-over of the works or any section or part.

Although clause 11.8 does not expressly state this (and, therefore, the contractor is not concerned about it), it is implied in the architect's terms of engagement that the employer's agreement must be obtained before giving an acceleration or postponement instruction. There is no provision for the contractor to object, but the architect must not issue the instruction unreasonably. Therefore, any instructed acceleration must not only be possible, it must be a practical proposition. If the architect issues such an acceleration or postponement instruction, the contractor must comply with it immediately and the clause 11.3 provision regarding liquidated or unliquidated damages applies from the adjusted date.

The architect must ascertain and certify a fair and reasonable adjustment to the contract sum in respect of the contractor's compliance with an acceleration or postponement instruction, together with any damage, loss and/or expense which the contractor suffers or incurs as a direct result of the instruction. Although the adjustment to the contract sum may comprise an addition or a deduction, in practice, both acceleration and postponement measures will result in the contractor incurring additional costs. There is a proviso to the effect that the architect may require the contractor to give an estimate of the cost of complying with the instruction before it is issued. If the architect requests such an estimate, the relevant provisions of clause 17 (other than the reference to extension of time) will apply.

If the architect adjusts the completion date either by granting an extension of time under clause 11.6 or by issuing an instruction for acceleration or postponement under clause 11.8, clause 11.9 states that the contractor must submit a revised time schedule to the architect within 10 working days of the architect's notice or instruction for the architect's consent. The revised time schedule then takes the place of the original time schedule. The clause does not state what is to happen if the architect cannot consent for some reason. The contract appears to rely upon the common sense of the parties to come to an agreement.

16.2.4 Liquidated damages

Provision for recovery of liquidated damages by the employer if the Works are not fit and ready for taking-over by the date or dates in the time schedule is contained

in Clause 11.3, alternative 1. When one is used to the terminology, the provision is unremarkable. The rates are in the time schedule. The period for which liquidated damages may be deducted runs from the date of taking-over stated in the time schedule, or any adjusted date, to the date of taking-over under clause 12 or under the provisions of clause 13. Where the rate is stated in the time schedule as 'per week' it is only full weeks which may be counted. It is not permissible to amend the rate by calculating the damages pro rata as a proportion of a week.¹² Inserting the words 'per week or part of a week' does not rectify the position; it makes it worse. 'Per week or part of a week' means that the rate is to be applied for each full week and also for any part of a week. Subject to proof to the contrary, such a description amounts to a penalty which would be unenforceable. The liquidated damages figure stated will be exhaustive of the employer's rights to claim compensation which arise directly out of the delay in completion.¹³ In common with SBC, IC and ICD, deduction of liquidated damages is subject to the condition precedent of the issue by the architect of a clause 11.2 certificate that the Works (or a section) are not fit and ready for taking-over. If such certificate is issued and, of course, subject to a written withholding notice in accordance with clause 16.6, the clause permits the employer to deduct liquidated damages at the rate or rates stated in the time schedule. The employer may deduct liquidated damages from the amount that is certified as payable to the contractor from time to time. Alternatively, the employer may recover the liquidated damages from the contractor as an ordinary debt by one of the dispute resolution procedures in the contract.

16.2.5 Unliquidated damages

Alternative 2 of clause 11.3 is unusual in that it is a provision for the recovery of unliquidated damages. In other words, it is a provision for the recovery of the ordinary kind of damages to which the employer would be entitled at common law for the contractor's breach of contract. To that extent, it may be argued that it is always open to the parties to strike out all the provisions for liquidated damages and that would give the same effect, because it is liquidated damages which is a contrived or agreed remedy and the absence of a liquidated damages clause would leave the employer free to resort to common law remedies. The importance of this clause is that, subject to the issue of a withholding notice under clause 16.6, it confers on the employer a right to deduct such damage, loss and/or expense from the amount which would otherwise be payable to the contractor in any certificate, i.e. it confers an express right of set-off on the employer, who will quantify the amount. There is no express provision for the employer to recover the damages as a debt, because if recovery is pursued through one of the dispute resolution procedures in the contract, the employer would be in exactly the same position as for any other common law claim for damages – the breach and the damages would have to be proved.

The clause provides that, subject to the issue of a clause 11.2 certificate, the employer is entitled to recover from the contractor such damage, loss and/or expense

¹² *Bramall & Ogden v Sheffield City Council* (1983) 1 Con LR 30.

¹³ *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30.

as may be suffered arising out of the contractor's failure to meet its obligations under clause 11.1. The big difficulty will be in calculating the damages. The clause gives no assistance in this regard, but the damages will be the equivalent of unliquidated damages at common law, which are recoverable on proof of actual loss. Therefore, the employer will have to calculate the amount of damages directly flowing from the delay in completion based on the principles set out in *Hadley v Baxendale*.¹⁴ Only damages within the reasonable contemplation of the parties at the date the contract was executed will ordinarily be eligible. The wording of the clause is very broad; and the use of this provision is unlikely to find favour with contractors who might be well advised to resist it. It is a substantial departure from normal procedures in the construction industry although an employer, who might find it difficult to pre-estimate what might be a substantial loss, must find it attractive.

16.2.6 Adjustment of damages for delay

Clause 11.4 is applicable whichever of the alternative versions of clause 11.3 is used. It is important in those instances where the architect has issued a clause 11.2 certificate, the employer has deducted liquidated or unliquidated damages and the architect then grants a further extension of time and adjusts the taking-over date to a later date. The clause stipulates that the employer is to repay any excess damages so deducted for the period between the former taking-over date and the later date as adjusted. The issue of a further extension of time will clearly invalidate any existing clause 11.2 certificate. Unlike the position under SBC, IC and ICD, there is no express provision for the architect to issue a further clause 11.2 certificate after a further extension of time. Because the issue of such certificate is a condition precedent before either liquidated or unliquidated damages can be deducted, it is thought that the wording of clause 11.2 is probably wide enough to allow the architect to issue further certificates following fresh extensions of time. The previous edition of this contract contained an entitlement for the contractor to have interest added to the retention repaid. That provision has now been removed and, without such express provision, it is not thought the contractor would have any right to interest in these circumstances.

16.3 Prolongation and disruption

16.3.1 Introduction

The opportunity for this type of claim is more limited than under some other standard forms. The principle of a claim for damage, loss and/or expense is related to disruption of the regular progress of the Works or of any section or things which delay their execution in accordance with the dates stated in the time schedule, where the disruption or delay is caused by any act, omission, default or negligence of the

¹⁴ (1854) 9 Ex 341.

employer or of the architect or a failure to comply with the CDM Regulations 2007 by certain parties.

16.3.2 Clause 7 Employer's liability

Clause 7 enables the contractor to make a claim for damage, loss and/or expense.

16.3.3 Commentary

Basic provisions

This clause entitles the contractor to claim reimbursement for any damage, loss and/or expense which it suffers or incurs in consequence of delays and disruptions caused by any act, omission or default (save architect's instructions) of the employer or the architect or a failure to comply with the CDM Regulations 2007 with all reasonable diligence by the CDM co-ordinator, the principal contractor (other than the contractor itself) or a designer which is not the contractor, a sub-contractor or supplier. Delays and disruptions which result from architect's instructions, a common ground of claim, are dealt with separately by clauses 8 and 17. The machinery of clause 7 is echoed by the very similar procedures in supplemental provisions in JCT DB Contract. In issuing the contract form, the ACA originally stated that under it 'the contractor cannot claim . . . additional money for a series of things that most clients consider to be normal building risks'. The scope of this clause is limited mainly to actions or defaults of the employer and the architect; matters which normally would be considered to be matters which the contractor could, in any event, pursue against the employer at common law.¹⁵

An important point and one often overlooked by contractors and architects alike is that the contractor is only entitled to have the relevant amounts included in interim certificates if the contractor complies precisely with the provisions of clauses 7.2 and 7.3. That is clear from clause 7.5. If the contractor fails to comply with the contract machinery which lays down procedures for the giving of notice and the submission of estimates, the contractor will be unable to recover any such amounts until the final certificate. Worse, the contractor will be unable to recover any interest or finance charges in respect of the intervening period.

The wording used in these provisions repays careful scrutiny. It is too easy to assume that these provisions are the same as the equivalent provisions in SBC. That would be a wrong and possibly costly assumption for both parties. There are several interesting points. It has already been noted that the scope for claims is severely limited. When considering 'damage, loss and/or expense', it is arguable that the contractor is entitled to recover more for the same default than would be claimable under SBC. There is an important difference in the wording used in ACA 3 compared to the equivalent provision in JCT Forms. In ACA 3 clause 7 the words 'damage, loss and/or expense' are not qualified by the word 'direct'. On one view the use of the

¹⁵ *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

phrase ‘in consequence of such disruption or delay’ indicates that a claim under clause 7 would also extend to cover consequential loss and cover those heads of claim which, if made as damages at common law, are not excluded if the employer, at the time of entering into the contract, knew or must be taken to have known were liable to result from the act, omission, default or negligence complained of.¹⁶ In passing, it should be noted that the word ‘damage’ is omitted from the first mention of loss and/or expense in clause 7.3 although retained later in the same clause and in clauses 7.1, 7.2, 7.4 and 7.5. However, it is also omitted in clause 17.1(c). Presumably the first omission is simply a typographical error.

The common law position regarding damages for breach of contract has been put quite simply as follows:

‘The governing purposes of damages is to put the party whose rights have been violated in the same position, so far as money can do, as if his rights had been observed.’¹⁷

Although the basic principle is quite clear, the way that principle is interpreted in various situations can raise problems. The defaulting party is not liable for all loss actually resulting from a particular breach. The law sensibly sets a limit to the loss for which damages are recoverable. The limit is sometimes defined by reference to ‘foreseeability’ or sometimes by reference to whether a particular effect is ‘within the contemplation of the parties’. In both practical and legal terms the contractor’s entitlement is to recover only that part of the resulting loss that was reasonably foreseeable or within the contemplation of the parties as liable to result from the breach relied on. This entitlement is to be judged at the time the contract was entered into.¹⁸ Therefore, it appears that under clause 7.1 the amount potentially claimable by the contractor includes all foreseeable consequential loss. Loss of profit would be included.¹⁹

Act, omission or default

The words ‘act, omission, default or negligence’ are very important because some of the concepts enshrined in them are very difficult to express. Although the reference is only to employer and architect, it is likely that the clause includes others for whom the employer is vicariously responsible in law. Negligence presents very little practical difficulty, because once the facts are established it is usually clear whether a duty of care in the legal sense arises and, if it does, whether it has been broken. In the vast majority of situations covered by clause 7, the contractor would have a right of action against the defaulting party, but the scope of this phrase is not to be limited by considering whether the contractor could sue employer or architect direct.

The legal meaning of ‘default’ has been considered, albeit in the very different context of a contract for the sale of real property:

¹⁶ *Hadley v Baxendale* (1854) 9 Ex 341.

¹⁷ *Victoria Laundry (Windsor) v Newman Industries, Coulson & Co* [1949] 1 All ER 997 at 1002 per Asquith LJ.

¹⁸ *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] 1 All ER 525. See the more comprehensive consideration of this in Chapter 5, Section 5.2.

¹⁹ *Wraight Ltd v P H & T Holdings Ltd* (1968) 13 BLR 27.

‘Default must, I think, involve either not doing what you ought or doing what you ought not, having regard to your relations with the other parties concerned in the transaction; in other words, it involves the breach of some duty you owe to another or others. It refers to personal conduct and is not the same thing as breach of contract.’²⁰

In the context of a construction industry contract, when construing similar words to the present in an indemnity clause and having cited with approval the above passage, it was said that:

‘default would be established if one of the persons covered by the clause either did not do what he ought to have done, or did what he ought not to have done in all the circumstances, provided of course . . . that the conduct in question involves something in the nature of a breach of duty so as to be properly describable as a default.’²¹

This appears to be the correct interpretation to be put upon the word ‘default’ in clause 7.1, and this view was reinforced by *Greater London Council v The Cleveland Bridge and Engineering Co. Ltd*,²² which emphasised that ‘default’ is a narrower term than breach of contract. However, when considering the wording of a bond, the Court of Appeal in *Perar BV v General Surety & Guarantee Co Ltd*²³ held that ‘default’ did not mean anything other than a breach which was its common meaning and the meaning to be derived from the context of the bond and the reference to damages. Therefore, in this contract, the precise meaning currently remains open to debate.

CDM Regulations 2007

The ground which centres on the failure of certain parties to comply with the CDM Regulations 2007 is referring to a breach of statutory duty. Such breaches are not usually actionable unless so stated in the relevant legislation or the statutory duty is made into a contractual duty by including in the contract a term to the effect that the obligation to comply with the Regulations is a term of the contract. In this instance, it is expressly made the subject of a claim by the contractor under clause 7.1.

It should not be imagined that it is easy to establish a claim under clause 7, and it is important to note that the contractor must be able to show that it ‘suffers or incurs damage, loss and/or expense’ in consequence of the disruption or delay occasioned by the employer’s (or architect’s) act, omission, etc. or the failure to comply with CDM Regulations. The damage, loss and/or expense must have been caused by the breach and not merely be the occasion for it.²⁴

²⁰ *In re Bayley Worthington & Cohen’s Contract* [1909] 1 Ch 648 at 656 per Parker J.

²¹ *City of Manchester v Fram Gerrard Ltd* (1974) 6 BLR 70 at 90 per Kerr J.

²² (1987) 8 Con LR 30.

²³ (1994) 66 BLR 72. In this case, the court declined to follow *Northwood Development Company Ltd v Aegon Insurance Company (UK) Ltd* (1994) 10 Const LJ 157, which held that ‘default’ was wider in meaning than ‘breach’ and included non-fulfilment of the contractor’s obligation under the contract, whether or not the contractor was in breach.

²⁴ *Weld-Blundell v Stephens* [1920] AC 956.

In other words, the loss, etc. must follow directly and in the natural course of things from the event that gives rise to it; and the event giving rise to the claim is the act, omission, default or negligence of the employer or of the architect or the failure to comply with CDM Regulations resulting in delay or disruption.

Time schedule

A further difficulty for the contractor is that the disruption or delay must be referable to the dates stated in the time schedule. The time schedule is thus the yardstick against which delays and disruption are to be measured and if there is no measurable impact on the time schedule, the contractor will have no basis for claim under this clause. The time schedule is a feature peculiar to ACA 3, although similar in some respects to the abstract of particulars under GC/ Works/1(1998). The time schedule is not the same thing as the contractor's programme. The time schedule is a contract document whereas the contractor's programme may be described as a contractual document, if required under the terms of the contract, but no more. The time schedule is printed at the back of the form of agreement. There are alternatives: one providing for the normal situation where the Works are completed as a whole; the other for the situation where the Works are divided into sections. Where the Works are to be completed as a whole, the time schedule contains the following information:

- (a) Date for possession (clause 11.1).
- (b) Date for taking-over and commencement of maintenance period (clause 11.1) (taking-over appears to be similar to practical completion except that the architect seems to be able to decide that the Works are fit and ready for taking-over at a somewhat earlier stage than that at which they would be eligible for certification as having achieved practical completion under JCT forms).
- (c) Weekly rate of liquidated damages (clause 11.3). (If a daily rate is required the necessary amendments must be made to the wording. However, this item is to be deleted where the employer wishes to exercise the option of recovering unliquidated damages based on actual loss for late completion.)
- (e) Length of maintenance period (clause 12.2).

Similar information is required for the alternative version of the time schedule used with the Works divided into sections. The final part of the time schedule which is common to both alternatives is headed 'Issue of Information'. Under the traditional contract procedure, where the architect is to be responsible for the preparation and issue of all drawings and specifications, etc., the architect should set out under this heading the drawings, details documents or other information which the architect will supply to the contractor together with the dates of proposed issue. This is a similar document to the information release schedule subsequently introduced into JCT 98 and SBC. The same reservations apply to this document as to the SBC information release schedule. In both cases, the architect is called upon to decide the order in which the contractor will require the information as well as accurately forecasting the dates on which it will be required. When the right of the contractor to set about construction of the Works in any order it sees fit is taken into

account,²⁵ the architect has an impossible task; which is why the production of an information release schedule under SBC is rare.

There is an alternative heading for use where the contractor is to supply drawings, etc., in which case the contractor is to complete it. Regular progress of the Works is to be judged against the dates in the time schedule and, under clause 7, failure by the employer or the architect to comply with those dates may give rise to a claim and will almost certainly do so if delay or disruption results.

Procedure

The claims procedure is set out in clauses 7.2 and 7.3. It is fairly straightforward, but the contractor must take care to comply with it precisely if it wishes to be reimbursed as the contract proceeds. The steps are as follows:

- The contractor must give written notice to the architect of any event giving rise to a claim. These are the events set out in clause 7.1. It should be noted that, unlike the position under SBC, the notice must be given by the contractor whenever such an event occurs even if, for one reason or another, the contractor does not wish to make a claim. Under SBC, the contractor need not make application if it does not wish to recover any loss and/or expense.
- Clause 7.2 requires the notice to be given immediately it becomes reasonably apparent that any event giving rise to a claim is likely to occur or has occurred. This is quite an onerous duty with which the contractor must comply if it wishes to recover damage, loss and/or expense as the work progresses.
- When the contractor makes its next interim application for payment after the issue of the notice, it must submit to the architect an estimate of the adjustment to the contract sum that it requires to take account of the damage, loss and/or expense which it has suffered prior to the date of submission of the estimate. The use of the word 'estimate', although often taken to mean 'an approximate judgment' or even 'a best guess' is here used in its strictly accurate sense.²⁶ Clause 7.4 requires the contractor to provide the documents, vouchers and receipts which are necessary to substantiate the estimate or as may be required by the architect'. The clause rather quaintly calls for 'such documents . . . as shall be necessary for computing the [estimate]' Since the estimate is already computed when the documents are to be provided, the purpose of the documents is not strictly to compute the estimate, but to substantiate it. It is difficult to know what may be required by the architect other than the information needed to substantiate the estimate, yet there is no doubt that, on its face, the clause empowers the architect to ask for anything. It is likely that the clause would be interpreted narrowly to embrace merely what the architect requires in order to form a view about the contractor's estimate. In practice, it is likely that most contractors will submit claims in traditional fashion together with substantiating documentation.
- The architect has 20 days, or however long the parties have agreed, to accept or reject the estimate. That period runs, not from the date of the contractor's applica-

²⁵ *Greater London Council v Cleveland Bridge & Engineering Co Ltd* (1984) 8 Con LR 30.

²⁶ See *Crowshaw v Pritchard & Renwick* (1899) 16 TLR 45, where the court considered that a contractor's estimate, dependent on its terms, may amount to a firm offer and then acceptance by the employer will result in a binding contract.

tion for payment, but from receipt by the architect of the estimate properly supported by other documents. Therefore, if the contractor is slow providing those supporting documents, the acceptance of the estimate and the inclusion of the amount in the next certificate will also be delayed. There is no provision for discussion or negotiation of the estimate, but in practice, no doubt, the stark wording of the contract will be modified by some discussion, albeit brief in view of the short timescale. If the architect accepts the estimate, the contract sum is to be adjusted accordingly and no more adjustments of the contract sum or payments can be made in respect of the same event. Therefore, if the contractor suffers damage, loss and/or expense, it must give immediate notice and then calculate the amount of its losses during the period up the next application for payment. But if the contractor makes a mistake and under-estimates the amount of its loss, acceptance by the architect will mean that the contractor will not be able to claim the shortfall thereafter either under the contract or by reference to dispute resolution. If the contractor underestimates, it has completely lost the chance to recover that money. Therefore, it is crucial that the contractor is accurate in its estimates. Obviously, if the architect rejects the contractor's estimates, the contractor still has the right to have the dispute referred to one of the dispute resolution methods in the contract.

- Clause 7.3 deals with the situation which may arise if one event results in continuing losses. If there are continuing losses, the contractor must submit further estimates with each subsequent interim application for payment in respect of the damage, loss and/or expense which it has suffered or incurred since the submission of its previous estimate. If the architect accepts these estimates, in each case the amount must be added to the contract sum but the contractor is not entitled to any further amounts for that same event in respect of the same period.
- It is clear from clause 7.4 that the contract sum must be adjusted and the amount included in the next interim certificate after the contractor's estimate has been accepted.
- The contents of clause 7.5 show why it is important that the contractor strictly complies with the contractual mechanism for claiming which is set out in clauses 7.2–7.4. The clause states that if the contractor fails to comply with clauses 7.2 and 7.3 (the submission of notices and estimates), the contractor is not entitled to any adjustment of the contract sum until the issue of the final certificate. Moreover, the contractor is not entitled to any interest or financing charges for the intervening period. In case there should be any doubt about the position, the clause makes clear at the outset that the architect has no power to make any adjustment to the contract sum in respect of the damage, loss and/or expense which the contract failed to claim or failed to claim in accordance with the contract.

It is clear that clause 7 entitles the architect to decide on the merits of what would normally be a common law claim provided that it arises from acts, omissions, defaults or negligence of the employer or architect.

The scheme of clause 7 is very simple and straightforward. If operated correctly, the provisions should prove of benefit to contractors and employers alike. The idea is to ensure that the contractor has a reasonable expectation of cashflow. In exchange for this expectation, it has to accept that the amount claimed and certified each month will not necessarily be an exact reflection of the actual amount of damage, loss and/or expense suffered, but most contractors would be willing to trade ultimate

precision but long-delayed payment against certainty of regular payment of money due provided the regular payments are a reasonable approximation of the amounts due. The penalties if the contractor fails to operate the mechanism properly are severe – payment delayed until the final certificate.

The system imposes duties on both sides: the contractor must make a quick and accurate estimate of its losses, but the architect has little time in which to check the estimate and reach a conclusion. As noted above, the 20 days runs from receipt of the necessary substantiating documents and payment of the amount can be delayed if the documents are not provided. Clearly there is also room for argument about the cause of the delay, but the existence of the time schedule as a specified measure of progress does away with some of the practical difficulties encountered under the claims clauses of other contracts.

Provisions for the ascertainment of loss and/or expense are found in some other clauses. Clause 10 provides that the contractor must permit work to be done by others on the site. It is headed 'Employer's Licensees' and deals with work to be done on site by the employer or the employer's employees, agents and contractors as well as work done by statutory undertakers such as water, gas and electricity suppliers. Clause 10.4 provides that if the regular progress of the Works or any section is disrupted or delayed by reference to the dates on the time schedule by the employer's licensees, the contractor is entitled to recover any resulting loss, damage or expense under the provisions of clause 7.4. Importantly, there is no claim to be made in respect of statutory undertaker's work carried out under clause 10.3. If the statutory undertakers are acting under their statutory powers, they fall under clause 10.3. If, on the other hand, they are acting under a contract with the employer, they fall under clause 10.2, in which case the contractor will have the right to found a claim for loss and/or expense as above.²⁷

Clause 11.8 also allows a claim for loss and/or expense. In broad terms it entitles the architect to issue an instruction to bring forward or postpone dates shown on the time-schedule for the taking-over of any part of the Works. It then states that the architect must ascertain and certify a fair and reasonable adjustment to the contract sum, if appropriate, to cover compliance by the contractor with the instruction together with any damage, loss and/or expense suffered by the contractor arising out of the instruction. There is a proviso that, if before giving the instruction the architect requires the contractor to give an estimate of the adjustment to the contract sum then, except for the provisions relating to extensions of time, clause 17 applies just as if the instruction was included in clause 17.1.

16.4 Valuation of instructions

16.4.1 Introduction

The instruction and valuation clauses of this contract are closely connected. There is a lot of cross-referencing of clauses but once that has been absorbed, the provisions

²⁷ *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* (1980) 15 BLR 8, decided under JCT terms, is relevant.

are reasonably straightforward. There is no definition of ‘variations’ and indeed the term is not used by ACA 3. There is no express provision for a quantity surveyor and it is assumed that the architect will carry out all valuations. Where the architect is unable to carry out valuations, there is nothing to prevent the employer or the architect engaging a quantity surveyor to carry out the task and advise the architect, but it is the architect who must issue the relevant valuations under the terms of the contract.

16.4.2 Clauses 8 and 17

Clause 8 deals with the issue of architect’s, usually written, instructions and gives the extent of the architect’s authority in this respect. Oral instructions can only be issued in an emergency, the primary meaning of which is a ‘sudden juncture demanding immediate action’.²⁸ Clause 17 deals with the valuation of architect’s instructions.

16.4.3 Commentary

Clause 8.1 deals with the architect’s power to issue instructions. The architect has power to issue instructions in connection with a list of items until taking-over of the Works. So far, this is the same position as understood under JCT contracts.²⁹ However, the end of the clause stipulates that, after taking-over, the architect may issue instructions at any time up to the time the contractor has completed its obligations in respect of the maintenance period (which is the equivalent of the rectification period under JCT contracts). The two provisions appear to be inconsistent, but it seems that the instructions issued after taking-over relate only to instructions empowered by clauses 8.1(a), (b), (c) and (d). It should be noted that although the list of possible instructions appears to be contained within clause 8.1, clause 8.2 lists the architect’s instructions which may give rise to payment which includes instructions issued under other clauses. These other clauses are in fact summarised under clause 8.1(g). The full list is as follows:

- opening up of work for inspection or testing, if the work is found to be in accordance with the contract (clause 8.1(c))
- addition, alteration or omission of obligations or restrictions in regard to working space, working hours, access to the site or use of parts of the site (clause 8.1(d))
- alteration or modification of the design, quality or quantity of the Works as described in the Contract Documents, including additions, omissions or substitutions or the removal of materials or goods brought to site by the contractor for the Works (clause 8.1(e))
- any matter connected with the Works (clause 8.1(f))
- resolving ambiguities or discrepancies falling within clause 1.5 which could not reasonably have been foreseen or found at the date of the making of the contract

²⁸ *The Concise Oxford Dictionary*.

²⁹ *New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd* [2001] BLR 74.

by a contractor of the degree of skill care and diligence specified in clause 1.2 (clause 8.1(g))

- resolving an infringement of statutory requirements under clause 1.6 (clause 8.1(g))
- matters relating to adverse ground conditions or artificial obstructions at the site as referred to in the optional clause 2.6 (clause 8.1(g))
- provision of samples under clause 3.5 (clause 8.1(g))
- the finding of antiquities, etc. under clause 14.2 (clause 8.1(g)).

Clause 8.2 makes clear that it is only those clauses which may give rise to a payment under clause 17. Even though clause 8.1(g) refers to a series of clauses elsewhere in the contract, clause 8.2 lists the particular clauses which may give rise to adjustment of the contract sum. However, it should not be thought that, if the contractor can bring the event within one of the clauses referred to in clause 8.2, clause 17 automatically applies. There are two important qualifications on the contractor's entitlement to payment for compliance with the architect's instructions:

- The instruction must require the contractor to carry out work or do some other thing which is not provided for, or reasonably to be inferred from, the contract documents or must require the omission of work or of any obligation or restriction. This appears to be quite an onerous provision. Although it is not unusual to find a reference to reasonable inference from documents, it is thought that in practice the necessary inference would have to be clear.
- The instruction must not have arisen out of or in connection with or must not reveal any negligence, omission or default of the contractor or of any sub-contractor or supplier or their servants or agents. It makes perfect sense that the instruction does not qualify for payment if it arises from any default of the contractor. It is less clear what is intended by the reference to an instruction revealing any default. Why should a contractor be deprived of payment in respect of an instruction which, perhaps in passing, indicates some default of the contractor which in any event has no connection to the instruction or the reason for the instruction? This wording is something which the ACA might look at again.

Only if these conditions are satisfied will compliance with an architect's instruction rank for payment.

The valuation provisions in clause 17 are not drafted in the same way as the standard valuation clauses under JCT contracts.³⁰ The system is based on the giving of estimates by the contractor and the acceptance, or otherwise, by the architect. Clause 17.1 provides that, if the architect issues an instruction under one of the clauses referred to in clause 8.2 which, in the opinion of either the architect or the contractor, requires an adjustment to the contract sum and/or will affect the time schedule, before complying, the contractor must provide the architect with various estimates as follows:

³⁰ Compare this provision with the 'Supplementary Provision' S6 of WCD 98 (since revised as 'Supplemental Provision' 4 of DB, Chapter 14, Section 14.8.5) and the clause 13A quotation procedure of JCT 98 (since revised as 'Variation and Acceleration Quotation Procedures' under SBC, Chapter 14, Section 14.5.5), both drafted after the ACA provisions.

- the value of the adjustment with all necessary supporting calculations; and
- the length of any extension of time to which the contractor may be entitled under clause 11.5; and
- the amount of any loss and or expense which the contractor may have suffered or incurred arising out of or in connection with the instruction (note that ‘damage’ appears to have been deliberately omitted from this clause).

The contract default position is that the estimates must be provided with 10 working days of receipt of the relevant instruction. There is provision for that period to be amended in the contract. The contract also provides that the architect and the contractor may agree a different period at the time the estimates are required.

In submitting estimates, the contractor must carry out its own valuation of the appropriate adjustment to the contract sum. However, this is not an opportunity for the contractor to quote for as much as it can get for carrying out the instruction. If that were the case, there would be little point in enshrining the process in the contract. It is clear that the calculation carried out by the contractor must, where practicable, be based on any relevant rates in the schedule of rates or other relevant document. Clause 17.2 imposes on architect and contractor a duty to take reasonable steps to agree the contractor’s estimate. Although there is nothing in the contract to allow the parties to agree figures which are different to those shown in the contractor’s estimate, it is likely that, in practice, such agreement will not simply amount to acceptance or rejection, but will involve some discussion on both sides until they arrive at mutually acceptable figures. A clue is to be found in the reference to agreement ‘on all or any of the matters’ in clause 17.3.

If agreement is reached, it is stated to be binding on employer and contractor and the contractor must comply with the instruction immediately. The architect must grant an extension of time equivalent to the agreed period and the agreed adjustment must be made to the contract sum. The contract is silent about the timing of the extension of time and the adjustment and it is suggested that the extension must be granted immediately, because there is no justifiable reason not to do so. The adjustment to the contract sum ought to be made so as to enable the amount to be taken into account in the next certificate.

Agreement is to be reached within five working days of receipt of the contractor’s estimates by the architect. Clause 17.3 deals with the situation if agreement is not reached. Five days is not long. If there is failure to reach agreement about any of the matters set out in the estimates:

- the architect may instruct the contractor to comply with the instruction and it must be valued by the architect under clause 17.5; or
- the architect may instruct the contractor not to comply.

Clause 17.4 stipulates that if the architect withdraws the instruction, the contractor has no claim arising from the instruction or from any failure to reach agreement. The costs of preparing the estimates may be substantial and it seems unfair to expect the contractor to shoulder all the costs resulting from what is essentially the employer’s change of mind. Some other contracts allow the costs of preparation of an estimate in such circumstances to be recoverable from the employer.

Clause 17.5 applies in two situations: (1) where the architect, either before or after issuing an instruction, issues a written notice to dispense with the contractor’s

obligation to submit estimates under clause 17.1 and (2) where there is a failure to agree estimates within five working days and the architect has decided to give an instruction under clause 17.3 to comply with the original instruction. If either of these two situations apply, the architect must ascertain and certify a fair and reasonable adjustment to the contract sum which, if appropriate, is to be based on the schedule of rates. This ascertainment must include any loss or expense arising out of or in connection with the instruction. The architect must also grant a fair and reasonable extension of time under clause 11.6.

Clause 17.6 deals with the failure of the contractor to comply with clause 17.1. The consequences are severe. If the contractor does not submit estimates under clause 17.1, and if the architect has not waived compliance under clauses 17.5 or 8.3 (emergency oral instructions), the contractor has no entitlement to payment in respect of the instructions until the final certificate. It loses its right to payment in interim certificates for compliance with the architect's instructions. To make matters worse, the contractor also forfeits any right to interest or finance charges for the period prior to the issue of the final certificate. In case an architect should feel sorry for a contractor in this situation, the contract makes clear that the architect has no authority to make any additions to the contract sum in respect of the instruction in question.

If it is practicable for the contractor to submit estimates and these can be agreed, the contractor should benefit from strict operation of these provisions. They are designed to provide rapid cash flow. If estimates cannot be submitted, the provisions of clause 17.5 are intended to fill the gap and ensure that the contractor is remunerated within a reasonable time for the additional work carried out. It is believed that few difficulties have been encountered in practice. The final certificate provisions should be viewed as an incentive to the contractor to comply with the requirements of the valuation clause.

Clause 19.2 provides for the issue of the final certificate. Unlike the position under SBC, IC and ICD, it is purely financial in its effect. It is to be issued by the architect within 30 working days (unless another period is inserted) after completion by the contractor of all its obligations under the agreement.

Before the final certificate is issued, the contractor must submit its final account for the Works to the architect within 30 working days of the expiry of the maintenance period, and this submission must include any outstanding claims. Any outstanding claim must be supported by the necessary vouchers, etc. and what is required is a claim which is properly calculated and backed up by such supporting evidence as the architect may require. If the contractor is not satisfied with the amount stated in the final certificate, it may refer the matter to adjudication for a rapid decision or it may choose whichever of the arbitration or litigation options applies. The parties can agree to use clause 25A and attempt to settle the matter by conciliation. However, the agreement of both parties is required for this route. That would be the position in any event if clause 25A did not exist. The existence of clause 25A may be considered to be a reminder to the parties that there are other ways of settling differences which may be cheaper for all concerned in the long run.

Claims under the ACA Standard Form of Contract for Project Partnering (PPC2000)

17.1 Introduction

As the name suggests, the first edition of this contract was published in 2000. It has been updated in 2003 and again in 2008 which is the version current at the time of writing. It is an unusual contract in that it is multi-party and can be executed by a mixture of client, constructor (i.e. the main contractor), consultants and certain sub-contractors. It is intended as a partnering contract and it is recommended by Constructing Excellence as a means of encouraging collaborative working. It is endorsed by the Construction Industry Council.

The intention behind the contract is that the various parties work together as a team and that more specialists can join the team later by signing a special agreement for that purpose. A key aspect is the creation of a core group, identified in the agreement. This group deals with design and costs and attempts to resolve disputes. There is an obligation to give early warning of difficulties so that the core group can act swiftly. The agreement includes provisions for incentives and key performance indicators.

The ACA has published a helpful guide to this contract together with SPC2000. The usual note of caution must be expressed that, helpful as the guide is, it has no legal effect on the interpretation of the contract. Where, as here, it is written by the author of the contract there is always the danger that the guide states what the author intended the contract to mean rather than what, strictly construed, it actually means.

Most building contracts are designed merely to govern what happens during the construction phase. One of the features of PPC2000 is that it is executed by all the relevant parties, including consultants, as early as possible in order to govern the entire procurement process. Before work begins on site, the Commencement Agreement is executed by the parties. But, this is not to be done until the pre-conditions set out in clause 14.1 are satisfied. The commencement agreement contains all the variable details similar to the ones to be found in the Contract Particulars in JCT contracts.

17.2 Extension of time and damages

17.2.1 Extension of time

Provisions for extension of time are contained in clause 18 which has the general title of 'Risk Management'. The procedure is set out in clause 18.4 and the grounds in clause 18.3. The date of possession, completion date and other detailed arrangements for the project are to be found in the project timetable which is to be submitted by the constructor, reviewed by the core group and approved by the client under clause 6.2. Clause 6.5 provides that with effect from the date of the commencement agreement, the members of the partnering team must carry out their agreed activities regularly and diligently and in accordance with the project timetable. This obligation is subject to the following clauses:

- clause 6.6 which provides that the client representative may postpone, accelerate or re-sequence the project
- clause 17 which sets out change procedures
- clause 18 which sets out provisions for extension of time
- clause 20.17 which provides for contractor suspension on non-payment, and
- clause 26.6 which deals with suspension or abandonment of the project.

17.2.2 Grounds for extension of time

The grounds for extension of time are to be found in clause 18.3. Some are client/consultant defaults; others are neutral events but they are not divided into groups. The grounds are as follows:

Default or failure of client or consultant (clause 18.3(i))

This is a catch-all type of clause similar in intent to SBC clause 2.29.6 and ACA 3 clause 11.5(e) Alternative 2. The principal purpose is to avoid time becoming at large for lack of a suitable clause enabling the architect to give an extension of time for a client default. There are a number of provisos attached to this ground:

- An exception is made to the extent that the delay is caused or contributed to by the constructor or any party for whom the constructor is responsible. That would be implied in any event, if not as a matter of law, as a matter of common sense.
- The delay must extend beyond any time limit in the partnering terms or project timetable. It is interesting that the reference is not simply to the completion date. Clearly the intention is to allow reference to be made, when assessing the delay, to any and all stipulations as to time inserted in these documents.
- The constructor must have given early warning to the client under clause 3.7 not more than five working days after the end of the particular time limit. Clause 3.7 requires early warning to be given by any partnering team member 'as soon as it is aware'. No doubt the constructor will be aware within five days after the end of

the time limit concerned but, if not aware within the five days, it seems that the constructor would lose its entitlement to an extension of time under this ground. For the purposes of this clause 18.3(i), it is the five day period which will prevail even if, under clause 3.7, the constructor is not aware and, therefore, not obliged to give early warning.

Discovery of an antiquity (clause 18.3(ii))

This ground depends on the presence of the antiquity not being reasonably apparent from an inspection of the site before the date of the commencement agreement or from any relevant surveys whether carried out by the constructor or provided to it. Whether the antiquity was reasonably apparent will be a question of fact on which the client representative will have to take an objective view.

Delay in third party consents listed in the commencement agreement (clause 18.3(iii))

The third party consents, such as planning or landlord's consents which will entitle the constructor to an extension of time are restricted to those listed in the commencement agreement. There is a proviso that the constructor must have taken all proper and timely steps to avoid or reduce any delay, but it is obliged to do this in any event as its general duty to mitigate its losses, but especially by reference to its duty in the first paragraph of clause 18.3 to use its best endeavours to minimise delays.

Change in law or regulation of the country (clause 18.3(iv))

This is a straightforward ground which places on the client the risk of a change of law or regulation in the country where the site is situated. The constructor would have to satisfy two conditions: demonstrate that the change did cause a delay and that it could not reasonably foresee it.

Weather conditions (clause 18.3(v))

To qualify for an extension of time, the weather conditions must have caused a delay and the local meteorological office records must show that the conditions are exceptionally adverse for the time of year. This means that it might be extremely hot and dry, cold and frosty, exceptionally high winds preventing use of a tower crane, or torrential rain leading to flooding.

Delay by local authority, statutory body or utility (clause 18.3(vi))

The delay must be a result of the carrying out of work in accordance with statutory duties and it must be work concerning the project. Delay caused by work being done in relation to an adjacent site would not qualify under this ground. The clause very sensibly sets out some criteria to be satisfied which other contracts leave for the parties to work out for themselves. The constructor must have done everything it

should have done in supplying information, placing orders and facilitating the work as soon as reasonably practicable to do so and must not have been responsible for delay or disruption to the authority or body concerned.

Opening up or testing (clause 18.3(vii))

Although it does not expressly so state, it must be implied that the opening up for inspection or testing refers only to what has been instructed by a consultant. Extension of time under this ground is subject to two exceptions:

- if the inspection or testing reveals something which is not in accordance with the partnering documents (equivalent to contract documents under other contracts)
- if the inspection or testing was reasonable, because non-compliance of a similar kind to what the inspection or testing was intended to investigate had already been discovered elsewhere in the project.

Insured loss or damage (clause 18.3(viii))

This ground covers a range of insurances referred to in clause 19.1. Clause 19.1 refers back to the relevant entries in the commencement agreement. Broadly, they refer to insurance of the project, existing structures and third party property. The constructor is entitled to an extension of time if the insurance was to be taken out by the constructor and the delay is caused by one or more of the insured matters.

Strike etc. (clause 18.3(ix))

This is a broad clause referring to strike or other industrial action by a party which is not a partnering team member. Applying the normal rules of construction, the clause covers a strike or any other industrial action provided only that it is not a strike.¹ The description could hardly be broader. The only stipulation about the party is that it is not a partnering team member. Therefore, the clause embraces any kind of strike or industrial action by any party outside the partnering team if it adversely affects the date for completion. This would seem to include the inability to supply materials to site because the supplier of raw materials to the manufacturer had engaged in a strike or other industrial action. This does not appear to be affected by the usual rules regarding foreseeability.

Government exercise of statutory power (clause 18.3(x))

The statutory power must directly affect the carrying out of the project by restricting labour, materials, goods or equipment required for the project. The effect must be

¹ *Expressio unius est exclusio alterius*. The express mention of a particular thing may indicate an intention to exclude other things: *Blackburn v Flavelle* (1881) 6 App Cas 628.

direct. If the exercise of the power merely affects something which itself restricts labour etc., it does not form a ground for extension of time.

Client's failure to allow access or possession of the site (clause 18.3(xi))

Clause 15.3(i) stipulates that the constructor must take possession of the site or the relevant parts under licence from the client. That merely gives expression to the position under the general law. The possession is subject to any constraints in the commencement agreement and the project timetable. Clause 6.4 states that the project brief, the commencement agreement and the project timetable must state any restrictions on possession and any arrangements for deferred or interrupted possession. This ground is made subject to those provisions. In order to bite, the possession and access must be under the client's control.

Suspension of obligations or the project (clause 18.3(xii))

Two kinds of suspension are grounds for extension of time. The first is suspension by the contractor under clause 20.17, because the client has failed to make a payment by the final date for payment. This provision is included in the contract under s. 112 of the Housing Grants, Construction and Regeneration Act 1996. The second kind is suspension of the project under clause 26.6 which requires suspension of the project by the client under certain circumstances. The circumstances are that it has become impossible to proceed with the project because of damage to the project caused by:

- a clause 19.1 insurance risk
- civil commotion
- act or omission of government, local authority or statutory body
- hostilities, or
- terrorist activity.

After due notice and proper consideration, if no solution is proposed or approved within 20 days of notice, the client must suspend. It has been said that '[i]n matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at excessive or unreasonable cost.'²

Use or threat of terrorism (clause 18.3(xiii))

This ground is the use or threat of terrorism affecting or reasonably likely to affect the project or people engaged on it. It also includes activities around the site. However, unlike SBC, it does not expressly include the response of the authorities to terrorism and the wording of the clause is not wide enough to allow any such implication.

² *Moss v Smith* (1977) 76 LGR 284 at 293 per Maule J.

Breach of contract by the client or any consultant (clause 18.3(xiv))

The constructor must have given early warning under clause 3.7 as soon as it became aware of the breach.

Delay, damage or obstruction by a clause 10.11 specialist (clause 18.3(xv))

The clause 10.11 specialist is one appointed directly by the client who is responsible for its performance. This is equivalent to employer's licensees under ACA 3 and directly employed contractors (who used to be known as 'artists and tradesmen') under SBC. The direct appointment of specialists by the client is tantamount to an invitation to the constructor to make a claim for extension of time and additional costs. It is better if all construction operations are firmly under the control of the constructor who takes full responsibility therefor.

Other event referenced in the commencement agreement (clause 18.3(xvi))

This is to allow for any additional ground which may be inserted into the commencement agreement by agreement between the parties.

17.2.3 Procedure

The first paragraph of clause 18.3 is important. It lays an obligation on the constructor to use its best endeavours to minimise delay or increased cost at all times. It is no accident that the provision is placed at the very beginning of the clause. It governs the list of grounds which follow and it is clear that the extent to which the constructor has used best endeavours must be taken into account in considering whether it is entitled to extension of time. The paragraph continues by expressly stating that the constructor is entitled to an extension if 'despite the Constructor's best endeavours' one or more of the grounds adversely affect the date for completion. Therefore, if the constructor has not used its best endeavours, its entitlement is reduced by the amount which the use of best endeavours could have prevented the delay.

The entitlement to extension of time is made subject to compliance with the procedures in clause 18.4. That is to say that it is dependent on compliance. Compliance is a condition precedent to entitlement. Clause 18.4 sets out three actions which the constructor must perform:

- (1) Give notice to the client representative as soon as becoming aware of any of the grounds in clause 18.3. With the notice, the constructor must include relevant evidence and cost information and detailed proposals for overcoming the events and minimising the effect on time and cost, which must be consistent with the partnering documents. This is an unusual requirement, not present in other contracts. Not only is the constructor to use its best endeavours to avoid delays, but if despite such best endeavours there is delay, the constructor is obliged to submit proposals to minimise the delay and the cost. The proposals must be 'detailed' that is to say that they must not merely be vague expressions of intent.

However, it is clear that the constructor is entitled to submit proposals which will be at a cost although presumably less cost than if the proposals were not carried out (clause 18.4(i)).

- (2) Carry out the proposals unless the client representative instructs otherwise. The representative has five working days from the date of notification to so instruct. The wording leaves open the question of whether the date of notification is the date when the notice is sent or when it is received. Strictly, the date of notification is the date on the notice and not the date when the notice is received. The client representative should count the five days from the date of the notice, but the constructor would be well-advised to count the days from the date of receipt. The constructor is not required to carry out the proposals if they are changes which must be dealt with under clause 17 (clause 18.4(ii)).
- (3) Provide reasonable additional evidence and cost information as requested by the client representative. The clause provides the additional stipulation that evidence and information must be provided if it becomes available after notification. In which case, a specific request from the representative is not required (clause 18.4(iii)).

The client representative is given only 20 days to respond to notification in accordance with clause 18.4(i) and (iii) and to give a fair and reasonable extension of time. He is also to deal with certain increases in cost which are dealt with in Section 17.4 of this Chapter. The contract is very clear that if either client or constructor dispute the extension of time, the dispute must be notified under clause 27.1 within 20 working days from the date of the response. If there is no referral of the dispute, the constructor is entitled to the extension of time set out in the response. If there is a referral, the constructor is entitled to the extension of time pending the resolution of the dispute. Unlike some other contracts, there is no provision for the client representative to carry out a review of extensions of time after practical completion. In the absence of a referral, the parties are stuck with the representative's decision.

17.2.4 Damages

The contract contains no express provisions for the client to recover liquidated damages if the constructor fails to complete the project by the date for completion in the commencement agreement. Nevertheless, the client has common law remedies for breach of contract and the client will be able to recover damages on that basis. Obviously, the absence of liquidated damages means that the client will have a significant task to prove the breach before proving every element of cost. There is no provision for the client to deduct any such damages from the amount due for payment, other than under clause 20.6 which reflects the statutory requirement for withholding notice.

17.3 *Loss and/or expense*

The recovery of what would usually be termed 'loss and/or expense' is clearly linked to extensions of time under this contract. This has the advantage of expressing in the

contract what many contractors and quantity surveyors do routinely (although wrongly) when acting under JCT contracts and ACA 3. However, it runs the risk of creating confusion around the purpose of giving an extension of time.

Clause 18.4 provides that, when giving notice of a clause 18.3 event, the constructor must provide cost information available and further cost information as the client representative requests or which becomes available to the constructor after giving the notice. In responding, the representative must not only give a fair and reasonable extension of time but also fair and reasonable site overheads in accordance with clause 18.5 and any other fair and reasonable increase in the agreed maximum price under clause 18.6. It is notable that what is to be ascertained is a 'fair and reasonable' amount. This is in contrast with the provision under SBC which requires the architect to ascertain the amount incurred. It is thought that the insertion of the words 'fair and reasonable' give scope to the client representative to use some discretion under this contract when ascertaining. However, it should be noted that clause 18.6(iii) restricts the constructor's entitlement to additional payment, on account of any of the events in clause 18.3, to what is set out in clauses 18.5 and 18.6. It is not clear whether this provision is intended to act as a bar on the constructor exercising its common law rights to claim damages for breach of contract. In any event, it is thought the wording is not sufficiently clear to achieve that objective.

Clause 18.5 provides that where certain events listed in clause 18.3 result in an extension of the completion date, additional site overheads must be added and they are to be proportionate to the site overheads agreed in the price framework as time based. The events which will give rise to additional site overheads are all the events in clause 18.3 except for those concerning third party consents, weather conditions, delay by local authorities and statutory bodies, insured loss and damage, strike or other industrial action and government exercise of statutory power. This is subject to any agreed adjustment in the commencement agreement. It is not clear why the client would want to adjust these events, because the exceptions listed are all neutral events for which the client is not responsible and there appears little reason for the constructor to be given additional money as well as time.

Clause 18.6 refers to the same events with the same exceptions and subject to adjustments in the same way as clause 18.5. Where the events give rise to what the clause refers to as 'unavoidable additional work or expenditure', such work and expenditure must be included in the constructor's proposals under clause 18.4 calculated, if possible, on the basis of the price framework. There are two points of note. The first is that the entitlement is said to be irrespective of whether the event gives rise to an extension of time. This appears to be effectively a claim for disruption costs. The second point is that the work or expenditure must not be within the scope of head-office (in clause 18.6 referred to as 'central office') or site overheads. In calculating the amounts, the following conditions apply:

- The constructor must keep the amount of work and costs to a minimum. This is little more than the ordinary duty to mitigate costs.
- The amounts should be presented on an open book basis without additional profit, head-office overheads or loss of profit related to other projects.
- The constructor is limited to payments described in clauses 18.5 and 18.6 in respect of any of the events listed in clause 18.3.

It is expressly stated in clause 18.8 that the constructor is deemed to have satisfied itself about the extent of the site and boundaries together with what is referred to as the nature of the environment surrounding the site to the extent that it directly affects the project. It is difficult to see what the draftsman may have had in mind when drafting this clause. Presumably, the intention is to prevent the contractor being able to state that it did not know that it was trespassing onto adjacent land, particularly where there are no clear walls, fences or other demarcations.

In practice, the only way in which a constructor can satisfy itself about the extent of the site is to ask the client. In turn, the client will probably have to consult its solicitor who must examine the deeds. The actual line of a boundary is often very difficult to determine and it can be the source of a great deal of argument between neighbours. Even deeds and deed plans are often remarkably vague about such things as boundaries. In these circumstances it seems unreasonable, to say the least, to expect the constructor to take responsibility for determining something about which even the client's solicitor may be unsure.

Important aspects of the surrounding environment could be such things as rivers likely to flood or ground subject to landslip. It is doubtful that the wording of the clause is sufficient to make the contractor liable for the consequences of flooding or slippage of land.

Clause 18.9 is obviously intended to place the cost of dealing with ground formation and structures (except for antiquities) onto the constructor with no grounds for an extension of time under that head.

It is a unique feature of this contract that any extension of time in accordance with clause 18 also entitles each affected consultant to an equivalent extension to perform the relevant consultancy services and amends the entitlement to payment. There is a proviso that the constructor's extension must not be due to the consultant's default or failure which seems entirely reasonable.

17.4 *Changes*

Parties are often beguiled by the phraseology and expressed intentions of partnering contracts to believe that they do not obey the same rules as other building contracts. The rules for interpretation of partnering contracts, however, are exactly the same as for other contracts. Clause 15.2 is very important. It states that after signature of the commencement agreement, the constructor must carry out and complete the project in accordance with the partnering documents and that the client must pay the agreed maximum price which is subject only to reduction in respect of agreed shared savings under clause 13.2 and other increases and decreases in accordance with the partnering terms. The partnering documents are defined in Appendix 1. The separate documents making up the partnering documents are listed in clause 2.2. They are to be read as a whole. Among them is the important price framework. Clause 12.4 makes clear that the constructor's profit, head-office overheads and site overheads are to be fixed at the amounts in the price framework subject to such variations as the client and constructor may agree and form part of the agreed maximum price.

A change is defined in Appendix 1 as a change in any part of the project by addition, omission or variation or by the expenditure of a provisional sum in the price

framework. Changes are dealt with under clause 17. Clause 17.4 provides that, if the client representative instructs a change, but the client and constructor have not agreed cost or time implications within 20 working days from the date of the instruction, it is for the client representative to ascertain the time and cost effects. This must be done on a fair and reasonable basis using where possible any prices for similar work in the price framework. This is similar to the provisions in other contracts where existing prices are to be used to price variations or to be used as a basis of such prices. A feature which is unique to this contract is that clause 17.7 provides that any change and any effect on the agreed maximum price if agreed or calculated in accordance with clause 17, is binding on all the partnering team members. The price framework is a key document. Clause 20.5 provides that the amount payable in respect of each application for payment made by the constructor is to be calculated in accordance with the price framework in order to establish the value of the constructor's services, pre-possession activities or the part of the project properly progressed, including unfixed materials, goods and equipment less amounts previously paid, and adjusted for shared savings under clause 13.2 and any link between payment and the achievement of KPI targets in accordance with clause 13.5.

Clause 17.1 permits any member of the partnering team to propose a change if it is in the best interests of the project. It is not clear how one is supposed to demonstrate that, albeit the clause requires it to be demonstrable. Such proposals are to be considered by the client together with the client representative as advised by the other members of the team. If the proposal falls under the category of continuous improvement, it must be considered by the core group. The core group are the people identified in the project partnering agreement. If the client approves, the change is to be notified to the constructor.

The client may propose a change at any time under clause 17.2. The procedure is that the client notifies the change to the constructor and the team members. The constructor has 10 working days within which to submit a change submission. In view of what the submission must contain, 10 days is very short. There is provision for the parties to agree a longer period. If the change is proposed before the date of the commencement agreement, it must include the effect on amounts payable for the constructor's services. Otherwise, it must include the effect on the agreed maximum price calculated on the price framework and on progress and the completion date calculated from the partnering and the project timetable. Clause 17.6 makes clear that the submission must minimise any adverse effect on the agreed maximum price. This seems to be an unnecessarily long way of saying that the submission should be as cheap and quick as possible. It goes on to refer to the spirit and content of the partnering agreement and the roles of the partnering team members. It must be questioned whether such considerations will weigh heavily on a constructor who is looking at making a loss on the project. It should be noted that the constructor must submit a change submission in two other situations following the constructor's objection: under clause 5.4 if the client representative confirms or amends an instruction; and/or under clause 8.11 if the lead designer confirms or amends a design.

On receipt of the constructor's change submission, clause 17.3 requires the client to consider it with the client representative advised by the other members of the team. The client must try to agree it or some variation of it with the constructor. The client has only five working days to notify the constructor to proceed with the change

or that the change is being withdrawn. If the notification instructs the constructor to proceed, it is open to the client to reserve some or all of the submission for later agreement or variation. The parties may agree to extend the five-day period for the client's notification. Clause 17.5 permits the client to directly instruct the constructor to proceed with a change without waiting for the change submission if the client considers that the change is urgent or simple. However, the constructor must still submit the change submission which is to be dealt with in the usual way.

Where it is agreed that a change results in an adjustment of the time for performance, an equivalent adjustment must be made to any consultant services which are affected. Consultants' payments may be amended in accordance with the relevant consultant payment terms.

Claims under NEC 3 Engineering and Construction Contract (NEC 3)

18.1 Introduction

The first edition of the New Engineering Contract was published in 1993. Although from its title, one might be excused for believing that it was not suitable for use for building works, its authors maintained that it could be used for either engineering or building. The second edition was published in 1995 and its title had been changed to the Engineering and Construction Contract although it was still known by the initials 'NEC'. Amendments have been issued since then to deal with the Housing Grants, Construction and Regeneration Act 1996 and a third edition was published in June 2005 and re-published with further minor amendments in June 2006. It is the June 2006 edition which will be considered here. The philosophy of this form is intended to be different from that of the more common JCT and other contracts. There is a family of NEC contracts of which NEC 3 is but one, albeit perhaps the most important.

Although the form was praised by Sir Michael Latham, as containing the kind of provisions advocated in his report 'Constructing the Team',¹ it has been the subject of some criticism by legal commentators.² Some perceived shortcomings are that the syntax and grammar is not good. This is partly because the present tense is used almost exclusively even where one would normally expect to see past or future tenses. The form is supposed to be a model of simple English, but sticking almost exclusively to one tense does not assist comprehension. That leads to ambiguity and a lack of certainty. Certainty is a prime requisite for a legally binding contract. It is difficult to know whether something is being expressed as a power or a duty or just as a fact. There are few reported cases dealing with this form of contract, but in a recent case involving the second edition of the form, the court was critical of the use of the present tense:

'I have to confess that the task of construing the provisions in this form of contract is not made any easier by the widespread use of the present tense in its operative provisions. No doubt this approach to drafting has its adherents within the indus-

¹ HMSO July 1994.

² D G Valentine, *The New Engineering Contract* (1996) 12 Const LJ 305 is well worth reading.

try but, speaking for myself and from the point of view of a lawyer, it seems to me to represent a triumph of form over substance.³

There are other difficulties. Clause numbering is quite strange. For example clause 21.3 is a sub-clause of clause 2, not clause 21. Clause 93.2 is a sub-clause of 9, etc. One would have expected to see reference to clauses 2.1.3 and 9.3.2 respectively. The most confusing, for some reason, is reference to sub-clauses of clause 1 – 11.1, 11.2, 14.3, etc. Defined terms have capitals and terms identified in the contract data (something like the JCT Contract Particulars) are in italics. It is difficult to get used to this, particularly in a phrase such as: ‘The Completion Date is the *completion date* unless. . .’⁴ Perhaps the strongest criticism is that the form appears to go out of its way to avoid using words and phrases which are in common use in other construction contracts. The effect of that is that it becomes very difficult to interpret the meaning of such words and phrases by reference to decisions in the courts and other legal authorities. For example, are ‘delay damages’ in option X7 the same as ‘liquidated damages’ under other standard forms and as generally understood at law? Interpretation of this contract is, therefore, to some extent a venture into the unknown. Leaving aside the precise legal meanings of the words used, the contract, although purporting to be clearer and simpler than other forms, is actually quite difficult to understand for anyone encountering it for the first time.

Guidance notes and flow charts are published. But although certainly useful in operating the contract and in conveying what the draftsman thinks has been produced, it must be remembered always that these have no legal significance. In law, what the draftsman intended to mean when the contract was drafted is irrelevant. It is the actual meaning as found in the words of the contract which is important. Obviously, a court has to interpret a contract in line with the intentions of the parties, but it is the intentions of the parties as revealed by the words of the contract, and not some extraneous document such as guidance notes, which matters.

NEC has become very popular for civil engineering work and it is used, and in some places strongly advocated, for building work. Whether it will increase in popularity remains to be seen. Opinions may change when cases on the form are more frequent. The form is said to comply fully with the AEC (Achieving Excellence in Construction) principles. The title page records that the Office of Government Commerce (OGC) recommends the use of NEC 3 by public sector construction procurers on their construction projects. The form does have its good points. It has a set of 9 core clauses which are intended to be present in every version of the contract. There are then six options (A, B, C, D, E and F) one of which must be included in every contract. The purpose of these is to convert the contract for use with different procurement systems:

- A – priced contract with activity schedule
- B – priced contract with bill of quantities
- C – target contract with activity schedule
- D – target contract with bill of quantities

³ *Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd* (2010) 131 Con LR 94 at 101 per Edwards-Stuart J.

⁴ See clause 11.2(3).

E – cost reimbursable contract

F – management contract.

In addition, there is a choice between two dispute resolution options and a selection of other clauses which may, but need not, be included in the contract. These cover such matters as performance bonds, advance payment to the contractor, sectional completion, delay damages.

Before turning to a consideration of the relevant clauses, it is worth noting that there is no architect or contract administrator mentioned in the contract. The parties to the contract are the employer and the contractor, but a key player is the project manager whose function it is to administer the contract by issuing instructions, certifying payment, assessing compensation events and the like. However, there is also a supervisor. The supervisor broadly deals with standards and quality of the work.

18.2 Compensation events

18.2.1 Clause 6

Put simply, compensation events are events which entitle the contractor to be compensated in terms of time and/or adjustment of the prices of the activities in the activity schedule. The idea is to deal with extensions of time, loss and/or expense and the valuation of variations at the same time. The result is a clause (6) of great complexity and some difficulty in interpretation.

Due to the complexity of clause 6, the procedures clearly require time to operate. It is debatable whether it is possible to use it properly as a tool to deal with the multitude of claims for additional money and time which characterise even the simplest project. The clause lists the events and sets out the procedure. The adjustment of the prices varies dependent on which of the main options is incorporated into the contract.

18.2.2 The compensation events

Project manager's instructions changing Works information – clause 60.1(1)

Works information is defined in clause 11.2(19) as information specifying the Works or stating constraints on carrying out the Works. Essentially, it appears that it will comprise drawings and specifications and similar restrictions to those possible under SBC clause 5.1.2. Where the contractor is to carry out some of the design, it will provide that part of the Works information. The project manager may issue instructions to change the Works information under clause 14.3. The second part of clause 11.2(19) states, somewhat inelegantly, that the Works information is to be found in the documents where the contract data says it is or in an instruction which is given in accordance with the contract. It is essential, from the employer's point of view, that the contract data does indeed list all the relevant documents. Any omissions may

cost the employer dearly if the contractor is successful in contending that they are changes. Although, in the main, this event covers what would normally be called variation instructions, it is not necessarily confined to that and any instruction changing the Works information as contained in the documents specified by the contract data or in any instruction will rank as a compensation event albeit possibly with little or no financial effect.

A change for any reason will fall under this ground except if:

- it is made under clause 44.2 which is merely accepting a defect to avoid correcting it; or
- made to the Works information provided by the contractor at its request or in order to make it comply with the employer's Works information.

The reasons for the exceptions are so that the contractor benefits neither from its own defects, nor from its failure to make its design suit the employer's Works information, nor from its decision to change its design later. A consequence of the latter is that the contractor may be entitled to keep any savings which it can make to its design. The clause does not expressly address the position if the project manager fails to issue an instruction. It is partially addressed in clause 63.1 which refers to the date when the project manager should have instructed the contractor to submit a quotation.

The employer's failure to allow access to and use of part of the site by whichever is the later of the access date and the date in the accepted programme – clause 60.1(2)

This clause used to refer to possession, rather than access. Possession is a wider entitlement. The accepted programme is the programme identified in the contract data unless the project manager has accepted a later programme. At any time, the accepted programme is the latest programme accepted by the project manager. The programme is dealt with in clause 31 and revisions to the programme under clause 32. This is a perfectly straightforward provision. The access date is to be inserted by the employer into the contract data. There is provision for access to be given in parts. In normal circumstances, that is the date on which the contractor must have access to and use of the site or the part indicated and the contract data would also show that a programme had been produced which reflected that date. However, if the contractor prepares a programme, accepted by the project manager, which indicates a later date for access, it is the later date which applies. Every time the contractor produces another programme with an adjusted date which is accepted by the project manager, the adjusted date applies. It is clear from clause 31.2 that the contractor cannot submit a programme showing a date earlier than the date in the contract data.

A party which enters onto land is normally taken to have possession of the land although, in the case of building contracts, a contractor is said to have an express or implied licence to be on the land. The extent of the contractor's occupation of the site under this contract is not exclusive possession. That is clear from clause 25.1 which states that it 'shares' (presumably meaning that it *must* share) the working areas with others as indicated in the Works information. Clause 33.1 refers to the employer allowing the contractor 'access to and use of' the site. In the ordinary

meaning of possession, the contractor would certainly have access, use and control of the site in order to enable it to carry out the contract Works.⁵ Failure to give access on the due date is a serious breach of contract. Depending on the circumstances, if prolonged, it may amount to repudiation on the part of the employer. The extent to which the contractor may take action against the employer at common law is discussed later.

Employer's failure to provide something by the date in the accepted programme – clause 60.1(3)

Clause 31.2 contains what appears to be a mandatory list of the contents of any programme submitted for acceptance. It is impossible to be definite about the matter, due to the curious use of the present tense mentioned earlier. In such circumstances, the normal rules for construing a contract should be employed. It is noted that the word 'may' is used in some clauses. That clearly denotes a power, but not an obligation to do something. In other words, where 'may' is used, it means that the action can be taken if desired. On the basis that the draftsman of the contract proceeded in a logical manner, the absence of the word 'may' must mean something different. It seems logical that it means that the particular action is obligatory. In other words, it is a duty.

The list seems to be fairly comprehensive regarding what the contractor *must* include in its programme, but it does not include reference to something being provided by the employer or the date for so providing. However, that does not preclude the contractor from incorporating other things. The conclusion is that this ground refers to the situation where it has been agreed between the parties that the employer will provide something to the contractor, perhaps paint, bricks or other building materials which the employer can obtain cheaply. Having come to an agreement, the contractor has quite reasonably included the item to be supplied, and the date by which it must be provided if the Works are not to be delayed, in its programme for acceptance by the project manager.

It is noteworthy that, under clause 31.3, the project manager has very limited scope to refuse to accept a programme. If the contractor has inserted the wrong date for requiring the information, the only grounds for rejection appear to be that either the contractor's plans are not practicable or it does not represent the contractor's plans realistically. The contractor is entitled to revise the programme and it may be in the contractor's interests to bring forward some of the dates when something is required from the employer. There appear to be no grounds on which the project manager can refuse to accept such a programme and the employer may be placed in a difficult situation. It is clearly inequitable that the contractor can, at will, revise the programme so as to effectively place the employer in breach of its obligations. However, there appears to be no easy solution, because the project manager's refusal to accept a programme for reasons other than those listed in clause 31.3 is itself ground for a compensation event (clause 60.1(9)).

⁵ For a full consideration of the position regarding possession of the site by the contractor, see Chapter 4, Section 4.6.

Project manager's instruction stopping work or preventing it from starting or changing a key date – clause 60.1(4)

This appears to be similar to a postponement instruction under a JCT contract. Clause 34.1 authorises the project manager to stop, not to start or to re-start work and clause 14.3 authorises changes to key dates.

Failure of the employer or others to work within the times on the accepted programme or the conditions stated in the Works information or carrying out work not in the Works information – clause 60.1(5)

This is split into three grounds. 'Others' are defined in clause 11.2(10) as people or organisations not being the employer, the project manager, the supervisor, the adjudicator, the contractor, or any employee, sub-contractor or supplier of the contractor. Therefore, such people can be anyone else. The limiting factor is that, in respect of the first part of the ground, they must be referred to in the accepted programme. Express relevant reference is made in clause 31.2 (fourth and seventh bullet points).

This is a sensible provision, but the employer, having agreed appropriate dates with the contractor, would be wise to keep careful watch on any future revised programme to ensure that the date is not changed to something which the employer cannot easily meet. The difficulties of achieving this have been noted earlier when dealing with clause 60.1(3). The project manager also has a duty to discuss with the employer any change to the original date.

This edition of NEC sees the addition of the third part of the ground which considerably enlarges the scope of this ground to include any work carried out by the employer and others, but which is not referred to in the Works information. Although the contractor does not have exclusive possession of the site, clause 25.1 expressly states that the contractor shares the working areas with others as stated in the Works information. In other words, the Contract states precisely the parties with whom the contractor must share the areas. Therefore, if the employer sees fit to introduce others, who are not included in the Works information, the contractor is likely to suffer inconvenience at least and serious disruption at worst for which it now has a contractual remedy.

Project manager or supervisor fails to respond to contractor within the stipulated period – clause 60.1(6)

This is the sanction if the project manager or the supervisor fails to comply with the provisions of clause 13.3. This requires them, and the contractor, to reply to communications within the 'period for reply' stated in the contract data. The NEC 3 is full of good ideas, but this is not one of them. The period during which a reply must be made depends on all the circumstances. For example, some communications do not need a reply at all, some need an immediate reply, while others can safely be left some weeks before a response is necessary. A well-known ploy among contractors seeking to establish grounds for a claim is to bombard the project manager with large numbers of letters on a daily basis; most asking for immediate answers to petty

questions. It is also notable that although this is the sanction if the project manager or the supervisor fails to respond by the due time, there is no express sanction if the contractor fails. In any event, subsequent clauses regulate the effects so that the compensation event is only relevant if the failure has some detrimental effect on the other party. This ground is best deleted.

Project manager gives instructions about an object of value, or historical or other interest found within the site – clause 60.1(7)

This is similar to the JCT provisions regarding what are termed ‘antiquities’ in those contracts. However, it is clear that the NEC 3 definition in clause 73 is very much broader than under JCT contracts and embraces, not only items of historic interest but also, anything valuable and anything which could objectively be classified as interesting. The only constraint seems to be that it must be an ‘object’. That is to say, it must be something separate from the site itself. Therefore, curious or even significant rock strata would not be covered by this clause, but pieces of jewellery, old weapons and the foundation of a Roman villa would be covered as would a piece of modern sculpture.

Project manager or supervisor changes a decision previously communicated to the contractor – clause 60.1(8)

Nothing in this contract suggests that the word ‘decision’ has any special, broad or restricted meaning, such as a formal decision under particular circumstances, and its ordinary meaning can be assumed. For example, an instruction of the project manager is a decision and a change or withdrawal of an instruction appears to fall under this ground. Therefore, this ground applies whenever the project manager gives the contractor a decision of any kind and then subsequently changes it.

Project manager withholds an acceptance for a reason not stated in the contract – clause 60.1(9)

The exception to this is if the acceptance in question is in regard to a quotation for acceleration or for not correcting a defect. Clause 13.8 gives the project manager the power (‘may withhold’) to withhold acceptance of any submission by the contractor. There are two things to note about this power.

The first is that it must be implied that the submission concerns something which the contractor is entitled to submit. Examples are to be found throughout the contract and its options together with contractually valid reasons for non-acceptance by the project manager.

The second is that although the project manager has a very broad power, the exercise of it may result in a compensation event if the reason for acceptance does not fall within one of the reasons stated in the contract. Therefore, whenever the contractor makes a proper submission under the contract, it is imperative that the project manager carefully considers the contractually valid reasons for rejection

before coming to a decision. Obviously, there may be instances when the project manager does not wish to accept a programme, particulars of a design or a quotation, etc. for reasons not included in the contract. The potential effect of the resultant compensation event requires a careful weighing of the balance between the benefits to the employer compared to the likely cost in terms of time and money.

No defect is found after the supervisor instructs the contractor to search – clause 60.1(10)

There is a proviso that excludes the situation where the contractor gave insufficient notice before doing work which obstructed a required test or inspection. Such notice is required under the provisions of clause 40.3.

Clause 4 deals with testing and defects. The Works information may require some tests and inspections to be carried out, but this ground deals with the situation under clause 42.1 where the supervisor may instruct the contractor to search, provided that reasons are given. Searching may include what is commonly understood by the expression ‘opening up and testing’ under SBC clause 3.17, but not the kind of opening up and testing following the finding of defective work as set out in SBC clause 3.18.4. In a similar way to that employed under SBC, this ground protects the contractor, if the search reveals that there is no defect, by providing the contractor with a right to additional time and/or money.

A test or inspection carried out by the supervisor causes unnecessary delay – clause 60.1(11)

This ground is a reference to clause 40.5 which requires the supervisor to carry out tests and inspections without causing unnecessary delay. ‘Unnecessary delay’ is a difficult concept. It presupposes that some delay is necessary. The difficulty with that is the absence of any criteria which can be used to separate necessary from unnecessary delay. A tentative view can be advanced that the ground excludes any delay which one might expect to be caused as a result of the opening up or testing. That would be ‘necessary’ delay in the sense of being ‘indispensable’ or ‘inevitable’ or ‘inevitably resulting from the nature of things’.⁶ On that reading of the clause, ‘unnecessary delay’ probably refers to delays which are not inevitable, but which are nonetheless caused by the opening up and testing. If that view is correct, it appears that the contractor is expected to have allowed in its price and timetable for the supervisor carrying out opening up and testing, because the contractor should be aware of the tests required from the Works information and what the contract refers to as the ‘applicable law’ (clause 40.1). Unfortunately ‘applicable law’ is neither defined nor is it part of the contract data (although the law of the contract is in the data). This seems to be a case of sloppy drafting and the meaning of ‘applicable law’ and its effect on this ground will depend upon all the circumstances. On a strict reading, ‘applicable law’ means the law which applies to the particular provision of the contract. It is not easy to see how the general law will ‘require’ tests and inspections.

⁶ *The Concise Oxford Dictionary.*

In due course a court will no doubt have the task of explaining this particular compensation event.

Physical conditions encountered by the contractor in the site which are not weather conditions and which an experienced contractor would have judged the chance of occurring to be so small that no allowance need be made for them – clause 60.1(12)

This edition of NEC sees the addition of a stipulation that it is only the difference between the physical conditions encountered and those for which it would have been reasonable to allow which are to be taken into account. That is perfectly sensible and may well have been implied in any event. This ground is similar, but not the same as clause 12(1) of the ICE 7th edition 1999 form of contract. Both use the expression ‘physical conditions’. Had the reference been to ‘site’, ‘ground’ or ‘soil’ conditions, the expression would have a limited rather than a wide effect. So far as the soil conditions are concerned, the expression has been held to apply to both transient and intransient combinations of stresses.⁷ In other words, pre-existing permanent conditions are included, but so are conditions which may change for one reason or another. It is often overlooked that the expression also refers to above ground conditions.

Weather conditions are excepted and the only sensible way to interpret this is that it means exactly what it says: ‘physical conditions which are not weather conditions’. Therefore, snow, ice, rain and excessive heat are not included under this ground. It is thought that if the weather conditions caused the site to be flooded, that would also be excluded as it would if the site became snow or ice bound. However, if the flooding was due to the failure of a dam which itself was caused by excessive rainfall or melting snow, that would probably be included in the overall ‘physical conditions’.

The proviso concerning the contractor’s judgment could cause difficulties. It must be read in conjunction with clauses 60.2 and 60.3. These clauses stipulate that, in judging the physical conditions, the contractor is assumed to have taken into account the site information which describes the site and surroundings and any publicly available information noted therein, what the contractor can obtain from a visual inspection and any other information it could reasonably be expected to have or to acquire. Moreover, if there is an inconsistency within the site information, the contractor is assumed to have taken account of the conditions most favourable to doing the work. It should be noted that ‘assumed’ used in this context appears to be similar to ‘deemed’ as used in many contracts.⁸ This appears to be a statement of what otherwise would be implied as a result of the operation of the *contra proferentem* rule. Therefore, there are three possible situations for the contractor’s judgment:

- physical conditions which will not occur
- physical conditions which have such a small chance of occurring that it would be unreasonable for the contractor to allow for them
- physical conditions which are very likely to occur.

⁷ *Humber Oil Terminals Trustee v Harbour and General* (1991) 59 BLR 1.

⁸ Meaning that circumstances are to be treated as existing even if manifestly they are not: *Re Cosslett (Contractors) Ltd, Clark, Administrator of Cosslett (Contractors) Ltd (in Administration) v Mid Glamorgan County Council* [1997] 4 All ER 115.

Effectively, the contractor is assumed to have made its decision based on the information in the site information (this might well include a soil investigation report), any other available information, its own experience and what the contractor can actually see. Therefore the job of deciding whether the first or last situations apply should be fairly easy.

The task of deciding whether physical conditions have so small a chance of occurring that it would be unreasonable to allow for them requires the contractor to calculate the risk. Whether it would be unreasonable is clearly to be decided based on what the contractor would view as unreasonable taking all factors into account. In practice, it is likely to be difficult to argue that a contractor was being unreasonable unless the matter was something which a normal contractor used to carrying out similar work would not have done. Obviously, in preparing its tender, a contractor is unlikely as a matter of principle to take unreasonable risks. It is suggested that a contractor faced with this kind of risk assessment should carry it out in a formal way so as to have evidence of the method of assessment if needed in the future.

A weather measurement is recorded within a calendar month and before completion date for the Works at the place stated in the contract data the value of which, compared to weather data, occurs on average less frequently than once in 10 years – clause 60.1(13)

This edition of NEC sees the addition of a stipulation that it is only the difference between the weather measurement and the weather shown by the contract data to occur on average less frequently than once in 10 years which are to be taken into account. The idea is that a record of past weather over the last 10 years is provided in the contract data. Weather conditions only qualify to rank as a compensation event if it exceeds what is in the contract data. The weather data containing the past weather measurements are divided into cumulative rainfall, the number of days when rainfall exceeds 5 mm or when minimum air temperature is less than 0°C or when snow is lying at a specific time; usually, no doubt, at some time early in the working day. There is a space in the contract data for the inclusion of additional criteria. If no recorded data are available, assumed values are to be inserted in the contract data. It appears that the intention is to provide a simpler system of deciding when the contractor is entitled to further time and or money without having to make a judgment about whether the weather conditions are exceptional. The result has a high chance of being accurate, but it will give rise to problems of fairness if the weather is exceptional and pushes the boundaries of one or more of the criteria at once, but keeps within the parameters set down. This event gives the contractor the right to claim additional money in respect of weather conditions which are outside the stipulated norm. Other standard forms may allow extra time (but not invariably), but they do not allow additional money to the contractor and it is difficult to see why they should do so.

An employer's risk event occurs – clause 60(14)

This is simple. Employer's risks are set out in clause 80.1 and an event occurs when one of the risks manifests itself. In such a case, it becomes a compensation event. The risks are broadly as follows:

- claims, proceedings and so on due to use or occupation of the site by the Works, negligence or breach of statutory duty by the employer or a fault of the employer or in the employer's design
- loss or damage to plant and materials supplied by the employer up to the day the contractor has accepted them
- loss or damage to plant and materials due to war and the like, strikes and the like and radioactive contamination
- loss or damage to parts of the Works taken over by the employer unless the loss or damage is due to existing defects or an event which was not an employer's risk or the contractor's on-site actions after take over occurred before the defects certificate
- loss or damage to the Works and equipment, materials, etc. kept on site by the employer after termination unless damaged by the contractor on site after termination
- additional risks stated in the contract data.

The purpose of this clause is unclear, because it should be noted that under clause 83.1 each party indemnifies the other against claims, costs etc. due to events at that party's risk. It is likely that the event is included under clause 60.1 in order to allow the contractor an extension of the contract period in addition to monetary compensation.

Take-over of part of the Works is certified by the project manager before both completion and the completion date – clause 60.1(15)

Take-over is dealt with in clause 35. Under clause 35.3, the project manager is to certify the date and extent when the employer takes over any part of the Works. It should be noted, however, that the employer may use any part of the Works before completion has been certified. In that case the employer has taken over that part of the Works when it begins to be used unless it is for a reason in the Works information or the use is to suit the contractor's method of working (clause 35.2). Take over is not quite the same as practical completion under JCT contracts although, in practice it may amount to the same. Take over depends on some action by the employer, while practical completion under JCT contracts depends on whether practical completion has taken place in the opinion of the architect; such opinion being exercised according to law.

Completion is defined in clause 11.2(2) as being when the contractor has carried out the work in the Works information stated to be carried out by the completion date and it has corrected the defects which would have stopped the employer from using the Works.

The completion date is defined in clause 11.2(3) as the completion date stated in the contract data unless it has been changed later in accordance with the contract. If so, it is presumably the date as changed although the definition does not expressly state that.

Therefore, this compensation event depends upon completion not having taken place and the completion date being still in the future so that the contractor is not in culpable delay. Provided those two criteria are met, all that is required is for the

project manager to certify take over of part of the Works. It has been seen that this happens when the employer begins to use the part provided that the use is not for a reason stated in the Works information and that the employer is not simply using the part to suit the contractor's way of working. But if the project manager fails to certify, there is no compensation event. However, once the completion date has passed and the contractor is in culpable delay, it appears that the project manager may certify take over and the employer may use some parts or all of the Works with impunity.

Employer, contrary to the Works information, fails to provide materials, facilities and samples for tests – clause 60.1(16)

This is a straightforward breach of the obligation stated in clause 40.2 which requires both employer and contractor to provide these things. Of course, it is only the employer's breach which is of consequence here. The breach specified is a failure to provide and not a failure to provide by any particular dates. Therefore, if the employer provides materials but three weeks after the date stipulated, that is not a compensation event under this clause.

Project manager notifies a correction to an assumption regarding a compensation event – clause 60.1(17)

This refers to the procedure noted in Section 18.2.3. If the project manager has stated an assumption under clause 61.6 which is later found to be wrong, the project manager must notify a correction. The importance of this event is related to clause 65.2 which provides that the assessment of a compensation event is not revised if the forecast is found to be wrong. Clearly, the necessary adjustment must be carried out here or the contractor may be deprived of adequate compensation.

Employer's breach of contract which is not otherwise a compensation event – clause 60.1(18)

This is clearly an attempt at a catch-all clause. The idea is to allow all breaches of contract to be dealt with under the contractual mechanism rather than having to be dealt with at common law.

It also prevents time becoming at large if an employer's action or default is responsible for delay, but for which the contract does not otherwise expressly provide. This contract does not expressly reserve the contractor's common law rights and remedies, but it is thought likely that the contractor would still have this option and clear words would be required to displace them.⁹ However, clause 12.4 states that the contract is

⁹ The Court of Appeal decision in *Lockland Builders Ltd v John Kim Rickwood* (1995), 77 BLR 38, suggested the contrary, but seems to ignore *Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) Ltd* (1974) 1 BLR 73; *Architectural Installation Services Ltd v James Gibbons Windows Ltd* (1989) 46 BLR 91. The more recent Court of Appeal decision in *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd* (1998) 87 BLR 52 supports the preservation of rights.

the entire agreement between the parties, while clause 63.4 states that rights to changes in prices, to the completion date and to key dates are the only rights in respect of a compensation event, and it has been suggested by some commentators that one or both of these clauses have the effect of excluding the parties' common law rights. The purpose of an entire agreement clause is much misunderstood. The usual purpose is to exclude liability for any statements, sometimes classed as collateral warranties, other than those contained in the contract.¹⁰ They may also operate to exclude extrinsic evidence proving additional terms.¹¹ However, the Law Commission has had this to say about an entire agreement clause:

'It may have a strong persuasive effect but if it were proved that, notwithstanding the clause, the parties actually intended some additional term to be of contractual effect, the court would give effect to that term because such was the intention of the parties.¹²

An important effect of clause 63.4 is to attempt to limit the remedies available for compensation events to those stated in the contract. It is arguable that this clause falls foul of section 13(1)(b) of the Unfair Contract Terms Act 1977.

Something which prevents the contractor completing the Works by the date on the accepted programme or at all and which the parties could not prevent, which an experienced contractor would have judged the chance of occurring to be so small that no allowance need be made for them and which is not another compensation event – clause 60.1(19)

This is obviously intended to be a catch-all clause to sweep up anything which should have been included. The main purpose is presumably to prevent time becoming at large for want of the power to extend time.

The task of deciding whether some unspecified event has so small a chance of occurring that it would be unreasonable to allow for it requires the contractor to calculate the risk. This is a much more difficult task than the one which faces the contractor in the ground stipulated in clause 60.1(12) where it merely has to consider physical conditions. Whether it would be unreasonable is again to be decided based on what the contractor would view as unreasonable, taking all factors into account. Again, in practice, it is likely to be difficult to argue that a contractor was being unreasonable unless the matter was such as a normal contractor used to carrying out similar work would not have done. In preparing its tender, a contractor is unlikely as a matter of principle to take unreasonable risks, but this ground expects the contractor to carry out a comprehensive review of all the possible risks. It can be argued that a competent contractor should do that in any event. It is suggested that a contractor faced with this kind of risk assessment should carry it out in a formal way so as to have evidence of the method of assessment if needed in the future.

¹⁰ *Inntrepreneur Pub Co Ltd v East Crown Ltd* [2000] 2 Lloyd's Rep 611.

¹¹ *McGrath v Shah* (1989) 57 P & CR 452.

¹² Law Commission, Law Com 154, Cmnd 9700 (1986) para 2.15.

A difference between the final quantity of work done and the quantity for an item in the bill of quantities which changes the defined cost per unit and if the affect is more than 0.5% of the total of the prices at the contract date – clause 60.4 (Options B and D)

This event relates to measurement and deals with the situation which often arises when the work measured is not the same as the work in the bills of quantities. It will be noted that the former term 'Actual Cost' has been rightly abandoned in favour of 'Defined Cost', presumably because the former was misleading. 'Defined Cost' is explained in clause 52. Three criteria must be satisfied before a compensation event can be said to have occurred:

- The difference must not be a result of a change to the Works information, or what would commonly be known as a variation.
- The difference must be the cause of the defined cost per unit changing.
- The item will not qualify for a compensation event unless its bill of quantities rate, when multiplied by the final quantity of work carried out under that item exceeds 0.5% of the total of the 'Prices at the Contract Date' (a somewhat awkward way of describing what other contracts would call the 'contract sum'). This is apparently to avoid trivial effects on items and leaving only important items for consideration.

The clause makes plain that if the defined cost per unit is reduced, the rate is also reduced. The main criterion is that there is a difference between the quantity of work actually done and the quantity in the bill of quantities for any important item and that this difference causes the actual cost to change. It should be noted that the end result may be a reduction in actual cost. It is not entirely clear how this complex little clause will work in practice.

A difference between the final quantity of work done and the quantity for an item in the bill of quantities at the contract date which delays completion or the meeting of a key date – clause 60.5 (Options B and D)

This is similar to the last event save that there is no limit on the items to be considered. That is clearly sensible, because even items which are relatively small in quantity may have a significant effect if they are delayed. The key criterion is that the difference, of whatever amount, must delay completion. This is a straightforward clause which, in similar fashion to SBC, amounts to a warranty on the part of the employer that the bills of quantities are accurate. Essentially, if the bills are not accurate and the difference causes a delay, the contractor has a claim.

Mistakes in the bill of quantities which are corrected by the project manager – clause 60.6 (Options B and D)

The mistakes must be either departures from the method of measurement stipulated in the contract data or due to ambiguities or inconsistencies. The departure from the method of measurement is clear enough. Ambiguity and inconsistency are ordinary

English words. In order to correct an ambiguity, the project manager must clarify it. In order to correct an inconsistency, the project manager must choose one of the inconsistent elements over the others. There appears to be no restriction on whether the correction results in more or less or whether higher or lower quality. In any event, the correction is dealt with as a compensation event. Obviously, it can lead to reduced prices. It is clear that it does not allow the project manager to correct mistakes in the contractor's pricing of the bills of quantities.

It is not thought that there is any justification for the view of some commentators that there is an inconsistency between this clause and clause 63.8 (see below). Clause 63.8 does not deal with bills of quantities. Clearly, the project manager must be allowed to deal with 'mistakes' in the bills of quantities as seems appropriate. There may or may not be a price for the employer to pay.

A very important new clause 60.7 has been inserted into Options B and D. It is simple and straightforward. It provides that where a compensation event is to be assessed as a result of the correction of an inconsistency between the bills of quantities and any other document, there is a presumption that the contractor has taken the bills of quantities as correct. It is not clear why this clause refers to any other document and not any other document in the Works information which is, after all, the basis for what the contractor undertook to do.

A change, after the contract date, in the law of the country in which the site is located – clause X2.1 (Secondary Options)

Where this secondary option applies, 'law' would be given its ordinary meaning and, in this instance, the ordinary meaning is not restricted in any way. Therefore, the clause is very broad and any change in any aspect of the applicable law of the site of the Works is a compensation event. It should be noted that the law of the contract as stated in the contract data may be stated as a different country from the site of the Works. For example, it is not unknown for a contract for Works in Europe to be carried out under English law. This could lead to confusion and it would have been consistent to have linked this clause to the law of the contract instead of the law of the country.

It is quite conceivable that there may be dozens of compensation events on this ground during the life of any contract. It should be noted that, although the contract date marks the beginning of such events, there is no concluding date indicated. In practice, of course, it is only those changes in the law which have an effect on the cost of the project which will be worth notifying by the contractor. The effect of the change in the law may be to reduce the total defined cost, in which case the prices are also to be reduced. Perhaps, for that reason, the clause empowers the project manager to give notice to the contractor and to instruct it to submit quotations.

Some commentators make reference to the guidance notes issued in support of this contract. However, care should be taken in using the notes. It should be remembered that, although they may be helpful, they do not have the force of law nor do they bind the parties. An adjudicator, arbitrator or judge trying to decide the meaning of the clauses would not be able to refer to the notes.

An instruction given by the core group to the partners to change the partnering information – clause X12.3(6) (Secondary Options)

Option X12 is the partnering option. The core group is the partners listed in the schedule of core group members. Instructions from the core group to the partners which change the partnering information constitute compensation events. Partnering information is defined in clause Z12.1(4) as information specifying the way in which the partners work together. The clause states that it may result in reduced prices.

Delay in making the advanced payment – clause X14.2 (Secondary Options)

Where secondary option X14 applies, the employer must make an advanced payment to the contractor of the amount stated in the contract data. It must be made within the time specified. That is within four weeks of the contract date. If an advanced payment bond is required, the payment may be delayed until not later than four weeks from the date the employer receives the bond, if that is later than the contract date. If the employer is late in making the payment, it ranks as a compensation event. Late receipt of the bond may be because it does not conform to the requirement in the Works information or, because the project manager cannot accept the bank or insurer proposed by the contractor on account of its poor commercial position relative to the value of the bond.

Clearly, delay in receiving the advanced payment may result in serious financial and time consequences for a contractor.

Correction of a defect for which it was not liable by the contractor – clause X15.2 (Secondary Options)

Option X15 refers to the limitation of the contractor's liability for design to reasonable skill and care. Clause X15.1 states that the contractor is not liable for design defects to the extent that it proves that it used reasonable skill and care. However, clause X15.2 simply refers to the correction of a defect, not a design defect. Clause 11.2(5) defines 'Defect' very broadly to cover both defects because part of the Works is not in accordance with the Works information and contractor's design defects. Therefore, it appears that this compensation event is not limited to the correction of design defects, but that it is a compensation event if the contractor corrects any defect for which it was not liable. It must always be implied that the contractor would be entitled to payment for the correction of defects for which it was not liable.

Suspension of performance by the contractor under the Housing Grants, Construction and Regeneration Act 1996 – clause Y2.4 (Secondary Options)

This is straightforward. The Act entitles the contractor to suspend performance of all its obligations if the employer has not made payment of all money properly due by the final date for payment and has not served any effective withholding notice. This clause makes such suspension into a compensation event. By doing so, it goes

further than the Act which only entitles the contractor to an extension of the contract period.¹³ Because it is a compensation event, the contractor may be entitled also to additional payment.

18.2.3 Procedure

The procedure is set out in clauses 61–65 inclusive. These are very complex in operation.

Clause 61 – notifying compensation events

If the event is due to either the project manager or the supervisor giving an instruction or changing a decision, clause 61.1 states that it is for the project manager to notify the contractor of the event. The project manager must do this at the time the instruction is given or the earlier decision is changed. This is a change from the previous requirement to notify ‘at the time of the event’. The new wording has the merit of being clearer than the old. Of course, the project manager may not then know that it is a compensation event, but there is no provision for the project manager to notify an event later. The notification must be separate from the instruction (clause 13.7). It is suggested that such communications are put into separate envelopes, even if sent on the same day. That may be over-cautious and it is difficult to envisage any tribunal coming to the conclusion that a notice is invalid, because it is in the same envelope as another communication. What is clear is that separate pieces of paper are required. There will be a need for close liaison between project manager and supervisor if the supervisor’s actions are not to be overlooked.

It appears strange that the contractor has to rely on the notification by the project manager before it can become entitled to additional payment or extension of the contract period in respect of these events. There may be a temptation for the project manager to fail to give notice where the event clearly is a matter concerning the employer’s default. This would be a wrong view, because the failure to notify and consequently give an appropriate extension of time in such instances might put time at large. There is no simple answer to this except that if the project manager does fail to give notice, it amounts to a breach of contract for which the employer may be vicariously liable if aware.¹⁴ If the contractor notifies the employer of the project manager’s breach, the employer is obliged to take some action or itself be in breach. It is arguable that it thus creates another compensation event under clause 60.1(18). The contractor would be obliged to give early warning notice to the project manager under clause 16.1 in any event. Therefore, if the project manager is in breach of obligation to notify the contractor under clause 61.1, the contractor should give early warning to the project manager and serve notice on the employer that there has been a breach. In any event, it is likely that clause 61.3 is broad enough to permit the

¹³ At the time of writing the Local Democracy, Economic Development and Construction Act 2009, which inserts s. 112(A) into the 1996 Act to correct the oversight, has not come into force.

¹⁴ *Penwith District Council v V P Developments Ltd* 21 May 1999, unreported.

contractor to notify the project manager in circumstances where the project manager has a duty to do so, but has not notified it.

The compensation events which fall into these categories are not listed in the contract, but an inspection of clause 60 suggests that they are 60.1(1), (4), (7), (8), (10) and (17). Instructions or changed decisions must be put into effect by the contractor immediately. If the project manager simply wishes to discover what it may cost to issue an instruction or change a decision, clause 61.2 permits the project manager to instruct the contractor to submit a quotation for 'proposed' instructions or changed decisions. In this instance, of course, the contractor does not put them into effect.

The use of the present tense allows only a surmise that the contractor's duty to notify a compensation event arises under clause 61.3 if the contractor believes it is a compensation event which has happened or which the contractor expects to happen and if the project manager has not already notified the event to the contractor. It is a surmise based on the fact that where a power is expressed, the word 'may' seems to be used, at least in clause 6. The contractor must act no later than eight weeks after it became aware of the event. That is a big improvement on the meagre two weeks allowed under the previous edition. The project manager's obligation to notify the contractor arises under clause 61.1 only in connection with a small number of the events. Therefore, the onus is on the contractor to notify in most instances. No doubt the contractor will do this in all instances, just to be sure.

Becoming aware

It will be a matter of fact, although perhaps difficult to prove, just when the contractor became aware of the event. The only restriction on such notification taking place at any time, provided only that it is no later than eight weeks after the contractor became aware, is set out in clause 61.7. That clause states that a compensation event 'is not notified' (presumably this means 'is not to be notified' when translated from NEC 3 parlance) after the defects date. The defects date is found in the contract data supplied by the employer. It appears to be roughly the equivalent of the end of the defects liability period in JCT contracts. Therefore, no notification by either contractor or project manager can take place after this date. In practice, it will be difficult for a contractor to demonstrate that it did not become aware of an event very soon after it occurred except in wholly unusual circumstances.

If it can be shown that the contractor became aware on a certain date and did not notify within eight weeks of that date, it is clear from clause 61.3 that it is not entitled to the benefit of additional time and/or money. This is a re-wording of the clause in the previous edition and leaves little room for doubt that the contractor's notice within eight weeks is intended to be a condition precedent to entitlement to time and money. Whether or not it does operate as a condition precedent may be open to doubt in view of the perceived need to add a rider to deal with the situation if the project manager should have notified. The exclusion of the condition applies only if the project manager should have notified the event but failed to do so. This may appear to be for the benefit of the contractor, but it actually benefits the employer by leaving open the opportunity to allow an extension of time even where the contractor has itself failed to notify within the period.

Quotation

Under clause 61.1, the project manager must request a quotation from the contractor unless it has been already submitted or the event is due to the fault of the contractor. Clause 61.4 deals with the project manager's duty when in receipt of the contractor's notification. The project manager must decide, within a week of the notification or such longer period as agreed by the contractor. It is not clear whether it is the date of issue or receipt of the notification which is intended although the wording suggests that it is the receipt which is the trigger. The clause lists four categories for the event. It:

- arises from the contractor's fault; or
- has not and is not expected to happen; or
- has no effect on actual cost or completion; or
- is not a compensation event.

If the project manager decides that the event falls into one or more of these categories, the project manager need do no more than notify the decision to the contractor that the prices, the completion date and the key dates are not to be changed. However, a project manager who decides that it does not so fall, in other words that it is valid, must instruct the contractor, as in clause 61.1, to submit a quotation. If the project manager fails to notify the contractor within the prescribed week, the contractor may notify the project manager. The contract states 'to this effect' and the meaning is not really clear which effect is intended. One may assume that, in the circumstances, the only thing which the contractor would notify the project manager would be that the compensation event is valid and gives entitlement to time and/or money and that the project manager has failed to notify within the relevant time period. The project manager has two weeks to respond, presumably to disagree, otherwise the failure is to be taken as acceptance that it is a compensation event and an instruction to submit quotations.

Early warning

Under clauses 16.1–16.4 inclusive, the contractor and the project manager have a duty to give early warning of various matters which obviously include compensation events. Clause 61.5 provides that a project manager who comes to the decision that the contractor did not give early warning of the event which an experienced contractor would have given, must so notify the contractor at the time the contractor is instructed to submit a quotation.

This becomes important when the project manager comes to assess the events, because clause 63.5 states that where such notification has been given under clause 61.5, the event is assessed as if the contractor had given early warning. Obviously, if the contractor had given early warning, the project manager might have taken various steps to reduce the impact of the event. On the other hand, it is conceivable that to treat it as if early warning had been given, when in fact it had not, could produce a result in the contractor's favour. For example, if early warning was given in a particular instance, the project manager might have issued further instructions to reduce

the impact of the event. In fact, the early warning was not given and the instruction remained unissued. However, if it is treated as if early warning had been given, it might be argued that the lack of instructions on the part of the project manager was a matter solely for the project manager and could not be the cause of any reduction in time and/or money for the contractor. The precise intention behind this provision is difficult to discern.

Forecasting

In submitting a quotation, the contractor will be obliged to incorporate some forecasts of the effects of the event. Clause 65.2 provides that an assessment will not be revised later because the forecast is found to be wrong. Due to the short timescale during which most events must be notified, the effects of the event will be unknown or only partly known. The contractor will, therefore, take some care about its forecasts, usually erring on the generous side. If, under clause 61.6, the project manager comes to the decision that the future effects of a compensation event are too uncertain to be reasonably forecast, the project manager 'states assumptions' about the event. Once again, the strange use of the present tense does not make the task of interpreting what this means easy, but it is presumed that the clause means that the project manager has a duty to state assumptions. From the contractor's point of view, the good thing about the project manager's assumptions is that, under clause 61.6, unlike forecasts, if any of them is later found to be wrong, the project manager 'notifies' (again presumably an obligation to notify) a correction. The added advantage of this for the contractor is that the notification of a correction by the project manager itself ranks as a compensation event (clause 60.1(17)).

Clause 62 – quotations for compensation events

This edition of the contract introduces a requirement that the project manager, before instructing alternative quotations, must discuss with the contractor different practicable ways of dealing with the compensation event. The wording gives very broad scope to the discussion, but it does not state that the project manager must take the views of the contractor into account. Even if it did, there is no suggestion that the project manager cannot deal with the compensation events in whatever manner seems appropriate. The preamble to this clause has presumably been inserted to comply with the expressed spirit of the contract. It has been seen that quotations usually cannot be amended to suit changed circumstances which come to light as the project proceeds. With the exception noted in clause 61.6, the quotations are fixed. They are to comprise the contractor's proposals about changes to the prices and its assessment of the amount of delay to the completion date and the key dates resulting from the event. It is clear that the contractor has a duty to submit the details or calculations of its assessment. It must also submit a revised programme with its quotation if it believes that the accepted programme will be affected (clause 62.2).

Clause 62.1 provides that either the project manager may instruct the contractor to submit alternative quotations based on different ways of dealing with the event or the contractor may submit additional quotations on its own initiative, provided the

contractor considers its suggestions to be practicable. There may be alternative ways of dealing with the event. One may be cheaper, but the other more effective. The contractor may well think of an entirely different way of resolving what is essentially a problem in each case. It is for the employer, advised by the project manager, to decide.

Under clause 62.3 quotations must be submitted within three weeks of the project manager's request. It is at least arguable that the time limit does not apply to a contractor submitting an alternative quotation under clause 62.1. The project manager has very little time to respond to a quotation; just two weeks from the submission of the quotations. These time periods are subject to clause 62.5 which allows them to be relaxed if the project manager and the contractor agree to an extension of the time periods before the quotation or the project manager's response is due. It is the duty of the project manager to notify the agreed extensions to the contractor. The project manager may reply in one of four ways:

- By giving the contractor an instruction to submit a revised quotation under but before doing so, the project manager must explain the reasons to the contractor. These reasons should be in writing. These may simply be that the quotations submitted triggered the idea of an entirely new approach. The project manager must give reasons, it appears, for the purpose of assuring the contractor that the revised quotation is not requested on a whim. However, there is nothing which seems to prevent the project manager so requesting and, indeed, giving that as the reason. The contractor has a further three weeks to submit the revised quotation. Presumably the three weeks commence on receipt of the instruction. There appears to be nothing to stop the contractor instructing the contractor to submit a revised quotation several times in succession providing that, each time, reasons are given.
- By a simple acceptance of the contractor's quotation.
- After a request under clause 61.2 for a quotation, that a proposed instruction or changed decision will not be given.
- If the project manager is not minded to accept any quotation and does not believe that the position can be rectified by asking for a revised quotation, the project manager may notify the contractor that he or she will make their own assessment.

Clause 63 – assessing compensation events

Although the word 'assessed' is used to state how the effects of a compensation event are to be determined, rather than such words as 'calculated' or 'ascertained', the word is nowhere defined in the contract. The ordinary everyday meaning of assess is to fix an amount or to estimate.¹⁵ It therefore seems that something less than complete accuracy is acceptable.

The key figures are the contractor's actual defined cost of work done, the forecast defined cost of work not yet done and the resulting fee. Clause 52 explains 'Defined Cost' as amounts calculated using rates and percentages stated in the contract data and other amounts at open market or competitively tendered prices with deductions

¹⁵ *The Concise Oxford Dictionary.*

for all discounts, rebates and taxes which can be recovered. Contractor's costs not included in the defined costs are treated as included in the fee. The definition of 'Defined Costs' is to be found in the main Options. Options A and B has one definition while Options C, D, E and F have another.

The dividing line between work done and not done is set at the date the project manager instructed the contractor to provide quotations. If the project manager failed to so instruct, it is the date when the instruction should have been given. It is the effect of the compensation events on such costs which determine the amount of compensation. The effect encompasses both the effect on cost and on time and the costs are the direct costs of the event (i.e. the valuation) as well as what JCT contracts would refer to as direct loss and/or expense. The assessment, which must be carried out in the first instance by the contractor in its quotations and, possibly later by the project manager if necessary, is a complex affair. Partly, that is due to the structure of the main options, and partly to the NEC approach to the subject. It has to be said again that many clauses are less than crystal clear and the need to go through the process many times as many compensation events are notified will stretch the resources of both contractor and project manager. The problem is that the system requires the calculation of what it would have cost the contractor to carry out the work without the compensation event and compare with an exercise to calculate what it cost taking the effect of the event into account. This is clearly a lot of work.

Clause 63.1 makes reasonably clear that the effect of the compensation event upon actual defined cost of work done, the forecast defined cost of work not yet done and the resulting fee is to be expressed as a change to the prices. Therefore, broadly it is the effect on the actual defined cost and forecast defined cost which is translated to the prices. Except in the situations where the contract expressly so states (e.g. clause 60.6 of Option B) the prices are not reduced if the effect of the event is to reduce the total defined cost (clause 63.2).

Difference between 'planned Completion' and 'Completion Date'

The difference between 'planned Completion' and 'Completion Date' is important in clause 63.3. The delay to the completion date is to be assessed as the length of time that the compensation event has caused planned completion to be later than planned completion shown on the accepted programme. Likewise, it is the difference between the planned key date on the programme and the planned date when it will be met. The exercise will necessitate careful examination of the programmes in the normal way, but with regard to the planned completion, it is only when a decision has been reached about the delay to the planned completion that the length of that delay is transferred to the completion date; similarly with regard to the key date. The contractor should be able to demonstrate its reasoning by means of the revised programme that it is obliged, under clause, 62.2 to provide to the project manager.

The programme

The accepted programme is the crucial document in assessing delays. However, that does not mean that, if the contractor has indicated an optimistic completed date and

key dates, these are the dates which will be used. Clause 31 makes clear (or as clear as the insistence on using the present tense will allow) that when submitting the programme for acceptance the contractor must show the key dates and the completion date. The completion date and the key dates are defined in clauses 11.2(3) and 11.2(9) respectively as the dates in the contract data. Therefore, the contractor does not have freedom to insert other dates of its choosing. If the contractor did attempt to insert other dates, the project manager could refuse to accept the programme on the ground that it did not show the information required by the contract (clause 31.3).

Clause 63.4 is new. It states that the rights of the parties in respect of a compensation event are restricted to changes to prices, the completion date and key dates. It is not thought that this clause is sufficient to exclude the common law rights of either party and it seems doubtful that is the purpose behind its inclusion. The better view is that it is to be construed in regard to contractual rights only. It is merely emphasising what is self-evident from reading the contract as a whole.

Clauses 63.5, 63.6 and 63.7 set out various terms of general application. Clause 63.5 refers to the effect if the contractor fails to give early warning and the project manager has notified the contractor. This provision has been discussed above. Clause 63.6 requires the assessment to include risk allowances for cost and time for matters which have a significant chance of occurring and which are at the contractor's risk. Clause 63.7 reasonably states that assessments are to be made on the assumption that the contractor has reacted both competently and promptly to the event, that any defined cost is incurred reasonably and that the accepted programme can be changed. The general law would imply these assumptions in any event.

Cost and time risk allowances

The most difficulty is caused by clause 63.6 which states the assessment of the effect of a compensation event must include cost and time risk allowances. Matters which are at the contractor's risk are referred to in clause 81.1. Some commentators even believe that the effect of this clause is that the contractor must bear the risk of such things as ground conditions which an experienced engineering contractor should have anticipated. It is reasonably clear that certain risks under clause 81.1 must be borne by the contractor. Clause 81.1 states that those risks are the risks not carried by the employer. The contractor must bear such risks from the starting date of the contract until the defects certificate has been issued. It is perfectly sensible and in accordance with law that the parties must stand by their bargain and that, in respect of the Works for which the contractor originally contracted, it will bear such risks. However, in this instance, the clause is dealing with the effects of a compensation event.

By its very nature, a compensation event is one over which the contractor has little or no control. Many of the compensation events rank as breaches of contract on the part of the employer for which the contractor could expect to recover damages sufficient to put itself in the position it would have occupied if the breach had not occurred. It is obvious that the effect of a compensation event could well include what would normally be considered as contractor's risk items under clause 81.1. The

contractor's costs for dealing with such items would also be part of the recoverable damages. Indeed, it appears that the contractor can raise a claim at common law for the whole of its damages where a compensation event is also a breach of contract on the part of the employer.

This is not a matter that the contractor must include for its risk items as part of a quotation to carry out additional work. Here, the contract is dealing with the assessment (which may be the contractor's quotation or it may be the project manager's assessment) consequent upon a compensation event.

Although the wording of clause 63.6 could be much clearer (hence the difficulty) the commonsense interpretation of it is that the assessment of the effect of a compensation event must include the cost to the contractor of what would otherwise be cost and time risk allowances for matters which have a significant chance of occurring and are at the contractor's risk under the contract. That also appears to be the legal interpretation. If the contractor is preparing the assessment, it will include its costs and, if the effects are in the future, it will have to make a forecast. Such a forecast will no doubt be on the generous side.

Ambiguities and inconsistencies

Clause 63.8 deals specifically with compensation events which arise from instructions to change the Works information in order to resolve an ambiguity or inconsistency. The way that it is to be treated depends, again quite reasonably, on whether it is the information provided by the employer or by the contractor which is changed. If it is the employer's information, the prices, the completion date and the key dates are assessed in the way most favourable to the contractor. If it is the contractor's information, the assessment is to be done in the way most favourable to the employer. It is unlikely that the general law would quite imply this procedure. It is similar to, but goes further than, the *contra proferentem* rule of contract construction.

Clause 63.9 is a new clause to NEC 3. It states that if a change to the Works information (which obviously must have been instructed by the project manager under clause 14.3) causes the description of a condition for a key date to be incorrect, the project manager must correct the description and it must be taken into account when the compensation event for the change (clause 60.1(1)) is assessed.

Main options

Clauses 63.10, 63.11, 63.12, 63.13, 63.14 and 63.15 deal with variations concerning the main options. Assessments under option A and C will be in the form of changes to the activity schedule, but assessments under options B and D will be in the form of changes to the bills of quantities. However, under options B and D, the project manager and the contractor may agree to use the lump sums and rates in the bill of quantities instead of the actual cost and resulting fee. No doubt this will appeal to many. In the case of main contract options C, D and E, if the project manager and the contractor agree, the contractor may carry out the assessment by using the shorter schedule of cost components. In any event, where the project manager is to assess, the shorter schedule may be used. The recovery of the fee will usually amount

to the difference between the fee percentage applied to defined cost before and after the effect of the compensation event is taken into account.

Clause 63.10 (Options A and B) provides that if the total defined cost is reduced by an event which is a change to the Works information or a correction of the project manager's assumption in assessing an earlier event, the prices are to be reduced. Clause 63.11 (Options C and D) is the same as clause 63.10 except that it excludes a change to employer's Works information where the change was proposed by the contractor and accepted by the project manager. Clause 63.12 (Options A and C) stipulates that assessments for changed prices are to be changes to the activity schedule while clause 63.13 (Options B and D) states that assessments are to be changes to the bills of quantities. This simply reflects the different documents employed in these options, but they add that the project manager and the contractor can agree that, instead of the defined cost, they use the rates and lump sums for assessment. Clause 63.14 (Option A) provides that the project manager and the contractor can agree that, instead of the defined cost, they use the rates and lump sums for assessment. Clause 63.15 (Options C, D and E) provide that if the contractor and the project manager agree, the contractor must and the project manager may assess using the shorter schedule of cost components.

Clause 64 – Project manager's assessments

This clause sets out stipulations regarding the assessment of a compensation event by the project manager. This should be the exception, because usually the contractor will have been requested to provide a quotation using the principles set out in clause 63. Only if the contractor fails to satisfy all the criteria may the project manager act. Of course, it is initially a matter for the project manager to decide whether such failure has occurred so as to justify intervention. There are six instances where the project manager may carry out the assessment. A result of the weird sentence construction is that the project manager may have a duty and not just the power to assess in these instances. They are set out in clauses 64.1 and 64.2. They are if:

- the contractor fails to supply the quotation and details within the time allowed. (This is straightforward. If the contractor does not comply with the three week time period set out in clause 62.3 or such extension of that time as agreed under clause 62.5);
- the contractor, in the opinion of the project manager, fails to assess the event correctly in its quotation and the project manager does not request a revised quotation. (Reference to 'correctly' can only mean in accordance with the rules set out in the contract. The contractor's assessment is not incorrect simply because it does not accord with the project manager's view);
- the contractor fails to submit a programme required by the contract when it submits its quotation. (Again, this is straightforward. Obviously, if the programme for the remaining work is unaffected by the compensation event, the requirement to provide a revised programme under clause 62.2 falls away);
- the contractor has submitted a quotation, but the project manager has not accepted the accompanying programme for one of the reasons stated in the contract. (Clause 31.3 sets out these reasons as being if the programme is not practicable, if it does not show the information required under the contract, if it is not a

realistic representation of the contractor's plans, or if it does not comply with Works information);

- there is no accepted programme; or
- the contractor has failed to submit a revised programme for acceptance.

It is not quite clear why the last two reasons are separated from the others in the contract. The only difference is that the project manager seemingly has a free hand in assessing the compensation event in the first instance, but in the second instance the project manager's own assessment of the programme must be used. Since the second instance deals with those circumstances where there effectively is no programme, it seems that the project manager has little choice in any event. It is difficult to see why the project manager should not do that in the first instance also if it seems appropriate.

Clause 64.3 could be drafted more clearly. The first phrase: 'The *Project Manager* notifies the *Contractor* of his assessment of a compensation event. . .' is clear if 'notifies' is taken to mean 'must notify'. However, the remainder of the first sentence: '. . .and gives him details of it within the period allowed for the *Contractor's* submission of his quotation for the same event.' is less clear. Presumably, the project manager is to notify the assessment and give details at the same time. But this time is the period allowed for the contractor to submit its quotation. Clause 62.3 states that such period is three weeks of being instructed to do so by the project manager (assuming for simplicity that no extension has been agreed under clause 62.5). But it is usually not until the end of the three weeks period that the project manager will know that he or she has to carry out the assessment. The last sentence caters for this by stating that the period begins when it becomes apparent that there is the need for the assessment. The clause does not state to whom it should become apparent, presumably the project manager. It would have been much easier to simply specify that the project manager should notify the contractor of the assessment within three weeks of becoming aware of the need to make an assessment.

However, the clause could conceivably be interpreted as meaning that the project manager must notify the contractor of the fact of the assessment and it is only the details which are subject to the time constraints.

Clause 64.4 is also new. It seems to be intended as a failsafe device although the wording leaves gaps. It provides that if the project manager does not carry out the assessment within the stipulated period, the contractor may serve notice on the project manager to that effect. Read strictly that means that the notice should say something like: 'Take this as notice that you have not assessed a compensation event within the time allowed.' A little more flesh is put on the bones by the provision that, if the contractor has submitted more than one quotation, it must state which quotation it proposes should be accepted. However, it follows that if only one quotation has been submitted by the contractor, it need say nothing further in the notice. One imagines that the average project manager may require a little more prompting than that.

Nevertheless, if the project manager does not reply within two weeks (presumably of receipt) of the notice, the notice is treated as acceptance by the project manager of the contractor's quotation. Surely it ought to be the failure to *reply* which is treated as acceptance? The clause gives no indication of what the project manager ought to say in the reply. Taken at face value, any kind of reply, short of acceptance itself, would be enough to prevent the contractor's quotation being treated as accepted.

Certainly a reply incorporating the project manager's assessment would settle the matter, but it appears that a reply stating that the project manager disagreed with the contractor's quotation would be enough to prevent it becoming accepted. The question is: 'What then?'

Clause 65 – implementing compensation events

This is a strange combination of words. Leaving that aside and trying to interpret this clause on its own terms, implementing the compensation events is not straightforward. Until they are implemented, the contractor is entitled to neither additional money nor additional time. Clause 65.1 purports to state how and when implementation occurs. The clause has been clarified in NEC 3. The clause proceeds to give a definition of when implementation takes place by stating that it is the project manager's notification of:

- acceptance of a quotation; or
- completion of the project manager's own assessment; or
- when the contractor's quotation is treated as accepted.

Following from the provisions of clause 65.1, it appears that, under the provisions of clause 61.1, the contractor is required to carry out the instruction or changed decision before the event is implemented. Clause 65.2 makes clear that an assessment is not to be revised just because it was based on a forecast which is later shown to have been wrong.

Clauses 65.3, 65.4 and 65.5 set out certain variations applicable to the main options. Under Options A, B, C and D, the project manager is to include in the notification, the changes to the prices, the completion date and the key dates included in the notification implementing an event. However, under options E and F, cost reimbursable and management contracts respectively, the project manager is to include the changes to the forecast amounts. Both options E and F produce what are cost reimbursable contracts.

18.3 Delay damages

18.3.1 Clause X7

Delay damages is not part of the core clauses of NEC. It is only a secondary option: option X7. If delay damages is not chosen, the employer must resort to ordinary unliquidated damages as a remedy for the contractor's late completion.¹⁶

18.3.2 Commentary

Delay damages appear to be the same as liquidated damages under other contracts and at law. There is no good reason for adopting a new name, because the courts will

¹⁶ See Chapter 3, Section 3.1.

look to the substance rather than the form to decide whether a provision is, in fact, liquidated damages.¹⁷ The general comments on liquidated damages in Chapter 3 are equally applicable to delay damages under NEC. The contractor is to pay delay damages from the completion date until either completion or when the employer takes over the Works. There is no requirement for the equivalent of a certificate of non-completion from the project manager. The rate of delay damages are to be set out in the contract data. Where options X5 (sectional completion) and X7 are used together, the individual damages are to be set down for each section. The contract data also provide for the situation where Option X7 is used without Option X5.

The delay damages are set at a rate per day. This might lead to the contractor successfully arguing that the amount is really a penalty unless, for example, the employer can show that the daily rate for Saturday and Sunday, which is the same as for the other days, was a genuine pre-estimate of the loss likely to be suffered by the employer in the case of an overrun.

Clause X7.1 provides that the contractor 'pays' (presumably 'must pay') damages at the rate in the contract data. It appears that, unlike the position under other contracts, the project manager takes the amount of delay damages into account when certifying payment (clause 50.2). Clause R1.2 provides that if the completion date is changed after delay damages have been paid, the employer must pay the overpayment with interest. Interest is to run from the date of payment to the date of repayment which is an assessment date. This is more advantageous for contractors than JCT contracts which make no provision for interest in these circumstances.

A welcome addition is clause X7.3 which was noted as missing in the last edition of this book. Clause X7.3 deals with the situation which occurs if the employer takes over part of the Works before completion. In common with other contracts, NEC 3 provides that the damages are to be reduced from the date on which the part was taken over. However, unlike other contracts, NEC 3 requires the proportionate reduction of the damages to be according to the benefit to the employer of taking over the part of the Works as a proportion of the benefit of taking over the whole of the Works not already taken over. Other contracts proportion the reduction according to the value of the part compared to the value of the whole of the Works. Although it may be argued that it is easy to calculate the value, but quite difficult to calculate the benefit and that disputes will arise, the reference to loss of benefit is better related to the concept of damages than simply a reference to value.

¹⁷ *Kemble v Farren* [1829] All ER 641.

Chapter 19

Sub-contract claims

19.1 Introduction

This chapter considers sub-contract claims arising under eight forms of sub-contract, namely, the:

- JCT Standard Building Sub-Contract Conditions (SBCSub/C)
- JCT Standard Building Sub-Contract with Sub-Contractor's Design Conditions (SBCSub/D/C)
- JCT Intermediate Named Sub-Contract Conditions (ICSubNAM/C)
- JCT Intermediate Sub-Contract Conditions (ICSub/C)
- JCT Intermediate Sub-Contract with Sub-Contractor's Design Conditions (ICSub/D/C)
- JCT Design and Build Sub-Contract Conditions (DBSub/C)
- JCT Management Works Contract Conditions (MCWC/C)
- ACA Form of Sub-Contract (ACA/SC).

The legal principles which apply to claims under the main contract forms equally hold good for sub-contract forms. This is something which is often misunderstood and claims under sub-contracts are often treated as though they are subject to a completely different set of rules to those governing claims under main contracts. There is nothing to prevent a sub-contractor bringing its claims as claims for damages under the common law and reference should be made to Part One of this book for general principles. Therefore, only claims made under the express provisions of the sub-contracts are considered here. Indeed, many of the sub-contract provisions are now very similar to the equivalent provisions of the relevant main contracts and the reader will be directed to those provisions when appropriate.

19.2 JCT Standard Building Sub-Contract Conditions (SBCSub/C)

19.2.1 Introduction to the form

Sub-contractors working under this form are usually termed 'domestic' indicating that they are sub-contractors whom the contractor has chosen and for whom the contractor bears full responsibility. Domestic sub-contractors are work and material

sub-contractors. The form is published for use where the main contract is the JCT Standard Building Contract SBC. Until the publication of SBC in 2005, the JCT Standard Building Contract contained a clause permitting the employer to nominate sub-contractors and a nominated sub-contract form and ancillary forms were published to achieve that end. Nomination was removed when SBC was published.

An early form of domestic sub-contract was DOM/1 which was introduced in 1980. The form lasted for over 20 years and through a succession of amendments. The JCT Standard Form of Domestic Sub-Contract was published in 2002 (DSC/C).

19.2.2 Extensions of time under (SBCSub/C)

Extensions of time, now referred to as 'Adjustment of Period for Completion' are dealt with by clauses 2.16–2.19. Schedule 2 'Variation Quotation' also includes provisions for fixing a new date for completion and the change in heading from the straightforward 'Extension of Time' of previous editions of the form is probably a more open recognition of agreements under the variation quotation procedure. 'Pre-agreed Adjustment' is a defined term used in clauses 2.18.4 and 2.18.6.4 when referring to a revised completion date fixed by acceptance of a variation quotation. It should be noted that references to extending time and fixing a new date for completion is taken to mean the date for completion of the sub-contract works or, if the sub-contract works are divided in the sub-contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

19.2.3 Commentary

Progress

An important clause in SBCSub/C is clause 2.3 which provides that the sub-contract works are to be carried out and completed in accordance with the programme details and reasonably in accordance with the main contract Works progress, all being subject to receipt by the sub-contractor of notice to commence. The words of clause 2.3 are similar to clause 2.1 of DSC/C and of clause 11.1 of DOM/1 before that. They have been construed very broadly by contractors over the years as obliging the sub-contractor to work in accordance with the contractor's progress on the Works and that if the contractor's progress slowed or quickened, the sub-contractor was obliged to follow suit. It has been held, under clause 11.1 of DOM/1, the relevant words of which were reproduced in clause 2.1 of DSC/C, that the sub-contractor may plan and perform the work as it pleases if there is no indication to the contrary, provided that it finishes by the time fixed in the contract. The sub-contractor's only obligation so far as programming requirements are concerned are those requirements expressly contained in the sub-contract itself.¹ It is likely that the same

¹ *Pigott Foundations v Shepherd Construction* (1996) 67 BLR 48.

principle applies in the case of other similarly worded sub-contracts and it certainly applies to SBCSub/C.

General points

The text should be compared with clauses 2.26–2.29 of SBC, which it closely resembles. The commentary to the extension of time provisions in SBC is generally applicable and the comments below will concentrate on the differences between the positions under the two forms. To a great extent, the differences arise from the contractual relationship. The only parties to the sub-contract are the main contractor and the sub-contractor. There is no contractual relationship between sub-contractor and employer. The practical consequence for present purposes is that the sub-contractor's claims against the main contractor will be passed up the contractual chain to the employer, if the claim is one for which the employer is responsible to the contractor. Despite the Contracts (Rights of Third Parties) Act 1999, third party rights are generally excluded from SBC and from SBCSub/C by clause 1.6 in each case which effectively restores the privity of contract position.

Notice

The notice provision in clause 2.17.1 is virtually identical with that in SBC clause 2.27.1. The sub-contractor must give written notice of delay to the main contractor. The sub-contractor must do this forthwith (i.e. as soon as it reasonably can).² In clause 2.17.1 the sub-contractor's obligation to give notice of the material circumstances is a qualified one. The material circumstances are to include the cause or causes of the delay, insofar as the sub-contractor is able to identify them. In practice, this qualification probably will make little difference, but it does offer the sub-contractor some limited protection against allegations that it has not included all the required information in its notice. The description of delay is more extensive than under SBC and refers to delay to commencement, progress or completion, whereas SBC refers solely to progress. Although it may be said that delay to commencement is included within delays to progress, that cannot really be said about delays to completion when all progress, delayed or otherwise, is finished. The notice must identify any relevant event.

Extension of time

It should be noted that the architect is not involved at all in giving extensions of time. The duty is the contractor's alone.

Time period

The contractor is given a time limit of 16 weeks from receipt of a notice of delay and of the required particulars from the sub-contractor in which to give an extension of

² *Hudson v Hill* (1874) 43 LJCP 273; *London Borough of Hillingdon v Cutler* [1967] 2 All ER 361.

time. It will be noted that this is four weeks longer than the architect is allowed under SBC. The reason is probably to allow the contractor to obtain the necessary extension of time from the architect before giving it an extension of time to the sub-contractor. Although that is sensible in theory, in practice, there are often arguments about whether the architect has received the full particulars and estimate of delay required. If there are fewer than 16 weeks left between receipt of the notice, particulars and estimate and the currently fixed completion date, the contractor must endeavour to give any extension no later than that date.

Clause 2.18.4 empowers the contractor to take into account any omission directions issued since the completion date was last fixed, so that the time necessary for completion has in the contractor's opinion been reduced as a result. This clause appears to permit the contractor to act without any notice from the sub-contractor. As soon as the contractor becomes aware that the omission of work has resulted in the sub-contractor requiring less time to complete the sub-contract works, it can act.

Sub-contract period

Clause 2.18.6.3 is vital; it parallels clause 2.28.6.3 of SBC, and means that, no matter how much work is omitted, the sub-contractor is always entitled to its original sub-contract period. Clause 2.18.6.3 prevents the contractor from fixing a shorter period for completion of the sub-contract works than the period stated in the sub-contract particulars. It is obvious that extensions cannot be reduced until after the first extension has been given. A question which sometimes arises is whether the contractor can 'set-off' an omission direction against the other grounds for extension in the first instance so as to give a reduced first extension. Common sense suggests that there is no good reason why the contractor cannot do so, but a strict reading of clause 2.18.4 indicates, by the word 'after', that a first extension must be given without any discounting to allow for omission directions. Each extension following must take account of omissions of work directed up to the date of the extension.

Clause 2.18.4.5, is a review clause, similar in purpose to clause 2.28.5 of SBC. The contractor has until 16 weeks after practical completion of the sub-contract works to make a final decision on extensions of time compared to the 12 weeks under SBC. The contractor can take into account any events entitling the sub-contractor to an extension of time which occur throughout the duration of the sub-contract and it must either: extend the period previously fixed for completion, subject to certain stipulations, shorten the period or confirm the period for completion previously fixed.

Best endeavours

The sub-contractor has an obligation under clause 2.18.6.1 to use constantly its best endeavours to prevent delay in the progress of the sub-contract works and to prevent the completion of the sub-contract works being delayed or further delayed. The sub-contractor is also required to do all that is reasonably required to the satisfaction of the contractor to proceed with the sub-contract works. These requirements echo the obligations of the contractor under SBC. They are essentially provisions requiring

the contractor to mitigate any losses, in this case of time, but it is suggested that as under SBC, the requirements in this proviso do not require the sub-contractor to spend substantial sums of money.³

Relevant sub-contract events

Clause 2.19 lists the relevant sub-contract events (as they are somewhat ponderously termed), the occurrence of which, in principle, gives rise to an extension of time. Grounds in clauses 2.19.1, 2.19.3, 2.19.5, 2.19.8–2.19.15 parallel those listed in SBC, clauses 2.29.1, 2.29.3, 2.29.5, 2.29.6–2.29.13 respectively and reference should be made to the commentary thereon.⁴ However, clauses 2.19.2, 2.19.4, 2.19.6 and 2.19.7 have differences and will repay closer inspection.

Contractor's directions: clause 2.19.2

The directions referred to are divided into three groups:

- Group 1:* Directions given to comply with SBC clause 2.15 (discrepancies in drawings, contract bills, etc.); clause 3.15 (postponement of any work to be executed under the contract); clause 3.16 (expenditure of provisional sums (except in connection with defined work)); clause 3.22.2 (action concerning antiquities); and clause 5.3.2 (variations to work carried out following a variation quotation). Compliance with an architect's instruction for the expenditure of a provisional sum for defined work is expressly excluded.⁵ That is because the contractor has been given sufficient information to enable it to make appropriate allowance in planning its work at tender stage.
- Group 2:* Directions for SBC clause 3.17 (inspections and tests) and clause 3.18.4 (opening up after discovery of defective work).
- Group 3:* Directions under SBCSub/C clause 3.10 (inspections and tests on the contractor's own initiative).

Approximate quantities: clause 2.19.4

Under SBC clause 2.29.4, the relevant event refers simply to the situation where the approximate quantity is not a reasonably accurate forecast of the amount of work which is required and has been carried out. Reference should be made to the comments on that provision. SBCSub/C takes a slightly different approach which, at first sight seems confusing. It splits the event into two categories. The first is in very much the same wording as under SBC except for the insertion of reference to the contract bills. The second seems to say the same thing but with the words in a slightly different order. However, the first category refers to the entitlement when the contract bills

³ See the consideration of 'best endeavours' in Chapter 11, clause 2.28.6.1 in Section 11.1.2.

⁴ See Chapter 11, Section 11.1.3.

⁵ See Chapter 14, Section 14.5.4 under the sub-heading: *Valuation of approximate quantities, defined and undefined provisional sums.*

provided as part of the contract documents with SBC contain approximate quantities which are not reasonably accurate forecasts. The approximate quantities in the second category are those contained in bills of quantities provided by the contractor as part of the sub-contract. In both cases, the sub-contractor may have an entitlement to an extension of time if it is clear that the sub-contractor has been delayed.

Suspension by the contractor: clause 2.19.6

There is a relevant event in SBC to cover suspension by the contractor following a failure of the employer to pay sums properly due. The equivalent event in SBCSub/C is clause 2.19.5 which is suspension by the sub-contractor for failure of the contractor to pay. However, clause 2.19.6 is suspension by the contractor under SBC. The logic is quite straightforward and it effectively steps down the contractor's right to an extension of time, following a justified suspension, to the sub-contractor which clearly cannot continue if the contractor has suspended all its obligations under SBC.

Impediment, prevention or default by the employer: clause 2.19.7

There is a relevant event in SBC to cover impediment, prevention or default by the employer which then entitles the contractor to an extension of time if appropriate. There is a similar clause in the sub-contract clause 2.19.8 which entitles the sub-contractor to an extension of time if the contractor is responsible for any impediment, prevention or default and the comments to SBC are applicable here. Clause 2.19.7 refers to acts of prevention, etc. of the employer under SBC which cause delay to the sub-contract. It is conceivable that not every such act will delay a sub-contract and it is for the sub-contractor to show that it has been delayed.

19.2.4 Direct loss and/or expense claims under (SBCSub/C)

The loss and/or expense provisions are contained in clauses 4.19–4.22.

19.2.5 Commentary

Sub-contractor's claims

Clause 4.19 gives the sub-contractor a right to claim, not through but *from* the main contractor for direct loss and/or expense not covered by a payment under any other provision in the sub-contract. With the exceptions noted below, it almost parallels SBC clause 4.23 and, so far as claims made by the sub-contractor are concerned, for the most part the situation is exactly the same as with claims by the contractor under SBC clause 4.23.⁶ It is good to see that JCT has corrected the anomaly in earlier sub-contracts which made no provision entitling the sub-contractor to any loss and/or

⁶ See Chapter 13, Section 13.1.

expense if it properly suspends performance of its obligations under clause 4.11. Causation was an obstacle to bringing the claim as being due to a default on the part of the contractor, because the plain fact was and is that, on a failure to pay by the contractor, the sub-contractor is not obliged to suspend performance of its obligations. It may do so if it so wishes. Therefore, the suspension breaks the chain of causation. It is the suspension and not the failure to pay which causes the sub-contractor loss and/or expense.

Application

For a claim to be successful, the regular progress of the sub-contract works including any part which is sub-sub-contracted must be *materially* affected by any of the relevant sub-contract matters. The onus is on the sub-contractor to give written notice of the claim to the main contractor. This it must do as soon as it has become, or reasonably should have become, apparent to the sub-contractor of the material effect on progress. There is no provision for the contractor to decide the amount of loss and/or expense payable. The clause envisages that the amount of such a disturbance claim will be agreed between the parties by negotiation. It is the agreed amount of direct loss and/or expense which is recoverable from the contractor as a debt. It has sometimes been contended that if the parties are unable to agree, nothing at all is recoverable. That is a highly technical argument, which is entirely devoid of merit. The reference to the amount 'agreed' by the parties is an attempt to establish a simple mechanism by which the sum to be paid to the sub-contractor can be fixed. It is clearly the intention of the parties that the sub-contractor receives the amount of loss and/or expense to which it is entitled. To the extent that the parties fail to agree, the dispute is referable to adjudication or arbitration. In practice, of course, it is very unlikely that the contractor will agree any amount due to the sub-contractor, but failing agreement, there can be no automatic recovery of the sum suggested by the sub-contractor.⁷

The wording of clause 4.19 indicates that there are three conditions precedent. The first is compliance with the provisions as to written notice. Under the first proviso, the sub-contractor must make written application to the main contractor as soon as it has become, or should reasonably have become apparent. The second proviso requires the sub-contractor to submit such information in support of its application as is reasonably necessary to show that regular progress has been or is likely to be affected, but only on the request of the contractor. Therefore, a sub-contractor which submits no supporting information is not in breach of its obligations under this clause unless it refuses to provide the information after the contractor has requested it. Obviously the contractor must be reasonable in what it requests. Whether or not such a request is reasonable is a matter which could conveniently be referred to adjudication.

The third proviso requires the sub-contractor to submit details of the loss and/or expense in order to enable that loss and/or expense to be ascertained and agreed. Again, the proviso is triggered only if the contractor requests the details. It is only in

⁷ *Hermcrest Plc v G Percy Trentham Ltd* (1991) 53 BLR 104.

this proviso that any reference is made to ascertainment and it is not clear which party is to carry it out. In practice, the sub-contractor will submit its application with what it believes to be full supporting information and the sum to which it believes it is entitled. Following receipt, the contractor, having requested and received any further information required, will produce its own ascertainment. It is at that point that the procedure founders on the weak assumption that the parties will agree a figure. In default of agreement, the figure must be decided by one of the dispute resolution procedures and 'in an appropriate case, that agreement might be reflected by a formula-based calculation.'⁸

Relevant sub-contract matters

The relevant sub-contract matters are in clause 4.20 and they are similar to the relevant matters under SBC clause 4.24. Therefore, comments elsewhere in this book in relation to SBC are also applicable to this sub-contract. However, there are some points to note in the following matters:

Directions of the contractor: clause 4.20.2

The directions referred to are divided into six groups:

Group 1: directions given for the expenditure of provisional sums with the exception of provisional sums for defined work.

Group 2: directions for opening up and testing under SBC clause 3.17.

Group 3: directions for opening up and testing under clause 3.10 of the sub-contract.

Group 4: directions about discrepancies in the numbered documents or between them and the main contract documents.

Group 5: directions for the postponement of work under the sub-contract whether or not connection to a postponement under SBC.

Group 6: directions about antiquities.

Suspension by the contractor: clause 4.20.4

The comments dealing with the equivalent clause in the extension of time provisions are applicable here.

Approximate quantities: clauses 4.20.5 and 4.20.6

The comments dealing with the equivalent clause in the extension of time provisions are applicable here.

⁸ *Norwest Holst Construction Ltd v Co-operative Wholesale Society Ltd* [1998] EWHC 339 (TCC) at paragraph 365 per Judge Thornton.

Impediment, prevention or default by the employer: clause 4.20.7

Comments elsewhere dealing with the equivalent clause in the extension of time provisions are applicable here.

Main contractor's claims

Clause 4.21 deals with claims by the main contractor against the sub-contractor in respect of disturbance of regular progress of the main contract Works by the sub-contractor or any of its persons, for example sub-sub-contractors. The contractor is required to give written notice. There is no reference to a written application and the contractor must act within a reasonable time of the effect becoming apparent. The clause is brief, but refers to the contractor's obligation to provide reasonable particulars of the effects on regular progress and details of the resulting loss and/or expense. Although the sub-contractor must reasonably request the loss and/or expense details before the contractor is obliged to provide them, the contractor must provide the supporting particulars about the effects on regular progress with the notice.

It is notable that the contractor's entitlement under this clause is to loss and/or expense. In contrast the entitlement of the sub-contractor under clause 4.19 is to *direct* loss and/or expense. On the basis that in a contract the use of different words is to be construed as denoting different things,⁹ it can be argued that the absence of the word 'direct' when referring to the contractor's claims in two separate clauses is a deliberate indication of a broader scope of entitlement. It is thought that there is a real distinction to be drawn between what the contractor can recover and the direct loss and/or expense which the sub-contractor can recover under clause 4.19. It is suggested that the different descriptions of the damages must allow the contractor to recover consequential losses under this provision in the correct circumstances.¹⁰

When claims made are agreed under clause 4.21.2, the main contractor may deduct the amount agreed from monies due or to become due to the sub-contractor or, if necessary, recover the sums due as a debt. It is clear that agreement is essential under this clause, as under clause 4.19. Clause 4.22 preserves to both parties their other rights and remedies.¹¹

19.2.6 Delayed completion by the sub-contractor

The main contractor's right to claim against a sub-contractor for delay in completion of the sub-contract works is set out in clause 2.21. The all-important date of practical completion is covered in clause 2.20.

⁹ *John Jarvis v Rockdale Housing Association* (1986) 36 BLR 48.

¹⁰ *Millar's Machinery Co Ltd v David Way & Son* (1934) 40 Com Cas 204.

¹¹ i.e. claims at common law, see Chapter 4.

19.2.7 Commentary

The main contractor's right to claim for delayed completion of the sub-contract works is dealt with on a different basis from its right to claim for the effect of any act, omission or default of the sub-contractor upon regular progress of the main contract Works.¹² In effect, clause 2.21 sets out the contractor's entitlement to unliquidated damages. It is exceptionally rare for a contract to include liquidated damages in respect of sub-contract work. The reason is that, whereas under a main contract the contractor is in control of constructing the whole of the Works, the multitude of sub-contractors each capable of delaying others and being delayed themselves makes it well nigh impossible to arrive at a rate of liquidated damages which represents a genuine pre-estimate of the effect of delay by any single sub-contractor.

The expedient of simply stepping down the full amount of liquidated damages from the main contract may occasionally represent an accurate representation of future loss, but more often, the contractor's delay will be a complex interaction of delays by many sub-contractors, suppliers and the contractor itself. Although it is not easy to arrive at an accurate amount of unliquidated damages in respect of any particular sub-contractor, it does free the contractor to concentrate on a particular sub-contractor's delay without the problems which may arise if, as undoubtedly will be the case, a sum set as liquidated damages is actually a penalty and unenforceable.¹³

Clause 2.21 is very simple. If the sub-contractor does not complete the sub-contract works within the period for completion in the sub-contract particulars, the sub-contractor must pay or allow the contractor the direct loss and/or expense caused by the failure to complete. In order to recover, the contractor must serve notice on the sub-contractor within a reasonable time of the expiry of the period for completion. In such circumstances, there appears to be no reason why a reasonable period should not be a few days, perhaps up to a couple of weeks at the most.

Unlike some other provisions considered in this chapter, there is no express stipulation that the amount of damages is to be agreed. At first sight, this appears to enable the contractor to simply set-off the amount it considers to be due from any other payments. However, clause 2.21 states that the sub-contractor must 'pay or allow' the amount of loss and/or expense. This phrase has been considered by the Court of Appeal. The Court was examining the equivalent clause (12) in the DOM/1 form of domestic sub-contract which is an ancestor of SBCSub/C. Clause 12 dealt with the failure of the sub-contractor to complete on time. Like clause 2.21 of SBCSub/C, clause 12.2 of DOM/1 provided that on receipt of the contractor's written notice that it had failed to complete on time, the sub-contractor must 'pay or allow' a sum equivalent to the damage suffered. It was argued that the phrase in question allowed the contractor to set-off the damages against sums due to the sub-contractor. The Court disagreed:

¹² See the consideration of clause 4.21 above.

¹³ See the detailed discussion about penalties in Chapter 3, Section 3.2.

[Counsel] has to assert that clause 12.2 provides an independent provision for set-off, not requiring the notice and the calculations envisaged in clause 23.2. He relies, therefore, on the words in clause 12.2, “The sub-contractor shall pay or allow to the contractor”. “Pay” obviously obviates set-off – the money is paid, there is nothing to be set off – but “allow”, he says, must mean allow by way of set-off.

I am unable so to construe clause 12.2 primarily because what the defendants are claiming to set off is the figure which they claim is the sum due to them, whereas what the sub-contractor is bound to pay or allow under clause 12.2 is the sum properly due to the contractor: the two are by no means necessarily the same. There may well be disputes as to whether or not, or by how long a period, the sub-contractor failed to complete the sub-contract works in time, and there may well also be disputes as to whether the damage claimed by the contractor was caused by the delay of this particular sub-contractor. Even, therefore, with consideration being limited to claims for liquidated sums by reference to the liquidated and ascertained damages payable to the employer, there is ample scope for disagreement about what is truly due under clause 12.2. I read clause 12.2 as requiring the sum to be paid but it can only be allowed in so far as it is agreed. The sub-contractor cannot be bound to allow it so far as it is disputed. In so far as the sum is agreed to be due, allowed in this sense to be due, it will fall within clause 23.1 and the contractor will be entitled to deduct it under clause 23.1 from any money otherwise due to the sub-contractor.

It is to be noted that in clause 12.2 there is no equivalent to the provision at the end of clause 29.4 which would enable the contractor, when calculating any payment to be made to the sub-contractor, to deduct his own estimate of the amount of the loss or damage which he claims to have suffered.¹⁴

That is a somewhat surprising result and may be confined to SBCSub/C and similar domestic sub-contracts. However, it is clear authority that, even under clause 2.21 and without express words, the contractor can only deduct those amounts which have been agreed with the sub-contractor.

Clause 2.20 is important. It is an odd feature of this clause that nothing in the clause actually fixes the date for practical completion. The best that can be said is that practical completion is ‘deemed’ to have taken place in certain circumstances. Although it is a matter for the sub-contractor to notify the contractor when, in the opinion of the sub-contractor, practical completion has taken place and the reasonably necessary information for the health and safety file has been provided, the contractor has 14 days in which to dissent. The contractor must give reasons and, of course, these reasons must be carefully considered, because in any subsequent adjudication on the issue, it will be the validity or otherwise of the contractor’s reasons which will determine the issue. If the contractor does not dissent, practical completion is to be deemed to have taken place on the date notified by the sub-contractor. The clause refers to practical completion ‘for all the purposes of this Sub-Contract’. A crucial purpose is, of course, the application of clause 2.21.

¹⁴ *Hermcrest Plc v G Percy Trentham Ltd* (1991) 53 BLR 104 at 115 per Dillon LJ.

If the contractor dissents, it is effectively up to the contractor to decide when practical completion is deemed to have taken place. The contractor must be satisfied that the sub-contract works are complete and the material has been supplied for the health and safety file. It must then give written notice to the sub-contractor. The only constraint is that the date cannot be later than the date of practical completion of the whole of the main contract Works. There is provision for the parties to agree the date, but in light of the contractor's dissent, that seems unlikely. The clause expressly refers to the possibility of the date being determined under one of the dispute resolution procedures. Presumably, it is only when determined under such procedures that the date can be said to be the date of practical completion rather than a deemed date.

19.3 JCT Standard Building Sub-Contract with Sub-Contractor's Design Conditions (SBCSub/D/C)

19.3.1 Introduction to the form

This form was published at the same time as SBCSub/C. It is for use where the main contract Works are being carried out under SBC, the contractor is to design parts of the Works (contractor's designed portion) and a sub-contractor is designing part or all of the sub-contract works.

19.3.2 Commentary

The comments for SBCSub/C are also applicable to the clauses in this sub-contract with just two exceptions.

Strikes and similar events: clause 2.19.13

The comments covering the equivalent relevant event in SBCSub/C are also applicable here, but it should be noted that the event has been enlarged so that there is provision for an extension of time if the strike affects persons engaged to prepare the contractor's designed portion. This could affect the sub-contractor itself if it prepares the design in house, but would apply also if the design was prepared by a sub-sub-contractor such as a firm of architects or engineers.

Directions of the contractor: clause 4.20.2

The comments covering the equivalent relevant sub-contract matter in SBCSub/C are also applicable here, but there is an important difference in clause 4.20.2. Group .1 is enlarged to include directions of the contractor for the expenditure of provisional sums included in the 'Contractor's Requirements'. These are defined in clause 1.1 as the documents dealing with the sub-contractor's designed portion and included in the numbered documents. It is the document which steps down the relevant part of the Employer's Requirements under SBC to the sub-contractor.

19.4 JCT Intermediate Named Sub-Contract Conditions (ICSubNAM/SC)

19.4.1 Extension of time and direct loss and/or expense

The provisions for extensions of time and claims for and against sub-contractors named under clause 3.7 of IC and ICD are contained in clauses 2.12, 2.13 and 4.16–4.19 and provisions for practical completion and failure to complete are contained in clauses 2.14 and 2.15.

19.4.2 Commentary

The references to ICSub/NAM are to the Form of Tender and Agreement. This is divided into three parts:

- (I) Invitation to tender (ICSub/NAM/IT)
- (II) Tender (ICSub/NAM/T)
- (III) Agreement (ICSub/NAM/A).

It is this last document which constitutes the sub-contract as actually executed by the main contractor and the sub-contractor, form ICSub/NAM/C containing the conditions of sub-contract being issued separately and incorporated by reference into the agreement.

Although the sub-contractors under this form are referred to as ‘named’, they must not be confused with the former nominated sub-contractors under JCT 98. There are considerable differences. For example, the architect is not required to certify amounts for payment to the sub-contractor, there is no provision for direct payment by the employer if the main contractor defaults on payment and the architect is not required separately to certify practical completion of the sub-contractor’s work. The architect will only be involved if either the sub-contractor or the main contractor is so seriously in default under the sub-contract that either becomes entitled to terminate the employment of the other, in which case the architect is required to step in to deal with the situation that then arises. Sub-contractors under this form have more in common with domestic sub-contractors under form SBCSub/C.

The extension of time provisions are somewhat shorter than the equivalent provisions under SBCSub/C and more like the IC and ICD extension of time provisions – as one might expect. The general comments made elsewhere under SBCSub/C are relevant and comments to IC and ICD are applicable to ICSub/NAM/C, but the following should be noted:

- Clause 2.12.1 refers to it becoming reasonably apparent that the commencement, progress or completion of the sub-contracts works is being delayed rather than simply the progress under IC and ICD and it is the period rather than the date for completion which the contractor must consider when deciding whether to make an extension of time.
- Clause 2.12.3 allows the contractor up to 16 weeks after practical completion to review the extensions of time. IC and ICD allow only 12 weeks. It is not clear why it was thought necessary to provide for different periods other than the ultimate

extension of time allowed to the contractor under the main contract will undoubtedly have an effect on its view of extensions under the sub-contracts. Presumably, the extra 4 weeks is intended to permit the contract to receive a final decision on extensions of time at the very end of the 12 weeks under IC and ICD before considering how much time to allow to the relevant sub-contractors.¹⁵

- Clause 2.13.4 deals with approximate quantities. The first part refers to the entitlement when the contract bills provided as part of the contract documents with IC or ICD contain approximate quantities which are not a reasonably accurate forecast. The approximate quantities in the second part are those contained in bills of quantities provided by the contractor as part of the sub-contract. In both cases, the sub-contractor may have an entitlement to an extension of time if it is clear that the sub-contractor has been delayed.
- Clause 2.13.6 effectively steps down the contractor's right to an extension of time, following a justified suspension, to the sub-contractor which clearly cannot continue to perform if the contractor has suspended all its obligations under IC or ICD.
- Clause 2.13.7 refers to acts of prevention, etc. of the employer under IC or ICD which cause delay to the sub-contract. It is conceivable that not every such act will delay a sub-contract and it is for the sub-contractor to show that it has been delayed.
- The event in clause 2.13.13 has been enlarged so that there is provision for an extension of time if the strike affects persons engaged to prepare any design work for the main contract Works by or on behalf of the contractor. The precise meaning of this clause is obscure. It appears to entitle the sub-contractor to an extension of time only if delayed because the strike affects persons whom the contractor has engaged to prepare designs for the main contract Works. It appears to preclude the sub-contractor from any extension of time if it has sub-sub-contracted its own design work to another person who is delayed by a strike. However, on the basis that the sub-contractor itself has been delayed by a strike, presumably it could obtain an extension of time, because there is no doubt that it has been engaged by the contractor. It is a very unsatisfactory clause and it would benefit from redrafting.
- Clause 4.17.4 refers to suspension by the contractor under the main contract for the purposes of stepping down the entitlement.
- Clauses 4.17.5 and 4.17.6 refer to approximate quantities in the contract bills in the main contract and the bills of quantities in the sub-contract.
- Clause 4.17.7 refers to impediment, prevention or default by the employer.

19.5 JCT Intermediate Sub-Contract Conditions (ICSub/C)

This is the sub-contract form for use with IC where the sub-contractor is not required to design. The numbering of the extension of time, loss and/or expense and practical completion and lateness clauses is identical to that in ICSub/NAM/C. The

¹⁵ Whether the period of review of extensions of time is mandatory or merely directory has been considered in Chapter 2, Section 2.2.4.

content is virtually identical except that there is no reference to strikes affecting persons engaged in design in clause 2.13.13. Therefore, the comments to sub-contract ICSUB/NAM/C are also applicable here.

19.6 JCT Intermediate Sub-Contract with Sub-Contractor's Design Conditions (ICSub/D/C)

This is the sub-contract form for use with IC where the sub-contractor is required to design part of the Works (the contractor's designed portion). The numbering of the extension of time, loss and/or expense and practical completion and lateness clauses is identical to that in ICSUB/NAM/C. The content is virtually identical except that in clause 2.13.13 the reference to strikes includes strikes affecting persons engaged in preparing the contractor's designed portion. Presumably the reference to persons will also include the sub-contractor and anyone to whom the sub-contractor has sub-sub-contracted such design. Therefore, the comments to sub-contract ICSUB/NAM/C are also applicable here.

19.7 JCT Design and Build Sub-Contract Conditions (DBSub/C)

This is the sub-contract form for use with DB.

19.7.1 Extension of time and direct loss and/or expense

The numbering of the extension of time, loss and/or expense and practical completion and lateness clauses is identical to that in SBSub/C.

19.7.2 Commentary

The content is virtually identical to SBSub/C save that references to clauses in the main contract are adjusted to refer to clauses in DB and the comments to SBSub/C are generally applicable with the following significant changes:

Extension of time

Approximate quantities: clause 2.19.4

The relevant sub-contract event refers to the situation where the approximate quantity is not a reasonably accurate forecast of the amount of work which is required and has been carried out. Unlike the position under SBSub/C, there is only reference to the bills of quantities in the sub-contract because there are unlikely to be bills of quantities associated with the main contract (DB). The bills referred to here are any bills which have been prepared by the contractor and included in the num-

bered documents. If the quantities are not a reasonably accurate forecast, the sub-contractor may be entitled to an extension of time. The entitlement would apply of course, only if the forecast was too low. Where the approximate quantities were in excess of what was actually required, it would be difficult (albeit perhaps not impossible in certain circumstances) for the sub-contractor to demonstrate that it resulted in a delay.

Strikes and similar events: clause 2.19.13

The comments covering the equivalent relevant event in SBCSub/C are also applicable here, but it should be noted that the event has been enlarged so that there is provision for an extension of time if the strike affects persons engaged to prepare the design of the main contract Works. This could affect the sub-contractor itself if it prepares the design in house, but would apply also if the design was prepared by a sub-sub-contractor such as a firm of architects or engineers.

Delay in the receipt of any statutory permissions: clause 2.19.15

This relevant sub-contract event covers delay in the receipt by the sub-contractor of permissions of approvals by any statutory body. There is a requirement that the sub-contractor must have taken all practicable steps to reduce the delay and it must be taken seriously. Realistically, this will probably amount to little more than that the sub-contractor must have made any necessary applications in good time, replied promptly to queries and used its best endeavours to obtain the permissions or approvals. An architect in the position of making applications to statutory bodies cannot guarantee the result and neither can the sub-contractor. The sub-contractor will be entitled to an extension of time under this relevant event if it can show that the delay was not due to its fault. This relevant event refers to any kind of statutory permission or approval. Virtually all buildings require planning permission and they must satisfy the Building Regulations. There are, however, many other possible controls over such things as fire, water and entertainment.

Loss and/or expense

Clause 4.19.2 has been added in the procedural part. It provides that if the employer's right to defer possession, and where paragraph 5 of the supplemental provisions in schedule 2 also apply, and if the sub-contractor suffers direct loss and/or expense as a result of deferment of possession or as a result of any of the relevant sub-contract matters, the sub-contractor must provide the contractor with information to enable it to comply with paragraph 5. The purpose of this provision is to deal with the fast track situation which replaces the normal loss and/or expense provisions when paragraph 5 of the supplemental provisions apply. Clauses 4.20.5 and 4.20.6 have been inserted in the list of relevant sub-contract matters to echo the relevant sub-contract event items dealing with approximate quantities and statutory permissions respectively.

19.8 JCT Management Works Contract Conditions (MCWC/C)

This is the form for use with the Management Building Contract (MC) whether or not the works contractor has any design responsibility. The form was produced in 2008.

19.8.1 Extension of time

This is dealt with in clauses 2.16–2.19.

19.8.2 Commentary

Other than the terminology of management contractor and works contractor instead of contractor and sub-contractor, these provisions closely parallel the provisions of SBSub/C. There are some points to note as follows:

Architect's dissent

The question of the architect's dissent has been discussed in Chapter 11, Section 11.6.2, when considering the extension of time provisions in the Management Building Contract MC. The works contract provides in clause 2.18.1 that the management contractor must consult the architect before either giving or refusing an extension of time to the works contractor. This is obviously because an extension of time given to the works contractor under MCWC will entitle the management contractor to an extension of time under MC (the second relevant project event). However, it is difficult to see the practical effect of consulting the architect, because the contract is clear that it is the management contractor's duty to consider whether the works contractor should have an extension of time. Therefore, it is open to the management contractor to consult the architect and, if the architect disagrees with the management contractor's view, to ignore the architect and proceed according to its own view. It seems that the management contractor cannot rely on the architect's opinion and it must take action as though the architect had never passed any opinion. No doubt the management contractor will carefully weigh anything the architect has to say, but final responsibility remains with the management contractor.

It is noteworthy that there is no requirement for the management contractor to consult or even notify the architect before the management contractor carries out its final review of extensions of time under clause 2.18.5. There is no reference to the architect's opinion or dissent nor to the terms of any such opinion or dissent being passed to the works contractor. In practice, the management contractor may be reluctant to give an extension of time in the face of the architect's contrary opinion.

Relevant events

The relevant events closely follow those in SBSub/C, but there are some differences:

- There is no provision for approximate quantities in the contract bills as in SBCSub/C for the very good reason that there are no contract bills associated with the management contract.
- Clause 2.19.13 refers to effects of strikes on any person engaged in the preparation of designs for the works contractor.
- Clause 2.19.15 deals expressly with delay in obtaining consents from any statutory body. There are two important criteria: the consents must be necessary and the works contractor must have taken all practical steps to avoid or reduce the delay. In other words it must have done everything possible in practice (as distinct from in theory). This is the duty to mitigate, in different words. The most obvious statutory body is of course the local planning authority.

19.8.3 Clauses dealing with loss and/or expense

Loss and/or expense is dealt with in clauses 4.20–4.23.

19.8.4 Commentary

The commentary on SBCSub/C clauses 4.19–4.22 is relevant, as is the consideration of the position under clause 4.23 of SBC.¹⁶ There are some points to note:

General

The wording and layout of these clauses are significantly different to the equivalent clauses in the 1998 edition. They follow what seems to be the standard JCT sub-contract clauses, but with minor changes.

Ascertainment

In the 1998 edition, the ascertainment was to be carried out by the architect or if the architect so instructed, by the quantity surveyor in consultation with the management contractor. Under the current works contract, there is no provision for ascertainment. Like other sub-contracts, the works contractor is only entitled to the *agreed* amount.

Relevant works contract matters

Clause 4.21.1 expressly excludes variations for which an acceleration or variation quotation has been accepted. That is obviously because such quotations already include allowance for loss and/or expense. There is no provision for approximate quantities in the contract bills as in SBCSub/C for the very good reason that there are no contract bills associated with the management contract.

¹⁶ See Chapter 13, Section 13.1.

Claims between management contractor and works contractor

These provisions are very similar to the equivalent provisions in SBCSub/C.

19.8.5 Delayed completion by the works contractor

This is dealt with under clauses 2.20 and 2.21. Although modelled generally on the equivalent provisions in SBCSub/C, there are some significant differences.

19.8.6 Commentary

Unlike the position under SBCSub/C, although the works contractor has a duty to notify the management contractor when, in its opinion, practical completion has been achieved, it is the management contractor's duty to pass the notice to the architect with any comments which the management contractor feels it appropriate to make. It is the architect's opinion, obviously exercised according to law, which determines whether practical completion has been achieved. Presumably, the architect will take account of the management contract's views, but there is no stipulation in the contract which states that the architect and the management contractor must agree. It is for the management contractor to issue the certificate of practical completion with the architect's consent.

There are two points worth considering here. The first is that the management contractor has no power to issue the certificate of practical completion if the architect withholds consent. The second point is that it is unusual that the person on whose opinion the certificate is based does not actually issue it. Is the certificate the architect's or the management contractor's? Who is the certifier? The certifier is nominally the management contractor under clause 2.20.2, but the opinion is that of the architect. The standard definition of a certificate as the formal expression of a professional opinion¹⁷ is not necessarily disrupted by these provisions, but it introduces an element of confusion. Although the management contractor is not entitled to issue the certificate without the architect's consent, is the management contractor entitled to refuse to issue a certificate embodying the architect's opinion if the management contractor disagrees with it? Probably not, however, the matter is not beyond doubt and it would have been so much easier for both MC and MCWC to provide that the architect, having taken into consideration the views of the management contractor, should certify practical completion of the works contract works and issue the certificate to the management contractor with a copy to the works contractor.

Other than the obvious changes in terminology, clause 2.21, which provides for the works contractor to pay or allow the amount of direct loss and/or expense to the management contractor, is similar to the equivalent clause in SBCSub/C. There is one addition, the purpose of which is not immediately obvious: the loss and/or expense must include any liquidated damages which the management contractor is obliged to pay to the employer as a result of the works contractor's failure to complete

¹⁷ *Token Construction Co Ltd v Charlton Estates Ltd* (1973) 1 BLR 48.

on time. The clause makes clear that the liquidated damages is not necessarily the total amount to which the management contractor is entitled. This provision was no doubt thought advisable in view of the management contractor's particular duties under MC and to put beyond doubt that liability for the whole or the relevant portion of liquidated damages could be stepped down to whichever of the works contractors was responsible for the delay.

19.9 ACA Form of Sub-Contract (ACA/SC)

19.9.1 Introduction

This form of sub-contract was issued by the Association of Consultant Architects in October 1982 and is designed for use with the ACA Form of Building Agreement.¹⁸ The form current at the time of writing is the third edition revised in 2003. It is not a negotiated contract and, therefore, in some circumstances may be interpreted *contra proferentem* (against the employer). It may also be caught by the Unfair Contract Terms Act 1977.

The contractor under ACA 3 is not obliged to use this sub-contract, but it is clearly drafted to correspond to the ACA 3 provisions and it is sensible to use it, because it steps the respective rights and liabilities up and down as appropriate. The opportunities for claims are considered below.

19.9.2 Extensions of time

The sub-contract provisions for extensions of time are contained in clause 7. It also deals with commencement and progress of the sub-contract works, the consequences of failure to complete on time and the contractor's power to accelerate or postpone the sub-contract works.

19.9.3 Commentary on the extension of time clause

The sub-contractor's obligation as set out in clause 7.1 is to commence the sub-contract works within 10 working days of receipt of the contractor's written instruction (a period which the parties may agree to change before executing the contract). The sub-contractor's duty is to proceed regularly and diligently in accordance with the sub-contract time schedule. The clause expressly makes provision for the sub-contractor to finish before the date for completion if it so wishes. These duties are expressly made subject to the content of the rest of clause 7. Whether the sub-contractor has proceeded regularly and diligently with the sub-contract works is a question of fact in each case.¹⁹

¹⁸ See Chapter 16 for consideration of the ACA Building Contract (ACA 3).

¹⁹ See Chapter 13, 'Effect on regular progress' in Section 13.1.4.

Grounds for extension of time

Clause 7.2 deals very concisely with extensions of time. The sub-contractor is entitled to extensions of time only on the grounds stated. The grounds are divided into three categories:

(a) Circumstances entitling the contractor to an extension of time

This ground does not make explicit reference to the main contract, but clearly it is only under the main contract that the contractor can become entitled to an extension of time. It is extremely unlikely that ACA/SC will be used to sub-contract work under any form of main contract other than ACA 3 and what follows assumes that is the case. The extension of time provisions in ACA 3 are in clause 11.5, but there are two alternative versions of clause 11.5.

Alternative 1 is a very restricted version, restricted in fact to such grounds as would be likely to set time at large if there were no provision for extending time. These grounds are, broadly, all defaults of the employer or the architect, but also expressly include failure by the CDM co-ordinator and the principal contractor (if not the main contractor) to comply with their duties.

Alternative 2 lists eight grounds.²⁰ It is essential, therefore, that the sub-contractor is made aware of the alternative which is in operation under the main contract.

There is a requirement for written notice from the sub-contractor and for full and detailed particulars. The wording makes clear that this is a condition precedent to any entitlement to an extension of time on the part of the sub-contractor. The notice and particulars must be given at the same time and in the manner that ACA 3 requires them to be given by the contractor to the architect. It is not clear why the requirement is worded in this way rather than the actual timing and manner being set out in the sub-contract. ACA 3 requires the contractor, immediately it is reasonably apparent that the taking-over is being or is likely to be prevented by one of the acts specified in the clause, to serve written notice on the architect. The contractor must submit to the architect full and detailed particulars of the extension of time to which it believes it is entitled. The contractor is under a further duty to keep the particulars up to date, by submitting such further particulars as are necessary or as requested by the architect, to enable the architect to carry out the duty to consider what extension of time is due. It should be noted that the architect is entitled to request the information without any limit placed on the timing of the requests. However, it is not thought that the wording in clause 7.2 is strong enough to permit the contractor to exercise a similar power under ACA/SC.

(b) Act, instruction, default or omission of the contractor

The sub-contractor is not required to give notice under this ground, but in practice notice will be given if only to remind the contractor that an extension of time is due.

²⁰ In both cases refer to the commentary on the ACA main contract terms: see Chapter 16, 'Grounds for extension of time' in Section 16.2.3.

It is for the sub-contractor to prove that the contractor has prevented completion of the sub-contract works by the due date. The proof required is said to be to the satisfaction of the contractor, but it is not considered that this amounts to anything more onerous than the usual standard of proof: the balance of probabilities. Otherwise, this ground is self-explanatory.²¹

(c) Instruction to postpone under clause 7.5

Clause 7.5 is an unusual clause because it empowers the contractor to accelerate the sub-contract works by bringing forward the date for completion or to postpone the completion of all or any part of the sub-contract works, and it requires the sub-contractor immediately to take the necessary measures to comply with the instruction if the contractor has acted reasonably. Any postponement instruction entitles the sub-contractor to an extension of time. Again, no notice from the sub-contractor is required.

Procedure

Except in relation to the first ground (a), it is for the contractor to take the initiative in granting an extension of time although, as already noted, it would be unusual for the sub-contractor not to let the contractor know if it believed itself entitled to an extension of time under any of the three categories. The only criterion is that the extension must be a fair and reasonable estimate. Clause 7.4 is important. It states that, in considering any extension of time, the contractor is entitled to take any omission of work from the sub-contract into account. That can be done at any time, but it must be before the taking over of the Works. Normally, the contractor would take omissions into account when considering an extension of time, but the wording seems wide enough to allow the contractor to reduce extensions of time already granted if it is able to point to an omission of work.

There is no general power of review, but where the architect has carried out a review of extensions of time under clause 11.7 of ACA 3 and fixed a later date for completion of the Works, the contractor must (in the first edition of the Form the word was 'may') also review extensions of time previously granted, but only in respect of the first category (clause 7.2(a)).

Sub-contractor's failure to complete on time

Clause 7.6 importantly provides that if the contractor gives an extension of time to the sub-contract works or issues an instruction accelerating or postponing them, the sub-contractor must submit a revised time schedule to the contractor within seven working days of the contractor's notice or clause 7.5 instruction. If approved by the contractor, the revised schedule will thereafter apply as the time schedule. Clause 7.3

²¹ Reference should be made to Chapter 16, Section 16.3.3, which considers whether there must be a legal wrong involved.

provides that if the sub-contract works are not completed in accordance with clause 7.1, the contractor must give a written notice to the sub-contractor. What this means is that, if the sub-contractor does not complete by the completion date and there is no extension of time or the extension of time does not extend to practical completion of the sub-contract works, the contract must issue the notice of non-completion.

In failing to complete the sub-contract works by the date for completion in the time schedule (including any revision to such schedule), the sub-contractor is in breach of contract. Unlike the position under JCT sub-contracts, there is no provision under ACA/SC for the contractor to recover from the sub-contractor any damages caused by the failure to complete in time. That does not mean that the contractor is without a remedy: it is open to the contractor to bring a common law action against the sub-contractor for damages for breach of contract using one of the dispute resolution procedures.

19.9.4 Damage, loss and/or expense

This is dealt with in clause 9 of the sub-contract and, to a lesser extent, by clause 5.

19.9.5 Commentary

The financial claims are very similar to those in clause 7 of the ACA main contract²² and effectively step down the procedure in the main contract form. Clause 9.1 requires the sub-contractor to give to the contractor any notices, particulars or estimates which the contractor has a duty to give to the architect under ACA 3. The sub-contractor must do this in sufficient time to enable the contractor to claim any adjustment to the contract sum or any damage, loss and/or expense on to which the contractor is entitled.

In order to be able to comply with this clause, the sub-contractor must be aware of the contents of the main contract. Clause 1.2 states that the sub-contractor is deemed to have full knowledge of all the contractor's obligations under the main contract whether express or implied. It goes on to state that the sub-contractor must carry out and complete the sub-contract works in such a way that no omission or default by the sub-contractor will cause or even contribute to a breach by the contractor of obligations under the main contract. It is sometimes argued that a deeming provision in itself is not sufficient to overcome clear evidence to the contrary: in this instance that the sub-contractor was not in possession of all the information relative to the main contract. Of course, the purpose of a deeming provision is precisely to put something beyond doubt and to avoid a party being able to argue to the contrary. The sub-contractor, having freely entered into the sub-contract would almost certainly be bound by such a clause. Leaving that question aside, a sensible sub-contractor would ensure, before executing this sub-contract, that it had all the necessary information about the main contract, that it had read and understood it and that it

²² Considered in Chapter 16, 'Grounds for extension of time' in Section 16.2.3.

was satisfied that it would be able to comply, not only with clause 2.1, but also with clause 9.1.

Clause 9.2 allows the sub-contractor to claim if regular progress is disrupted or delayed by anything (excepting architect's instructions)²³ which would entitle the contractor to claim damage, loss and/or expense against the employer under clause 7 of the main contract. The procedure is not spelled out, but it appears that the sub-contractor must request the contractor to recover damage, loss and/or expense from the employer. There is a proviso that the sub-contractor must comply with its obligations under clause 9.1, but little else to indicate how the provision is supposed to work in practice. It is plain from the wording that claims under this clause extend to both disturbance and prolongation.

The wording of the clause, besides being lacking in procedural information, reads strangely in parts. An example is the middle of the clause which states that the contractor must recover the damage, loss and/or expense if the sub-contractor so requests. Read strictly, that is a duty imposed on the contractor to recover the damage etc. One might have expected the wording to be couched in somewhat different terms and to refer to the contractor's obligation to attempt to recover or to submit to the employer and that everything recovered should be paid to the sub-contractor. To state that the contractor 'shall' (must) recover is leaving no alternative. No doubt in interpreting this clause, the courts would construe the words as meaning that the contractor must do everything reasonably practicable in order to achieve recovery for the sub-contractor. A sub-contractor seeking to claim from a contractor on the grounds that the contractor failed to recover damage, loss and/or expense even after a request by the sub-contractor is unlikely to get very far. In practice, the provision probably means little more than that the contractor must pass on the sub-contractor's claims.

Clause 9.3 deals with the situation where under clause 9.2 the contractor recovers some money for any circumstance which affects the sub-contract works. The contractor must pay the sub-contractor a proportion of any money which it recovers by adding it to the sub-contract sum. The precise amount is left to the contractor's opinion. The clause provides for the proportion to be nil. The clause simply states that the proportion must be fair and reasonable. The contractor's opinion must be exercised according to law and it is something which could be challenged in adjudication, arbitration or litigation. It is arguable that this provision is caught under the Housing Grants, Construction and Regeneration Act 1996 as being essentially a pay-when-paid provision (under s. 113).

Clause 9.4, which is similar to clause 7.1 of ACA 3, deals with claims by the sub-contractor against the main contractor for damage, loss and/or expense that the sub-contractor suffers or incurs as a result of any act, omission, default or negligence of the contractor or its employees, agents or sub-contractors which disrupts the regular progress of the sub-contract works, or delays them in accordance with the dates stated in the sub-contract time schedule. Claims resulting from the contractor's instructions to the sub-contractor are excluded and they are dealt with under clause 5 which is considered below to the extent that it is relevant.

²³ Architect's instructions are dealt with separately by main contract clause 8: see the commentary about that in Chapter 16, Section 16.4.3.

This is a claim directly against the contractor from the sub-contractor and it deals with claims which the main contractor cannot pass on to the employer. Clause 9.4 permits the sub-contractor to make a contractual claim against the contractor for matters which would otherwise fall into the category of common law claims for damages for breach of contract and negligence. Although the clause states that the sub-contractor is entitled to recover the damage, loss and/ or expense as a debt, the provision provides no machinery for the ascertainment or the recovery of such claims. In the absence of such mechanism, the sub-contractor is in little or no better position than if clause 9.4 had been omitted altogether. In other words, the clause says very little to assist the sub-contractor in its claim. In practice, the sub-contractor no doubt will make an application to the contractor for payment of the amount of damage, loss and/ or expense the sub-contractor claims, but if the contractor does nothing or rejects the claim, the sub-contractor will be forced to seek adjudication, arbitration or legal proceedings in order to secure payment.

The provisions are no more helpful to the sub-contractor than provisions in JCT sub-contracts which stipulate that amounts must be agreed before being due for payment.

Claims resulting from instructions

Clause 5.2 requires the sub-contractor to provide estimates to the contractor in respect of instructions if the contractor is required to provide estimates to the architect under the main contract and asks the sub-contractor for them. If the contractor is bound by its estimates under the main contract, the sub-contractor will be similarly bound under the sub-contract.

Clause 5.3, which entitles the sub-contractor to recover payment and what amounts to loss and/or expense for carrying out the contractor's instructions, is made subject to clause 5.2. That means that if the sub-contractor submits an estimate at the contractor's request, to be submitted as, or as part of, the contractor's estimate to the architect, agreement by the architect will prevent the sub-contractor from making any other claim in respect of the same instruction under clause 5.3.

The sub-contractor is not required to apply for payment. Clause 5.3 simply states that the contractor must ascertain and pay a fair and reasonable adjustment to the sub-contract sum. The ascertainment must be based on the sub-contract pricing schedule, if applicable, for the compliance. The contractor must also include an amount for damage, loss and/or expense incurred by the sub-contractor 'arising out of or in connection with' the instruction. That phrase has been construed broadly by the courts.²⁴

No guidance is given about the way in which the contractor must set about the ascertainment, but there are two provisos:

- The subject matter of the instruction must not have arisen from 'or shall not reveal' any negligence, omission or default of the sub-contractor or its employees.
- If the instruction was originally issued to the contractor under the main contract, any adjustment of the sub-contract sum must not be greater than the adjustment

²⁴ *Ashville Investments Ltd v Elmer Contractors Ltd* (1987) 37 BLR 55.

of the contract sum in respect of the sub-contract works as certified by the architect under the main contract.

The effect is plain albeit the second proviso could have been more clearly drafted. Essentially, the proviso is concerned with ensuring that the contractor does not have to pay the sub-contractor more than the contractor receives in respect of the instruction. Once again, it is arguable that this provision is caught by s.113 of the Housing Grants, Construction and Regeneration Act 1996.

APPENDIX

Example of contractor's claim for reimbursement of direct loss and/or expense under SBC with quantities clauses 4.23–4.26 – architect's and quantity surveyor's assessment with commentary

A.1 Introduction

In the first edition of this book the authors encountered difficulty in devising a suitable example of an ascertainment under the 1980 JCT contract. Even at the time of writing the second edition there had been little experience of the use of the JCT form in practice and so there was limited data against which to examine the courts' or arbitrators' attitudes towards the provisions. JCT 80 developed into JCT 98 which in turn developed into SBC 2005. Importantly the terms of clauses 4.4 and 4.23–4.26 of SBC 2005 provide that, if the contract administrator and contractor undertake their roles correctly, a contractor's entitlement to reimbursement under the clauses should be dealt with monthly during the course of the contract. Hence, there should be no such thing as a 'claim' submission, consisting of several lever arch files, sometime after practical completion.

Though the clause numbers may have changed, the content of clauses 4.23–4.26 has not changed significantly from that of their predecessors. However, there is now a wealth of judicial decisions relating to the recovery of loss and/or expense under the JCT form (albeit serving as much to confuse as to clarify). There are, it seems, as many approaches to recovery under clauses 4.23–4.26 as there are contractors preparing them. It can often appear that the greatest factor constraining the constituents – and often the amount – of the amount sought is the imagination of its draughtsman. The birth of the 'claims consultant' has been witnessed and 'claims-manship' has been elevated to an art whereby the draughtsman searches for theoretical and hypothetical arguments and calculations by which, it is hoped, to convince the architect or quantity surveyor, or the employer that the loss and/or expense claimed, in all probability, must have accrued. This is rather surprising when one considers the word 'claim' or any of its derivatives cannot to be found in the SBC form. More often than not, the theories and hypothesis are enhanced with computer-aided charts, diagrams and spreadsheets. Although often of doubtful use, nonetheless

they are the means by which the architect and quantity surveyor are intended to be convinced of the accuracy of the 'claim' submitted.

To comprehensively discuss and provide examples of each such approach is certainly beyond the scope of this book. Moreover, the imaginative, artistic and hypothetical approach is likely to disguise one fundamental point. The contractor, if entitled to payment at all, is entitled to reimbursement of *its* direct loss and/or expense,¹ not some hypothetical contractor's theoretical loss and/or expense.²

There can be few companies in the industry – large or small – that could operate without the use of computers. From drafting correspondence and minutes of meetings on word processing software through to simple labour and wage records, estimating, programming, and measurement and valuation on spreadsheets; even the smallest contractors have no excuse for poor record-keeping.

What follows is not a 'sample claim', but a final build-up, warts and all, of a contractor's application under a hypothetical contract as it might be done by the architect and/or quantity surveyor after practical completion. It is to be assumed, of course, that payments have been made to the contractor from time to time under interim certificates during the course of the contract, and that only a small balance will be left to be ascertained and paid after this exercise.³

A.2 Contract Particulars

The contract is for the construction of a speculative, but prestigious, office development. The essential details are: a reinforced concrete structure (no basement) supported upon bored piles; cladding is curtain walling with tinted anti-sun glass; full air-conditioning; marble flooring and wall and column linings to the prestigious entrance hall.

Contract Sum	£5,400,000.00
Date of Possession	1 September 2008
Date for Completion	13 September 2010 (i.e.106 wks)
Bills of Quantities	Measured to SMM7
Fluctuations	<i>As can occur the parties have not expressly deleted the fluctuations clauses but have simply inserted against the Contract Sum in Article 2 the words 'fixed price'</i>

Delays occurred to the Works as follows:

- (1) The discovery of underground brick and concrete obstructions required substantial re-designing of the foundations, necessitating reinforced concrete rafts;
- (2) A period of heavy snow during February and March 2009 delayed the erection of the structural steel;

¹ See Chapter 5, Section 5.1.

² *Costain Ltd v Haswell & Partners Ltd* (2009) 28 Con LR 154 at 212.

³ See Chapter 13, Section 13.1.6.

- (3) Statutory Undertaker delay in installing the mains electric supply and power on date; and
- (4) Public holidays fell within the contract period due to the delayed completion resulting from (1) to (3) above.

The contractor has given the notices of delay required under clause 2.27 and it subsequently applied for direct loss and/or expense under clause 4.23 based on the same facts. The architect granted extensions of time at appropriate times during the progress of the Works and has made a final decision under clause 2.28.5. The architect has confirmed the previous interim extension of time awards which together total 20 weeks. The revised completion date is 31 January 2011. In accordance with clause 2.28.3 the architect has stated the relevant events which have been taken into account in awarding the extension and the time attributable to each event. The architect made the following summary of conclusions for the office file which were also shown on the notice to the contractor under clause 2.28.5:

		<i>no. of weeks</i>
(1) Underground obstructions	(a) Little work progressed during weeks 4 to 7 inclusive of the project	4 (clause 2.29.2.1)
	(b) Extra work in construction of raft foundations	1 (clause 2.29.1)
(2) Heavy snow	Steel erection delayed	
(3) Installation of mains electric supply	Delay in installation of incoming mains cable to mains distribution board and power on date	10 (clause 2.29.7) 3 (clause 2.29.8)
	(4) Construction work pushed into 2011 over Christmas holidays	<u>2 (the above)</u>
Total extension		20

On receipt of the contractor's application for loss and/or expense, the architect made reference to notes on the extended period and instructed the quantity surveyor accordingly. The quantity surveyor has incorporated that opinion in the build-up notes.

A.3 *The ascertainment*⁴

In summary the quantity surveyor has ascertained the contractor's total entitlement as follows:

⁴ This is not strictly an ascertainment but more an assessment. See Chapter 13, at end of Section 13.1.4.

Claim no

(1) Underground obstructions	
(i) costs of delay during re-design	£38,202.06
(ii) costs of unproductive labour	£ 6,512.46
(iii) costs of delay caused by additional works.	£ 9,550.52
(2) Heavy snow	nil
(3) Statutory undertakers – mains electric supply	nil
(4) Contractor's public holidays	£18,121.04
(5) Increased costs resulting from delays	£18,750.00
(6) Under recovery of contribution to head-office overheads resulting from delays	£ 654.27
Total:	£91,790.35

For the purpose of this example it has been assumed that, in carrying out the ascertainment, the quantity surveyor made notes. What follows are imaginary figures. The figures have no basis in fact or reality and are totally unrealistic, and unsuitable for use in an actual ascertainment, not even for comparison purposes. Figures are used simply to avoid putting 'yyyy' or 'xxxxx'. The notes also record the architect's decisions about those aspects of the claim which it is for the architect alone to decide – essentially questions of principle i.e. not matters of quantum which have been delegated to the quantity surveyor.⁵

Further assume that, before work commenced, the quantity surveyor and the contractor prepared a month by month forecast of preliminaries expenditure based on the contractor's priced preliminaries section of the contract bills. The extent to which the quantity surveyor has ascertained correctly is discussed in the 'observations' which follow after the ascertainment of each head of claim.

Claim no. 1 Underground obstructions – delay four weeks**(i) Cost of delay during redesign****(a) Management and staff**

Little work was carried out after the underground obstructions were discovered until a decision was made about the foundations and the redesign was finished. Although, obviously, it is the end date of the project that is extended, the delay caused to that end date occurs at an early stage in the project. Since the loss and/or expense to which the contractor is entitled must be directly attributable to the delay concerned, the quantity surveyor must establish what additional costs or losses accrued during the period of delay,⁶ that is to say during the time it took from discovery of the underground obstructions to the re-design of the Works. In addition the re-design had a longer construction time than that of the original design.⁷

⁵ See Chapter 13, Section 13.1.4.

⁶ *Costain Ltd v Haswell & Partners Ltd* (2009) 128 Con LR 154 at 212.

⁷ See separate head of claim (1)(iii) 'Costs of delay caused by additional works.'

At this early stage in the project, in accordance with its programme and the predicted preliminaries expenditure based on the contract bills, the contractor had already committed to site the following management and other staff:

1 no. site agent	resident on site	£500.00/wk.	£ 500.00
1 no. sub agent	resident on site	£450.00/wk.	£ 450.00
1 no. site clerk	resident on site	£350.00/wk	£ 350.00
1 no. section engineer	ave. 2 days/wk.	£440.00/wk.	£ 176.00
1 no. chainman	ave. 2 days/wk	£100/wk	£ 40.00
1 no. quantity surveyor	resident on site	£430.00/wk	£ 430.00
Weekly⁸ preliminaries cost of management and staff			£1,946.00/wk

A contracts manager, bonus surveyor and senior quantity surveyor all visited site regularly from head office throughout the project. However, the contractor has priced the contract bills in such a way that it is intended that their costs are recovered through the contractor's overall allowance for overheads. These costs are dealt with later in this analysis.

The contractor's site management and staff are retained on site during the whole of the delay period and the quantity surveyor calculates the loss and expense on the cost of time-related management and staff to be:

Period of critical delay	4 weeks @ £1,946.00/wk	= £7,784.00 <i>to collection</i>
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(b) *Site accommodation*

By the time the delay occurred, the contractor had already brought to site much of its intended site establishment and this was in accordance with its preliminaries forecast based on the contract bills. On site between weeks 4 to 7 inclusive were:

3 no. site offices	£160.00/wk
1 no. site toilet unit	£140.00/wk
1 no. site store	£130.00/wk
1 no. canteen/drying room	£165.00/wk

The accommodation is retained on site during the whole period of investigation, decision-making and redesign and the quantity surveyor calculates the loss and expense of the time-related site accommodation to be:

3 no. site offices	£160.00/wk. each × 3 × 4 weeks	= £1,920.00
1 no. site toilet unit	£140.00/wk. × 4 weeks	= £560.00
1 no. site store	£130.00/wk. × 4 weeks	= £520.00
1 no. canteen/drying room	£165.00/wk. × 4 weeks	= £660.00
		£3,660.00
		<i>to collection</i>

⁸ Calculated on a five day week.

(c) Services and facilities

Against the items for power, lighting, fuels, water, telephone and administration the contractor has made an overall allowance in the contract bills equivalent to £1.20/m²/wk. The total floor area of accommodation referred to above is 220 m² (i.e. item b) 'Site accommodation') and the quantity surveyor calculates the loss and expense of the time-related services and facilities to be:

$$220 \text{ m}^2 \times \text{£}1.20 \times 4 \text{ weeks} = \text{£}1,056.00$$

to collection

(d) Safety, health and welfare

Against this item the contractor has a time related allowance in the contract bills of £200.00/wk. The quantity surveyor calculates the loss and expense associated with the safety, health and welfare costs to be:

$$\text{£}200.00 \times 4 \text{ weeks} = \text{£}800.00$$

to collection

(e) Storage of materials

The contractor has shown no separate allowance in the contract bills for either the stores and/or attendance by a resident storeman/site clerk associated with the storage of material. Their costs are catered for in the site accommodation and staff items noted above. The quantity surveyor therefore calculates the loss and expense associated with storage of materials costs to be:

£incl.
to collection

(f) Rubbish disposal

Against an item for rubbish disposal in the contract bills the contractor has an allowance of an average of five skips per week over the period of the contract. Each skip is valued at £165.00 which is taken to be the cost of the skip hire, skip removal and a further allowance for site labour associated with the task of rubbish removal. The quantity surveyor calculates the loss and expense associated with rubbish removal to be:

$$\text{£}825.00 \times 4 \text{ weeks} = \text{£}3,300.00$$

to collection

(g) Cleaning

Against an item for cleaning in the contract bills, the contractor has a time-related allowance of £2,750.00 for the whole of the contract period. The quantity surveyor calculates the loss and expense associated with cleaning to be:

$$(\pounds 2,750.00 \div 106 \text{ weeks}) \times 4 \text{ weeks} = \pounds 103.77$$

to collection

(h) Drying out

Against this item the contractor has entered a time-related allowance of *£nil* in the contract bills. The quantity surveyor has therefore made no allowance in the calculation for any costs associated with this item:

$$\pounds \text{nil}$$

to collection

(i) Protection of work

Against this item in the contract bills the contractor has shown a time-related allowance totalling $\pounds 7,200.00$ for the whole period of the contract. The quantity surveyor calculates the loss and expense associated with protection during the period of delay to be:

$$(\pounds 7,200.00 \div 106 \text{ weeks}) \times 4 \text{ weeks} = \pounds 271.70$$

to collection

(j) Security

Against this item in the contract bills the contractor has a time-related allowance of $\pounds 15,000.00$ for the whole of the contract period. The quantity surveyor calculates the loss and expense associated with security to be:

$$(\pounds 15,000.00 \div 106 \text{ weeks}) \times 4 \text{ weeks} = \pounds 566.04$$

to collection

(k) Maintenance of public and private roads

Against this item the contractor has provided for a time-related allowance of $\pounds 3,750.00$. In the analysis of programmed expenditure of preliminaries agreed between the contractor and quantity surveyor before work began, that amount was shown as being expended in the following way:

	% of total, expended in equal proportions weekly
month 1	35
month 2	25
months 3–24	35
month 25	5

The quantity surveyor calculates the loss and expense associated with maintenance of public and private roads to be:

$$\begin{array}{r}
 (\pounds 3,750.00 \times 35\%) \div 4 \text{ weeks} \times 1 \text{ week} \\
 (\pounds 3,750.00 \times 25\%) \div 4 \text{ weeks} \times 3 \text{ weeks} \\
 \hline
 \pounds 1,031.26 \\
 \text{to collection}
 \end{array}
 = \pounds 328.13$$

(l) Small plant and tools

Against this item in the contract bills the contractor has made an overall time-related allowance of £9,500.00. In the analysis of programmed expenditure of preliminaries agreed between the contractor and quantity surveyor before work began, the amount was simply spread equally throughout the contract period. The quantity surveyor calculates the loss and expense associated with small plant and tools to be:

$$(\pounds 9,500.00 \div 106) \times 4 \text{ weeks} = \pounds 358.49 \text{ to collection}$$

(m) Mechanical plant – earthmoving and concrete plant

By the time the underground obstructions had been discovered the contractor was committed to sending – and had already sent to site – the following plant, in anticipation of beginning excavation and construction of pile caps and ground beams:

tracked excavator	1 no.
dumper truck	1 no.
concrete mixing plant and cement silo	1 no.

This was considered reasonable by the architect.

During the period of delay, the excavator and dump truck were retained on site as was the mixing plant and silo which were both constructed in position ready for operation. Based on standard hire charges for plant of the type concerned (without operatives), the quantity surveyor has calculated the loss and expense on these items to be:

tracked excavator	£1,500.00 × 4 weeks	= £ 6,000.00
dumper truck	£ 500.00 × 4 weeks	= £ 2,000.00
concrete mixing plant and silo	£2,500.00 × 4 weeks	= £10,000.00
		<u>£18,000.00</u>
		<i>to collection</i>

(n) Mechanical plant transport

A site vehicle for general use throughout the period of the project has been allowed by the contractor in the contract bills. It has been valued by simply inserting a lump sum of £14,000.00 (including fuel, running costs and driver). The quantity surveyor has calculated that the contractor is due to loss and expense associated with this vehicle amounting to:

$$(\pounds 14,000.00 \div 106) \times 4 \text{ weeks} = \pounds 528.30 \text{ to collection}$$

(o) Temporary works

The contractor has allowed in the contract bills for ongoing maintenance necessary to repair the normal degradation of specific hardstandings which will need to be created on the site during the construction process. The amount concerned is provided as a lump sum of £10,000.00. One such hardstanding is already constructed by the time the underground obstructions are discovered and the quantity surveyor has calculated that the contractor is due to loss and expense associated with additional maintenance throughout the four weeks delay of:

total area of hardstanding = 2,000 m ²	
area laid at time of delay = 297 m ²	
programmed duration	
for provision of 297 m ² of	
temporary hardstanding = 8 weeks	
cost attributed to maintenance of 297 m ² for	
four week delay = $(£10,000.00 \div 2,000) \times 297 \div 8 \times 4 =$	£742.50
	<i>to collection</i>

Collection of costs for underground obstructions

Management and staff	£7,784.00
Site accommodation	£3,660.00
Services and facilities	£1,056.00
Safety, health and welfare	£800.00
Storage of materials	£incl.
Rubbish disposal	£3,300.00
Cleaning	£103.77
Drying out	£nil
Protection of work	£271.70
Security	£566.04
Maintenance of public and private roads	£1,031.26
Small plant and tools	£358.49
Mechanical plant: earthmoving and concrete plant	£18,000.00
Mechanical plant transport	£528.30
Temporary works	£742.50
Total loss and expense for 4 weeks'	<hr/>
delay to summary	£38,202.06

(ii) Cost of unproductive labour

In addition to the losses associated with time-related cost items, the contractor has suffered losses in respect of certain costs resulting from unproductive output for measured works which the quantity surveyor must also take into account. Within the rates and prices for the measured work in substructures programmed to be done at the time of the delay, the contractor made allowance for:

2 no. civils gangers	wage cost at £340.00/wk/each
6 no. labourers	The labour element of the measured rates for substructure works are calculated on an average cost of £203.72/wk. per operative, based on a 37 ¹ / ₂ -hour week, including employer's national insurance contribution, graduated pension, holidays with pay, wet and guaranteed time, bonus payments and other similar on-costs and with an allowance for head-office overheads, on costs and profit of 11%.

The gangers are retained on site. Each ganger is almost wholly unproductive during that time except that, for some 20% of the time one was moved to another site. So far as the labourers are concerned they, too, are largely unproductive throughout the period of delay. During that time the contractor was prevented from carrying out a programmed amount of work worth £16,300.00 (incl. overheads and profit). Instead, it carried out only £2,750.00 (incl. overheads and profit) worth of that work in the same four week period. Given that the work is labour intensive and assuming a labour/plant/material ratio of 80 : 12.5 : 7.5 the programmed labour return compared with the actual net labour return in the period will be £11,747.75 and £1,981.98 respectively. The labour has, therefore, been unproductive to the tune of £9,765.77 or 83.13% of net programmed return on labour.

Loss due to unproductive time on measured work:

4 wks × £340.00 × 1 ganger	= £1,360.00
4 wks × £340.00 × 1 ganger × 80%	= £1,088.00
4 weeks × 6 labourers @ £203.72 × 83.13%	= £4,064.46
	<u>£6,512.46</u>
	<i>to summary</i>

(iii) Cost of delay caused by additional works – one week delay

The additional work involved the contractor in engaging another civil engineering supervisor and other staff on the project for the period of this extra work. The costs of the supervisor and the staff concerned will already have been taken into account in the valuation of the additional work in accordance with clause 5.6 of the contract. The contractor's entitlement under clause 4.23 is, therefore, confined to the costs, if any, associated with the critical delay which results in the further one week overrun to the completion of the contract. The quantity surveyor has calculated that loss and expense to be:

One week at the total weekly rate from the collection of item (i) a) to o) above, viz:

1 week × £9,550.52 per week	= <u>9,550.52</u>
	<i>to summary</i>

Observations on claim No. 1**(i) Cost of delay during redesign****(a) *Management and staff***

The quantity surveyor has, quite correctly, ascertained the loss and expense that accrued at the time the delay arose. So far as the individual operatives are concerned it is difficult to see how each of the individuals was totally unproductive. The management and staff identified are likely to have carried out some productive work even though operations out on site are suspended. For example:

- the site clerk's day-to-day duties may well not be directly affected by a delay to progress on site;
- the quantity surveyor will no doubt still have much that can be done that was not affected by the delay; and
- the site agent and sub agent may well have been able to carry out preparatory work for other future planned operations on this site or perhaps might even be able to lend short-term assistance associated with work on other projects.

The contractor's duty is to minimise the loss occasioned by the delay, so far as it reasonably can do.⁹ To that end it must make the best possible productive use of the staff involved and the quantity surveyor will want to be satisfied that the personnel claimed for were, in fact unavoidably unproductive as a consequence of the delay in question.

So far as the calculation of the contractor's loss is concerned; it appears from this example that the quantity surveyor has adopted the contractor's rates in the preliminaries section of the contract bill as equating to the cost of the claimed staff and management. In practice, for various reasons those rates are likely to differ from the true cost to the contractor of employing each of the individuals concerned. Since the contractor's entitlement is to be reimbursed its direct loss and/or expense, the quantity surveyor should calculate that loss and expense by reference to actual cost.

Most contractors these days, irrespective of size, will have computerised wage and other cost records and so, it would not be unreasonable to presume that an accurate record of staff costs can readily be made available to the quantity surveyor. In any event the quantity surveyor should start from the position of establishing the contractor's true cost. Much of the speculation and conflict which surrounds the ascertainment of loss and expense claims could no doubt be substantially reduced and perhaps even avoided altogether if, as soon as the contractor has notified the architect that it has become apparent that the Works are being delayed, the architect and/or quantity surveyor made it clear to the contractor what records they will expect to have available to them and in what format they should be

⁹ See Chapter 6, Section 6.4.

produced. Indeed, that is one of the reasons why the contractor's application must be made promptly and why, if the contractor delays in making its application, it should not be given the benefit of any doubt.

On the general question of cost versus preliminaries; there is a school of thought which says the contractor is not, in fact, precluded from being reimbursed at the rates used in the preliminaries section of the contract bill. Indeed, it has been argued that the contractor is entitled to recover *either* its actual staff cost or its preliminaries allowance, whichever is the greater.

The rationale behind this proposition seemingly is that, since the contractor is entitled to recover its loss then, if the true cost exceeds the preliminaries rate the true cost will clearly be the measure of that loss. However, if preliminaries rates exceed the true cost then, provided the contractor can demonstrate that those preliminaries rates are rates that it consistently and successfully recovers on similar contracts, the fact that it is retaining the relevant staff on this project longer than envisaged means that it is prevented from deploying that same staff on other work where they would provide the return. Arguably, since the time-related charges are generally intended to reflect the contractor's true preliminaries costs, the quantity surveyor will have reviewed the potential accuracy of those rates and prices when initially assessing the contractor's tender. If obvious and seriously inflated the quantity surveyor will no doubt have raised and hopefully have resolved the point before the employer executes the contract.

However, on the principle that loss and/or expense is to be recovered on the same basis as damages for breach of contract, actual costs are to be used unless there are powerful reasons to the contrary.

(b) *Site accommodation*

Whereas it may well be relatively simple to re-deploy staff or to temporarily re-allocate them to alternative productive tasks during short periods of delay so as to mitigate the cost implications of the delay, the same is not generally true of site accommodation. Even if it could be re-deployed, the economics of dis-establishing and re-establishing it again at a later date would be likely to militate against such re-deployment and so it is reasonable to suppose, in the present circumstances, that the contractor should be reimbursed for the cost of the various facilities claimed.

However, once again the quantity surveyor appears to have based the calculation on the contractor's rates in the preliminaries section of the contract bills and not on the true cost of the accommodation concerned. What is more, with the possible exception of the toilet unit, the cabins in question may well be the contractor's own property, as is commonly the case, and not hired in simply for this project. Therefore, the quantity surveyor will wish to determine whether or not they do belong to the contractor. If they are the contractor's property the amount to which the contractor will be entitled by way of loss and expense will be considerably less and will amount simply to a figure calculated by reference to the depreciation on the asset value¹⁰

¹⁰ See Chapter 7, Section 7.3.8.

with, perhaps, a further allowance for additional repair and maintenance costs (see below). In the event that any service costs associated with the cabins (such as toilet facilities) are also included in the rates, the quantity surveyor will also want to be satisfied that any genuine tangible reduction in those service costs resulting from the suspension/delay will be credited against the loss and expense that would otherwise be due to the contractor.

(c) *Services and facilities*

Following the principle that the contractor is entitled to recover only its actual cost in respect of each of the items referred to, the quantity surveyor should ascertain the contractor's losses by reference to the actual charges incurred for the period concerned. However, the quantity surveyor must also apply a realistic approach to the exercise of ascertainment. Clearly, the quantity surveyor is not free to disregard the contract terms in undertaking the ascertainment process. But the quantity surveyor's judgment and expertise must be applied to the task. That is to say, there can be little or no justification for spending an inordinate amount of time and cost in insisting on cost records which themselves may produce an inexact result. That is particularly so when, taking into account the possible margin of error likely to result, applying a properly considered tender rate may well prove more cost effective in the long run. The occasions when that is likely to be the case are probably few but there may be some merit in approaching the ascertainment of these particular items on the basis adopted in the example above. That is to say, by reference to the allowance in the contract bills related to the superficial floor area of the site accommodation.

Accounts for items such as fuel, telephones, lighting etc, are often rendered a month or more in arrears. They may often be based on estimated readings and may often include fixed rental or similar charges for the forthcoming quarter or other accounting period. It can be difficult, if not in fact impossible, to differentiate between costs attributable directly to the delay and those which may well have little or no bearing on the delay. However, it may be more appropriate to base any assessment on the available cost records for the site even if that would produce an estimate rather than an ascertainment. Such an approach would at least have some relationship to the site costs being incurred which the rates and/or prices in the contract bills do not.

(d) *Safety, health and welfare*

As a general principle the quantity surveyor should look to establishing the true cost of the items concerned and not some theoretical average weekly cost included in the contract bills. It is quite possible that specific relevant cost records for things such as safety officer's site visits and the like will not necessarily be readily available, and it has to be conceded that, like the electricity, fuel and other costs referred to above, there is some practical merit in approaching valuation of this item by reference to the preliminaries allowance. However, at the very least the quantity surveyor must be satisfied

that the allowance concerned realistically reflects the costs that the contractor is likely to incur in respect of such items. It is of course reasonable to expect the contractor to make a time-related allowance for this item in the contract bills, whilst for convenience that allowance may well be calculated by reference to average weekly (or perhaps monthly) costs. Many of the recurring weekly or monthly costs associated with safety, health and welfare will largely depend on the amount of work done and the level of staffing in any particular week or month of the project.

Quite simply, the time and cost dedicated to the safety, health and welfare matters will be relative to the number of operatives on site and to the activities in which they are involved. The extent to which the contractor has chosen to sub-let work and the terms on which it may have agreed to provide safety, health and welfare facilities to those sub-contractors may also have a bearing on the cost that the main contractor actually bears in this respect. It follows that if work is delayed and the labour force (or sub-contract attendance) is consequently significantly, temporarily, reduced – or is largely inactive – then it is quite conceivable that costs of these time-related preliminaries may also be significantly below the average.

(e) *Storage of material*

The contractor has made no separate allowance for either the stores and/or attendance by a resident storekeeper/site clerk associated with the storage of material. The quantity surveyor obviously considers that the adjustment to the site accommodation and staff will cover any additional storage costs.

It should not be forgotten that if the contractor can demonstrate that it has incurred additional storage costs as direct result of the delaying items then an entitlement may exist. However, it is likely that such costs would be picked under clause 5.6 and therefore care would need to be taken to ensure that this head of claim was not covered more than once.

(f) *Rubbish disposal*

Once again the quantity surveyor appears to have referred to the contractor's preliminaries allowance as opposed to the true cost of providing facilities for the removal of rubbish from the site when ascertaining the contractor's loss. Having quite possibly arranged for skips to be delivered to site before realising the Works were to be suspended, it could reasonably be the case that the costs of temporarily removing them from site and then subsequently returning them again later would far outweigh the ongoing hire cost, if any, pending resumption of the work. Moreover, the contractor might legitimately argue that, without the aid of a crystal ball, it could have had no way of knowing from one day to the next when the delay would come to an end. Consequently, even if it transpires that it would have been more economical to remove and return the skips at a later date, that would not have been a practical option and so the contractor would reasonably expect to be paid any additional hire charges resulting from the delay.

The quantity surveyor also appears to have ignored the fact that, even if in the particular circumstances it was appropriate to value the contractor's

loss by reference to the preliminaries rate, the rate includes allowance for skip removal and a further allowance for site labour associated with the task of rubbish removal. An adjustment for those allowances would seem appropriate, in any event, given the reduction in onsite activity.

(g) *Cleaning*

So far as cleaning is concerned, generally the same observations as those made above could be made against this head of claim i.e. the use of the contract rates and/or prices and whether the same level of cleaning was required given the reduction in onsite activity.

(h) *Drying out*

Here the quantity surveyor has valued the item at £nil on the premise that the contractor entered no value against this item in the contract bills. The fact that the contractor is entitled only to its costs and not to some theoretical preliminaries valuation in this case works to the contractor's advantage. This is because irrespective of the absence of a contract rate and/or price for this work, if it transpires that the contractor has incurred a cost under this head then there is no reason in principle why it should not recover that additional cost incurred due to the delay.

(i) *Protection of the Works and Security*

It is entirely reasonable to expect the contractor to have to protect the Works and maintain security throughout the additional period associated with the delay. Indeed, it may even be argued that during that period of inactivity increased protection and security may have been necessary.

Any additional protection of the Works during the suspension would have been specific and therefore the actual additional costs should be relatively easy to identify. Also, it is not uncommon for contractors nowadays to engage the services of private security companies and even if an inhouse watchman and other security arrangements were adopted there is no obvious reason why the quantity surveyor should refer to the preliminaries rates rather than proper cost records to provide evidence of the contractor's loss and expense.

(j) *Maintenance of public and private roads*

Leaving to one side the obviously erroneous use of theoretical rates and calculations derived from the contract bill, the quantity surveyor must also consider whether or not the head of claim is likely to cause additional loss and/or expense. For example, despite convenient reference to it as a time-related cost, the need for ongoing maintenance of public and private roads may well have more to do with the work done than the time taken to complete the project. In short, although described as time-related, it is difficult to see how, subject to weather conditions, the roads in question will require maintenance so as to warrant the contractor being paid additional loss and expense when the site is effectively at a standstill during that time and the roads concerned are not, therefore, in use.

(k) *Small plant and tools*

The cost records should form the basis of the quantity surveyor's calculation. Moreover, it should not be forgotten that the contractor has an underlying duty to mitigate the costs associated with the delay. Whether or not the items of small plant, tools and equipment are owned or hired in by the contractor, they may well have been readily taken off hire or transferred for use on other projects. The quantity surveyor should, therefore, be satisfied that the contractor is not claiming for what could have been avoidable costs. Once satisfied that that is not the case, then again the amount to which the contractor is entitled will vary greatly depending on whether or not the tools and equipment concerned are hired or owned in house.¹¹ Even if the use of the preliminaries rates could be justified on practical grounds, given the relatively insignificant value of this item and the relative margin for error likely to arise from adopting those figures, the quantity surveyor has used what amounts to an average weekly cost. Since the nature, extent and quantity of small plant, tools and equipment necessary on the site depends on the nature of the work being done at any given time, it is not justifiable to merely adopt the average weekly rate in the contract bills.

(l) *Mechanical plant: earthmoving and concrete plant*

The ascertainment will involve the quantity surveyor in more than simply applying, as has been done here, standard hire charges upon which the contract price was based to a multiplicand which represents the number of weeks of delay. The quantity surveyor must once more consider whether the contractor could realistically have arranged for the plant and machinery concerned to be taken off hire or temporarily removed from site pending resumption of the Works. Since it costs money to take plant from the yard to the site and back to the yard and then back to the site again, the financial consequences of this would have to be carefully considered. That is to say, would the removal and re-mobilisation costs have outweighed the likely savings?

There is also the fundamental question of whether or not the plant and equipment sent to site is hired or owned by the contractor. It may of course be that the contractor's rate upon which the preliminaries are based properly reflects the correct hire charge and that the contractor fully intended to hire in the plant concerned but when the time came, it utilised in-house plant that was available at the time. There will be a significant difference in what the contractor is entitled to be reimbursed depending on whether the items concerned are owned or hired in. Finally, even when considering cost records, if the equipment is hired, the quantity surveyor will want to consider whether the rate(s) claimed include some allowance for an operator/driver or for fuel, maintenance or other such work-related costs that would be unlikely to arise during periods of inactivity.

¹¹ See Chapter 7, Section 7.3.8.

(m) Transport: site vehicle

The principles that apply to heavy mechanical plant and equipment referred to in item (l) above do not differ when considering any loss associated with site transport.

(n) Temporary works: hardstandings and roads

Although the preliminaries items in the contract bills offer a good checklist of the likely heads of cost and/or loss that the contractor may incur as a consequence of delay to the Works, they should not be blindly followed. Leaving to one side the obviously erroneous use of theoretical rates and calculations derived from the contract bill, the quantity surveyor must also consider whether or not the head of claim is likely to cause additional loss and/or expense. For example, despite convenient reference to it as a time-related cost, the need for ongoing maintenance of road(s) and/or hardstanding(s) may well have more to do with the work done than the time taken to complete the project. In short, although described as time-related, it is difficult to see how, subject to weather conditions, the road/hardstanding in question will degrade over a two or three week period so as to warrant the contractor being paid additional loss and expense when the site is effectively at a standstill during that time and, therefore, the hardstanding and/or road concerned is not in use.

(ii) Cost of unproductive labour

Here, the quantity surveyor has quite rightly had regard to the contractor's wage records for the costs associated with the gangers concerned. Quite correctly, too, account has been taken of the time when one of the gangers was deployed elsewhere and so was productively employed. However, the quantity surveyor appears to have disregarded the fact that some productive work was done by the labour force and so one would expect a further proportion of the gangers' costs to be offset against that (albeit reduced) productivity.

Regarding the loss associated with the alleged reduction in the productivity of labourers; the quantity surveyor will want to be satisfied that the reduced output is not due simply to either poor management on the contractor's part or to some other inefficiency of the operatives concerned. The quantity surveyor will also want to be convinced that the measure of efficient working, namely the rate of output envisaged in the contract bills is, in fact, a reasonably realistic prospect. In essence the questions are:

- (1) was the expected output reasonable in the first place? *and*
- (2) could the contractor have achieved a far better rate of production than it did in fact achieve? It follows from this question that the quantity surveyor must be reasonably satisfied that there is a link between the alleged delay and the alleged financial consequences of it.

The quantity surveyor will only be in a position to properly ascertain the resulting loss if those two facts have been established.

(iii) Cost of delay caused by additional works

The quantity surveyor has simply applied an all-in weekly rate for the time-related costs derived from that calculated for Claim 1(i). Therefore, for the reasons already outlined above, the use of the figure is open to criticism.

Claim no. 2 Heavy snow

The architect has notified the quantity surveyor that this is not a matter under clause 4.24 and, therefore, the contractor is not entitled to any additional costs for delay associated with this item.

Claim no. 3 Statutory undertakers: mains electric supply

The architect has notified the quantity surveyor that this is not a matter under clause 4.24 and, therefore, the contractor is not entitled to any additional costs for delay associated with this item.

Observations on claims nos. 2 and 3

The architect has granted an extension of time in respect of these two events. However, there is no direct relationship between the provisions for extension of time and those for reimbursement of loss and expense.¹² The contract makes clear that the contract sum shall not be adjusted otherwise than in strict accordance with the express provisions of the contract.¹³ So far as losses resulting from delay and/or disruption are concerned, clauses 4.23–4.26 of the contract alone set out the circumstances giving rise to entitlement and nowhere in clauses 4.23–4.26 is the contractor given the right to recover these costs. The architect's opinion has been given to the quantity surveyor that this part of the claim for loss and/or expense has no validity. The quantity surveyor, therefore, has no option but to ignore any such costs in ascertaining the contractor's overall entitlement under the contract.

Claim no. 4 Contractor's public holidays: delay two weeks

Delays caused by the preceding relevant events have pushed the completion beyond the Christmas/New Year holiday 2010/11. It will not be delayed beyond Easter 2011, but because the project will extend beyond the two week 'construction industry holiday period', the quantity surveyor calculates the contractor's entitlement as:

2 weeks × the total weekly rate from the collection of Claim no. 1 items (a) to (o) above:

2 weeks × £9,060.52 per week

£18,121.04
to summary

¹² See Chapter 13, Section 13.1.2.

¹³ Clause 4.2.

Observations on claim no. 4

On a strict reading of the contract, the contractor is not entitled either to an extension of time or to payment of loss and expense resulting from the contract period being carried over a previously irrelevant holiday.¹⁴ This is on the simple basis that the contractor entered into a contract which provided for extensions of time and loss and/or expense in certain circumstances and the contractor must have been aware that the contract period might be extended or prolonged into a holiday period. The courts have not been slow to acknowledge the fact that a certain type of consequential loss will generally give rise to an entitlement, despite the absence of an express term of the contract to that effect, but that is generally in connection with a contractor being forced to work in less advantageous conditions. The principle is quite simple. If a delay is caused by an event which gives rise to an entitlement and that delay then pushes the contract over into a public holiday or other disruptive or delaying period then, the consequential loss and expense may be recoverable.¹⁵

In this example the situation for the architect is, of course somewhat complicated since the contractor has suffered three separate delay events – the fourth relates to the Christmas holiday. Two are not the financial responsibility of the employer and the question therefore is; did the contract period extend into, and beyond, the holiday period as a direct result of a matter referred to in clause 4.24 or, alternatively, was it the result of the heavy snow or the Statutory Undertaker, neither of which carry any entitlement? Only when reasonably satisfied that it is a relevant matter referred to in clause 4.24 can the architect confidently instruct the quantity surveyor to include the loss and expense concerned in the ascertainment under the contract. In this case given the timing and nature of events it would appear unlikely that the contract period extended into the holiday period because of a clause 4.24 matter.

Even if it is assumed that the architect has carried out the necessary analysis, for the reasons already explained the quantity surveyor must have regard to actual costs and not to preliminaries rates and prices to ascertain the financial consequences. Since the period during which the loss is incurred is the unforeseen holiday break then it is the cost associated with that particular period in the contract on which the quantity surveyor should concentrate attention.

The quantity surveyor has, however, simply applied an all-in weekly rate for time-related costs derived from an analysis of an entirely unrelated period and even then for the reasons already outlined, that figure is itself open to criticism. The quantity surveyor should consider whether, and if so to what extent, the costs accruing during the holiday period might be significantly lower than those of a normal working period. For example, plant may easily be taken off hire; certain wages may be payable from holiday credits for which the contractor has already made allowance in its rates and prices in the contract sum; and a closedown of the site will inevitably mean a tangible reduction in costs such as light, heating, telephone, administration, maintenance of plant and equipment and the like.

¹⁴ See Chapter 2, Section 2.3.7.

¹⁵ See Chapter 7, Section 7.2.

Claim no. 5 Increased costs

The contract is let on a fixed price basis. The quantity surveyor is aware that throughout the project and up until practical completion there have been increases in the cost of labour and certain materials. The contractor has claimed that it is entitled to be compensated for those increases and the quantity surveyor has calculated the contractor's entitlement adopting the NEDO indices (calculation not shown), and the resulting amount is:

£18,750.00
to summary

Observations on claim no. 5

Clearly if due to delays the contractor incurs labour or material increases that it would not otherwise have encountered then this is a real loss. However, in arriving at a proper ascertainment of that loss a number of factors must be considered. Use of a NEDO formula is undoubtedly a convenient expedient by which to mechanically ascertain an estimated loss and so avoid what would otherwise be a difficult and time-consuming exercise. It is for the contractor to supply detailed evidence supporting its claim for increases. Those difficulties are not underestimated. However, that is clearly not sufficient justification for the quantity surveyor to ignore ascertaining the contractor's true loss and cost and in doing so having to consider the particular circumstances of this project instead of applying general theoretical principles. For example, it may be that the contractor took delivery of 100% of its requirements before the expected increase. The difficulties in ascertaining the true extent of that loss may well be compounded further by the fact that when the contractor came to place its order, market forces allowed it to secure a deal with the supplier which resulted in it paying a significantly reduced price. An increase of 5% some eight months on might then result in a purchase price of less than the material rate on which the contractor's contract price is based. Those and other such particular circumstances might well make the quantity surveyor's task of ascertaining the increased cost a difficult and onerous one and there can be little justification for rejecting a proper analysis in favour of a theoretical approach.

Claim no. 6 Loss of contribution to head-office overheads

The quantity surveyor accepts the principle that, where the contractor is delayed and must retain resources on site for longer than anticipated then, if those resources do not produce a significant corresponding increase in the turnover achieved on this particular project there will be a shortfall in the contribution which will be made by the site to defray head office overhead costs.

The quantity surveyor has calculated the extent of that shortfall by establishing that the margin to be recovered, if based on the average margin recovered over the last three years, will be 11% as evidenced by an auditor's certificate to that effect.

The contribution to overheads anticipated to be recovered over the contract period of 106 weeks from the tender sum of £5,400,000 was therefore:

$$\frac{11}{111} \times \frac{\pounds 5,400,000}{106 \text{ weeks}} = \pounds 5,048.44 \text{ per week}$$

The 'final account' (without allowance for recovery of loss and expense) is £5,750,000 and so, the actual contribution to overheads that will be recovered over the actual contract period from the final account figure will be:

$$\frac{11}{111} \times \frac{\pounds 5,750,000}{126 \text{ weeks}} = \pounds 4,522.38 \text{ per week}$$

The shortfall in recovery is, therefore, estimated to be:

$$(\pounds 5,048.44 - \pounds 4,522.38) \times 126 \text{ weeks} = \pounds 66,283.56$$

However, since only events (1) and (4) above carry any entitlement to reimbursement of loss and expense pursuant to Clause 4.23, the quantity surveyor has calculated the loss and expense due to be:

$$\frac{11}{111} \times \frac{\pounds 5,750,000}{113 \text{ weeks}} = \pounds 5,042.65 \text{ per week}$$

The shortfall in recovery is, therefore, said to be:

$$(\pounds 5,048.44 - \pounds 5,042.65) \times 113 \text{ weeks} = \pounds 654.27$$

to summary

Observations on claim no. 6

The quantity surveyor has adopted what is commonly referred to as a formula approach to ascertaining the contractor's entitlement. There has been much debate about the applicability and use of such formulae¹⁶ which only deal with the matter of quantum and not an entitlement in principle.¹⁷ The proposition put forward is essentially this: after making their best estimate of the prime cost of the Works, contractors when tendering tend to add a single percentage uplift to the prime cost rates and prices. In this way they provide, in the distribution of those rates across the whole scope of the work, for a contribution to the general overheads and profit of the company. When the contractor is delayed, the contractor's loss and expense resulting from that delay will hopefully include a proportionate extension of this percentage. Put simply, if the contractor expects this project to contribute 10% of the contract sum to the company's overheads and profit¹⁸ throughout, say, a 106 week contract period and if the contract period becomes 126 weeks and there is no corresponding increase in contribution, the contractor will have recovered less than

¹⁶ See Chapter 7, Section 7.3.3 under 'Use of formulae'.

¹⁷ See Chapter 7, Section 7.3.3 under 'Formulae in common use'.

¹⁸ See Chapter 7, Section 7.3.4.

expected in respect of overheads and profit. On the face of it the simplicity and logic of that proposition is attractive and difficult to deny.

Indeed, since first mooted in *Hudson's Building and Engineering Contracts*, other respected works have been cited as giving express approval to the proposition. But, that conveniently ignores the warnings that all proponents of the formula approach give concerning its use.¹⁹

The most fundamental of these must be that its application depends on a basic presumption, which the contractor must of course substantiate, that the percentage claimed would have been capable, in fact, of being earned elsewhere had it not been for the delay concerned²⁰. This itself depends on two further presumptions. First, that the contractor did not underestimate the true cost and therefore the predicted resource level and/or duration of the Works. Secondly, that subsequent market trends have not changed so as to reduce the potential for achieving that contribution from work elsewhere.

Moreover, the criteria which must be met before consideration can legitimately be given to using a formula approach to ascertainment have been further expanded since a formula first appeared in *Hudson's* 10th edition. Finally, it should not be forgotten that the philosophy behind this head of claim depends largely on the argument that the contractor was unable to deploy its resources on this delayed project to work elsewhere during the period of delay. With the extensive use of sub-contractors and, in particular, labour-only sub-contractors over recent years and with the flexibility that sub-contracting offers main contractors when deciding on their capacity to take on further work, the argument that the contractor was forced to turn work away because its labour force was already committed on the late project is now more difficult to sustain.

A.4 Generally

It is worth repeating that all figures used in these examples are entirely imaginary. They are merely a means to an end. It is important to read the observations with the examples in order to understand the principles of ascertainment, because the imaginary quantity surveyor has not carried out an ascertainment in the best possible way. The loss must have followed directly from the event and evidence should be produced to support the amount claimed and/or ascertained.

It may be true that the contractor's recovery against overheads and profit during the original contract period may, week by week, have been less than anticipated. The shortfall may, in fact, have been made up in the period of overrun during which the contract will have been earning an overhead recovery on additional work done, but not previously anticipated. Additional site supervision costs would clearly be a recoverable head of claim but a direct causal relationship would have to be established between the alleged cause of delay and the necessity to employ supervisory staff for the additional period. The figures would also require substantiation by way of wages sheets or the like.

¹⁹ See Chapter 7, Section 7.3.3 under 'Use of formulae'.

²⁰ See Chapter 7, Section 7.3.3 under 'The principle'.

A claim for increased costs is in principle permissible, but the method adopted is wholly unsatisfactory. Unless the parties have agreed otherwise, it is inappropriate to use a theoretical index-related approach. Indeed, over the period concerned this could even work to the contractor's disadvantage and insistence on a proper investigative approach should not be seen as merely an attempt to make life difficult for the contractor but more a means of arriving at what, after all, is said in the contract to be an ascertainment of the losses incurred.

Loss of productivity or uneconomic working is a possible head of claim, and is particularly difficult to assess as regards labour. Some indication has been given earlier in this book about the best way of keeping labour records, and it is certainly not permissible, as this quantity surveyor's ascertainment tends to suggest, to add what amounts to an arbitrary percentage to the allegedly anticipated labour costs.²¹

It is evident that the loss will vary according to the circumstances of the case and even where the actual labour cost is compared with that contemplated at the time of tender, this will necessitate abstracting the labour element from the contract price and the actual labour costs from the contractor's records. The gross difference between these two figures must be further adjusted to take account of any actual labour costs expended as a result of unclaimable circumstances, such as contemporaneous delay and disruption arising from *force majeure* or from the contractor's own inefficiency. Even this approach falls short of the ideal since it relates facts in the form of the ascertained actual costs to an estimate of what the costs otherwise would have been. The difference between the two, of course, is itself an estimate and not a fact. For this kind of approach to have any reasonable prospect of success, the contractor must put forward convincing evidence that the labour costs contemplated were reasonable at the time *and* capable in fact of achieving the work output required by the original work content.

Finally, there is no reference to interest or to finance costs under the principles established in *F G Minter Ltd v. Welsh Health Technical Services Organisation* (1980). It seems that, the substantial differences in wording between clause 24 of JCT 1963 and clause 4.25 of the 2005 edition virtually rule out any such entitlement in practice, although in theory it still exists, because, if properly administered the contract should now ensure that the contractor's loss and/or expense is largely reimbursed from month to month as it incurs it; and so finance charges therefore should be minimal.²² Nevertheless, it *may* be possible for a contractor to establish such an entitlement, and it should certainly not be ruled out altogether.

²¹ See Chapter 7, Section 7.3.5.

²² See Chapter 7, Section 7.3.10.

Table of cases

The following abbreviations of reports are used:

AC, App Cas	Law reports, Appeal Cases
All ER	All England Law Reports
ALJR	Australian Law Journal Reports
ALR	Australian Law Reports
APCLR	Asia-Pacific Construction Law Reports
BCL	Building and Construction Law
BCLC	Butterworth's Company Law Cases
BLM	Building Law Monthly
BLR	Building Law Reports
BURR	Burrow
Camp	Campbell's Reports
C&F	Clark & Finnelly's House of Lords Cases
Ch App	Chancery Appeal Cases
Ch, Ch D	Law Reports, Chancery Cases/Division
CILL	Construction Industry Law Letter
CLC	Commercial Law Cases
CLD	Construction Law Digest
CLR	Commercial Law Reports (Canada)
Com Cas	Commercial Cases
Con LR	Construction Law Reports
Const LJ	Construction Law Journal
CP	Common Pleas
CSIH	Court of Session Inner House
CSOH	Court of Session Outer House
Ct Cl	Court of Claims Reports
DLR	Dominion Law Reports
EG	Estates Gazette Cases
ER	English Reports
EWCA (Civ)	England and Wales Court of Appeal Civil Division
EWHC	England and Wales High Court
Ex, Exch, Ex D	Law Reports, Exchequer Cases/Division
F&F	Foster & Finlayson's Nisi Prius Reports
FSR	Fleet Street Reports
GWD	Green's Weekly Digest
H & C	Hurlstone and Coltman's Exchequer Reports
H & N	Hurlstone & Norman's Exchequer Reports

HLC	Clark & Finnelly's House of Lords Reports New Series
JP	Justice of the Peace & Local Government Review
JPL	Journal of Planning Law
KB	Law Reports, King's Bench
LGR	Local Government Reports
LJCP	Law Journal Reports, Common Pleas
LJ Ex	Law Journal Reports, Exchequer New Series
LJQB	Law Journal Queen's Bench
Lloyd's Rep	Lloyd's Reports
LR	Law Reports
LT	Law Times Reports
M & W	Meeson and Welsby's Exchequer Reports
NE	North Eastern Reports
NSWLR	New South Wales Law Reports
NY	New York Court of Appeal
NZLR	New Zealand Law Reports
P & CR	Planning and Compensation Reports
PD	Law Reports, Probate Division
QB	Law Reports, Queen's Bench
R	Rettie, Crawford & Melville, Session Cases
SCR	Supreme Court Reports
Sc LR	Scots Law Reports
ScotCS	Scottish Court of Session
ScotHC	Scottish High Court Decisions
(TCC)	Technology and Construction Court
TLR	Times Law Reports
UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
WAR	Western Australian Reports
WASCA	Western Australia Supreme Court: Court of Appeal
WLR	Weekly Law Reports
WWR	Western Weekly Reports (Canada)

<i>A & D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd</i> (2000) 17 Const LJ 199	223, 262
<i>Abbey Developments Ltd v PP Brickwork Ltd</i> [2003] EWHC 1987 (TCC).....	105, 106
<i>Aerospace Publishing v Thames Water Utilities</i> [2007] EWCA Civ 3; (2007) 110 Con LR 1.....	151
<i>Aktieselskabet Reidar v Arcos</i> [1926] All ER 140.....	70, 71, 72
<i>Alder v Moore</i> (1961) 2 QB 57 CA	76
<i>Alexiadi v Robinson</i> (1861) 2 F & F 679	220, 265
<i>Alfred McAlpine Capital Projects Ltd v Tilebox Ltd</i> [2005] EWHC 281 (TCC); (2005) 104 Con LR 39.....	65
<i>Alfred McAlpine Homes North Ltd v Property & Land Contractors Ltd</i> (1995) 76 BLR 65.....	148, 149, 154, 167, 294
<i>Alghussein Establishment v Eton College</i> [1988] 1 WLR 587	25, 84
<i>Allied Maples Group Ltd v Simmons & Simmons</i> [1995] EWCA Civ 17; (1996) 46 Con LR 134.....	153
<i>Altus (The) see Total Transport Corporation v Amoco Trading Co</i>	71
<i>Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC</i> [1952] 2 All ER 452	32, 249

Amantilla Ltd v Telefonos PLC (1987) 9 Con LR 139.....	5
AMEC Building Ltd v Cadmus Investment Co Ltd (1997) 13 Const LJ 50.....	105, 150, 155
AMEC Process and Energy Ltd v Stork Engineers & Contractors BV (<i>No 3</i>) [2002] EWHC B1 (TCC).....	174
Angelic Star, The [1988] 1 Lloyd's Rep 122.....	66, 67
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Appleby v Myers (1867) LR 2 CP 651.....	113
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Arenson v Arenson [1975] 3 All ER 901.....	14
Argyropoulos & Pappa v Chain Compania Naviera SA, unreported, 1 February 1990, abridged in 7-CLD-05-01	31
Ariston v Charley Records Ltd, The Independent 13 April 1990.....	61
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Ashville Investments Ltd v Elmer Contractors Ltd (1987) 37 BLR 55.....	470
Associated Distributed Ltd v Hall and Hall [1938] 1 All ER 511	75, 76
Astilleros Canarios SA v Cape Hatteras Shipping Co Inc and Hammerton Shipping Co SA [1982] 1 Lloyd's Rep 518.....	374
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Auto Concrete Curb Ltd v South Nation River Conservation Authority (1994) Const LJ 39	322
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Babacomp Ltd v Rightside [1974] 1 All ER 142.....	22
Babcock Energy Ltd v Lodge Sturtevant Ltd (1994) 41 Con LR 45	151
Bacal Construction (Midlands) Ltd v Northampton Development Corporation (1976) 8 BLR 88	9, 103, 114, 322
Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd (1996) 78 BLR 42	352
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Balfour Beatty Ltd v Chestermount Properties Ltd (1993) 62 BLR 1	24, 32, 39, 87, 184, 250
Ballast Wiltshire v Thomas Barnes & Sons Ltd, 29 July 1998, unreported	62
Banco de Portugal v Waterlow & Sons Ltd [1932] AC 452	126
Barque Quilpue Ltd v Brown [1904] 2 KB 261.....	27, 84, 99
Bath and North East Somerset District Council v Mowlem [2004] EWCA Civ 115 (2004) 100 Con LR 1.....	76
Baylis v Mayor of the City of Wellington (1886) 4 NZLR 84	90
Beattie v Gilroy (1882) 20 Sc LR 162.....	351
Beechwood Development Company (Scotland) Ltd v Stuart Mitchell (t/a Discovery Land Surveys) [2001] ScotCS 30.....	150, 159

Behzadi v Shaftsbury Hotels Ltd [1992] Ch 1.....	20
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Biffa Waste Services Ltd and Another v Maschinenfabrik Ernst Hese GmbH and Another [2008] EWHC 6 (TCC); (2008) 118 Con LR 104.....	67
Bilton (G) & Sons v Mason (1957) unreported	331
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Blackburn v Flavelle (1881) 6 App Cas 628.....	410
Boot (Henry) Construction Ltd v Central Lancashire New Town Development Corporation (1980) 15 BLR 8	239, 242, 295, 302, 303, 390, 402
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Boskalis Westminster Construction Ltd v Liverpool City Council (1983) 24 BLR 83.....	245
Bowmer and Kirkland Ltd v Wilson Bowden Properties Ltd (1996) 80 BLR 131.....	322, 346
Bramall & Ogden v Sheffield City Council (1983) 1 Con LR 30.....	79, 80, 394
Bremer Handelsgesellschaft MBH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep 109.....	129, 130
Brikom Investments Ltd v Carr (1979) 2 All ER 753	88
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British Sugar plc v NEI Power Projects Ltd (1987) 87 BLR 42.....	120
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Brodie v Cardiff Corporation [1919] AC 337	304
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Bruno Zornow (Builders) v Beechcroft Developments (1990) 6 Const LJ 132.....	47
Bryant (C) & Son Ltd v Birmingham Hospital Saturday Fund [1938] 1 All ER 503.....	116
Burden (R B) Ltd v Swansea Corporation [1957] 3 All ER 243	294, 324
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Chambers v Goldthorpe [1901] 1 KB 624.....	14
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City Inn Ltd v Shepherd Construction Ltd [2010] ScotCS CSIH 68 upholding [2007] CSOH 190,	11, 13, 37, 188, 227, 280
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Construction Partnership UK Ltd v Leek Developments [2006] EWHC B8 (TCC).....	133
Convent Hospital v Eberlin & Partners (1988) 14 Con LR 1.....	336
Conway v Crow Kelsey & Partner (1994) 39 Con LR 1.....	15
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Cremdean Properties Ltd v Nash (1977) 244 EG 547	114
Crosby (J) & Sons Ltd v Portland UDC (1967) 5 BLR 121	164, 193, 194, 195, 196
Croudace Construction Ltd v Cawoods Concrete Products Ltd (1978) 8 BLR 20.....	120, 121
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De Beers UK Ltd (Formerly: The Diamond Trading Company Ltd) v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC)	138
Demers v Dufresne [1979] SCR 146	15
Department of the Environment for Northern Ireland v Farrans (Construction) Ltd (1982) 19 BLR 1	179
Derry v Peek (1889) 14 App Cases 337	114
Diestal v Stephenson [1906] 2 KB 345	69, 81
Dillingham Construction Pty Ltd v Downs (1972) 13 BLR 97	116
Diploma Constructions Pty Ltd v Rhodgkin Pty Ltd [1995] 11 BCL 242	284
Dodd Properties (Kent) Ltd v The City of Canterbury (1979) 13 BLR 45	174
Dodd v Churton [1897] 1 QB 562	28, 85, 390
Donnison v The Employers' Accident and Livestock Insurance Co Ltd (1897) 24 R. 681	132
Doyle Construction Ltd v Carling O'Keefe Breweries of Canada (1988) Hudson's Building and Civil Engineering Contracts, 1995, 4.133	293
Doyle (John) Construction Ltd v Laing Management (Scotland) Ltd [2002] BLR 393	197, 199, 200
Dudley Corporation v Parsons & Morrin Ltd, 8 April 1959, unreported	335
Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] All ER 739; [1915] AC 79	58, 59, 60, 64, 70, 73, 77, 81
East Ham Corporation v Bernard Sunley & Sons Ltd [1965] 3 All ER 619	293
Edgeworth Construction Ltd v F Lea & Associates [1993] 3 SCR 206	15
Edison (The) <i>see</i> Liesbosch, Dredger v SS Edison	174
Ellis-Don Ltd v Parking Authority of Toronto (1978) 28 BLR 98	144, 155
English Industrial Estates Corporation v George Wimpey & Co Ltd [1973] 1 Lloyds Rep 51	69
English Hop Growers v Dering [1928] 2 KB 174	64, 73
ERDC Group Ltd v Brunel University [2006] EWHC 687 (TCC); (2006) 109 Con LR 114	7
Exports Credits Guarantee Department v Universal Oil [1983] 2 All ER 205	75
Fairclough Building Ltd v Rhuddlan Borough Council (1985) 3 Con LR 38; (1985) 30 BLR 26	308
Fairclough Building Ltd v Vale of Belvoir Superstore Ltd (1990) 28 Con LR 1	95
Fairfield-Mabey Ltd v Shell UK Ltd (1989) 45 BLR 113	34
Fairweather (H) & Co Ltd v London Borough of Wandsworth (1987) 39 BLR 106	10, 33, 34, 136, 145, 147, 280, 281
Fairweather (H) Ltd v Asden Securities (1979) 12 BLR 40	269
Fee (J & J) Ltd v The Express Lift Co Ltd (1993) 34 Con LR 147	23
Fernbrook Trading Co Ltd v Taggart [1979] 1 NZLR 556	249
Ferrum GmbH v Owners of the Mozart (1984) TLR 2 November 1984	90
Finnegan (J F) Ltd v Ford Seller Morris Developments Ltd (1991) 53 BLR 38	264, 274, 352
Finnegan (JF) Ltd v Sheffield City Council (1988) 43 BLR 124	141, 149, 158, 159
Finnegan (J J) Ltd v Community Housing Association Ltd (1995) 65 BLR 103	272
Fletcher v Minister of Town and Country Planning [1947] 2 All ER 496	259
Ford Motor Company v Armstrong (1915) 31 TLR 267	64, 70
Forsyth v Ruxley Electronics and Construction Ltd & Others (1995) 73 BLR 1	124
Freeman & Son v Hensler (1900) 64 JP 260	101, 110, 298

GAB Robins Holdings Ltd v Specialist Computer Centres Ltd [1998]	
EWCA Civ 924; (1999) 15 Const LJ 43.....	192, 193
Gallagher v Hirsch (1899) NY 45.....	105
Galliford Try Ltd v Mott MacDonald Ltd [2008] EWHC 1570 (TCC);	
(2008) 120 Con LR 1.....	14
Galoo Ltd & Others v Bright Grahame Murray TLR 14 January 1994.....	35
Garnac Grain Co Inc v Faure & Fairclough [1968] AC 1130.....	127
Gaymark Investments Pty Ltd v Walter Construction Group Ltd [1999]	
(2005) 21 Const LJ 71.....	29, 129
Gear (WW)Construction Ltd v McGee Group Ltd [2010] EWHC 1460 (TCC);	
(2010) 131 Con LR 63.....	131, 285
General Accident Assurance Corporation v Noel [1902] 1 KB 377.....	72, 73
Gleeson (M J) (Contractors) Ltd v Hillingdon Borough Council (1970)	
215 EG 165.....	47, 61, 69, 78
Gleeson (M J) plc v Taylor Woodrow Construction Ltd (1989) 49 BLR 95.....	68
Glenlion Construction Ltd v The Guinness Trust (1987) 39	
BLR 89.....	141, 142, 143, 220, 237
Glen v The Church Wardens & Overseers of the Parish of Fulham (1884)	
14 QBD 328.....	135
GMTC Tools and Equipment Ltd v Yuasa Warwick Machinery Ltd (1994)	
73 BLR 102.....	198
Golden Bay Realty Pte Ltd v Orchard Twelve Investments Pte Ltd [1991]	
1 WLR 981.....	74
Greater London Council v Cleveland Bridge & Engineering Co Ltd (1987)	
8 Con LR 30.....	110, 210, 288, 398, 400
Hadley v Baxendale (1854) 9	
Ex 341.....	58, 60, 77, 118, 119, 160, 169, 175, 176, 178, 179, 395, 397
Hall and Shivers v Van der Heiden (No 2)[2010] EWHC 586 (TCC).....	92
Hall & Tawse South Ltd v Ivory Gate Ltd (1997) 62 Con LR 117.....	7
Hampshire County Council v Stanley Hugh Leach Ltd (1991) 8-CLD-07-12.....	353
Hancock v B W Brazier (Anerley) Ltd [1966] 2 All ER 901.....	98
Harbinger UK Ltd v GE Informaion Services Ltd [2001] 1 All ER (Comm) 166.....	253
Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd [1970] 1 All ER 225 CA.....	91
Harrison (M) & Co (Leeds) Ltd v Leeds City Council (1980) 14 BLR 118.....	204, 298
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465.....	15, 19, 114, 322
Henderson v Merritt Syndicates [1995] 2 AC 145; (1994) 69 BLR 26.....	15, 322
Hermcrest plc v G Percy Trentham Ltd (1991) 53 BLR 104.....	276, 452, 456
Heron II (The) <i>see</i> Koufos v Czarnikow Ltd.....	119
Herschel Engineering Ltd v Breen Property Ltd [2000] EWHC Technology 178;	
(2000) 16 Const LJ 366.....	223
Hersent Offshore SA and Amsterdamse Ballast Beton-en-Waterbouw	
BV v Burmah Oil Tankers Ltd (1979) 10 BLR 1.....	284, 378, 379
Holbeach Plant Hire Ltd v Anglian Water Authority (1988) 14 Con LR 101.....	179
Holland (John) Construction & Engineering Pty v Kvaerner R J Brown Pty Ltd	
and Another (1996) 82 BLR 83.....	198
Holland Hannen & Cubitts (Northern) v Welsh Health Technical Services	
Organisation (1981) 18 BLR 80.....	100, 107, 115, 298
Holloway Holdings Ltd v Archway Business Centre Ltd, 19 August 1991,	
unreported.....	89, 272
Holme v Guppy (1838) 2 M & W 387.....	23, 27, 84

Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd (2000) CILL 1787.....	27
How Engineering Services Ltd v Lindner Ceilings Partitions plc 17 May 1995, unreported	191, 200, 226
How Engineering Services Ltd v Lindner Ceilings Partitions plc [1999] 2 All ER (Comm) 374	155
Hudson v Hill (1874) 43 LJCP 273	448
Hughes v Metropolitan Railway Co (1877) 2 App Cas 439	172
Humber Oil Terminals Trustee v Harbour and General (1991) 59 BLR 1	426
Hydraulic Engineering Co Ltd v McHaffie, Goslet & Co (1878) 4 QBD 670 CA.....	378
Hydrocarbons Great Britain v Cammel Laird Shipbuilders (1991) 53 BLR 84.....	247
IBA v EMI and BICC (1980) 14 BLR 1 HL.....	103
IBM (UK) Ltd v Rockware Glas Ltd [1980] FSR 335	232
Icos Vibro Ltd v SFK Construction Management Ltd (1992) APCLR 305	76
Imperial Chemical Industries plc v Bovis Construction Ltd, GMW Partnership and Oscar Faber Consulting Engineers (1992) 8 Const LJ 293	196
Imperial Tobacco Company v Parsley [1936] 2 All ER 515	60, 64, 73
Impresa Castelli SpA v Cola Holdings Ltd (2002) 87 Con LR 123.....	75
Indian Airlines v GIA International [2002] EWHC 2361 (Comm)	65
Inntreprenuer Pub Co Ltd v East Crown Ltd [2000] 2 Lloyd's Rep 611.....	430
Inserco v Honeywell Control Systems Ltd, 19 April 1996, unreported.....	198, 340
Jackson v Eastbourne Local Board (1886) Hudson, Building Contracts, (4 th ed) Vol 2, p 81	322
Jarvis Brent Ltd v Rowlinson Construction Ltd (1990) 6 Const LJ 292	89, 90
Jarvis (J) & Sons Ltd v Castle Wharf Developments & Others [2001] EWCA Civ 19; [2001] 1 Lloyd's Rep 308.....	16
John Jarvis Ltd v Rockdale Housing Association (1986) 36 BLR 48	332, 454
J-Corp Pty Ltd v Mladenis and Another [2009] WASCA 157; (2009) 131 Con LR 188	68
JDM Accord Ltd v Secretary of State for the Environment, Food and Rural Affairs (2004) CILL 2067	341
Jeancharm Ltd v Barnett Football Club Ltd [2003] EWCA Civ 58	62
Jennings Construction Ltd v Birt [1987] 8 NSWLR 18.....	293, 378
Jobson v Johnson [1989] 1 All ER 621	67, 78
John Barker Construction Ltd v London Portman Hotels Ltd (1996) 50 Con LR 43; (1996) 83 BLR 31; (1996) 12 Const LJ 277.....	93, 185, 210, 211, 225, 259, 388
John Holland Construction & Engineering Pty Ltd v Kvaerner R J Brown Pty Ltd (1996) 82 BLR 83	197
John L Haley Ltd v Dumfries and Galloway Regional Council (1988) 39 GWD 1599	134
John Mowlem & Co Ltd v British Insulated Callenders Pension Trust Ltd (1977) 3 Con LR 63.....	354
John Mowlem & Co Ltd v Eagle Star & Others (1995) 62 BLR 126	232, 254, 304
Jones v St John's College Oxford (1870) LR 6 QB 115.....	28, 85
Joseph Constantine Steamship Line v Imperial Smelting Corporation Ltd [1942] AC 154.....	124

Kemble v Farren [1829] All ER 641	58, 61, 64, 445
Koch Hightex GmbH v New Millenium Experience Company Ltd [1999] EWCA Civ 983.....	129
Koufos v Czarnikow Ltd (The Heron II) [1969] 1 AC 350	72, 119, 144
Lamprell v Billericay Union (1849) 18 LJ Ex 282	22
Landom Trust Ltd v Hurrell [1955] 1 All ER 839.....	60
Lantic Sugar Ltd v Baffin Investments Ltd [2009] EWHC 3325 (Comm).....	133
Laserbore v Morrison Biggs Wall (1993) CILL 896	6
Law v Redditch Local Board [1892] All ER 839.....	80
Lebeaupin v Crispin [1920] 2 KB 714	247, 372, 389
Leggott v Barrett (1880) Ch D 306	362
Les Affréteurs Réunis v Leopold Walford [1919] AC 801.....	98
Levy v Assicurazione Generali [1940] 3 All ER 427.....	244
Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd [1918] AC 350.....	183
Liberty Mercian Ltd v Dean & Dyball Construction Ltd [2008] EWHC 2617 (TCC).....	49, 50
Liesbosch, Dredger v SS Edison (The Edison) (1933) AC 449	174
Liverpool City Council v Irwin [1976] 2 All ER 39.....	67
Lockhart v Falk (1875) LR 10 Exch.....	70
Lockland Builders Ltd v John Kim Rickwood (1995) 77 BLR 38.....	97, 280, 305, 429
Lodge Holes Colliery v The Borough of Wednesbury [1908] AC 323	128
Loftus-Brigham v Ealing LBC (2004) 20 Const LJ 82	184
Lombard North Central plc v Butterworth [1987] QB 527	75
London and South England Building Society v Stone [1983] 1 WLR 1242	126
London Borough of Camden v Thomas McInerney & Sons Ltd (1986) 9 Con LR 99	135
London Borough of Hillingdon v Cutler [1967] 2 All ER 361	220, 330, 448
London Borough of Hounslow v Twickenham Garden Developments Ltd (1970) 7 BLR 81.....	109, 111, 226, 287, 298
London Borough of Lewisham v Shepherd Hill Civil Engineering, 30 July 2001 unreported.....	87, 374
London Borough of Merton v Stanley Hugh Leach Ltd (1985) 32 BLR 51	27, 83, 84, 95, 99, 101, 102, 129, 131, 138, 163, 164, 194, 195, 196, 220, 221, 222, 225, 239, 291, 293, 297, 305, 354, 378, 396
London Chatham and Dover Railway Co v South-Eastern Railway Co [1893] AC 429.....	177, 179
London Underground Ltd v Citylink Telecommunications Ltd (2007) 115 Con LR 1.....	200
London Underground Ltd v Kenchington Ford plc & Others (1999) 63 Con LR 1.....	192
Longley (James) & Co Ltd v South West Regional Health Authority (1984) 25 BLR 56.....	181
Lord Elphinstone v Monkland Iron & Coal Co (1886) 11 App Cas 332	61
Lordsvale Finance v Bank of Gambia [1996] QB 752	65
Lorna P Elsley, Executrix of the Estate of Donald Champion Elsley v J G Collins Insurance Agencies Ltd (1978) 4 Const LJ 318.....	73, 83
Lowe v Peers (1768) 4 Burr 2225	81
LRE Engineering Services Ltd v Otto Simon Carves Ltd (1981) 24 BLR 127.....	111, 241, 303

Lubenhams Fidelity & Investment Co v South Pembrokeshire District Council and Wigley Fox Partnership (1986) 6 Con LR 85.....	15, 183
Ludbrooke v Barrett (1877) 46 LJCP 798.....	15
Luxor (Eastbourne) Ltd v Cooper [1941] 1 All ER 33.....	27, 84, 100
Mackay v Dick (1881) 6 App Cas 251.....	100
Manchester Diocesan Council for Education v Commercial and General Investments Ltd [1969] 3 All ER 1593.....	133
Marston Construction Co Ltd v Kigass Ltd (1989) 15 Con LR 116.....	6
Matsoukis v Priestman & Co Ltd [1915] 1 KB 681.....	247, 372, 389
McAlpine Humberoak Ltd v McDermott International Inc (No 1) (1992) 58 BLR 1.....	189
McCutcheon v David McBrayne Ltd [1964] 1 WLR 125.....	98
McGrath v Shah (1989) 57 P & CR 452.....	430
Melachrinou v Nicholl & Knight [1920] 1 KB 693.....	126
Methodist Homes Housing Association Ltd v Messrs Scott & McIntosh, 2 May 1997, unreported.....	10, 229, 281, 289
Mid Glamorgan County Council v J Devonald Williams and Partner (1993) 8 Const LJ 61.....	196, 197
Midlands Mainline Ltd and Others v Eagle Star Insurance Co Ltd [2004] EWCA Civ 1042.....	184
Millar's Machinery Co Ltd v David Way & Son (1934) 40 Comm Cas 204.....	121, 464
Miller v London County Council (1934) 50 TLR 479.....	26, 84, 375
Ministry of Defence v Scott Wilson Kirkpatrick and Dean and Dyball Construction [2000] BLR 20.....	346
Minter (F G) Ltd v Welsh Health Technical Services Organisation (1980) 13 BLR 7 CA; (1979) 11 BLR 1.....	13, 118, 121, 168, 170, 171, 174, 284, 292, 305
Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup and Partners International Ltd [2007] EWHC 918 (TCC).....	185
Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) Ltd (1974) 1 BLR 73.....	305, 429
Molloy v Liebe (1910) 102 LT 616.....	107
Mona Oil Equipment Co v Rhodesia Railway Co [1949] 2 All ER 1014.....	100
Monarch Steamship Co Ltd v Karlshamns Oljefabriker (AB) [1949] AC 196.....	183
Moorcock, The (1889) 14 PD 64.....	98
Morrison-Knudsen International Co Inc v Commonwealth of Australia (1972) 13 BLR 114.....	115
Moss v Smith (1977) 76 LGR 284.....	411
Motherwell Bridge Construction Ltd v Micafil Vakuumtechnik and Another (2002) 81 Con LR 44.....	36, 46
Multiplex Constructions Pty Ltd v Abgarus Pty Ltd & Another [1992] APCLR 252.....	78
Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd [2007] EWHC 447 (TCC); (2007) 111 Con LR 78.....	30, 130
Nauru Phosphate Royalties Trust v Matthew Hall Mechanical and Electrical Engineers Pty Ltd and Another (1992) 10 BCL 178.....	197
Neodox Ltd v Borough of Swinton & Pendlebury (1958) 5 BLR 34.....	238
New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd [2001] BLR 74.....	392, 403
North Sea Ventilation Ltd v Consafe Engineering Ltd 20 July 2004, unreported.....	63

Northwood Development Company Ltd v Aegon Insurance Company (UK) Ltd (1994) 10 Const LJ 157	398
Norwest Holst Construction Ltd v Co-operative Wholesale Society Ltd (No 2) [1998] EWHC Technology 339	150, 152, 156, 453
Oakley v Portsmouth & Ryde Steam Packet Co (1856) T1 Exchequer Reports 6 1F	246
Ogilvie Builders Ltd v The City of Glasgow District Council (1994) 68 BLR 122	175
Oldschool v Gleeson (Construction) Ltd (1976) 4 BLR 103	212
Opat Decorating Service (Aust) Pty v Hansen Yuncken (SA) Pty [1995] BCL vol 11 360	284
Pacific Associates v Baxter (1988) 44 BLR 33	14
P & O Developments Ltd v Guy's & St Thomas' National Health Service Trust [1999] BLR 3	183
Pantland Hick v Raymond & Reid [1893] AC 22	22
Parsons (H) (Livestock) Ltd v Utleigh Ingham & Co Ltd [1978] 1 All ER 525; [1977] 2 Lloyd's Rep 522	120, 162, 397
Partington & Son (Builders) Ltd v Tameside Metropolitan Borough Council (1985) 5 Con LR 99	12
Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1970) 1 BLR 114	22, 29, 83, 86, 87, 158, 161, 207, 253, 258, 263, 275
Pearson v Dublin Corporation [1907] AC 351	114
Penwith District Council v V P Developments Ltd, 21 May 1999, unreported	18, 27, 102, 345
Perar BV v General Surety & Guarantee Co Ltd (1994) 66 BLR 72	398
Perini Corporation v Commonwealth of Australia (1969) 12 BLR 82	27, 46, 84, 102
Perini Pacific v Greater Vancouver Sewerage and Drainage District (1966) 57 DLR (2d) 307	29, 86
Peter Kiewit Sons' Company of Canada Ltd v Eakins Construction Ltd (1960) 22 DLR (2d) 465	107
Petromec Inc v Petroleo Brasileiro SA (Petrobras) and Another (2007) 115 Con LR 11	198, 214
Philips Hong Kong Ltd v Attorney General of Hong Kong (1993) 61 BLR 41 PC, (1991) 7 Const LJ 340 CA (Hong Kong), (1990) 50 BLR 122	60, 62, 64, 65, 77
Phillips Petroleum Co UK Ltd v Enron Europe (1997) CLC 329	262
Phoenix Components v Stanley Krett (1989) 6-CLD-03-25	336
Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556 HL	91
Pigott Foundations v Shepherd Construction (1996) 67 BLR 48	67, 447
Plater v Sonatrach (2004) CILL 2073	184
Porter v Tottenham Urban District Council [1915] 1 KB 776	111
Pratt Contractors Ltd v Transit New Zealand [2003] UKPC 83	265
President of India v La Pintada Cia Navegacion SA [1984] 2 All ER 773	177, 178
President of India v Lips Maritime Corporation [1987] 3 All ER 110	179
Public Works Commissioner v Hills [1906] AC 368, [1906] All ER 919	59, 65
Queen, The v Walter Cabot Construction (1975) 21 BLR 42	109
Ralph M Lee Pty Ltd v Gardner and Naylor Industries Pty Ltd (1997) 12 Const LJ 125	198
Ramac Construction Co Ltd v J E Lesser (Properties) Ltd [1975] 2 Lloyd's rep 430	269

Ranger v Great Western Rail Co [1854] All ER 321	59
Rapid Building Group Ltd v Ealing Family Housing Association Ltd (1984) 1 Con LR 1	24, 58, 82, 87, 111
Re Apex Supply Co Ltd [1941] 3 All ER 473	76
Re Bayley Worthington & Cohen's Contract [1909] 1 Ch 648	398
Re Cosslett (Contractors) Ltd, Clark, Administrator of Cosslett (Contractors) Ltd (in Administration) v Mid Glamorgan County Council [1997] EWCA Civ 2229; [1997] 4 All ER 115	426
Redheugh Construction Ltd v Coyne Contracting Ltd and British Columbia Building Corporation (1997) 29 CLR (2d) 39-46	346
Reinwood Ltd v L Brown & Sons Ltd [2008] UKHL 12; (2008) 116 Con LR 1	270
Re Nuttall and Lynton and Barnstaple Ry (1899) 82 LT 17	322
Re Polemis and Furness, Withy & Co [1921] 2 KB 560	96
Rees & Kirby Ltd v Swansea City Council (1985) 5 Con LR 34 CA	102, 170, 173, 174
Re Stratton's Deed of Disclaimer [1957] 2 All ER 594	379
Re White (1901) 17 TLR 461	90
Re Yeardon Waterworks Co & Wright (1895) 72 LT 832	90
Rhodia International Holdings Ltd and another v Huntsman International LLC [2007] EWHC 292	233
Richard Roberts Holdings Ltd v Douglas Smith Stimson Partnership and Others (1988) 5 Const LJ 223	127
Roberts v Brett (1865) 11 HLC 337	220
Roberts v Bury Commissioners (1870) LR 5 CP 310	28, 85
Robertson Group (Construction) Ltd v Amey-Miller (Edinburgh) Joint Venture [2005] ScotCS CSOH 60	121
Robinson v Harman (1848) 1 Ex 850	148
Robophone Facilities v Blank [1966] 3 All ER 128	61, 82
Rotherham Metropolitan Borough Council v Frank Haslam Milan and Co Ltd (1996) 59 Con LR 33	240
Royal Brompton Hospital NHS Trust v Hammond & Others (No 7) (2001) 76 Con LR 148	24, 36, 39, 224
Royal Brompton Hospital NHS Trust v Hammond & Others (No 8) (2002) 88 Con LR 1	191
Royal Insurance Co Ltd v G & S Assured Investments Co Ltd [1972] 1 Lloyd's Rep 267	352
Ruabon SS Co v London Assurance [1900] AC 6	35
Saintline Ltd v Richardsons, Westgarth & Co Ltd [1940] 2 KB 99	96, 120, 121, 169
St Modwen Developments Ltd v Bowmer and Kirkland Ltd (1996) 14-CLD-02-04	155
Sallis (Michael) & Co Ltd v ECA Calil (1987) 4 Const LJ 125	13
Saxon Steamship Co Ltd v Union Steamship Co Ltd (1900) 69 LJQB 907	71
Schuler A G v Wickman Machine Tool Sales Ltd [1974] AC 235	261
Scott v London and St Katherine's Docks Co (1865) 3 H & C 596	125
Scott Lithgow Ltd v Secretary of State for Defence (1989) 45 BLR 1	254
Serck Controls Ltd v Drake & Scull Engineering Ltd (2000) 73 Con LR 100	6
Sharpe (C) & Co Ltd v Nosawa [1917] 2 KB 814	126
Sharpe v San Paulo Railway (1873) 8 Ch App 597	104, 108, 320, 323
Shawton Engineering Ltd v DGP International Ltd [2005] EWCA Civ 1359	21
Shore & Horwitz Construction Co Ltd v Franki of Canada Ltd [1964] SCR 589	155, 166

Shore v Wilson (1842) 9 C & F 355	89
Sindall Ltd v Solland (2004) 80 Con LR 152.....	31
Sir Lindsay Parkinson & Co Ltd v Commissioners of Works and Public Buildings [1950] 1 All ER 208	5, 108, 146, 325
Sir W Harte Dyke (ex parte) In re Morrish (1882) 22 ChD 410 CA	90
Skandia Property (UK) Ltd v Thames Water [1999] BLR 338	183
Skanska Construction UK Ltd v Egger (Barony) Ltd [2004] EWHC 1748 (TCC)	188
Skanska Construction UK Ltd v The ERDC Group Ltd [2003] SCLR 296	291
Smith v Eric S Bush [1989] 2 All ER 514	15
Spectra Pty Ltd v Pindari Pty Ltd [1974] 2 NSWLR 617	133
Stanor Electric Ltd v R Mansell Ltd (1988) CILL 399.....	59, 61, 79, 376
Steria Ltd v Sigma Wireless Communications Ltd [2007] EWHC 3454 (TCC); (2007) 118 Con LR 177.....	30, 36, 130, 131, 134
Stevenson v Watson (1879) 48 LJCP 318.....	15
Stilk v Myrick (1809) 2 Camp 317.....	43, 44
Stockport MBC v O'Reilly [1978] 1 Lloyd's Rep 595	319
Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd (1998) 87 BLR 52.....	97, 280, 305, 429
Strutt v Witnell [1975] 1 WLR 870.....	126
Suisse Atlantique, etc v N V Rotterdamsche Kolen Centrale [1966] 2 All ER 61	71, 90
Sunley (B) & Co Ltd v Cunard White Star Ltd [1940] 2 All ER 97.....	166, 167
Sutcliffe v Thackrah [1974] 1 All ER 859	14, 294
Sweatfield Ltd v Hathaway Roofing Ltd (1997) CILL 1235.....	107
Symonds v Lloyd (1859) 141 ER 622.....	98
Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory [1979] AC 91.....	152
Talley v Wolsey-Neech (1978) 38 P & CR 45.....	69
Tameside Metropolitan Borough Council v Barlow Securities Group Services Ltd [2001] BLR 113 CA.....	97
Tate & Lyle Food and Distribution Co Ltd v Greater London Council [1982] 1 WLR 149, [1981] 3 All ER 716.....	153, 157, 175, 176, 181
Temloc Ltd v Errill Properties Ltd (1987) 39 BLR 30.....	24, 44, 45, 67, 68, 72, 230, 277, 374, 394
Terry Pincott v Fur and Textile Care Ltd (1986) 3-CLD-05-14	252
Tersons Ltd v Stevenage Development Corporation (1963) 5 BLR 54.....	285, 379
Test Valley Borough Council v Greater London Council (1979) 13 BLR 63	98, 102
Tharsis Sulphur & Copper Company v McElroy & Sons (1878) 3 App Cas 1040	322
Thomas Bates & Son Ltd v Thurrock Borough Council [1976] JPL 34.....	100
Thomas Feather & Co (Bradford) Ltd v Keighley Corporation (1953) 52 LGR 30.....	93
Thorn v London Corporation (1876) 1 App Cas 120	113, 322
Token Construction Co Ltd v Charlton Estates Ltd (1973) 1 BLR 48	269, 274, 464
Total Transport Corporation v Amoco Trading Co (The 'Altus') [1985] 1 Lloyd's Rep 423.....	71
Transfield Pty v Arlo International (1980) 30 ALR 201	232
Trident Construction v Wardrop (1979) 6 WWR 481.....	15
Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board (1973) 9 BLR 60	50, 99
Turner (E) & Sons Ltd v Mathind Ltd (1986) 5 Const LJ 273.....	69
Turriff Construction v Regalia Knitting Mills (1971) 9 BLR 20.....	5

UBH (Mechanical Services) Ltd v Standard Life Assurance Co (1990) BCLC 865.....	262
Update Construction Pty Ltd v Rozelle Child Care Ltd (1992) 9 BLM 2.....	313
Victor Stanley Hawkins v Pender Bros Pty Ltd (1994) 10 BCL 111.....	232
Victoria Laundry (Windsor) Ltd v Newman Industries Ltd, Coulson & Co [1949] 1 All ER 997.....	119, 160, 397
Viking Grain Storage v T H White Installations Ltd (1985) 3 Con LR 52.....	98
Voaden v Champion [2002] 1 Lloyd's Rep 623.....	127
Vonlynn Holdings v Patrick Flaherty Contracts Ltd 26 January 1988, unreported.....	105
Wadsworth v Lydall [1981] 2 All ER 401.....	178, 179, 180
Wall v Rederiaktiebolaget Luggude [1915] 3 KB 66.....	81, 82
Walter Lawrence & Son Ltd v Commercial Union Properties (UK) Ltd (1984) 4 Con LR 37.....	243, 250
Wates Construction (London) Ltd v Franthom Property Ltd (1991) 7 Const LJ 243.....	391
Wates Construction (South) Ltd v Bredero Fleet Ltd (1993) 63 BLR 128.....	335
Watts, Watts & Co Ltd v Mitsui & Co Ltd [1917] All ER 501.....	57, 81, 82
Webster v Bosanquet [1912] AC 394.....	59, 62
Weld-Blundell v Stephens [1920] AC 956.....	182, 398
Wells v Army and Navy Co-operative Society Ltd (1902) 86 LT 764, 2HBC 4th Edition (vol 2) 346.....	22, 23, 28, 29, 85, 86, 210, 253
Wertheim v Chicoutimi Pulp Co [1911] AC 301.....	123
West Faulkner Associates v London Borough of Newham (1995) 11 Const LJ 157 CA.....	288, 378
Westminster Corporation v J Jarvis & Sons Ltd (1970) 7 BLR 64 HL, [1969] 1 WLR 1448.....	392
Wharf Properties Ltd v Eric Cumine Associates (1991) 52 BLR 1.....	196
White v Jones [1995] 1 All ER 691.....	15
Whittall Builders v Chester-le-Street District Council (the 1985 case) (1996) 12 Const LJ 356, (1985) 11 Con LR 40.....	96, 112, 139, 158, 163
Whittall Builders v Chester-le-Street District Council (1987) 40 BLR 82.....	112, 297
Williams v Fitzmaurice (1858) 3 H & N 844.....	322
Williamson v Murdoch [1912] WAR 54.....	90
Williams v Roffey Brothers & Nicholls (Contractors) Ltd [1990] 1 All ER 512.....	43, 45
Witts and Others v Montgomery Watson Ltd [1999] 11 BLISS 5.....	128
Wood v Grand Valley Railway Co (1913) 16 DLR 361.....	152
Wormald Engineering Pty Ltd v Resources Conservation Co International [1992] 8 BCL 158.....	284, 378
Wraight Ltd v P H & T (Holdings) Ltd (1968) 13 BLR 27.....	111, 117, 121, 162, 169, 397
Yates Building Co Ltd v Pulleyn and Sons (York) Ltd (1976) 237 EG 183.....	133
Yorkshire Dale Steamship v Minister of War Transport [1942] 2 All ER 6, [1942] AC 691.....	34, 182, 183
Young & Marten Ltd v McManus Childs Ltd (1969) 9 BLR 77.....	98, 103
Yuen Kun Yen v Attorney General of Hong Kong [1988] AC 175.....	15

Table of standard form contract clauses

ACA 3

<i>Clause</i>	<i>Page</i>	<i>Clause</i>	<i>Page</i>
1.2	404	11.4	395
1.3	387	11.5	29, 386, 387, 391, 405, 466
1.5	403	1st alternative	112, 387, 390, 391, 466
1.6	404	2nd alternative	86, 112, 389, 391, 408, 466
2.6	404		
3.5	404	11.5(e)	408
7	396, 397, 398, 401, 468, 469	11.6	386, 387, 388, 391, 392, 393, 406
7.1	97, 113, 397, 398, 400	11.6(a)	391
7.2	396, 397, 400, 401	11.7	386, 392, 467
7.3	396, 400, 401	11.8	41, 393, 402
7.4	397, 400, 401, 402	11.9	393
7.5	97, 396, 397, 401	12	394
8	396, 403	12.2	399
8.1	403	13	394
8.1(a)	403	14.2	404
8.1(b)	403	16.6	394
8.1(c)	403	17	396, 402, 404
8.1(d)	403	17.1	402, 403, 404, 406
8.1(e)	403	17.1(c)	397
8.1(f)	403	17.2	405
8.1(g)	403, 404	17.3	405, 406
8.2	403, 404	17.4	405
8.3	406	17.5	405, 406
10	402	17.6	406
10.2	402	19.2	406
10.3	402	22.4	387
10.4	402	25A	406
11	386		
11.1	112, 113, 386, 387, 395, 399	CE	
11.2	387, 392, 394, 395	1.1	265
11.3	394, 395, 399	1.5.1	265
1st alternative	394	2.1	264
2nd alternative	394		

<i>Clause</i>	<i>Page</i>	<i>Clause</i>	<i>Page</i>
2.9	264	2.14.2	313
3.5	264	2.15.2	255, 313
4.14	366	2.15.2.1	255
5.3	264	2.15.2.2	255
5.7	264, 265, 318, 366	2.15.2.3	255
5.8	264, 318	2.23	254, 357, 359
5.9	264, 265, 318	2.24	254, 357, 359
5.10	264, 318	2.25	254, 357, 359
5.11	264, 265, 318	2.25.1	261
5.12	264, 318	2.26	234, 254, 261, 357, 359
5.13	264, 265, 318, 366		
5.14	264, 265, 318	2.26.1	255
5.15	264, 318	2.26.2	255
5.16	264, 265, 318	2.26.10	255
7.27	277	2.26.12	256
		2.28	274
CM/TC		2.29	274
2.25	260	3.5	353, 354
2.26	260	3.6	353
2.26.1	260, 275	3.7	353
2.27	260	3.8	353
2.28	260	3.9	353, 357
2.32	275	3.9.1	353
2.32.1	275	3.10	353
2.32.2	276	3.11	352, 353
3.8	362	3.12	353
3.12	362	3.13	353
3.14	362	3.14	353
4.23	316	3.15	353
4.24	316	4.9	312, 354
5	362	4.10.3	312
5.3	362	4.10.4	312
5.6	362	4.12	354
5.7	362	4.20	117, 311, 312, 314, 315, 357, 359
5.8	362		
5.9	362	4.20.1	312
5.10	362	4.20.2	312
5.11	362	4.21	311, 312, 314, 357, 359
5.12	362	4.21.1	313
		4.21.5	312
DB		4.22	311, 312, 314, 357, 359
2.1.1	356		
2.2	352	4.23	311, 312, 314, 357, 359
2.9	354		
2.10.1	354	5	352, 354, 357, 359
2.10.2	354	5.1	352, 354
2.11	357	5.1.2	354
2.12	353	5.2	354, 359

<i>Clause</i>	<i>Page</i>	<i>Clause</i>	<i>Page</i>
5.4	355, 357	46(1)(b)	113
5.4.2	355	46(3)	379
5.4.3	356	46(3)(a)	379
5.4.4	356	46(3)(b)	379
5.5	355	46(6)	117, 384
5.6	355	47	377, 380
5.7	355	47(1)	380
		47(3)	380
		47(4)	380
		47(5)	380
		47(6)	380
		48	374
		50	380
		51	374
		55	369, 373
		55(1)	373, 374
		55(5)	374
		63(2)	378
		65	377
GC/Works/1(1998)		IC/ICD	
1(1)	372	1.1	345
1(3)	379	1.7.1	346
25	370, 379	1.9.4	97
34	113	2.10	93
36	369, 370, 373	2.11	93
36(1)	370	2.12.1	320
36(2)(b)	113, 371, 373, 375	2.12.2	321
36(4)	371	2.13	321
36(5)	371	2.13.1	321
36(6)	371	2.14	321
37	375, 376	2.19	10, 248
37(4)	376	2.19.1	248
38	42	2.19.2	250
40(1)	381	2.19.3	250
40(2)	383	2.19.4.1	42
40(2)(a)	371, 381	2.19.4.2	248
40(5)	381	2.20	10, 234, 248, 251
41(2)	371, 377, 381	2.20.2.1	251
41(4)	382, 383, 384	2.20.2.2	251
42	381	2.20.11	251
42(1)	381	2.22	273
42(2)(b)	371, 377	2.23	273
42(3)	381	2.24	273
42(4)	381	3.7	250, 307, 458
42(5)	381, 382	3.13	251, 308
42(5)(a)	382	4.1	347
42(5)(b)	382	4.1.1	321, 347
42(6)	371, 377	4.1.2	347, 348
42(7)	382		
42(8)	382		
42(11)	382		
42(12)	382		
43	365, 381, 382		
43(1)(a)	377, 383		
43(1)(b)	384		
43(2)	383		
43(4)	384		
43(6)	379		
46	377, 378		
46(1)	117, 379		

<i>Clause</i>	<i>Page</i>	<i>Clause</i>	<i>Page</i>
4.2	321	18.4	261, 262
4.9.2	307	18.5	262
4.17	117, 305, 309	18.6	262
4.18	305, 309	18.7.3	262
4.18.2.1	308	19	42, 362
4.18.5	97	25	362
4.19	95, 305, 309	26	362
5	16, 345	26.3	362
5.1.1	345	26.4	362
5.1.2	345	26.4.4	363
5.2	349	26.5	363
5.3	349	26.6	362, 363, 364
		26.7	363
MC		26.8	363
1.1	258, 361	26.9	364
2.3	275	27	316
2.16	257	27.1	316
2.17	257	27.2	317
2.18	257	27.5	317
2.19	257	27.6	318
2.19.2	259	27.7	318
2.20	257, 259	27.8	316, 317
2.22	275		
2.23	275	MTC	
3.9	361	1.6	263
3.13	361	2.1	263
3.15	361	2.6	263
3.16	42	2.10	263
3.23	258	2.10.1	263
8.5	316	2.10.2	263, 264
		3.5.1	364
MP		3.5.4	365
9.3	262	5.1	364, 365
13	31	5.2	365
15.3	262	5.3	365
16	276	5.4	365
16.1	276	5.5	365
18	261	5.6	365
18.1.1	261	5.7	365
18.1.2	261	5.8	318
18.1.3	261		
18.1.4	261	MW/MWD	
18.1.5	261	2.7	10, 86, 251
18.1.6	261	2.8	273
18.1.7	261	2.8.2	274
18.1.8	261	2.8.3	274
18.2	261	3.4	311, 350
18.3.1	261	3.4.2	350

<i>Clause</i>	<i>Page</i>	<i>Clause</i>	<i>Page</i>
3.6	350, 351	60.1(5)	423
3.6.2	310, 351	60.1(6)	423
3.6.3	117, 310, 351	60.1(7)	424, 435
3.7	350, 351	60.1(8)	424, 435
NEC 3		60.1(9)	422, 424
11.2(2)	428	60.1(10)	425, 435
11.2(3)	428, 440	60.1(11)	425
11.2(5)	433	60.1(12)	426, 430
11.2(9)	440	60.1(13)	427
11.2(10)	423	60.1(14)	427
11.2(13)	3	60.1(15)	428
11.2(19)	420	60.1(16)	429
12.4	429	60.1(17)	429, 435
13.3	423	60.1(18)	429, 434
13.7	434	60.1(19)	430
13.8	424	60.2	426
14.3	420, 441	60.3	426
16.1	434, 436	60.4	431
16.2	436	60.5	431
16.3	436	60.6	431, 439
16.4	436	60.7	432
25.1	421, 423	61	434
31	421, 440	61.1	434, 435, 436, 444
31.2	421, 422, 423	61.2	435, 438
31.3	422, 440, 442	61.3	434, 435, 435
32	421	61.4	436
33.1	421	61.5	436
34.1	423	61.6	437
35	428	61.7	435
35.2	428	62	434, 437
35.3	428	62.1	437, 438
36	42	62.2	437, 439, 442
36.1	42	62.3	438, 442, 443
4	425	62.5	438, 442, 443
40.1	425	63	434, 438, 442
40.2	429	63.1	421, 439
40.3	425	63.2	439
42.1	425	63.3	439
44.2	421	63.4	430, 440
52	431, 438	63.5	436, 440
52.2	445	63.6	440, 441
6	420, 435	63.7	440
60	435	63.8	432, 441
60.1	428, 437	63.9	441
60.1(1)	420, 435, 441	63.10	441, 442
60.1(2)	421	63.11	441, 442
60.1(3)	422, 423	63.12	441, 442
60.1(4)	423, 435	63.13	441, 442
		63.14	441, 442

<i>Clause</i>	<i>Page</i>	<i>Clause</i>	<i>Page</i>
63.15	441, 442	3.15	257, 315, 360
64	434, 442	3.22.1	257
64.1	442	4	360
64.2	442	4.16	315
64.3	443	4.17	315
64.4	443	4.18	315
65	434, 444	4.19	315
65.1	444		
65.2	429, 437, 444	PPC2000	
65.3	444	2.2	415
65.4	444	3.7	408, 409, 412
65.5	444	5.4	416
73	424	6.2	408
80.1	427	6.4	411
81.1	440	6.5	408
83.1	428	6.6	41, 408
T1.1	425	8.11	416
R1.2	445	10.11	412
X5	445	12.4	415
X7	444, 445	13.2	415, 416
X7.1	445	13.5	416
X7.3	445	14.1	407
X12	433	15.2	415
X12.3(6)	433	15.3(i)	411
X14	433	17	408, 416
X14.2	433	17.1	416
X15	433	17.2	416
X15.1	433	17.3	416
X15.2	433	17.4	416
X2.1	432	17.5	417
Y2.4	433	17.6	416
Z12.1(4)	433	17.7	416
		18	408, 415
PCC		18.3	408, 409, 412, 414
1.1	360	18.3(i)	408, 409
2.1.2	257	18.3(ii)	409
2.18	256	18.3(iii)	409
2.19	256	18.3(iv)	409
2.19.1	256	18.3(v)	409
2.19.4	256, 257	18.3(vi)	409
2.20	256	18.3(vii)	410
2.21	234	18.3(viii)	410
2.21.1.2	257	18.3(ix)	410
2.21.3	257	18.3(x)	410
2.23	275	18.3(xi)	411
2.24	275	18.3(xii)	411
3.10	360	18.3(xiii)	411
3.10.2	360	18.3(xiv)	412
3.14	257, 315, 360	18.3(xv)	412

<i>Clause</i>	<i>Page</i>	<i>Clause</i>	<i>Page</i>
18.3(xvi)	412	2.26.3	230, 234
18.4	408, 412, 414	2.27	10, 219, 228, 248, 256, 295, 448, 477
18.4(i)	413		219, 448
18.4(ii)	413	2.27.1	222
18.4(iii)	413	2.27.2	222
18.5	414	2.27.3	222
18.6	414	2.28	10, 140, 219, 228, 248, 256, 295, 342, 448
18.6(iii)	414		223, 231
18.8	415	2.28.1	227, 228
18.9	415	2.28.2	228, 477
19.1	410, 411	2.28.3	281
20.5	416	2.28.3.1	229, 231
20.6	413	2.28.3.2	229, 230, 234
20.17	408, 411	2.28.4	220, 223, 228, 230, 231, 449, 477
26.6	408, 411	2.28.5	234
27.1	413	2.28.5.2	127, 232
SBC		2.28.6	221, 225, 232
1.1	231, 244, 279, 340, 345	2.28.6.1	42, 233
1.3	69, 79, 297, 304, 325	2.28.6.2	230, 232, 233, 449
1.7.1	220, 330	2.28.6.3	233, 234
1.7.4	133	2.28.6.4	219, 222, 225, 228, 234, 248, 256, 295, 448
1.9	269	2.29	234, 450, 477
1.9.4	97	2.29.1	234
2.2.2	333	2.29.2	477
2.4	140, 287, 298	2.29.2.1	112, 234, 235, 296, 450
2.5	235, 279, 296, 297	2.29.3	234, 235, 300
2.7	239, 242, 302	2.29.4	234, 236, 300, 450
2.7.1	239	2.29.5	24, 28, 237, 241, 243, 301, 408, 450
2.7.2	239, 302	2.29.6	234, 242, 450, 477
2.9.1.2	211, 227	2.29.7	234, 243, 450, 477
2.9.2	211	2.29.8	234, 244, 450
2.11	93, 142, 237, 302	2.29.9	234, 244, 450
2.12	93, 142, 237, 302	2.29.10	234, 245, 450
2.12.1	239	2.29.11	234, 246, 450
2.12.3	239	2.29.12	234, 246, 450
2.13.1	320	2.29.13	234, 246, 450
2.14.1	321	2.30	140
2.14.3	296, 321	2.31	180, 268, 269, 273, 275
2.15	234, 279, 298, 321, 450	2.31.3	269
2.16.2	296	2.32	268, 273, 275
2.22	279	2.32.1	179, 180, 268, 271, 272, 273
2.26	10, 219, 228, 248, 256, 295, 303, 342, 448		

<i>Clause</i>	<i>Page</i>	<i>Clause</i>	<i>Page</i>
2.32.2	180, 272	4.23	4, 16, 17, 95, 96,
2.32.2.1	272		117, 131, 136, 141,
2.32.2.2	272		169, 203, 205, 241,
2.32.4	271, 272		278, 279, 282, 283,
2.38	336		284, 285, 286, 287,
3.4	332, 340		288, 291, 292, 294,
3.9	361		295, 296, 297, 299,
3.10	328, 330		300, 305, 309, 312,
3.10.1	326, 328, 360		316, 337, 341, 377,
3.10.3	333		451, 463, 475, 477,
3.12	330, 346		484, 492
3.12.3	329	4.23.1	284, 313
3.14	215, 221, 230, 296,	4.23.2	289, 292, 312
	328	4.23.3	290, 312
3.14.1	11, 104, 326, 329,	4.24	17, 95, 137, 141,
	330		143, 278, 279, 283,
3.14.2	326		286, 292, 295, 305,
3.14.3	331, 332		309, 311, 312, 316,
3.14.4	329		343, 453, 475, 492,
3.14.5	330		492, 493
3.15	234, 279, 297, 298,	4.24.1	203, 279, 283, 296,
	327, 329, 450		341
3.16	234, 279, 297, 329,	4.24.2	297, 298, 300
	330, 331, 450	4.24.2.1	279
3.17	234, 279, 297, 299,	4.24.2.2	279, 299
	425, 450, 453	4.24.2.3	279, 299, 313
3.18.1	326	4.24.3	279
3.18.4	234	4.24.4	279, 300
3.22	300	4.24.4	236
3.22.1	235, 299	4.24.5	283, 301
3.22.2	234, 299, 450	4.24.6	97, 112, 243, 283,
3.23	241, 242, 304		295, 301, 333
3.23.1	241	4.25	95, 278, 295, 304,
3.24	241, 242, 304		305, 309, 312, 316,
4.1	321		475, 492, 497
4.2	321, 335	4.26	4, 95, 278, 279, 280,
4.2.5	279		295, 305, 309, 312,
4.4	279, 304, 306, 343,		316, 475, 492
	475	5	16, 286, 296, 333,
4.5.2.1	344		337, 340, 341, 345,
4.5.2.2	16, 291		352, 361, 362
4.10	343	5.1	104, 204, 325, 329,
4.13.4	272		353, 360, 361
4.14	236, 279, 300, 301	5.1.1	325, 326, 343, 345
4.15	269	5.1.1.1	325
4.15.4	272	5.1.1.3	326
4.16	343	5.1.2	326, 327, 328, 341,
4.16.2.2	305		341, 345, 420
4.22	342	5.1.2.1	326, 327

<i>Clause</i>	<i>Page</i>	<i>Clause</i>	<i>Page</i>
5.1.2.2	326, 327	7.2(a)	467
5.1.2.3	326, 327	7.3	467
5.1.2.4	326, 327, 328	7.4	467
5.2	330, 333, 354	7.5	467
5.2.1	333, 343, 344	7.6	467
5.2.2	341	9.1	468, 469
5.3	333, 341, 343, 344	9.2	469
5.3.1	341, 342	9.3	469
5.3.2	235, 450	9.4	469, 470
5.3.3	342, 343		
5.4	344	DBSub/C	
5.5	343	2.19.4	460
5.6	333, 337, 339, 341, 342, 343, 349, 484, 488	2.19.13	461
5.6.1.1	335	2.19.15	461
5.6.1.2	335, 338, 339	4.19	117
5.6.1.3	335	4.19.2	461
5.6.1.4	338	4.20.5	461
5.6.1.5	338	4.20.6	461
5.6.2	336, 339	ICSub/C	
5.6.3	336, 338	2.13.13	460
5.6.3.2	339	4.16	117
5.6.3.3	296, 337, 339	ICSub/D/C	
5.7	333, 337, 339, 341, 343	2.13.13	460
5.8	333, 337, 339, 341, 343	4.16	117
5.8.1	339	ICSubNAM/C	
5.9	333, 336, 337, 338, 339, 339, 341, 343	2.12	458
5.10	333, 343	2.12.1	458
5.10.1	337, 341	2.12.3	458
5.10.2	337, 341	2.13	458
6.8	244,	2.13.4	459
8.11	246	2.13.6	459
		2.13.7	459
Sub-Contracts		2.13.13	459
		2.14	458
ACA/SC		2.15	458
1.2	468	4.16	117, 458
2.1	469	4.17	458
5	469	4.17.4	459
5.2	470	4.17.5	459
5.3	470	4.17.6	459
7	465	4.17.7	459
7.1	465, 468	4.18	458
7.2	466	4.19	458

<i>Clause</i>	<i>Page</i>	<i>Clause</i>	<i>Page</i>
MCWC/C		2.19.2	450
1.1	258	2.19.3	450
2.16	462	2.19.4	450
2.17	462	2.19.5	450, 451
2.18	462	2.19.6	450, 451
2.18.1	259, 462	2.19.7	450, 451
2.18.5	462	2.19.8	450, 451
2.19	462	2.19.9	450
2.19.8	258	2.19.10	450
2.19.13	463	2.19.11	450
2.19.15	463	2.19.12	450
2.20	464	2.19.13	450
2.20.2	464	2.19.14	450
2.21	464	2.19.15	450
3.5	361	2.20	454, 456
4.20	463	2.21	454, 455, 456
4.21	463	3.10	450, 453
4.21.1	463	4.11	452
4.22	463	4.19	117, 451, 452, 454, 463
4.23	463	4.20	451, 453, 463
5	361	4.20.2	453
		4.20.4	453
SBCSub/C		4.20.5	453
1.6	448	4.20.6	453
2.3	447	4.20.7	454
2.16	447	4.21	451, 454, 463
2.17	447	4.21.2	454
2.17.1	447	4.22	451, 454, 463
2.18	447		
2.18.4	447, 449	SBCSub/D/C	
2.18.4.5	449	1.1	457
2.18.6.1	449	2.19.3	457
2.18.6.3	449	4.19	117
2.18.6.4	447	4.20.2	457
2.19	447, 450		
2.19.1	450		

Index

- acceleration, 40–47, 54, 393
- accepted risks
 - under GC/Works/1(1998), 372
- access to Works, 241, 411, 421–2
- act of God, 246, 372–3, 387
- additional work (*see* variations)
- additive analysis, 185
- Administration of Justice Act 1982, 177
- advance payment, 374, 433
- agency, 11–12, 108
- agreed amount, 276
- agreed damages (*see* liquidated damages)
- ambiguities, 441
- Ancient Monuments and Archeological Areas Act 1979, 300
- antiquities, 299–300, 313, 409, 415, 424
- applications for loss and/or expense, 278, 282–6, 306, 312
- applications for money claims by
 - sub-contractors, 452–3
- approximate quantities, 235–6, 301, 338–9
- Arbitration Act 1996, 178
- architect
 - as employer's agent, 11–12, 25, 312
 - certificates of (*see* certificates)
 - duties and functions
 - extensions of time, 30–31, 223–32
 - money claims, 291–5
 - discretion, 12–13
 - instructions of, 108, 234–5, 297–9, 301–2, 310, 315, 328, 329–33, 346, 350, 364–5, 390, 403–4
 - issue instructions for provisional sums, 298–9, 330, 350
 - knowledge of, 11, 293–4
 - liability to contractor, 13–16
 - no authority to value variations, 324, 345
 - opinion of, 291–3
 - powers
 - confirm instruction, 330
 - extend time, 224–7
 - order or permit variations (*see* variations)
 - ratify instructions, 329, 330, 331
 - require opening up of work, 234
 - require postponement of work, 234
 - under the contract, 11
 - request for information, 202, 223, 248, 252
 - right to dissent under MC, 259, 462
- ascertainment, 137, 294–5, 438–9, 463
- at any time, 262
- base date, 246
- baseline, 320–21
- best endeavours, 45, 225, 232–3, 371, 409, 412, 449–50
- betterment, 127–8
- bills of quantities, 115, 235, 255, 320–21, 321–3, 346, 356–7, 431–2
- bonus clauses, 93–4
- breach of contract, 4, 20, 49, 95, 108, 110, 118, 144, 180, 221, 224, 279, 310–11, 331, 394, 412, 429–30
- Brown's clause, 52
- buying work, 161
- causation, 32, 37, 46, 48, 182–91
- CDM co-ordinator, 373, 378, 388, 396
- certificates and certification, 89, 304–5, 306–7
- change in the law, 409, 432
- changes (*see* variations)
- civil commotion, 244–5, 389

- claims
 - acceleration, 40–7, 54, 393
 - basis of, 8–11
 - by contractor (*see* direct loss and/or expense; extensions of time)
 - by employer (*see* liquidated damages)
 - categories, 135–9
 - CDM compliance, 241, 304, 388, 390, 396
 - common law, 4, 95–116, 277, 305, 311, 401
 - contractual, 4, 9
 - costs of, 180–1
 - definition, 3
 - development control requirements, 312–13
 - direct loss and/or expense, for (*see* direct loss and/or expense)
 - disruption, for, 54, 135–6, 138–9, 381, 414
 - evidence, 206–8
 - example build-up of entitlement, 475–97
 - ex contractu*, 4
 - ex-contractual*, 4
 - ex gratia*, 8
 - final certificate, 97
 - financing charges, 168–80
 - foreshortened programme, 140–3
 - fraudulent, 9
 - global, 53, 164, 192–200
 - heads of, 140–81
 - increased cost of labour, 167–8
 - increased materials costs, 167–8
 - inefficient or increased use of labour or plant, 163–4
 - narrative, 208–9
 - notice of (*see* notices)
 - on site establishment costs, 137, 148–9
 - outline of, 205–6
 - overheads, 54, 149–60, 414
 - preliminaries, 136
 - preparation, 201–6
 - profit, 160–3, 414
 - prolongation, for, 135, 136–8, 381
 - quantum meruit*, 4–8
 - site supervisory staff, 164–5
 - sub-contract (*see* sub-contract claims)
 - substantiation, 206–8
 - types of, 3–8
 - under ACA 3, 385–406
 - under CE, 318
 - under CM/TC, 316
 - under DB, 311–15
 - under GC/Works/1(1998), 369–84
 - under IC and ICD, 305–9
 - under MC, 316
 - under MP, 316–18
 - under MTC, 318
 - under MW and MWD, 309–11
 - under NEC 3, 418–45
 - under PCC, 315
 - under PPC2000, 407–17
 - under SBC, 278–304
 - uneconomic working, 163–4
 - variations, in respect of (*see* variations)
 - winter working, 143–7, 164
- cleaning, 489
- clerk of works, 340
- collaboration, 264, 316
- commercial settlement, 19
- common law claims, 95–116, 305, 401
 - contractual claims distinguished, 4
 - late possession of site, 109–13, 377
 - site conditions, 113–16, 372, 426–7
- compensation events, 420–34, 444
- completion date
 - contractor's duty to complete on or before, 26, 58, 84–7, 140, 264
 - deferment (*see* extension of time)
 - delay beyond, 223–5
 - phased, 69
- completion period, 260
- computers, 184–9
- concurrency, 32–40, 52, 138, 184, 262
- condition precedent, 30, 89–90, 96, 129–32, 220, 232, 268–9, 284, 293, 312, 412, 435, 452
- consequential loss, 96, 118, 120–2, 286, 397
- Construction (Design & Management) Regulations 2007, 241, 204, 373, 378, 388, 396, 398–9
- construction manager's instructions, 362
- consult, to, 259, 360
- contract
 - breach as condition, 76
 - breach of, 4, 20, 49, 95, 108, 110, 118, 144, 180, 221, 224, 279, 310–11, 331, 394, 412, 429–30
 - documents, 346–7, 399, 403
 - fee, 360
 - implied terms in, 97–103
 - multiple breaches of, 60–1, 70–2

- partnering, 407, 415
- sum, 347–8
- variation of, 103–4
- variation pursuant to (*see* variations)
- contract administrator (*see* architect)
- Contra proferentem*, 24, 29, 375, 385, 426, 465
- contractor
 - application by, for direct loss and/or expense, 278, 282–6, 306, 312, 316, 317–18, 414, 420–34
 - under ACA 3, 396
 - under DB, 312
 - under IC and ICD, 306
 - under MC, 316
 - under MP, 317–18
 - under NEC 3, 420–34
 - under PPC2000, 414
 - under SBC, 278, 282–6
- claims against
 - by employer (*see* liquidated damages)
 - by sub-contractor (*see* sub-contractors)
- claims by (*see* direct loss and/or expense; extensions of time)
- correction of defect for which not liable, 433
- default of, disruption of (*see* direct loss and/or expense)
- directions, 450, 453, 457
- duty to comply with architect's instructions, 330
- duty to notify architect of delay (*see* notices of delay)
- duty to provide information, 202, 207, 222–3, 248, 261, 289–91, 306, 310, 317, 381
- extension of time for (*see* extensions of time)
- holidays, 32, 493
- notice of delay (*see* notices)
- rights in respect of valuations, 344, 349
- right to confirm instructions, 330, 331
- right to do contract work, 104
- right to possession of site, 58, 109–13
- right to receive instructions in time, 142
- right to reimbursement (*see* common law claims)
- risk, 440–1
- contractor's designed portion (CPD), 245, 251, 325, 332, 339, 350, 457
- Contractor's Proposals, 331, 356
- Contracts (Rights of Third Parties) Act 1999, 448
- contract sum analysis, 348–9, 355
- co-operation, 27, 84, 99–101
- correspondence, 211–12
- cost records
 - as evidence in support of claims, 209–10
- costs, 181
- cost savings, 362, 384
- course of dealing, 98
- critical path, 136–7, 186
- custom, 98
- damages
 - consequential, 118, 120–2, 397
 - duty to mitigate, 125–7
 - general, 26, 147–8
 - measure of, 123–4
 - misrepresentation, 113, 114
 - remoteness of, 119, 121, 128, 174, 397
 - special, 118–19, 166, 178–80
 - under PPC2000, 413
 - unliquidated, 275, 277, 394, 395
- dayworks, 318
- decisions, 314
- deemed knowledge, 415
- default, 301, 371–2, 374, 387, 388, 396–8, 408–9, 451, 454, 459, 466–7
 - meaning, 237
- Defective Premises Act 1972, 98
- deferment of possession of site, 48, 112–13, 235, 258, 296
- defined work, 338–9
- delay
 - CDM compliance, 241–2, 398–9
 - concurrent, 32–40, 52
 - contractor in advance of time, 225–6
 - culpable, 31–2
 - damages for (*see* direct loss and/or expense; liquidated damages)
 - due to sub-contractor, (and *see* sub-contractors)
 - material circumstances of, 220–1
 - statutory permission, due to, 461, 463
 - statutory requirements, due to, 242
 - statutory undertaker's work, due to, 242–3
 - unnecessary, 425
 - whether justified (*see* extensions of time)

- delay damages (*see* liquidated damages)
 demurrage, 70
 design, 245, 253–4, 255–6, 339, 355, 356–7,
 420, 459, 460, 463
 design integration, 332
 direction, 332
 direct loss and/or expense, 52–3, 117–22,
 169, 185, 193, 337
 and extension of time, 9–10, 136, 137,
 148, 280–2
 access, 303–4
 application for, 278, 282–6, 306, 312, 316,
 317–18, 414, 420–34
 ascertainment, 137, 294–5, 438–9
 assessment by architect (*see* architect)
 as opposed to indirect, 118–20
 common heads of loss, 147–81
 concurrency, 138
 definition, 117–18
 details, 290–1
 formulae for calculating claim for
 overheads, 152–60
 head office overheads, 54, 149–60
 heads of claim, 140–81
 increased costs, 167–8
 inefficient or increased use of labour and
 plant, 163–4
 interest, 168–80
 on-site establishment costs, 137, 148–9
 opening up for inspection and testing,
 299
 preliminaries, 136, 280
 profit, 160–3
 relevant matters, 295–304
 SCL extension of time protocol, 51–60
 sub-contractors' claims for (*see*
 sub-contractors)
 under ACA 3, 395–402
 under CE, 318
 under CM/TC, 316
 under DB, 311–15
 under GC/Works/1(1998), 377–80
 under IC and ICD, 305–9
 under MC, 316
 under MP, 316–18
 under MTC, 318
 under MW and MWD, 10, 309–11
 under NEC 3, 420–34
 under PCC, 315
 under PPC2000, 413–15
 under SBC, 278–305
 uneconomic working, 163–4
 winter working, 143–7, 164
 discrepancies, 297, 307, 313, 321, 354
 disruption (*see* claims)
 disturbance (*see* disruption)
 dominant cause, 33–5
 drawings, 115, 116, 142, 301–2, 320
 drying out, 489

 early warning, 436–7
 egress from the Works, 241, 303–4
 Eichlay formula, 159–60
 Emden formula, 158–9
 employer
 agent under DB, 11–12, 25, 312
 claims against (*see* direct loss and/or
 expense; extensions of time;
 variations)
 claims by (*see* liquidated damages)
 duty of care, 115
 failure to give ingress or egress, 241,
 303–4
 failure to provide something, 422, 429
 hindrance by, 27–8
 instructions, 255, 313–14, 326, 353–4
 interference, 31
 liability for architect's breaches, 101–2
 obligations to co-operate, 27, 84, 99–101
 to ensure architect performs, 101–2
 Employer's requirements, priority of, 352–3
 endeavour, 228
 entire agreement, 430
 equity, 20
 estoppel, 88
 evidence, 206–8
 example of build-up of entitlement,
 475–97
 ex-contractual claims (*see* common law
 claims)
 ex-gratia claims, 8
 expense: (*see* direct loss and/or expense)
 extensions of time, 26–40, 51, 87, 185, 193
 and loss and/or expense, 9–10, 136, 137,
 148, 280–2
 access to Works, 241, 411, 421–2
 Christmas holiday, 32, 493
 clause, 22, 23, 28–9, 86
 concurrency, 32–40, 52, 138
 defective clauses, 28–9, 30
 deferment of possession, 112–13, 235,
 258, 296, 461

- failure to give, as excuse for acceleration, 46–7
- for sub-contractors (*see* sub-contractors)
- fluctuations and, 227
- grounds for, 234–48, 253, 258, 261, 263, 265, 371–3, 387–93, 408–12
- late instructions and drawings, 237–9
- modified or additional work, 371
- notices by contractor, 128, 129, 219–22, 251–2, 256, 259, 260, 261, 263, 378–9, 388, 412, 434–5
- omission of work, 230, 232, 250, 392
- opening up for inspection and testing, 234, 299, 410, 425–6
- owing to delay:
 - relating to CDM compliance, 241–2
- prevention principle, 29–30
- protocol, 51–6
- relevant events, 228–9, 234–48
- review of, 230–2, 250, 256–7, 262
- schedule 2 quotation, 233–4
- termination, before, 31
- time limit for, 24–6, 227–8, 248–50, 252–3, 284–6, 291, 370, 391, 438, 448–9, 458–9, 467–8
- under ACA 3, 386–93, 405
- under CE, 264–7
- under CM/TC, 259–60
- under DB, 254–6
- under GC/Works/1(1998), 370–3
- under IC and ICD, 248–51
- under MC, 257–9
- under MP, 260–2
- under MTC, 262–6
- under MW and MWD, 251–4
- under NEC 3, 420–34
- under PCC, 256–7
- under PPC2000, 408–13
- under SBC, 219–48
- work not forming part of contract, 239–40, 412
- extra work, 107–8

- failure to give ingress or egress
 - direct loss and/or expense, giving rise to, 303–4
 - extension of time, giving entitlement to, 241
- fair commercial rate, 6
- fair and reasonable, 227
- final account and final statement, 315, 354
- final certificate, 19
 - claims on, under ACA 3, 406
- financing charges
 - claims for, 117, 168–80, 380
- float, 53, 189–91, 226
- fluctuations, 168, 228, 248
- force majeure*, 246–7, 389
- forecasting, 437
- foreseeability (*see* damage, remoteness of)
- formula for calculating claim for overheads, 152–60
 - application of, 152–7
 - Hudson, 157–8
 - increased costs, 168
 - Eichleay, 159–60
 - Emden, 158–9
- forthwith, 220, 330
- frustration, 10
- functus officio*, 391

- global claims, 53, 164, 192–200
- government action, 246, 389, 410–11
- ground conditions, unforeseeable, 372

- hardship (*see ex gratia*)
- holidays, 32, 493
- Housing Grants, Construction and Regeneration Act 1996, 98, 236, 300, 303, 317, 373, 433, 469, 471
- head office overheads, 54, 149–60
- hindrance, 29–30, 99–101, 237, 301, 303, 316, 451, 454, 459
- Hudson formula, 157–8

- impediment, 237, 258, 266, 301, 451, 454, 459
- implied terms, 27, 97–103
- inability to obtain labour and goods, 247–8
- increased cost, claim for, 167–8
- information, 142–3, 202, 207, 222–3, 237–9, 248, 261, 289–91, 306, 314
- information release schedule, 142
- ingress to the Works, 241, 303–4
- insurance risks, 389, 410
- interest, 53, 117, 168–80
 - rate of, 175–6

- judgment debt, 178
- knock-on effect (*see* winter working)

- labour
 - claim for inefficiency or increased use, 163–4
 - returns, 213
- late completion
 - damages for (*see* liquidated damages)
 - whether justified (*see* extensions of time)
- late instructions and drawings giving
 - rise to claim for direct loss and/or expense, 301–2
 - extension of time, 237–9
- Late Payment of Commercial Debts (Interest) Act 1998, 177, 180
- Late Payment of Commercial Debts Regulations 2002, 180
- late possession of site
 - ground for common law claim by contractor, 109–13
- Law of Property Act 1925, 20
- Law of the country, change in, 409, 432
- letter of intent, 5, 6, 7
- levels, 301–2
- Limitation Act 1980,
- liquidated damages, 57–94, 179–80, 328
 - after termination, 90–3
 - as an option, 76
 - as limitation of liability, 65–6
 - as opposed to penalties, 58–65, 75
 - as repayment of loan, 66–7
 - calculation of, 77–8
 - defences, 84–93
 - definition, 57
 - exhaustive remedy, 44–5, 67–72
 - formula for, 77
 - genuine pre-estimate of loss, 58, 62, 65, 66–7, 70
 - hire purchase in relation to, 60, 75–7
 - if no breach of contract, 75–7
 - interest on, 269–70
 - maximum recovery if a penalty, 80–2
 - maximum recovery if not applicable, 22, 26, 82–4
 - notice of intention to claim, 268, 271–2
 - or injunction, 72–3
 - partial possession, 78–80
 - precondition to deduction, 89–90
 - purpose, 57–8
 - rate, 67–8, 373–4
 - relation to loss, 74–5
 - repayment, 270, 395
 - severance and, 60
 - sums greater than genuine pre-estimate, 66–7
 - terminology, 57
 - under ACA 3, 393–4, 395
 - under CE, 277
 - under CM/TC, 275–6
 - under DB, 274
 - under GC/Works/1(1998), 373–6
 - under IC and ICD, 273
 - under MC, 275
 - under MP, 276
 - under MTC, 276–7
 - under MW and MWD, 273–4
 - under NEC 3, 444–5
 - under PCC, 275
 - under SBC, 268–73
- local authority's work
 - delay due to, 389
- local combination of workmen, 246
- Local Democracy, Economic Development and Construction Act 2009, 300, 317, 434
- loss of opportunity, 150–2
- loss of productivity (*see* uneconomic working)
- loss of profit, 160–63
- main options, 441–2
- maintenance of roads, 489
- management and staff, 485
- material effect on regular progress, 284, 286–9
- materials, 240–1
- measurement
 - valuation by, 333–8, 365
- mechanical plant, 490
- misrepresentation, 113, 114
- Misrepresentation Act 1967, 113, 114, 115
- mitigation
 - of delay, 52
 - of loss, 53, 125–7
- mutual trust, 264
- named sub-contractors, 105, 250–1
- narrative, 208–9
- negligence, 128, 148, 224, 294, 310
- negligent misstatement, 16, 19
- network diagrams, 184–9
- nominated sub-contractor, 105
- nominated supplier, 105

- non-completion
 - certificate of, 89, 268, 269, 274
 - liquidated damages for, 57–94
 - notice of, 274
- notices, 128–35, 283
 - as condition precedent, 30, 89–90, 96, 129–32, 220, 232, 268–9, 284, 293, 312, 412, 435, 452
 - e-mail, 133
 - faxed, 133
 - essential elements of, 133–5
 - issue of, 134–5
 - making time of the essence, 20–2
 - of delay giving rise to claim for extension of time, 128, 129, 219–22, 388
 - under ACA 3, 388, 400
 - under CE, 265
 - under CM/TC, 260
 - under DB, 254
 - under GC/Works/1(1998), 378–9
 - under IC and ICD, 251–2
 - under MC, 259
 - under MP, 261
 - under MTC, 263
 - under MW and MWD, 252
 - under NEC 3, 434–5
 - under PCC, 256
 - under PPC2000, 412
 - under SBC, 219–22
 - under sub-contracts, 448, 468
 - of intent to claim liquidated damages, 268, 271–2
 - of management contractor's decision, 259
 - of withholding, 270, 274, 277
- officious bystander test, 98
- Omissions from the contract Works
 - as variations, 104
 - breach of contract, 104–7
 - valuation of, 336
- on-site establishment costs
 - claim for, 148–9
- opening up for inspection and testing, 234, 299, 410, 425–6
- other rights and remedies, 305
- overheads
 - claims for increased costs, 149–52
 - formulae for calculating, 152–60
- partnering, 407, 433
- payment problems, 343
- penalties
 - as opposed to liquidated damages, 58–65, 75
 - general, 58–65, 78, 84
 - maximum recovery, 80–2, 83
- performance specified work, 242
- PERT charts, 185
- plant, 165–7
 - claim for inefficient or increased use, 163–4
 - contractor's hired, 165–6
 - contractor's own, 166–7
- possession, 58, 109–13, 327
 - deferring, 112–13, 235, 258, 296, 461
 - failure to give, 110–12, 377, 390, 411
 - partial, 376
 - sufficient, 109–10, 297–8
- postponement of work, 297–8, 467
- power, lighting, telephones, etc., 487
- powers of architect (*see* architect)
- powers of quantity surveyor (*see* quantity surveyor)
- practical completion, 140, 456–7
- precedence diagram, 185
- prevention by the employer, 29–30, 99–101, 237, 301, 303, 316, 451, 454, 459
- priced document, 347
- prime cost, 257, 339, 360
- principal contractor, 304, 388
- priority of documents, 347–8, 352–3
- productivity, loss of, 163, 497
- profit, claim for, 54, 397
- programme/progress schedules, 220
 - accepted, 54, 141, 421, 422, 439–40
 - as evidence in support of claim, 210–11
 - foreshortened, 14–43
- progress review, 256
- project manager
 - assessments, 438–9, 442–4
 - change of decision, 424
 - duties, 420
 - failure to respond, 423–4
 - instructions, 420–21, 423, 424
 - notifies a correction, 429
 - withholding acceptance, 424–5
- project changes (*see* variations)
- project drawings, 361
- prolongation of work (*see* claims)
- proof
 - burden of, 124–5

- protection of Works, 489
- protocol, 51–6
- provisional sums, 235, 298–9, 308, 313–14, 328–9, 331–2, 338–9
- quantity, difference in, 431
- quantity surveyor
 - architect and, 17
 - ascertaining loss and/or expense, 16–17
 - duties and functions of, 17–18, 324–5, 344–5, 349, 351
 - liability of, 18–19
 - powers of, 16–19, 335, 337
- quantum meruit* claims, 4–8
- reasonable endeavours, 232–3, 262
- reasonable objection, 308, 326, 328, 350, 359, 360
- reasonable remuneration, 7
- reasonable time, 22, 24, 392
- reasonably apparent, 260, 284
- reasonably practicable, 227
- records in support of claim, 379
- recovery, double, 158
- regularly and diligently, 226, 233, 287–8
- reimbursed by other payment, 286
- relevant events for extensions of time, 228–9
- relevant matters, 295–304
- reliance principle, 15
- relief events, 265, 266, 318
- remoteness of damage, 119, 121, 128, 174
- repudiation, 20, 107, 110–11
- Res ipsa loquitur*, 125
- restitution, 4
- risk management, 408
- rubbish, 488
- safety, health and welfare, 487–8
- Sale of Goods Act 1979, 102
- savings, 384
- schedule of rates, 348–9
- SCL extension of time protocol, 51–6
- Scott schedule, 213–15
- search, instruction to, 425
- sections, 47–51
- security, 489
- sequence of work, 327–8
- services and facilities, 487
- settlement, 19
- similar, 334–5
- site
 - accommodation, 149, 486–7
 - boundaries, 354, 415
 - conditions, 113–16, 372, 426–7
 - diaries, 212–13
 - meetings, 134, 212
 - supervision staff, claims for costs of, 164–5
- small plant and tools, 490
- specification, 320, 346
- specified perils, 244
- standard method of measurement, 116, 235, 301, 323, 336
- Statute of William III 1697, 81
- Statute Law Revision Act 1948, 81
- statutory permissions, 461, 463
- statutory undertaker's work, 242–3, 389, 409–10
- storage, 488
- strikes, 245–6, 372, 410, 457, 459, 460, 461, 463
- sub-contract claims, 446
 - delayed completion by sub-contractor, 454–7, 464–5
 - direct loss and/or expense, 451–4, 461, 463–5, 468–71
 - extensions of time, 447–51, 458–9, 460–61, 462–3, 465–8
 - relevant sub-contract events, 450–1
 - relevant sub-contract matters, 453–4
 - main contractor's defaults, 451, 469–70
 - postponement instructions, 467
 - suspension of work,
 - under ACA/SC, 465–71
 - under DBSub/C, 460–1
 - under ICSUB/C, 459–60
 - under ICSUB/D/C, 460
 - under ICSUBNAM/C, 458–9
 - under MCWC/C, 462–5
 - under SBCSub/C, 446–57
 - under SBCSub/D/C, 457
- sub-contractors
 - claims against, 454–7, 464–5
 - delay by, 254
 - notification of delay, 448, 468
 - progress, 447–8
- subtractive analysis, 185
- sum payable on occurrence of event, 76
- supplemental provisions, 314–15, 357–9
- Supply of Goods and Services Act 1982, 98

- Supreme Court Act 1981, 177
- suspension of performance, 236, 300, 373, 411, 433–4, 451, 453, 459
- take over before completion, 428–9
- temporary works, 491
- termination, 31, 90–3, 308–9
- terrorism, 244–5, 411
- thereupon, 252
- third party consents, 409
- time
 - at large, 22–6, 84–7, 253, 387, 430
 - limits, 24–6, 227–8, 248–50, 252–3, 284–6, 291, 370, 391, 438, 448–9, 458–9, 467–8
 - of the essence, 20–2
 - schedule, 399–400
- tort, 4, 95, 96
- trade usage, 98
- transport, 491
- unavoidable circumstances, 29
- undefined work, 338–9
- uneconomic working, 163–4
- unexpected problems, 10
- Unfair Contract Terms Act 1977, 15, 66, 369, 374, 386, 430, 465
- unliquidated damages, 275
 - (*and see* common law claims; direct loss and/or expense)
- valuation
 - architect's authority, 324, 351
 - of approximate quantities, 338
 - of contractor's designed portion, 339
 - of project changes, 361
 - of *quantum meruit*, 5–8
 - of variations, 16, 52, 108, 136, 350–1, 365, 402–6
 - by agreement, 333, 354
 - by contractor, 354
 - by contractor's priced document, 347
 - by measurement, 333–8, 365
 - by quotation, 219, 341–3, 349, 357–9, 363, 381, 404–6, 416–17, 436, 438–9
 - of additional or substituted works as dayworks, 339–41, 356, 365
 - of obligations and restrictions, 341
 - of omissions from contract Works, 336
 - preliminary items, 336
 - provisional sums, 356
 - rules, 349, 355–6, 382
 - savings, 362, 284
 - under ACA 3, 402–6
 - under CE, 366
 - under CM/TC, 361–2
 - under DB, 352–9
 - under GC/Works/1(1998), 381–4
 - under IC and ICD, 345–9
 - under MC, 361
 - under MP, 362–4
 - under MTC, 364–5
 - under MW and MWD, 350–51
 - under NEC 3, 436, 437–8
 - under PCC, 360
 - under PPC2000, 415–17
 - under SBC, 333–41
- variations, 319–66
 - additional or substituted work, 371
 - architect's power to order, 310, 324, 350, 360, 364–5
 - baseline, 320–1
 - definition, 325, 353, 362
 - delay due to, 22–3
 - design, 339, 353–4, 355
 - Employer's Requirements, to, 331
 - extension of time for, 234
 - in obligations or restrictions, 326–8
 - instructions of architect, 310, 346
 - interim certificates, 343
 - key date, 423
 - money claims and, 296, 313, 315, 316
 - of contract, 103–4, 326
 - omission of work, 104
 - payment, 343
 - reasonable objection, 326–7, 328, 344, 349, 360
 - scope, 325–6
 - under ACA 3, 402–6
 - under CE, 366
 - under CM/TC, 361–2
 - under DB, 352–4
 - under GC/Works/1(1998), 381–4
 - under IC and ICD, 345–9
 - under MC, 361
 - under MP, 362
 - under MTC, 364–5
 - under MW and MWD, 350
 - under PCC, 360
 - under PPC2000, 415–17
 - under SBC, 325–45
 - valuation of (*and see* valuation)

- waiver, 87–8, 132, 374
- war, 389
- weather, delay due to, 243–4, 372–3, 409, 427
- winter working, 143–7, 164
- work not forming part of the contract
 - giving rise to claim for extension of time, 239–40, 412
 - money claim, 302–3
 - (*and see* valuation)
 - work not in accordance with the contract, 326
 - work, quality and quantity, 347–8
 - work schedules, 320, 346
 - working space, limitation in, 327
 - works contract variation (*see* variations)