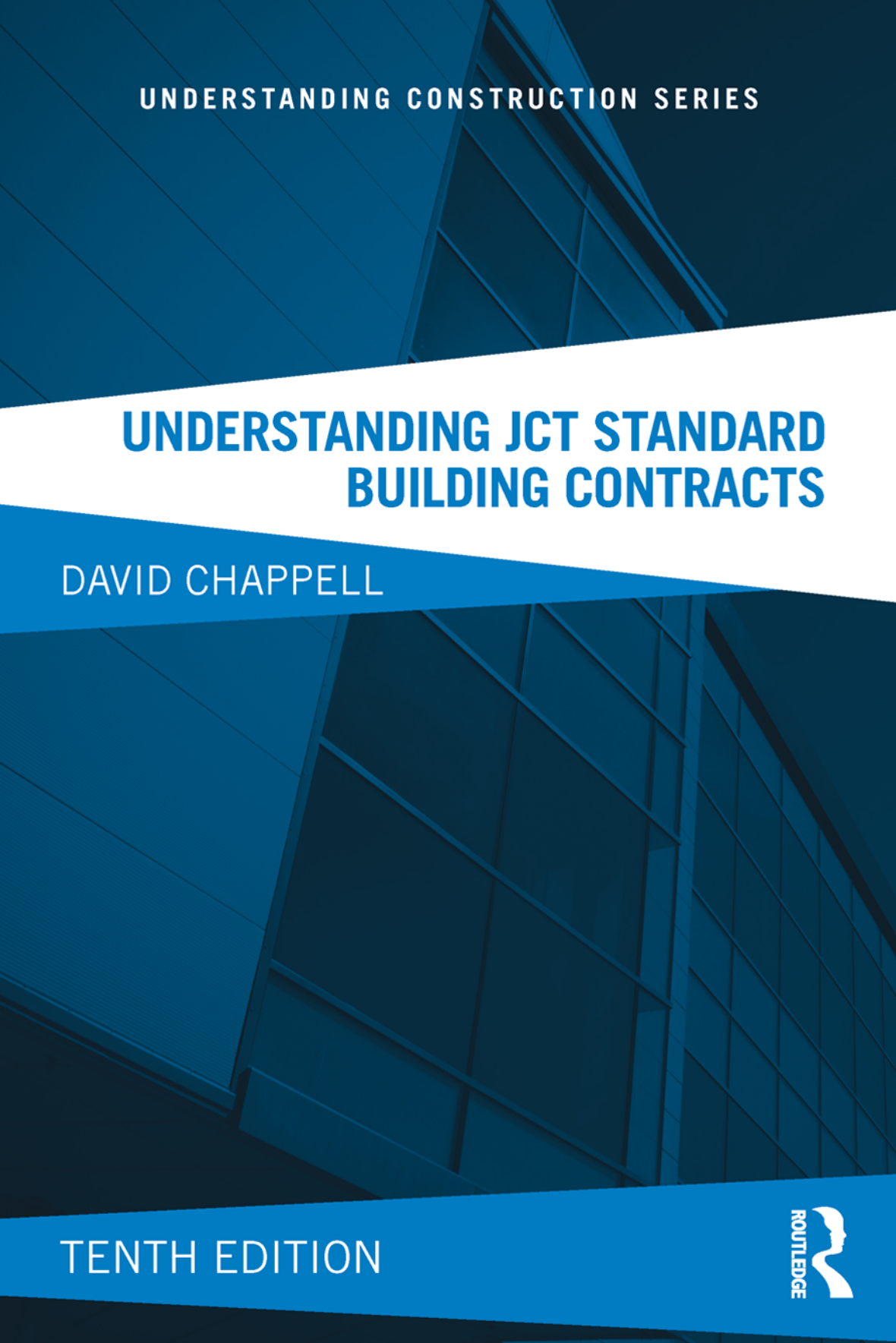

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DAVID CHAPPELL
TENTH EDITION
ROUTLEDGE

Understanding JCT Standard Building Contracts

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Understanding JCT Standard Building Contracts

Tenth Edition

David Chappell

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Preface to the tenth edition

This book continues to be popular among architects, quantity surveyors and contractors; presumably because it contains a lot of information packed into a small space at a reasonable cost. It is a source of great pleasure that this text has been adopted as a standard text for students in schools of architecture and building as well as being read by those who are established in the industry. I will do my best to ensure that the text remains relatively simple and easy to read, and free from legal phraseology while at the same time remaining up to date and improved where possible. The original intention was to provide a straightforward guide to the three standard forms of contract in common use. In a later edition it was enlarged to deal with the most common form of design and build contract and subsequently the Intermediate and Minor Works contracts each had a separate edition dealing with the situation where the contractor carried out part of the design.

My guiding principle remains the kind of book I would have wanted when I was a newly qualified architect. What I wanted then and what was not available was a short book which told me all I needed to know about the then current forms of contract and which I could read without having to look up every other word in a legal dictionary. I wanted a book which was not too superficial, which gave me a few insights and which pointed the way to further reading.

All the JCT series of contracts and sub-contracts were completely re-written and some new contracts were added during 2005. In 2009 the Local Democracy, Economic Development and Construction Act passed through Parliament. It made some important changes to the Housing Grants, Construction and Regeneration Act 1996, but they did not immediately come into force. They had to wait until the Scheme for Construction Contracts (England and Wales) Regulations 1998 had been updated to comply with the 2009 Act. The last edition of this book was updated to take account of these changes. In the 2016 edition of JCT contracts, parts have been made simpler, other parts less so, further substantial and very important changes have been made to the payment, loss and/or expense and insurance provisions. Reference is made to BIM protocol, clauses dealing with the Public Contracts Regulations 2015 and the Freedom of Information Act 2000 and there are very many minor but significant changes to other clauses.

This edition takes account of these changes together with recent legal decisions and relevant statutes. It also includes a section dealing with performance bonds and guarantees. The new contracts will generally be referred to as SBC16 etc. However, in this book, to avoid unnecessary characters, the 2016 contracts will continue to be referred to as SBC, IC, ICD, MW, MWD and DB and the two intermediate and two minor works contracts will continue to be grouped together for most purposes. Reference to SBC is to SBC with quantities.

As always, I am grateful to all those who have taken the trouble to express a view on this book and all suggestions have been carefully considered and acted upon where appropriate.

Note: Throughout this text, the contractor and any sub-contractor have been referred to as 'it' on the basis that they are corporate bodies.

Since writing the last edition, my dear wife Margaret, who always encouraged my writing, has died. I am grateful to my children and grandchildren who have helped in their various ways to make life worth living.

David Chappell
David Chappell Consultancy Limited
Wakefield, March 2017

Introduction

This book is written as a helpful general guide to six forms of contracts produced in 2006, amended and re-issued in 2011, amended and re-issued in 2016. These are:

Standard Building Contract with quantities, 2016 (SBC16), Intermediate Building Contract 2016 (IC16), Intermediate Building Contract with contractor's design 2016 (ICD16), Minor Works Building Contract 2016 (MW16), Minor Works Building Contract with contractor's design 2016 (MWD16) and Design and Build Contract 2016 (DB16).

The text refers to contracts in England and Wales and substantially to Northern Ireland. It does not apply to Scotland, which has major legal and contractual differences.

It should be noted that the Housing Grants, Construction and Regeneration Act 1996 has been amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009, in force from 1 October 2011 and the Scheme for Construction Contracts (England and Wales) Regulations 1998 has been amended by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011. The equivalent legislation in Northern Ireland (the Construction Contracts (Amendment) Act (Northern Ireland) 2011) came into force on 14 November 2012. The Northern Ireland Scheme was amended by the Scheme for Construction Contracts in Northern Ireland (Amendment) Regulations (Northern Ireland) 2012 which also came into force on 14 November 2012. The England and Wales Act and Scheme as amended are virtually identical to the Order and Scheme as amended in Northern Ireland.

It has been thought sensible to arrange the guide under a series of topics rather than undertake a clause-by-clause interpretation, because there are dangers in looking at the clauses in isolation and taking too literal an approach. So far as possible, the way in which all the contracts deal with a particular topic is examined together. However, it should be noted that:

- IC and ICD are dealt with together as are MW and MWD. The differences between IC and ICD and between MW and MWD relate to the incorporation of the contractor's designed portion (CDP) in ICD and MWD. These differences are highlighted where they occur. Generally for ease, unless the

text dictates a different treatment, these four contracts are referred to in two groups as IC/ICD and MW/MWD.

- Provision for possession and completion in sections has been incorporated into SBC, IC, ICD and DB.
- SBC does not have separate private and local authority versions, but it is still available for use with bills of quantities (SBC/Q), with approximate quantities (SBC/AQ) and without quantities (SBC/XQ).
- No architect is specified in DB. Any instructions or directions are given by the employer or, if appointed, the employer's agent. References in this book to the architect are never intended to mean an architect employed by the contractor. Such architects are treated as being part of the contractor's team – which indeed they are.
- References to case law have been inserted for the benefit of those who wish to read further and to show the way in which contract provisions have been interpreted by the courts. It should be noted, however, that detailed expositions of cases have been excluded.

The book tries to state the law and the position under the contracts as at the end of March 2017.

Legal language has been avoided and, where the contractual position is obscure, a suggested course of action is laid down. In the interests of clarity, the provisions have been simplified; this book, therefore, supplements but does not take the place of the original forms of contract. More than anything, it is intended to be practical with emphasis on the contractor's interests. When in difficulty, the golden rule is to obtain expert advice.

1 Contractor's obligations

1.1 The forms

It seems appropriate to begin by looking briefly at the standard forms under consideration. All the JCT forms of contract were substantially amended in 2005. These became SBC, IC/ICD, MW/MWD and DB. These forms were re-issued in October 2011 after having been amended to take account of changes to the Housing Grants, Construction and Regeneration Act 1986 wrought by the Local Democracy, Economic Development and Construction Act 2009. The contracts became suitable for use in Northern Ireland when the amendments took effect on 14 November 2012.

SBC is a very comprehensive document which is suitable for use with any size of building works. Owing to its complexity, however, its use is likely to be reserved for projects which are substantial in value or complex in nature.

DB provides a basis to allow contractors to carry out the design as well as the construction. The resemblance between SBC and DB is still very strong. There lies the trap, because DB has many substantial differences from the traditional form of contract. Essentially, the scheme of the contract is that the employer, either personally or through an agent, produces a performance specification (the Employer's Requirements) which the contractor must satisfy. The contractor demonstrates how it intends to do this by producing the Contractor's Proposals. With this type of contract, the contractor carries most of the risk so far as cost, time and finished product are concerned. No independent architect is involved and, therefore, there are no certificates of any kind. There are merely statements and notices from the employer and applications for payment from the contractor. In addition to the normal clauses, this contract contains optional supplemental provisions.

The forerunner of IC/ICD was introduced to fill the gap between what is now SBC and what is now MW/MWD. A look inside the front cover suggests its use if the Works (all the work to be done) are of simple content, adequately specified or billed and without complicated services or specialist work. There is no suggested upper price limit but £490,000 (at 2017 prices) and a maximum contract period of 12 months seems reasonable. Price and length of contract period are not, however, the most important factors.

MW and MWD are suitable for use on projects having a maximum value of £200,000 (at 2017 prices). They are not suitable for complex Works and no provision is made for bills of quantities or named sub-contractors. Very importantly, as far as contractors are concerned, there is only limited provision for reimbursement of loss and/or expense, although a claim can always be made using common law rights. This form is very popular and not only for minor Works. It is known to be used in conjunction with bills of quantities, although quite unsuitable. The reason for its popularity is no doubt because it is short and simply expressed. Its simplicity is deceptive, however, and there are pitfalls for the unwary.

The contractor may think that the suitability or otherwise of a particular form for a particular project is academic in the sense that it can do very little about it. The choice is for the employer advised by the architect. A thorough knowledge of the contents of the various forms, however, can influence the contractor's tender – if it has any sense.

Some employers use the standard forms, but with amendments to suit their own requirements and ideas. Such amendments, if substantial, may turn a standard form into the employer's 'written standard terms of business' under section 3 of the Unfair Contract Terms Act 1977 with the result that, if the meaning of any part of the contract is ambiguous and no recognised method of interpretation will resolve its meaning, the meaning most favourable to the contractor would be used. Amended forms of contract do have an unfortunate habit of backfiring on the party, making the amendments inconsistent or inoperative [1]. Any amendment to clauses 2.26–2.29 of SBC is likely to provide a bonus to the contractor unless great care is taken. More will be said about this later when dealing with extensions of time.

Whichever of these forms is used, the contractor undertakes to carry out the Works in accordance with the contract documents.

Contract documents

It is vitally important to know which are the contract documents, because they are the only documents which spell out what the employer and the contractor have agreed to do. Letters exchanged before the contract is entered into and the contractor's programme are not contract documents, that is they are not binding on the parties, unless expressly so stated. Architects may point to minutes of site meetings as evidence of what was agreed, but they cannot amend the contract documents [2]. In order to amend the terms of the contract it would be necessary for the employer (not the architect on the employer's behalf) and the contractor formally to agree the change, preferably in writing and preferably as a deed.

SBC defines them in clause 1.1 as the contract drawings, contract bills, agreement, conditions and (if appropriate) the Employer's Requirements, Contractor's Proposals and the CDP (Contractor's Designed Portion) analysis and (if appropriate) the BIM Protocol. The contract drawings must be the drawings on which the contractor tendered. It is not unusual for the architect to have made revisions

to the original drawings between tender and the signing of the contract. The contract drawings must be carefully scrutinised before signing and, if such revisions are present, the architect must be asked to restore them to their previous condition.

IC and ICD provide four options:

- contract drawings and specification priced by the contractor;
- contract drawings and work schedules priced by the contractor;
- contract drawings and bills of quantities priced by the contractor;
- contract drawings and specification and the sum the contractor requires for carrying out the Works;

together with the agreement and conditions (the printed form) and, if applicable, the BIM Protocol and/or particulars of tender of any named person in the form of tender and agreement ICSub/NAM.

If the contractor is simply asked to state a sum required to carry out the Works – the last option – it must also supply a Contract Sum Analysis or a schedule of rates on which the Contract Sum is based.

Although the bills of quantities, the specification, the work schedules, the Contract Sum Analysis and the schedule of rates are each referred to as the priced document, the way in which the contract documents are defined in clause 1.1 makes it very arguable that neither the Contract Sum Analysis nor the schedule of rates is a contract document. In some circumstances, this may be important because the priced document is essential to value architects' instructions requiring a variation (clause 5.3.1). It will normally be to the contractor's advantage if the third option is used (with priced bills) because it puts the onus on the employer to ensure that the quantities are correct (see clause 2.12). All the other options provide room for dispute if there are inconsistencies.

MW provides, in the second recital, and MWD in the third, for the contract documents to be any combination of contract drawings, specification and work schedules together with the conditions (the printed form). MWD adds the Employer's Requirements. The third recital, the fourth in MWD, provides that the contractor must price either the specification or the schedules or provide a schedule of rates.

DB defines the contract documents in clause 1.1 as the Employer's Requirements, the Contractor's Proposals and the Contract Sum Analysis together with the agreement, the conditions and, if appropriate, the BIM Protocol. The contents of the Employer's Requirements, the Contractor's Proposals and the Contract Sum Analysis are to be listed in the Contract Particulars. They are frequently composed of a mixture of specifications of various kinds and drawings. The Contract Sum Analysis is sometimes as detailed as bills of quantities.

It is usual to talk about 'signing' the contract, but in fact it can be executed in either of two ways: under hand (also known as a 'simple' contract) or as a deed (also known as a 'specialty' contract). As far as building contracts are concerned,

there are two important differences. A deed does not need what is called 'consideration' to make it a valid contract, but a simple contract does need consideration. For example, a builder who offered to construct a house for someone would have to receive something in exchange for there to be a valid simple contract, but if the contract was entered into as a deed, it would be binding even if the builder agreed to build the house without any reward.

The second important difference concerns the Limitation Act 1980 which operates to limit the period during which either party may bring an action to enforce their rights under the contract. In the case of a simple contract, the period is six years from the date of the breach. For practical purposes, the starting date is usually taken as practical completion [3]. In the case of a deed, the period is 12 years. It is clear, therefore, that a contractor is more exposed if it enters into a building contract in the form of a deed.

It used to be the case that a deed had to be sealed in order to be properly executed. This was usually achieved by the impression of a device on wax or a wafer and fixed to the document. In fact, it was usually sufficient if it could be shown that both parties intended the document to be sealed [4]. The Law of Property (Miscellaneous Provisions) Act 1989 and the Companies Act 1989 abolished the necessity of sealing for individuals and companies respectively. Indeed, sealing alone is not sufficient to create a deed. In Northern Ireland, the Companies (No. 2) Order (Northern Ireland) 1990 and the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 removed the requirements for sealing for companies and for individuals respectively. All that is necessary now in order that a document be executed as a deed is that it be made clear on its face that it is a deed and, in the case of a company, that it is signed by a director in the presence of a witness who must attest the signature [5] or by a director and company secretary, or, in the case of an individual generally, that it is signed by the individual in the presence of a witness who must attest the signature. It is a matter on which proper advice should be sought before executing the contract.

Clause 1.7 of SBC, IC/ICD and DB provides that all notices and other communications must be in writing. If there is no BIM Protocol, the parties must agree in writing how they are going to communicate. For example, for all the usual contract correspondence they can agree to communicate by first class post and/or by e-mail. However, it will be seen later that when a party intends to terminate the contractor's employment, the contract expressly states the ways in which that is to be communicated and the parties must comply.

Discrepancies

It is quite usual for there to be some small, and sometimes large, discrepancies between the provisions in the printed form and in, say, the bills of quantities or specification. Priority of documents then becomes important. It is often thought that terms which are hand- or type-written must take precedence over those which are printed because the written terms must represent the clear intentions

of the parties. Indeed, that is the general law: type prevails over print [6]. However, clause 1.3 of SBC, IC/ICD and DB and clause 1.2 of MW/MWD clearly state that nothing contained in any of the contract documents will override or modify the terms in the printed form.

This kind of provision has been upheld in the courts [7]. In practice, it means that, if a term in the contract bills or specification is in conflict with a term in the printed form, the printed term will prevail. For example, if the bills provide for an estate of houses to be completed on specific dates, in other words phased completions, and the printed form contains just one date, it is the date in the printed form which will apply and the contractor will have fulfilled its obligations as to the time for completion if it completes all the houses on that one date. If the printed form stipulates that the period for payment is 14 days, that stipulation cannot be overridden by a clause in the bills allowing 21 days. To be effective, the change must be made to the printed form itself. A clause in the bills stating that the bills take precedence over the printed form is ineffective, because the clause in the printed form states that it takes precedence. To alter the situation requires the change to be written into the printed form itself.

All six contract forms are lump-sum contracts. That is to say that, in general, the contractor takes the risk that the work may be more costly than it expects. Specific clauses, however, modify the effects.

In particular, when bills of quantities are used, SBC clause 2.13.1 and IC/ICD clause 2.12.1 expressly provide that the bills are to be prepared in accordance with the Measurement Rules (NRM2) unless specifically stated otherwise in respect of particular items. The Measurement Rules were produced by the RICS to replace the Standard Method of Measurement (SMM7). Errors in the bills are to be corrected and treated as variations. The effect of this is that a contractor is entitled to price everything as though measured in accordance with NRM2 unless there is a note for that item. A general note to the effect that not everything is measured in accordance with NRM2 would not be effective. Contractors can recover substantial amounts of money simply by paying attention to this point.

Under DB, there is less scope for the contractor to claim additional costs, because it is generally taken to have allowed in its price for satisfying the Employer's Requirements.

If the contractor makes an error in pricing which is not detected before acceptance of the tender, it is stuck with it. This may seem harsh and many *ex gratia* claims are made on this basis, but if two parties contract together they are usually taken to know what they are doing. It may be possible for the contractor to obtain relief if it can show that the employer detected a substantial mistake in pricing and, although knowing that the contractor would not wish to contract on those terms, purported to accept the tender. However, the same principles apply to a sub-contractor tendering for sub-contract work [8]. In Canada, an architect has been held liable to a contractor for failure to include important information in the invitation to tender. As a result, the contractor was unable to use its preferred system and lost money [9].

Although the contractor has an express duty under SBC and IC/ICD to notify the architect if it finds any discrepancies, it is established that, under SBC, IC/ICD and MW/MWD, the contractor has no duty to search for discrepancies and inconsistencies between the contract documents. The architect is responsible for providing the contractor with correct information. If the contractor does not discover a discrepancy until too late, the employer must pay for any additional costs resulting [10]. In the nature of things, inconsistencies will be present. All the three forms make provision for the correction of such inconsistencies: SBC in clause 2.15, IC/ICD in clause 2.13, MW in clause 2.4 and MWD in clause 2.5.

The architect may well consider that a contractor who is carrying out its obligations properly will have to examine the documents carefully and so detect discrepancies. This favourite argument does not change the legal position noted above. The important question is whether, as a matter of fact, the contractor has or should have discovered a discrepancy. Of course, upon finding a discrepancy, the contractor should always ask the architect, in writing, for an instruction.

Most of the contractor's problems in this respect arise because it is anxious to proceed 'regularly and diligently' and when confronted by two drawings, or a drawing and a bill item, which do not correspond, it attempts to solve the problem itself. By so doing, the contractor loses its right to payment for any variation and probably takes responsibility for the design of that particular part of the work. If, however, the contractor does not proceed on that particular part of the work, asks the architect for instructions and notifies delay and disruption, it will be entitled to the whole of its loss, in terms of time and money as well as payment for the variation instruction when it eventually arrives.

A closely linked situation, although not strictly an inconsistency, is where the contractor is not provided with a particular detail it requires. The contractor may think it knows what the architect intends to be done, but if the contractor carries on without precise instructions, it will probably become liable for any inadequacy in the detail [11]. The contractor should deal with it in precisely the same way as inconsistencies, notify the architect and request instructions.

Although payment for architect's instructions requiring a variation to correct a discrepancy will be fairly automatic under the terms of SBC, the same may not be true of IC or ICD, if bills are not used, and MW/MWD.

For example, under the provisions of clause 4.1 of IC/ICD, the contractor will be deemed to have priced for work in the specification even if not quantified. The rules in this clause are quite complicated and will repay careful study before tendering. Broadly, the rule is that if there are no quantities for a particular item, the contract documents must be read together. If there is a conflict between documents, the drawings prevail. Where quantities are shown, they prevail.

One of the dangers of the deceptively simple MW and MWD is that the contractor's obligation is to carry out the Works in accordance with the contract documents on which it has submitted its price. The contract documents will probably be drawings and specifications and, therefore, the contractor will be deemed to have included for the whole of the work shown on the drawings and

specification. If there is an inconsistency, it appears that the contractor must be deemed to have priced for either option. In consequence, it appears that cases where the contractor will be entitled to additional payment as a result of inconsistencies will be rare.

In view of the different philosophy underlying DB, discrepancies are dealt with in an entirely different way. Two situations are envisaged: a discrepancy within the Employer's Requirements including change (which is the DB term for a variation) and a discrepancy within or between the Contractor's Proposals and any contractor design documents. A discrepancy regarding the Contractor's Proposals and contractor design documents is covered by clause 2.14.1. The contractor must suggest an amendment and the employer may choose between the discrepant items and the suggestion at no additional cost. Under clause 2.14.2, a discrepancy in the Employer's Requirements is dealt with in whatever manner is stated in the Contractor's Proposals or, if not so stated, as suggested by the contractor, which the employer can either accept or reject in favour of his or her own solution. Either way, it is to be treated as a change.

A topic which frequently causes difficulty is when there is a discrepancy between the Employer's Requirements and the Contractor's Proposals. The contract makes no provision to deal with this situation. Indeed, one of the footnotes emphasises the importance of removing all discrepancies between the two documents. We all (except, it seems, the JCT) know that life is not like that and discrepancies will occur. The straightforward way of resolving such matters is on the basis of priority of documents.

Although not expressly stated, the contract wording clearly points to the Employer's Requirements taking precedence over the Contractor's Proposals. The third recital of the terms and conditions provides that the employer has examined the Contractor's Proposals and is satisfied that they appear to meet the Employer's Requirements. It is clearly not intended that under the contract, the employer or the employer's advisers should check the Contractor's Proposals exhaustively to *ensure* that they meet the Employer's Requirements in every particular [12]. Had such a thing been intended, it would have been easy for the draughtsman to have used clear words to that effect. However, the wording strongly points to the intention that the Contractor's Proposals will be drafted to meet the Employer's Requirements.

Because the contract does not expressly deal with discrepancies between Employer's Requirements and Contractor's Proposals, it is likely that a court would imply a term that is necessary for the business efficacy of the contract – giving precedence to the Employer's Requirements. This is because:

(a) The contract philosophy is that the employer sets out requirements. The intention is that the Employer's Requirements and the Contractor's Proposals should dovetail together and that, where they do not do so, that is a qualification or divergence. It would be perverse to permit the Proposals to take precedence. The employer is entitled to assume that the contractor is complying with the Employer's Requirements.

(b) The Contractor's Proposals should be an indication of how the contractor is to comply with the Employer's Requirements – not an indication of how it wishes to construct the project or allocate risk. The wording of the first and second recitals reflects this.
(c) Clause 2.2 provides that the Employer's Requirements prevail over the Contractor's Proposals where workmanship or materials are concerned.
(d) Under the terms of the contract, the employer cannot issue a change instructing the contractor to vary the Contractor's Proposals. Clause 5.1.1 provides that a change means a change in the Employer's Requirements. Neither can the employer instruct the expenditure of a provisional sum in the Contractor's Proposals (see clause 3.11). In the absence of a right to instruct a change to, or the expenditure of a provisional sum in, the Contractor's Proposals it would be perverse for the Contractor's Proposals to prevail over the Employer's Requirements, because that would disentitle the employer from issuing changes in respect of the discrepant parts of those Contractor's Proposals.

These points also apply in general to the Employer's Requirements and Contractor's Proposals in the CDPs of SBC and ICD. The position under MWD is different in detail, because although there is provision for Employer's Requirements there is no provision for Contractor's Proposals. Therefore, the situation here is even clearer. Article 1 requires the contractor to comply with the contract documents, one of which is expressly stated to be the Employer's Requirements. Therefore, under MWD, there can be no doubt that the contractor must comply with the Employer's Requirements so far as the CDP is concerned.

1.2 Implied and express terms

The general law will imply three important terms into all building contracts:

- The contractor will carry out the work in a good and workmanlike manner.
- The contractor will supply and use good materials.
- The contractor will undertake that the completed building is reasonably fit for its intended purpose where that purpose is known and there is no other designer involved [13].

These terms can only be modified or supplanted if there are express terms (i.e. written in) in the contract dealing with the same topics or, in the case of the third term, if someone has been employed in a design capacity.

Implied terms come as a shock to some contractors, who think that the whole of their obligations is covered by the terms which can be read in the printed document. There are, in fact, a good many other terms which the law will imply.

Some of these terms are implied by statute, for example, the Supply of Goods and Services Act 1982 and the Defective Premises Act 1972. In addition, the Unfair Contract Terms Act 1977 will often operate to void the effect of some

clauses in a contract, particularly those clauses seeking to exclude or reduce liability. Where consumers are concerned, the Consumer Rights Act 2015 strictly protects the rights of consumers and clauses which have not been negotiated may be regarded as unfair and ineffective.

The courts are usually reluctant to imply terms into a contract made between two parties because, provided that there is no mistake, misrepresentation, illegality, and so on in a contract, it is generally considered that the parties should be left with the bargain they have made, no matter how uncomfortable it turns out to be. When the courts do imply a term into a contract, it must not be inconsistent with an express term and it must have as its basis the presumed intentions of the parties; in other words, what they would have written into the contract had they given thought to the matter before the contract was made. The courts, however, will not imply terms into a contract simply because it seems to be a good idea. Terms will only be implied in accordance with certain principles which the courts themselves have built up over a number of cases. In general, the courts will imply a term if:

- It is the kind of term which, if asked, both parties would immediately agree was part of their bargain.
- The contract is apparently complete, but lacks just one term to make it workable.
- The parties have not fully stated the terms and the court is seeking to define the contract.

It can readily be seen that these categories are not completely separate, but rather instances of differing emphasis [14].

In SBC, IC/ICD, MW/MWD and DB the contractor's primary obligations are stated in clause 2.1 in each case. It is no accident that these obligations are at the very beginning of the conditions. In each contract the obligations are expressed in very similar terms: the contractor is to carry out and complete the Works in accordance with the contract documents. This is a basic and absolute obligation from which the contractor can only expect relief in very restricted circumstances; for example, if the employer prevents completion [15], or if the contractor lawfully terminates its own employment in accordance with the appropriate clause (SBC, IC/ICD and DB clauses 8.9, 8.10 and 8.11, MW/MWD clauses 6.8, 6.9 and 6.10). It is considered that generally clause 2.1 is not sufficient to impose any design liability on the contractor [16]. But it should be noted that, under DB, the contractor is made responsible for completing the design of the Works and under ICD and MWD the contractor has design responsibility for a portion of the Works.

Contractor's duties

The contractor's duties are scattered throughout each contract. There are over 90 separate instances in SBC, more than 70 in IC/ICD and 38/43 in MW/MWD

respectively. The contractor has over 100 duties under DB. These, it must be remembered, are express duties and take no account of the duties which will be implied. It is, therefore, of the utmost importance that the contractor reads the contract carefully. It should be considered a working tool, not something to be thrown into a drawer. It is well worthwhile highlighting the duties in coloured pen.

An obligation which seems to cause difficulty is contained in SBC and IC/ICD clause 2.4 and DB clause 2.3. This is the obligation to proceed with the Works regularly and diligently. MW/MWD does not expressly refer to carrying out the Works regularly and diligently but, strangely, a failure to do so is made a ground for termination. The question is, what does the obligation mean in practice?

The words will be interpreted in the light of the facts, but it seems clear that simply going slow will not necessarily be taken to mean that the contractor is not proceeding diligently. It has been suggested that an obligation to work with due diligence is an obligation on a contractor to work so as to meet the key dates and the completion date in the contract [17]. It has been established that the duty is to proceed regularly and diligently (the words being read together), efficiently and industriously, using the resources necessary to complete the contract on time. It is not sufficient for the contractor to have men on site at regular intervals; the work must be being progressed [18]. This is important in view of the fact that failure to proceed regularly and/or diligently is a ground for termination by the employer in all six contracts. Failure on the part of the contractor to keep to its programme would hardly qualify under this head unless such failure was gross. But an architect who did not issue a default notice in the face of the contractor's clear failure to proceed regularly and diligently would be in breach of duty to the employer. The court of appeal has explained the meaning of regularly and diligently as follows:

> 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. [19]

SBC clause 2.9.1.2 requires the contractor to provide two copies of its master programme and to update it within 14 days of any decision by the architect in relation to extensions of time. IC/ICD, MW/MWD and DB have no such provision, but there is no reason why such a requirement should not be incorporated

into the specification or preliminaries. It is useful if the programme is specified as being in network form, because it enables the estimation of extensions of time easily whereas a simple bar chart cannot demonstrate delays in the same way. SBC contains a provision in the Contract Particulars which can be completed to require the contractor to show critical paths. The courts have approved the use of computerised techniques to input the delays into a precedence diagram to determine the likely extension of time [20]. All architects and contractors should make use of this facility.

Contractors often show on their programmes that they intend to complete several weeks before the Date for Completion in the contract. It is the contractor's privilege to complete earlier than the Date for Completion if it wishes, but the employer, through the architect, is not bound to assist the contractor by providing information earlier than necessary to enable the contractor to complete the Works by the contractual date [21]. However, contrary to common belief, the architect is not entitled to withhold a Certificate of Practical Completion in such circumstances until the contract completion date has arrived. It may not be to the contractor's advantage to produce a programme showing that it will finish four weeks early. The architect may argue that the contractor is not entitled to any extension of time until delays affect the end date by more than four weeks. Of course, in such an instance the contractor would be entitled to recover whatever direct loss and/or expense it could prove if matters giving rise to loss and/or expense were the cause of the delay.

Architect's satisfaction

The contractor's basic obligation is qualified in each of the forms under consideration, except DB, by the proviso that where and to the extent that the approval of quality of materials or standards of workmanship are a matter for the opinion of the architect, they must be to the architect's reasonable satisfaction. This does not impose a dual responsibility upon the contractor unless the contract documents expressly state that is to be the situation [22].

In general, the contractor must follow the requirements laid down in the contract documents, such as to provide concrete to a certain specification standard. Provided the contractor does just that, it has fulfilled its obligations. It matters not that the architect is not satisfied, provided the materials or workmanship are in accordance with what is laid down in the contract. The architect may not be satisfied and be simply disappointed with the results of the specification, but if the architect wants an improved result in such a case, the employer has to pay for it.

If, however, materials or workmanship are stated in the contract documents to be to the architect's satisfaction, or some such similar phrase, the contractor's obligations will be to reasonably satisfy the architect. In deciding whether he or she is reasonably satisfied, the architect may apply a subjective standard, but qualified by concepts of honesty, good faith and genuineness and the absence of arbitrariness, capriciousness, perversity or irrationality [23]. For example, the

architect cannot specify iron and expect gold. In effect, the architect's approval will override any specification requirement. It is, therefore, important to obtain such approval in writing.

Even if the contractor does not manage to ensure that the architect expresses approval in writing on every occasion that the architect expresses it orally, the issue of the final certificate, in the case of SBC, IC and ICD, will be conclusive evidence that such approval has been given (SBC, IC and ICD clause 1.9.1.1). The position is similar under DB regarding the employer's approval, except that there is no final certificate; merely a final statement which may become conclusive about the same kind of things as under SBC. The final certificate under MW/MWD is not conclusive about anything.

This is of crucial importance, especially to those contractors who may be worried at tender stage about the frequency of architect's approvals in the specification. Of course, it does not remove the obligation to satisfy the architect, but once satisfied and the final certificate issued, it becomes the architect's concern.

In 1994 it was established that quality and standards of materials and workmanship are always matters for the opinion of the architect [24]. However, clause 1.9.1.1 of SBC, IC and ICD and clause 1.8.1.1 of DB expressly state that the final certificate (or final statement under DB) is not conclusive that any materials, goods or workmanship comply with the contract.

Since 2011, if the architect does not issue the final certificate by the correct date, the architect loses the power to issue the final certificate at all. Under DB, the situation is reversed and it is the contractor which loses the chance to issue the final statement. The consequences are dealt with in Chapter 5.

SBC clause 3.20 stipulates that where materials, goods or workmanship are to be to the architect's satisfaction, any dissatisfaction must be expressed within a reasonable time of the work being carried out. In the light of the remarks above, it seems that clause 3.20 may extend to all materials, goods and workmanship whether or not expressly noted in the specification or bills of quantities. This is an added safeguard for the contractor against the architect waiting until the project is nearly complete before making known a complaint. It puts the onus on the architect to decide whether or not he or she is satisfied. The precise meaning of 'a reasonable time' will always be open to dispute, but in this context it is thought that the architect must express any dissatisfaction before the contractor carries out the next operation. For example, if the contractor lays a screed, the architect must express any dissatisfaction before the floor finish is applied and possibly before all wet trades have finished. Employers will no doubt delete this provision.

Duty to warn

Although the position is not crystal clear, it seems that the contractor has no duty to warn the architect of defects in the architect's design although, in certain circumstances, the contractor may have a duty to warn the employer if it can be shown that the employer is placing special reliance upon the contractor [25]. The contractor certainly has a duty to the employer in those cases where the

architect has produced the original drawings, but is taking no further part in the project [26]. The prudent contractor will always notify the architect if it considers that there is a design defect irrespective of whether it has a duty to do so [27]. It is wise to put the notice in writing. The architect who ignores such a warning would be misguided to say the least, but then no blame can attach to the contractor. There are occasions when there is a danger of death or injury where it seems that no amount of warning on the part of the contractor will suffice and nothing short of refusal to proceed will discharge its responsibility [28].

1.3 Design

In general, the contractor will have no obligation to, nor liability for, design under a so-called traditional contract unless it has taken it upon itself (not uncommon), or unless the contract documents clearly set out such an obligation and liability [29]. Architects often specify items which unavoidably involve design and the contractor secures the items by means of sub-contractors or suppliers. Problems arise when design defects appear. Although the sub-contractor or supplier may have design liability to the contractor under the sub-contract, the contractor does not have the same liability to the employer under the main contract. The result is that the employer has no remedy except against the architect who should have arranged things, perhaps by means of a sub-contractor warranty, so that the employer had a means of redress.

The general position is now modified by SBC, ICD and MWD, all of which provide for a Contractor's Designed Portion (CDP) incorporated as part of the contract. There is no longer any necessity to use additional supplements.

The architect should now use the CDP when the supply of such things as roof trusses, precast floor beams or any other element having a design content is required and which the architect does not wish to design. It is convenient to consider the CDP in each contract as a little design and build section. Under SBC and ICD the employer prepares a performance specification in the form of Employer's Requirements to which the contractor responds with its Contractor's Proposals. Both documents become part of the contract documents together with a breakdown of the part of the Contract Sum related to the CDP work known as the CDP Analysis. Discrepancies are dealt with broadly in the same way as under DB.

DB, ICD and MWD clause 2.1 and SBC clause 2.2 require the contractor to complete the design of the CDP (the whole of the Works in the case of DB of course). It is the contractor's responsibility to complete the design of the *whole* of the Works which distinguishes DB. Although the responsibility appears to be confined to completing the design, it has been held by the court that in carrying out design and build, the contractor has the duty to review whatever design is presented to it and to ensure that it works [30]. This is, of course, quite an onerous responsibility. The contracts seek to overcome this judgment by the insertion of a clause which provides that the contractor is not to be liable for anything in the Employer's Requirements nor for any design in the Requirements (SBC

clause 2.13.2, ICD clause 2.34.4, MWD clause 2.1.4 and DB clause 2.11). This has the effect of confining the contractor's responsibility to completing the design. Obviously, a contractor who can see that an existing design is seriously defective probably has a duty to warn (see Section 1.2 above).

Under clauses 2.19.1, 2.34.1, 2.1.1 and 2.17.1 of SBC, ICD, MWD and DB respectively, the contractor's design liability is confined to reasonable skill and care, just like an architect. These are important clauses, because without them the contractor's liability would be the higher standard of fitness for purpose [31]. The architect has power to issue directions for the integration of CDP work with the rest of the design.

Only SBC (clause 2.41), ICD (clause 2.33) and DB (clause 2.38) include a clause to deal with copyright. Although the contractor holds the copyright in each case, the employer is given an irrevocable licence to use the contractor's design in connection with the Works. It should be noted that there is an important proviso. The licence is subject to all money due and payable to the contractor having been paid. On this basis the employer does not actually have a licence until the building is completed and the final certificate issued and paid. In order to make this clause workable, the employer may perhaps be considered to have a licence throughout the progress of the work, so long as payment is made of money due, and that the licence becomes irrevocable only on payment of the final amount. This clause still needs some redrafting. Although there is no express clause dealing with copyright under MWD, the general law would apply, in particular the Copyright, Designs and Patents Act 1988. Under the general law, copyright would remain with the contractor as creator of the design and the employer would acquire a licence to reproduce the design in the form of a building provided that a significant sum had been paid to the contractor for the design [32]. A significant sum might well be somewhat short of payment of the whole of the final account figure.

DB, SBC and ICD include provision for submission of design drawings by the contractor. They are contained in Schedule 1 for DB and SBC and Schedule 6 for ICD. The procedure repays careful reading. The architect (or the employer under DB) must return one copy of each drawing marked either A, B or C. The contractor may proceed with drawings marked A. Drawings marked B may be used provided the contractor strictly adheres to the comments. Drawings marked C must be resubmitted after the comments have been taken into account. Submission of the drawings cannot be taken by the architect as an opportunity to amend the design. Drawings may only be marked B or C if they are not in accordance with the contract. For example, the architect has no power to require the contractor to change something on a drawing just because the architect would have done it a different way. In order to mark drawings B or C, the architect (or the employer under DB) must be able to say that the drawings did not comply with the Employer's Requirements or, if not shown on the Employer's Requirements, with the Contractor's Proposals. Probably comment can also be made if it can be shown that the contractor's construction detail would not work.

1.4 Materials and workmanship

SBC, IC, ICD, MW, MWD and DB clause 2.1 imposes substantial obligations on the contractor to carry out and complete the Works in accordance with the contract documents. Moreover, items for the architect's approval, so far as quality and standards are concerned, are to be to the architect's reasonable satisfaction, but not of course under DB. If there is no reference to the specification or the architect's approval, quality and standards must be appropriate to the Works or, if the contractor is designing, to the design. This leaves scope for argument. These obligations form a basis against which the contract clauses dealing with materials and workmanship should be studied.

MW makes no further reference to materials, goods and workmanship except that materials and goods reasonably and properly brought onto site and adequately stored and protected are to be included in progress payments (clause 4.3). MWD includes a set of provisions in clause 2.2.1, most of which are contained in MW clause 2.1.

Procurable

A very useful protection is given to the contractor by SBC clause 2.3.1 and DB clause 2.2.1. The contractor's duty is stated to be to provide materials and goods of the standards described 'so far as procurable' – that is, obtainable. If the contractor cannot obtain goods, etc., of the standards described, its obligation seems to be at an end.

The clause provides no escape for a contractor who is finding it more difficult or more expensive to obtain the required standard of goods. Unexpected rises in prices are the contractor's risk. If the contractor was late in placing the order, the materials are not objectively unobtainable, but merely due to the contractor's own fault and it is probable that the contractor has a duty to supply materials, etc., at least equal in standard to what is specified and at no extra cost to the employer.

If the materials become unobtainable after the contractor's tender is accepted, it then falls to the architect to issue an instruction to vary the materials or, under DB, for the employer to consent to the substitution of another material. If the new materials prove more costly, the contractor is entitled to be paid the difference. Neither IC, ICD, MW nor MWD provides this relief for the contractor, who will be responsible under these contracts for providing alternatives at the original cost. If the amount of unobtainable material is substantial, it may amount to frustration of the contract [33].

Workmanship has been separated from materials and goods under SBC and DB. So far as workmanship is concerned, it must be of the standard described in the bills of quantities (or specification if the Without Quantities version is being used). If the CDP is being used, the workmanship must be as described in the Employer's Requirements. Only if not described in the Employer's Requirements is the workmanship to be as described in the Contractor's Proposals.

Under DB, materials and workmanship must be in accordance with the Employer's Requirements. It is only if they are not specifically described in the Employer's Requirements that the contractor is entitled to look at its own Proposals or at any design document it has subsequently provided. This is extremely significant and indicates that the prime document is the Employer's Requirements.

Clause 2.1 in all the contracts provides that all work must be carried out in a workmanlike manner and in accordance with the construction phase plan. SBC clause 3.19, DB clause 3.14 and IC/IDC clause 3.16.2 provide that if the contractor fails to comply with this provision, the architect (or the employer under DB) may issue whatever instructions may be reasonably necessary, including the instructing of a variation, in consequence. First the contractor must be consulted but not under IC/ICD. Providing, and to the extent that they are necessary instructions, the contractor is not entitled to any payment for the variation nor to any extension of time. This clause is something of a 'catch all' attempt to cover those circumstances where it cannot be said that the work is not in accordance with the contract, but it is not carried out in a workmanlike manner so that it is dangerous or it threatens the proper carrying out of other parts of the Works.

Opening-up and testing

The contractor may be required to open up work already covered up or to carry out testing of materials, even if they are already built into the Works (SBC clause 3.17, IC/ICD clause 3.14 and DB clause 3.12). MW and MWD make no specific reference to opening-up and testing, but the power to order such work probably exists under clause 3.4. The contractor is entitled to be paid for opening-up and making good again and for any tests required unless:

- The cost of such opening-up and testing is already included in the contract.
- The work or materials are found not to be in accordance with the contract.

If it is suggested that the cost is already included in the contract, the contractor should make sure that it is indeed included. It seems unlikely that any very general note in the specification would cover the situation and the amount of opening-up and testing would have to be specified in reasonable detail. Otherwise, the contractor could be required to undertake limitless amounts of investigative work of this nature with no recompense. If covered work is found to be defective, the contractor has to bear the cost of uncovering, correcting the defects and making good again. That appears to be reasonable.

Contractors often feel aggrieved when asked to open up work. The grumble seems to be threefold: it throws doubt on their competence, the architect or clerk of works could have inspected before covering up and the contractor feels that, after opening-up, some excuse will be found to justify the exercise and leave the contractor with the expense. Thus if opening-up is instructed in order to inspect

part of the foundations or drainage, just before practical completion of the whole building is due, the contractor will be understandably irritated.

Contractors just have to live with the fact that they are not always trusted. Opening-up is often ordered because some aspect of the work provokes the suspicion that all is not well. Take, for example, the case of a specified 60 mm concrete screed laid on a solid concrete ground floor with a separating membrane between. Severe cracking may be noticed and it may be suspected that the screed is not thick enough and instructions may be given for opening-up of part of it to make sure. Testing of pieces of the removed screed may also be ordered to check that it is of the correct mix, etc. If it is found that the screed is at least 60 mm thick and of the correct mix, etc., and the separating membrane is in position and undamaged, the contractor would have a good case for reimbursement.

Undoubtedly, the screed is defective in the generally accepted sense because it is badly cracked, but it is demonstrably in accordance with the contract, which is all the opening-up clause requires for the contractor to obtain payment. The problem may be that, in the circumstances, the architect should have specified a reinforced screed. On the other hand, if everything is found to be in accordance with the contract except that the screed is only 55 mm thick, it will avail the contractor nothing to protest that the 5 mm difference cannot possibly have caused the cracking. The contractor may argue that to avoid cracking, some light reinforcement would be necessary, that cracking, in itself, is not serious and so on, but it would still be expected to remove the screed and relay it to the required thickness at no extra cost. If, however, in the process of relaying, the architect instructed the inclusion of additional light reinforcement in the new screed, the contractor would have an arguable case that it should be paid for more than the additional reinforcement. However, under DB, or if it is the subject of a CDP in SBC, ICD or MWD, a design or specification error will usually also be a matter for the contractor.

It should be noted that the architect has no duty to the contractor to find defects [34]. The architect's duty is to the employer. The contractor can have no recourse against the architect who does not detect a defect until late in the contract, because it is the contractor's obligation to build in accordance with the contract documents.

Failure of work

An important provision in IC/ICD (clause 3.15) relates to failure of work. If any materials or work are found to be at variance with contract requirements, the contractor must, without prompting, tell the architect how it intends to ensure that there are no similar failures elsewhere on the job.

The proposed measures must be entirely at the contractor's own cost. For example, if it is discovered that insulation has been omitted from some parts of a roof, the contractor might propose opening-up the roof on the underside in, say, half a dozen places chosen by the architect for inspection. If the contractor's proposal is accepted, the contractor has to stand the cost even though all

inspected parts of the roof have insulation in accordance with the contract. The contractor would, however, be entitled to an appropriate extension of time. The contractor must submit its proposal within seven days of the discovery of the initial defect. If further instances of missing insulation are found, the contractor would be obliged to open up further sections of roof.

If the architect is not satisfied with the contractor's proposal, if the proposal is not submitted within seven days or if there are some pressing safety or statutory reasons why a wait of even seven days is too long, the architect may issue instructions for opening-up, as the architect sees fit, at the contractor's expense. In such a situation, the contractor has ten days in which to decide whether to carry out the instruction or to write to the architect with its objections. Objections will usually relate to the amount of opening-up required but there could be other grounds. If the architect does not withdraw or modify the instruction within a further seven days, the matter must be referred to one of the dispute resolution procedures.

A problem for the contractor lies in the fact that, in this clause, no distinction is made between major and minor failures of work. The only qualification is that the proposals are restricted to establishing that there are no similar failures. On every contract there will be a multitude of very minor instances, readily corrected, where work is not in accordance with the contract and one or two cases which may be major. The contractor would be well advised to settle with the architect, at an early stage, in what circumstances the architect expects clause 3.15 to be operated. This is best done at the first site meeting and recorded in the minutes, or, less easily, by an exchange of letters.

SBC clause 3.18.1, IC/ICD clause 3.16.1 and DB clause 3.13.1 empower the architect (or the employer under DB) to order the removal from site of work or materials which are not in accordance with the contract. MW and MWD have no similar provisions, but it is thought that the architect must have this power under clause 3.4. Note that an instruction simply to correct defective work is not strictly valid (except probably under MW/MWD terms). The instruction must require removal of the work from the site [35]. In practice, of course, it usually amounts to the same thing.

Under SBC and DB if work, materials or goods are not in accordance with the contract, the architect (or the employer under DB) may do any or all of the following:

- instruct that the materials, etc., be removed from site;
- (SBC only) allow the work to remain and make an appropriate deduction from the Contract Sum. The employer must agree and the contractor must be consulted;
- issue such instructions requiring a variation (called a 'change' under DB) as are reasonably necessary as a consequence of previous action under this clause. There is to be no additional cost, extension of time or loss and/or expense. Once again, the contractor must be consulted;
- issue instructions under clause 3.18.4 or 3.13.3 under SBC or DB respectively requiring the contractor to open up or test the work to establish to the

> reasonable satisfaction of the architect (employer under DB) the likelihood of any other similar instances of failure to comply with the contract. If the instruction is reasonable, the contractor is not entitled to any addition to the Contract Sum, but it is entitled to an extension of time unless work is found not to comply with the contract.

In using the last power, 'due regard' must be had to a code of practice. That involves the need to consider carefully and give appropriate weight to the code. The code is part of the printed contract form and it is a list of relevant factors required to be considered in order that the extent of instructions to open up is reasonable. There are 15 items ranging from the need to show the employer that a particular defect does not occur throughout the Works, to proposals the contractor may make and 'any other relevant matters' – which just about covers everything. There is no requirement that the instruction to the contractor must be justified. Reference to the code will probably be most useful if the contractor decides to seek adjudication or arbitration on whether his objection to the instruction is justified.

There is a danger for the employer if the instruction states how defective work is to be remedied. It is sometimes thought (quite wrongly) that because the contractor is in breach of contract in providing materials or workmanship which are not in accordance with the contract, removal from the site and replacement with more expensive work or materials can be ordered. If such instructions are given, the contractor is entitled to be paid as though a variation were being ordered [36].

A question which sometimes arises on traditional contracts such as SBC, IC, ICD, MW and MWD is the extent to which a contractor is liable if the architect's specification allows the contractor to choose the precise type of material within limits. It is established that, unless there is special clause in the contract which provides to the contrary, the architect is liable for the suitability of the materials specified. If the architect specifies in such a way that the contractor has a choice, it may be assumed that the architect believes that no further restrictions are needed. Provided the material chosen was good of its kind and it did not have actual knowledge of its likely bad effects, the contractor will not be liable [37].

Employer's representative

This provision only occurs in SBC. Clause 3.3 allows the employer to appoint a representative who can act under the contract and exercise all the functions which the contract allows the employer to perform, or prescribes that the employer shall do; in other words, the employer's powers and duties (the employer's agent under DB is quite different).

In order to achieve this, the employer must issue written notice to the contractor, stating that the employer wishes the representative to deal with all the functions of the employer under the contract or whether any exceptions are

required. Any exceptions must be set out in the notice. For example, the employer may not want the employer's representative to make certain decisions.

An intriguing footnote [39] suggests that to avoid possible confusion over the roles of the architect and the quantity surveyor and the role of the employer's representative, the employer's representative should not be either architect or quantity surveyor. Presumably, although not expressly stated, the employer's representative will be in reality a project manager in one of its several confusing manifestations.

None of the JCT contracts being considered has any role for a project manager. Indeed, where a project manager is appointed by the employer, the courts suggest that it is not a specific profession and depends upon the profession of the person occupying that role [38]. Where there is a person acting as contract administrator, the only role for the project manager is as the representative of the employer. In other words, they act for the employer as his agent in ways that must be specified by the employer. Contractors must be careful to understand that situation. Calling someone a project manager does not automatically invest him with any powers. The project manager (or the employer's representative) cannot issue instructions or certificates under the contract and should not enter the site without the permission of the architect and the contractor or try to chair site meetings: that is the job of the contract administrator. Clause 3.3 makes the position clear under SBC, but project managers are often appointed by employers where IC/ICD or even MW/MWD is being used.

DB already has provision for an employer's agent who is appointed under article 3 of DB. The employer's agent is roughly in the position of the architect under the traditional contracts, subject to some significant differences which will become clear in the rest of this book. However, it is important to understand that the employer's agent, unlike the architect, is not classed as independent and any things the employer's agent does would not be given as much weight in court as those of the architect [39]. For example, he has no duty to the employer to act fairly between the parties there are no certificates to be issued and the employer's agent is not required to use his discretion in any matter. Moreover, although article 3 states that the employer's agent may act for the employer under any of the clauses in the contract, the employer is entitled to amend that position by notifying the contractor.

Ownership of goods

Much difficulty has been caused by what is known as 'retention of title'. The position can be quite complicated. Clauses 2.24 and 2.25 of SBC, 2.17 and 2.18 of IC/ICD and clauses 2.21 and 2.22 of DB are intended to provide that materials and goods stored on or off site, for which the employer has paid, become the employer's property.

In essence the problem is that the terms of the main contract only bind the parties to that contract; they cannot, subject to the Contracts (Rights of Third Parties) Act 1999, affect the rights of third parties such as suppliers. The supplier

of the goods may have a retention of title clause in its contract of sale to the contractor which stipulates that the goods, in fact, remain the supplier's property until the supplier has been paid by the contractor. Therefore, if the employer pays the contractor for goods stored on or off site and the contractor does not pay the supplier, ownership of the goods will not pass to the employer. This is because the contractor cannot pass ownership until it has ownership itself. The goods still belong to the supplier who may, in the event of the contractor's liquidation, take them away provided they are not fixed to the building.

In such a case, the employer may be faced with the prospect of paying twice for the same goods; hence the traditional reluctance to certify or make payment for off-site materials (see Chapter 5 for the provisions for off-site materials and goods). There is an obligation to certify or pay for materials stored on site, but in either case the contractor may have to produce evidence of ownership or satisfy the architect in some other way that the employer will become the owner of the goods when the contractor has been paid.

A supplier's retention of title clause will normally be defeated once the goods are incorporated into the fabric of the building [40].

That is a very simple exposition of a very complex problem and contractors who encounter difficulties in this area should seek good legal advice. It tends, however, to be more of a problem for employers and suppliers.

It should be noted that all the contracts now contain a clause making it clear that no rights are conferred on third parties other than, in the case of SBC and DB, certain rights for purchasers, tenants and funders.

As a final, general, point, all the contracts have an optional clause in the supplemental provisions at the end. This clause requires the parties to work with each other in a co-operative and collaborative way, in good faith and in a spirit of trust and respect. Some guidance has been given by the courts on the meaning of a similar clause in a different (NEC) contract. The clause considered required the parties to act in a spirit of mutual trust and co-operation. This kind of clause seems to have a very limited effect. At its highest, it does not require either party to act against its own interests, but could prevent one party from improperly exploiting the other [41].

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2 Insurance

2.1 General

Insurance is a highly specialised field which must be left to the experts. It cannot be stressed too strongly that architects and quantity surveyors are not insurance experts and they should always advise their clients to seek expert advice on the insurance provisions and their implications before a contract is executed. However, it is essential that the employer and the contractor have a working knowledge of their respective rights and obligations under the contractual provisions. SBC and DB deal with indemnities and insurance in clause 6 and schedule 3. IC and ICD deal with them in clause 6 and schedule 1 and MW and MWD deal with them in clause 5 in each case. They can be broken down into the following parts:

- indemnities – injury to persons and property;
- insurance – injury to persons and property;
- insurance – liability of the employer (not MW or MWD);
- insurance of the Works – new Works – existing structures;
- remedies if a party fails to insure;
- professional indemnity insurance.

SBC, DB, IC and ICD provisions are virtually identical. MW and MWD provisions are less detailed with some significant omissions and they will be considered later. The insurance provisions have been reorganised and some things which were in the schedules have been moved to clause 6 and consolidated.

It is essential that the contract provisions are read carefully to ensure that the appropriate insurances are in force before the contractor takes possession of the site. Insurance documents received from the contractor should not simply be passed to the employer without any kind of comment. It is the architect's, or in the case of DB the employer's agent's, duty either to check the contractor's insurance, to ask an expert to do so or to make sure that the employer obtains expert advice [1].

2.2 Injury to persons and property

There are two important definitions in clause 1.1 of SBC, DB, IC and ICD. Although there are no equivalent definitions in MW or MWD, the wording of the relevant clauses amounts to much the same. 'Employer's Persons' are persons engaged or authorised by the employer (specifically excluding the contractor, contractor's persons, statutory undertakers, architect (not relevant to DB) and quantity surveyor). 'Contractor's Persons' are the contractor's employees, agents and any persons employed on the site except the architect, quantity surveyor, employer, employer's persons and statutory undertakers.

The contractor indemnifies the employer and takes liability in the case of any loss, expense, claim or proceedings as a result of carrying out the Works in respect of:

- personal injury or death of any person unless and to the extent that it is due to the act or neglect of the employer or any employer's persons or statutory undertaker (clause 6.1);
- injury or damage to property of all kinds, excluding the Works and materials on site, to the extent that it is due to the negligence or default of the contractor or any of the contractor's persons. If option C.1 or any agreement replacement schedule applies, loss or damage to existing structures and contents is excluded in respect of the perils to be insured (clauses 6.1 and 6.2).

The contractor is also liable if the injury to persons or property is a result of breach of statutory duty and, in addition to its servants or agents, it is made liable for any contractor's persons.

Thus, if a person is injured due to the Works, the contractor is liable unless it is the employer's fault and then the extent of the employer's fault is taken into account. If property is damaged, the contractor is liable only to the extent it is the contractor's fault [2]. It is clear that the contractor is still obliged to indemnify the employer against claims for personal injury or death even if the employer's neglect is partially responsible. In such a case, of course, the contractor's liability would be reduced accordingly. A similar formula has been introduced to maintain the indemnity to the employer even if the contractor's negligence is only a part cause of injury to property.

In practice, a person suffering injury to person or property would usually claim against the employer who would, by virtue of this clause, join the contractor as a third party in any proceedings. It should be noted that the contractor is not liable under clause 6.2 for any loss or damage to the Works unless practical completion has been certified or they have been taken into partial possession or a section completion certificate has been issued under the relevant provisions of SBC, DB, IC or ICD.

It may be thought superfluous to have an indemnity clause when the following clause 6.4 requires the contractor to take out insurance against just the same

liabilities. But the indemnity is important. If a claim was successful against the employer and the contractor's insurance company refused to meet the claim for some reason, the contractor would nevertheless be liable. The level of insurance required is to be inserted in the Contract Particulars.

It should be noted that the contractor does not provide the employer with indemnity against the results of the employer's own negligence. To provide such indemnity, the clause must be expressed in very clear words [3].

2.3 Liability of employer

SBC, DB, IC and ICD clause 6.5 are in virtually identical terms intending to cover the liability of the employer if damage is caused to any property other than the Works by the carrying out of the Works. Such occurrences as collapse, subsidence, heave, vibration, weakening or removal of support or lowering of ground water arising from the carrying out of the Works are included. This clause operates when the damage which occurs is not due to negligence on the part of either employer or contractor or their servants or agents. For example, the contract may call for piling operations on a town centre site and, despite careful design and conscientious work, cracking occurs in adjacent buildings. Because the contractor is only liable for such damage caused by its negligence, without this clause, the employer would have to foot the bill [4]. The clause envisages that a sum may be stated in the contract documents representing the indemnity required and the architect may instruct the contractor to take out appropriate insurance. The insurance must be taken out by the contractor in joint names with insurers approved by the employer, with whom policy and premium receipts must be deposited.

Clause 6.6 expressly states that the contractor is not to have any liability in respect of injury or damage to any person, the Works, site or any property caused by:

- ionising radiation;
- contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuels, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or component unless it is included in terrorism cover;
- pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;
- an act of terrorism which is not within the terrorism cover taken out under the contract.

These risks are called 'excepted risks'. Any such damage, therefore, will be the sole responsibility of the employer.

2.4 Insurance of the Works

There are two types of insurance risks in the contract.

- 'Specified perils' insurance – this is insurance which provides for insurance against fire, lightning, explosion, etc.
- 'All risks insurance' – this is insurance against physical loss or damage to work executed and site materials, but *excluding* the cost of repairing, replacing or rectifying property which is defective due to wear and tear, obsolescence, deterioration, rust or mildew or any work executed or materials lost or damaged as a result of its own defect in design, plan, specification, materials or workmanship or any other work executed which is lost or damaged if such work relied for its support or stability on the defective work.

Other exclusions include loss or damage arising from war, nationalisation or order of any government or local authority, disappearance or shortage only revealed on the making of an inventory and not traceable to any identifiable event, the exceptions with regard to ionising radiation, etc. Therefore, risks such as impact, subsidence, theft and vandalism are included in this type of insurance. There used to be certain other exclusions applicable only to Northern Ireland (civil commotion, unlawful and malicious acts, etc.). 'Civil commotion' is now introduced into contracts used in Northern Ireland, together with other amendments, by means of an adaptation schedule obtainable from the Royal Society of Ulster Architects.

Insurance of the Works falls into two categories: new Works and work to existing structures. There are three standard provisions: SBC and DB schedule 3, options A, B and C (IC/ICD schedule 1, options A, B and C). Options A and B in each contract relate to new work where either the contractor or the employer, respectively, has the responsibility to insure. The type of insurance to be taken out is 'all risks' and the period is specified in clause 6.7.2 which, in simple terms, refers to the period when the contractor is engaged upon the Works or any part of the Works not the subject of practical or section completion, partial possession or termination.

Not only the Works, but the value of any unfixed materials or goods delivered to the site must be insured including a percentage stated in the Contract Particulars to cover professional fees. Full reinstatement value is required which will, of course, be greater than the simple value of everything on the site, but it does not include the additional costs of carrying out subsequent work later than intended nor the loss suffered by the employer due to delay. The insurance must be taken out in joint names with insurers approved by the employer with whom policy and premiums must be deposited. The contractor should obtain good advice. The risk does not include consequential loss [5].

It should be noted that the insurance is to be taken out in the joint names of the employer and the contractor. The important effect of this is that the insurers now have no right of subrogation against one or other of the parties if damage occurs due to the party's negligence. Subrogation, in this context, is the right of

the insurer to stand in the shoes of the insured party and recover, from the party causing the damage, amounts paid out. Since both parties are insured on a single policy, if one of the 'all risks' occurred due to the employer's negligence while it is the contractor's obligation to insure in joint names, the position would be covered by the policy and the insurer would not be able to claim against the employer. Where the contractor wishes to use its existing annual policy for option A, it must contain terms which equate it to a joint names policy. The employer's interest must be endorsed and the annual renewal date must be stated in the Contract Particulars. Option B, where the employer is to insure, is little used in practice.

Financial responsibility

If there is any element of under-insurance or any excess payable on the insurance, this is the responsibility of the party who has the obligation to insure. Where the contractor has the obligation to insure, insurance money is to be payable to the employer, who must issue, through the architect, special reinstatement certificates on the same date as normal interim certificates as repair work proceeds until the insurance money is fully certified less only the amount for professional fees. The contractor is entitled to no money additional to insurance money in respect of the insured matter, but it is entitled to interim certificates in the normal way for other work carried out even though some of that work has been damaged by an event which resulted in the insurance payment to the employer. Thus, except for the possibility of under-insurance or excess, neither the contractor nor the employer should suffer any financial loss. If the employer insures, the remedial work is to be treated as if it were a variation and the contractor is to be paid its full cost. That is also the case if the contractor insures, work or materials suffer damage or loss due to terrorism and the employer has not terminated after a notice from the insurers that terrorism cover will cease to be available (SBC, IC/ICD and DB clause 6.13).

If either the contractor or the employer insures, the contractor must immediately give written notice of any damage to employer and architect. He must state its nature, extent and location. After inspection by the insurers, if required, the contractor must proceed with restoration and removal of debris.

Existing structures

If the work consists of alterations or extensions to existing structures, the employer must insure the existing structure and contents, the Works and all unfixed materials delivered to the site and intended for incorporation. This is option C. The insurance is in two parts:

- specified perils insurance for the existing building and contents. The contract provides for the substitution of a different form of insurance if the details are stated in the Contract Particulars;
- all risks insurance for the new work.

Assuming that the existing building and contents are to be covered in accordance with the default details in the contract, both parts are to be taken out in joint names. The distinction between types of insurance is important. Where, for example, the contractor or its sub-contractor causes damage to a water pipe in an existing building, the contractor will be liable for the resultant damage caused by the escaping water which will not fall under the descriptions of 'flood, bursting or overflowing of water tanks, apparatus or pipes' as described in 'specified perils' [6].

There has been much uncertainty surrounding the position when the employer is to insure the Works and existing structures. There have been decisions in the courts to the effect that even if the contractor by its negligence caused fire damage to the Works or existing structures which were insured by the employer, the employer had to bear the risk [7]. The decisions of the courts, combined with changes in the wording of the insurance clauses, have been confusing. In one instance, what appeared to be a sound judgment excluding the situations where the contractor was negligent has been overturned by the Court of Appeal [8] which seems to suggest that the courts themselves are not finding it easy to interpret the clauses. In the light of the different decisions, the basic principle under the 2011 JCT contracts appears to be that if damage, which falls under one of the categories of specified perils, is caused to the existing structure, a claim can be made under the employer's insurance even where the damage is a result of the contractor's negligence.

In the event of loss or damage, the contractor must give immediate written notice to the employer and the architect. At this point, if there has been loss or damage to the existing structures, either party may terminate the contractor's employment if it is just and equitable so to do (see Section 7.2). If neither party opts for termination or the notice is decided against by an adjudicator, arbitrator or the court, the contractor must make good the loss and damage, remove debris and proceed with carrying out the Works as before. The contractor's work is to be treated as a variation and the contractor is to be paid accordingly (SBC, IC/ICD and DB clause 6.14).

Restoration

Note that the contractor's obligation to commence restoration under all the SBC and DB schedule 3 (IC/ICD schedule 1) insurances begins as soon as the insurers have carried out any inspections they deem necessary and not when the claim is accepted. The contractor is, therefore, put into the position of carrying out rectification work before it knows whether any insurance money will be paid out.

Failure to insure

In regard to any of the insurance which is the contractor's responsibility, it is required to produce evidence of insurance on demand to the employer unless it has already deposited the policy and premium receipts. If the contractor fails to

insure, the employer may take out and maintain the appropriate insurance, deducting the cost from monies due or to become due to the contractor. Alternatively, the employer may sue for the debt.

The contractor has similar powers if the employer fails to insure new work where that clause applied. If the employer fails to provide evidence of insurance, the contractor may itself take out the necessary insurance and it is entitled to have the amount of the premium added to the Contract Sum. It should be noted that the unusual powers given to the contractor of the right to enter and inspect the existing structure for the purpose of making an inventory and survey have been removed from the 2016 contracts (SBC, DB, IC or ICD clause 6.12).

Liability to insure

The contractor's liability to insure ends on and including the date of termination of the contractor's employment or the issue of the practical completion or last section completion certificate, or on partial possession as regards the relevant part (clause 6.7.2). It is important that the contractor obtains formal certification before dispensing with such insurance [9].

Insurance of the contractor's plant and tools is not provided for under either contract and it is the contractor's liability. Most contractors do carry this sort of insurance.

Under clause 2.6 (SBC, IC and ICD) or clause 2.5 of DB, there is still the rather curious provision which allows the employer to occupy the Works or to use the Works to store goods if the contractor consents. The employer or the contractor (whichever is responsible for the insurance) must obtain the insurer's confirmation that the occupation or use will not prejudice the insurance. If option A applies or the contractor is covering risks in regard to existing structures and the insurers require an additional premium, the contractor must notify the employer. If the employer still wants to occupy or use the Works, the additional premium must be added to the Contract Sum. The contractor must supply receipts on request. It should be noted that early use or occupation of the Works under these clauses does not rank as partial possession and if the contractor is in culpable delay, liquidated damages for the part in early use are still recoverable [10].

If employer does not wish to use options A, B or C

If the employer does not wish to use options A, B or C, the employer could opt to take either the risk or the sole risk for damage caused by any of the 'all risks' without the need to insure. Obviously, an appropriate amendment to the contract would be required and expert insurance advice must be obtained. Contractors should note, however, that if the employer opts to accept the risk (rather than the sole risk), the employer has the right to refuse payment to the contractor for rectification work to the extent that the loss or damage is due to the negligence of the contractor. If the employer opts for taking the risk only, the

contractor should consider whether it should itself insure against possible liability.

Terrorism cover

Insuring against acts of terrorism is always a tricky business, because of the difficulty faced by insurers in forecasting trends. The insurance industry, in co-operation with government has set up the Pool Reinsurance Company Limited which enables insurers to continue to offer insurance against terrorism. JCT contracts refer to it as 'Pool Re Cover'. It should be noted that it does not cover all kinds of terrorism.

Clause 6.10 of SBC, DB, IC and ICD provides that to the extent that the policies for the Works under any of the options excludes terrorism insurance, either employer or contractor, whichever is responsible for taking out the insurance, must take out the insurance cover stated in the Contract Particulars. If nothing is stated, the default position is Pool Re Cover. Where option A applies, the cost of Pool Re Cover is deemed included in the Contract Sum except for increases in premiums. Where a different terrorism cover is stated, the cost will be added to the Contract Sum. If the employer is a local authority, it may instruct the contractor not to renew the cover (of any type) if there is an increase in premiums. In such an instance, the local authority would have to pay the cost of reinstatement after damage.

Clause 6.11 states that if either employer or contractor is notified by the insurers that terrorism cover as previously enjoyed will cease from a particular date, either party as appropriate must notify the other. The employer has just two options: either to require in writing that the Works continue to be carried out, or to specify that the contractor's employment will terminate on a date after the date of the insurer's notification, but before the date of cessation of cover. If the option is to continue, under option A the employer may instruct the contractor to take out any other terrorism cover which the contractor can reasonably obtain and the cost is to be added to the Contract Sum. If the option is termination, clause 8.12 in each of the four contracts applies (excluding clause 8.12.3.5). If the decision is not to terminate and damage is suffered as a result of terrorism, clauses 6.13 and 6.14 apply as discussed earlier in this section.

Joint Fire Code

Clauses 6.17–6.20 of SBC and DB and clauses 6.15–6.18 of IC/ICD apply where the Contract Particulars state that the Joint Fire Code applies. The Joint Fire Code means the Joint Code of Practice on the Protection from Fire of Construction Sites and Buildings Undergoing Renovation (published by the Construction Confederation and the Loss Prevention Council). The Joint Fire Code will apply if the insurer of the Works requires the employer and the contractor to comply with the Code. These clauses place an obligation on both parties to comply with the Code. There are also time stipulations within which

the contractor must carry out remedial measures to rectify a breach. Where the insurer has stated that the Works are a 'Large Project' the Code specifies additional requirements.

2.5 Professional indemnity insurance

DB and SBC clauses 6.15 and 6.16 and ICD clauses 6.19 and 6.20 require the contractor to take out and maintain professional indemnity insurance in respect of the contractor's design. The type and limit of indemnity is to be stated in the Contract Particulars. The period for which the insurance must run from practical completion of the Works is also to be stated in the Contract Particulars. Usually this will be six years if the contract is executed under hand and 12 years if it is a deed. There is a saving provision which makes the contractor's obligation dependent on insurance being available at commercially reasonable rates.

A smart contractor will insist on an amendment so that the clause refers to the insurance being available *to the contractor* at commercially reasonable rates. There may be reasons specific to the contractor why it cannot obtain insurance at the same reasonable rates as other contractors. It may be something to do with the contractor's claims history. Whatever the reason, from the contractor's point of view, if it cannot obtain the insurance at reasonable rates it is not relevant that others can do so. If the insurance becomes unavailable at such rates, the contractor must give notice to the employer and the employer and the contractor must discuss how they can best protect their positions without such insurance. If there was an easy answer to that question no doubt the contract would have already included it as a consequential clause.

This is a welcome improvement to the contracts. If there is a design fault, the employer can be expected to claim against the contractor and it is sensible for the contractor to have insurance to cover such an eventuality. It also protects the employer against the difficulty which can arise when the employer has a good claim but the contractor is clearly not in a position to meet it.

2.6 Sub-contractors

Protection for sub-contractors is provided under SBC, DB, IC and ICD clause 6.9 whereby the contractor or employer, as appropriate, will ensure broadly that the joint names policy either:

- provides for recognition of each sub-contractor as insured under the policy; or
- includes a waiver by the insurers of the right of subrogation against any sub-contractor.

This protection is offered to sub-contractors in respect of loss or damage to the Works or to site materials by specified perils and applies also to insurance which is taken out by one party because the other party has failed to do so.

Under clause 6.9.3 of IC/ICD, the protection is to extend to named sub-contractors.

2.7 MW and MWD insurance

The insurance position under MW and MWD is broadly similar to SBC, DB, IC and ICD, but it is much more briefly set out in clause 5 and there are differences, mainly omissions.

The contractor has the same indemnity and insurance liabilities in respect of injury or damage to persons or property, but there is no provision for insurance to cover damage to adjacent property if no one is negligent. Presumably this is because the contract is primarily intended for small Works. The size of the job, however, is no indication of the possibility of such damage and each project should be assessed on its merits and a suitable clause inserted if necessary. It should also be noted that there is no provision for professional indemnity insurance in MWD. Therefore, if the contractor is required to carry out any design as part of the CDP, a suitable clause must be inserted requiring such insurance to be taken out. Even if such a clause is not inserted, the contractor would be well advised to take out its own insurance against design flaws.

Essentially, clause 5.2 makes the contractor liable for damage to property, except the Works, site materials or to the existing property to the extent of specified perils if insured by the employer under clause 5.4B, to the extent that the damage is due to the contractor's or any sub-contractor's negligence or default. The contractor will be liable to a partial extent if it is partially at fault and damage is caused to surrounding buildings or passing vehicles. If clause 5.4C applies, loss or damage to existing structures and contents is excluded in respect of the perils to be insured.

The Works are expressly excluded, but it is the contractor's obligation to carry out and complete the Works in accordance with the contract documents. Therefore, the contractor has to properly complete the Works in any event. In other words, it has to redo the work if it is defective. It would be a nonsense if the contractor could claim on the employer's insurance for failure to carry out the Works in accordance with the contract. The contractor is obliged to carry appropriate insurance.

If the Works are alterations or extensions to an existing structure, the employer is obliged to insure the Works and the existing structure under the provisions of clause 5.4B. Effectively, the employer and contractor agree that if there is damage caused by one of the specified perils, this clause would deal with the situation [11]. Under earlier contract wording, damage by fire due to the contractor's negligence had been held not to be so covered [12]. It is suggested that the current clause 5.4B covers all specified perils even if due to the contractor's negligence.

There are only two possibilities in respect of damage to the Works: insurance of new Works by the contractor or insurance of existing structures by the employer. The risks to be insured are identical to specified perils in SBC and the

parties should consider whether, in any particular case, more extensive insurance is required. There is no provision for termination after loss or damage if it is just and equitable and the parties must make their own arrangements in such circumstances. Otherwise the position after damage is the same as under the other contracts. It has been recognised that it is difficult for residential occupiers to take out insurance in joint names. There can also be difficulties if the employer is a tenant. Therefore, where such insurance would normally be required under clause 5.4B, but is unobtainable, clause 5.4C permits alternative insurance arrangements to be agreed and binds the parties to observe them. Obviously, the Contract Particulars should be completed to reflect the insurance actually taken.

The party responsible for insuring is required to produce evidence of insurance to the other within seven days on request but, if the party defaults, there is no provision for either the employer or the contractor to insure, nor can the cost of such premiums be recovered. Since the situation is neither provided for in the termination clauses nor, it is thought, sufficient to allow repudiation at common law, it might be best for the party not in default to take out the appropriate insurance itself, after due notice, and then take the matter to adjudication or arbitration to claim damages for breach of contract. Hopefully this will be a rare occurrence.

It should be noted that the procedure after the occurrence of any loss or damage is virtually identical to the procedure under the other forms already discussed. That includes, for the first time, the right of a party to terminate if it is just and equitable to do so.

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3 Third parties

3.1 Assignment and sub-letting

Under SBC, IC, ICD, MW, MWD and DB, the contractor has no automatic right to sub-let work. SBC clauses 3.7–3.9, IC/ICD clauses 3.5 and 3.6, MW/MWD clause 3.3 and DB clauses 3.3 and 3.4.

Assignment

Assignment is not the same or even similar to sub-letting, although the terms are often confused. Assignment is dealt with in clause 7.1 of SBC, DB, IC and ICD and in clause 3.1 of MW and MWD.

Assignment occurs when a right or duty is legally transferred from one party to another. After the transfer, the original party retains no interest in the right or duty transferred. When this is carried out properly, it is termed novation and involves the formation of a new contract.

The parties to a building contract are, of course, the employer and the contractor. In broad terms their rights are to receive a completed building and to receive payment respectively. Their duties echo the rights. The employer's duty is to pay and the contractor's duty is to complete the work. Under the general law a party is entitled to assign the benefit of its rights to a third party, but neither employer nor contractor may assign their duties. An express term in the contract may modify this position. Thus, in the absence of any express term, a contractor may assign its right to payment to a third party in return for money 'up front' in order to enable it to carry out the contract. An employer may assign the right to the completed building to another for payment.

All the contracts under consideration contain an express term forbidding assignment of rights or duties by either party unless both parties agree. There is no stipulation that a refusal of consent must be reasonable. There appears to be no good reason why the contracts should not be amended to permit assignment of rights and, if a contractor is anxious to raise working capital in this way, it should be brought to the attention of the employer at tender stage. If a contractor or employer attempts to assign rights despite the clause to the contrary, the assignment will be ineffective [1]. The clause will also prevent assignment of the

right to damages for breach of contract. However, if the purported assignee cannot sue the contractor, because the assignment is prohibited, the employer may be able to recover damages (presumably on behalf of the purchaser) if it could be seen by the contractor that a subsequent purchaser of the building might suffer loss. This is a difficult point in practice [2].

Clause 7.2 of SBC and DB applies only when so stated in the Contract Particulars. It allows the right to bring proceedings against the contractor in the name of the employer to be assigned to enforce any term of the contract made for the benefit of the employer. The power may be used if the employer sells or leases the whole of the premises comprising the Works after practical completion. Without this important clause, a future purchaser or lessee of the property has very little chance of obtaining satisfaction through tortious remedies [3]. It is becoming very common now for the contractor, sub-contractors, suppliers and all the consultants to enter into warranties which themselves contain assignment rights and often very much more onerous conditions than the standard form of contract. The third party is not entitled to dispute enforceable agreements made between the employer and the contractor before the date of the assignment. See Section 3.5 for details of third-party rights and warranties.

Sub-letting

Sub-letting is quite different from assignment. It is the delegation rather than the transfer of a duty. For example, if a contractor sub-lets plumbing work to a sub-contractor, the main contractor remains responsible if the sub-contractor fails to perform or performs badly. If, however, the contractor were able by novation to assign its duty to carry out the contract to a second contractor, it would be the second contractor who would be liable if the work was done badly.

Perhaps in an attempt to clarify the position, clauses 3.7.1 of SBC, 3.3.1 of DB, 3.5 of IC/ICD and 3.3.1 of MW/MWD provide that even though part of the Works may be sub-let, the contractor remains wholly responsible for carrying out and completing the Works in all respects. A similar provision is included in paragraph 9.7 of the named specialist provisions in schedule 8 of SBC, paragraph 1.6 of the supplemental provisions in schedule 2 of DB and paragraph 13 in schedule 2 of IC/ICD in respect of named sub-contractors.

The right to sub-let work is similar in SBC and DB, but there are subtle differences in IC/ICD and MW/MWD. There is a complete prohibition on sub-letting without consent in SBC, DB, MW and MWD. Under IC and ICD, there is a prohibition on sub-letting other than with the conditions in clause 3.7 unless the architect's consent has been obtained. It could be argued that, under IC and ICD, the contractor can sub-let without consent provided the conditions in clause 3.7 are applied. That must be what the contract draftsman had in mind, because the provision has remained basically unaltered from the 2005 to the 2016 editions.

Where the architect's written consent is required, the general proviso, that consent must not be withheld or delayed unreasonably, applies (SBC and IC/ICD

clause 1.11, DB clause 1.10 and MW/MWD clause 1.7). A similar condition relating to the consent of the employer to sub-letting work (3.3.1) and design (3.3.2) is contained in DB. Note that the contractor is only obliged to obtain consent to the fact of sub-letting, not to the sub-contractors themselves. In practice, of course, the architect may well consider that it is reasonable to refuse consent unless the contractor reveals the names of the sub-contractors and those sub-contractors are acceptable.

All the contracts require the contractor to ensure that sub-contracts include terms which provide that:

- if the contractor's employment is terminated, for any reason, under the main contract, the employment of the sub-contractor under the sub-contract is to be similarly terminated. This provision, of course, will only be effective if it is included in the sub-contract because the sub-contractor is not a party to the main contract and cannot be bound by its terms;
- no materials on site must be removed except for use on the Works unless the contractor gives consent (not MW/MWD);
- if the value of materials has been included in an interim certificate (or interim payment under DB) and the amount has been paid to the contractor, they become the employer's property (not MW/MWD);
- if payment is made by the contractor to the sub-contractor, the materials become the property of the contractor (not MW/MWD);
- the sub-contractor must give access to workshops, etc., in accordance with clause 3.1 (not MW/MWD);
- the contractor and sub-contractor will comply with the CDM Regulations;
- the sub-contractor is entitled to simple interest at 5 per cent above Bank of England Base Rate if the contractor fails to pay money due by the final date for payment;
- if the Contract Particulars provide for third-party rights and/or warranties from the sub-contractor, the terms must be consistent with the relevant JCT sub-contracts (not MW/MWD);
- the supply and grant to and by the sub-contractor of all information and licences reasonably necessary if information or licences are required from the sub-contractor for the BIM protocol, as built drawings and the CDM Regulations (not MW/MWD).

The contracts say that contractors must use the JCT forms of sub-contract devised for use with the standard main contract forms, but there is a get-out provision that they must do this where it is considered appropriate. The contracts are not specific about who is responsible for the considering and no doubt in practice the contractor will decide. Whether or not the JCT sub-contracts are used, contractors should ensure that all the matters listed above are incorporated in the sub-contracts as well as anything else in the main contract which might affect the sub-contract. SBCSub/A, SBCSub/C, SBCSub/D/A and SBCSub/D/C are the domestic forms of sub-contract for use with SBC, ICSub/A,

ICSub/C, ICSub/D/A and ICSub/D/C are the equivalent for use with IC. DBSub/D/A and DBSub/C are used with DB. The named sub-contract for IC/ICD is ICSub/NAM/A.

MW and MWD have nothing more to say about either assignment or sub-contracting. There is a standard form of sub-contract (MWSub/D) for use with MWD, but no standard sub-contracts are especially drafted for use with MW and JCT suggests using the Short Form of Sub-Contract (ShortSub).

Ownership

It will be seen that an attempt is made in SBC clause 3.9.2.1, IC/ICD clause 3.6.2.1 and DB clause 3.4.2.1 to protect the employer against retention of title clauses preventing ownership of materials passing to the employer (second, third and fourth bullet points above). The dangers were highlighted in a case concerning a sub-contractor [4]. This question was discussed in Section 1.4 earlier.

The clauses stipulate that the contractor must include conditions with regard to unfixed materials provided by the sub-contractor. If for any reason the contractor does not include such conditions, it is in breach of contract. That is likely to be small comfort to the employer because problems with retention of title are only likely to occur if the main contractor becomes insolvent. In such a case, suing for breach of contract would be a fruitless exercise. However, the provisions may lead to architects asking to inspect sub-contracts to ensure that the conditions have been incorporated. Even if such provisions are included in sub-contracts, they will not be effective against sub-sub-contractors or suppliers to the sub-contractors who may have a retention of title clause in their sub-sub-contracts or contracts of sale. The only way for the employer to be sure is if the provisions are stepped down to the earliest point of supply or if an amendment is made so that the architect is not required to certify (and, under DB, the contractor cannot apply for payment) for unfixed materials on site. Although one form of contract contains provisions for putting that option into effect, it is unlikely to be popular with contractors and rightly so [5].

IC and ICD go on to deal with 'named sub-contractors' and DB, in the supplemental provisions, deals with persons named as sub-contractors in the Employer's Requirements, a provision that will be discussed at length in Section 3.2. Nominated sub-contractors and suppliers have now been removed from SBC, but there is provision for named specialists which also will be discussed in Section 3.2.

Domestic sub-contractors

SBC contains further important provisions with regard to what it terms 'domestic sub-contractors'. At first sight, clause 3.8 provides the employer with a way of narrowing the choice of sub-contractor in appropriate cases. The system is that the work to be done must be measured or described adequately in some other way in the bills of quantities so that it can be priced by the contractor. A list of

persons or firms is provided in the bills from which the contractor must choose to carry out the work. The contractor has sole discretion in selecting the firm.

The list must contain at least three names. Presumably the architect will have contacted all the firms on the list to make sure that they are willing and able to carry out the work. It should be noted that either the employer (or the architect acting on behalf of the employer) or the contractor may add more names to the list at any time before a binding sub-contract is entered into in respect of the particular work. The only proviso is that the other party must consent to the additional names. However, consent (under clause 1.11) is not to be unreasonably withheld. This provision can be useful to a contractor who wishes to use a firm not included on the original list. It seems that the only reasonable ground for refusing consent, so far as the employer is concerned, would be that the suggested additional firm is not capable of carrying out the work to the standard required by the contract.

Note that the additional names may be added by either party even after the main contract is let. This gives maximum flexibility to the contractor to take advantage of competitive prices. Effectively, irrespective of the sub-contractors named in the contract, the contractor can use any sub-contractor it wishes simply by adding the name to the list; subject of course to the employer being unable to raise a reasonable objection.

If at any time before the contractor has entered into a binding sub-contract the number of firms able and willing to carry out the work falls below three and the employer and the contractor cannot agree on the addition of more firms so that the list comprises at least three, the contractor must carry out the work itself, and in so doing, it may sub-let the work to any sub-contractor of its choice provided the architect gives consent under clause 3.7.

The previous provision that a person chosen from the list by the contractor becomes a sub-contractor has been removed, probably because it is self-evident. The employer will not, thereafter, be concerned with any problems of delay, financial claims or termination of employment of the sub-contractor. These are solely the concern of the contractor and the sub-contractor involved. The contractor, of course, may be able to found a claim on events relating to the sub-contract work as if the work were carried out by the contractor's own operatives (for example, extension of time for exceptionally adverse weather conditions). The contractor, however, under all the contracts remains responsible for the work of his sub-contractors, and for any defects therein, to the employer.

Sub-contract

This is not the place to discuss the forms of sub-contract, but there are some general points which deserve mention if only to emphasise the importance of having a sub-contract which sets out the rights and duties of the parties in a realistic manner.

Many problems between main and sub-contractors arise because a project is not ready for a sub-contractor to commence work on the date anticipated, or the sub-contractor is prevented from maintaining reasonably expected progress due

to delays for other reasons. If the commencement of the sub-contract is delayed, the sub-contractor may say that it wants more money or even that it cannot, at a later date, fit the work into its programme. Whether the sub-contractor can lawfully take that stance depends upon the terms of the sub-contract. If there are no express terms or agreement about the date for commencement, the law will not imply that the contractor must have the site ready for the sub-contractor by any particular date. The most which will be implied is that the contractor must have the site ready within a reasonable time [6].

Similarly, in the absence of an express term of the sub-contract, there will be no implied term that the contractor must ensure that there is sufficient work available to enable the sub-contractor to maintain reasonable progress and execute the sub-contract Works in an efficient and economic manner [7]. It has been held that sub-contract form DOM/1 clause 11.1 simply requires the sub-contractor to finish its work by the date fixed in the sub-contract. Provided it does that, it may plan and perform the work as it pleases [8]. It is thought that the principle also applies to the new sub-contract forms for use with the SBC, DB and IC/ICD which have similar wording. Thus, if the sub-contract contains a term requiring the sub-contractor to proceed with the sub-contract works at such times and in such manner as the contractor directs, the sub-contractor will be required to do exactly as stated. In many instances, the contractor will supply a sub-contractor with a programme, but it will seldom be a contract document. Only if it is a contract document will the sub-contractor be obliged to work to it and an instruction to work differently would constitute a variation [9].

In the absence of a warranty, employers will find it very difficult to take direct action against sub-contractors in tort. The only exceptions are likely to be if the sub-contractor's negligence causes damage to property other than the Works or if there is a danger or imminent danger to health or safety. However, where there is a warranty, its terms will not necessarily constitute the whole of the sub-contractor's liability and the courts are likely to find a concurrent liability in tort [10]. This liability may sometimes exceed the sub-contractor's liability in contract [11].

3.2 Named sub-contractors

Named sub-contractors under IC/ICD

IC and ICD make provision for something called naming. This is not just a matter of terminology. The provision is different from the former nomination procedures in JCT 98. DB also has a naming procedure in the supplemental provisions. SBC has provision for named specialists. The idea in each case is to provide the employer with a means of ensuring that particular parcels of work are carried out by sub-contractors of the employer's choice. There is always a conflict here between choice by one party and responsibility for that choice being put on another party. The courts have never been greatly in favour of the system as previous decisions show all too clearly. The provisions are quite complex and what follows is a broad description.

IC/ICD clause 3.7 provides for persons to be 'named' and the detailed provisions are in schedule 2. There are two options:

- where work is included in the contract documents and priced by the contractor to be carried out by a person named in the documents;
- where there is a provisional sum and the architect issues an instruction naming a person to carry out the work it represents.

In the first situation, the contractor must enter into a sub-contract (ICSub/NAM/A) with the named person within 21 days of entering into the main contract. The main contract will become binding when the employer accepts the contractor's tender. There is, therefore, very little time. A substantial quantity of documentation is involved which is obviously intended to be part of the tender documentation and, thereafter, part of the contract documents. That presupposes that all sub-contract tenders will be received well before the main contract tenders are invited. This first option is not something which will appeal to an architect when time is pressing. The architect will be more likely to take the second option.

If the contractor cannot enter into a sub-contract in accordance with the particulars in the contract documents, it must notify the architect. An architect who is satisfied that the particulars have prevented the execution of the sub-contract, has three options:

- alter the particulars, creating a variation;
- omit the work, creating a variation;
- omit the work and substitute a provisional sum for which an instruction is required.

Note that the architect can only alter the particulars in so far as they are not contract terms. Only the parties to a contract can agree to vary its terms. If the work is omitted in its entirety, the employer may use directly employed labour to carry it out under clause 2.7.

In the second situation, the instruction on a provisional sum can arise:

- after the contractor has notified the architect that the particulars are preventing execution of the sub-contract;
- if the provisional sum is substituted before the sub-contract is signed;
- if there is already a provisional sum in the contract documents.

The instruction must name a person, describe the work and include all the complex documentation (ICSub/NAM/IT and ICSub/NAM/T). In this instance, the contractor has 14 days from the date of the instruction in which to make a reasonable objection. If a reasonable objection is made, the contract leaves the position open. Presumably the architect must name another firm and so on. The procedure could be protracted. Fortunately the architect now has power to make

an extension of time under the broad relevant event clause 2.20.6. If there is no objection, the contractor must enter into a sub-contract with the named person.

There is a form of employer/sub-contractor agreement which should be completed (ICSub/NAM/E). This provides the only redress for the employer if the sub-contractor fails in the design or selection of materials for which it has undertaken responsibility. The contractor has no liability in these areas. It should be noted that this is the case even under ICD where the contractor is given design responsibility in certain circumstances for CDP work. What is worse, from the employer's point of view, no other sub-contractor is so liable since the employer's only redress in the case of ordinary (clause 3.5) sub-contractors is through the main contractor. In general, however, the contractor is responsible for the normal workmanship and materials aspects of a named person's work.

Termination

If the named person's employment is terminated, the architect may:

- name another person;
- instruct the contractor to make its own arrangements to do the work;
- omit the work still to be completed.

In the last case, the employer may employ direct labour to carry out the work.

The consequences of termination are complex, depending upon whether the work was originally included in the contract documents or arises as a result of an instruction regarding the expenditure of a provisional sum. Briefly, in the first case if the architect has exercised the option of naming another person, the contractor is entitled to an extension of time, but not a claim for loss and/or expense. In all other circumstances, the contractor is entitled to both time and money. It is important to note, however, that, if the termination occurs through the contractor's fault, it can have none of these benefits.

The contractor must take whatever action is necessary within reason to recover from the named person any loss sustained by the employer as a result of the termination. The contractor need not take any legal proceedings unless the employer agrees to pay any reasonable legal costs incurred.

Named sub-contractor under DB

In order for the supplemental provisions contained in schedule 2 paragraph 2 to bite, the Employer's Requirements must state that certain work is to be carried out by a named sub-contractor. The procedure is that the contractor must execute a sub-contract soon after entering into the main contract. If, acting reasonably, it cannot do so, the employer must issue a change instruction (the name for a variation under this contract) to remove the grounds for the failure or direct the contractor to do it itself or select a suitable sub-contractor or the employer may simply omit the work.

The employer's consent, which as usual may not be unreasonably withheld, is needed if the contractor wishes to terminate the sub-contractor's employment.

After termination, the contractor must finish the work itself. The contractor is obliged to use reasonable diligence to recover from the defaulting sub-contractor monies due to the employer. Otherwise, unless the termination is due to the contractor's own default, the finishing work is treated as a change for which, of course, the employer must pay. The contractor must include a term in the sub-contract designed to enable it to claim money even though the employer rather than the contractor has suffered the loss (paragraph 1.4.5). Such a clause is thought to be effective [12].

Named specialists under SBC

These provisions are contained in schedule 8: supplemental provisions. Whether or not they apply depends on how the Contract Particulars have been completed. There are three options. They apply in respect of both pre-named specialist work and post-named specialist work or just pre-named or not at all.

Pre-named is when the person and the work are identified in the contract document. Post-named is when the person and the work are identified in an instruction to expend a provisional sum. The contractor must enter into a sub-contract as soon as reasonably practicable in a way set out in clause 3.9. If it cannot reasonably do so, the architect must issue instructions to remove the grounds or select another named specialist or direct the contractor to do the work or omit the work. There are provisions to deal with the contractor's reasonable objection to post-named specialists and to replacement specialists. The employer's consent, which as usual may not be unreasonably withheld, is needed if the contractor wishes to terminate the sub-contractor's employment.

After termination, the architect has only seven days to issue instructions to select another named specialist or direct the contractor to do the work or omit the work. If the architect fails to issue an instruction, the contractor is to do the work.

MW and MWD

It is possible, although not advisable, effectively to nominate sub-contractors in MW and MWD by:

- naming the firm in the contract documents;
- naming the firm in an instruction regarding a provisional sum (clause 3.7);
- including a specially worded nomination clause in the contract.

The big problem with the first two options is that there is no provision for the consequences, which case law has shown can be considerable. To include a special clause is probably the most satisfactory, but it is likely to be substantial and counter to the spirit of this simple form of contract and it is probably

sufficient to class the whole contract as the employer's written standard terms of business for the purpose of the Unfair Contract Terms Act 1977.

Introducing nomination into these contracts seems to be a bad move.

Points

A final point in regard to sub-contractors. In general terms, it can be said that the inclusion of a 'pay-when-paid' clause in the sub-contract will be effective against the sub-contractor, who has completed its work, but only if the employer becomes insolvent before paying to the main contractor sums due to the sub-contractors. It should be noted that the Housing Grants, Construction and Regeneration Act 1996 section 113 states that payment provisions which attempt to make payment dependent on receipt of payment from a third party (pay-when-paid provisions) are ineffective except in the case of third-party insolvency. Although the effect is reduced, from a contractor's point of view, it may still be worthwhile having a 'pay-when-paid' clause to afford protection in the event of employer insolvency. The Act prevents payment being made conditional on carrying out obligations under another contract or the decision of anyone whether obligations under another contract have been carried out. Therefore, the legislation cannot be avoided by including a clause making payment depend on duties, decisions or certificates under the main contract or any other contract.

3.3 Employer's directly employed contractors

When the contractor is in possession of the site it is said to have a licence to be there in order to carry out its contractual obligations. Ideally, those obligations should embrace every aspect of the Works and the construction should be entirely under its direction and control. The drawings and bills of quantities should be complete and accurate and the architect should only be required to make occasional visits to keep an eye on progress. Life, certainly a contractor's life, is rarely like that.

Quite apart from the contractor's own shortcomings, inaccuracies in drawings and a steady stream of variations, SBC, IC, ICD and DB provide for the possibility of other contractors, quite separately engaged by the employer, arriving on site and carrying out work. The clauses governing the situation are 2.7 and 2.6 respectively and the correct term for these directly engaged contractors is 'employer's licensees'. Occasionally, one still comes across reference to this clause by its former names of 'artists and tradesmen' or, rarely now, 'the Epstein clause' (this last after the famous sculptor). The contracts term the work done by such contractors as 'work not forming part of the contract'. The only sensible interpretation to give to work not forming part of the contract is that it refers to work which the contractor has no obligation to carry out and for which it has no right to receive payment.

The clauses are virtually identical. Two situations are envisaged:

- where the contract documents provide for work not forming part of the contract to be carried out by the employer or by persons directly engaged;
- where the contract documents do not make any provision for work not forming part of the contract.

In the first situation, the detail in the contract documents must be sufficient to enable the contractor to inform itself precisely of what is to be done and when it is to be carried out. Items of attendance must be specified so that the contractor has the opportunity, at tender stage, to assess the cost of it. Provided this is done, the contractor has no option, as the work proceeds, but to allow the directly employed contractors to do their work.

In the second situation, there is no mention of the work in the contract documents and if the employer wishes to employ others, the contractor's consent must first be sought. The contract stipulates that the contractor must not unreasonably withhold its consent. What is reasonable will depend upon circumstances. The contractor will require to be informed about the extent of the work, its timing and probably the identity of the person or firm to carry it out.

Reasonable grounds for refusal of consent could be that the contractor has suffered bad experiences working alongside such person or firm in the past or that to allow the work would seriously interfere with progress. The wise contractor will carefully consider all aspects and obtain written assurances from the employer (not the architect) before giving consent.

Clearly any work done by others during the time the main contract is in progress will cause some disturbance, but there are remedies available which will be discussed later. If work is fully detailed in the contract documents, but the employer wishes to change the work in some way – perhaps to extend its scope, it immediately falls into the second category. There is no provision for varying this work. The variation clauses in the contract refer only to contract work, i.e. that to be executed by the contractor. In these circumstances the employer must seek the contractor's consent before varying the work just as though none of the work was mentioned in the documents.

The wording of the definitions in each contract make clear that directly employed contractors are not to be considered as sub-contractors but as persons for whom the employer is deemed to be responsible (i.e, 'Employer's Persons' in the language of the contract). This means that the employer must make certain that they are properly insured and, if damage occurs through their negligence, the employer will be liable although it is possible that such liability may be passed on to the directly engaged contractors.

The employer and the contractor must take care that all these employer's licensees have a separate contract with the employer and they must be paid directly by the employer and not, under any circumstances, through the contractor. If the contractor allows itself to become the channel for payment and instructions to such persons, it runs the risk that they may be considered sub-contractors for whom the contractor is responsible.

Disadvantages

In practice, there are few advantages and very many disadvantages for the employer in bringing persons, other than the contractor, onto the site. Sometimes the employer may wish to do so because, for example, they are the employer's own employees in the case of a local authority or the employer may have a special relationship with them in the case of sculptors, graphic designers or landscape contractors, or it may simply be that the employer wants to have complete control over them which would not be the case if sub-contractors were named.

Once on the site, or even before entering the site, the employer's licensees will inevitably cause delay and disruption. In the case of a small item such as a specially designed memorial plaque to be fixed complete with unveiling apparatus in the entrance hall of a public building, the disturbance may be so slight as to be insignificant. The work not forming part of the contract, however, may be quite substantial and scheduled to be carried out quite early in the job. Take, for example, the case of special equipment which may necessitate the early supply of baseplates, conduits, etc., which the contractor may have to build in or which the specialist firm insists on fixing itself. If it is late or even if it is on time, severe disruption may result.

Fortunately, the contract provides remedies for the contractor. This of course is the disadvantage as far as the employer is concerned. The extension of time clause in each contract includes a ground referring to any impediment, prevention or default, by act or omission of the employer (SBC clause 2.29.7, DB clause 2.26.6, IC and ICD clause 2.20.6) and any act of the employer in bringing another contractor onto the site may fall into that category if the directly employed contractor causes any delay to the main contractor.

If the work is carefully detailed in the contract documents and the employer's licensees carry it out without any fault, it seems that no ground for extension exists. Of course, all the circumstances must be taken into account. In other cases it seems that granting some extension cannot be avoided. For example, where the work is not previously detailed and only carried out with the contractor's consent, the contractor will certainly be entitled to an extension to cover the carrying out of the work if thereby the completion date is exceeded. Moreover, the impediment, prevention or default clause in the provisions for loss and/or expense (SBC clause 4.22.5, IC/ICD clause 4.17.4 and DB clause 4.21.5) allow the use of directly employed contractors as ground for a financial claim. Since the presence of other contractors on the site will almost invariably cause disruption to regular progress to some extent, the inclusion of employer's licensees, unless detailed in the contract documents and carrying out their work flawlessly, may amount to much the same as a blank cheque from the employer.

The contractor's remedies, and employer's problems, do not end there. If the execution or failure to execute such work causes a suspension of substantially all the Works for a period to be named in the Contract Particulars (clause 8.9.2 in each contract), the contractor may terminate its employment under the contract with all that entails for the employer (see Section 7.2).

Another aspect, which is closely related to employer's licensees, is the situation if the employer undertakes to supply any materials or goods for the Works. There is no specific provision in any of the contracts for the employer to undertake direct supply, therefore an additional clause should be inserted if required.

The contractor's letter giving consent under clause 2.7.2 (SBC, IC and ICD) or clause 2.6.2 (DB) is most important and it is suggested that it should be worded somewhat along the following lines:

> To Employer
>
> Dear Sir,
>
> We are in receipt of your letter referring to the engagement of *(insert name)* in accordance with clause 2.7.2 *(substitute 2.6.2 when using DB)* of the conditions of contract. The work is not detailed in the contracts bills/specification (substitute Employer's Requirements when using DB), but we understand that it will consist of *(details)* and it will commence on site on *(date)* reaching completion on *(date)*.
>
> We give our consent to the work subject to your written confirmation that you recognise our entitlement to extension of time and loss and/or expense in consequence.
>
> Yours faithfully,

It is clear that an employer making use of the provisions to employ other contractors on the site is in a very vulnerable position. The employer would be well advised to allow all the work to be carried out through the contractor or, at least, arrange for any additional work to be done after the contractor has reached practical completion stage and left the site. Most contractors would also be well pleased with that arrangement despite generous remedies available in the contract.

MW and MWD

MW and MWD make no mention of employer's licensees. Any such arrangement must be with the consent of the contractor and, of course, in this case, it need not be reasonable in withholding its consent. If the contractor does consent, extension of time would be granted under clause 2.7 (2.8 under MWD), but there is no contractual provision for loss and/or expense. It may be difficult to sue at common law because of the difficulty of proving breach of contract since the contractor, by its consent, has agreed. The answer would seem to be for the contractor to consent on condition that the employer makes special provision to reimburse any loss and/or expense. However, following suspension of the Works, powers of termination are available under clause 6.8.2.

3.4 Statutory provisions

Every person or firm has a duty to comply with requirements laid down by statute; that is by Act of Parliament. It seems clear that a contractor's duty to comply with statutory requirements will prevail over any express contractual obligation [13].

Clauses dealing with statutory obligations are now scattered throughout the contract, SBC deals with them in clauses 1.1, 1.4.5, 2.1, 2.2.3, 2.17, 2.18, 2.21, 3.7.2 and 3.23, IC/ICD in clauses 1.1, 1.4.5, 2.1, 2.3, 2.15, 2.16 and 3.18, MW in clauses 1.1, 1.3.5, 2.1, 2.5, 2.6 and 3.9, MWD in clauses 1.1, 1.3.5, 2.1, 2.6, 2.7 and 3.9, and DB in clauses 1.1, 1.4.5, 2.1, 2.15, 2.16, 2.18, 3.3.2 and 3.16. SBC, IC, ICD and DB provisions are very similar and they will be considered first.

The meaning of 'Statutory Requirements' is helpfully defined in each contract as being requirements of any Act of Parliament, any instrument, rule or order made under any statute or directive, or any regulation or by-law of any local authority or any 'statutory undertaker' relative to the Works. Statutory instruments are usually made by a Secretary of State and the most important, from the contractor's point of view, will probably be:

- the Building Regulations;
- the Construction (Design and Management) Regulations 2015, usually referred to as the CDM Regulations (which are considered below); and
- the Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011. Northern Ireland and Scotland have their own versions which are very similar.

The contractor must comply with all statutory requirements and give all notices which may be required by them. It is also responsible for paying all fees and charges legally demandable in respect of the Works. The contractor is entitled to have such amounts added to the Contract Sum unless they are already provided for in the contract.

Indemnity

SBC and DB, but not IC or ICD, contain indemnity provisions which deserve attention. Not only must the contractor pay charges as above, but it agrees to indemnify the employer against liability in respect of such charges. Therefore, if the contractor fails to pay as legally required, it assumes liability on behalf of the employer. Such liability might well extend to undoing work already done, delays or fines. This is an onerous provision which might easily be overlooked. Its purpose is to keep the employer safe from damage or loss and its effect would be broader than the position under IC or ICD, where the employer's remedy for the contractor's failure to pay would be to sue for damages for breach of contract.

Indemnity clauses tend to be interpreted by the courts against the person relying on them. In particular, they must be drafted in very precise terms if they are to include indemnity against the consequences of the employer's own negligence [14]. This may give the contractor some relief in certain instances, but it should note that the time during which it remains liable under an indemnity clause does not begin to run until the liability of the employer has been established, usually by the court.

Divergence

The contractor has a duty to notify the architect immediately if the contractor finds a divergence between statutory requirements and the contract documents or architect's instructions. The contractor has no obligation to search for such divergences (see Section 1.1). When the architect receives the notice, or if the architect finds a divergence, SBC clause 2.17.2 and IC/ICD clause 2.15.2 give the architect just seven days to issue an instruction about the divergence. If the architect fails to meet this deadline, the contractor would appear to have clear grounds for an extension of time and reimbursement of loss and/or expense. The architect's instruction will be treated as a variation.

Provided that the contractor notifies the architect if it finds a divergence and otherwise carries out the work in accordance with the contract documents and any other drawings and instructions issued by the architect, both forms of contract give the contractor a valuable safeguard. The contractor is not to be held liable to the employer if the Works do not comply with statutory requirements. The contractor is still liable for compliance as far as, for example, the local authority is concerned, but it should be able to recover its costs for rectifying such work from the employer. Thus, if the contractor fails to find a divergence, it is able to escape liability by virtue of this clause. Of course the question to be asked might be whether the contractor, acting reasonably, ought to have found the divergence.

The position is different where the divergence is between statutory requirements and the CDP under SBC or ICD. In such cases, the contractor must propose an amendment to deal with the divergence and the architect has 14 days to issue an instruction. The contractor must comply at no cost to the employer.

Emergency

In practice, contractors should beware of carrying out instructions from anyone other than the architect. If the building control officer directs that work does not comply with the Building Regulations the only safe course is to refer the matter immediately to the architect. The only exception to this is in the case of an emergency. If the matter really is urgent, the contractor may carry out the necessary work immediately provided that it:

- notifies the architect forthwith of the steps it is taking; and

- supplies only sufficient materials and carries out just enough work to ensure compliance.

The contractor is then entitled to payment for what it has done just as though the architect had issued an instruction.

MW and MWD

MW and MWD contain broadly similar provisions. The contractor must pay all charges and comply with all statutes, instruments, etc. It must notify divergences which it finds, after which it has no liability for non-compliance as far as the employer is concerned. There is no provision for any indemnity similar to SBC, nor is there provision for emergency compliance. The contractor must, therefore, report any urgent matters to the architect. In circumstances where the matter really cannot wait – for example, if there is an element of danger involved – it is thought that the contractor's obligation to comply with statutory requirements must prevail and it would be entitled to claim reimbursement from the employer for emergency work. The contractor is responsible for divergences between CDP work and statutory requirements. In practice, the contractor would have difficulty in persuading the architect that it was not in breach for failing to notify an obvious divergence, or negligence in construction. MW and MWD provisions are quite brief, but adequate for this sort of project.

DB

The provisions of DB broadly follow from SBC, but there are important differences. Under clause 2.15, if either the contractor or the employer finds a divergence, the finder must inform the other. The divergence is between the statutory requirements and the Employer's Requirements or the Contractor's Proposals or any change under clause 5. It is left to the contractor to write to the employer with a proposed amendment to remove the divergence. If the employer consents, the contractor must incorporate the amendment at its own cost. The contract is silent about the situation if the employer does not consent, but the employer may not unreasonably withhold or delay such consent. Any dispute as to whether the employer is acting reasonably could be referred to adjudication. Clause 2.15.2 has three sub-clauses:

- If a change in statutory requirements occurs after the base date and, in consequence, there must be an addendum to the Contractor's Proposals, it is treated as a change under clause 5. For example, there may be a change in the Building Regulations which requires a partial redesign.
- If a decision is made after the base date by a development control authority (such as a local authority) and the Contractor's Proposals have to be amended, it is treated as a change under clause 5 unless the Employer's Requirements expressly state otherwise.

- Clause 2.15.2.3 states that if the Employer's Requirements specifically state that parts of them comply with statutory requirements and if such parts later need amending to comply with statutory requirements, the employer must issue a change instruction.

CDM Regulations

Breach of the Construction (Design and Management) Regulations 2015 is a criminal offence; however, a breach will no longer give rise to civil liability. Therefore, one person cannot sue another for breach of the Regulations. Compliance with the Regulations is made a contractual duty so that breach of the Regulations is also a breach of contract. The important clauses are mainly clauses 3.16 in DB, clauses 3.23 in SBC, clauses 3.18 in IC/ICD and clause 3.9 in MW and MWD. The clauses in all the contracts are very similar and it is only necessary to look at SBC in any detail.

Article 5 in SBC assumes that the architect will be the Principal Designer under the Regulations. Under DB, the Principal Designer is assumed to be the contractor. If that is to be the case, careful planning is required to deal with the handover after tender stage from the previous Principal Designer to the contractor acting in that role. If one looks carefully, it is possible to see the word 'or' enabling the user to insert an alternative name. It is not at all certain that every architect wants to take on the role. Article 6 records the name of the principal contractor. That will almost always be the contractor under the contract.

There are grounds for termination (failure to comply with the Regulations) in the list in both employer and contractor termination clauses (clauses 8.4 and 8.9, clauses 6.4 and 6.8 in MW/MWD).

Three points are very significant and they should be read together. Clause 3.23 has been included to provide that the employer 'shall ensure' that the Principal Designer carries out all the duties under the Regulations and that, whether or not the principal contractor is the contractor, the contractor also will carry out its duties in accordance with the Regulations. Compliance or non-compliance by the employer with clause 3.23 falls under the impediment, prevention or default relevant event and relevant matter, depending on the circumstances. With careful consideration this may well be a fruitful source of claims for contractors. Every architect's instruction potentially carries a health and safety implication which should be addressed under the Regulations. Where, as in DB, the contractor carries out all or some of the design, it takes on the designer's duty under the Regulations and any question of delay or disruption will require most careful thought. Even projects which are not notifiable fall under the Regulations so far as certain aspects are concerned. All parties must have a clear understanding of them.

It is certain that the key factor for employers, architects, Principal Designers and principal contractors is to structure their administrative procedures very carefully if they are to avoid becoming in breach of their contractual obligations.

Statutory undertakers

A statutory undertaker is any body, such as an electricity supplier or gas supplier, which derives its authority from statute. There tends to be some misunderstanding of the position of such a body in relation to the contract. SBC clause 3.7.2 and DB clause 3.3.2 make clear that a local authority or statutory undertaker carrying out work as part of its statutory obligations is not a sub-contractor. This appears to be generally understood and, although not expressly mentioned in IC/ICD or MW/MWD the position must be the same under those forms also. The result is that the statutory undertaker has no contractual liability to either employer or contractor when it is using statutory powers. If such a body enters a site to lay cables, make connections, etc., within its statutory powers, it may cause severe disruption or delay. All four forms will provide some remedy for the contractor in terms of extension of time, but the contractor cannot contractually recover any loss and/or expense in respect of the disruption either from the statutory undertaker or from the employer.

The position is quite different if the statutory authority is carrying out work on site which is not a statutory obligation. For example, the electricity supplier may be wiring a house as would any electrical sub-contractor. In those circumstances, the authority:

- may have a contract with the contractor and be in the position of a named specialist or domestic sub-contractor under SBC, a named or domestic sub-contractor under DB or IC/ICD and a domestic sub-contractor under MW/MWD;
- may have a contract with the employer to carry out work and be licensee under SBC, IC/ICD or DB.

In the first instance, the contractor's remedy for disruption by the statutory authority would be against the authority itself under the terms of the sub-contract. In addition, depending upon whether the authority was a named sub-contractor, there would be other important safeguards under the terms of the main contract (see Section 3.2). In the latter instance, if the authority were a licensee, the contractor's remedies would be against the employer under the main contract.

It is, therefore, of the utmost importance to the contractor that it correctly identifies the true role of the statutory undertaker. It is generally fairly clear if the undertaker is a sub-contractor, but it may be the subject of dispute whether it is an employer's licensee [15].

A contractor faced with major losses due to the activities or inactivities of a statutory authority carrying out its statutory obligations may not be totally without remedy if it can show that its loss was caused by the authority's negligence. In those circumstances, the contractor should take legal advice to assess the chances of a successful action in tort.

3.5 Third-party rights and warranties

The purpose of a warranty is to create a contractual relationship between two parties who, otherwise, would not have that relationship. It enables the parties to take legal action against each other in contract. Without this relationship, they would be obliged to take the action in tort, if at all. Actions in contract are often easier. The courts have made clear that remedies in tort are not suitable for what are basically breaches of contract. Strictly, one should talk about a collateral warranty, because it runs alongside and depends upon another contract. Therefore, if an employer enters into a contract on, say, SBC terms and the contractor and a sub-contractor enter into a sub-contract on the relevant JCT sub-contract, there will be no contractual relationship between the employer and the sub-contractor. That kind of relationship could be very desirable, especially if the sub-contractor is responsible for part of the design.

Future purchasers or tenants or funders often require warranties from the contractor and some or all of the sub-contractors. The JCT produce standard warranties (see below). Generally, a party entering into a warranty will be taking on at least the same, and in some circumstances greater, liability to the third party as that owed to the other party to the original contract. Warranties are normally executed as deeds and, therefore, no consideration is required from the other party. Having said that, it is common to find that a warranty contains a clause which states that the party giving the warranty acknowledges payment of a small sum (often £1 and never more than £10) as consideration for the warranty. The sum is never actually paid but once the warranty is signed, the party giving the warranty (called the warrantor) cannot deny receipt. The JCT warranties are reasonable because they have been agreed across all sections of the industry, but any party asked to sign a specially drafted warranty must be very careful and take advice on the matter. That kind of warranty can introduce very onerous terms.

Third-party rights are complicated provisions which the various footnotes do little to clarify. SBC and DB clauses 7A and 7B make provision for third parties (purchasers, tenants or funders) to obtain rights under the contract.

Prior to the introduction of the Contracts (Rights of Third Parties) Act 1999, there was what was known as 'privity of contract'. Only parties to a contract could have any rights under its provisions. Therefore, a contract between two people agreeing to give money to a third could not be enforced by that third person [16]. The Act changed that to give third parties, who are mentioned in a contract by name or type or class, the right to claim under the contract. Most contracts include a clause to remove the effect of the Act (SBC, IC, ICD and DB clause 1.6, MW and MWD clause 1.5).

However SBC and DB now take advantage of the Act and an exception is inserted into clause 1.6 accordingly. The idea is that, to save the need for the contractor to enter into a host of warranties in favour of the funder and each purchaser or tenant, the funder, purchasers and tenants are given rights against the contractor under the contract. In order to achieve this, the rights in question

are set out in schedule 5 in SBC and DB. Inevitably, the rights are set out in much the same way as they would occur in a warranty.

In order for the rights to be available to any particular third parties, the Contract Particulars must be completed against clause 7.4 to identify what the contract calls 'Rights Particulars' which are to be set out in a separate document. There is a sample document included in the JCT Guidance Notes and on the JCT website which should be consulted. Alternately, a different set of Rights Particulars can be drafted. In essence the Particulars should say which parties are to receive the benefit of the rights and who is to give them. The names of the contractor and any sub-contractors involved must be given or some method of identification must be stated such as 'all sub-contractors'. The procedure is daunting in its complexity and great care is needed to complete the relevant items properly.

In order to activate the rights, the employer must issue a notice to the contractor. The funder, tenant or purchaser gains the rights on the date of receipt of the notice by the contractor.

If it is decided not to take advantage of the third-party rights procedure, there is provision under SBC and DB clauses 7C and 7D to require the contractor to enter into warranties within 14 days of a notice from the employer provided that details of the relevant funder, tenants and purchasers have been entered in the Contract Particulars. The relevant warranties are CWa/P&T for a purchaser or tenant and CWa/F for a funder. IC and ICD have similar contractor warranty arrangements under clauses 7.6 and 7.7.

SBC and DB under clauses 7E and IC and ICD under clause 7.8 also make provision for warranties from sub-contractors. Details of the sub-contractors who will be required to supply warranties are to be inserted in the Rights Particulars. Then these sub-contractors will be expected to provide warranties to the tenants, purchasers, funders or the employer listed in respect of the contractor's third-party rights or warranties. The relevant sub-contractor warranties are SCWa/P&T for a purchaser or tenant, SCWa/F for a funder and SCWa/E for the employer. There is provision for the sub-contractor to propose amendments to the warranty subject to approval by the employer and the contractor who must not unreasonably withhold or delay such approval.

MW and MWD make no provision for warranties of any kind.

3.6 Performance bonds and guarantees

Clause 7.3 of SBC and DB require the contractor to enter into a performance bond or a parent company guarantee as stated in the Contract Particulars. The contract does not include a sample of either form, probably because of the great variation in wording possible. It is up to the employer to arrange details of the bond or parent company guarantee on which expert legal advice is always required.

Bonds

A bond is an agreement which is usually executed as a deed. The idea is that one person (usually a bank or insurance company) agrees to be responsible to a third party usually referred to as the 'beneficiary' (e.g. the employer) for the proper carrying out of obligations by another (e.g. the contractor). The person taking the responsibility is referred to as the 'surety'. The primary obligation of the contractor is underwritten by the surety, i.e. a guarantee. Guarantees must be in writing [17].

It will be noted that SBC, DB and IC/ICD already contain sample bonds for Advance Payment, Off-Site Materials and Goods and Retention. These have been agreed between JCT and the British Bankers' Association. A performance bond is an undertaking given by a surety to the employer by which the surety promises to pay the employer up to a specified sum if the contractor fails to carry out its obligations. There are basically two kind of bonds:

- 'on default' bonds, and
- 'on demand' bonds.

On default bonds are better from the contractor's point of view because if the employer 'calls in' the bond, the employer has to demonstrate that the contractor is in default of the particular obligations under the contract which are the subject of the bond. That can be a lengthy process.

On demand bonds are increasing in use. They tend to be favoured by banks and other financial institutions that provide bonds. That is because when they receive a demand which complies with the requirements of the bond, they can pay without having to decide whether the contractor actually is in default or not. The mere fact of the demand is sufficient and the surety simply checks that the demand complies with the bond without having to carry out a long and expensive investigation with the danger of getting it wrong and subsequent litigation overturning the surety's decision. Although it may be thought that the surety would be loath to pay out, the surety will not be too concerned because it will have ensured that it had covered itself with the contractor against the risk. For example, in return for providing a bond, the contractor's bank may reduce the contractor's overdraft facility by the amount of the bond which will seriously affect the contractor's ability to take on work.

The Contract Particulars provide for the insertion of a date by which the bond expires. The contractor will be anxious to fix this date as early as possible for obvious reasons. The Contract Particulars give the date of practical completion of the Works as the default date, but there is the option to choose two weeks after the end of the rectification period or the date of issue of the certificate of making good. Note that is the date of issue not the date on which the certificate stated that the defects had been made good.

There are many cases from the courts regarding performance bonds [18] such as often trying to decide the, sometimes difficult, question of whether the bond

is on default or on demand. Performance bonds are commonly capped at 10 per cent of the Contract Sum. The SBC and DB leave the percentage to be inserted, but percentages in excess of 10 per cent will inflate the tender price, because there will be a premium to be paid by the employer. The effect of a bond, like that of any other contract, depends on its precise wording and this can be particularly important where it is vital to have funds available to complete the Works if the original contractor defaults. All the provisions of a bond must be followed. Any alteration to the primary obligations (e.g. between the employer and contractor) without the consent of the surety may discharge the surety from their liability under the bond [19].

Parent company guarantee

A parent company guarantee is similar but not identical to a performance bond. The principal difference is that the guarantee is not offered by an independent party, but by the parent or holding company of the contractor. Usually a parent company guarantee actually guarantees performance, so that if the contractor fails, the parent will itself complete or at least pay for the additional costs of completion by another company. However, care must be taken that the parent is not likely to become insolvent with the contractor and careful investigations are required. Assuming the parent does remain solvent, it covers the contractor's liability until the end of the relevant limitation period. However, it is always essential to have the wording checked by an expert in this field.

References

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2 *St Martin's Property Corporation Ltd and St Martin's Property Investments Ltd v Sir Robert McAlpine & Sons Ltd*, and *Linden Gardens Trust Ltd v Linesta Sludge Disposals Ltd* (1993) 63 BLR 1; *Darlington Borough Council v Wiltshier Northern Ltd* (1994) 69 BLR 1.
3 *Murphy v Brentwood District Council* (1990) 50 BLR 1.
4 *Dawber Williamson Roofing Ltd v Humberside County Council* (1979) 14 BLR 70.
5 ACA Form of Building Agreement Third Edition 1998 (2003 revision).
6 *Piggott Construction Co Ltd v W J Crowe Ltd* (1961) 27 DLR (2d) 258.
7 *Martin Grant & Co Ltd v Sir Lindsay Parkinson & Co Ltd* (1984) 3 Con LR 12.
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14 *Walters v Whessoe Ltd and Shell Refining Co Ltd* (1960) 6 BLR 24.
15 *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* (1980) 15 BLR 1.

16 *Tweddle v Atkinson* (1861) 1 B & S 393.
17 S.4 Statute of Frauds 1677.
18 *Simon Carves Ltd v Ensus UK Ltd* (2011) 135 Con LR 96, *I E Contractors Ltd v Lloyds Bank PLC and Rafidain Bank* [1990] 2 Lloyd's Rep 496, *Try Build Ltd v Blue Star Garages* (1998) 66 Con LR 90.
19 *Holme v Brunskill* (1878) 3 QBD 495.

4 Work in progress

4.1 Setting-out

In an effort to start the job and, having started it, to maintain reasonable progress, the contractor sometimes assumes more than its fair share of responsibility. An example of this may be observed in the contractor's attitude to setting-out when faced with wholly or partially inadequate drawings. Very often, it does its best on the information available when it should be seeking to protect its own position.

Setting-out is covered by SBC clause 2.10, IC and ICD clause 2.9. MW and MWD make no mention of setting-out, but it is thought that a term is to be implied on similar lines to the express terms in the other contracts.

SBC and ICD clauses are virtually identical. The architect's obligation to determine levels and provide setting-out information is, in each contract, made subject to the contractor's obligation to provide the architect with relevant levels and setting-out information for the CDP work. The provision in IC is similar, but obviously excludes any reference to CDP work.

DB has no similar term dealing with setting-out. This is because it is the contractor's obligation, as designer, to establish all the relevant setting-out dimensions and levels. It must be implied that the contractor has the same setting-out duty as if one of the other traditional contracts were used. The employer's obligation is merely to define the boundaries of the site (clause 2.9).

It is the contractor's responsibility, under any of the six contracts, to set out the Works accurately and if it makes any mistake, it must amend it at its own cost. For example, a contractor may set out a building in such a way that the dimensions of the building work properly in relation to all the other building dimensions, but the building as a whole is in the wrong position on the site.

This kind of error may only become obvious when site works are in progress. Clearly the contractor may have carried out many thousands of pounds worth of work by that time. The contractor's obligation seems to be to tear down what it has built and start again, setting it out correctly this time. Certainly, where someone is in breach of contract, the other party is entitled to receive an amount of money which would put it in the same position (so far as money could do it) as if the contract had been correctly carried out [1]. In the case of

incorrect setting-out, that would mean the cost of demolition and re-erection. However, this very strict and draconian approach is likely to be modified in practice by the courts or an arbitrator and if the cost of rectification was out of all proportion to the benefit to be gained, rectification would not be supported and a nominal sum might be awarded instead [2]. All the circumstances would have to be taken into account including whether the injured party intended to have the matter put right or simply pocket the money.

If the building encroaches onto neighbouring land, it amounts to trespass and the contractor would be liable for damages if sued directly by the neighbour or as third party if the neighbour sued the employer.

Fortunately, most errors are detected quite early, often while the building is still in the foundation stage and the damage can be limited. What would the situation be where the contractor sets out wrongly so that the employer has substantially more building than expected? There was a case some years ago in which the building, a school, was half a metre longer than shown on the drawings. The error was not discovered until the architect designed a floor tiling pattern and found that it was too short. On the face of things, the employer had gained rather than lost by the contractor's error. In such an instance it would probably be unreasonable to expect the contractor to correct the error particularly as the error was in the middle of the building and not at one end, although that is its strict obligation. The contractor would certainly have no claim for reimbursement for additional work and materials used. Moreover, the employer would probably be able to claim that it would be involved in additional maintenance expense for the life of the building.

It is probably to overcome such problems that SBC, IC and ICD provide that the architect, with the employer's consent, can instruct the contractor not to amend errors in setting-out and make an appropriate deduction from the Contract Sum. There is no guidance in the contract regarding what might constitute an appropriate deduction. The courts have held that it is a deduction which is reasonable in all the circumstances [3]. The situation is similar to that created when the employer opts not to have defects corrected at the end of the rectification period (see Section 7.1) and an appropriate deduction might be the cost to the contractor of rectification of the defective setting-out [4]. It is more likely that a much smaller sum would be indicated. In the case mentioned above, the cost would be substantial and it is doubtful if a court would enforce the point. Each case has to be decided on its own facts and if the contractor's setting-out error really was impossible to live with, demolition and rebuilding could be ordered.

In all cases where errors are accepted by the architect and employer, the amount to be deducted is likely to be a source of argument. It should be noted, however, that once the architect has issued an instruction accepting errors in setting-out on the basis that a deduction is to be made later, the contractor is freed from the threat of expensive corrective measures.

Since the contract is vague regarding the exact method of calculating what is to be deducted, an astute contractor should be able to keep such deductions

within reasonable limits. If the contractor is unhappy about the deduction and the architect refuses to adjust it, the remedy is to refer the matter to the appropriate dispute resolution procedures. Such problems should be capable of quick resolution by adjudication.

A contractor who makes an error in setting-out is often understandably annoyed at the prospect of amending mistakes. It may unjustly accuse the architect or clerk of works of being aware of the error long before the contractor noticed it. However, under the general law the architect has no duty to the contractor to detect errors [5].

Inadequate drawings

What if the architect's drawings are inadequate? The architect must determine the levels and must provide accurate drawings [6]. The most common failure in this area is that the drawings do not indicate beyond doubt how the building is to be set out. Triangulation from several fixed points is the only certain way of avoiding misunderstandings. It is good practice for the architect to provide special setting-out drawings, shorn of all surplus information and indicating only the important setting-out dimensions.

If the drawings do not contain all relevant information, the contractor should immediately write to the architect requesting the missing details. If the architect does not supply them on time, the contractor has a claim for extension of time and loss and/or expense. The architect cannot escape from obligations by asking the contractor to set out as the contractor sees fit pending inspection by the architect. Although the contractor's course of action is, in fact, inaction until it receives proper drawings, most contractors would try to make progress by setting out a number of pegs for the architect to inspect. If the contractor decides to do this, then as soon as the architect has approved the setting-out, the contractor should produce a drawing showing the actual triangulated dimensions as set out on site and send it to the architect requesting confirmation that the setting-out is correct. If the contractor does not protect its interests in this way, it is laying the groundwork for disputes later. A suitable letter could be somewhat as follows:

To the architect

Dear Sir,

We refer to our letter of the (date) *in which we informed you that the information on your drawings was insufficient to enable us to set out the Works accurately. You responded by telephone, asking us to set out the Works to the best of our ability based on the information provided.*

We have carried out your instructions and you visited the site on (date) *and approved our setting-out.*

> *We enclose our drawing number* (insert) *showing the principal dimensions of our setting-out and we should be pleased to receive your written confirmation of approval before we proceed. If we do not receive such confirmation by return of post, we shall be obliged to notify you of delay to the Works and disruption for which we will seek appropriate extension of time and financial recompense.*
>
> *Yours faithfully,*

The contractor will be involved in a considerable amount of additional work if it elects to attempt to set out from inadequate drawings and this procedure cannot be recommended. It would not be so bad if the contractor could claim payment for its additional work, but an instruction from the architect to the contractor to, in effect, design the siting of the building is not an instruction empowered by the contract (see Section 4.2) except in relation to CDP work.

It cannot be stressed too strongly that many contractors are the authors of their own misfortune. This is not because they are trying to be devious, but is quite the reverse: they are trying to maintain progress. In so doing, they often shoulder more responsibility than the contract would impose. A large part of the problem is that the contractor cannot afford delays. Despite what some architects may think, contractors never gain as a result of delay, even if they escape liquidated damages and recover loss and/or expense.

The contractor's ideal is to complete the Works in less than the contract period. Thus, if it simply sits and waits for the full setting-out information, it is losing money. The contractor may be successful in claiming some or all of its losses at some time in the future, but that does not help the contractor to fund the work at the time funding is most needed. It is therefore likely that contractors will continue to try to overcome deficiencies in drawings, particularly setting-out drawings, for no reward. An awareness of the architect's obligations, however, can make the contractor's lot easier.

Of course, under DB and the CDP content of SBC, ICD and MWD, it is the contractor's task to produce drawings which are adequate for its own setting-out, unless of course the employer has misguidedly included all the production drawings as part of the employer's requirements.

4.2 Release of information and architect's instructions

The use of an information release schedule applies only to SBC, IC and ICD. Whether or not one is to be provided should be stated in the recital. If the schedule is provided, it should be noted that it is not a contract document. The provision is contained in clauses 2.11 of SBC and 2.10 of IC/ICD. The information – presumably, drawings details, schedules and so on – is to be released by the architect in accordance with the schedule. There is provision for the parties to agree that the information can be released at some other time than shown on the schedule. There is also a saving clause, if the architect is

prevented by the action or default of the contractor or any of the contractor's persons.

It must not be confused with a contractor's information required schedule which most contractors deliver to the architect at the start of the work indicating when they require various drawings and details. Such a schedule has no contractual significance other than it may serve as evidence to support a contractor's claim that it did not receive information when it was reasonably necessary to do so. Obviously, if an information release schedule is provided, it overrides any information required schedule to the extent that it deals with the same information.

Anecdotal evidence suggests that the information release schedule is rarely used. The reason is obvious. Any contractor will need the schedule showing the sequence and timing of the information release in order to work out a tender. That means that, before a contractor is appointed, the architect has to decide the order in which the contractor will require the drawings. It is clear that the schedule effectively sets in stone the contractor's programme before it is even produced. Few architects are so brave, or foolhardy, as to do that, quite apart from the financial disadvantage to an employer of a tender based on such artificially fixed criteria. In practice, information release schedules, if used at all, are generally agreed between architect and contractor at the start of the construction process. The wording of the contract indicates that the schedule must have been provided before the contract is executed. Therefore, a schedule agreed after signing is not an information release schedule under the contract, although it may have a lesser value in respect of the architect's intentions.

If the schedule is not provided or if it does not contain all the information which will be necessary, the architect must provide further drawings and details reasonably necessary to explain and amplify the contract drawings: SBC clause 2.12, IC and ICD clause 2.11. The architect must issue this information and any instructions to enable the contractor to carry out and complete the Works in accordance with the contract. One of the important provisions of the contract is the requirement that the contractor must complete the Works by the date for completion. Therefore, the architect's obligation is to provide further drawings, information and instructions in time to enable the contractor to finish by the completion date.

The clause, however, proceeds to amplify the situation. One might say that JCT is here guilty of gilding the lily, because had the clause been left at this point, the meaning would have been relatively clear. However, it goes on to say that the architect must have regard to the progress of the Works or, if the architect thinks that practical completion is likely to be achieved before the contract completion date, the architect should have regard to the completion date. Otherwise, account of must be taken when the architect believes the contractor reasonably required further drawings, details, etc. This appears to open the door to the architect being able to delay issuing further information and simply to match the contractor's progress, even if the contractor is in delay. The danger

here is that a 'chicken and egg' situation will arise so that it may be difficult, with hindsight, to judge whether the architect's late issue of the information is responsible for the contractor's slow progress or vice versa.

If the contractor has reason to believe that the architect is not aware when the contractor should have a drawing, the contractor must advise the architect sufficiently before the time when the contractor would need the information. It is to do this to the extent that it is reasonably practicable. A Master's degree in crystal-ball gazing is probably required for this exercise and no doubt contractors will continue to set out a list of when and what information is required at the beginning of the contract and update it as the work proceeds.

MW has a very simple clause (2.3, ICD clause 2.4) dealing with this topic which simply obliges the architect to issue further information which is 'necessary' for the proper carrying out of the Works.

Obviously, where CDP is used, the contractor is obliged to provide design documents, calculations and any other information reasonably necessary to amplify the Contractor's Proposals. This is dealt with by SBC clause 2.9.4, ICD clause 2.10.2 and MWD clause 2.1.3. Under DB, the contractor must provide similar information (clause 2.8) under the design submission procedure. It is important to understand that the provision of this information is not to allow the architect or employer's agent to change it. There is no power to do that. Objection may be made to the information, but only if it does not comply with the contract. Under SBC and DB, schedule 1 sets out a design submission procedure based on the architect marking the submitted drawings in the well-known A, B or C categories.

To some contractors, the position with regard to architects' instructions is simplicity itself. If the architect issues an instruction, the contractor must carry it out and eventually the contractor will be paid for its trouble. Although this is generally true, it is by no means the whole story and sometimes it can be quite false. Provision is made for architects' instructions in SBC clauses 3.10–3.21, IC/ICD clauses 3.8–3.17 and MW/MWD clauses 3.4–3.8. A very similar provision in clauses 3.5–3.14 of DB provides for employers' instructions.

Leaving MW and MWD aside for a moment, the contractor must forthwith comply with any instruction given by the architect provided that the instruction is empowered by the conditions, that is to say the other clauses of the contract. 'Forthwith' in this context does not mean 'immediately'; it means 'without delay or loss of time' [7].

In order to discover what instructions are empowered, it is necessary to search through the whole contract to find the appropriate clauses. For example, there are 22 such clauses in IC and ICD. It is important to know what instructions are empowered because, if the contractor simply carries out an instruction which the architect, or the employer under DB, is not empowered to give, the contractor will be in breach of contract and the employer will have no liability to pay. In such cases, the contractor may have recourse against the architect personally or in the case of DB, it may be able to argue that the instruction, although outside the contract, must still be paid for.

The architect is in the position of an agent with limited authority by virtue of the architect's contract with the employer. The contractor need not worry what the precise terms of that authority are in any particular case. If an instruction is empowered by the contract, the contractor may – indeed must – carry it out even though the architect may not, in fact, have the employer's consent.

A good example is the situation where an architect issues an instruction for the carrying out of additional work. The architect's agreement with the client will probably stipulate that the architect must obtain the client's consent before issuing an instruction of that nature. But if the architect issues such an instruction, it is empowered by the contract and the contractor is entitled to be paid for it. If the architect has not obtained the client's consent that is a matter between architect and client and no concern of the contractor, who is entitled to rely only on the contract between contractor and employer.

In SBC, IC, ICD and DB, there are exceptions to the requirement that the contractor must comply forthwith. The following sets out the exception and to which contracts they apply:

- The issue of instructions requiring a variation of an obligation or restriction imposed by the employer in the bills or specification in working space, access to site, working hours or the execution of the work in a specific order. In such cases, the contractor need not comply provided that it makes reasonable objection in writing to the architect. A reasonable objection might well be, for example, that the contractor would be quite unable to make satisfactory progress under the new conditions. If the architect agrees, the instruction may be withdrawn, but any dispute may be referred to immediate adjudication, arbitration or litigation as appropriate (applies to all).
- If the instruction requires the contractor to provide a variation quotation: in such a case the variation must not be carried out unless the architect has issued a confirmed acceptance or another instruction without requiring a quotation (SBC only).
- If either the architect or the contractor becomes aware that compliance may infringe patent rights, the other must be consulted and the instruction will only be effective if confirmed by the architect (SBC and DB).
- If the contractor is unsure whether an instruction is empowered by the contract, it may request the architect to specify the clause. The architect must specify the clause in writing forthwith. On receipt of the architect's notification, the contractor may either immediately invoke the dispute resolution procedures on the point or accept the clause nominated by the architect and carry out the instruction. If the contractor elects to carry out the instruction, it is 'deemed' to have been empowered even if it is not in fact [8]. This is a useful protection for the contractor and ensures that, after such enquiry and response, the contractor is entitled to the benefits of other contract provisions in respect of the instruction – for example, the valuation of variations, extensions of time and loss and/or expense – even if the architect has made a mistake in nominating the clause (applies to all).

- If the contractor objects within seven days on reasonable grounds to an instruction for a named specialist. It need not comply until the architect has issued further instructions (SBC only).
- An instruction which adversely affects the contractor's design may be the subject of the contractor's written objection (SBC, DB and ICD).

Whether the contractor is entitled to refuse to comply with any instructions in the exceptions mentioned pending the result of adjudication or arbitration on the matter is a difficult question. Whether such a refusal is a good idea will depend upon circumstances and, if in doubt, advice should always be sought. The contractor is certainly entitled to refuse compliance if it is sure that its original objection is well founded. However, this calls for remarkable powers of foresight because, if the result of adjudication or arbitration is that the original objection was unjustified, the contractor would be in breach of contract if it had not complied. If it were thought prudent to carry out the instruction before the result of the dispute was available, it would be wise to make it clear that the instruction is being carried out without prejudice to the reference. At that stage, an appropriate letter will be drawn up by the contractor's contractual adviser who is dealing with the dispute resolution procedure.

Compliance notice

Under all these contracts, an architect, or the employer under DB, who considers that the contractor is unreasonably delaying carrying out a valid instruction, has the power to issue a notice requiring compliance within seven days of receipt. If, after seven days, the contractor has not complied, the employer (note, not the architect) may employ others to do the work and an appropriate deduction may be made from the Contract Sum. It is difficult to see how this can be any other than the additional cost to the employer of getting another contractor to do the work. It may also include additional architect's and quantity surveyor's fees, etc. If the architect's instruction is valid, there is very little the contractor can do except carry out the instruction as soon as it receives such a notice.

If the costs involved are likely to be substantial and the contractor considers the architect's insistence on compliance within seven days unreasonable for that or another reason, it can always write a strongly worded letter which may convince the architect or serve as useful evidence of prevailing circumstances and intentions in any future adjudication or arbitration on the point. In practice, architects are usually and properly reluctant to bring others onto the site to do the work unless relations have deteriorated considerably, the work has little prospect of being completed or the project is almost completed.

Oral instructions

SBC clause 1.7.1 states that all instructions must be in writing and then, illogically, clause 3.12.1 states what is to happen if instructions are given orally.

Basically, oral instructions are of no effect. Contractors often do, but should never, comply with them. If such an instruction is given, the contractor must confirm it in writing to the architect within seven days. The architect then has a further seven days in which to decide whether to dissent. If the architect does not dissent, the instruction takes effect from the expiry of the latter seven days. Therefore, from the date of the oral instruction, anything between eight and about 15 days can elapse before the instruction becomes effective.

There is really no excuse for oral instructions, and if the contractor makes it clear, in a friendly way of course, that it will not act on oral instructions, the architect may stop giving them. SBC and DB go on to provide, in clause 3.12.2 and 3.7.2 respectively, that the architect, or the employer under DB, may confirm instruction within seven days. How the contractor is to know that the architect will confirm on, say, day six when its own obligation is to confirm, is not stated.

If neither architect nor contractor confirms within the time period stated, but the contractor carries out the instruction, the contractor has no rights in the matter. The architect, or the employer under DB, may, however, confirm the instruction at any time up to the issue of the final certificate and it will be deemed to have taken effect on the date it was issued orally. The moral is clear: all instructions must be in writing. If not, the contractor must immediately confirm, wait seven days for dissent and, if none, carry it out.

Although an architect may argue that there is no alternative but to give an oral instruction if it is required immediately and the architect is at some distance from site, such a contention carries little weight now that e-mails, texts and messages are the norm. An instruction sent by fax or e-mail is properly served in writing if sent to the usual address where faxes or e-mails are to be sent [9]. If there is no BIM Protocol, the parties should agree a protocol for service of instructions and other documents in accordance with SBC, IC, ICD and DB clause 1.7.2. If they do, a document issued in accordance with the protocol will be validly served. MW and MWD have no specific provision, but there is nothing to prevent the parties agreeing a protocol under these contracts also.

IC and ICD make no provision for oral instructions. They are not mentioned. Therefore, confirmation by the contractor will have no effect. Confirmation by the architect will have the same effect as if the instruction had been issued at the time of confirmation.

However, an architect who relies upon the absence of a written confirmation in order to avoid authorising payment later may have a nasty shock in store. Looked at in terms of what the contract says, the position is clear. Work done, which is not properly instructed under the terms of the contract, is work 'not in accordance' with the contract and the architect has a duty to order such work to be removed from site. The architect who does not so order is in breach of contractual duty to the employer. Moreover, the contractor is in breach of its contract if it does not remove it. It appears that a contractor who carries out work on the basis of an architect's oral instruction, which the architect later refuses to confirm, is entitled to amend the work to restore it to its previous condition in

order to avoid a breach of contract. There is good authority, however, to the effect that compliance with an architect's instruction issued orally is good defence to a claim for damages for such breach of contract [10].

On the other hand, a contractor who accepts an oral instruction under IC or ICD and carries it out will not be able to argue for any reason that it was not empowered by the contract [11].

MW and MWD

The position under MW and MWD is somewhat different from that under the other four forms. Clause 3.4 has been changed in the 2016 version and states that instructions must be in writing and that, if oral instructions are issued, they are not effective until confirmed by the architect in writing. Therefore, a purely oral instruction must be ignored by the contractor. There is no provision for confirmation by the contractor. The contractor must carry out the architect's written instructions forthwith and there is provision in clause 3.5 for the architect to issue a seven-day compliance notice and for the employer to engage others to do the work if the contractor defaults.

The actual clause may appear to be all-embracing in its effect because it states that the architect 'may issue instructions'. There is no mention of the instructions being empowered by the conditions (as in SBC, DB, IC or ICD). Although it may seem that the architect can issue instructions about any matter that the architect sees fit, the architect must act within the scope of his or her authority. The courts usually take a dim view of provisions in contracts which appear to give one party unlimited powers and they construe them narrowly, having in mind the main object of the contract and limiting the provisions accordingly [12].

Therefore, it is wisest to assume that this clause only gives the architect power to issue instructions regarding the Works included in the contract. Five other clauses relate to specific instructions:

- to integrate the design of the CDP Works with the design of the Works (2.1.2 under MWD only);
- not to make good defects at his own cost (2.10 (2.11 under MWD));
- to order variations (3.6);
- to expend provisional sums (3.7);
- to exclude persons from the Works (3.8).

In addition, by necessary implication, the architect probably has power to instruct postponement, correction of inconsistencies, opening-up and testing, and removal of defective work.

Issue of instructions

The issue of instructions, unless omitting work, will provide grounds for extension of time under all six contracts. In addition, under SBC, DB, IC and ICD,

the issue or late issue, if requested by the contractor in reasonable time, will be grounds for a financial claim under clauses 4.20 (SBC), 4.19 (DB) and 4.15 (IC/ICD). Under the provisions of MW/MWD it is stipulated that when the architect values an instruction under clause 3.6 the valuation must include any loss and/or expense incurred by the contractor in complying with the instruction and the contractor need make no special application. It is the architect's duty to include the loss and/or expense.

There are one or two popular misconceptions about instructions under traditional contracts. Only the architect has power to issue an instruction and, as noted above, the power is limited. Neither the clerk of works nor any other consultant may issue instructions although, in practice, they often do. An employer who attempts to issue an instruction is in breach of contract. Alternatively, the employer may be considered to be attempting to negotiate a new contract to carry out the work in the instruction.

If the contractor carries out an instruction issued by anyone other than the architect, it does so at its peril. It is not entitled to payment and it is probably in breach of contract itself by so doing. For example, if a contractor carries out an instruction given by the heating consultant to install an extra radiator, the architect can require the extra radiator removed from site as not being in accordance with the contract and the contractor must bear the whole cost (see the discussion above on the confirmation of oral instructions). The architect has no power to certify payment for an instruction unless the instruction has been issued by the architect. Obviously, under DB, it is the employer or the employer's agent who may issue instructions.

What is an instruction?

The golden rule for contractors is clear. They should not carry out instructions unless they are:

- given by the architect, or the employer under DB, in writing or otherwise confirmed;
- empowered by the contract;
- identifiable as instructions.

This raises the question, what is an instruction? The RIBA and ACA have published standard instruction forms which are in common use. The forms are boldly headed 'Architect's Instruction'. It is good practice to issue all instructions on such forms because it is easy to identify them later when they may be in a file of other papers; however, it is not the form but the substance which determines whether it is an instruction, and an instruction can be issued as a letter.

Sometimes the contractor may simply receive a drawing and a compliment slip. It is dangerous to treat this as an instruction unless there is some message on the compliment slip saying that the work shown on the drawing is to be carried out. Anything sent with a compliment slip should be treated with suspicion. If

the contractor receives a copy of the employer's letter to the architect asking that something be done, it is not an instruction, except under DB, but an invitation to the contractor to do that something at its own cost.

An item in the minutes of a site meeting probably becomes an instruction when the minutes are agreed as accurate at a subsequent meeting and possibly before that if the architect, or the employer under DB, is responsible for producing the minutes. One architect regularly scribbled instructions on site on pieces of plywood and the backs of roofing tiles. Such conduct is rather precious, but the instructions are valid, provided they are signed and dated. The production of copies may be a problem.

Not all instructions imply payment. Many instructions may be simply clarifications or be issued under some provision which has no financial implication, such as SBC clause 3.18.1 requiring the removal from site of work not in accordance with the contract.

An instruction requiring a variation is not valid, and there is no liability on the employer to pay, if it is issued in respect of something which the contractor must do anyway in carrying out its obligations under the contract [13]. In passing, it may be noted that an instruction signed in the architect's name by another person is quite valid, provided that the person had the architect's authority to sign [14].

4.3 Clerk of works

A good clerk of works can make a tremendous difference to work on site in terms of absence of defects, efficiency and overall good quality.

SBC, IC and ICD make provision for the appointment of a clerk of works. DB, MW and MWD make no such provision, possibly in the case of DB because the employer's agent may take this role. In the case of MW and MWD, it is probably because projects executed under this contract are expected to be relatively small and uncomplicated. There is no reason, however, why provision for a clerk of works should not be made in the specification for either contract.

SBC clause 3.4 states that the employer may appoint a clerk of works who is to be under the direction of the architect. The only duty of the clerk of works is to inspect and the contractor must give every reasonable facility. In practice, that means that the contractor should not hinder the clerk of works who must be allowed access to all parts of the Works. The contractor cannot be expected to go to great lengths to erect scaffolding to enable the clerk of works to inspect the building, but if the scaffolding is already in position, the clerk of works must be allowed access.

Directions

If the clerk of works gives a direction to the contractor, it is of no effect. This means that not only can the contractor ignore it but also that it is in breach of contract if it takes any action, or becomes inactive, as the case may be, on

account of the direction. The clause then contains the curious provision that a direction of the clerk of works will be effective if given on a matter on which the architect is empowered by the contract to issue instructions and if the direction is confirmed by the architect within two business days of issue of the direction. A 'Business Day' is defined as any day other than Saturday, Sunday or a Public Holiday. The direction is then deemed to be an architect's instruction effective from the date of the architect's confirmation.

Two points arise from this provision. First, the architect's confirmation must be given within two business days – an action which rarely happens. If confirmation is delayed, the direction is not deemed to be an architect's instruction. But does it matter, since the confirmation itself presumably ranks as an instruction anyway? Second, even if confirmed within two days, the direction is effective only from the date of confirmation. There seems little point in the clerk of works giving a direction in the first place. It would seem more appropriate if the clerk of works simply gave the architect a telephone call and requested the issue of an instruction about the matter.

The usual scenario is that the clerk of works issues a direction. The contractor need not, in fact must not, take any action on it no matter how urgent. The contractor may feel certain that it will be confirmed and either does the work and takes a chance or possibly holds back from that portion of the work until it hears from the architect. If the contractor takes the latter course, it may suffer disruption and/or delay for which it has no redress.

If it takes the former course, the architect may not confirm and the contractor will not be paid for any additional or substituted work. Worse, the architect may issue instructions, in accordance with clause 3.18.1, that the work done in response to the direction of the clerk of works is not in accordance with the contract and must be removed from site. The moral is quite clear: if given a direction by the clerk of works, the contractor should ignore it, carry on working as usual and, if confirmation is received from the architect, then, and only then, carry out the direction. If, as a result, the work is disrupted, the contractor will be able to make application for loss and/or expense.

Clearly, this is not the way a contractor usually works. Directions from the clerk of works are quite often treated as though they are architect's instructions from the moment of issue.

IC/ICD clause 3.3 is much shorter. It merely makes reference to the clerk of works being appointed by the employer as an inspector under the direction of the architect. The clerk of works is not empowered to give directions, even directions which may be ignored! From this point of view IC and ICD appear eminently sensible. Some clerks of works have expressed the view that they should be empowered to issue instructions under the contract. Such a provision would obviously lead to confusion on site.

The duty of the clerk of works is to the employer. The clerk of works has no duty towards the contractor to find defects. The approval of the clerk of works counts for nothing. It may or may not be indicative of the architect's attitude. If the clerk of works points out defects, the contractor would be wise to take notice,

but there is no substitute for a competent site manager (or person in charge under IC/ICD and MW/MWD).

The contractor will often present daywork sheets to the clerk of works for signing. This is incorrect practice. SBC clause 5.7, IC/ICD clause 5.4 and DB clause 5.5 stipulate that such vouchers must be delivered to the architect, the architect's authorised representative or the employer respectively, for verification no later than seven business days after the work has been carried out. The clerk of works is not the architect's or the employer's representative unless the architect or the employer specifically states the same in writing to the contractor.

A negligent clerk of works will not remove liability from the architect so far as the employer is concerned, but if the employer successfully sues the architect for negligence, the damages payable by the architect may be reduced on account of the negligence of the clerk of works [15]. This is a point of more interest to the architect and the employer than to the contractor. It depends on the clerk of works being employed by the employer and not by the architect, as sometimes happens, and raises the point of the employer's vicarious liability for the actions of the clerk of works.

Defacement

Many clerks of works are in the habit of using chalk or wax crayon to deface work or materials which they consider to be defective. In this they are sometimes encouraged by the architect and, indeed, the contractor itself. Some contractors, however, quite rightly take exception to such conduct and protest to the architect. If materials are defaced by the clerk of works it is because, presumably, they are not in accordance with the contract. Either they will be removed by the contractor or the architect will instruct removal. They are, therefore, the contractor's property. It may be that the contractor could use materials in other less stringent situations except for the fact that they are defaced. There is no doubt that the clerk of works is not entitled to deface Works or materials. The clerk of work's role is purely to inspect. The contractor should put a stop to defacement as soon as it first appears. This is best done by a suitably worded letter on the following lines to the architect:

> Dear Sir,
>
> It is common practice for the clerk of works to deface work or materials considered to be defective. The basis for such action presumably is to bring the defect to the notice of the contractor and ensure that it cannot remain without attention.
>
> We object to the practice on the following grounds:
>
> 1. The work or materials so marked may not be defective and we will be involved in extra work and the employer in extra costs in such circumstances.

2. The work or materials so marked, if indeed defective, will not be paid for and will be our property when removed. We may be able to incorporate it in other projects where a different standard is required. Defacement by the clerk of works would prevent such re-use.

We will take no point about the defacing marks we noted on site today, but if the practice continues, we will seek financial reimbursement.

Yours faithfully,

Specialist clerks of works

It is the practice of some large organisations, who maintain a body of clerks of works on their permanent staff, to allow a number of so-called 'specialist' clerks of works to inspect the site at regular intervals. It is not always appreciated that the contractor has possession of the site under licence from the employer and, with the exception of the persons noted in the contract, the contractor has the right to refuse admittance to the site. The situation is clearly delicate, but the contractor would be ill-advised to allow a multitude of inspectors to roam the site. Of course, it is always open to the architect, or the employer under DB, to make such 'specialist' clerks of works authorised representatives, in which case the contractor must allow them access, certainly under SBC, DB, IC or ICD provisions (clause 3.1).

The architect is unlikely to make large numbers of persons authorised representatives because it would imply that they can act for the architect, issue instructions, etc. The situation is not absolutely clear, but any contractor faced with 'specialist' clerks of works might try refusing access until such time as the position has been clarified in writing.

Snagging

A 'snag' sounds much less concerning than a 'defect'. The term 'snag' is not used in any contract, but common usage suggests that it is just another name for a defect. Although it may suggest a minor defect, no such distinction is made in practice.

A clerk of works will often issue snagging lists, particularly as practical completion draws near. If the contractor accepts such lists as merely helpful reminders of work to be done, all should be well. Problems and disputes sometimes arise on site because the clerk of works produces snagging lists and after items receive attention the architect produces another list. Contractors often feel aggrieved about it, maintaining that one list is quite enough. In fact, the snagging list is not of contractual significance unless issued by the architect and it is clearly stated that it represents the only points requiring attention before the architect is prepared to issue a practical completion certificate. It is the contractor's obligation to

complete the building in accordance with the contract and the clerk of works can never dispense the contractor from that obligation. The clerk of works has no duty to produce snagging lists. Their only purpose is to remind the contractor of some, but not all, items that require attention.

A clerk of works can be very useful but it should always be remembered that the clerk of works is just an inspector empowered to look and to note and that is all. If the clerk of works issues directions, the contractor should not act on them, unless of course they relate to obvious defects, until they are confirmed. Confirmation by the contractor is not effective.

References

1 *Robinson v Harman* (1848) 154 ER 363.
2 *Forsyth v Ruxley Electronics & Construction Ltd* (1995) 73 BLR 1.
3 *Mul v Hutton Construction Ltd* (2014) 154 Con LR 159.
4 *William Tomkinson & Sons Ltd v The Parochial Church Council of St Michael* (1990) 6 Const LJ 319.
5 *Oldschool and Another v Gleeson (Contractors) Ltd and Others* (1976) 4 BLR 103.
6 *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.
7 *Hudson v Hill* (1874) 43 LJCP 273.
8 For an interesting judicial comment about 'deeming' see: *Re Coslett (Contractors) Ltd, Clark, Administrator of Coslett (Contractors) Ltd (In Administration) v Mid Glamorgan County Council* [1997] 4 All ER 115.
9 *Hastie & Jenkerson v McMahon* (1990) *The Times* 3 April 1990; *Construction Partnership UK Ltd v Leek Developments* [2006] EWHC B8 (TCC); *Bernuth Lines Ltd v High Seas Shipping Ltd* [2006] Lloyd's Rep 537; *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT and Another* [2012] 3 All ER 842.
10 *G Bilton & Sons v Mason* (1957) unreported.
11 *Bowmer & Kirkland Ltd v Wilson Bowden Properties Ltd* (1996) 80 BLR 131.
12 *Glyn and Others v Margetson & Co and Others* (1893) AC 351.
13 *Sharpe v São Paulo Brazilian Railway Co* (1873) 8 Ch App 597.
14 *Anglian Water Authority v RDL Contracting Ltd* (1992) 27 Con LR 76.
15 *Kensington & Chelsea and Westminster Area Health Authority v Wettern Composites* (1984) 1 Con LR 114.

5 Money

5.1 Payment

The 2016 editions of these contracts make significant changes to the payment clauses and also attempt to simplify the arrangement to avoid duplication. Although that is an admirable target, changing the layout of what one has grown to know (if not love) means that one has to get to know the new layout and understand it afresh. What follows can be no more than a brief summary and the parties are advised to study the contract terms carefully.

SBC, IC and ICD each provide for the issue of eight different kinds of certificate:

- Interim certificate
- Non-completion certificate (not MW/MWD)
- Section completion certificate (not MW/MWD)
- Practical completion certificate
- Certificate of making good
- Certificate releasing insurance money
- Certificate after termination
- Final certificate.

The figure for MW and MWD is six (no certificates are issued under DB, because there is no independent architect as certifier). As can be seen above, many of these certificates are not financial, although most contractors associate the word 'certificate' with money. In order to be a valid certificate, a document must be headed 'Certificate' or start with the words 'I certify' or be clearly referenced to the contract provision empowering issue. In any event, it must be the clear expression of the judgment, skill or opinion of the architect [1].

Financial certificates and payment are now dealt with in SBC clauses 4.7–4.26, IC and ICD clauses 4.7–4.21, MW and MWD clauses 4.3–4.9. SBC, IC and ICD provisions are similar and will be discussed together. MW, MWD and DB will be considered separately below.

The due date of each payment is no longer to be set out in the Contract Particulars. A new term has been introduced to all the contracts: the 'Interim

Valuation Date'. It is the interim valuation date which must be entered in the Contract Particulars. If no first due date is inserted, it will be a month after the date of possession and, in either case, thereafter on the same date or nearest business day every month. This is a most important date. The due dates are seven days after each interim valuation date.

It should be carefully noted, especially by architects, that under the 2016 edition, monthly interim payments do not cease at practical completion. They continue until the final payment. There is no longer a requirement for a payment soon after practical completion to include half the retention. It will be released in the next scheduled payment after practical completion (which in any event will be no longer than a month and often much less than that). This change also applies to DB and MW/MWD.

The architect has a maximum period of five days after each due date in which to issue the certificate. The architect may ask the quantity surveyor to carry out a valuation not more than seven days before the date of the certificate, but responsibility for the correctness of the sum on the certificate remains with the architect [2]. The amounts to be included in each certificate are as follows. Subject to retention:

- total value of work properly executed;
- total value of materials delivered to site for incorporation, if not premature;
- value of listed off-site materials.

Not subject to retention:

- in respect of payments or costs due in regard to various insurance costs, statutory fees, patent rights (not IC/ICD), opening-up and testing, contractor suspension, loss and/or expense;
- in respect of restoration, repair or replacement following certain insured loss or damage;
- fluctuation payments.

Less reimbursement of advance payment, retention and any authorised deductions. The certificate should express the amount due to the contractor as the balance between the total of the above amounts and the amounts already certified on previous certificates and additional amounts paid by the employer after an interim payment notice.

It is often thought that the architect named in the contract must sign all certificates for them to be valid. That is not correct. It is quite sufficient if a properly authorised person signs in the name of the named architect [3]. It matters not that the person is not an architect, provided the person is authorised by the architect to sign in the architect's name. It should be noted, however, that the architect's signature on a certificate does not amount to issuing the certificate. To accomplish that under the provisions of these contracts the architect must at least bring the contents of the certificates to the attention of the employer [4].

Failure to issue a certificate within the five days will mean that the architect cannot then issue a certificate relevant to that due date. This is a point which all architects must carefully watch. Gone are the days when the architect could issue a certificate roughly every month and whenever it was issued it would be valid and the period for payment would be measured from the date of the certificate. It cannot be emphasised too much that those days are long gone.

The contractor may submit an interim or final application for payment to the quantity surveyor, not later than the interim valuation date or the issue of the final certificate respectively, stating the sum the contractor considers is due and the basis of its calculation. If the architect has failed to issue a certificate within the five days, all is not lost so far as the contractor is concerned; far from it: the application for interim payment becomes an interim payment notice. The final application for payment is discussed later. If the contractor has not submitted an interim application for payment, it may 'at any time' after the architect's failure, give an interim payment notice to the quantity surveyor stating the sum considered to be due on the due date and the basis of its calculation. It is thought that the words 'at any time' mean exactly what they say [5] although, in practice, the issue of the payment notice will probably become redundant after the issue of the next interim certificate.

The final date for payment is 14 days from the due date. The basic position is that the amount payable to the contractor is the sum certified. However, if there is no certificate, the amount payable is the sum in the contractor's interim application for payment or in the contractor's interim payment notice. If the interim payment notice was issued by the contractor after the architect failed to issue the certificate within the five-day period, the final date for payment is 14 days from the due date plus the number of days after the expiry of the five-day period by which the interim payment notice was given. This creates a problem for the architect who, in interim certificates, not only has to state the amount previously certified, but also any amounts paid by the employer after an interim payment notice. The architect cannot know for certain whether the employer has actually paid still less the amount involved. The architect will have to rely on what the employer says has been paid. However, an employer wishing to pay less may issue a pay less notice of which more later in this section.

Payments under DB

Valuations may be made in accordance with clause 4.12 (Alternative A) or 4.13 (Alternative B). Alternative A refers to stage payments. The contractor is entitled to payment of the amounts stated in the Contract Particulars when the stages of work set out are completed. It is important that the stages are described very carefully so that there is little room for dispute. In addition to the stage payments, the contractor is also entitled to such other payments specified under the contract as they become due; for example, payment of the value of change instructions under clause 5 and of loss and/or expense under clause 4.19. Alternative B provides for periodic payments. Essentially, this type of valuation

is the usual one, consisting of the value of work properly executed, the value of change instructions, loss and/or expense and so on. Under the 2016 edition, there is no difference in the application timing and procedure whether Alternative A or B is chosen. The difference is in the method of determining the sum due in each application.

As in SBC and IC/ICD, the interim valuation date is the date specified in the Contract Particulars and the due dates are seven days after the interim valuation date or seven days after the date the application is received by the employer whichever is later. The accurate identification of the due date is important, because the final date for each interim payment is 14 days from its due date.
The interim application must be made by the contractor for the sum it considers to be due at the due date. Clause 4.7.4 allows the employer to state in the Employer's Requirements precisely what details the contractor must include with the applications. A wise employer will make sure that the contractor is required to provide a proper breakdown with each application. In practice, it is surprising how seldom that requirement is included.

Applications under this form of contract are contractor-driven: the contractor states the amount it has calculated as being due and it is for the employer to make the next move (clause 4.7.5). The employer has a maximum of five days after the due date in which it must give a payment notice to the contractor. The notice must state the sum the employer considers to have been due on the due date and the basis of calculation. The notice is important, because, if given within the time period, the sum stated is the sum which must be paid. If the payment notice is not given or is given late, the sum to be paid is the sum in the contractor's application. However, an employer wishing to pay less may issue a pay less notice of which more later in this section.

Payments under MW and MWD

The provisions for payment under these contracts are similar to SBC, IC and ICD, but somewhat abbreviated. The interim valuation dates are set out in the Contract Particulars and are virtually identical to the entries for SBC and IC/ICD. The due dates for interim payments are stated in clause 4.3 to be seven days after the interim valuation dates. It should be noted that the monthly intervals for all contracts do not stop at practical completion, but continue to the final certificate (final statement under DB).

The architect has a maximum period of five days after each due date in which to issue the certificate. Failure to issue a certificate within the five days will mean that the architect cannot then issue a certificate in relation to that due date. If the architect fails to issue a certificate within the stipulated period, the contractor may at any time afterwards issue a payment notice to the architect stating the amount the contractor considers to be due at the due date and the basis of calculation. If the architect issues the certificate within the five-day time period, the final date for payment is 14 days from the due date. If the payment notice was issued by the contractor after the architect failed to issue the certificate within

the five-day period, the final date for payment is 14 days from the due date plus the number of days after the expiry of the five-day period by which the payment notice was given. If the architect fails to certify within the stipulated period and the contractor issues a payment notice which the employer must pay, the architect will have the problem of finding out and including in future certificates the amount paid as well as the amount previously certified. However, an employer wishing to pay less may issue a pay less notice of which more later in this section.

Each certificate must state the value of Works properly executed and materials properly on site less amounts previously certified and additional amounts paid by the employer after an interim payment notice.

Priced activity schedule

Priced activity schedules apply to SBC (clause 4.14.1) IC and ICD (clause 4.9.1) if the second, fourth or fifth recital respectively so state. The activity schedule must be attached to the contract with each activity priced so that the total of the prices equals the Contract Sum, less provisional sums, prime cost sums, contractor's profits on this and the value of any work for which approximate quantities are included in the bills of quantities. The contractor has an option whether or not it wishes to provide an activity schedule. If it does, the schedule is used to assist in the valuation of interim certificates. The prices in the activity schedule are to be proportioned so as to give the amount in the interim certificate. This may mean that the contractor will receive sums in the interim certificates which more closely reflect the work carried out.

A priced activity schedule is usually used as an alternative to priced bills of quantities. It seems strange, at first sight, to use it as well as bills of quantities. It should be noted, however, that even where a priced activity schedule is used, bills of quantities are still used for the valuation of variations.

Advance payment

SBC, DB, IC and ICD make provision for advance payment, but all contain a note in the Contract Particulars excluding local and public authorities. The employer can pay a sum to the contractor on a date stated in the Contract Particulars. The idea is that the sum will be paid early, in order to assist the contractor to finance the project. The contractor must reimburse the employer the amounts, and at the intervals, which the two parties agree and state in the Contract Particulars. In these circumstances, the contractor is required to give a bond, usually in the form reproduced at the back of the contract (SBC clause 4.7, DB clause 4.6, IC and ICD clause 4.7).

Retention

Under SBC clause 4.17 and DB 4.16 a percentage, assumed by the contract to be 3 per cent, is held by the employer, who may use the money whenever the

contract directs that the employer may deduct from money due or to become due to the contractor. The percentage may be varied by an entry in the Contract Particulars. This retention fund is also useful at the end of the job to ensure that making good of defects is carried out. Half the retention fund is to be released at practical completion and the rest on the issue of the certificate of making good.

Except under IC/ICD and MW/MWD, the retention money is held on trust for the contractor. That means that, although it is held by the employer, it really belongs to the contractor, which is why the employer has only limited powers of access to it. It is settled that the contractor has the right to demand that the retention money be paid into a separate bank account, clearly named as a trust account in favour of the contractor [6]. The employer must certify to the architect and the contractor that the amount has been placed in a separate bank account in accordance with the contract.

Indeed, SBC and DB include a provision to that effect although not if the employer is a local or public authority. The importance of keeping trust money separate is that, if the employer becomes insolvent, clearly identified trust money can be paid to the contractor. Otherwise, it has to take its chance along with other creditors. The employer has no right to use the money for his or her own purposes and to do so would be a breach of trust. The employer has an obligation to keep the trust money in a separate bank account even if there is no clause to that effect or if such a clause has been struck out [7] and that, of course, also applies to local and public authorities. The contractor is not obliged to make a request for the money to be placed in a separate account each time a certificate is issued and paid. It may make just one request at any time [8]. If the employer goes into receivership before a separate account has been set up, it seems that the contractor has lost its right to the money [9].

SBC and DB state that the employer has no obligation to invest the money. In other words, the contractor is not entitled to interest. Since there is a statutory obligation to invest, which a contract provision cannot defeat, it is possible that a contractor who insisted would be entitled to interest. Note, however, that no contractor has, so far, felt confident enough to test the point through the courts.

The second part of the clause allows the employer to use the fund for money which the contract allows the employer to withhold or deduct. If this clause does not apply to local authorities, perhaps the intention is that the retention will not be a trust fund and, therefore, the local authority does not need a special provision to be able to use the fund. How that operates in practice only time will tell. SBC provides for release of the second half of retention after the certificate of making good is issued.

Under SBC clause 4.18 and DB clause 4.17 it is possible for a bond to be provided in lieu of retention if the Contract Particulars so state. If the contractor fails to provide a bond, the ordinary retention provisions apply until the bond is provided. There are complicated provisions to take care of the situation in which the bonded sum falls below the figure which would have been in the retention fund. A suitable bond form is provided at the back of the contract in schedule 6.

There is no retention clause, as such, in IC/ICD and MW/MWD, the amount of retention being dealt with under IC/ICD clause 4.9.1 and MW/MWD clause 4.3 in a positive, rather than a negative, way by referring to the percentage to be paid rather than the percentage to be withheld. The actual percentage to be paid must be inserted in the Contract Particulars. The percentage to be paid increases at practical completion and the remaining retention is withheld until the final payment. The whole effect is the same as deducting retention. The percentages in the Contract Particulars are stated to apply only where the employer is not a local or public authority.

The final account

Under SBC, IC and ICD, not later than six months after practical completion or the last section completion certificate, the contractor must send to the architect, or to the quantity surveyor if so directed, all documents necessary for working out the final Contract Sum. Not later than three months thereafter, the architect or, if instructed, the quantity surveyor must ascertain all previously unascertained amounts of loss and/or expense and prepare a statement of all adjustments and send the contractor a copy of the computations of the adjusted Contract Sum. All three contracts provide detailed guidance on the way in which the Contract Sum is to be adjusted in clause 4.3.

A sensible new clause provides that if the contractor does not provide the documents required at the end of the six-month period, the architect may give the contractor a month to supply them. If they are still not supplied, the architect or the quantity surveyor is entitled to ascertain the loss and/or expense and adjust the Contract Sum based on their own information. The three-month period will obviously not have commenced, because it does not start until receipt of all the documents. Therefore, the contract provides that the ascertainment and statement must be sent to the contractor following completion. Experience suggests that, on receipt, the contractor will choose that moment to send the missing documents. The contract is silent about what happens then, but it is difficult to see how the architect can ignore that information [10].

The rules for the issue of the final certificate vary slightly between SBC and IC/ICD. In the case of SBC the final certificate must be issued not later than two months from the latest of the following:

- the end of the rectification period;
- the issue of the certificate of making good;
- the date the statement and ascertainment are sent to the contractor.

It is common experience for the last event to be the determining factor.

In the case of IC and ICD, issue must take place within 28 days of the latest of the same events. In the case of SBC, IC and ICD the final certificate must state the adjusted Contract Sum, the amounts previously certified including advanced payments, any sums paid as a result of the issue by the contractor of an

interim payment notice and the balance expressed as either a sum due to the employer or a sum due to the contractor. The final certificate must state the basis of calculation.

The due date is the date of issue of the final certificate, but if it is not issued within the period specified in the respective contracts, it is the last day of that period. The final date for payment is now only 14 days from the due date. This may trip anyone who does not carefully read the contract and expects the period to be 28 days as previously. It is important to understand that if the final certificate is not issued within the specified period, the architect has no power to issue it at all. Therefore, the conclusive effect of the certificate will be lost.

If the architect fails to issue the final certificate within the period and the contractor has issued a final application for payment, that application becomes a payment notice. If no final application has been made, the contractor may 'at any time' issue a final payment notice stating the amount the contractor considers to be due and the basis of calculation. In that case, the final date for payment is two months under SBC or 28 days under IC/ICD from the due date plus the number of days after the expiry of the period by which the payment notice was given. If issued on time, the final certificate will determine the amount to be paid. If the certificate is not issued on time, the payment notice will determine the amount; but an employer or contractor wishing to pay less may issue a pay less notice, of which more later in this section. It is suggested that the words 'at any time' mean exactly what they say and, in the case of a final payment, it could be open to the contractor to issue a payment notice a considerable time later although there may be nothing to be gained by waiting.

If the final certificate is issued within the stipulated period then, unless adjudication, arbitration or other proceedings have been commenced by either party within 28 days of the date of issue, the final certificate is conclusive evidence that:

- where quality or standards of materials, goods or workmanship are expressly stated to be a matter for the architect's approval, the architect is reasonably satisfied;
- the contract terms requiring adjustment of the Contract Sum have been correctly applied;
- all due extensions of time have been given;
- reimbursement of loss and/or expense is in final settlement of all matters under clause 4.20 (IC and ICD clause 4.15).

The only exceptions arise in the case of fraud or accidental inclusions or exclusions of work, materials or figures in any computation or arithmetical error. It is clearly stated that no other certificate is conclusive evidence that work or materials are in accordance with the contract. The current position so far as the first item is concerned has been discussed in Section 1.2. If an adjudication Decision has been given after the issue of the final certificate, either party has 28 days from the date of the Decision to refer the dispute decided by the adjudicator,

to arbitration or litigation. That is because adjudication is not necessarily finally binding and either party must be allowed to seek arbitration or litigation on that dispute.

Under MW and MWD, the contractor must supply within the specified period, usually three months, from practical completion all documentation for computation of the final certificate. The due date is 28 days after receipt of the documentation or the date stated in the certificate of making good whichever is later. The architect must issue the final certificate not later than five days after the due date. The certificate must state the amount the architect considers to be due and the basis of its calculation. The final date for payment is 14 days from the due date. If the architect fails to issue a final certificate, the contractor at any time may issue a payment notice stating the amount it considered to be due and the basis of calculation. In that case, the final date for payment is 14 days from the due date plus the number of days after the expiry of the five-day period by which the payment notice was given.

The final certificate under MW and MWD is not stated to be conclusive as regards any matter, not even the amount.

All six contracts are lump-sum contracts. The contractor is entitled to payment provided it completes substantially the whole of the work [11]. The fact that interim payments are made does not alter the position. Failure to perform substantially means that the contractor cannot recover [12].

Reference in the contracts to work 'properly executed' refers to work which is in accordance with the contract. The contractor is not, of course, entitled to be paid for defective work. If the architect does certify defective work, the architect may become personally liable if the contractor becomes insolvent [13].

The arrangements for final payment under DB are somewhat different. They are set out in clause 4.24. Within three months of practical completion, the contractor must submit the final statement to the employer. It must state the adjusted Contract Sum and the amounts already paid by the employer, the basis of calculation and details of the adjustments. If the contractor fails to submit the final statement on the expiry of the three months, the employer may give it a further two months' notice of intention to submit an employer's final statement. Unless the contractor first issues a final statement, the employer may issue one giving the same details as required from the contractor so far as the employer is reasonably able to do so. The due date for payment is one month after the latest of:

- the end of the rectification period;
- the date in the notice of completion of making good;
- the date of submission of the final statement from the contractor to the employer.

Except to the extent that the employer or the contractor dispute it before the due date, the final statement becomes conclusive on that date about the sum due and the other conclusive effects of clause 1.8 apply. The final date for payment has also been reduced to 14 days from the date when payment becomes due to match the

interim payments and other contracts. Within five days of the due date, whichever of the employer or the contractor is shown as liable to pay in the final statement must issue a payment notice stating the amount it considers is due and the basis of calculation. The payment to be made is the amount stated in the payment notice or, if no payment notice is issued, the amount shown on the final statement.

Either party has 28 days from the date of issue of the final statement in which to start adjudication, arbitration or other proceedings. Otherwise, the final statement is conclusive about the same three matters noted earlier in respect of SBC, IC and ICD, i.e. workmanship, extensions of time and loss and/or expense, when the final statement becomes conclusive about the balance due. The catch is that if the employer or the contractor, as appropriate, decides to dispute the whole of the final statement under clause 4.24.6, the contract appears to contain no mechanism to make the final statement conclusive in the future. All that appears to be required under clause 4.24.6 is that the party wishing to dispute, issues a written notice specifying the dispute to the other. That has effects upon the due date and the conclusivity in respect of the three matters in clause 1.8.

Listed items

It should be particularly noted that, under SBC clause 4.16, IC/ICD clause 4.10 and DB clause 4.15, if the employer wishes to pay for materials or goods off site, the materials or goods will have been listed, supplied to the contractor and attached to the contract bills of quantities, the priced document, specification or the Employer's Requirements as appropriate. The items on the list must be divided into two categories: the first category is 'uniquely identified items' and the second category is 'not uniquely identified items'. Uniquely identified items are those materials or goods which are easy to recognise, such as heating boilers or sanitary fittings or the like. Items not uniquely identified cover such items as bricks, sand, tiles, timber and anything which it would be difficult to recognise as belonging to a particular site.

The architect is obliged to include all such listed materials and goods in the valuation in any certificate and they must be included before delivery to site. Under DB, they are to be included in the contractor's application for payment. In each contract, its right to payment is subject to the contractor fulfilling certain specified criteria. They are as follows:

- The contractor must have provided reasonable proof that it owns the items, so that after it has been paid the value of items included in certificates, the ownership of items will pass to the employer.
- The contractor must have provided reasonable proof that the items are insured in respect of specified perils.
- They must be kept at the premises where they have been manufactured or stored and they must either be set on one side or, alternatively, they must be clearly marked so as to identify the employer and that they are destined for the Works.

- The contractor must have provided the employer with a bond in respect of the uniquely identified items if so required by an entry in the Contract Particulars. The surety for the bond must be approved by the employer and, unless otherwise agreed, the terms of the bond must be as agreed between the JCT and the British Bankers Association and included in the Schedules at the end of the printed contract. In the case of materials which are not uniquely identified, the provision of a bond is mandatory.
- The items must be in accordance with the contract.

There is no provision for payment for off-site materials under MW and MWD.

Set-off

The question of set-off has long been a bone of contention. In general, it appears that there is a right of set-off unless, looking at the contract as a whole, it is excluded expressly or by necessary implication [14]. The point is important because, at one time, the architect's certificate was considered as good as cash and had to be honoured [15]. It is now clear, however, that an employer with good grounds can pay less than the amount on a certificate and, resisting summary judgment, go to arbitration or trial [16]. This is bad news for contractors, particularly because it appears that the employer need only show that there are reasonable grounds to challenge the certificate [17]. It will be rare for contractors to obtain summary judgment if employers fail to pay and contractors may be wiser to use the contractual power to terminate their employment.

Following the Housing Grants, Construction and Regeneration Act 1996 and the amendment which came into force in 2011 [18], all four contracts contain express provisions to deal with set-off or, as the contracts now refer to it, the employer's intention to pay less than what is specified in the architect's certificate or the contractor's payment notice (SBC clauses 4.11.2, 4.11.3, 4.11.5 and 4.12; IC/ICD clauses 4.12.2, 4.12.3, 4.12.5 and 4.13; MW/MWD clauses 4.5.4 and 4.5.5; DB clauses 4.9.2, 4.9.3, 4.9.5 and 4.10). Because the provisions are inserted as a result of legislation, they are substantially the same in each contract.

If the employer wishes to pay less than what it says on the certificate or on the payment notice, whichever is relevant, the employer must issue a written notice not later than five days before the final date for payment of any certificate (application under DB) or payment notice [19]. This notice, which used to be called a withholding notice, is now termed a pay less notice. It must state the amount that the employer considers to be due at the date the notice is given and the basis of its calculation. The notice may be given on behalf of the employer by the architect or any person acting as contract administrator, the quantity surveyor or by any person authorised by the employer. If the employer does not give a pay less notice, the sum certified or stated in the payment notice must be paid in full. Where the final certificate shows a sum due from the contractor to the employer, the contractor has a similar right to serve in writing a pay less notice no later than five days before the final date for payment of the final certificate.

SBC clauses 4.11.6 and 4.11.7, IC/ICD clauses 4.12.6 and 4.12.7, MW/MWD clause 4.6, and DB clauses 4.9.6 and 4.9.7 provide that the employer must pay simple interest at five per cent above Bank of England official bank rate at the date payment becomes overdue if the employer fails to pay the amount due by the final date for payment. This is in addition to the contractor's other rights to suspend or terminate or, in appropriate cases, to accept repudiation under the general law. The relevant clauses in each contract only refer to the 'Interest Rate'. In order to discover what the rate is, one has to look at the definitions. It is not at all clear why the rate could not simply be stated in the clause.

It is important for the contractor to understand that the contractual entitlement to interest depends upon a certificate or a payment notice having been issued in the appropriate amount and that the employer has failed to pay the whole of that amount by the final date for payment. There is no contractual entitlement to interest on an amount which the contractor may believe the architect should have certified but has not done so although an adjudicator could award the interest if it is decided that the certificate should have been issued.

5.2 Variations

Contractors sometimes ask if they are obliged to carry out an architect's instruction requiring a variation. The answer is 'yes' as far as JCT contracts are concerned, but there are some points to note. The clauses authorising the architect to issue instructions requiring variations are SBC clause 3.14, IC/ICD clause 3.11 and MW/MWD clause 3.6.1. In the absence of these clauses, the architect would have no power to order variations and any attempt to do so by architect or employer would amount to a breach of contract and the contractor might be justified in negotiating a new price for the contract. This is because SBC, IC, ICD, MW and MWD are lump-sum contracts and, basically, the contractor has tendered a price for the whole of the Works.

There are some other clauses which authorise variations in specific circumstances (SBC clause 2.14.3, IC/ICD clause 2.13.1, etc.), but the principal clauses are the ones noted above. SBC, IC and ICD provisions are similar and will be considered first. Variations are defined in these contracts, in clause 5.1 in each case, as the alteration or modification of the design or the quality or quantity of the Works from that shown in the contract documents. They include: additions, omissions and substitutions; alterations of kinds or standards of materials; or the removal from site of materials delivered for the Works, unless the removal is because the materials are defective. That is all very clear and gives the architect wide powers.

An important provision is the architect's power to issue instructions imposing, adding to, omitting from or altering obligations or restrictions relating to access, working space, working hours or the order of the work. This seems to be a dangerous extension of the architect's powers into the contractor's own field, and there is only one safeguard: the contractor can make reasonable objection under SBC clause 3.14.2 or IC/ICD clause 3.11.2.

The architect may not omit work, which has been measured in the bills and priced by the contractor, in order to give it to others to carry out [20]. The prohibition also covers the omission of provisional sums to allow others to do the work [21].

The position under DB is broadly similar. An important difference is that variation instructions under clause 3.9 may only be given by the employer. Moreover, they are referred to as 'Change instructions', because the employer may only instruct a change in the Employer's Requirements which may, in turn, require an alteration in the design, quality or quantity of the Works. Indeed, the contractor has the right to refuse to put a change instruction into effect if it has sufficient reason such as its effect upon the design.

The employer must issue instructions regarding the expenditure of provisional sums, but only if they are in the Employer's Requirements. Provisional sums which are in the Contractor's Proposals, but which have never been transferred to the Employer's Requirements, cannot be expended.

The employer has the same power to impose or vary restrictions as under SBC.

Valuation

Under SBC, IC and ICD, variations are to be valued by the quantity surveyor in accordance with the rules laid down in the contract. This procedure may be set aside if the contractor and the employer (not the architect) agree. This allows the employer, for example, to accept the contractor's quotation for a proposed variation. Alternatively, under SBC, there is provision for a contractor's quotation, requested under clause 5.3.1 and schedule 2 (a 'Variation Quotation'). In IC and ICD there is simply provision for an agreement on the valuation. The effect of this is discussed later in this section. The rules for the valuation of variations are sensible. In SBC reference is to be made to the prices in the priced bills. In IC and ICD reference is to be made to the prices in the priced document (see Section 1.1).

Omissions are to be valued at the rate in the bills. Additions and substitutions which are similar in character and executed under similar conditions and without significant change in quantity to work in the bills are to be priced using those rates. If there are changes in the conditions and quantity, valuations are to use the bill rates or other priced documents as a basis. If the work is not of a similar character or involves other than additions, omissions or substitutions or if it is not reasonable to value it using bill rates as a basis, then a fair valuation must be made. Rules are set out for the valuation of work on a daywork basis if it cannot properly be measured.

The above is only a general summary and all parties are advised to study the relevant clauses carefully. It should be remembered, however, that the quantity surveyor has a fair degree of discretion regarding the method of valuation and is under no obligation to obtain the contractor's agreement. The amount to be included in any certificate in respect of such valuation is for the architect to decide [22] even though, in practice, the architect will usually adopt the quantity

surveyor's valuation. Even in adopting the quantity surveyor's valuation, however, the architect has a duty to the client to carry out sufficient checks to be satisfied that the certified sum is correct. That is not to say that the architect is obliged to revalue the work – that would be needless duplication – but the architect should ask for sufficient supporting information from the quantity surveyor so that the work that has been valued can be easily seen. The rules for valuation, where approximate quantities are involved, and the implications of defined and undefined provisional sums should be carefully studied where the RICS New Rules of Measurement (NRM2) are to apply.

Important provisions require that if an instruction causes substantial changes in the conditions under which other work is carried out, such other work will be treated as if varied. For example, if the architect issues an instruction changing 'dry lining' to 'three coats wet plaster work', the contractor will be entitled to be paid for that variation as appropriate. By virtue of SBC clause 5.9 or IC/ICD clause 5.5, it will also be entitled to additional payment because altered conditions may lead the contractor to carry out some of its other operations in a different order or may necessitate added protection. The change in conditions must be substantial.

The variations clauses do not seem to include valuation of the effect of a variation upon the regular progress of the work. Any claims under this head must be made in accordance with SBC clause 4.20 or IC/ICD clause 4.15. In SBC and IC/ICD clauses 5.10.2 and 5.6.2 respectively, it is clearly stated that no allowance must be made in the valuation for any effect on regular progress or other loss and/or expense for which the contractor would be reimbursed under any other clause. If, however, the contractor can show that it would not be so reimbursed under another provision, it is entitled to have the amount valued under the variation clause.

There is an alternative valuation procedure in SBC. It allows the architect to instruct the contractor that a variation is to be dealt with under schedule 2 which deals with variation quotations and acceleration quotations. The contractor has 21 days from receipt of the instruction or requested further information to submit its quotation to the quantity surveyor. The quotation must include the value of the work, any extension of time, loss and/or expense and the cost of preparing the quotation. The architect may request other information such as a method statement. Acceptance must be within seven days from receipt and be confirmed by the architect. If not accepted, valuation is to be carried out under the normal rules or the architect must instruct that the variation is not to be carried out. The great advantage of this procedure is that otherwise contentious claim matters are settled at the time of the variation. Points for contractors to watch:

- The contractor has seven days after receipt of the instruction to give written notice that the information provided is not sufficient.
- If a later variation is instructed to variation quotation work, neither the normal rules nor schedule 2 apply. Instead, the quantity surveyor must make a fair and reasonable valuation based on the earlier variation quotation.

DB

Valuation under this contract is dealt with under clause 5. The process is similar to SBC except that no architect or quantity surveyor is involved. Effectively, the valuation is to be undertaken by the contractor. If the employer disagrees, the remedy is to serve the payment notice within five days from the due date. The standard valuation rules are set out in clause 5.4.

If, in the Contract Particulars, the supplemental provisions are said to apply, paragraph 2 governs the valuation of change instructions. Essentially, the process is in substitution for clause 5. It is triggered by the issue of an instruction from the employer. If the employer, or the contractor, believes that a valuation, extension or time or loss and/or expense will be entailed, the contractor has 14 days to submit an estimate of the value, extension of time, loss and/or expense and details of the resources required and a method statement. The employer has ten days to either agree or:

- instruct compliance and S4 will not apply; or
- withdraw the instruction.

If the instruction is withdrawn, the contractor is entitled to be paid for any abortive design work. The sting in the tail is that if the contractor fails to submit the required estimates, the valuation is to be carried out under clause 3.9, extensions of time under clauses 2.23–2.26 and loss and/or expense under clause 4.20, but no payment is to be made until the final statement and no financing charges can be included.

MW and MWD

Under MW and MWD variations are empowered by clause 3.6. It is a very short clause allowing the architect to vary the Works by addition, omission or change or to change the order or period in which they are to be carried out. The contractor has no right of reasonable objection, but it can always refer any dispute to adjudication or arbitration.

Valuation of variations may be carried out by the architect and contractor reaching agreement before the work is carried out. Indeed, clause 3.6.2 states that the architect and the contractor shall endeavour to do so. This means little more than that they must make an attempt to do so. It is thought that if the architect asks the contractor for a price and does not accept it, the parties will be deemed to have endeavoured to agree and the architect may then proceed to value the variation. The standard procedure is valuation by the architect, on a fair and reasonable basis using the prices in the priced specification, schedules or schedule of rates where relevant. The architect's view as to whether the particular priced document is 'relevant' in any particular instance will, doubtless, prevail, at least until adjudication. The contractor is not in a strong position and, even if priced schedules are used, the employer does not warrant that they are correct.

A major difficulty, from the contractor's point of view, is that it is deemed to have included in its price for carrying out and completing the Works in accordance with the contract documents. Thus, work shown on the drawing, but not in the schedules, does not rank as a variation as would be the case under SBC with Quantities edition. (See also Section 6.2 in relation to the inclusion of loss and/or expense.)

MW and MWD no longer make provision for a quantity surveyor to be appointed. However, a quantity surveyor may be appointed and the architect will probably delegate the carrying out of valuations.

Points

All six forms make reference to the fact that no variation will vitiate or invalidate the contract. This is superfluous, because nothing empowered by the contract can invalidate it. It must not be thought, however, that the architect or the employer under DB can order variations with impunity. If the variation or the sum of all the variations on a particular contract is such that the whole scope and character of the work is changed, the contractor may be entitled to negotiate a totally new contract. For that situation to arise the change must be such that the contractor can say that the project is not substantially that for which it originally tendered. For example, if virtually every detail is changed little by little so that flat roofs are replaced by pitched, baths by showers, small wooden windows by large metal windows and so on, the contractor may well have a case. It should be noted that the mere number of variations is not important and each situation must be considered on its merits.

All variations, except omissions, entitle the contractor to extensions of time if they cause the completion date to be exceeded. They may also entitle the contractor to be reimbursed for direct loss and/or expense.

A situation which sometimes arises concerns work which the architect insists is included in the contract, but which the contractor is equally certain should be an extra. Certain groundworks sometimes fall into this category. The architect may refuse to authorise a variation. What is the contractor to do? The work may be substantial in quantity and value. If the contractor is confident of its position, its remedy appears to be to refuse to carry out the work unless a variation is authorised and, failing such authorisation, to treat the contract as repudiated and sue for damages [23].

This may not always be a prudent action to pursue, the contractor risking the possibility of bearing huge losses if the result of legal action is not in its favour. If the contractor proceeds with the work and attempts to claim later, it may be considered that it has carried out the work on the architect's interpretation of the contract and that it is entitled to no extra payment. There is no easy answer but, at the very least, if the contractor elects to proceed, it should make clear its position in writing to the employer and do the work 'without prejudice' to its rights to claim later.

In some circumstances, it may be held that the employer has implicitly promised to pay if the work is, in fact, additional to the contract [24]. In practice, it should be possible for the parties to agree that the contractor carries out the work on the clear understanding that the matter can be settled by adjudication or arbitration and payment made if the work is found to be a variation. A suitable letter might run along the following lines:

To the Employer

SPECIAL DELIVERY – WITHOUT PREJUDICE

Dear Sir

We refer to your letter of *(date)* and ours of *(date)* relating to *(describe work)*. It is our firm view that this work is not included in the contract and, therefore, constitutes a variation for which we are entitled to payment.

We are advised that we can refuse further performance until you authorise a variation. If you continue to refuse to so authorise, we may treat the contract as repudiated and sue for damages.

Without prejudice to our rights, we are prepared to carry out the work, leaving this matter in abeyance for future determination by adjudication or arbitration, if you will agree in writing and confirm that you will not deny our entitlement to payment in such reference if, on the true construction of the contract, the work is held to be not included.

Yours faithfully,

Dayworks

The valuation of dayworks is often a contentious issue. If the work is to be valued by measurement or on some other basis, the submission of signed daywork sheets by the contractor will be irrelevant. It is only if the work is to be carried out and valued on a daywork basis that signed daywork sheets assume any importance. If the sheets are signed by the architect's authorised representative, they must be valued using the hours and resources on the sheets. The quantity surveyor has no power to go behind the sheets and substitute another estimate of the hours it should have taken to do the work [25]. Signing under the phrase 'for record purposes only', which is very common, does not imply that there is power to value the work on a different basis [26]. Even where sheets have not been signed, they will be good evidence of the hours spent provided that they were completed by the contractor at the end of the relevant day in accordance with the architect's or quantity surveyor's requirements [27].

References

1 *Token Construction Co Ltd v Charlton Estates Ltd* (1973) 1 BLR 50.
2 *R B Burden v Swansea Corporation* [1957] 3 All ER 243.
3 *London County Council v Vitamins Ltd* [1955] 2 All ER 229.
4 *London Borough of Camden v Thomas McInerney & Sons Ltd* (1986) 9 Con LR 99.
5 *Connex South Eastern Ltd v M J Building Services Group PLC* [2005] EWCA Civ 193.
6 *Rayack Construction Ltd v Lampeter Meat Co Ltd* (1979) 12 BLR 30; *Bodill & Sons (Contractors) Ltd v Harmail Singh Mattu* [2007] EWHC 2950 (TCC).
7 *Wates Construction (London) Ltd v Franthom Property Ltd* (1991) 53 BLR 23.
8 *J F Finnegan Ltd v Ford Sellar Morris Developments Ltd (No. 1)* (1991) 25 Con LR 89.
9 *MacJordan Construction Ltd v Brookmount Erostin Ltd* (1992) 56 BLR 1.
10 *Skanska Construction UK Ltd v The ERDC Group Ltd* [2003] SCLR 296.
11 *Hoenig v Isaacs* [1952] 2 All ER 176.
12 *Bolton v Mahadeva* [1971] 2 All ER 1322.
13 *Sutcliffe v Thackrah* [1974] 1 All ER 319; *Dhamija and Another v Sunningdale Joineries Ltd and Another* [2011] EWHC 2396 (TCC).
14 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* (1973) 1 BLR 73.
15 *Dawneys Ltd v F G Minter Ltd* (1971) 1 BLR 16.
16 *C M Pillings & Co Ltd v Kent Investments Ltd* (1985) 4 Con LR 1.
17 *R M Douglas Construction Ltd v Bass Leisure Ltd* (1991) 53 BLR 119.
18 The Local Democracy, Economic Development and Construction Act 2009.
19 *Whiteways Contractors (Sussex) Ltd v Impresa Casteli Construction UK Ltd* (2000) 16 Const LJ 453.
20 *Commissioner for Main Roads v Reed & Stuart Pty Ltd* (1974) 12 BLR 55; *Vonlynn Holdings Ltd v Patrick Flaherty Contracts Ltd* (1988) unreported; *Abbey Developments Ltd v PP Brickwork Ltd* [2003] EWHC 1987 (TCC).
21 *AMEC Building Ltd v Cadmus Investments Co Ltd* (1996) 13 Const LJ 50.
22 *R B Burden Ltd v Swansea Corporation* (1957) 3 All ER 243.
23 *Peter Kiewit Sons' Company of Canada Ltd v Eakins Construction Ltd* (1960) 22 DLR (2d) 465.
24 *Molloy v Liebe* (1910) 102 LT 616.
25 *Clusky (trading as Damian Construction) v Chamberlin* (1994) April BLM 6.
26 *Inserco Ltd v Honeywell Control Systems Ltd* (1996) unreported.
27 *J D M Accord Ltd v Secretary of State for the Environment, Food & Rural Affairs* (2004) 93 Con LR 133.

6 Claims

6.1 Extension of time

The basic idea of the extension of time and liquidated damages clauses in SBC, IC, ICD, MW, MWD and DB is very simple and straightforward. If the contractor does not complete the Works by the date for completion, the employer is to be paid pre-agreed damages. If, however, the contractor is delayed due to certain specified events, the contract period will be extended, thus releasing the contractor from the obligation to pay damages for the overrun in respect of those events. In essence, that is all there is to the provision. In practice, however, the application of the clauses seems to cause problems out of all proportion to the issues at stake. Part of the difficulty lies in the number of myths and misunderstandings which cloud the sensible operation of the contract provisions.

The extension of time provision are for the benefit of the contractor and the employer. It is easy to see that the contractor benefits from an extension of time because it releases it from the obligation to pay liquidated damages. The benefit to the employer is a little more complex.

Under SBC, IC and ICD clause 2.4 and DB clause 2.3 the employer must give possession of the site to the contractor on the date for possession stated in the Contract Particulars. The contractor is obliged to commence the Works on the date for possession and regularly and diligently proceed with them so that they are complete on or before the date for completion stipulated in the contract. MW clause 2.2 and MWD clause 2.3 are to much the same effect, but without the requirement to proceed regularly and diligently (albeit that failure to do so is a ground for termination under clause 6.4.1.2). Under SBC, IC, ICD and DB, but not under MW or MWD, the employer may defer possession by up to six weeks.

It is important to remember that under the general law the contractor's obligation to complete the Works by the contractual completion date is removed if the employer or the employer's agents are responsible for some or the whole of the delay [1]. Actions such as the issue of instructions or any kind of interference or obstruction fall into this category. In those cases time becomes 'at large', that is to say that there is no longer any date by which the contractor must complete and, therefore, no date from which liquidated damages can be calculated [2]. The contractor's obligation is then to complete the Works within a reasonable time.

A reasonable time may, of course, be the length of the original contract period plus the period for which the employer has caused delay. The employer may still claim damages, but instead of merely being able to deduct them, the employer is faced with the problem of having to prove them first.

These general rules may be amended if there is an express term in the contract that allows the completion date to be extended [3]. There is such an express term in the six contracts under consideration that allows the architect or the employer under DB to give an extension of time for employer's defaults and thus preserve the employer's right to deduct liquidated damages for any period of overrun beyond the extended date. The benefit to the employer is now clear.

The extension of time provisions are contained in SBC clauses 2.26–2.29, IC/ICD clauses 2.19 and 2.20 and DB clauses 2.23–2.26. (The provisions in MW and MWD are somewhat different and contained in clauses 2.7 and 2.8 respectively which will be considered later.) The provisions clearly take account of two distinct types of delay:

- delays caused by the employer (these are the most important);
- delays caused by events outside the control of either the contractor or the employer.

The JCT contracts now helpfully list them in that order.

An extension of time may only be given if the event falls within the events contemplated by the extension of time clause. This means that if the employer causes delay by some default which is not included in the clause, an extension of time will not be able to be given and time will become 'at large'. In deciding whether there is power to extend time and whether the event does fall within the events in the clause, the court will construe the terms against the person wishing to rely upon them. The clause must provide expressly or by necessary inference for an extension on account of the employer's fault [4].

There may be faults of the employer which will not fall within the terms of SBC, DB, IC or ICD clauses and which, therefore, will cause the liquidated damages clause to be inoperative. Even more interesting is the position under MW clause 2.7 and MWD clause 2.8. Until 1988 there was no list of events for which an extension might be granted, but only the bald statement that the architect could make a reasonable extension of time for delays caused by 'reasons beyond the control of the contractor'. A number of authorities considered that this clause was not specific enough to embrace any faults of the employer. If correct (the point has not, to my knowledge, been tested in the courts under the Minor Works contracts), any additional instructions or other delaying actions or omissions by the employer would make time 'at large'. The point appears to have been taken by the Joint Contracts Tribunal, which added the words: 'including compliance with any instruction of the Architect under this contract whose issue is not due to the default of the Contractor'.

A further sentence was added to make clear that reasons within the control of the contractor include defaults by any person or firm employed by the contractor,

e.g. sub-contractors. This was in response to a judicial decision which appeared to indicate that, in certain circumstances, the actions of a sub-contractor are beyond the contractor's control [5]. The current MW/MWD contracts retain these features. Architect's instructions are likely to be the main source of delay attributable to the employer. It is not, of course, the sole example of possible employer-generated delay and the earlier comments are probably still valid in respect of other such delays, for example, late information. Indeed, it is thought that the addition of just one example of an employer's delay gives the argument greater force. In the majority of MW/MWD contracts the amount of liquidated damages at risk is probably too small to be worth the expense of testing the point.

A contractor must make a separate application for loss and/or expense. An extension of time has no financial implication other than release from liquidated damages; not even the much beloved 'additional preliminaries'. A contractor may make application for reimbursement of direct loss and/or expense with or without an extension being granted. The courts have emphasised that a claim for loss and/or expense does not depend on a prior grant of extension of time [6]. The contractor may make such financial claim even if it completes the work before the contract date for completion provided only that it can satisfy the architect that it has suffered loss and/or expense due to circumstances which may or may not also be a ground for extension of time.

It can readily be appreciated that this approach is to the contractor's financial advantage in that it is not bound in any way to the grounds for extension of time when claiming financially.

Contractor's duties

It is for a contractor to prove a link between an event and a period of delay. It is not sufficient for the contractor merely to show a delay and point to an event, in effect saying, 'It must have been that' [7].

The contractor has very precise duties under SBC clause 2.27 and DB clause 2.24. The contractor must submit a notice in writing as soon as it becomes reasonably apparent that it is being delayed or that it is likely to be delayed. It must do this whether the delay is the contractor's own fault or due to some other reason. The purpose of this provision is clearly to enable the architect (or the employer under DB) to take whatever steps may be appropriate at the earliest possible moment to minimise the effect of the delay. If the contractor fails to give such notice, it is in breach of contract [8]. Failure to give notice, however, may not remove the obligation to grant an extension in appropriate circumstances. There has been some discussion as to whether the minutes of a site meeting constitute an effective notice. It is considered that a specific written notice is required [9] (which of course may be in the contractor's report handed to the architect at the meeting).

The notice must include the reasons for the delay and state which of the causes is one of the relevant events listed in clause 2.29 (clause 2.26 under DB). As soon as possible, at the same time as the notice if it can, the contractor must

send an estimate of the length of the delay beyond the date for completion. The effect of each relevant event must be noted separately, stating whether the delays will operate concurrently. If the contractor thinks the completion date will not be exceeded, it must say so at this point. The contractor must send further notices to update the original notice as necessary.

The contractor has two more duties. It must constantly use its best endeavours to prevent delay and it must do everything reasonably required by the architect or the employer under DB to proceed with the Works. This obligation has been defined as doing 'everything prudent and reasonable' to achieve an objective [10]. This is not, as sometimes thought, an acceleration clause. Neither does it give any power to order the contractor to incur additional cost to maintain progress in spite of delays. If it did, the extension of time clause would be redundant. It simply means that the contractor must take all reasonable steps to reduce the effect of a delay; for example, by redeploying part of the workforce to other sections of the work.

An obligation on the part of the contractor to incur additional costs cannot be totally excluded and will depend on circumstances [11]; for example, the importance of completing the Works by the completion date. In normal circumstances, using best endeavours may mean little more than continuing to work regularly and diligently as far as practicable. Acceleration of the Works can only be achieved by agreement between contractor and employer. If the architect or the employer under DB makes a reasonable suggestion to progress the Works, the contractor should take notice, but it is not required to incur any additional expense.

It must be stressed that failure by the contractor to carry out its duties meticulously will not remove the obligation to grant an extension in appropriate instances, but the contractor's failure may be taken into account in deciding on the appropriate extension in any particular case. Probably the yardstick is whether and to what extent the architect or the employer could have taken action to reduce the effect upon the completion date if the contractor had given notice at the correct time. The principle is that a party is not entitled to gain as a result of its own wrong [12].

The provisions in IC/ICD clause 2.19 are in broadly similar terms although not so detailed. The obligation to give notice of any delay, to state its cause and to use best endeavours is repeated, but the contractor is not obliged to make an estimate of the extent by which the completion date will be exceeded. Obviously, a prudent contractor will do so and it will supply a very full and well-documented case.

The provisions of MW clause 2.7 and MWD clause 2.8 are very short. The contractor's obligation is to notify the architect in writing if it becomes apparent that the Works will not be completed by the date for completion. If the delay is for reasons beyond the contractor's control, the architect must give an extension of time. That is the end of the contractor's duties in respect of delays, but if it is wise the contractor will present a full and detailed statement of the causes and an estimate of the delay to the architect.

Architect's duties

The architect's duties under MW and MWD are briefly stated. After receiving the contractor's notice, the architect must make, in writing, a reasonable extension of time. There is no time limit set, but the architect should act promptly. In general, the decision should be made before the contract completion date is reached, but there may be instances when the delay is continuing. In such a case, the architect may wait until the delay has ended before making an extension [13].

SBC and DB give a time limit of 12 weeks from the receipt of required particulars (not the notice) from the contractor in which an extension of time must be given. If there is less than 12 weeks to the contract completion date, the architect (employer under DB) must endeavour to reach a decision and notify the contractor before the completion date even if the decision is that it is not fair and reasonable to make any extension. In giving an extension, any instruction which requires an omission of work may be taken into account and the contractor must be so notified. Which of the relevant events has been taken into account and the time allocated to each must also be stated. Two points must be considered: whether the delay is caused by a relevant event and, if so, whether it is likely to delay completion.

IC/ICD places no time limit on the exercise of the architect's duty. A fair and reasonable extension is to be made as soon as the architect is able to estimate the length of delay beyond the completion date. The architect must, however, make the decision within a reasonable time having regard to all the circumstances. This contract specifically allows the architect to grant an extension of time for certain events listed in clause 2.20 which occur after the date for completion and which are the fault of the employer. The absence of this provision would lead to such events, occurring after the date for completion, rendering time 'at large'. SBC does not contain this provision and it is by no means certain that the architect would have the same power if it were not for the provision noted in the next paragraph. The kind of event referred to includes such actions as the architect issuing instructions for extra work after the date for completion has passed, but while work is still in progress. Such an event would clearly mean further delay.

A valuable provision in SBC and DB requires the architect or the employer under DB to make good any deficiencies in previous extensions. After the date for completion has passed the architect or the employer may, but no later than 12 weeks after practical completion must, either:

- fix a later completion date than previously fixed; or
- fix an earlier completion date after taking into account omissions from the work; or
- confirm the completion date previously fixed.

In carrying out this review, the architect may take account of any relevant information or notice. A date, however, may not be fixed earlier than the original

contract completion date. This provision enables account to be taken of any relevant event which the contractor has failed to notify and which is an employer default, thus preserving the employer's right to deduct liquidated damages.

IC/ICD contains a provision for the architect to make further extensions of time at any time up to 12 weeks after practical completion. There is no provision for reducing any extension previously granted, but otherwise this term serves the same purpose as the term mentioned above in SBC. It is sometimes stated that the 12-week period is not mandatory and the architect may carry out the review after that time [14]. Architects would be prudent, however, to ensure that they carry out their duty in this respect within the stipulated period and not rely upon a legal decision which depended upon the special circumstances in which the employer was trying to obtain an advantage from the architect's default. A subsequent decision confirms the 12 weeks deadline but then apparently leaves the door ajar [15]. An architect who is prevented from carrying out the review within the allotted period by unavoidable circumstances may be entitled to carry it out as soon as possible after the circumstances have been resolved.

Relevant events

An extension of time may only be given for grounds listed in the contract. SBC, DB, IC and ICD refer to these grounds as 'Relevant Events' (clauses 2.29, 2.26 and 2.20 respectively). The wording in the four contracts is very similar, but there are some important differences. It may be helpful to consider each event separately, indicating where there is a significant difference. In most instances here the wording has been shortened and simplified:

Variations This includes any other things which the contract states are to be treated as a variation or requiring one.

Compliance with architect's instructions (or employer's instructions under DB) This is a most important clause because it relates to something within the control of the employer. An extension must be granted if the employer is to preserve the right to deduct liquidated damages. It should be quite clear whether an event is a compliance with an instruction, but it should be noted that an instruction to open up work for inspection under clause 3.17 (SBC), 3.12 (DB) or 3.14 (IC and ICD) will give grounds for an extension only if the uncovered work is found to be in accordance with the contract.

The contractor's work in accordance with the special clause 3.15 of IC and ICD, in which the contractor must propose action to ensure that there are no similar failures, will also provide grounds for extension of time on the same basis, although the work itself is to be carried out at no cost to the employer. An architect's instructions under SBC clause 3.18 or the employer's instructions under DB clause 3.13 have similar effect. (This provision is discussed in Section 1.4.) Instructions regarding the expenditure of provisional sums are also included except where they relate to defined work when the contractor is deemed to have made due allowance in programming and planning. (Note that if full information is not provided in the bills of quantities, a correction must be made under clause

2.14.1 of SBC and the correction will be treated like a variation instruction, i.e. the contractor will be entitled to extension of time and to make application for loss and for expense.) This is not relevant to DB.

Deferment of possession This clause occurs in SBC, DB, IC and ICD. Under MW and MWD, failure by the employer to give possession to the contractor on the date stated in the contract is a serious breach for which the contractor may be able to claim substantial damages [16]. SBC, DB and IC/ICD sensibly allow the employer to defer possession for a limited time (clauses 2.5, 2.4 and 2.5 respectively) and equally sensibly allow the architect to grant an extension.

Antiquities SBC and DB allow for an extension of time if the contractor discovers some antiquity, fossil or the like and is delayed by complying with clause 3.22.1 (SBC) or 3.15.1 (DB) or with the architect's or employer's instructions concerning the antiquities. IC/ICD has no clause dealing with antiquities and, therefore, there is no corresponding relevant event for extensions of time.

Approximate quantities The contractor is entitled to an extension of time where approximate quantities are included in the bills of quantities and the approximate quantities are not a reasonably accurate forecast of the quantity of the work required. This clause is not included in DB.

Suspension by the contractor of performance of its obligations This clause puts into effect the extension of time to which the contractor is entitled under section 112(4) of the Housing Grants, Construction and Regeneration Act 1996 (as amended) after it has exercised its right to suspend for non-payment (see Section 7.2).

Impediment, prevention or default by the employer This is intended to be a catch-all clause to ensure that there is no event for which the employer is responsible which causes a delay to the contractor, but for which the architect has no power to issue an extension of time. This is a very broadly worded clause. Advantage is taken of the broad scope of this clause to omit a number of relevant events which were in the 1998 contracts and thus simplify the list. Among the former relevant events now covered by this ground are:

- architect's failure to comply with the information release schedule or to provide information at the right time;
- work not forming part of the contract;
- the employer's failure to give access to the site;
- deferment of possession;
- compliance or non-compliance with the CDM Regulations.

Reference to delay on the part of nominated sub-contractors has been removed (because there are no nominated sub-contractors) and also the inability to secure labour or materials.

The carrying out of work or failure to carry out work in pursuance of its statutory obligations, by a statutory undertaker in relation to the Works This clause relates to the laying of pipes and cables, connections, etc., which the body has an obligation to carry out. It must be a statutory obligation and not simply a contractual

duty. The work must relate to the contract Works in order to qualify. Thus, if the electricity supplier causes delay to a site solely because of its operations in regard to a neighbouring site, the contractor has no grounds for extension.

Exceptionally adverse weather conditions This is somewhat broader in meaning than the old term 'exceptionally inclement weather conditions'. Adverse weather can be rain, snow or frost. It can also be very hot and dry conditions or even high winds. The key word is exceptionally. Thus, heavy snow in January may not be exceptional. In order for this clause to operate the weather must be exceptional having regard to the time of year or the location of the site. Before reaching a conclusion, it is usual for the architect to require meteorological reports for perhaps ten years prior to the occurrence.

The contractor is, of course, expected to exercise a reasonable degree of anticipation at tender stage. Therefore, if the date for possession is stated as 25 November, the contractor must allow for the kind of weather which can be expected at that time of year when planning its site operations. In other words, it must expect, for example, snow in December, frost in February, etc. Note that it is the adverse weather which must be exceptional, not the period of time. The contractor's actual progress must be considered, even if the contractor is late through its own fault [17].

Loss or damage caused by any specified peril This is quite straightforward. The risks (the contract refers to them as 'specified perils') are listed in the contract. They include fire, lightning, explosion, storm, tempest, etc. If progress is delayed thereby, there should be no problem in obtaining a suitable extension. It should be noted, however, that the risks are more restricted than the wider 'All Risks' which are also defined.

Civil commotion, use or threat of terrorism or activities of the authorities in consequence A civil commotion is more serious than a riot [18]. Regrettably, terrorism is self-explanatory.

Strike, lock-out, etc., affecting any of the trades employed on the Works or engaged in preparation, manufacture or transportation of goods for the Works or, where CDP or DB is concerned, anyone in the design

Presumably it matters not whether the strike is official or unofficial, but it should be noted that a work to rule does not fall within this clause. The strike must operate directly. A strike which affects a trade which in turn affects another trade involved in the Works does not give grounds for an extension unless, of course, it is a transportation or manufacturing strike such as is specifically covered. For example, a strike in firm A which manufactures door-closers for the site will qualify, but a strike in firm B which supplies a special component of the door-closers to firm A will not, even though progress may be as badly affected by one as by the other. Where contractor's design is included, a strike which affects persons preparing the design will qualify.

The exercise of any statutory power by the UK government or a local or public authority after the base date, which directly affects the Works This clause is quite broad in its effects. The events would probably be covered by *force majeure* in any case. The key word is 'directly'. Thus, a government order which sets in train a

series of events which culminates in such restrictions would not be covered.

Delay in the receipt of permission or approval of any statutory body This applies to planning permission and the satisfaction of building regulations. It also covers such things as entertainment licences and any other applicable statutory control. This applies only to DB. Importantly, the contractor must have taken all practicable steps to avoid or reduce the delay. Therefore, a late application for necessary statutory approval will prejudice or entirely remove the entitlement to an extension of time.

Force majeure This is a wider term than 'act of God' meaning broadly 'circumstances independent of the will of humankind'. Most situations which would be covered by this clause, such as strikes, etc., are already dealt with under other clauses.

Note that under SBC, DB, IC and ICD fluctuations are frozen at contract completion date or any extended date. However, there is an important proviso that the architect (or the employer under DB) must respond to every written notice of delay by granting an extension or otherwise, and the printed text of the extension of time clause must not be amended. If the architect does not respond or amendments are made, fluctuations continue after the contractual completion date unless amendments are also made to the fluctuations clauses.

Whatever the contract may say, the contractor has a better chance of obtaining an extension if it presents a clear, well-documented case. A network analysis is invaluable for this purpose.

Liquidated damages

There is much misunderstanding of the liquidated damages clause. Its purpose is to avoid the employer having to recover unliquidated damages which would necessitate proving that there was a breach of contract and proving the amount of the loss suffered. A liquidated damages clause simplifies the process by providing for a sum of money to be paid by the contractor for every week (or day) by which the contractor fails to complete the Works after the contract, or extended date for completion. It used to be said that the sum must be a genuine pre-estimate of the likely loss to the employer. Although that is still broadly correct, it has recently been modified so that the sum should not be exorbitant when viewed in regard to the importance to the employer of getting the project completed on time [19]. That suggests that the employer with a serious reason for requiring completion on time will be allowed some flexibility when the validity of the rate of liquidated damages is considered.

Liquidated damages do not have to be proved. A precondition in the case of SBC, IC and ICD is that the architect has issued the certificate (or under DB the employer has issued a notice) of non-completion in accordance with clause 2.31 (SBC), 2.28 (DB) and 2.22 (IC/ICD). If the architect fixes a new completion date after issuing a certificate of non-completion, the certificate is thereby cancelled and a new certificate is essential even if the extension was given after practical completion [20].

Another precondition is that the employer should give written notice of intention to deduct or require payment [21]. It is referred to in SBC clause 2.32.2, DB clause 2.29.2 and IC/ICD clause 2.23.2. It also implicit in clause 2.32.4 (SBC), 2.29.4 (DB) and 2.23.4 (IC/ICD) which states that the employer's written requirement remains effective unless withdrawn even if a new certificate or notice of non-completion has to be issued.

In the written requirement, the employer must state that he or she may require payment or may deduct liquidated damages at the rate in the contract or some lesser rate. The employer must do this, at the latest, before the due date of the final payment, but obviously earlier than that if a payment or deduction is required before the final payment. In addition, of course, if the employer intends to deduct, the appropriate (pay less) notice must be served five days before the final date for payment of a particular certificate (see Section 5.1). If, unusually, the employer requires the contractor to pay, a special written notice requiring payment must be sent to the contractor by the employer and, if the contractor fails to pay, the money may be recovered by the employer as a debt. The employer may deduct the damages from money due to the contractor. The employer is entitled to deduct even if the loss is less than the stated sum or if the employer in fact gains by the delay [22].

The liquidated damages clause is often referred to by the contractor as the 'penalty' clause. This is incorrect. A penalty is not enforceable. In practice, it matters not whether the sum is referred to as a penalty or as liquidated damages [23]. It is the real nature of the sum which counts. A penalty is a punishment. It would probably be a penalty, for example, if the stipulated sum were greater than the greatest loss which could conceivably follow from the contractor's breach. Another example of a penalty is where the same amount is deductible as damages upon the happening of dissimilar events. In practice, this most often arises because one sum is stated as damages whether the whole or any part of a readily divisible building is delayed [24].

Where liquidated damages in respect of an estate of houses were expressed as £*x* per dwelling per week and no Sectional Completion Supplement was used, it has been held to be inconsistent and unenforceable [25]. The insertion of liquidated damages into a contract requires the greatest care. The wording '£*x* for every week or part of a week' is capable of being construed as a penalty for the obvious reason that damages incurred during a one-day delay are unlikely to be equal to damages during a full week's delay unless, of course, they represented something like rental charges payable at the beginning of each week. Although it is possible to substitute unliquidated for liquidated damages, it cannot be accomplished simply by inserting 'nil' for the amount of liquidated damages. That would simply mean that the employer has specified 'nil' as the total amount of liquidated damages suffered as a result of delay [26]. It would be necessary to delete the whole of the liquidated damages clause (clause 2.32 in SBC, 2.29 in DB and clause 2.23 in IC/ICD). It is relatively rare for the courts to decide that liquidated damages are really a penalty and they will not take account of hypothetical situations when considering this question. They will

take a pragmatic approach to whether the sum is liquidated damages or a penalty [27].

In deciding whether a sum is liquidated damages or a penalty, the court would look at the situation at the time the contract was entered into, not at the time of the breach. Provided that the sum is a genuine attempt to estimate the employer's loss in the future and not exorbitant in relation to the importance to the employer for the project to be completed on time, it will be valid. It is of no consequence that it is virtually impossible to estimate accurately, provided that the employer makes reasonable assumptions.

Contractors sometimes say that if there is a liquidated damages clause there must be a corresponding bonus clause for early completion. There is no legal foundation for such statements. It is entirely up to the employer whether a bonus clause is included. If it is, it need have no monetary relationship to the liquidated damages clause. Such a bonus can be as large or small as the employer wishes. Of course, once the sum is inserted in the contract, it must be paid if early completion is achieved and it may form part of a claim if the contractor is delayed by the employer or the architect.

If an employer tells the contractor that liquidated damages will not be deducted and the contractor acts on that basis (such as paying all the subcontractors in full) the employer will probably be estopped (prevented) from later attempting to recover the liquidated damages [28].

Liquidated damages under MW and MWD are dealt with in clauses 2.8 and 2.9 respectively. The provisions are similar to those contained in the other contracts but there is no requirement for a non-completion certificate to be issued. It appears, although it is not very clear, that there is no requirement for a notice stating that the employer may require payment or may deduct liquidated damages at the rate in the contract or some lesser rate unless the employer intends to deduct the damages from the final certificate sum in which case, the notice must be served no later than the issue date of the final certificate. Obviously, whenever it is decided to deduct liquidated damages, a pay less notice is required.

6.2 Money claims

Under the standard building contracts, to make a claim implies that a contractor considers that it is due an extra payment quite apart from the ordinary system of valuing work done. Claims are a symptom of inefficiency by one of the parties; whether claims are made on the part of the contractor or the architect and employer depends on the circumstances. Contractors generally dislike making claims; architects always dislike dealing with them.

There are three kinds of claim: contractual, common law (sometimes called extra-contractual) and *ex gratia*.

Contractual claims are those claims which are made under the express provisions of the particular contract in use. SBC makes provision mainly in clauses 4.20 to 4.24, but also possibly in clause 5.10.2. IC and ICD deal with them under

clauses 4.15 to 4.19, but also possibly in clause 5.6.2. DB deals with them under clauses 4.19 to 4.23 and possibly 5.7.2, but also under section 3 of the supplemental provisions if the Contract Particulars entry states that they are to apply. MW and MWD make no provision for financial contractual claims but do make limited provision for the architect to take direct loss and/or expense into account when valuing variations (see Section 4.2). In order to make a contractual claim, the contractor must comply precisely with the terms of the appropriate clause. More details of this are given below.

Common law claims arise outside the express provisions of the contract. They generally relate to breach of implied or express terms of the contract. The loss and/or expense provisions of SBC, DB, IC and ICD all currently provide for the architect to deal with claims arising out of acts of prevention or default on the part of the employer and there should be little need for contractors to seek common law remedies. Common law claims can also be made in tort, for breach of a collateral contract, for *quantum meruit* or sometimes for breach of statutory duty.

Some contractors do not realise that it is possible to make a common law claim as an alternative to a contractual claim on the same facts or, if the contractor has not complied with the provisions of the contract claims clause and providing, of course, that the facts constitute sufficient grounds. For example, architects' instructions form grounds for a claim under the contract machinery, but not at common law, because the issue of architects' instructions is not a breach of contract; quite the reverse: it is something expressly allowed by the contract. A contractual and common law claim can be made at the same time although there cannot be two lots of recovery for the same breach. However, contractors should ensure that all claims are submitted and dealt with before the final certificate is issued if SBC, DB, IC and ICD are involved. The final certificate under those forms is conclusive that all claims of whatever kind, based on the relevant matters, have been settled.

Ex gratia claims are sometimes known as hardship claims. They have no legal foundation, but the contractor sometimes considers that it has a moral right to extra payment or it has, perhaps, underpriced and it appeals to the employer to help. Whatever the moral rights may be, the contractor's chances with such a claim will usually depend on the benefit to the employer – if any. If to make an *ex gratia* payment would enable the contractor to finish a contract when, otherwise, it would go into liquidation, the employer may occasionally make a payment to save the expense of securing another contractor to complete the work at a very much increased cost. However, it must be borne in mind that giving money to a contractor on the brink of insolvency may be a very bad decision.

SBC clauses 4.20 and 4.21, DB clauses 4.19 and 4.20 and IC/ICD clauses 4.15 and 4.16 can be considered together because they are very similar in most respects except that it is the employer rather than the architect who deals with the claim. There is no connection between financial claims – known in the contract as notifications – and claims for extension of time. That has been made clear by the courts [29]. Nevertheless, contractors commonly seek an extension

of time and then base claims for loss and/or expense on relevant matters which are the same as the relevant events for extension of time.

To recover loss and/or expense, the contractor must be able to show that the loss and/or expense resulted from deferment of possession of the site or that regular progress of the Works has been or is likely to be materially affected by one or more of the list of relevant matters included in the clause. 'Materially' means substantially. Trivial disruptions are excluded. There is no entitlement under these clauses if the contract provides for the contractor to be reimbursed under another clause or if the contract provides that there is to be no addition to the Contract Sum or stops these clauses from working.

The relevant matters included are, briefly:

- variations;
- architect's or (under DB) employer's instructions with regard to postponement, discrepancies, provisional sums, opening-up of work found to be in accordance with the contract, contractor's reasonable objections, antiquities, under supplemental provision 9: paragraph 9.6 (SBC only);
- delay in receipt of development control requirement permission (DB only);
- where approximate quantities are included in the bills of quantities and the approximate quantities are not a reasonably accurate forecast of the quantity of work required (not DB);
- impediment, prevention or default of the employer.

Contractor's duties

In order to be able to claim, the contractor must have suffered or be likely to suffer direct loss and/or expense. This means damages as generally understood. The word 'direct' is important. Direct damage flows naturally from the breach without any other intervening cause [30]. Therefore, if the architect (the employer under DB) issues an instruction varying the type of ironmongery and the contractor incurs loss and/or expense, over and above the difference in the value of the work and materials, it is entitled to claim. But if the cause of the contractor's loss and/or expense is the fact that the supplier has failed to deliver the new ironmongery according to an agreed delivery date, the supplier's failure would be an intervening cause and the contractor could not cite the instruction as giving rise to direct loss and/or expense. The contractor's remedy would be against the supplier. Direct damage also means the normal and ordinary damage which does depend upon special circumstances. In order to claim special damages in addition to the direct damages, the contractor would have to proceed at common law and show that the special circumstances which give rise to additional damages were known to the parties at the date the contract was entered into [31]. The precise circumstances of every case require careful study.

It is still vital that the contractor notifies the architect (or the employer under DB) *as soon as* the likely effect of a relevant matter on regular progress or the likely nature and extent of loss and/or expense resulting from deferment is or

should be reasonably apparent to the contractor. It should be noted that the notification *as soon as* the effect is reasonably apparent is a precondition to the contractor's entitlement. The reason for this provision is clear. The architect (or employer under DB) must have the opportunity, so far as possible, to issue instructions to overcome the difficulty or to arrange for proper and detailed records to be kept. The architect cannot act without being aware of the difficulty. Therefore, the contractor must not delay in submitting the notice simply because it has not marshalled all its facts. However, an architect may not be justified in rejecting an application if it can be shown that the fact that it was technically late did not prejudice the employer's position in any way.

The notification must be accompanied by an initial assessment of the loss and/or expense incurred and likely to be incurred and the information necessary for ascertainment to take place. The contractor must update the assessment and the information at monthly intervals in the form and manner as required by the architect until all reasonably necessary information has been supplied.

The initial notification can be quite simple:

> Dear Sir,
>
> We hereby notify you under clause 4.21.1 (substitute '4.20.1' when using DB or '4.16.1' when using IC or ICD) of the conditions of contract as follows:
>
> We have incurred/are likely to incur direct loss and/or expense and financing charges in the execution of this contract for which we will not be reimbursed by a payment under any other provision in this contract because the regular progress of the Works has been/is likely to be materially affected by (describe), being a Relevant Matter in clause (insert one or more of clauses 4.22.1–4.22.5 when using SBC, clauses 4.21.1–4.21.5 when using DB or clauses 4.17.1–4.17.4 when using IC or ICD).
>
> We enclose our initial assessment of the loss and/or expense we have incurred and other amounts likely to be incurred together with the information reasonably necessary for the loss and/or expense to be ascertained. (If the information is not immediately available, this paragraph must be amended to indicate that it will be provided as soon as reasonably practicable.)
>
> Yours faithfully,

Architect's (employer under DB) duties

Under SBC, DB, IC and ICD, it is for the architect (employer under DB) to decide whether the claim is valid. In the 2016 editions, a timetable is set out. The architect has just 28 days from receipt of the initial assessment and information to notify the contractor of the ascertainment which must make reference

to what the contractor has supplied. Moreover, the architect has only 14 days from each subsequent update from the contractor. Each ascertainment must be in sufficient detail to enable the contractor to see any differences between the submission and the ascertainment. This is an improvement from the contractor's point of view, but the ascertainment can only be done on the basis of the evidence provided and it will be noted that the contractor's updates are to include information required by the architect or the quantity surveyor. There is no longer the express wording to allow the architect to instruct the quantity surveyor to ascertain, but the wording of the contract makes plain that either architect or quantity surveyor will do it. After the decision is made that the claim is valid, the amount of direct loss and/or expense must be ascertained by either the architect or the quantity surveyor. The quantity surveyor has no power to decide whether the claim is valid in principle; only the architect can do this [32].

The architect may not simply wait until the end of the contract before certifying such sums. If the architect fails to act, it is a breach for which the employer, if aware, is responsible [33].

Loss and/or expense under DB

The contract provides for a much simpler process if schedule 2 supplemental provision 3 applies. Then the procedure is that with each payment application, the contractor must include an estimate of the amount of loss and/or expense incurred during the preceding period. This must exclude any loss and/or expense already being dealt with under supplemental provision 2. As long as the loss and/or expense continues, the contractor must continue including the estimates. The employer has 21 days to accept the estimate, negotiate, refer to adjudication (seems rather extreme at that point) or say that clause 4.20 will apply in the normal way.

If there is agreement or agreement after negotiation, the amount is to be added to the Contract Sum.

There are two possible stings in the tail for contractors. The first is that after agreement of an estimate for a particular period, the contractor may not revisit that estimate even if it later discovers that it has overlooked something very serious. It should be remembered, however, that the contractor still has its common law remedies available for damages if the serious matter is a breach of contract.

The second sting is that if the contractor fails to send the estimates, the loss and/or expense is to be dealt with under clause 4.20, but the contractor is not entitled to receive payment until the final account and final statement. Moreover, no financing charges are payable.

Key points

The presentation of the supporting information for a claim requires and deserves careful thought. Some contractors appear to think that if they send large parcels of documents, the architect will be obliged to certify something approaching the

sum required. However, so long as the architect is baffled by the claim, no final decision will be made. The correct approach is to make a claim as simple and easy to digest as possible. The main points should be logically arranged, based on and referenced to contract clauses. Each point should be cross-referenced to evidence bundled separately. Everything the contractor says should be clearly evidenced. Long and rambling narratives are a mistake. Indeed, they are usually counter-productive.

The contractor who wishes to avoid long delays and numerous requests for further information will submit its supporting information in this way as soon as possible after making the initial application, without waiting for the architect or the employer under DB to request it.

What may be included in a claim? The answer is any direct loss and/or expense directly referable to deferment of possession or one or more of the relevant matters in the clause. What constitutes direct loss and/or expense depends upon the particular circumstances. It can become quite complicated, but attention should be given to the following:

- Plant and labour inefficiency as a direct result of the disruption.
- Increases in cost occurring during the period of disruption.
- Increases in head office overheads. This is a difficult cost item to disentangle and many contractors put forward costs based on a formula. The most used is the Hudson formula, but Eichlay and Emden formulae are also used. The Emden formula is probably the most convincing and it has often been accepted by the courts as a reasonable method of calculation [34]. Before any entitlement to overheads can get off the ground, the contractor must be able to show that other work had to be turned down due to the prolongation on site. This can be difficult to demonstrate; particularly where large firms are involved [35].
- Establishment costs calculated at the time of disruption.
- Loss of profit is a permissible part of a claim [36]. The contractor must be able to show that it would have been able to earn the profit elsewhere but for the disruption [37].
- Interest and financing charges are allowable provided they are a direct result of the disruption [38].
- In principle, the cost of preparing the claim can form a valid head of claim [39]. However, that kind of cost will be subject to very close scrutiny. There may be a case (although difficult to prove) for a contractor to claim, as special damages, the cost of preparing a claim to satisfy an unreasonable architect or quantity surveyor of the justice of a claim [40]. The counter argument is that none of the contract expressly requires the contractor to put together a carefully reasoned claim. If the architect unreasonably refuses to consider a justified claim, the contractor should simply refer the matter to adjudication or arbitration in which case the cost of preparing the claim will be part of the costs of the arbitration which the contractor can claim if it is successful.

The key point to be borne in mind is that loss and/or expense can be claimed provided it is a foreseeable and direct result of the disruption or delay. Moreover, although the contractor must prove that it has suffered or incurred the loss before it is entitled to reimbursement, the burden of proof is 'the balance of probabilities'. This is very much less than the standard of 'beyond a reasonable doubt' in criminal cases. The balance of probabilities is like saying that it is more likely than not that the contractor suffered the loss.

If there is an extremely complicated interaction between a number of matters included in the claims clause such that it is virtually impossible to separate the costs into a series of items, it is possible to present the evaluation on a global basis [41]. In such cases it is important to ensure that there is no duplication and to identify individual causes where this is possible.

The distinction must be made between global evaluation, which may be permitted in appropriate circumstances, and the global approach to liability, which is not permitted [42]. A contractor must frame its application with sufficient detail that the architect is able to see exactly to what matters the contractor is referring and in what way each of the matters delayed or disrupted the Works. For example, it is not good enough for the contractor simply to say: 'There was a multitude of variations throughout the project. AIs (architect's instructions) were late. The employer's men were constantly tramping through the site and the result was an overrun of six weeks and £24,000 extra loss and expense.' Instead, the contractor should list each variation, when it was received and demonstrate the effect of each one individually, and it should do the same with the late AIs and the occasions when the employer's men disrupted the Works. If the claim is for costs due to delay and the consequences of numerous events have a complex interaction, it may be permissible to maintain a composite claim if it is impossible to identify the specific relation of each event and its time and cost result [43]. The circumstances when this approach will be acceptable will be rare in practice. A contractor is entitled to submit a global claim if it wishes, but it should be aware that there are serious difficulties of proof [44]. Global claims, if presented as 'all or nothing', will fail completely if some of the causative events are not established. Therefore, this type of claim should show how the total amount is to be reduced if some events are not established and to take account of the contractor's own inefficiencies and issues of that nature [45].

It often happens that a contractor suffers loss and/or expense due to a variety of causes, some of which are permissible as contractual claims, others of which fall outside the claims clause and can only form the basis of a claim at common law. Strictly common law claims must be taken through adjudication, arbitration or the courts, but it usually does no harm to submit them to the architect as part of an overall claim provided it is made clear that they are not contractual claims. The architect should refer all common law claims to the employer who might well decide that it is more convenient to settle them through the architect than through arbitration or the courts. Of course, any money found to be due to the contractor as a result of a common law claim cannot be certified through the contract. It must be paid by the employer separately. All claims for loss and/or

expense under MW and MWD, with the very limited exception already noted, are common law claims, because there is no contractual machinery to enable the contractor to claim and the architect to deal with such claims. Finally, it should be noted that whether the contractor is claiming through the contract or at common law, it can only claim – and the architect can only ascertain – the precise loss and expense suffered, not some notional figure or values taken from the preliminaries section of the bills of quantities which may not be accurate [46]. Having said that, it has been suggested that those figures might represent the loss, if not the expense, to the contractor [47].

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7 The end

7.1 Practical completion and rectification

When the architect is of the opinion that practical completion has been achieved and the contractor has provided all the information required under the CDM Regulations and, if the subject matter of the certificate is or contains contractor's design, the contractor has complied with its obligation to provide as-built and other design drawings, the architect must issue a certificate to that effect, stating the date of practical completion (SBC clause 2.30, IC/ICD clause 2.21, MW clause 2.9 and MWD clause 2.10). Under DB, there is no certificate. When the Works have reached practical completion and the information for the health and safety file and as-built drawings have been provided by the contractor, the employer must issue a written statement to that effect under clause 2.27. Under DB it is treated as a matter of fact, not opinion.

The contractor is always anxious to obtain this certificate which confers enormous benefits. It marks the date when:

- The rectification period begins.
- The contractor's liability for insurance ends.
- The contractor's liability for frost damage ends.
- The employer's right to deduct full retention ends and half the retention already held is due for release.
- Liability for liquidated damages ends.
- The contractor's licence to be on the site ends.
- The period of the review of extensions of time begins (not applicable to MW and MWD).

Such is the importance of practical completion that the contractor might be forgiven for thinking that the term would be carefully defined in the contract. Unfortunately, no definition is to be found. This does not mean that the architect, or the employer under DB, is completely free to fix any date. Except under DB, the date is left for the architect's opinion, but that opinion is open to question if the contractor chooses to refer the point to adjudication or arbitration. A number of cases have considered the matter, not always coming to quite the same

conclusion. However, a number of important factors can be identified. Practical completion does not mean substantially or nearly complete. It means complete except for minor items when there are no apparent (i.e. visible) defects [1]. It certainly does not mean completion down to the last detail. That would make it a penalty clause and, therefore, unenforceable [2]. It has recently been defined as 'complete for all practical purposes' [3].

A useful working definition might be that practical completion is when there are no defects apparent and when such minor items as are left to be completed can be completed without any inconvenience to the employer using the building as intended. A contractor who feels that the practical completion certificate or written statement is being unreasonably withheld should inform the architect or the employer under DB in writing, noting the date on which the contractor considers practical completion has been achieved.

On many projects, it is common to have what is known as a 'handover meeting', at which the employer and the professional team meet the contractor and jointly inspect the building. In some instances, the decision that the building has reached practical completion is effectively left to the employer. Such an arrangement is quite wrong and if the employer were to make the final decision, it would be a breach of contract which stipulates (except under DB) that the decision is one for the architect alone. If the employer interferes with or obstructs the issue of any certificate, the contractor has grounds for termination (SBC, IC and ICD clause 8.9.1.2, MW and MWD clause 6.8.1.2).

Whether there would be much point in termination at such a late stage in the contract is a matter to be decided on the particular circumstances. It is probably more usual that the employer is anxious to accept the building, often against the architect's advice. Since practical completion is greatly to the contractor's advantage, interference by the employer to secure the early issue of the certificate would seldom be questioned by the contractor.

Sometimes under SBC, IC, ICD, MW or MWD, the employer will take possession of the building some time before the architect would have certified practical completion. The contractor does not dissent and both employer and contractor expect the architect to issue a certificate of practical completion. The architect may consider that, if both parties agree, he or she is free to issue the certificate. This is not, in fact, the case: the contract requires the architect to issue the certificate only when certain criteria have been satisfied. The certificate is the formal expression of the architect's opinion [4]. If the architect's opinion was not properly represented in the certificate it would amount to unprofessional conduct to say the least. Quite apart from matters of professional ethics, there could be serious legal consequences for the architect depending on particular circumstances, despite the agreement of the parties to the contract.

In some instances, the decision seems to be taken by the clerk of works. Although this appears to be wrong, it must be remembered that, in forming an opinion, the architect is entitled to take into account any information, including the views of the clerk of works. The final opinion, however, must be that of

the architect. A practical completion certificate signed by the clerk of works is simply a useless piece of paper.

Much more serious are the situations where the contractor suspects that a certificate of practical completion is being delayed, because the employer/developer has been unsuccessful in leasing the property and liquidated damages provide an income until a lease can be arranged. The contractor ought to be able to rely upon the architect to act properly in accordance with the contract even though considerable pressure may be imposed by the employer.

Under DB, although practical completion is treated as a matter of fact and not opinion, in practice it is for the employer to make the decision to issue the written statement. If it disagrees, the contractor's recourse is to adjudication or arbitration/legal proceedings.

Where sectional completion is used, a section completion certificate must be issued on practical completion of each section. When the last section completion certificate is issued, a practical completion certificate for the Works should be issued at the same time. That is because the contractor's obligation is to carry out and complete the Works. It is also possible that the sum of all the sections may not quite be the same as the whole Works for various reasons. The employer must do the same under DB using the section completion statements and the practical completion statement for the whole of the Works.

Rectification

Once practical completion has been certified or partial possession (see below) has been taken by the employer, the rectification period begins. In the case of partial possession, the rectification period only affects the part taken into possession. The length of the period can be anything, provided it is clearly stated in the contract. A common period is six months, but many consider that 12 months is more appropriate and mechanical installations commonly specify 12 months on all contracts. It should be noted that none of the six contracts under consideration allows for differing periods to be inserted for different parts of the same building unless completion in sections is employed. Problems can also occur if the sub-contract and main contract rectification periods do not correspond.

The rectification period is often mistakenly referred to as the 'maintenance period'. Maintenance implies that the building must be kept in pristine condition: floors polished, paintwork renewed, etc. Contractors sometimes think that they have a duty to attend to any matter raised during this period. That is not the case. The contractor must make good any defects, shrinkages and other faults which appear during the period (SBC clause 2.38, DB clause 2.35, IC/ICD clause 2.30, MW clause 2.10 and MWD clause 2.11).

The phrase 'other faults' is to be interpreted to mean faults which are like defects and shrinkages. 'Defects' means work not in accordance with the contract and not defects due to some other reason, such as poor standard of specification or the employer's occupancy. 'Shrinkages' are only to be made good if they are due to materials or workmanship not being in accordance with the contract.

Thus, if the moisture content of the timber was specified too high, but the timber was fixed at the specified moisture content and shrinkage took place solely because, on occupation, central heating reduced the moisture content below the specified level, the contractor would not be liable.

Although it is no longer expressly stated, the contractor is also liable for frost damage, provided the frost occurred before the date of practical completion. Damage due to frost occurring after practical completion is the employer's liability.

Reference is made to defects which 'appear' during the period. The word seems to extend to mean defects which are apparent during the period; for example, defects still existing at practical completion even though there should be no such defects [5]. In any event, the contractor will be liable for any disconformity between the Works and the contract documents.

The architect should be careful not to instruct the contractor how the defects are to be made good; the contractor may be entitled to payment as though the architect had issued a variation [6].

SBC and DB provide for a schedule of defects to be delivered to the contractor as an instruction no later than 14 days after the end of the period and separately provide for the issue of instructions whenever the architect (or the employer under DB) considers it necessary. SBC and DB, but not IC/ICD or MW/MWD, require the contractor to make good the defects within a reasonable time after receipt of the schedule or instructions. It is thought that the architect or employer under SBC or DB respectively are not entitled to bombard the contractor with instructions requiring rectification of relatively trivial defects until after the end of the period. The kind of instructions envisaged appear to be those which are urgent because of ongoing deterioration if they are not dealt with or where the occupants cannot reasonably be expected to use the building after the defects appear. The contractor would be expected to deal with urgent or serious defects or a multitude of defects very quickly but would probably be acting reasonably if it waited until the end of the period before it commenced the making good process of less important defects.

IC/ICD and MW/MWD empower the architect to issue instructions that defects are to be made good at any time during the period and up to 14 days thereafter. These are shorter clauses but it is suggested that the effects are similar to the equivalent SBC and DB clauses.

The significance of this is sometimes misunderstood by contractors. The contractor can refuse to make good defects appearing after the end of the period, but if work or materials are not in accordance with the contract, they are still the contractor's liability. The rectification period is largely for the contractor's benefit. If it were not for this period, the contractor would have no right to return to the site and rectify defects. The employer could simply take adjudication or arbitration proceedings for damages (probably the cost of having the work put right by others). This is the position after the expiry of the period. In general, any defects which appear after the rectification period will often be referred to the contractor, in the hope of obtaining speedy rectification. If the contractor refuses, and the defects are a result of the work or materials not being in accordance with

the contract, the employer can employ others and adjudicate or arbitrate against the contractor. The employer has the right to charge the contractor the full cost of putting right defects which appear after the end of the rectification period.

The contractor is to make good the defects at its own cost. Under all these contracts, the architect (or the employer under DB) is empowered, however, to instruct that some or all of the defects are not to be made good (with the consent of the employer) in which case an appropriate adjustment may be made to the Contract Sum. The precise meaning of 'appropriate deduction' has been the subject of some debate. It is now clear that it refers to an amount which may vary depending on the circumstances [7]. Such an instruction may be issued if the employer does not want to be disturbed by the rectification of minor faults or because the architect considers that it would be prudent to employ someone else to do the work.

The defects clause gives the contractor the right to reduce the cost of remedial works by doing them itself. It is now established that where, without fault on the part of the contractor, the employer elects not to have the defects corrected by the contractor, the sum that can be recovered (appropriate adjustment) is limited to the sum which represents the cost which the contractor would have incurred if it had been called upon to remedy the defects [8]. It appears that if defects which appear during the rectification period are not notified to the contractor until later, it is still a breach of contract on the part of the contractor, but the contractor cannot be made to put the work right and the employer can only recover from the contractor what it would have cost the contractor to correct the defects [9]. However, if the contractor refuses, neglects or for some reason is unable to properly make good defects which have been properly notified, the appropriate deduction would probably be the cost to the employer of having the defects made good by others. It may even be sufficient for the employer to demonstrate that the contractor's workmanship has been consistently poor throughout the contract in order to refuse it the opportunity to return to make good defects. The contractor's general attitude will also be a factor [10].

If some of the defects are the responsibility of the employer, the contractor may be instructed that such defects are to be made good, but that the contractor is to be paid for so doing. It is not thought that the contractor is obliged to deal with such defects even if paid. At the end of the rectification period when all defects have been made good, the architect must issue a certificate to that effect. Under SBC terms the second half of the retention will be released after the issue of this certificate. Under DB, the release of the second half of the retention is triggered by a notice of completion of making good defects.

Partial possession

MW and MWD contain no provision for the employer to take partial possession of the Works. SBC clauses 2.33–2.37, IC/ICD clauses 2.25–2.29 and DB clauses 2.30–2.34 refer to partial possession. It is important to remember that partial

possession is not the same as phased or sectional completion. If the employer wishes the Works to be completed according to a particular timetable, sectional completion which is designed for this purpose should be used and the appropriate parts of the Contract Particulars should be completed. If the standard form is used without sectional possession and completion, the employer cannot achieve a phased completion by simply – as is sometimes done – setting out the phases and completion dates in the bills of quantities. The contractor's obligation in such a case is simply to complete by the date for completion in the Contract Particulars. Any conflicting dates in the bills are overridden by the provisions of SBC, IC and ICD clause 1.3. Similarly, conflicting dates in the Employer's Requirements are overridden by clause 1.3 of DB.

The purpose of the partial possession clause is to enable the employer, with the consent of the contractor, to take possession of any part or parts of the Works before practical completion of the whole of the Works. If, unusually, partial possession were to be taken of the whole of the Works, it would amount to deemed practical completion of the whole [11]. Note that the employer cannot take possession without the contractor's consent (the contractor is in possession of the site), but the contractor may not refuse such consent unreasonably. If the contractor agrees to the employer taking possession, the contractor should take care that the procedure is carried out formally. It should give consent in writing subject to a written statement being issued stating the date on which partial possession was taken in accordance with clause 2.33 (IC/ICD clause 2.25 or DB clause 2.30). The statement must be issued as soon as partial possession is taken, but the contractor would be advised to secure the statement no later than the date of possession and make the handing-over of the written statement a condition for the giving of consent. The reason for taking such great care is that it has been held that if the employer merely enters the Works, stores materials and even carries out factory processes in a building before practical completion, but without the issue of any formal certificate or written statement, partial possession has not been taken. Therefore, if there is a fire which destroys the building and the contents brought in by the employer, then the contractor is liable for the cost unless the position has been agreed with the insurers [12].

The issue of the written statement, however, will ensure that the appropriate contractual provisions come into operation as follows:

- The rectification period is deemed to have begun, for the part taken into possession, on the date in the written statement.
- When all defects, etc., have been made good, a certificate of making good (or notice in the case of DB) for the part is to be issued.
- Half the retention for the part must be released.
- The contractor's obligation to insure the part ceases (this is a crucial provision because the responsibility becomes the employer's).
- The amount of liquidated damages which may be payable is reduced in proportion to the value of the part.

Provided that the contractor is not inconvenienced by the partial possession of the Works and it secures the written statement, it can be seen that there are advantages in acceding to the employer's request.

SBC, IC and ICD clause 2.6 and DB clause 2.5 contain provisions to cover the situation where the employer wishes to make use of or occupy the Works before practical completion for storage or other purposes, but does not wish to take partial possession. The contractor's consent is required, but it is not to withhold such consent unreasonably. Before the contractor gives its consent the party responsible for Works insurance must obtain from the insurers confirmation that the proposed use will not prejudice the insurance. If the contractor is responsible for insurance and the insurers require an additional premium, the contractor must notify the employer, and if the employer still requires the use of the Works, the amount of the additional premium payable by the contractor must be added to the Contract Sum. It should be noted that occupation of the Works in this way is not partial possession and the consequences of partial possession (reduction of liquidated damages, start of the rectification period, etc.) do not follow [13].

7.2 Suspension and termination

If the employer fails to pay the contractor in full the amount due by the final date for payment, the contractor may issue a notice to the employer stating its intention to suspend. It must also state the grounds of the suspension (i.e. that the employer has failed to pay a particular sum of money which should have been paid by a specified date). The notice must be in writing and it must allow the employer seven days in which to pay the money properly due. Obviously, the employer is not obliged to pay any amount for which a valid pay less notice has been issued. It should be noted that, under SBC, IC, ICD, MW and MWD, in order to comply with the clause, the contractor must send a copy of the notice to the architect. The contractor's entitlement to suspend under the clause depends on this. However, if the architect is not copied in, the contractor is still entitled to suspend under s. 112 of the Housing Grants, Construction and Regeneration Act 1996 (as amended) and obtain an extension of time and reimbursement of reasonable costs.

This is a draconian remedy, but no doubt merited on occasion. It is suggested that the notice be sent by special delivery to ensure that it is received the next business day and that there is evidence to that effect. The suspension may continue until payment has been made in full. The clause is said to be without prejudice to any other rights and remedies which the contractor may possess. This means that if the contractor exercises this right, it does not prevent it from exercising other rights under the contract or at common law, for example: the right to terminate.

All JCT contracts provide the contractor with further remedies to deal with the period of suspension. It is to be taken into account for an extension of time and the contractor is also entitled to make applications for loss and/or expense.

Under the general law it is possible to discharge a JCT contract in one of four ways:

- By performance, when both parties have completed their obligations under the contract.
- By agreement, when both parties agree that, despite not having completed or perhaps started their obligations to each other, the contract should come to an end. This should be done with the same formality with which the original contract was entered into. Unless executed as a deed, such an agreement will usually be effective only if both parties have outstanding obligations.
- By frustration, when events outside the control of both parties render the contract something radically different from what was originally contemplated [14].
- By breach, when one of the parties commits a breach so serious as to indicate a clear intention not to be bound by the contract and the other party accepts that the contract is at an end. There are serious dangers for the party accepting the repudiation, which will be discussed later.

All four contracts state that the contractual right to terminate is without prejudice to any other rights and remedies which the employer or contractor may possess. In other words, the employer or the contractor may opt to bring their obligations to an end, if they have sufficient grounds, using common law principles rather than the contractual machinery. In certain instances it may pay them to do so because termination at common law entitles the party properly carrying out the termination to damages; whereas termination under the contract simply entitles that party to whatever remedies are stipulated in the contract [15]. However, it should be noted that some of the grounds listed in the contract entitling the employer or contractor to terminate the contractor's employment would not be sufficient to justify termination at common law.

The four contracts refer to termination of employment, thus the contract itself is still in existence and provides for the arrangements to be made after termination. If termination of the contract takes place at common law, it is possible that the whole contract is extinguished and none of its clauses can apply thereafter except the dispute resolution clauses. This is rare and unless the contract or notice is specific, a court will normally consider that the parties intend merely to put an end to their remaining obligations under the contract [16].

The termination clause in SBC, IC, ICD and DB is clause 8. There is an additional clause related to insured risks in SBC, DB and IC/ICD clause 6.14 and provision for termination by the employer if terrorism cover is to cease (SBC, DB, IC and ICD clause 6.11.2.2). In MW and MWD termination is covered by clause 6 and the additional clause related to insured risks is clause 5.7.

Damage by insured risks

SBC, DB and IC/ICD clause 6.14 and MW/MWD clause 5.7 may be considered

together because they are virtually identical. They deal with the situation where substantial loss or damage is caused to any of the existing structures.

The contractor must give written notice to the employer as soon as it discovers the loss or damage, irrespective of whether it intends to implement the termination provision. The contract states that 'if it is just and equitable' to do so, either party may serve notice on the other to terminate the contractor's employment. The notice must be served by hand, special or recorded signed for delivery within 28 days of the occurrence and then the other party has seven days within which to refer to the dispute resolution procedures as to whether the termination is 'just and equitable'. If notice to refer is not given within the seven days, the right is lost and the termination is deemed to be just and equitable. It is unlikely that this restriction will be effective in the case of the statutory right to adjudicate 'at any time'.

Three points deserve expansion:

- The meaning of 'just and equitable' is not clear. The provision is presumably intended to cover the position where alterations are being carried out to an existing building which is itself badly damaged by the occurrence. In such circumstances it would seem pointless to proceed with a contract for alterations if the building to be altered is largely destroyed. Such an event would probably rank as frustration under the general law in any event.
- Where a notice is to be served by hand, special or recorded signed for delivery, it is wise to follow the direction precisely. Simply sending the notice by fax, e-mail or even ordinary first class post may not suffice. When either party takes a serious step under the contract, it is safest to comply with the provisions exactly to the extent of repeating the wording in the contract in any notice required to be given, so that there can be no doubt about intentions. The courts tend to take a business-like view of such items as notices, and may overlook minor imperfections, looking at the spirit rather than the letter, unless it is thought that one of the parties is seeking unfair advantage, when a notice may be interpreted very strictly.
- The termination notice must be given within 28 days of the occurrence itself, not of the discovery of the occurrence. Although it seems unlikely that damage of sufficient seriousness to warrant termination under this clause will lie undiscovered for more than a day or so, it is quite conceivable that by the time the contractor has found the damage and notified the employer, the employer may have only three weeks in which to assess the problem and decide what to do.

The consequences of termination under this provision are the same as for termination by either party. The contractor is not entitled to receive any payment in respect of direct loss or damage arising from the termination.

Non-availability of terrorism cover

SBC, DB and IC/ICD 6.11.2.2 provide that the employer may give notice of termination if the insurers in the joint names policy give notice that terrorism cover will cease from a specific date (the 'cessation date'). The termination notice must state a termination date which must be after the cessation date.

Termination by employer

SBC, DB, IC and ICD clauses 8.4–8.6 deal with termination by the employer. They are similar and can be considered together. The equivalent provisions in MW and MWD (clause 6.4–6.6) will be discussed separately.

The grounds for termination are if the contractor before practical completion:

- wholly or substantially suspends the carrying out of the Works or, where relevant, the design before completion without reasonable cause;
- fails to proceed regularly and diligently with the Works or with the design under DB or ICD;
- refuses or neglects to remove defective work, etc., after written notice and the Works are materially affected;
- fails to comply with clauses restricting sub-letting, restricting assignment or, IC/ICD only, dealing with named sub-contractors;
- fails to comply with the CDM Regulations;
- becomes insolvent or makes an arrangement with creditors, etc;
- is guilty of corruption, i.e. giving or receiving bribes and the like.

In practice, there may be instances where it may be difficult to show that the contractor has wholly suspended without reasonable cause or failed to work regularly and diligently. The employer seeking to rely upon these grounds must be very sure of the facts. It has been suggested that a term in a contract requiring a contractor to proceed with due diligence is an obligation to execute the Works so that key dates and the completion date will be met [17]. Since most contracts, in the absence of sectional completion provision, will not have key dates other than the completion date, it seems on that basis that the contractor's contention that it is working regularly and diligently will be difficult to disprove unless it is clear that it cannot meet the completion date through its own fault. Architects who fail to take action in respect of a contractor who fails to proceed regularly and diligently may risk legal action by the employer.

Fortunately, 'regularly and diligently' has been considered by the courts and it has been stated that it means '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' [18]. Certainly, it is not enough if the contractor merely fails to work according to programme or stops working on part of the Works for a brief period. The court appears to be saying

that failure to proceed regularly and diligently is something which the architect will easily recognise although it may be difficult to put into words.

It is difficult to understand why the third ground is included at all. The employer already has a satisfactory remedy if the contractor fails to comply with a notice requiring compliance with an instruction (see Section 4.2). In order for this ground to be effective, the contractor must refuse or neglect to deal with defective work. That is, it must fail to act despite reminders. Moreover, its inaction must result in the Works being materially affected – presumably if the defective work would have an adverse effect upon what followed. It is not thought that failure to remedy defects which are not urgent would come within this ground. However, it should be noted that, on the plain wording of the ground, there could be circumstances where the contractor's failure to comply with an architect's instruction to deal with defective work on just one occasion may be sufficient to justify a default notice prior to termination.

The fourth ground is intended to give the employer a remedy if the contractor does not comply with the clauses noted. It is thought that the contractor's failure would have to be quite unequivocal. In most cases the failure could be dealt with less drastically by an appropriately worded letter.

The fifth ground was introduced to give the employer a remedy if the contractor fails to carry out its contractual duties in regard to the CDM Regulations. Presumably, a grave lapse is envisaged before the provision would be applied.

Termination is no longer automatic. The definition of insolvency is set out conveniently in clause 8.1. Insolvency is covered in clause 8.5. The employer may terminate by notice at any time without the need for any prior default notice. The contractor must inform the employer immediately if it becomes involved in any of the matters set out in clause 8.1, very importantly, from the date the contractor becomes insolvent, even if the employer has not yet given termination notice:

- Most of the contractual consequences of termination will apply.
- Clauses of the contract which require further payment or release of retention will not apply.
- The contractor's obligations to carry out and complete the Works and the design (in the case of DB, ICD or SBC where CPD applies) will be suspended.
- The employer may take reasonable measures for the protection of the site, the work and site materials. The contractor is expressly required to allow and not hinder or delay such measures.

The employer may terminate on grounds of corruption by simply serving a notice of termination stating the ground. All that is required is that the contractor or anyone employed by or acting for the contractor has committed certain offences set out in the clause [19].

In order to terminate on any of the first five grounds, the architect, or the employer under DB, must first serve a notice by special or recorded signed for

delivery specifying the default. Notice may be served also by hand (note that service by fax or e-mail is not valid). The contractor has 14 days from receipt of the notice in which to remedy or start to remedy the default. If it takes no action, the employer may then serve notice of termination by the same means. The employer (it must be the employer) has 21 days in which to act. Note that the architect is not empowered to serve the actual notice of termination. There is a sting in the tail for the contractor because, if it remedies the default after receiving the default notice and sometime later repeats the default, the employer is entitled to serve notice of termination without first serving a further default notice. Indeed, a further notice of default would be invalid [20]. To what extent the repeated default must be exactly the same as the original default is a matter of speculation, but it is wise to avoid being a test case.

There is an important proviso to the effect that notice of termination must not be given unreasonably or vexatiously. Thus, it would be unreasonable to attempt to take unfair advantage [21] and vexatious to serve notice in an attempt to annoy.

Under MW and MWD, clauses 6.4 and 6.5 entitle the employer to serve notice of termination on five of the grounds already mentioned, i.e. wholly suspending the Works, failure to work regularly and diligently, failure to comply with the CDM Regulations and insolvency of the contractor. It is noteworthy that nowhere in the contract is the contractor required to proceed regularly and diligently; nevertheless failure to do so is a valid ground for termination [22]. The earlier comments on these grounds generally apply to MW and MWD. A default notice is specified to be given by the architect in respect of the first three grounds. The contractor has seven days from receipt to end the default, failing which the employer may terminate by giving further notice within the following ten days. There is no provision for the employer to terminate without another default notice if the contractor repeats the default. In the case of insolvency, no default notice is required and the insolvency provisions closely follow those of the other forms. In view of the employer's difficulties in terminating on these grounds, mentioned earlier, a contractor might be forgiven for thinking that, short of corruption or insolvency, it is safe from termination provided that it stays on site and does at least some work. Such a view may be unduly optimistic in the light of current law. The various grounds for termination are briefly summarised in Table 7.1.

Termination by contractor

Failure to pay is a common ground to all four contracts under discussion. This is a valuable option for the contractor. At common law, failure to pay is not usually grounds for repudiation but there are exceptions [23]: the remedy is to use the dispute resolution procedures.

Before issuing the termination notice, the contractor must send a notice specifying the default to the employer. It is a 14-day notice under SBC, DB, IC and ICD (clause 8.9.3) and a seven-day notice under MW and MWD (clause 6.8.3).

Table 7.1 Grounds for termination under SBC, IC/ICD, MW/MWD and DB

Ground	*SBC*	*IC*	*ICD*	*MW*	*MWD*	*DB*
By employer						
Contractor wholly or substantially suspends work	X	X	X	X	X	X
Contractor wholly or substantially suspends design	X		X		X	X
Contractor fails to proceed regularly and diligently with the work	X	X	X	X	X	X
Contractor fails to proceed regularly and diligently with the design	X		X		X	X
Contractor neglects defective work	X	X	X			X
Contractor wrongly assigns	X	X	X			X
Contractor wrongly sub-lets	X	X	X			X
Contractor fails to comply with named sub-contractor clause		X	X			
Contractor fails to comply with CDM Regulations	X	X	X	X	X	X
Contractor becomes insolvent	X	X	X	X	X	X
Contractor guilty of corruption	X	X	X	X	X	X
If notice that terrorism cover not available	X	X	X			X
If regulation 73(1) of the Public Contracts Regulations applies if the grounds in regulation 73(1)(a) or 73(1)(c) apply	X	X	X	X	X	X
By contractor						
Employer fails to pay including VAT	X	X	X	X	X	X
Employer obstructs certificate	X	X	X	X	X	X
Employer wrongly assigns	X	X	X			X
Employer fails to comply with CDM Regulations	X	X	X	X	X	X
Works suspended for specified period due to:						
Specified instructions	X	X	X	X	X	
Impediment, prevention or default	X	X	X	X	X	X
Employer becomes insolvent	X	X	X	X	X	X
By either party						
Works suspended for specified period due to:						
Force majeure	X	X	X	X	X	X
Instructions for default of statutory undertaker	X	X	X	X	X	X
Damage due to insured or excepted risks	X	X	X	X	X	X
Civil commotion or terrorism	X	X	X	X	X	X
Exercise of statutory power	X	X	X	X	X	X
Delay in receipt of development control permission						X
If just and equitable following insured damage	X	X	X	X	X	X

All notices must be given by hand, special or recorded signed for delivery and the remarks on delivery in relation to employer termination are applicable. The contractor may serve the termination notice within 21 days from the expiry of the 14 days or within ten days in the case of MW/MWD.

Under SBC, IC, ICD, MW and MWD the employer's obstruction of the issue of any certificate (not just financial certificates) is a ground for termination. It is usually difficult to prove that the employer has interfered with the issue of a certificate unless the architect is ill-advised enough to say so in a letter refusing issue. It would be sufficient if the contractor could show that the employer had instructed the architect to reduce the amount on a financial certificate or requested the architect to delay the issue of, say, a certificate of practical completion [24]. Failure by the employer to comply with the contractual provisions regarding the CDM Regulations is a common ground to all six contracts. Failure by the employer to comply with the assignment provisions is common to SBC, IC/ICD and DB.

If the Works are suspended for a period of one month (in the case of MW and MWD) or for the period inserted in the Contract Particulars (in the case of SBC, IC, ICD and DB) for any of the reasons listed, the contractor can terminate. Most of the reasons can be readily identified from Table 7.1 and read in detail in the particular contract form. One or two points, however, are worth noting. Prior notice of default must be given and 14 days (seven under MW/MWD) allowed for the employer to end the suspension. The instructions are given in regard to:

- correction of discrepancies;
- variations;
- postponement of the Works.

If the employer becomes insolvent and becomes bankrupt or makes an arrangement with creditors or, being a company, starts liquidation or a number of other matters associated with insolvency, the contractor may terminate its employment.

Termination by either party

There are a number of grounds in SBC, DB, IC, ICD, MW and MWD enabling either employer or contractor to terminate. Damage to existing property has been dealt with.

Under SBC, DB, IC and ICD clause 8.11 and MW/MWD clause 6.10 either party may terminate if the Works are suspended for the period stated in the Contract Particulars (the default period is two months; one month is specified in clause 6.10 in the case of MW and MWD) by *force majeure*, damage to the Works by one or more of the insured or excepted risks; instructions issued in regard to the correction of discrepancies, variations or postponement of work provided they resulted from negligence or default of a statutory undertaker; civil commotion or terrorism; exercise of statutory power by the UK government, local or

public authority directly affecting the Works. DB also includes delay in receipt of development control permissions.

Consequences

The consequences of termination vary depending upon the party carrying out the termination and the clause under which the termination takes place. If the employer terminates under SBC, DB, IC or ICD clauses 8.4–8.6, the rights and duties of the parties may be summarised as follows:

- The employer may take and the contractor must give up possession of the site. After termination, the contractor no longer has a licence to remain on site and, if it does so, it is trespassing. It used to be thought that if the contractor disputed termination it had the right to stay in possession until the termination was shown to be valid [25]. Currently, the contrary and more sensible view prevails that the contractor must give up possession pending arbitration and if the termination is found to be invalid, the contractor will have an adequate remedy in damages. If the contractor refuses to give up possession of the site, it is thought that an English court would grant an injunction to force the contractor to give up possession [26]. All six contracts clearly state that termination by the employer and the consequences are without prejudice to the employer's other rights and remedies. Thus, the contractor must leave site and await the results of any proceedings.
- The employer may employ and pay others to complete the Works.
- The employer may use any of the contractor's site equipment and site materials to complete the Works but not equipment belonging to others without permission.
- If so instructed, the contractor must remove its temporary buildings, plant, equipment, goods and materials and ensure that other owners of equipment do the same.
- To the extent that they are assignable and to the extent that it is lawful, the contractor must assign all benefits in agreements with sub-contractors and suppliers to the employer, if the architect (or the employer under DB) so requires within 14 days of the date of termination. The employer is entitled to pay these firms and deduct such payments from money due to the contractor (this does not apply to MW/MWD).
- Clauses requiring payment or release of retention to the contractor cease to apply. Therefore, the employer need make no further payments to the contractor even on certificates already issued if a pay less notice has been issued or if the contractor has become insolvent after the last date on which the pay less notice could be issued. If the contractor becomes insolvent after the termination has taken place for other reasons, no further payment need be made until the Works are complete and defects rectified even if the employer had already wrongly held onto the money long after the final date for payment had passed [27].

- If there is a CDP, the contractor must provide the employer with two copies of all the design documents which have been prepared.
- A reasonable time after the Works are complete and the defects rectified, an account must be drawn up stating:
  - the amount of loss and/or expense caused to the employer by the termination, including the cost of having the Works completed by others;
  - the amount already paid to the contractor;
  - the amount which would have been payable for the Works in accordance with the contract.

The result may be a sum payable to the contractor, but it is more likely to be a sum due to the employer. In effect, the employer is entitled to the difference in cost between the original contract and the actual cost. Proper allowance must be made for variations, professional fees and any other costs incurred by the employer.

In all these contracts (except MW and MWD) power has been introduced for the employer to opt not to continue with the work at all, in which case the contractor is entitled to payment as noted above. To prevent abuse of this power, if the employer does not opt to continue or abandon the Works within six months of the date of termination, the contractor may serve notice on the employer requiring a decision.

In exercising the option of not completing the Works, the employer must notify the contractor within six months of termination. The notice must be followed with a statement setting out the value of work properly carried out together with any other monies due to the contractor under the contract and any loss and expense due to the employer arising from the termination. Taking into account amounts previously paid, the balance must be paid to either employer or contractor as before. If the employer has not acted by the end of the six-month period, the employer has two months to issue the statement. The contract does not say what is to happen if the employer does nothing at all, but the contractor would presumably issue its own statement of the financial position and if the employer still remained silent, the contractor could proceed by way of one of the dispute resolution procedures.

If the contractor terminates under SBC, DB, IC or ICD clauses 8.9 or 8.10, the rights and duties of the parties may be summarised as follows:

- The contractor must remove from site all its temporary buildings, plant, equipment, goods and materials as soon as reasonably possible after termination. It must give its sub-contractors similar facilities to remove their property.
- If there is a CDP, the contractor must provide two copies of the design documents prepared.
- Clauses requiring payment or release of retention to the contractor cease to apply.
- The contractor must prepare an account as soon as reasonably practicable setting out the amount as follows:

- the total value of the Works at termination;
- any sum ascertained under the loss and/or expense clause;
- reasonable cost of removal of its property from site;
- the cost of materials properly ordered for the Works for which the contractor has paid or is legally bound to pay;
- any direct loss and/or damage caused to the contractor by the termination after taking into account amounts already paid to the contractor under the contract.

The problem for the employer is the direct loss and/or damage to which the contractor is entitled. Among the damages to be included is the loss of profit which the contractor would have received had the contract proceeded to completion [28]. If the termination occurs after only a few weeks of a long contract, the employer will find this item particularly expensive. Of course, the contractor must demonstrate that, if the contract had continued, it is likely that it would have made a profit. Depending on the economic climate, this sometimes might prove a problem for many contractors.

Where termination occurs by notice from either party under SBC, DB, IC or ICD clause 8.11 or under SBC, DB or IC/ICD clause 6.14 or by the employer under SBC, DB, IC or ICD clause 6.11.2.2, the rights and duties of the parties are the same as if the contractor had terminated except that the contractor has no right to any loss and/or damage arising from the termination unless the event concerns damage to the Works by an insured risk due to the employer's negligence.

The consequences of termination under MW and MWD are similar but somewhat shorter. If the employer terminates, everything covered in the other contracts is included except:

- There is no provision for the contractor to be required by the architect to remove temporary buildings, etc., from site.
- There is no provision for the contractor to provide such CDP drawings as have been prepared.
- The contractor cannot be required to assign any sub-contracts to the employer.

If the contractor terminates, everything covered in the other contracts is included except:

- The contractor is not required to remove temporary buildings, etc., from site.
- Where there is a CDP, the contractor is not required to provide such design drawings as have been prepared.
- The reasonable costs of removal of the temporary buildings, etc., are not to be taken into account in preparing the account.

In conclusion, the following basic points should be noted:

- A party contemplating termination should take advice. There is a grave danger that a party trying to terminate will thereby commit a breach entitling the other party to terminate instead [29].
- From the employer's point of view, termination is always more expensive – in time and money – than persevering to the completion of the contract with the original contractor. This is true no matter who terminates.
- Termination should not be lightly threatened. In more ways than one it is the last resort.

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8 Dispute resolution

8.1 General

Settlement of disputes is dealt with in clause 9 of SBC, DB, IC and ICD and in clause 7 and schedule 1 of MW and MWD. It is a pity that, in trying to simplify the contracts, the JCT did not make the Minor Works Contracts conform with the other JCT contracts.

All the contracts now make express provision for the parties to agree to resolve any dispute by mediation (SBC, DB, IC and ICD clause 9.1, MW and MWD clause 7.1). Formerly, it was included as advice in a footnote. There is little point including, in any contract, a provision that the parties can agree something, because it is open to the parties to agree virtually anything. Therefore, this clause is, at best, superfluous or, at worst, misleading. A contract should set out the parties' rights and duties and related procedures. There is no room for this kind of unnecessary clause.

8.2 Adjudication

The Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009) section 108, gives the right to any party to a construction contract to submit disputes to an independent adjudicator. It is clear that the system is very popular and it is expected that most disputes will be resolved in this way. A considerable body of case law has been generated. Section 108 also provides that the contract must:

- enable a party to give notice of adjudication at any time;
- provide a timetable to secure an appointment and referral to the adjudicator within seven days of the initial notice;
- require the adjudicator to make a decision in 28 days from referral;
- allow the adjudicator to extend the period as agreed by both parties or for 14 days if just the party who started the procedure agrees;
- impose a duty on the adjudicator to act impartially;
- enable the adjudicator to investigate the facts and relevant law without being requested to do so.

The adjudicator's decision will be binding until otherwise agreed by the parties or until the matter is referred to arbitration or litigation (if there is no arbitration agreement). Neither the adjudicator nor the adjudicator's employees or agents will be liable for actions or omissions done as part of the adjudication.

The adjudication provisions are to be found in clause 9.2 of SBC, DB, IC and ICD and clause 7.2 of MW and MWD. All the contracts specify that the procedure must be in accordance with part 1 of the Scheme for Construction Contracts (England and Wales) Regulations 1998 (as amended). The Scheme puts in place the provisions of the Act, but with somewhat more detail. It used to be thought that only disputes *under* the contract could be referred, but it is now clear that any dispute connected with the contract may also be referred [1]. The procedure commences with a notice of adjudication sent by the party seeking adjudication (the Referring Party) to the other party (the Responding Party). The Referral must be sent to the adjudicator within seven days from the date of the notice of adjudication. As and when the Referral to adjudication is made, both it and any accompanying documents that are sent with it to the adjudicator must simultaneously be copied to the other party. The notice of adjudication, must clearly set out:

- a description of the dispute and parties; *and*
- where and when the dispute arose; *and*
- what remedy or relief is being sought; *and*
- the names and addresses of the parties.

The adjudicator has wide powers to set an agenda and the discretion to take the initiative in ascertaining the facts and the law in relation to the matter(s) referred. Moreover, the adjudicator may:

- use his or her own knowledge and/or expertise if the parties agree;
- give any directions regarding the conduct, timetable, deadlines and length of submissions;
- request either party to supply documents reasonably required or any statements;
- decide the language to be used and any necessary translations;
- meet and question any parties to the adjudication;
- open up, reviewing or revising any opinions, notices, decisions and the like previously given under the contract;
- visit the site or any other relevant premises used for the preparation of work in connection with the contract and/or call on the parties to carry out testing or opening-up of work, or further testing or further opening-up;
- take technical or legal advice and/or, after notice to that effect to the parties, make enquiries of the parties' employees or other representatives.

Once the Referral is made then the Responding Party has right of reply. It should be noted that a contractual right of reply is not a strict requirement of the

Scheme. The Scheme requires merely that the Referral be made within seven days of the date of the notice of adjudication and says nothing about the Responding Party's rights of reply, let alone when that reply should be given or what it should contain. Without doubt a right of reply must exist and all adjudicators will specify a period in which the Response must be given.

Unless and until agreement is reached to be finally bound or until the adjudicator's decision is ratified or reversed in arbitration or litigation, the parties are bound by it. They must give effect to it and if they fail to do so legal proceedings may be begun in order to secure such compliance, even where all disputes and differences are agreed under the contract to be referred to arbitration as opposed to litigation. It is clear that the courts have a policy of enforcing adjudicators' decisions whether they are good or bad [2].

In practice, an adjudicator's decision may only be resisted if the adjudicator has acted outside his or her jurisdiction [3] or has failed to observe the rules of natural justice [4]. However, the rules of natural justice are not applied as strictly to adjudication as to other, finally binding, methods of dispute resolution [5]. The jurisdiction of an adjudicator is determined by the notice of adjudication. The adjudicator is entitled only to deal with the dispute identified in the notice. For example, if the notice stated that the dispute was that the employer had not paid the amount certified, the adjudicator would not be entitled to consider whether the architect should have certified a greater amount. If the adjudicator's decision is not enforceable, the adjudicator may not be entitled to a fee and, if already paid, it may be reimbursable, but the adjudicator's terms may change that position [6].

There is provision in each of the six contracts to allow an adjudicator to be named in the contract. There is also provision for an adjudicator nominating body. There are disadvantages with both systems. A person with impeccable credentials can be named in the contract, but that person may not be suitable for the particular type of dispute which occurs. On the other hand, a nominating body may appoint as adjudicator someone who turns out to be less than ideal. It is unfortunate that, despite the vetting procedure and criteria adopted by these bodies, some of the adjudicators one encounters are deficient in basic legal knowledge and in the ability to strip away the floss and focus on the real issues in the adjudication. Indeed, there are some adjudicators who believe that they are entitled to reach their decisions by 'gut instinct' rather than by applying proper legal principles. Because adjudication is rough justice and need not be finally binding, the courts will enforce an adjudicator's decision even if it is wrong in fact and law.

The parties need not be legally represented and if the dispute concerns valuation or quality of work, legal representation may not be essential. However, it should be realised that most disputes have a legal aspect, a large amount of case law has accumulated regarding adjudications and the employment of a legal adviser to frame the arguments in the Referral or the Response may be wise.

It is important to understand that adjudication cannot be excluded from a construction contract (except of course in the case of residential occupiers).

Adjudication is not an alternative to arbitration or litigation. Arbitration or litigation are the finally binding options. Therefore, each of these JCT contracts must be completed so that the parties may choose adjudication (for a quick but not necessarily final decision) and one of either arbitration or litigation (legal proceedings).

8.3 Arbitration

Arbitration is the time-honoured system of settling disputes. In essence it is when two parties who are in dispute about something agree between themselves to ask an independent third party to settle the matter between them and they agree to abide by the decision of the third party.

Arbitration as understood in regard to building disputes has tended to become somewhat cumbersome and peopled by large numbers of solicitors, barristers and expert witnesses. In serious cases involving very large amounts of money it is perhaps understandable why this should be so. It does not seem to be generally appreciated, however, that arbitration can be a relatively quick process if the dispute is minor and dealt with on the basis of documents only. Both parties can agree that legal advisers will not be involved and a settlement can be achieved with the minimum of fuss.

The main advantage of arbitration over litigation in the courts is privacy. No one but those immediately involved need know the details of the dispute and the arbitrator's decision (known as the award). Another advantage is that the parties can choose an arbitrator with technical knowledge who understands, better than a judge, the day-to-day on-site problems of the construction industry. Arbitration can be quicker than litigation provided both parties are anxious to proceed. If there is to be a hearing, it can be arranged in a place and at a time to suit both parties.

The disadvantage of arbitration is that the arbitrator, unlike a judge, has very limited powers to move events on if one of the parties is determined to go slow. Arbitration can then become very expensive.

Arbitration is governed by the Arbitration Act 1996. Where two parties have entered into a contract which provides that disputes are to be settled by arbitration it effectively prevents one party from deciding to pursue the dispute through the courts. The other party will be granted a stay (postponement) of legal proceedings to allow arbitration to take place. At one time the courts had a discretion under certain circumstances to allow litigation to proceed, but under the 1996 Act there is no exercise of discretion and the only ground to allow litigation to continue and refuse a stay would be if the arbitration agreement were void or inoperative.

It is unusual for an Act of Parliament to set out principles but, importantly, this Act sets out the underlying principles in section 1. These principles are the basis under which the Act will be interpreted. The principles are as follows:

- The object is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

- The parties should be free to agree how their disputes are resolved subject only to the public interest.
- The courts should not intervene except as provided by the Act.

One important point stems from this. Many of the provisions are non-mandatory which means that the parties can exclude them if they so agree. Note that any such agreements must be in writing to be effective. It is vitally important that parties decide carefully which of the non-mandatory provisions, if any, are not going to be adopted. The following are some of the more interesting points:

- The arbitrator must act fairly and impartially.
- The arbitrator must decide how the arbitration is to be run, including the manner of submissions and evidence. If the arbitrator thinks fit he or she can adopt an inquisitorial role and take the lead in asking questions to find out the facts.
- The arbitrator may order inspection, photography, custody, sampling or experiments on property owned or in the possession of either party.
- The Act now puts a positive obligation on the parties to pursue the claim without delay and to attend hearings.
- The arbitrator can now order the parties to do things and order them to perform their side of a contract.
- The arbitrator can now award simple or compound interest as seems appropriate.
- The arbitrator can 'cap' the costs that can be recovered in an arbitration. This should dissuade anyone who is intent on going to arbitration to settle a score rather than genuinely to settle a dispute. This power may encourage parties to exercise restraint and avoid unnecessary expense.

Although agreements to arbitrate must still be in writing, 'agreement in writing' is given a very broad interpretation so that virtually any form of record, whether signed or not, will qualify.

If both parties have signed a standard form contract containing an arbitration clause, there is little doubt that they have entered into a binding agreement to arbitrate; but what is the position if one party has simply written to the other confirming agreement to enter into a contract on standard terms (e.g. SBC)? An arbitration clause is really a separate contract existing alongside the main contract and capable of existing after the main contract has ended. Therefore, if it is intended to incorporate the arbitration clause it is important to refer to it in clear words [7]. Failure to do so, however, is not necessarily fatal [8].

There is an arbitration clause in SBC, DB, IC and ICD article 8 and clauses 9.3–9.8. MW and MWD deal with arbitration in article 7, clause 7.3 and schedule 1. The arbitration provisions in all these contracts are virtually identical. It should be noted that if arbitration is the procedure of choice, it must be so stated in the Contract Particulars. Otherwise, litigation is now the default option. This

appears to be a bad decision on the part of JCT and overturns a long-established position which used to make arbitration the default procedure.

SBC, DB, IC, ICD, MW and MWD

The most important point is that a dispute or difference must have arisen between the parties, i.e. the employer and contractor. The architect is not a party to the contract and, therefore, cannot be a party in the arbitration proceedings although the architect can be a witness. When exactly a dispute has arisen will be something which should be obvious but, basically, the two parties must be in disagreement [9].

The subject matter of the dispute can be the interpretation of contract provisions or any other matter arising in connection with the contract, including items left to the architect's discretion; withholding of certificates, adjustment of the Contract Sum, unreasonable withholding of consent or rights and liabilities of the parties. In fact, virtually any kind of dispute can be referred provided it bears a relation to the contract [10].

The party seeking arbitration must write and give the other party a notice of reference to arbitration. If they fail to agree on a mutually acceptable person within 14 days of the initial request, either party may write to whomever is named in the Contract Particulars as the appointor. The appointor will be either the President or Vice-President of the Royal Institute of British Architects (RIBA), of the Royal Institution of Chartered Surveyors (RICS), or of the Chartered Institute of Arbitrators (CIArb). If it becomes necessary to take this latter course, there is a form to be completed and a fee to be paid. It is worth noting that an arbitrator appointed in this way, which is binding on the parties, is almost impossible to remove.

The arbitrator has wide powers under the Arbitration Act and the contract gives additional powers to direct measurements and valuations, to ascertain and award any sum which should have been included in a certificate to open up, review and revise any certificate, opinion, decision, requirement or notice, and to determine all matters in dispute as if the certificates, etc., had not been given. The arbitrator has power to rectify the contract so that it accurately reflects what the parties agreed. This enables the arbitrator to correct errors and certain specific kinds of mistake. It has been held that an arbitrator always had this power. The new provision simply recognises the point expressly.

The arbitration is to be conducted under the JCT 2016 edition of the Construction Industry Model Arbitration Rules (CIMAR). These are set out in full in a handy booklet (available from the Joint Contracts Tribunal or downloadable from www.jctcontracts.com). An important feature is a choice of procedure. The procedure extends to the taking-up of the award. The choice of procedure is welcome: documents only, full procedure or the short procedure with a hearing, which may be quite informal and may even be held on site. It is not open to the parties to agree to dispense with the CIMAR.

The arbitrator is immune from actions of negligence although the arbitrator

may be removed and the award overturned in certain limited circumstances. It used to be the custom for arbitrators to give awards without reasons, but the parties may request reasons or the courts order them to be given. It appears to be largely due to the determination of the courts that reasoned awards have not led to a spate of appeals.

The award of the arbitrator is stated to be final and binding. In practice, arbitration awards do tend to be final and binding because, although there is provision in the Arbitration Act 1996 for an appeal to be made, it is surrounded by conditions. The appeal must relate to a question of law arising from the award. There is no appeal from facts decided by the arbitrator. All the parties must consent to the appeal or the High Court must give permission.

The courts are reluctant to give permission to appeal to the High Court and appeals to the Court of Appeal are virtually impossible unless the matter involves something of public importance [11]. The contracts state that the parties agree that either of them may apply to the courts to decide any question of law arising in the course of the arbitration or appeal to the High Court on a question of law arising from the award. This appears to overcome the necessity of seeking permission from the court itself [12].

English law is to be used in deciding any point under the contract (SBC, IC and ICD clause 1.12, MW and MWD clause 1.8 and DB clause 1.11). This is the case irrespective of the nationality or homes of the parties or the situation of the Works. It is important to settle this point because, in the case of an arbitration between two parties of differing nationalities over a contract in a third country, the position could become complicated. It is always open to the parties to agree that a different system of law is to be applied if they so wish and a suitable amendment must be made in that case. For example, the Northern Ireland Adaptation Schedule stipulates that the law is to be the law of Northern Ireland.

Reference to arbitration may be made at any time. As a matter of practice, in view of the relatively short contract periods envisaged by most contracts let on MW/MWD terms, arbitrations are likely to take place after practical completion under those contracts.

8.4 Litigation

Each contract has provision for litigation (referred to in the contracts as 'legal proceedings') instead of arbitration. It used to be thought that the arbitrator's powers under the contract were wider than that of the court. For example, the arbitrator had the power to open up and review the architect's decisions. That view was largely based on a case [13] which has been overruled in the House of Lords [14]. Litigation is now the default option and it will apply unless arbitration is expressly stated to apply in the Contract Particulars.

8.5 Points to note

The arbitration clause in a contract will survive the contract itself to allow the

arbitrator, for example, to decide whether the contract has in fact come to an end and to determine the consequences for the parties [15].

The majority of references to arbitration are settled or fade away before being determined by the arbitrator. If the reference is not to be decided on the basis of documents only, a hearing will be involved. The parties will have exchanged claims, defences and counterclaims. Discovery of documents will have taken place and expert witnesses will have reported. The whole process tends to be very expensive.

The moral seems to be: do not resort to arbitration unless there really is no alternative. If arbitration is the answer, keep it as simple as possible, when the award arrives it will be final and binding. At that point, the losing party invariably wishes that settlement proposals had been accepted and the costs and mental trauma avoided.

Alternative Dispute Resolution (ADR) is commonly referred to as the modern method of resolving disputes. ADR is essentially a group of dispute resolution techniques which depend upon the willingness – indeed, the determination – of the parties to settle the dispute. If both parties wish to use ADR techniques, there is nothing to prevent their doing so and the courts actively require their use. Among the alternative procedures in use are mediation, conciliation and mini-trial. Parties also try combinations of processes with varying degrees of success.

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BLM	*Building Law Monthly*
BLR	*Building Law Reports*
Ch App	Chancery Division Appeal Cases
CILL	*Construction Industry Law Letter*
CLD	*Construction Law Digest*
CLJ	*Commonwealth Law Journal*
Con LR	*Construction Law Reports*
Const LJ	*Construction Law Journal*
DLR	*Dominion Law Reports*
EG, EGCS	*Estates Gazette Cases*
ER	*English Reports*
EWCA	England & Wales Court of Appeal
EWHC	England & Wales High Court
GWD	*Green's Weekly Digest*
KB	*King's Bench* (Law Reports)
LGR	*Local Government Reports*
LJCP	*Law Journal Reports, Common Pleas*
LR Ex	*Law Reports, Exchequer*
LT	*Law Times Reports*
QB	*Queen's Bench* (Law Reports)
QBD	Law Reports, Queen's Bench Division
SCLR	Scottish Council of Law Reporting
STL	*Scottish Times Law Reports*
TCLR	*Technology and Construction Law Reports*
WLR	*Weekly Law Reports*

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