

**COURSE FOR BPP PROFESSIONAL EDUCATION**  
**CONSTRUCTION LAW – BASIC PRINCIPLES**

**SESSION 1: THE CONSTRUCTION PROCESS**  
**ROLES AND LEGAL RELATIONSHIPS -THE STATUTORY CONTEXT**

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**PART A: THE PROCUREMENT PROCESS**

**1. The nature and extent of construction activity**

Construction activity extends from, at one extreme, the individual house for a private client to, at the other, new hospitals or shopping developments. It encompasses buildings, engineering works, such as sewers and bridges, and major infrastructure projects, such as airports and trunk roads. Arguably, the defining characteristic of the construction process is that it concerns the procuring of purpose built solutions to client needs, not the purchase of “off the shelf” products.<sup>1</sup>

**2. The persons involved**

Those involved in the construction process include:

- The client, the employer;
- Design consultants – principally architects and engineers (civil, structural, mechanical and electrical);
- Quantity surveyors;
- Contract administrators (employer’s representatives);
- CDM Co-ordinators (formerly planning supervisors) and principal contractors (see the Construction (Design and Management) Regulations 2007 (“the CDM Regulations”));
- Contractors, sub-contractors and specialist contractors (“specialists”).
- Regulatory authorities – principally planning authorities (always a local authority) and building control authorities (usually, but not necessarily a local authority).
- Specialist agencies, such as the Health and Safety Executive and the Environment Agency.

There are, in addition, funders, purchasers and tenants, and users.

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<sup>1</sup> **Lord Bingham** at the KCCCL 1996 Conference suggests the following reasons for construction disputes. Project supplied is variable until finished, and price is fluid – creates uncertainty and opportunity for argument. Long delivery, more possibility of changing circumstances. Complex products need detailed planning, greater possibility of error and incompleteness. Unusual number and range of participants, scope for misunderstanding and buck passing. Large amounts of money at stake can make costly dispute resolution seem worthwhile. Non specific contract documentation, complex. A claims culture, gross inequality of commercial power and a tendency to plan for claims.

### **3. The decision to build**

Those involved are the client and, in the case of a developer, its funders. The decision to build may involve consideration of other options evaluated in the light of the client's needs and requirements. Feasibility studies may be required, usually involving a design consultant and possibly a quantity surveyor or other financial advisor.

### **4. Typical stages of a construction project**

A typical construction project will involve the following stages (work stages) and numerous published plans of work, such as the RIBA Plan of Work, reflect these stages. In practise, however some stages may overlap, or may do so for certain parts of the project.

#### Feasibility

The client's requirements and constraints on development are assessed in sufficient detail to decide whether to proceed with the project. If so, an initial (strategic) brief is prepared identifying requirements for and constraints on the project and covering matters such as location, function, quality, budget, programme, consultant roles and procurement route.

At the end of this stage, the client will begin to assemble a consultant team. The range of consultants depends on the nature of the project and the procurement route. If the project is notifiable under the CDM Regulations, a CDM Co-ordinator must, generally, be appointed by the client,<sup>2</sup> "as soon as is practical after initial design work or other preparation for construction work has begun"

#### Outline proposals

A final (project) brief is prepared along with outline proposals for the project. Outline development control approval (outline planning, landlord consents) may be sought at this stage. The British Property Federation views this stage as part of Feasibility.

#### Final proposals

Designs for the project are developed and costed in sufficient detail to enable detailed design to commence. Final development control approval (full planning approval) is, ordinarily, sought at the end of this stage.

#### Detailed Design

Although this stage is some times merged with Final proposals, it is important that all aspects of the design of the project are sufficiently developed and co-ordinated so that changes during subsequent work stages are minimised and production information (information for construction) can be prepared. A design freeze is usually imposed at the end of this stage, and Building Regulation approval sought.

#### Production information

Information is prepared showing how the project is to be constructed and remaining statutory (for instance, building control) and other approvals are obtained. Depending

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<sup>2</sup> The regulations only apply to clients: "who in the course or furtherance of a business (a) seeks or accepts the services of another which may be used in the carrying out of a project for him; or (b) carries out a project himself".

on the procurement method, production information may be prepared before or during the construction of the project. Where consultants prepare production information it generally (should!) comprise fully co-ordinated drawings, schedules and specifications. Depending on the procurement route, bills of quantities may also be produced.

Depending on the procurement method, detailed design and production information for parts of the project (works packages) may continue during construction of the project.

#### Tender action

Tender documentation is prepared and tenders obtained and appraised. The timing of this stage, and the work encompassed by tender, depends on the procurement method. The next stage, construction, cannot start until a principal contractor is appointed.

The British Property Federation views all the stages between Feasibility and Construction as the Pre-Construction phase.

#### Construction

The construction stage involves three principal stages, mobilisation, construction to completion (often referred to as practical completion), as well as work, including making good of defects, from practical completion up to final account (final certificate). The employer's consultants may have inspection and certifying duties during this stage. If the project is notifiable under the CDM Regulations, a principal contractor must, generally, be appointed by the client before construction work starts.

The interrelationship between the Construction stage and the Pre-construction stage depends on the procurement route.

## **PART B: LEGAL RELATIONSHIPS**

### **1. Structuring legal relationships**

The structure of legal relationships adopted on a construction project depends partly on the chosen procurement and payment route and partly on the extent to which persons other than the client, who might suffer loss or damage if it is defective (such as funders and those who may acquire interests in the project on completion), are to be included in this structure. The principal objective is to ensure that there are clear lines of contractual responsibility between those who are to provide goods, materials and/or services in connection with the project and those who may suffer loss or damage if those goods, materials or services are inadequate.

### **2. Procurement routes**

The principal procurement routes are as follows. In deciding what is appropriate, consideration should be given, not only to how design and construction responsibilities are allocated and programme, but to where risk, particularly the risk of delay and disruption to the procurement process is to lie.

- Traditional procurement (general contracting). The client engages consultants to design and a contractor (a main contractor) to construct the project in accordance with prescriptive information provided by the consultants. It can be difficult to

decide where design stops and workmanship starts, see Rotherham MBC v. Haslam Milan & Co Ltd (1996) 78 Build LR 1 (CA).<sup>3</sup>

The client may wish to designate sub-contractors, or specialists, to undertake specific packages of work (usually referred to as naming or nomination). If so, appropriate legal relationships must be structured between the employer, the main contractor and the sub-contractor/specialist.<sup>4</sup>

It may be necessary to procure certain elements of design from those constructing the works. If so, this can be done either by identifying a design and build element within the main contract (in JCT contracts referred to as performance specified work or contractor design portion supplement work) or procuring the design from a designated sub-contractor/specialist.

- Design and build procurement. The client engages consultants to provide such design as the client considers necessary (“the employer’s requirements” or, if only part of the project is procured in this way, “the performance specification”) and engages a contractor, who will ordinarily have provided proposals for the design (“contractor’s proposals”) with its tender, to complete the design and construct the project.. A variant of this form of procurement is where the employer requires the design and build contractor to engage the consultant who prepared the employer’s proposals to complete the design. A simple novation is unlikely to be appropriate as it can result in conflicts of interest for the designer.
  
- Turnkey contracting is a variant of design and build, as is the Private Finance Initiative (PFI). PFI contracting involves a legal entity, known as a special purpose vehicle, taking on obligations to the client, usually a public body, for maintenance and, possibly, operation as well as design and construction of a facility to be used by that client. The special purpose vehicle may involve a number of different organisations who contract with each other, possibly under a partnering agreement which seeks to provide for how risk and reward is to be shared between the participants so that disputes are minimised. The special purpose vehicle may also be involved in financing the project, with those costs being recouped from the public body during the operation period. In practice most, if not all, of the work will be sub-contracted to organisations that are not part of the partnering agreement.

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<sup>3</sup> Rotherham The architects considered that they had left nothing relevant to suitability unspecified, they believed steel slag was suitable. Specification not left open to allow contractor to exercise skill and judgement, but because architect thought no further stipulations necessary.

<sup>4</sup> See cases such as Bickerton v. NW Metropolitan RHB [1970] 1 WLR 607 (HL). Nominated sub-contractor in liquidation. Contractor not liable to reimburse employer for costs of completion over and above the original sub-contract price and entitled to damages for delay in re-nomination, which the employer was obliged to make. The contractor had neither the right nor the duty to carry out the nominated sub-contract works.

- Management contracting. The client engages, in addition to consultants, a contractor (the management contractor) to advise on matters such as buildability and construction sequence and programme. In due course, the management contractor engages sub-contractors for specific packages of work in accordance with the programme; design of other packages continuing mean time. There is often some dilution of the management contractor's responsibility for the construction works. If so, direct contractual links need to be created between the employer and the sub-contractors or specialists.
- Construction management. Similar to management contracting. The client engages the works contractors and a construction manager to co-ordinate them. The construction manager is not directly responsible for the construction works.

### 3. Payment routes

The principal payment routes are as follows. They provide different balances of risk between employer and contractor, particularly as regards the cost of construction being greater than anticipated. It is usual to move away from lump sum where the quantity of the work cannot be readily predicted at the outset.

- Lump sum. The contractor is paid a fixed amount for the works. If the contract is entire (which is unusual, as instalment payments are generally provided for) the lump sum is payable on completion (substantial performance) of the works.<sup>5</sup> It may be difficult to identify what the works are: Are they as indicated on the drawings and specification, what if there is a bill of quantities?
- Measurement and value. The contractor is paid at the agreed rates for the works. The agreed rates are based on approximate quantities and the works are re-measured on completion.
- Cost plus. The contractor gets paid for the actual cost of its works plus an agreed percentage for its profit.
- Guaranteed Maximum Price (GMP). The intention is that the GMP sets the maximum sum payable for the works indicated in the contract documents. The intention is to put the risk of design development and unforeseen contingencies on the contractor, even though the scope may be poorly defined at the time of contracting. It does not apply if there are changes to the works. This can be a fertile area of dispute. Consider Mowlem v. Newton Street (2003) CILL 2002;<sup>6</sup> Skanska v. Egger (2003) CILL (1969).<sup>7</sup>

<sup>5</sup> See cases such as Appleby v. Myers (1867) LR 2CP 651, Hoenig v. Issacs [1952] 2 All ER 176, gets paid subject to an abatement for defective and incomplete work.

<sup>6</sup> Mowlem: Clause provided that the contractor accepted responsibility for "all risks, contingences and other matters influencing and affecting or which might influence or affect the carrying out of the works". Project concerned conversion of office to flats. Unexpected repairs required to the concrete frame. Court held that this risk lay with Mowlem.

<sup>7</sup> Skanska: Additional steelwork provided post contract was a design development, not a change in the Employer's Requirements. The tender

- Target Cost. The intention is to introduce a gain/pain share. Any saving on the Target Cost is shared between the Employer and the Contractor according to a contractual formulae. If the Target Cost is exceeded, the contractor does not recover the full amount of costs to which he would be entitled. Rather they are abated in accordance with a contractual formulae.

#### 4. **Extending protection to third parties**

The position of a purchaser of a development can be protected by assigning the benefit of the various contracts to that person, this may not always be possible or appropriate. In consequence, the principal method (at present) for extending protection to third parties that may suffer loss or damage if the project is defective is through collateral warranties. A warranty is a contractually binding promise given to a third party by a party to a contract (the warrantor) with another party (the principal), that the warrantor will perform its contractual obligations to the principal. The warranty is collateral because it is secondary and parasitic on the principal contract to which it relates. It is common on large development projects for warranties to be given by principal consultants, contractors and specialists in favour of funders and purchasers or major tenants. Warranties should not be confused with indemnities.

This may change as the construction industry adapts to the Contracts (Rights of Third Parties) Act 1999. This provides that a third party can enforce a term of a contract if it expressly states that the third party can or if the contract confers a benefit on that third party, unless the contract shows that the parties did not intend the term to be enforceable by the third party. The third party's rights are subject to the defences available to the contract parties, but the parties cannot vary or rescind the contract without the third party's agreement so as to affect its benefit.<sup>8</sup> At present, most contracts in the construction industry seek to exclude the operation of this Act.

#### 5. **Securing funds for remedial work**

Clear lines of responsibility are little use if there are no funds available when things go wrong. Apart from carrying out appropriate financial checks on those concerned, the principal methods for ensuring that funds are available to carry out remedial works and meet claims are by use of insurance or bonds (either performance or on demand, see Trafalgar House v. General Surety and Guarantee (1995) 73 Build L R 32).<sup>9</sup>

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drawings had indicated a need for steel and there was sufficient information to show that more detailed information would be provided post contract. What was shown on the post contract drawings did not constitute a design change.

<sup>8</sup> Probably this does not restrict exercising rights under the contract.

<sup>9</sup> Trafalgar House In that case held to be a performance bond. Proof of damage needed before liability. This may mean that the money is not available to complete the works, Paddington v. Technical & General [1999] BLR 244.

### Performance bonds<sup>10</sup>

A performance bond is a contractual undertaking by a third party (the bondsman/surety/guarantor) often, but not necessarily, an insurance company or parent company, to pay money to another person, the creditor, in the event that the person, the principal debtor, whose performance is being bonded, usually a contractor, fails to comply with its contractual obligations to the creditor. The amount of a performance bond will generally be calculated as a percentage (often 10%) of the value of the contract to which the bond relates. This sum is only payable on proof of default by the bonded party, and then only to the extent that the principal has suffered damage as a result of that default.<sup>11</sup>

### “On demand” bonds

Performance bonds can be contrasted with on demand bonds. An “on demand” bond can be called, not on proof of default by the principal debtor, but on the presentation to the bondsman, by the creditor, of documentation stipulated for in the bond. Banks prefer such bonds, as they do not have to investigate whether or not there has actually been a default, merely check that the correct documentation has been submitted.

Since a bond is, ordinarily, a promise by one person to answer for debt of another, it should be made or evidenced in writing, signed by the bondsman. If not, it will be rendered unenforceable by s. 4 of the Statute of Frauds 1677.

## **6. Securing funds through insurance**

Those engaged in the procurement process carry a range of insurance policies and these are often stated as a contractual requirement.

- Consultants generally carry professional indemnity insurance against the risk of claims against them in the course of their business and, in many cases, are required to carry such insurance by their professional bodies. Such insurance indemnifies the consultant both in respect of the costs of meeting claims arising out of its failure to perform services with reasonable skill, care and, possibly, diligence (failure to perform their professional duty) and for the costs incurred in defending such claims. It is generally written on a “claims made” basis.
- Consultants, contractors and specialists generally carry public liability insurance. The principal purpose of such insurance is to provide an indemnity in respect of damages payable because of accidental injury to persons or accidental loss or damage to property. It is usual for liability that would normally be covered by a professional indemnity policy to be excluded. As employers they must also, by law, carry employer’s liability insurance.

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<sup>10</sup> Insurance companies prefer performance bonds, banks on demand bonds. The language tends to be archaic and not compatible with the relevant construction contracts, see criticisms in **Paddington v. Technical & General** [1999] BLR 244. Note also the automatic determination on insolvency problem.

<sup>11</sup> See for example, **Paddington v. Technical & General** [1999] BLR 244.

- Contractors and specialists generally have contractor's all risks insurance. The principal purpose of such insurance is to provide an indemnity in respect of physical damage to the works being constructed, and related materials, caused other than by defects in design, workmanship or materials. Sometimes, however, the latter type of damage is not wholly excluded.
- Contractors and Specialists (particularly suppliers) normally carry insurance providing cover in respect of injury to persons or damage to other property due to failure of products supplied by the insured. This is arranged either as part of their public liability insurance policy or as a separate product liability policy. In either case, this insurance is concerned with damages payable in respect of injury to persons or loss or damage to property caused by products put into circulation by the insured, not with damage to those products, themselves. Such insurance is not, in consequence, a complete substitute for a professional indemnity policy, but it may be all that a specialist can obtain at an economic level.
- Project insurance may be available. This is taken out by the Client and is intended to provide an indemnity in respect of defects, including design and construction defects, in the Project. Such insurance only covers major elements, is likely to be expensive and have a high excess. It generally involves some waiver of subrogation rights. The insurer may wish to appoint someone to protect its interest during the course of the Project.

## **PART C: THE STATUTORY CONTEXT – IN OUTLINE**

### **1. Introduction**

The principal legislation relevant to the construction process is concerned with planning and building control, but there is also legislation concerned with health and safety and environmental protection. Criminal sanctions are imposed for non-compliance. There is also legislation concerned with procurement, defective work and materials, work affecting adjacent premises and dispute resolution. Some of this legislation is highlighted later in this seminar.

### **2. Planning legislation.**

The principal legislation concerned with planning is the Town and Country Planning act 1990, as amended by the Planning and Compensation Act 1991 and subsequent legalisation. The features of the system, which is administered by local planning authorities, are as follows.

- Development plans (strategy for development) are drawn up for each area.
- Development (including change of use) requires planning permission before it can be carried out.
- Procedures are laid down for applying for outline and final planning approval.
- Applications are considered in accordance with matters such as local and government planning policy and the relevant development plan. Approval can be given subject to conditions.
- Appeals from a refusal or the imposition of conditions can be made to the Secretary of State (generally dealt with by a planning inspector).

- A further appeal lies (by what is in effect judicial review) to the court.

### 3. Building legislation.

The principal legislation concerned with building control is the Building Act 1984 and the Building Regulations (2000), as amended. The features of the system, which is administered by approved persons (generally local authorities), are:

- The regulations, which are principally concerned with health and safety<sup>12</sup> in respect of buildings, deal with a number of matters ranging from structure, fire safety, resistance to moisture, and sound, ventilation, drainage, conservation of fuel and glazing.
- The regulations are generally described in functional terms. But “deemed to satisfy standards, expressed in quantitative terms, are set out in a range of “approved documents”.
- Those wishing to erect or extend or make material alterations to buildings must, in general, apply for and obtain building regulation approval for those works.
- The application can be passed or where the plans do not comply with the building regulations, rejected or passed subject to conditions requiring modification.
- Checks can be carried out during the course of construction to check compliance.

### 4. Health and Safety legislation

The principal legislation is the Health and Safety at Work Act 1974 and the regulations made under that Act. Such regulations concern matters such as scaffolding, machinery, material packaging and are outside the scope of this seminar. Of particular concern are the Construction (Design and Management) Regulations 2007, which impose various duties, some actionable in tort, on those involved in construction works, including designers, contractors and clients using such persons in the course or furtherance of a business.<sup>13</sup>

- The client’s (non delegable) principal duties<sup>14</sup> are to ensure that those it appoints are competent; there are suitable project management arrangements for health and safety in place and ensure that designers and contractors are provided with such information concerning the site, use of the project and time to be allowed to constructors for planning before start on site in the Client’s possession. In the

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<sup>12</sup> See The Building Regulations 1985, reg. 8 (no duty beyond this). Building Act 1984, s. 38 (creates civil liability, not yet in force). See also Tesco Stores v. Wards Construction (1995) Build LR 94. Purpose not referable to the protection of property or chattels. Store burnt down, omission of fire barriers. No duty of care owed by council, in approving drawings to ensure regulations complied with, so no damage to property caused to owners or occupiers.

<sup>13</sup> Thus domestic homeowners procuring work on their own homes appear to be exempt.

<sup>14</sup> Clients are regarded by the HSE as one of the major forces that can prevent accidents – their attitude to health and safety is important and guides the whole project: Eg Kevin Myers, former chief inspector of construction for the HSE: “To an extent clients kill people. Too often in this industry best value is seen as the cheapest job possible. Pressure is immediately put on contractors to cut corners and that goes down the supply chain.”

case of a notifiable project,<sup>15</sup> to appoint the Principal Contractor and CDM Co-ordinator; provide health and safety information to the CDM Co-ordinator as soon as possible; ensure that, so far as reasonably practical, work does not begin on site if a health and safety plan hasn't been prepared; ensure the information in the health and safety file is up to date; ensure that the construction phase does not start unless the Principal Contractor has prepared a construction phase plan which is sufficient to enable the construction work to start without risk to health or safety.

- The CDM Co-ordinator's principal duties are to ensure the project is notified to the HSE; ensure the design refers to health and safety management and has adequate information regarding the structure and materials; ensure co-ordination between designers; give adequate advice to Clients regarding competence of contractors; ensure preparation of the health and safety file and that this is delivered to the Client on completion of the project; advise and assist the Client in its compliance with the Regulations; co-ordinate co-operation between designers and contractors in relation to design or any change in design during the construction phase; gather in and communicate information; advise the Client about competence and resources.
- Designers principal duties are to advise Clients as to their duties (this includes checking that a CDM Co-ordinator has been appointed and the project notified); to ensure that all designs have regard to the need to avoid any foreseeable risks to health and safety of anyone involved in the construction, cleaning of the structure or anyone who may be affected by the work of such person (for example, the public, there is also an express duty to consider the health and safety of end users in offices, shops and other workplaces); try to combat these risks at source; give priority to measures for protecting those involved in construction, cleaning and those who may be affected; ensure any design gives adequate information about any aspect of the structure which may affect those involved in the construction, cleaning or those affected by this; cooperate with the CDM Co-ordinator (including providing information necessary for the health and safety file), if any, and any other designers.
- The principal contractor's (can also be the CDM Co-ordinator) principal duties are to prepare a construction phase plan before the start of the construction phase; take reasonable steps to ensure co-operation between all contractors; ensure so far as possible that all contractors comply with the health and safety plan; provide the CDM Co-ordinator with all information which he will require to put in the health and safety file; ensure all contractors are provided with all information regarding health and safety risks and that each contractor passes on this information to its employees. The new Regulations make clear that the principal contractor has key roles on ensuring that construction work is carried out, so far as reasonably practical, safely and without risk to health. It must also manage, plan and monitor its own risk and consult the workforce and make available to them site surveys etc; that all contractors are informed of the amount of time that will be allowed for planning and preparation before they begin work.

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<sup>15</sup> A project is notifiable if the construction phase is likely to involve more than (a) 30 days; or (b) 500 person days of construction work.

If design changes and decisions during the construction phase have significant health implications, liaise with the CDM Co-ordinator about any implications for the construction phase plan.

- Contractors' principal duties are not to carry out construction work unless the client is aware of its duties under the Regulations; to plan, manage and monitor its work to ensure, so far as practical, that it is carried out without risk to health and safety, to ensure that its sub-contractors are informed of the time available for planning and preparation before they begin work, to provide training for workers to enable their work to be carried safely without risk to health; to take reasonable steps to prevent unauthorised access to site. In the case of a notifiable project, a contractor has further duties are to cooperate with the principal contractor; to provide the principal contractor with all the information which may affect the health and safety of construction workers or those who may be affected by construction work; to provide all information the principal contractor would expect to be included in the health and safety file; not allow any employee to work unless he knows the name of the CDM Co-ordinator and principal contractor and has a copy of the health and safety plan.
- The completed health and safety file should be provided to those who subsequently acquire an interest in the project.

## **5. Environmental legislation**

The principal environmental legislation affecting the construction industry is as follows.

- Controls over waste management provided for in part 2 of the Environmental Protection Act 1990. Controls over contaminated land are provided for in the Environment Act 1995.
- Controls over air pollution (including integrated pollution control) in part 1 of the Environmental Protection Act 1990.
- Controls over water pollution in the Water Resources Act 1991.

These controls are administered by the Environment Agency. Other relevant legislation includes the Water Industry Act 1991 (discharges to drains and sewers), the Control of Pollution (Amendment) Act 1989 (carriage of waste) and the Control of Pollution Act 1974 (noise from construction sites and machines).

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**SESSION 2: OBLIGATIONS IN CONTRACT AND TORT**

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**INTRODUCTION**

In this section of number of, mostly, common law principles relevant to the procurement of buildings are considered. Knowledge of the general law of contract, tort and property, is assumed.

**PART A: CONTRACT – ISSUES**

The contractual liabilities of those involved in the procurement of construction projects depend principally on the terms of the agreements they conclude. Nevertheless, there are few matters that merit special consideration.

**1. Contract formation**

The principal difficulties that can occur in this area concern tenders, letters of intent and the battle of forms. Questions of illegality can also arise.

Tenders

A contract may be concluded when an invitation to tender is followed by a conforming tender, Blackpool & Fylde Aero Club v. Blackpool BC [1990] 1 WLR 1195 (CA).<sup>16</sup> See also Harmon v. House of Commons (1999) 67 Con LR 1,<sup>17</sup> discussed in Craig (2003) Const LJ 237.

There may be statutory controls over the tender process under the various EU Directives and consequent Regulations concerned with procurement of public works. These provide for the advertising of contracts above a certain value, the prohibition of technical specifications in contract documents that favour particular providers and

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<sup>16</sup> **Blackpool** Invitation to tender usually no more than an offer to receive bids, but could give rise to binding obligations. Here, although not expressly stated, it was clear that there was a contractual obligation to consider the tender in conjunction with others. Liable since failed to do so, staff did not empty letter box in time for it to be considered.

<sup>17</sup> **Harmon**: Where public sector employer invites competitive tenders, contract comes into existence under which it undertakes to treat all (compliant??) tenders fairly. Harmon was held in breach of this obligation also in breach of the relevant procurement directives. Court also held, as a matter of causation that but for these breaches Harmon would have been awarded the contract. Thus could recover the cost of preparing the tender as damages (£500,000). Court also held that, in principle, its damages could be assessed by reference to the loss of its anticipated gross margin or profit.

require the application of objective criteria when evaluating and awarding such contracts.<sup>18</sup>

### Letters of intent

A letter of intent generally states an intention to contract in the future, but creates no liability in respect of that further contract. Depending on the wording it may give rise to an obligation to pay a *quantum meruit* for work requested, if provided, it may create an immediately binding ancillary contract for certain works or may give rise to an “if” contract, which only comes into force if the requested work is commenced, British Steel v. Cleveland Bridge [1984] 1 All ER 504.<sup>19</sup>

A good recent example is ERDC Group v. Brunel University [2006] BLR 255 (TCC)<sup>20</sup> where a series of capped letters of intent were issued but work continued to completion after the last of these. The contractor claimed a *quantum meruit*, the employer contended that valuation was governed by the intended contract provisions and rates. Also employer advanced a counterclaim for breaches occurring after the expiry of the last letter of intent (in September 2002).

### Battle of forms

Negotiations for construction contracts, particularly at the sub-contract level and below may continue for extended periods. The question of when, if at all, a contract is concluded, whether by agreement or conduct, and what terms apply, can involve

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<sup>18</sup> Rights under the relevant legislation, eg the Public Service Contracts Regulations 1993 are subject to short time bars (3 months), see for example, Morton Communications v. Home Office [1999] BLR 112.

<sup>19</sup> British Steel Letter of intent asked for work to proceed immediately, pending preparation and issue of a form of sub-contract which at the time still in negotiation. So no “if contract” either, terms to uncertain. Hence entitled to reasonable price, and no possibility of a counterclaim for delay. Note also Monk Construction v. Norwich Union (1992) Build LR 107 (CA). Letter authorised maximum sum to be expended on enabling works pending conclusion of contract, whole job built. Entitled to quantum meruit on work done outside terms of letter. Note: Jarvis v. Galliard [2000] BLR 33 (CA), even if the letter of intent looks as though it could give rise to a contract, words such as “subject to concluding a formal contract” read in the context of a preliminaries clause that require the contract to be by deed may operate in a similar manner to the words “subject to contract”. But contrast Stent Foundations v. Tarmac Construction, (1999) 78 Const LR 188 (CA) “until final documents available” not construed in this way.

<sup>20</sup> ERDC: Prior to the 1<sup>st</sup> September 2002 (the last letter of intent) a clear intention to create legal relations, thus a series of contracts each superseding the previous one, up to that date. Work was to be valued using the relevant rates and prices. After 1<sup>st</sup> September 2002, there was a move to a non-contractual basis, but, on unusual facts of the case, not right to switch from claimant’s rates to valuation based entirely on claimant’s costs, had continued to apply for payment based on rates, rates were reasonable. While something might have to be added, if project took longer than allowed for in the rates and prices, for costs incurred due to prolonged execution of the works, the paying party was not required to pay for delay or inefficiency. Counterclaim failed, as no contract in place at time of alleged breaches.

extensive analysis of the communications between the parties in the light of when work actually commenced. Consider Butler Machine Tool v. Ex-Cell-O Corp [1979] 1 WLR 401 (CA); Percy Trentham v. Archital Luxfer [1993] 1 Lloyd's Rep 25 (CA).<sup>21</sup>

### Illegality

Contractors or consultants are occasionally engaged on the basis that they will be paid in cash. Such arrangements will be illegal and the contract unenforceable by either party, if intended to defraud the revenue (tax) or customs and excise (VAT).

## **2. Assignment and sub-contracting**

The normal legal principles of assignment apply. Benefits can be assigned in contract law, not burdens, although the latter can be vicariously performed (sub-contracted).

### Assignment

Only contractual benefits can be assigned. Contractual prohibitions on assignment will be effective; Linden Garden Trust v. Lenesta Sludge Disposals [1994] 1 AC 85 (HL).<sup>22</sup>

### Vicarious performance

Vicarious performance (sub-contracting) does not generally relieve the original contracting party of its obligations. This is so even where the obligation is one of skill and care and an apparently competent person is used/engaged for the design work in question, consider Moresk Cleaners Ltd v. Hicks [1966] 2 Lloyd's Rep 338.<sup>23</sup> On the other hand, a designer's obligation may be discharged by exercising skill and care in the choice of components that involve no "in context" design.

Many standard form contracts include restrictions on sub-contracting. Breach of such provisions does not invalidate the sub-contract but may give an entitlement in damages.<sup>24</sup>

### Client designated sub-contractors

Sub-contractors are sometimes designated by the client (commonly referred to as nomination or naming). By restricting the Contractor's freedom to construct the works as it wishes, the Client may be at risk if the designated sub-contractor defaults,

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<sup>21</sup> Percy Trentham Where transaction fully executed, contract came into existence during performance even if could not be precisely analysed in terms of offer and acceptance. The correspondence, in itself, did not establish this but payment was made by instalments and works completed though negotiations never concluded.

<sup>22</sup> Linden Gardens Contractual bar on assignment without consent, valid, assignment void as between original contract parties.

<sup>23</sup> Moresk Design involved reinforced concrete structure on slope, designer relied on contractor for design. If design entrusted to architect, employer can look to architect to see that building properly designed. Architect has no power to delegate duty to any one else, certainly not a contractor. If architect not able to design part of the works. Three choices. It can say, not my field. It can ask employer to employ a specialist consultant to deal with that aspect of the matter. Or, while retaining responsibility, it can seek appropriate advice and assistance from a third party, paying him out of own pocket, with knowledge that if goes wrong, and sued, can sue third party.

<sup>24</sup> John Young v. The Rugby Group, 19<sup>th</sup> December 2000 (lawtel).

particularly if it fails to complete the works and another sub-contractor has to be engaged. The issues are considered in cases such as Bickerton v North West MRHB [1969] 1 All ER 977 (CA).<sup>25</sup>

### Novation

If contractual burdens are to be transferred, this must be by agreement between the original contracting parties and the third person that is to assume the relevant obligations. A true novation extinguishes (rescinds) the original contract and replaces it with a new contract.

Novation is sometimes used in the design and build procurement route to ensure that the client's designers are responsible to the contractor for completing the design<sup>26</sup> but with some obligations to the original client retained. There is great scope for conflicts of interest in such an arrangement and it may, as in Blyth & Blyth v. Carillion (2002) 79 Con LR 142<sup>27</sup> (Scotland), not amount to a true novation.

### 3. Privity of contract

The Contracts (Rights of Third Parties) Act 1999 has implications for the devising of contractual relationships for the procurement of construction projects. The current position favoured by contract drafting bodies is to exclude its operation.

- Themis Avaamides v. Mark Colwill [2007] BLR 76 (CA). The third party must be expressly identified either individually or as a member of an identified class or by description within the meaning of s. 1(3) of the Act, to have rights under the contract.<sup>28</sup>

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<sup>25</sup> Bickerton: Employer bore the risk, in terms of additional cost and delay, of arranging a new nomination, under JCT 1963. Consider also Percy Bilton v. GLC [1982] 1 WLR 794 (HL), also concerned with JCT 63. The new nomination was invalid if it did not include work necessary to remedy defects in the original sub-contractor's work. More recent versions of this contract contain complex machinery for such occurrences.

<sup>26</sup> For further discussion of this type of arrangement see Try Build Ltd v. Invecta [1999] 71 Con LR 140.

<sup>27</sup> Blyth: The "Novation" Agreement did not amount to a full rescission of the original contract, some residual rights remained; but it provided that the liability of the designer both before and after assignment would be owed to the contractor. Held, on construction, that this agreement did not give contractor a right to recover damages suffered by it for breach of the consultant's agreement prior to novation, since original client had not suffered damage. Note: It was accepted by Carillion that the novation agreement operated more like an assignment than a true novation.

<sup>28</sup> Themis: The relevant part of the agreement under which the defendants purchased the company's assets (the company being in contract with the claimants) merely referred to the purchaser agreeing to settle the current liabilities of the company. Albeit an earlier part of the clause referred to completing outstanding orders of the company's customers, the CA was not prepared to construe the general reference to liabilities as referring to the customers. Thus the agreement did not give the claimants, to whom the company had a liability, a claim under the C(RTP)A (it appears that exceptions to the rule of Privity will be construed narrowly).

#### 4. Contract terms

Contracts concerned with the procurement of construction projects are, generally, subject to a number of implied terms. There may also be statutory terms for payment and dispute resolution.

##### Contracts for consultant services

That the consultant will perform the services to be provided with reasonable skill and care (and diligence) and in a reasonable time (see also the Supply of Goods and Services Act 1982, Part II). See George Hawkins v. Chrysler (UK) Ltd (1986) 38 BLR 36 (CA).<sup>29</sup>

That the client will not hinder or prevent the consultant from performing its obligations.

##### Contracts for construction work

As regards goods and materials: That goods and materials will be of satisfactory quality and, if the employer reasonably relies on the contractor's expertise in selecting them, that they will be reasonably fit for the purpose for which they are to be used (see the Supply of Goods and Services Act 1982, Part I, as amended). The necessary reliance is unlikely to be found where the employer has engaged a designer. Consider Young & Marten v. McManus Childs [1969] AC 454 (HL);<sup>30</sup> see Rotherham MBC v. Haslam Milan & Co Ltd (1996) 78 Build LR 1 (CA).<sup>31</sup>

As regards workmanship: That the work will be done with all proper (reasonable) skill and care (see also the Supply of Goods and Services Act 1982, Part II). This duty includes a duty to warn of known design defects in the work being constructed.<sup>32</sup>

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<sup>29</sup> **Hawkins:** A designer's duty did not extend to warranting fitness for purpose. This contrasts with the higher duty of a person designing and constructing, who owes a duty to ensure that the product is reasonably fit for the purpose of which it is intended.

<sup>30</sup> **Young & Martin** Roofers purchased and installed Somerset 13 tiles, a type suggested by the developer of the houses concerned. After installation failed because of latent manufacturing defect. Although the fitness for purpose term excluded, the merchantable quality term not excluded and these tiles not merchantable.

<sup>31</sup> **Rotherham:** The specification provided for granular hardcore to be stone, etc, slag or a combination. Steel slag used, expanded, cracked floors. There was no implied term of fitness for purpose since, although the purpose made known, freedom of choice was not given to contractor to enable it to exercise skill and judgement in choice of material but because architect believed no further stipulations necessary. The term allowing for inspection and sampling by architect, did not show reliance by employer on contractor, the reliance was on the architect, and his expertise and knowledge, not on the contractor. Also the selection of materials was part of the overall design which, in this case, was the responsibility of the architect. There was an implied term of merchantability, but satisfied since slag used was fit for some of the purposes within the description under which it was sold and saleable under that description without abatement of price, e.g. hardcore for road building.

<sup>32</sup> See for example, Plant Construction v. Clive Adams [2000] BLR 137 (CA). It is not clear if this duty extends to a duty to warn of

Note also the employer's duties: That it will not hinder or prevent the contractor from performing the contract; where there is an independent certifier, not to hinder or interfere with the latter's exercise of its certifying duties, that it will do all that is necessary on its part to bring about completion of the contract by, for instance, giving possession of the site within a reasonable time and, if appropriate, obtaining necessary planning permissions and Building Regulations consents.

#### Contracts for design and construction work

Where the employer reasonably relies on the contractor's skill and judgement, that not just the goods and materials used, but the completed building will be fit for the particular purpose for which it was intended; Graves & Co Ltd v. Baynham Meikle [1975] 1 WLR 1095 (CA).<sup>33</sup>

Note also Co-operative Insurance Society Ltd v Henry Boot Scotland Ltd (2002) EWHC 1270 (TCC). Unless the contract provides otherwise (see JCT WCD05) an obligation to complete a design includes examining the design at the point at which responsibility is taken over, assessing the assumptions upon which it was based and forming an opinion whether those assumptions were appropriate.

#### Contracts with a builder for the purchase of a dwelling to be constructed, or in the course of construction by that builder

That the builder will do its work in a good and workmanlike manner, that he will supply good and proper materials; and that the dwelling will be reasonably fit for human habitation, Hancock v. Brazier (Anerley) Ltd [1966] 1 WLR 1317 (CA).<sup>34</sup> This is an exception to the *caveat emptor* rule, generally applicable to contracts for the sale of real property. (Note: Many new dwellings are sold by builders/developers with express warranties along these lines backed by insurance, such as that available through the NHBC).

#### Contracts for the purchase of goods

That the goods will be of satisfactory quality and, if there is reasonable reliance on the supplier's expertise in selecting them, that the goods will be reasonably fit for the

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defects that ought to have been identified by a reasonably competent contractor.

<sup>33</sup> Graves & Co Floors cracked because of use of fork lift trucks. Since owners made known the purpose for which building required and relied on contractor's skill and judgement to provide a package deal for warehouse, the duty of the contractor was to see that the finished work was reasonably fit for purpose, not merely to use skill and care. As for the sub-contractor engineers, in this case common intention was that they would design a project fit for purpose. Even if their only obligation was one of skill and care, here it was clear that a new mode of construction was being used, and vibration noted as a problem in BS Circular. Failed to take account of this, thus breach of duty.

<sup>34</sup> Hancock That the builder will do work in good and workmanlike manner, that he will supply good and proper materials and that the dwelling will be reasonably fit for habitation. This duty encompasses the whole dwelling as well as its parts, including parts constructed before the sale. There is no such duty if the dwelling has been completed before the sale.

purpose for which they are to be used (see the Supply of Goods Act 1979, as amended). The necessary reliance is unlikely to be found where the goods are specified by a designer.

#### Terms as to payment and dispute resolution

In most cases payment is dealt with expressly but, in the absence of an express term, contracts with contractors and consultants will be subject to an implied obligation to pay a reasonable price and, in the absence of a contract, an obligation to pay for work and/or materials requested on a *quantum meruit* basis.

The Housing Grants, Construction and Regeneration Act 1996, Part II, requires any construction contract in writing, other than those entered into with a residential occupier for work on their own dwelling, to contain specific provisions concerning dispute resolution (adjudication) and the method and timing of payments into construction contracts. The Act achieves this by providing that if the parties do not expressly include such terms in their contract, the relevant provisions in the Scheme for Construction Contracts 1998 are implied into the contract.

The Act also invalidates “pay when pay” clauses and gives a statutory right to suspend performance upon notice for non-payment of sums due.

For the purpose of Part II of the Act a construction contract is a contract for construction operations. Construction operations are widely defined and include most building and engineering works as well as professional services relating to such works.

## 5. Exemption clauses

Exemption clauses are more common in consultants’ agreements<sup>35</sup> than in construction contracts, the latter being often drafted by consensus bodies such as the JCT. Exemption clauses may be found in bespoke construction contracts but, in the case of consumer contracts these may be difficult to enforce and may give rise to criminal sanctions, for instance if they purport to exclude the implied terms of quality under the Sale of Goods Act 1979 or the Supply of Goods Act 1982.

Provisions that make certain types of decision or certificates conclusive may be found in certain standard form construction contracts.<sup>36</sup> Risk allocation and insurance provisions in construction contracts may also have a similar effect to exemption clauses. Consider, for example, the JCT joint names insurance regime Co-operative Retail Services v. Taylor Young [2002] 1 WLR 1419 (HL).<sup>37</sup> But note Tyco v. Rolls

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<sup>35</sup> Common exemption clauses in consultants’ agreements include clauses seeking to limit the period during which claims can be made and the maximum amount that can be claimed, and net contribution clauses, which seek to modify the common law of joint and several liability. It is surprising that such terms have not attracted the attention of the Office of Fair Trading.

<sup>36</sup> See, for example, Barking v. Terrapin [2000] BLR 479. The final certificate issued under the then standard form of contract JCT WCD 1981 was conclusive as to materials and workmanship but not design, being to the satisfaction of the Employer.

<sup>37</sup> Co-operative Services: The insurance provisions in JCT 80 precluded a claim in respect of fire against the contractor and sub-contractor, both because of the requirement to insure in the joint names of the

Royce [2008] BLR 285 (CA), para 77ff, where Rix LJ, probably *obiter*, suggested that a provision for joint names insurance may well influence the construction of the contract, but if the underlying contract indicates that one co-assured may be liable to another, there is nothing in the doctrine of subrogation to prevent it from proceeding against the other to recover the insurance proceeds in the absence of an express ouster of the right of subrogation.

Exemption clauses are more likely to survive the relevant statutory controls (the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1994 or 1999)<sup>38</sup> if they have been individually negotiated, alternatives are offered and they are drafted with regard to available insurance.

## 6. Certificates and certifiers

Many construction contracts, particularly those entered into with employers, provide for the contract to be administered by an Architect, Engineer or other contract administrator. It used to be considered that the function of such a person was, at least under the standard form engineering and building contracts, to determine rather than give effect to the rights of the parties and that the decisions of such a person were binding on the parties other than were expressly stated to be subject to review by a contractual mechanism such as arbitration, Northern Regional Health Authority v. Crouch [1984] QB 644 (CA). This view has now been discredited and Crouch overruled by Beaufort Developments v. Gilbert Ash [1998] 88 Build LR 1 (HL).

The current view is that, in the absence of clear words to the contrary (see for instance JCT provisions relating to the Final Certificate), the role of the contract administrator is to give effect to the parties' rights on an interim basis and his decisions and certificates are not binding in subsequent proceedings.

In exercising their certification functions (including if exercising a review function, eg under ICE, clause 66) contract administrators have to act independently and honestly and fairly, but what is fair is flexible and tempered to the particular facts and occasion. A certifier's decision does not have to be reached by a judicial process (in accordance with the dictates of natural justice, hearing both sides); Amec v. S of S for Transport [2005] BLR 227 (CA).<sup>39</sup>

In other respects contract administrators act as the agent of their employers; Consideration should be given to whether there is to be a role for a contract administrator (agent or independent); Merton LB v. Leach (1985) 32 Build LR 51; but note Beaufort Developments v. Gilbert-Ash [1998] 88 Build LR 1 (HL).<sup>40</sup> For a recent example, where

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parties and on construction of the provisions relating to the contractor's obligations in the event of fire.

<sup>38</sup> The new regulations cover a wider range of contracts but the consumer must still be an individual person.

<sup>39</sup> Amec: The CA held that there was no difference in these respects between an Engineer's certification functions under the ICE conditions and his review functions under clause 66. Also his position was not the same as an adjudicator.

<sup>40</sup> Merton Architect acts as agent when supplying contractor with drawings, instructions, levels, and the like and in supervising the progress of the works and seeing that it is properly executed. To the

the contract was to be administered by a construction manager, and this view of his dual functions confirmed, see Scheldebouw v. St James's Homes [2006] BLR 113 (TCC).<sup>41</sup>

## 7. Limitation Issues

Depending on whether or not the contract is a simple contract or entered into by deed, the period in which proceedings must generally be brought is either six years or twelve years from date of breach. There are a number of ways used to postpone the date from which the limitation period runs.

### The duty to review

In the case of a designer the original breach will occur when the design is first produced but, were the designer is engaged throughout the project, there is a continuing duty to review that design at least until it is constructed, possibly until substantial completion of the works. Thus the limitation period in a claim against a designer may, depending on the terms of its contract and the circumstances, run from substantial completion of the works or the termination of its contract, if earlier, New Islington & Hackney HA v. Pollard Thomas [2001] BLR 74 (TCC) (but note the duty to review is not of the same character as the duty owed in respect of the initial design, since the duty to review only arises if something makes a review necessary or prudent).<sup>42</sup>

### Deliberate concealment

In the case of a contractor, work will be progressively covered up thus, in the case of defective work it may be possible to postpone the commencement of the limitation period by establishing deliberate concealment of a fact relevant to the claimant's cause

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extent that the architect performs these duties, the employer contracts that the architect will perform them with reasonable diligence, skill and care. But where the contract confers on the architect discretionary powers which he must exercise with due regard to interests of contractor and employer, latter does not undertake that he will exercise those powers reasonably, rather than he will leave him free to exercise his discretion fairly and without improper interference. Beaufort suggests that may be an agent in all cases?

<sup>41</sup> Scheldebouw: The employer's construction manager's contention that the construction manager was there entirely as its agent and to project is agent, with no obligation to act independently and impartially, was rejected, he did, in exercising decision making functions, have to act fairly and impartially, using his professional skills and best endeavours to reach the right decision, as opposed to a decision that favours the interest of his employer. Note the judge also held that the contract did not permit St James to replace the original contract manager with itself.

<sup>42</sup> New Islington: Alleged lack of sound insulation in properties designed by Defendant. Found on the facts and under RIBA Form that there was a continuing duty to review design up to Practical Completion, but not after that date. Cause of action accrued not on knowledge of defect but when fault existed, this was when properties handed over on Practical Completion. Claimant had knowledge more than 3 years before proceedings commenced so s. 14A Limitation Act 1980 did not assist. Note also Thameside MBC v. Barlows [2001] BLR 113 (CA). In the case of an action against builder for damages for defective houses the limitation period commenced on the date of delivery to or possession by the employer since it is only then that the employer could make a claim.

of action (s. 32(1)(b) Limitation Act 1980).<sup>43</sup> The generally accepted view is that something more than merely getting on with shoddy work is required to establish deliberate concealment, something unconscionable, William Hill v. Bernard Sunley [1982] 22 Build LR 1.<sup>44</sup> See now, Cave v. Robinson Jarvis [2002] 2 WLR 1107 (HL).<sup>45</sup>

### Temporary disconformity

In the case of defects occurring during the course of construction, Kay & Hosier v. Dickenson [1972] 1 WLR 146 (HL), Lord Diplock, 165 provides support for a temporary disconformity theory, that there is no breach until completion. The argument being that it is unrealistic and unfair to treat every disconformity, however, short lived-as a breach of contract potentially sounding in damages. The scope of this doctrine is, however, somewhat unclear. It was not accepted to be of universal application by Roskill LJ in Lintest Builders. v. Roberts [1980] 13 BLR 38. Also, in many cases, the obligation is to carry out as well as to complete the works in accordance with the stated standards: Nene Housing Society v. National Westminster Bank [1980] 16 BLR 22 (TCC).

But note Shawton Engineering v. DGP [2006] BLR 1: “Where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach.” Although not referred to this suggests some sympathy for the temporary disconformity doctrine.

Also note, ANM Group v. Gilcomston [2008] BLR 481 (OHCS, Scotland) where the this doctrine was applied to postpone the commencement of the limitation period for a claim against a contractor to the date of the final certificate (probably not good law in England).

## **8. Property rights passing by contract**

Contracts relating to construction projects may provide for the transfer or use of various property rights.

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<sup>43</sup> **Section 32(1) (b):** Where any fact relevant to the Plaintiff's right of action had been deliberately concealed from him by the Defendant. Section 32(2). Deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment.

<sup>44</sup> **William Hill v. Bernard Sunley** Under the previous legislation deliberate concealment was regarded as closely akin to fraud. It appeared that this link was broken in **Brocklesby**. See for an example of what was regarded as necessary, **Gray v. TP Bennett** [1987] 43 Build LR 63 where the court was satisfied that the work had been deliberately organised to conceal the hacking off of concrete nibs from the employer's inspectors, the Architect/Engineer.

<sup>45</sup> **Cave:** Lord Millett identified two situations, where a person took active steps to conceal a breach of duty after he became aware of it, and where there was deliberate wrongdoing by a person and he concealed or failed to disclose it in circumstances where it unlikely to be discovered for some time. Lord Scott did not consider that the statute needed embellishment. Deliberate was to be contrasted with a breach that was not deliberate, inadvertent, accidental, unintended.

### Rights in goods and materials

Property in goods and materials supplied under a construction contract will, in the absence of express terms to the contrary, pass to the employer at the time that they are worked into the building. Property in those materials will have passed to the contractor under the relevant sub-contract or supply contract in accordance with the intention of the parties to that contract. In the case of supply contracts, the Sale of Goods Act 1979, as amended, contains provisions to determine when property passed (although commonly overridden by Romalpa (retention of title) clauses in supply contracts) and, see s.25,<sup>46</sup> to enable the contractor, as buyer in possession with the consent of the seller, to give good title to the employer when payment is made under the main contract. See P5 Ltd v. Unite Integrated Solutions [2006] BLR 150.<sup>47</sup>

These provisions do not, however, apply to contracts for work and materials, these being governed by the Supply of Goods and Services Act 1982, as amended, which says nothing about the passing of property.

### Copyright

A consultant has copyright in his work, such as drawings and models, see the Copyright, Designs and Patents Act 1988. Subject to any express or implied agreement to the contrary, a consultant can prevent, by injunction, the unauthorised copying of that work, such as by repeating the design in some other building. It can also claim damages or an account of profits. It is usual, however, for contracts with designers to contain express provisions giving the employer a licence to use the designs for constructing the project and, as necessary, in connection with its subsequent maintenance or alteration. Problems can occur where the consultant is engaged to provide a partial service, see for example Stovin-Bradford v. Volpoint Properties Ltd [1971] 1 Ch 1007 (CA).<sup>48</sup>

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<sup>46</sup> Section 25 SGA, s. 9 Factors Act 1889. Delivery or sale of goods by a person, who has bought or agreed to buy those goods them, and who has obtained, with the original seller's consent, possession of the goods, to a person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, is effective to transfer title to that person.

<sup>47</sup> **P4 Ltd**: P4 supplied equipment to Tudor (apparently under a contract of sale) subject to terms including a retention of title clause. Tudor was a subcontractor to Unite under DOM/1. Before P4 paid, Tudor became insolvent, Tudor had not, apparently, been paid by Unite. Held, although there was a delivery and agreement agreed disposition of the equipment to Unite within the meaning of s. 25(1) SGA (see s. 9 Factors Act 1889), s. 25(1) only provided protection if there was a sale or other disposition (eg. payment was made), not where there was an agreement for a sale or other disposition.

<sup>48</sup> **Stovin Bradford** Architect agreed to carry out design work to obtain planning approval. Nominal fee compared with full service fee (100 Guineas). Held: there was an implied licence to make use of drawings for planning, but no implication of a licence to use drawings for erecting a building. It may be that the licence only takes effect on payment, **Blair v. Osbourne & Tomkins** [1971] 2 QB 78, 85 (CA).

### The consultant's lien

The client will, unless the contract provides otherwise, have property in the documents the consultant prepares, other than internal working documents. But the consultant may exercise a lien on such material against payment of its fees and expenses.

## **PART B: TORT - ISSUES**

### **1. Liabilities in negligence – imposing a duty of care**

The normal principles of liability apply. The application of the tests for imposing of a duty (foreseeability, proximity and justice and reasonableness) can cause difficulties. This is because, in the case of damage to property, it can be difficult to categorise the type of harm, and because the law is reluctant to allow claims in negligence to short circuit carefully structured contractual relationships.

#### Identifying the category of harm

In general, it is easier to establish a duty in respect of damage to property than in respect of damage to economic interests (pure economic loss). But, in the case of a defective construction project, the harm can be regarded either as damage to property or as economic loss. The distinction depends, principally, on the concept of “other property” and “the complex structure theory”, Murphy v. Brentwood [1991] 1 AC 398, although the requirement for “ownership” may also be relevant, Delaware Mansions v. Westminster CC (1998) 88 Build LR 99<sup>49</sup> (now see [2000] BLR 1 (CA). But note, on the continuing nuisance point, [2002] BLR 25 (HL)).

Once the relevant category of harm is identified, consideration must be given to the appropriate proximity test.

- In the case of damage to persons or property this is usually established by the physical proximity of the parties or physical proximity at the time of damage between the defective thing, put into circulation by the defendant, and the claimant or its property.
- In the case of economic harm, this requires reliance and reasonableness of reliance on statements, Caparo Industries v. Dickman [1990] 2 AC 605, or voluntary assumption of responsibility, Henderson v. Merrett Syndicates [1994] 3 WLR 761.

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<sup>49</sup> Delaware Westminster had duty in respect of tree roots, breached when adopted reduced tree pruning regime. But any damage occurred before Flecksun became freeholder, and had taken no assignment from previous owner, so can only sue if further damage during its ownership. The position was similar in nuisance (but nuisance continuing after property interest acquired). Delaware, the management company, did not, however, have sufficient proprietary interest in the building for a claim in nuisance or negligence, Leigh and Sullivan v. Aliakmon [1986] 1 AC 785; Canary Warf Ltd v Hunter [1997] 2 WLR 684 applied.

Consider cases such as Bellefield Computer v. E Turner & Sons Ltd [2000] BLR 97 (CA)<sup>50</sup> (physical damage); Machin v. Adams [1997] 84 Build LR 79 (pure economic loss);<sup>51</sup> Baxall Securities Ltd v. Sheard Walshaw [2001] BLR 36 (physical damage);<sup>52</sup> see [2002] BLR 100 (CA) (CA differed from the judge on causation). Note also Payne v. John Setchell [2002] BLR 489, 513ff<sup>53</sup> (pure economic loss). Note, Baxall was

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<sup>50</sup> **Bellefield**: Builder constructed industrial building. Fire separating wall between two parts of building negligently constructed and did not extend full height. Purchaser of building suffered damage when fire spread from one side of building to the other, both to building and contents. Held: Fact that one side of building used for different purpose from other, did not make other property from other side of building, but could recover loss caused by fire damage to contents, not building itself as no duty owed in respect of pure economic loss. Other property rule a policy issue.

<sup>51</sup> **Machin**: Machin agreed to purchase property being extended, contract provided for the issue of a final certificate by the architect. The architect knew that property to be sold, and that his client needed a letter indicating the extent of the works, he knew or must have known would be shown to someone else. Letter said works satisfactory standard to date, two weeks left to complete. Did he owe duty of care in negligence to purchaser shown letter. Held, no reliance by Ms Machin, and did not owe duty of care because ignorant of purpose for which advice in letter required by Ms Machin, thus no assumption of responsibility and, because anticipated would return to site to certify completion, could not anticipate that Ms Machin would rely on letter to take irrevocable step. Need for a connecting thread between purpose for which advice given and the action which an advisee who relies on it takes, and therefore with the damages the advisee suffers. Here no such thread, could not say from what harm the architect was to be regarded as having undertaken to guard the purchaser.

<sup>52</sup> **Baxall v. Sheard**: Defective design/ supervision of roof drainage by defendant, Architect - two faults, should have noticed overflows omitted, system undersized. Claimant takes lease after having property surveyed. Subsequent flood due to lack of overflows and blockage. Second flood due to undersized system and no overflows. Liable for damage to goods stored in premises due to second flood because of undersized system (latent defect) a material cause. Not liable for first flood because a reasonable possibility of discovery of defect on inspection. No liability for works necessary to correct defects in the roof system itself. Court of Appeal did not disagree with the legal principles adopted, but concluded, as a matter of causation, that the reason for both floods was the same, the lack of overflows - thus no liability for either occurrence. But note, this case doubted in Pearson Education Ltd v. Charter Partnership Ltd [2007] EWCA Civ 130. In that case CA held that Architects were liable to the claimant lessees of a warehouse in circumstances where the architect's negligent design of the rainwater drainage system had led to a flood that caused the claimant substantial financial loss. An earlier flood, of which the claimant was not aware, was not enough to place the claimant outside the range of any duty of care owed to it by the architects and it did not break the chain of causation between the architect's want of care and the damage caused.

<sup>53</sup> **Payne**: Architect engaged to provide designs for terraced properties including foundations. At end of work provided letter to client, Mr Wright, dated October 1998, certifying that work was carried out to its satisfaction. Held, the purpose of providing the letter was to provide the then owner with a document that could be used to satisfy a

applied but the reasoning questioned, in Pearson Education v. The Charter Partnership [2007] BLR 324 (CA).<sup>54</sup>

#### Claims that short-circuit the contractual matrix

The requirement that the imposition of a duty must be just and reasonable will, coupled with the proximity test, generally precludes duties to avoid economic loss that cut across or are intended to augment contractual obligations, see discussion of Junior Books v. Vetchi [1983] 1 AC 520 in Henderson v. Merrett Syndicates,<sup>55</sup> consider also Pacific Associates Inc. v. Baxter [1990] 1 QB 993 (CA).<sup>56</sup>

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prospective purchaser that the foundations could be treated as having been soundly build to a satisfactory design (Defendant accepted this in evidence). The document was intended to be seen and relied on by a prospective purchaser who might come on the scene at any time after 1998. Thus defendant had duty in law not only to Mr Wright but to subsequent purchasers and those likely to lend money secured on the house to take care that the statements were reliable. The judge remarked *obiter* that the duty was not indefinite in time, could be regarded as owed 10 years, since the certificate was to be treated as tantamount to NHBC cover (well there you go!!!).

<sup>54</sup> **Pearson**: Defendant's specification for roof drainage system inadequate. Flood occurred in mid 1990s causing damage to stock of lessee of warehouse IBD. Loss adjusters knew system inadequate, but did not advise IBD. Lease and other assets of IBD transferred to Pearson in 2000. Further flood because of incapacity of the drainage system in 2002, caused £2 million damage to Pearson's stock. Held: Defect was latent, thus applying Baxall, Defendant was liable to Pearson in negligence. CA held that the fact that a third party became aware of a latent defect did not make that defect patent to other who neither knew or ought to know of the discovery. CA said that the Baxall principle that where it was reasonable to expect an occupier to inspect the property before entering into occupation, no duty of care would be owed in respect of any defect such an inspection should disclose, alternatively that failure to carry out such an inspection, broke the chain of causation, merited consideration by the HL.

<sup>55</sup> **Henderson**: Two relationships Direct Names employ managing agent (but limitation problems). Indirect Names are members of a syndicate (employ Members' Agent). The Members' Agent employs a Managing Agent. No contract between managing agent (negligent) and names. Existence of contractual right not inconsistent with co-existence of right in tort, but agreement of parties can modify shape of duties in tort which, in absence of contact would be available. Managing agents owed duty of care to names, had voluntarily assumed responsibility for provision of underwriting services (under this head the just and reasonableness requirement less important) and there was concomitant reliance. But have to ask whether assumption of responsibility is consistent with the contractual matrix. Not usually in the case of building contract works.

<sup>56</sup> **Pacific Associates**: Fact that employer in contract with builder as well as engineer relevant to finding that no duty of care owed by engineer to builder. Builder's claim is against the employer. A recent example of the same principle can be seen in RM Turton v. Kerslake [2000] Lloyd's Rep PN 967 (NZCA). Heating system negligently under specified by engineer engaged by Architect. Contractor engaged to construct works including the specified system. Contractor held liable to employer when system failed. Could Contractor recover from engineer in negligence. Held not just and reasonable to impose a duty

## 2. Liabilities in negligence – other considerations

There are a number of considerations to be born in mind, other than the principles relevant to establishing a duty of care, when considering the potential liability in negligence of those involved in the procuring of construction works.

### Liability of employers

Provided that reasonably competent consultants and contractors are engaged, the general rule is that an employer is not liable for the torts of independent contractors. There are, however, a number of exceptions relevant to construction. These are usually classified under the heading of extra hazardous activities and include work on or near party walls (eg Alcock v. Wraith [1991] 59 Build LR 16)<sup>57</sup> and work on highways. But now see Biffa Ltd v. Maschnefabrak [2009] BLR 1 (CA)<sup>58</sup> where the court took a narrow view of this doctrine, seeking to restrict it to activities that were inherently or exceptionally dangerous, whatever precautions were taken, as opposed to those, like welding, that were only dangerous if proper precautions weren't taken.

### Liability of consultants

A consultant generally owes concurrent duties in negligence and in contract to his client but there is doubt as to whether this duty is limited to damage to persons and other property; contrast Storey v. Charles Church (1997) 13 Const LJ with Samuel Payne v. John Setchell [2002] BLR 489 (both TCC).<sup>59</sup> A consultant also owes a duty of care to those whose person or property might, foreseeably, be injured or damaged because of defects in its work. Duties of care to third parties to avoid financial harm (pure economic loss) will be more difficult to establish (in general there will be insufficient proximity).

### Liabilities of contractors (builders)

A contractor will owe a duty of care in negligence to those whose person or property might, foreseeably, be injured or damaged because of defects in his work. A contractor will not generally owe a duty of care in negligence to avoid financial harm (pure

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in such circumstances, inconsistent with the contractual matrix. (Only in Canada has such a claim succeeded).

<sup>57</sup> **Alcock:** Work by a builder on a party wall, causing damp and dry rot in next door property.

<sup>58</sup> **Biffa:** The authority in which the extra hazardous doctrine was developed, Honeywill v. Larkin [1934] 1 KB 191 (CA) was described as anomalous. It might not survive a HL challenge. The CA also confirmed that, in deciding whether someone was an employee, supervision should not be equated with control, ie control over the manner in which the work was executed. Only where there was control was there an employer/employee relationship. Not the case here where one person (OT) engaged another, Pickfords, to provide welding over a weekend, the welders providing their own equipment, and having their own foreman to supervise and Pickfords, not OT, deciding how many to bring.

<sup>59</sup> In Storey the judge considered that the concurrent duty included pure economic loss. In Payne, the judge considered that such a view was inconsistent with the reasoning in Murphy v. Brentwood, and that the concurrent duty only extended to damage to persons and other property(!).

economic loss) to third parties.<sup>60</sup> Defects in the project constructed by the contractor will, because of the “other property rule”, usually be regarded as pure economic loss, see Murphy v. Brentwood [1991] AC 398.

#### Liabilities of valuers

A valuer engaged by, or on behalf of an intending purchaser of small residential property, will generally owe a duty of care in negligence to that intending purchaser to avoid causing him financial harm (pure economic loss) due to defects in the work provided, even where the valuer is engaged by a third party, such as a mortgage company, see Smith v. Eric Bush [1990] 1 AC 851. Subject to statutory control, this duty can be limited or excluded by appropriately worded exemption clauses. Damages for breach of that duty will be quantified on a difference in value basis.

#### Exemption and risk allocation clauses

The interrelationship between the imposition of a duty of care in negligence and an exemption clause in a contract to which either the tortfeasor or the claimant is a party, but not both, raises a number of complex issues concerned with the question of reliance and the allocation of risk. Consider British Telecommunications Plc v. James Thompson, [1999] BLR 35 (HL);<sup>61</sup> Smith v. Eric Bush [1990] 1 AC 831 (HL).<sup>62</sup>

#### Statute of limitations

The availability of a remedy in the tort of negligence will be statute barred if a claim is not brought within the periods allowed by the Limitation Act 1980, as amended by the Latent Damage Act 1986. In addition to the normal 6 years from cause of action, a claim may be brought within 3 years of, to paraphrase, “reasonable discoverability”;<sup>63</sup> provided that, in

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<sup>60</sup> It is possible that a contractor does owe a concurrent duty of care in negligence to its employer by analogy with Henderson.

<sup>61</sup> British Telecommunications (Employer sought to sue domestic sub-contractor) Held by the Scottish court that it was not just and reasonable to allow employer to sue the domestic where the employer had an insurance obligation for the kind of harm suffered under the main contract. Reversed by HL (note employer insured the risk of such an occurrence, but domestic sub-contractor was not within the ambit of the joint names policy). See also, National Trust v. Haden Young Ltd (1994) 77 Build LR 1 (CA). Insurance provisions in MW80 did not allocate risk so could sue sub-contractor in negligence where it had set fire to the existing premises. Consider Co-op Retail Services v. Taylor Young [2002] BLR 64. The obligation to include a person within a joint names policy appears to allocate risk for that person’s default to the insuring party.

<sup>62</sup> Smith Reliance by P on D’s (valuer to Mortgage Company) expertise despite exclusion clause in D’s contract with Mortgage Company and Mortgage Company not being liable to P. Despite clause, reliance and reasonableness of reliance, so proximate relationship and a duty of care owed.

<sup>63</sup> **Section 14A: Reasonable discoverability:**

"(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above [the three year period from “reasonable discoverability”] is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

either case, claims cannot be brought more than 15 years after the date of the act or omission complained of (the long stop). The test for "reasonable discoverability is not at all clear: See Harris Springs v. Howes [2008] BLR 229 (TCC) and commentary.

The facts of Pirelli General Cable Works Ltd. v. Oscar Faber & Partners [1983] 2 AC 1 (HL) illustrate how these rules might work in practise, but the decision in that case, as to when damage occurs, is problematic because it would now be characterised as an economic loss case and was not followed by the Privy Council; Invercargill CC v. Hamlin [1996] 2 WLR 367 (PC).<sup>64</sup> See the discussion in Abott v. Will Gannon [2005] BLR 195 (CA).<sup>65</sup>

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- (6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both -
- (a) of the material facts about the damage in respect of which damages are claimed; and
  - (b) of the other facts relevant to the current action mentioned in subsection (8) below.
- (7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
- (8) The other facts referred to in subsection (6)(b) above are -
- (a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence;...
- (9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.
- (10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire-
- (a) from facts observable or ascertainable by him; or
  - (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;
- but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

The leading case on this is Haward v. Fawcetts [2006] 1 WLR 682 (HL)

<sup>64</sup> **Pirrelli:** (Note first instance judge's finding that appellants had been negligent in passing the design of the chimney was not challenged). Cause of action in tort for negligence design or construction of a building accrues when damage came into existence, here when cracking occurred in the chimney, not when it was discovered or should with reasonable diligence have been discovered (but what if a pure economic loss claim, as suggested in Murphy). **Invercargill:** PC accepted that in NZ local authorities did have a duty to take reasonable care during their inspection of new dwellings. In the particular context of latent damage to a building, the plaintiff's claim was for economic loss, not physical damage, Such loss only occurred when the market value of the house was depreciated by reason of the defective foundation having been discovered. The measure of loss being cost of repair, if reasonable to repair, or depreciation in market value, if not. Pirelli was doubted.

<sup>65</sup> **Abott:** Although concerned with whether Pirelli was correct, CA regarded it as binding, and did not have to consider whether the claim was a physical damage or an pure economic loss claim. Thus, held that

### Statutory transfer or causes of action in negligence

Note, s. 3 of the Latent Damage Act 1986. Where a cause of action in negligence has accrued to a person in respect of damage to property, and another person acquires an interest in that property before the material facts about the damage have become known to a person with any interest in that property, a fresh cause of action accrues to that other person on the date he acquires his interest. This provision was considered in Payne v. John Setchell [2002] BLR 489.<sup>66</sup>

### **3. Liabilities in nuisance**

Building operations inevitably cause some inconvenience to neighbours, but will not amount to a nuisance in law provided they are reasonably carried out and all proper and reasonable steps are taken to ensure that no undue inconvenience is caused to neighbours, for instance, by noise and dust. This qualification to the normal principles of nuisance does not apply if reasonably foreseeable physical damage is caused to neighbouring property or reasonably foreseeable interference with their property rights (such as easements).

Construction operations that cause material damage to other property, Midland Bank Plc. v. Bargrove Property Services (1992) 60 BLR 1,<sup>67</sup> or that interfere with natural rights of support for adjoining land, or with the property rights of adjoining owners, such as rights of light, rights of way, or rights of support, will be actionable in nuisance.

In most cases, a claim can be made both against the employer and the contractor. An injunction as well as damages can be claimed.

### **4. Liabilities in trespass**

Where building operations intrude onto or over other land, those responsible will be liable in trespass to the owner of that land. An injunction as well as damages can be claimed. But note, as regards the maintenance of property from adjacent land, the provisions of the Access to Neighbouring Land Act 1992 and, as regards work on party walls, the provisions of the Party Wall, etc Act 1996.

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the cause of action accrued, in regard to negligent structural advice and design, when cracks occurred in the bay window built in accordance with that advice/design. CA said, *obiter*, that even if Invercargill was applied, "and the claimants' cause of action accrued at the time they suffered economic loss, I do not accept Mr Holwill's submission that this occurred in March 1997. The defective design had not caused any loss at that time. It would only do so when it manifested itself in some way which would affect the value of the building, measured either by the cost of repairs or depreciation in market value."

<sup>66</sup> **Payne**: The judge doubted that a cause of action for pure economic loss could transfer under this provision, since it was not a claim for damage to property.

<sup>67</sup> **Midland Bank**: Defective retaining wall constructed by D on its land. Would cause loss of support in due course, P took matter into own hands, repaired. No physical damage. No recovery. Should have applied for *qui timet* injunction. But it may be necessary to show actual danger, not just a reasonable perception of danger to succeed, Birmingham v. Tyler [2008] BLR 445 (CA).

## 5. The Defective Premises Act 1972

There is under this Act a statutory duty, actionable in damages, to see that work taken in connection with the provision of (including conversion to) a dwelling is done in a workmanlike manner or a professional manner, as appropriate, with proper materials and so that as regards that work the building will be fit for habitation when completed. The duty is owed by a person who takes on such work for example, developers, suppliers of goods, local authorities and possibly DIY enthusiasts. If engaged in the business of undertaking that work the duty encompasses the work of sub-contractors engaged by that person. The duty is owed to the person commissioning the works and to any person who acquires an interest (legal or equitable) in the dwelling.

The scope of the Act is narrow. "Provision of a dwelling" does not encompass rectification works to an existing dwelling, Andrews v Schooling [1993] 1 All ER 723 (CA). Also, the gist of the action is unfitness for habitation at date of completion, Thompson v. Clive Alexander and Partners (1992) CILL 755. There is a limited defence for those who follow instructions.

The test for unfitness for habitation was considered in detail in Bole v. Huntsbuild Ltd [2009] EWHC 483 (TCC); [2009] WLR (D) 98;<sup>68</sup> defective foundations rendered a dwelling unfit for habitation at completion even though it was subsequently lived in.

The limitation period is six years from the date the dwelling was completed or, in the case of further work carried out by a person to rectify his earlier work, six years from the time that work is finished (s. 1(5)); see Avril Alderson v. Beetham Organisation [2003] BLR 217 (CA).<sup>69</sup>

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<sup>68</sup> **Boyle:** Whether a property was unfit for habitation was a matter of fact in each case. The Housing Act 1985 s.604(1) provided a useful checklist as to the type of defects that might be fundamental enough to render a property unfit for habitation. Unfitness extended to non-minor "defects of quality" rendering the dwelling unsuitable for purpose as well as to dangerous defects. A property could be unfit for habitation even if the defects only applied to part of it. The DPA would apply to such defects even if their effect was not evident at the time the dwelling was completed. The defects had to be considered as a whole. In the instant case, the defects reached category 4 of the BRE Digest scale of seriousness and significant underpinning was required.

<sup>69</sup> **Avril:** Beetham the developer converted premises to dwellings. Work done defectively. Damp due to inadequate damp-proofing so uninhabitable on completion, but that more than 6 years before claim brought. Beetham also carried out remedial work in a good and workmanlike manner but because of mis-diagnosis of the problem did not cure the damp. This work completed less than 6 years before the action. Held that the intention of Parliament was to give a fresh cause of action to provide a dwelling fit for habitation if the further work did not rectify the original work as intended. No doubt the further action is only in respect of the further work, but that work is for the purpose of rectifying the original work. Thus damages were based for the failure to rectify the original work.

**COURSE FOR BPP PROFESSIONAL EDUCATION**  
**CONSTRUCTION LAW – BASIC PRINCIPLES**

**SESSION 3: CONSTRUCTION DISPUTES AND THEIR RESOLUTION**

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**SECTION A: TYPES OF CONSTRUCTION DISPUTE**

Construction disputes generally concern claims for payment, claims for loss and expense caused by delays or disruption during design and/or construction, or claims for damages due to defects in the completed works, sometimes all of these.

**1. Claims for payment**

Apart from the action in debt, the common law provides little in the way of remedies for non-payment of amounts due under a construction contract or professional services agreement. Failure to pay, unless persistent is not, generally, a repudiatory breach, justifying termination of the contract by the other party.

The position is now modified by Part II of the Housing Grants, etc. Act 1996 which provides that a party to a construction contract who is not paid sums due to it by the final date for payment of those sums can, on seven days notice suspend its obligations under the contract until such time as it is paid. The act also invalidates “pay when pay” clauses other than in cases of insolvency.

Abatement, set-off and counterclaim

Claims for payment are often resisted on the basis that the services or work provided was defective or that the party seeking payment is, itself, in breach some other obligation under the contract. Such allegations can amount to an abatement, a set off and/or a counterclaim.

The difference between these concepts has its roots in pre 1875 Judicature Act procedure. Put briefly:

- An abatement is an allegation that, because of defects, the services or work supplied are not worth the contract price and that, in consequence, less, or nothing should be payable for those services. Loss caused by delay in the work does not amount to an abatement, consider Mellows v. Bell Projects (1998) 87 Build LR 26.
- A set off is an allegation that the claimant is itself in breach of some obligation under the contract, causing damage to the defendant, and that it is only just that in equity both the claimant’s and the defendant’s cross-claim should be considered in the same proceedings, their being one judgement to the net winner, see Hanak v. Green [1958] 2 QB 9.

- A counter-claim is an allegation that the claimant is in breach of some obligation to the defendant that can, under the rules of court, be brought in the same proceedings as the claimant's claim. Many counterclaims can be relied on as a set-off or abatement. But this is not always the case. For example a claim under a separate contract with the claimant, or an allegation of breach of contract relied on to resist a claim on a cheque, do not give rise to a set off.

#### Statutory controls over counterclaims

If Part II of the Housing Grants, etc Act 1996 applies to the relevant contract,<sup>70</sup> the right to resist claims for payment by consultants or contractors by relying on counterclaim, set-off or, possibly, abatement is severely curtailed. The allegations relied on to resist payment must have been the subject of a "notice of withholding" issued within the contractual or statutory period for issuing such notices. If not, the claimant will be entitled to summary judgement on his claim, and the respondent's allegations will be sent for trial or arbitration, as the case may be.<sup>71</sup>

## 2. **Delay claims (time) and disruption and prolongation claims (money)**

It is important to distinguish between the time and the money consequence of delay and disruption claims.

#### Practical completion and substantial completion

Certain contracts, principally JCT Standard Forms, refer to Practical Completion. For a consideration of what this means see, for example Jarvis v. Westminster Corporation [1970] 1 WLR 637; Kaye v. Hosier & Dickinson [1972] 1 WLR 146, 165.<sup>72</sup> Other contracts (eg ICE Standard Forms) adopt a more flexible concept of what is necessary to achieve completion. See also the common law concept of substantial completion; Hoenig v. Isaccs [1952] 2All ER 176 (CA).<sup>73</sup>

#### Delay claims

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<sup>70</sup> Section 104(1): A construction contract is an agreement with a person for any of the following: (a) The carrying out of construction operations; (b) Arranging for the carrying out of construction operations by others, whether by sub-contract to him or otherwise; (c) Providing his own labour, or the labour of others, for the carrying out of construction operations. Construction operations are defined in s. 105. The contract must also be in writing, s. 107, and must not principally relate to operations on a dwelling (a house or flat) that one of the parties occupies or intends to occupy as his residence.

<sup>71</sup> See also common law position. Clear words needed to exclude remedies, Gilbert Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd (1972) 1 Build LR 73.

<sup>72</sup> **Jarvis** Probably can be practically complete despite latent defects. But not if patent defects, given the purpose of the maintenance period (substantial performance concept displaced?). All the construction work to be done must be done. Now JCT standard form contracts also make a link between Practical Completion and the provision of information for the health and safety file.

<sup>73</sup> **Hoenig**: In the case of an entire contract, the contractor is entitled to payment where the work is substantially finished, even if defective (including incomplete) in certain respects, an abatement of the price being allowed for the defects. One test is to ask whether the work is effective for its primary purpose. If not, it is not substantially complete?

A delay claim is ordinarily a claim for more time to complete, brought under the express terms of the contract. The contention is that because of delays caused by events which entitle the contractor to more time under the contract (generally events for which the employer is responsible, but other “neutral” events may be included, the completion date of the contract should be extended.

Concurrent delays (one compensatable the other not) can cause problems. The general principle is that in such as case the contractor gets time, thus relief from liquidated damages, but not money, but note City Inn v. Shepherd Construction [2008] BLR 269 (OHCS, Scotland) where it was held that these ridged principles of causation were disposed by the express wording of the (JCT) contract which, in the case of extensions of time, required them to be fair and reasonable (it is doubtful if this reflects the law of England and Wales).

In the absence of a contractual mechanism to extend time, a contractor may be able to resist a claim for damages for late completion on the grounds that, because of acts or omissions for which the employer is responsible, it was prevented from completing its works by the completion date; Multiplex Construction v. Honeywell Control Systems [2007] BLR 195.<sup>74</sup> If such an argument succeeds, the employer cannot rely on the contract completion date as founding a claim in damages. Instead the contractor has a reasonable period to complete its work, and is only in breach of contract if that period expires without the works being completed.

A good review of some of the problems associated with delay claims is found in Balfour Beatty v. Chestermount Properties (1993) Build LR 1.<sup>75</sup> See also the Society of Construction Law Delay and Disruption Protocol.

#### Making time of the essence

For a consideration of the problems that arise where there is no fixed (and extendible) time to complete; see Sawton Engineering v. DGP International [2006] BLR 1 (CA).<sup>76</sup> A notice making time of the essence can only be issued if there is a breach at that time; the contractor can only be legitimately determined for delay if such a notice period has elapsed or if the contractor’s failure to complete within a reasonable period of time was a

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<sup>74</sup> Multiplex: The acts or omissions need not be defaults, the principle applies to legitimate acts as well, but in either case it must be shown that they prevented completion on the due date. The court also said that ambiguities in an extension of time clause should be resolved in favour of it allowing legitimate extensions of time and suggested that loss of an entitlement to more time through non-compliance with time limits for making a claim did not put time at large.

<sup>75</sup> Balfour Beatty: The problems discussed concern the effect of acts of prevention not encompassed by an extension of time clause, on the contract date for completion (time at large). How relevant events occurring during a period of culpable delay should be dealt with (the net extension method). The issue is how many days should be added to the completion date, not by what date should the contractor have completed. Concurrent causes (relevant and irrelevant) can also be a problem. The better view is that the contractor gets an extension, but no prolongation costs. It’s all to do with burden of proof.

<sup>76</sup> Sawton: the originally agreed fixed period, work content, variations, all are relevant in deciding what a reasonable period is.

fundamental breach. To establish what a reasonable time was, it is necessary to consider at the time that the question arose, all the relevant circumstances.

#### Condition precedents and delay claims

It is common for extension of time machinery in contracts to include provision for contractor to give notice of delays. If expressed as a condition precedent to an entitlement to more time, the question arises whether failure to give the notice in respect of an employer fault event puts time at large under the prevention principle. This was accepted in Australia in Gaymark v. Walter Construction [1999] NTSC 143 (NSW) but was doubted by Jackson J in Multiplex v. Honeywell [2007] EWHC 447 (TCC).

#### Disruption and prolongation claims

If a consultant or contractor is disrupted in carrying out its works, this may give rise to a claim either in damages, if a breach of contract can be shown, or for a contractual payment, if the reasons for the disruption are matters that give rise to such an entitlement. Where the disruption delays the completion of the work in question, such a claim is often referred to as a prolongation claim.

A prolongation claim can also provide a consultant or contractor with a defence to a claim against it for damages for delayed completion of its work. This defence will be based either on the grounds that the contract provides for an extension to the contract period in such circumstances (an extension of time claim) or, if it does not, that the defendant has been prevented from completing by the contractual date because of circumstances for which the claimant is responsible and, thus, it is entitled to a reasonable time to complete its works. This is sometimes referred to as “time being at large”.

Because of the possibility that a number of different occurrences will be responsible for any delay or disruption alleged, including the inefficiencies of the person carrying out the works in question, it can be extremely difficult to prove causation and damage by linking a particular occurrence with particular financial and time consequences. In consequence global claims are common, see discussion in British Airways v. McAlpine (1994) 72 Build LR 26.<sup>77</sup> See also the discussion of such claims in John Doyle v. Laing Management [2002] BLR 393 (Scotland).<sup>78</sup>

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<sup>77</sup> British Airways The approach of seeking to force a party to individualise occurrence and damage was rejected. A global claim can be advanced. The problem is also discussed in Merton v. Leach (1985) 32 Build LR 51. What is alleged in a global claim is that the work ought reasonably to have cost fx. In fact it cost fy. The only explanation for the difference is the occurrences relied on by the Claimant. Such a claim can be attacked by showing that the premises are not correct or that there were other occurrences which could have resulted in the cost overrun or, usually following cross-examination, that there is no evidence that any of the matters relied on had any cost consequences.

<sup>78</sup> John Doyle: Global claims could be defeated by showing that an event for which the defendant was not responsible played a part in causing the global loss or made a material contribution to the global loss. But failure of the global claim did not necessarily mean that no claim would succeed because there may be sufficient evidence to apportion individual losses to individual events for which the defendant was

These difficulties are compounded in multi-party cases where it is sought to establish that failures by one party, usually a consultant, are responsible for the claimant having to make payments to another party, usually a contractor.

### 3. Defects in the services or the works

The usual principles of causation and remoteness of damage, together with the usual defences, apply.

#### Loss and damage

The ordinary measure of loss is cost of rectification but damages may also be recoverable for inconvenience and discomfort, but seldom distress. In cases, usually concerning subjective of aesthetic complaints, where the court is satisfied that the contract has been performed to a substantial extent, it may consider that the cost of rectification is wholly disproportionate and, if diminution in value cannot be shown, award damages on a loss of amenity measure, not cost of rectification; Ruxley Electronics v. Forsyth [1995] 3 WLR 118 (HL).

#### Mitigation and betterment

The claimant must mitigate its loss and failure to exercise a contractual remedy may affect the level of damages as in Pearce v. Baxter [1999] BLR 101 (CA).<sup>79</sup>

Alternative quotations for any remedial work are desirable. Betterment issues can also arise, and credit may have to be given if the original cost of construction, to the client, would have been higher had the design not been defective. In consequence, full records should be kept of the condition of the premises before any remedial work is done and of the work itself and the steps taken to ensure that it was reasonable in the circumstances.<sup>80</sup>

#### Proving a loss without property

Problems can arise where the employer either does not have, or sells its interest in the land where the project is being constructed, particularly if there is a prohibition on assignment in the relevant contracts. Consider Linden Garden Trust v. Lenesta Sludge Disposals [1994] 1 AC 85 (HL);<sup>81</sup> Darlington BC v. Wiltshire Northern. (1994) 69 Build LR 1 (CA);<sup>82</sup> Alfred McAlpine v. Panatown [2000] BLR 331 (HL).<sup>83</sup>

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responsible. Furthermore, in considering causation a common sense view had to be taken.

<sup>79</sup> Pearce A refusal to allow contractor to remedy defects or to give instruction to do so, restricts damages to cost contractor would have incurred in remedying them. Note different relationship between completion and maintenance period in JCT contracts and ICE contracts.

<sup>80</sup> Skandia Property v. Thames Water [1999] BLR 338 (CA), if work beyond reinstatement undertaken, must be reasonable and follow proper advice. Here replacement of full waterproofing system not recoverable, no proper investigations carried out.

<sup>81</sup> Linden Gardens Contractual bar on assignment without consent, valid, assignment void as between original contract parties. In the McAlpine case, breach and damage occurred after the employer, St Martin, had sold the property and purported to give assignment. Held: St Martin could recover real damages, even though no property interest at date of breach since knew at time of contract formation was going to be

#### 4. Tax and VAT considerations

The incidence of tax and VAT should not be overlooked in deciding what amounts are to be claimed in debt or damages.

#### 5. Problems with multi-party proceedings

Two problems are frequently encountered in multi party proceedings. The first concerns the status of compromises between two parties in proceedings between one of those parties and a third party. The second concerns the availability or otherwise of rights of contribution under the Civil Liability (Contribution) Act 1978.

##### Settlement

A settlement between two parties is, under the principle in Biggin v. Permanite [1951] 2 KB 314 (CA), generally admissible as evidence as to the quantum of the claim in proceedings between one of those parties and a third party, and may be relevant as the measure of loss under the second limb of Hadley v. Baxendale.<sup>84</sup>

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occupied, possibly purchased by third parties, not by St Martin, and no automatic acquisition of rights against purchaser on acquisition, the Albazero [1977] AC 744, principle applied.

<sup>82</sup> Darlington: Darlington agreed with Morgan Grenfell, who did not own property, that latter would be employer under building contract for construction of the Dolphin Centre, Wiltshire was the contractor. At the end of construction, rights under the contracts were to be assigned to Darlington. After completion defects emerged, the rights were assigned to Darlington. Did Darlington have a claim for real damages? Yes applying the St Martins (Albazero) principle (which doesn't really work since Morgan Grenfell never had property). The court also discussed the possibility of Morgan Grenfell having a performance interest, which could be compensated.

<sup>83</sup> Panatown Employer did not own land on which building to be constructed and no interest in that land (different companies in the same group). Building alleged to be defective: could employer recover substantial damages? Discussion of the narrow ground of liability (Albazero principle - under which the consignee's loss is attributed to the consignor where it is in the contemplation of the contracting parties that property would pass from the consignor after contract formation in circumstances where the consignee would not have direct rights against the ship-owner. The consignor is treated as having contracted on behalf of those who will acquire an interest. The consignor must account to such persons for the damages recovered). Also a broad ground of liability was identified (the performance interest). This was that a person who engaged person to provide work and materials and did not receive the contracted for performance suffered a loss, at least where intended to pay for the remedial works. Consideration of whether the duty of care agreement by contractor to the land owner affected these principles. Yes, because neither principle applied where the parties contemplated a direct claim between landowner and contractor.

<sup>84</sup> The settlement is not evidence as to liability see Biggin v. Permanite [1951] 2 KB 314 (CA), discussed in P&O Developments v. Guy's & St Thomas's NHST [1999] BLR 2. There can be problems with apportioning the settlement between the various defendants if the settlement is not apportionable between them; Brompton v. Hammond and Lerche [1999] BLR 162.

Note Lubermans Mutual v. Bovis [2004] EWHC 2197 (Comm.),<sup>85</sup> where, because of the absence of any method of calculation in a global settlement, Bovis was unable to recover from its insurers in respect of what it said were sums allowed in that settlement in respect of employer's claims against it which were encompassed by the policy.

### Contribution

Contribution is only recoverable between those responsible to the same person for the same damage; consider BICC Ltd v. Parkinson [2002] BLR 64<sup>86</sup> (CA). In the matrix of liabilities that occur in complex construction projects, this may not always be easy to establish.

- There must be a basis of liability, Co-operative Retail Services v. Taylor Young [2002] 1 WLR 1419 (HL).<sup>87</sup>

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<sup>85</sup> **Lubermans:** Bovis was employed as contractor by Braehead to construct a retail and leisure centre. Disputes arose. Bovis claimed some £37 million as due from Braehead. Braehead counterclaimed for damages of between £75 and £103 million for alleged mismanagement of the project, defective work and liquidated damages. The disputes were settled by an agreement under which Braehead paid £15 million to Bovis. The method of calculation of that global sum was not identified. Bovis was insured by Lubermans under a construction, engineering and design professional liability policy and a commercial excess liability policy. Bovis claimed £19 million from Lubermans on the basis that this was the amount of Braehead's valid counterclaim and that the £15 million payment was the result of setting off £19 million due to Braehead against Bovis's entitlement to £32 million and costs from Braehead. Held: (1) It was an implied term of a contract of indemnity in the form of a liability policy that it was an essential element of the insured's cause of action that his loss had been specifically ascertained by means of a judgment, arbitration award or settlement agreement. (2) In law, an insured who relied on a settlement as a means of ascertainment had to prove by extrinsic evidence that he was in truth under a liability insured by the policy and that what he paid by way of settlement of that liability was reasonable. Therefore a settlement agreement deficient in not identifying the loss suffered specifically by reference to the insured liability could not amount to a valid ascertainment. The court could not open up a global settlement and evaluate for reasonableness the insured's own assessments of the amounts allocated to each claim against the insured. If the agreement did not specifically identify the cost to the insured of discharge of the claim or claims said to be within the scope of the cover, the ascertainment of the relevant loss to the assured could not be supplied by extrinsic evidence whether objectively or subjectively evaluated. Accordingly the global settlement agreement in the instant case did not satisfy the requirement of ascertainment of loss under the liability insurance policies since it did not impose on the insured any identifiable loss in respect of any identifiable insured eventuality. That conclusion was not contrary to the public policy of encouraging settlement of claims.

<sup>86</sup> **BICC:** Defects in containment bund to contaminated soil, leading to continuing water ingress. This was caused both by design and construction. It was the same damage for the purpose of the Act. As designed and constructed, the bund was ineffective to keep water out.

<sup>87</sup> **Co-operative Services:** The insurance provisions in JCT 80 precluded a claim in respect of fire against the contractor and sub-contractor.

- Liability must be for the same damage; Royal Brompton Hospital v. Hammond [2002] 1 WLR 1397 (HL).<sup>88</sup>
- Liability must be owed to the same person; Birse Construction v. Haste (1996) 1 WLR 675 (CA).<sup>89</sup>

## 6. Contractual remedies and procedures

In addition to a party's common law rights, contracts used in the construction industry, particularly standard form construction contracts, often provide for express rights, either in addition to or in substitution for common law rights.

- The right of the employer to carry out work at the contractor's expense where the contractor has failed to carry out such work, despite being instructed to do so under the contract. Note Bath and North East Somerset DC v. Mowlem [2004] BLR 153 (CA) where an interim injunction was granted restraining Mowlem from denying access to the site to a contractor engaged pursuant to such a provision.
- The right of the employer to deduct or claim damages at an agreed rate (usually called liquidated and ascertained damages) where the contractor fails to complete its works within the agreed contract period, including any extensions awarded under the contract. The agreed rate must be stated in the contract and must be a genuine estimate of the employer's likely loss, not a penalty.
- The right of the contractor to claim extensions to the contract period where prevented from completing by circumstances outside its control (in more complex contracts a list of events entitling an extension may be given).
- The right of the contractor to recover payment for instructed variations to its work in accordance with a pre-determined set of rules (this being one of the reasons why a bill of quantities or schedule of rates is included in the contract).<sup>90</sup>

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Thus the consultant sued by the employer in respect of the same damage could not bring contribution proceedings against that contractor and sub-contractor. Note the similar conclusion reached in respect of IFC 84 in Scottish & Newcastle v. GD Construction [2003] BLR 131 (CA).

<sup>88</sup> **Royal Brompton:** Claim, in arbitration for delay, against TW, compromised. Claim against consultant was for negligent over certification of extension of time. Could Consultant claim contribution from TW. Not the same damage. Basis of consultant's liability was diminution of chance of success of resisting claim by contractor. Basis of contractor's liability was damages for delay). The "same damage" did not include damage that was not the same, but was substantially and materially similar.

<sup>89</sup> **Birse:** A subcontractor sued by a contractor in respect of a claim by the employer for defective work, was not entitled to bring contribution proceedings against the engineer alleged to be liable to the employer for the same damage. The liability was not to the same person.

<sup>90</sup> How is the cost of the varied work assessed? This is one of the purposes of including a bill of quantities, see Henry Boot v, Alstom [2000] BLR 247 (CA).

- The right of the contractor to claim further payments (often referred to as loss and expense) where disrupted or delayed in carrying out the works because of matters for which the employer, or those engaged on his behalf, are responsible.
- The right of either party to “determine the employment of the contractor” where the other party commits a specified default. In the case of the employer, this usually includes non-payment or interference in the decisions of the contract administrator. In the case of the contractor, this usually includes failure to proceed regularly and diligently with the works or suspending the works without reason. Unlike termination for repudiatory breach at common law, the contract continues in existence to determine the parties’ rights. If a new contractor is engaged, this will be under a different contract.
- The securing of moneys earned by, but not due to the contractor, such a retention monies, in trust accounts (this only works if separate accounts are actually set up).<sup>91</sup>

Such provisions may also be found in professional services contracts, but they are likely to be much more rudimentary and uncertain in scope.

## 7. Insolvency

Insolvency (corporate) bankruptcy (individuals) are, in most cases, governed by the Insolvency Acts 1986 and 2000, and the Enterprise Act 2002. When a bankruptcy commences (when the bankruptcy order is made) all property belonging to or vested in the bankrupt vests in the trustee, for distribution between the bankrupt’s creditors. There is no automatic vesting of property in the case of a winding up, but the liquidator takes control or custody of the company’s property. In either case the trustee or liquidator, as the case may be, can disclaim onerous property including unprofitable contracts.<sup>92</sup>

Insolvency also affects proceedings against the insolvent person.

- When a bankruptcy petition is pending or a bankruptcy order made, the court may stay any proceedings (including arbitration) against the bankrupt and such proceedings may not per pursued against the bankrupt prior to discharge, other than with the consent of the court.
- Once a winding up order is made or a provisional liquidator appointed, no action or proceedings can be proceeded with or commenced against the company or its property without the leave of the court.

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<sup>91</sup> Only works if in separate bank account, else cannot be traced.

<sup>92</sup> A person interested in such a contract can apply to the trustee/liquidator to require him to decide whether or not he will disclaim within 28 days, or such other period as the court allows, if the trustee/liquidator does not do so, it is deemed to have adopted the contract.

There are similar restrictions on actions and proceedings where an administrative receiver or administrator is appointed under the Insolvency Acts or the Enterprise Act but their role is more concerned with continuing or selling the business or its constituent parts as a going concern. The Enterprise Act favours, and streamlines administration and restricts administrative receivership, thus reinforcing the “rescue culture”.

- Clauses (such as forfeiture clauses) that seek to divest the insolvent party of rights will be ineffective if they contravene the principles of insolvency law, for instance if they offend against the *pari passu* principle, British Eagle v. Air France [1975] 1 WLR 758, 780 (HL).<sup>93</sup> It does not appear that clauses providing for or giving a right to determine the contractor’s employment upon the insolvency of one of the parties fall foul of this principle.<sup>94</sup>
- Clauses that provide that the employer may, in the event of determination, sell the contractor’s machinery or materials to recoup its losses are likely to be regarded as a floating charge on the contractor’s assets. Such charges must be registered under s. 395 of the Companies Act 1985 to be effective, in the event of the contractor’s insolvency, against the administrator or liquidator; Smith v. Bridgend CBC [2002] BLR 160 (HL).<sup>95</sup>

Upon insolvency, mutual credits, debts and other dealings between the insolvent and its creditor are ordinarily subject to statutory set off, unless the creditor had notice that a bankruptcy or winding-up petition was pending at the date the debt became due.

## **SECTION B: THE FORUM FOR DISPUTE RESOLUTION**

### **1. Arbitration or litigation**

Arbitration and litigation are alternatives. Construction litigation is governed by the Civil Procedure Rules and is generally commenced in the Technology and Construction Court. There is a Pre-Action Protocol for Engineering and Construction Disputes.<sup>96</sup>

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<sup>93</sup> Mullan v. Ross and London (1996) 86 BLR 1 (CA, NI). Declaration made that clause providing for payment directly to sub-contractor on main contractor insolvency would offend against the *pari passu* principle enshrined in equivalent of s. 107 Insolvency Act 1986.

<sup>94</sup> By analogy with the position in landlord and tenant law where clauses determining leases on insolvency have been held to be effective.

<sup>95</sup> Smith: ICE 5<sup>th</sup> Edition provided for this. Similar provisions are found in the current editions.

<sup>96</sup> This sets out requirements for the letter of claim (before action) and for the defendant’s response. In particular, jurisdictional objections should be taken in the response, for instance a contention that the matter is governed by an arbitration clause. There is also a requirement for the parties to meet before proceedings commence to agree the main issues, the root cause of disagreement on these and to consider how the matter can be resolved without litigation or, if litigation is unavoidable, how it can be conducted to comply with the overriding objective. If there are limitation problems, the claim can be commenced immediately but questions about how the protocol should be complied with brought before the court. The protocol does not apply to proceedings for the enforcement of adjudicator’s decisions,

Arbitration is governed by the Arbitration Act 1996. But, in many cases will also be regulated by Arbitration Rules such as the ICE Rules and CIMAR (Construction Industry Model Arbitration Rules).

Subject to a consumer's right to litigate claims below a certain limit (set by reference to the small claims jurisdiction of the county court, now £5,000) an arbitration clause will be binding on both parties, unless invalidated by the Unfair Terms in Consumer Contracts Regulations 1999, such as happened in Zealander v. Laing Homes [2000] 2 TCLR 724.<sup>97</sup> If either seeks to litigate a dispute under the contract containing such a clause, the other can apply for a mandatory stay of those proceedings (see s. 9 of the Arbitration Act 1996), thus forcing the dispute to be resolved by arbitration.

Arbitration may be preferable to litigation, particularly in the county court, if the matter is before a, possibly disinterested, judge with little construction background. It may also be quicker to bring the matter to a hearing. Furthermore, it is confidential, there are no restrictions on representation and the proceedings can often be tailored to suit the needs of the parties. If not properly managed, however, arbitration can be more expensive than litigation, nor, which may be an advantage, is legal aid available. There may also be difficulties if the arbitrator lacks legal qualifications or experience.

It used to be considered that if a construction contract provided for decisions to be made and certificates issued by a third party, such as an architect, those decisions could only be challenged in arbitration. This is no longer the case and such decisions, unless expressly stated to be binding, can be opened up and reviewed either in court (or in arbitration?), Beaufort Developments v. Gilbert Ash [1998] 88 Build LR 1 (HL).

## 2. Adjudication

If Part II of the Housing Grants, etc Act 1996 applies to the contract, either party will have a right to adjudication of disputes in accordance with a procedure complying with the statutory requirements (either provided for in the contract or provided for in the Scheme for Construction Contracts 1998).<sup>98</sup> In general, the result will be a decision on the dispute within 28 days of an adjudicator being appointed and the matter being referred to that adjudicator. The adjudicator's decision is final but not binding (the underlying dispute can still be litigated or arbitrated). The adjudicator's decision, if involving the payment of money, should be enforceable by summary process unless the adjudicator lacked jurisdiction or was not impartial (actual or apparent bias). See the discussion in Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] BLR

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for injunctive relief, for summary judgement or where the matters at issue have been adjudicated.

<sup>97</sup> Zealander: The NHBC arbitration agreement was invalidated because it would have forced the claimant/consumer to litigate part of its claim, arbitrate the rest and had not been drawn to the claimant's attention and individually negotiated.

<sup>98</sup> The right is not lost merely because the party seeking adjudication has commenced litigation, see Skodia Property v. Thames Water [1999] BLR 338 (CA).

93,<sup>99</sup> similar reasoning adopted in Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd [2000] BLR 522 (CA).<sup>100</sup>

There is uncertainty as to whether Part II of the Housing Grants, etc Act 1996 conflicts with Article 6.1<sup>101</sup> of the European Convention on Human Rights, see the Human Rights Act 1998, the current first instance view is that it doesn't.

### 3. Mediation

Mediation (or conciliation) is a best regarded as a form of facilitated negotiation. Provisions for this are found in certain standard form contracts and may provided that the neutral can express of view on the merits if the matter does not settle.

Mediation is consensual and non-determinative; it may or may not be evaluative. Mediation works best where parties are prepared to view the dispute between them in commercial, not strictly legal terms. It can be particularly useful in helping to resolve multi-party disputes. An unreasonable refusal to consider mediation may have cost implications in legal or other proceedings; Halsey v Milton Keynes General NHS Trust [2004] EWCA (Civ) 576.<sup>102</sup>

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<sup>99</sup> **Macob**: Adjudicator's decision which appears on its face to be properly issued, binding and enforceable, even if validity or merits challenged because of alleged errors of fact and law. The usual relief summary judgement.

<sup>100</sup> **Bouygues (UK) Ltd**: Errors within jurisdiction do not affect enforceability by summary judgement, as this is answering the right question in the wrong way, as opposed to answering the wrong question. Grave breaches of natural justice may render a decision unenforceable by summary process, if they destroy the adjudicator's impartiality.  
<sup>101</sup> The right to a fair trial, etc.

<sup>102</sup> **Halsey**: The unsuccessful party has to show why there should be a departure from the normal costs rule so as to deprive a successful party of some or all of its costs because it had refused to agree to alternative dispute resolution. Such a departure is not justified unless it was shown that the successful party had acted unreasonably in refusing to agree to this. In deciding whether a party had acted unreasonably the court should bear in mind the advantages of ADR over the court process and have regard to all the circumstances of the particular case. Relevant factors could include: (i) the nature of the dispute; (ii) the merits of the case; (iii) the extent to which other settlement methods had been attempted; (iv) whether the costs of ADR would be disproportionately high; (v) whether any delay in setting up and attending ADR would have been prejudicial; (vi) whether ADR had a reasonable prospect of success (vii) whether the successful party had refused to agree to ADR despite the court's encouragement. There was no basis on which the court could discriminate against successful public bodies when deciding whether a refusal to agree to ADR should result in a costs penalty. The Lord Chancellor's 'ADR Pledge' was no more than an undertaking that ADR would be considered and used, wherever the other party accepts it, in all suitable cases by all government departments and agencies. It was difficult to see circumstances in which great weight should be given to the Pledge.

**COURSE FOR BPP PROFESSIONAL EDUCATION**  
**CONSTRUCTION LAW – BASIC PRINCIPLES**

**SESSION 4: UNDERSTANDING CONSTRUCTION CONTRACTS**  
**AND PROFESSIONAL SERVICES AGREEMENTS**

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## INTRODUCTION

Construction contracts and professional services agreements do not exist in a vacuum but are, or should be, prepared in response to a number of legal and practical issues, many of which have their roots in the nineteenth century, if not earlier.

## PART A: CONSTRUCTION CONTRACTS - ISSUES

The principal vehicle through which works are constructed is the construction contract. Such contracts should address the following issues.

**1. Setting the parties' primary obligations (what is to be provided for how much, when?)**

What is to be provided?

Consideration should be given to the various procurement routes and their allocation of design/performance risk (traditional, design and build, contract management, management contracting). Consideration should be given to whether there is to be a role for a contract administrator (agent or independent).

Is there to be a maintenance period after completion? How does this affect the employer's right to damages, consider Pearce v. Baxter [1999] BLR 101 (CA).<sup>103</sup>

How is the work to be provided described (drawings, quantities and/or schedules)? Is the work to be described prescriptively or by performance?

What is the standard of performance?

Are such standards to be express or implied (Sale of Goods Act 1979, Supply of Goods and Services Act 1982, common law)? For terms implied at common law see, for example Merton v. Leach (1985) 32 Build LR 51.<sup>104</sup>

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<sup>103</sup> **Pearce** A refusal to allow contractor to remedy defects or to give instructions to do so, restricts damages to cost contractor would have incurred in remedying them. Note the different relationship between completion and maintenance period in JCT contracts and ICE contracts.

<sup>104</sup> **Merton** Implied term that employer would not hinder or prevent the contractor from carrying out its obligations in accordance with contract and from executing the work in a regular and orderly manner. No duty on the contractor to check for discrepancies and divergences in the architect's information.

Are standards to be objective or subjective (who decides compliance)?

Where are standards to be stated (contract conditions, drawings, quantities, specifications, schedules)?

When is performance required?

What dates are to be fixed, (start, on site, progress and completion dates, phases)? How is completion assessed?

What is to be paid for?

What is the payment route (lump sum, measurement and value, cost plus). Particularly in a lump sum contract, what work is to be paid for? Some lump sum contracts allow provisional sums. These, in effect, introduce packages of measurement and value work.

## **2. Altering the contracted for performance**

Why must there be an express power to alter the contracted for performance?

Defining the scope of the power to alter performance (quantity and quality of work, method and timing of performance).

Determining the consequences of an alteration of performance (cost,<sup>105</sup> loss/expense, time).

## **3. Monitoring and controlling the manner of performance**

Is a general power to instruct the contractor required.

Are provisions needed to allow for monitoring performance (early warning, assessing compliance (quantity, quality, method and time))?

Are provisions needed dealing with the possibility of defective work (opening up, testing, removal of defective work, dealing with potentially defective repetitive work)?

Are there any restrictions on who performs the contractor's primary obligations (contractor, sub-contractors, specialists, suppliers)? If so, who decides?

Who is entitled to performance (parties, assigns, third parties)? Are warranties to be provided, if so, on what terms?

## **4. Valuation and timing of payments**

Balancing cash flow against security for the paying party. Complying with the statutory context (Housing Grants, Construction and Regeneration Act 1996).

Interim payment options (valuation of work, activity schedule, milestones), What is included and when (work, materials - unfixed, off-site, advances on account, mobilisation payments)? Determining the time and amount of payments (schedules, bills of quantities).

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<sup>105</sup> How is the cost of the work assessed, this is one of the purposes of including a bill of quantities, see Henry Boot v, Alstom [2000] BLR 247 (CA).

How does the assessment of interim payments relate to the contract sum?

Authorising and releasing payment (who decides, status of certificates, interim and final).

## **5. Risks and sanctions**

### Time and cost risks

How does the contract allocate responsibility for delays and additional costs due to delays or disruption in performance (defaults, neutral events).

Are damages for late completion to be liquidated. If so how is the rate of damages to be assessed so as to reflect the likely level of loss.

### Performance risks and sanctions

Dealing with non-performance by contractor, sub-contractors or the employer: Suspending performance and determining the contract.

Balancing risks by retention of monies, passing of title clauses, rights of suspension (Housing Grants, Construction and Regeneration Act 1996). Consider also bonds, collateral warranties and limits on post completion liability (conclusivity provisions).

### Injury to persons and property

Allocating the risks consequent upon injury to individuals or damage to the works and other property (indemnity and insurance clauses).

## **6. Dispute resolution**

Alternative procedures for dispute avoidance, management and resolution (contract administrator, adjudication, arbitration/litigation, mediation). The legal context: Arbitration Act 1996; Housing Grants, Construction and Regeneration Act 1996, s. 108; status of contract administrator's decisions.

## **PART B: PROFESSIONAL SERVICES AGREEMENTS - ISSUES**

The principal vehicle through which consultancy services, for instance those of an architect, an engineer or a quantity surveyor, are procured is the professional services agreement. Such agreements should address the following issues. In practice, however, professional services agreements are usually more rudimentary than construction contracts.

### **1. Setting the parties' primary obligations**

The primary obligations are concerned with what is to be provided for how much, when?

#### What is to be provided?

How is the scope of the consultant's services determined (work stages, types of services, scope of work, brief and budget)?

What use can be made of any information provided by the consultant (copyright, licence to use drawings, ownership of drawings)?

Where are express standards recorded (contract conditions, the brief, schedule of services)?

In most cases, the contract will describe the services in the most rudimentary terms, if at all. Much will depend on conceptions of what is encompassed by a professional level of service. A good introduction can be found in Hudson (1995) pp. 243-261. One of the most contentious areas is the extent to which a designer, engaged during the construction of works, has a duty to inspect the construction. In the absence of express terms to the contrary, the carrying out of periodic inspections as necessary to administer the building contract, and to check important matters of construction, is all that can ordinarily be expected. It is not unusual for a consultant to contend that any defects in the project are the result of failings by the contractor for which it is not responsible and which it could not have identified during periodic inspections.

What is the standard of performance?

Express and implied standards (Supply of Goods and Services Act 1982, common law)?  
Skill and care, diligence, best or reasonable endeavours, or what?

If the standard is one of skill and care, what can be expected, is, in most cases, assessed by reference to the designer's peers, those in the same profession. It will usually be necessary to rely on expert evidence from an expert in the same profession to support an allegation of breach of a duty of skill and care.

When is performance required?

Over what period are the services to be performed?

How much?

What is the payment route (lump sum, percentage, time charge)?

## **2. Altering the contracted for performance**

What is the scope of the client's power to instruct the consultant to perform additional services, change the brief or change the design?

What are the consequences of such instructions (cost and time)? How are additional payments to be calculated, what records should be kept?

## **3. Monitoring and controlling the manner of performance**

Does the client have any control over the manner in which the consultant performs the services (authorising commencement of work stages, terminating performance where services no longer required)?

Can the client monitor performance, require defects to be corrected (authorising drawings and consultant's proposals)? What are the implications of "approving" the consultant's work?

Can the consultant sub-contract or delegate the performance of its services?

Who is entitled to performance (original parties, assigns, third parties)? Are warranties required, if so, on what terms?

#### **4. Quantification and timing of payments**

Balancing cash flow against security for the paying party. Complying with the statutory context, if applicable (Housing Grants, Construction and Regeneration Act 1996).

Interim payments. What is to be included and when? Determining the timing and amount of interim payments (who decides)?

#### **5. Risks and sanctions**

##### Time and cost risks

How is responsibility for time resulting from delays in performance (defaults, neutral events) allocated, if at all?

How is responsibility for the cost of disruption in performance (fault, neutral events) allocated, if at all?

Should there be a closed list of events that entitle the consultant to money. Should all circumstances beyond the consultant's control be included, or nothing said at all?

##### Performance risks and sanctions

Dealing with non-performance by the client or the consultant: suspension (see Housing Grants, Construction and Regeneration Act 1996) and termination. Should, the client be able to terminate the appointment at will?

Insurance and exemption clauses (limitation period, liability cap, set off, net contribution).

#### **6. Dispute resolution**

Procedures for dispute avoidance, management and resolution (adjudication, arbitration/litigation, mediation). The legal context: Arbitration Act 1996; Housing Grants, Construction and Regeneration Act 1996, s. 108.

### **PART C: STANDARD FORM CONTRACTS**

#### **1. The use of Standard Form Contracts and Agreements**

Because of the complexities of the construction process, it is usual for consultants and contractors, at least where the employer is professionally advised, to be engaged on standard terms of contract. These contracts will be drafted by one of the party's advisors, alternatively Standard Form Contracts may be used. These are published, in the case of consultants, by the professional institutions and, in the case of contractors, by contract drafting bodies set up by the construction industry with representation from all sectors of the industry. These standard form contracts are amended from time to time by the bodies responsible for their production.

The selection of an appropriate standard form contract should reflect the chosen procurement route as well as the nature and complexity of the project.

## 2. **Principal Standard Form Building Contracts**

The Joint Contracts Tribunal produces the principal building contracts, the majority of these provide for lump sum pricing.

- The SFBC 05 family of contracts for major works using general contracting. These allow for phased completion and for packages of work (design portion supplement work) to be designed by the contractor. The variants relate to the use or otherwise of bills of quantities.
- The IFC 05 contract, for intermediate works using general contracting. This allows for phased completion and use of employer selected sub-contractors/specialists (naming), and for packages of work to be designed by the contractor. Design can also be carried out by named sub-contractors/specialists.
- The MW 05 agreement, for small works. There is, in the MWD form, provision for design by the contractor.
- WCD 05. This is the JCT's contract for use where a design and build contractor is to be engaged.
- MC05. This is the JCT's contract suite for use where the project is to be procured using Management Contracting. There is also a suite of contracts for Contract Management.
- JCT also publishes more specialised contracts such as the Jobbing Contract and the JCT Measured Term Contract (MT 05) and standard form warranties and bonds.

The JCT has also produced a consumer contract for use in connection with small domestic works and is engaged in preparing a professional services agreement. It publishes standard form sub-contracts (which replace the old forms known as DOM/1 and DOM/2) for all of its Main Contract forms.

## 3. **Principal Standard Form Engineering Contracts**

The principal engineering contracts are produced under the sponsorship of the Institution of Civil Engineers (by the CCSJC). These contracts provide for measurement and value pricing and allow for the contract administrator (the engineer) to have more involvement in the manner in which the work is carried out than would normally be the case under a building contract.

- ICE Edition – 7<sup>th</sup> Edition 1999. The form is intended for use on projects that consist mostly of civil and structural engineering works.
- The ICE Conditions of Contract for Minor 'Works – 1995 edition. This form is intended for use where such works are of a straightforward nature and of short duration.

- The ICE Design and Construct Conditions of Contract 1992 Edition - This is similar in structure to ICE 6<sup>th</sup> Edition but provides for the contractor to be engaged on a design and build basis.

**4. Principal Standard Form Consultants Agreements**

These are produced by the RIBA (for architects) and the ACE for (engineers). They are very consultant friendly and, in consequence, are often modified in use.

**5. Other Standard Form Contracts**

Other standard form contracts are produced by the Institute of Mechanical and the Institute of Electrical Engineers, the Government (the GC/Works family) and the ICE group responsible for the New Engineering Contract.

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