Contents

Conditions: Part 1: General

Clause 1: Interpretation, definitions, etc.

1.1 All clause references relate to the Conditions of Contract unless specifically stated otherwise.

1.2 The Contract is to be read as a whole. Thus, any term is subject to qualification by other terms, usually related and cross-referenced, unless specified as to be read in isolation.

This is a general principle of law.

1.3 Definitions essential to the interpretation of the Contract (most are self-explanatory).

The definitions listed refer to the Contract as a whole; those given in individual clauses are in the context of that clause only (e.g. Variation – Clause 13.1).

Following the ruling by the Court of Appeal in *Jarvis John Ltd* v. *Rockdale Housing Association* (1986) the meaning of 'the Contractor' in JCT 80 (and similar contracts) includes the servants and agents of the Contractor (i.e. those through whom the organisation operates). It is probable that the definition does not include sub-contractors.

1.4 Not used.

1.5 Despite the roles and responsibilities of the Architect, and any CoW, the Contractor is wholly responsible for the execution of the Works in accordance with the Contract – Clause 2.1. Only the Final Certificate, as noted in Clause 30.9.1.1, provides conclusive evidence of the Works' compliance with the requirements of the Contract.

1.6 If the Employer appoints or replaces the Planning Supervisor or Principal Contractor he must inform the Contractor in writing.

1.7 If no provision is made for the giving or service of notices or documents they shall be served by an effective means to an agreed address. If no address is agreed then the delivery to the last known principal or registered business address will be treated as effective giving or serving.

1.8 Where the contract requires an act to be done in a specified number of days the period begins immediately; public holidays are excluded.

1.9 The Employer must give written notice to the Contractor that an individual will exercise all the functions ascribed to the Employer's Representative. A footnote says that neither the Architect nor the Quantity Surveyor should be appointed to the role of Employer's Representative.

1.10 The law of the contract shall be English law irrespective of the nationality, residence or domicile of the Parties or the location of the Works.

1.11 Where the Appendix so states, the Parties have agreed to Electronic Data Interchange.

Clause 2: Contractor's obligations

2.1 Primary obligation for the Contractor to execute and complete the Works in accordance with the Contract Documents.

English Industrial Estates Corporation v. *Kier Construction* (1991): (Contract was ICE5.) Following *Yorkshire Water Authority* v. *McAlpine* (1986), the arbitrator held that although a method statement, normally, was not a contract document, because the method statement was attached to the tender (which was a contract document), such attaching caused the method statement to become a contract document.

If the quality is to be the subject of the opinion of the Architect, if must be his reasonable satisfaction (something the BQ should define).

Thus, the Architect cannot demand better quality than is stated in the Contract Documents, as amended by AIs, regarding quality, etc.

By its nature, this condition excludes any design responsibility on the part of the Contractor – he undertakes to complete the Works in accordance with the supplied design; he does not undertake that the building will be suitable for its intended purpose. Neither does the Contractor undertake that the building will not fail, unless due to standards of workmanship, etc., not in accordance with the Contract. He does not contract to produce a result.

See *Cable* v. *Hutcherson Bros. Pty.* (1969) (Australian).

However, the Courts now regard Contractors as experts in construction and so any design matter that the Contractor considers dubious should be queried by him, in writing, to the Architect, requesting his instruction and indicating the possible construction problems and/or possible subsequent failure.

Following *Duncan* v. *Blundell* (1820), *Equitable Debenture Assets Corporation Ltd* v. *Wm. Moss and others* (1984) and *Victoria University of Manchester* v. *Hugh Wilson & Lewis Womersley and others* (1984), an implied term exists for the Contractor to warn the Architect of design defects known to the Contractor and of such defects the Contractor believes to exist. The belief requires more than mere doubt as to the correctness of the design but less than actual knowledge of errors.

Such action should relieve the Contractor of any liability for subsequent building failure due to inadequate or inappropriate design.

'To complete the Works' refers to practical completion, the point at which, *inter alia*, the defects liability period (DLP) commences.

Certain contractual requirements cease at this point also e.g. fire insurance and liquidated damages liability.

'The Architect (or Employer) may dictate the working hours, order of work execution and postponement of work *but not the method of executing the work*.

2.2 .1 Contract Bills may not override or modify provisions of the Articles, Conditions or Appendix but may affect them, e.g. by noting obligations or restrictions imposed by the Employer.

See *Gleeson M.J. Ltd* v. *London Borough of Hillingdon* (1979).

John Mowlem & Co. Ltd v. *British Insulated Callenders Pension Trust Ltd* (1977): (BQ attempted to constrain a performance specification for watertight concrete; consulting engineers used for structural design.) There must be a very clear contractual condition to render a contractor liable for a design fault. Design is a matter which a structural engineer is qualified to execute, which the engineer is paid to undertake and over which the Contractor has no control.

.2.1 Contract bills – to have been prepared in accordance with SMM7. Any departure from SMM7 must be specified in respect of each item or items – usually in the Preambles.

.2 Any error in the BQ or any departure from SMM7 not specified – not to vitiate the Contract but to be corrected and the correction treated as a Variation in accordance with Clause 13.2.

Bryant & Son Ltd v. *Birmingham Hospital Saturday Fund* (1938): If the Bills do not describe the work appropriately, costs of changes necessary are additional to the Contract Sum.

Note: If the error or departure were sufficiently great so as to change the entire basis or nature of the Contract, it is probable that it *would* vitiate the Contract.

See *Pepper* v. *Burland* (1792).

The errors are those concerning BQ preparation by the PQS, not pricing errors by the Contractor.

2.3 Discrepancies in or divergencies between documents.

If the Contractor finds a discrepancy between any of the specified documents – drawing, BQ, AIs (except Variations), drawings or documents issued under Clause 5, and the Numbered Documents (annexed to Agreement NSC/A) – Contractor to give the Architect written notice specifying the discrepancy and the Architect shall issue instructions to solve the problem.

'*If*' indicates that the Contractor is not bound to find any discrepancies but specifies what the Contractor must do should he make such a discovery.

Again, pricing errors by the Contractor are *not* covered nor is his misinterpretation of the design, unless the design is ambiguous, in which case he may claim.

However, the Contractor is considered to be an expert in construction and so the Courts will require him to execute the appropriate duty of care in such things as cross-checking Contracts Documents and drawings.

Thus this situation is by no means crystal-clear; the Contractor should check and only in extreme cases place reliance on this Clause to avoid any liability.

However, in *L.B. Merton* v. *Stanley Hugh Leach Ltd* (1985), the judge accepted that the Contractor was not obliged to check drawings to seek discrepancies or divergencies so as to impose a duty on the Architect to provide further information.

Normally the Contract provisions will prevail over other Contract Documents, e.g. BQ.

See *Gold* v. *Patman & Fotherington* (1958).

Supply of Goods and Services Act (1982): implied term that a supplier, acting in the course of a business, will carry out the service with reasonable skill and care.

2.4 The two parts of this Clause concern Performance Specified Work (as detailed in Part 5 of the Contract) for which the Contractor must provide a statement on how the performance specification will be met; hence, the Contractor must design the work concerned to comply with the specification (fitness for purpose to that extent).

.1 *If* the Contractor finds a discrepancy or divergence between his Statement and AI issued by the Architect after receipt of the Contractor's Statement – Contractor to give the Architect written notice specifying the discrepancy/divergence, Architect to issue an instruction on the matter.

.2 *If* the Contractor or the Architect finds a discrepancy in the Contractor's Statement – Contractor to correct the Statement to remove the discrepancy at no cost to the Employer and inform the Architect in writing of the correction.

Clause 3: Contract Sum – additions or deductions – adjustment – Interim Certificates

Where the Contract provides for the Contract Sum to be adjusted, as soon as any such adjustment amount has been determined, even if partial (or even, presumably, 'on account') it should be included in the computation of the following Interim Certificates.

This is a distinct aid to the Contractor's cash flow, the 'life-blood' of the industry, by requiring even estimate, partial or 'on account' Valuations of extras to be included in the following (Valuation and) certification for payment.

Clause 4: Architect's instructions

4.1.1 Contractor to forthwith comply with all AIs which the Architect expressly empowered by the Conditions to issue.
The exceptions are:

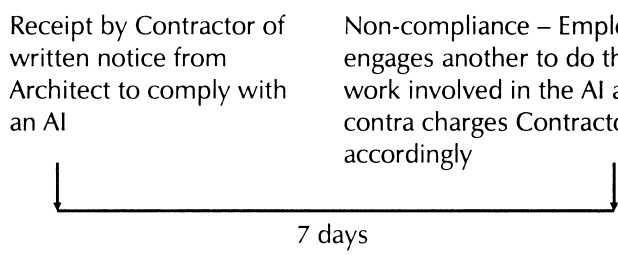
.1 where such an instruction is one requiring a Variation, the Contractor need not comply if he has made reasonable objection in writing to the Architect

.2 where such an instruction is one requiring a Variation, the Contractor need not comply if a 13A Quotation has been issued

(a) until the Architect issues an acceptance of the 13A Quotation

(b) until an instruction in respect of the Variation has been issued under Clause 13A.4.1.

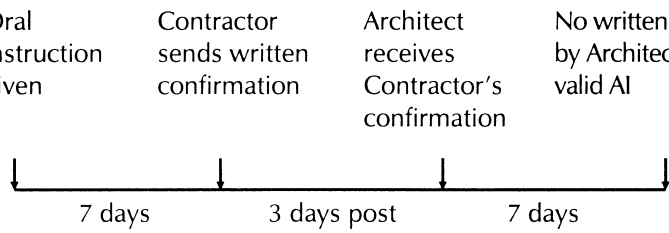
4.1.2



4.2 Contractor receives what purports to be an AI from the Architect. Contractor may request Architect to specify the authority (which Clause) for the instruction, in writing.
Architect complies with request, forthwith.
Contractor complies with the instruction – deemed, in all cases, to be a valid AI.

4.3.1 All instructions issued by the Architect – to be in writing

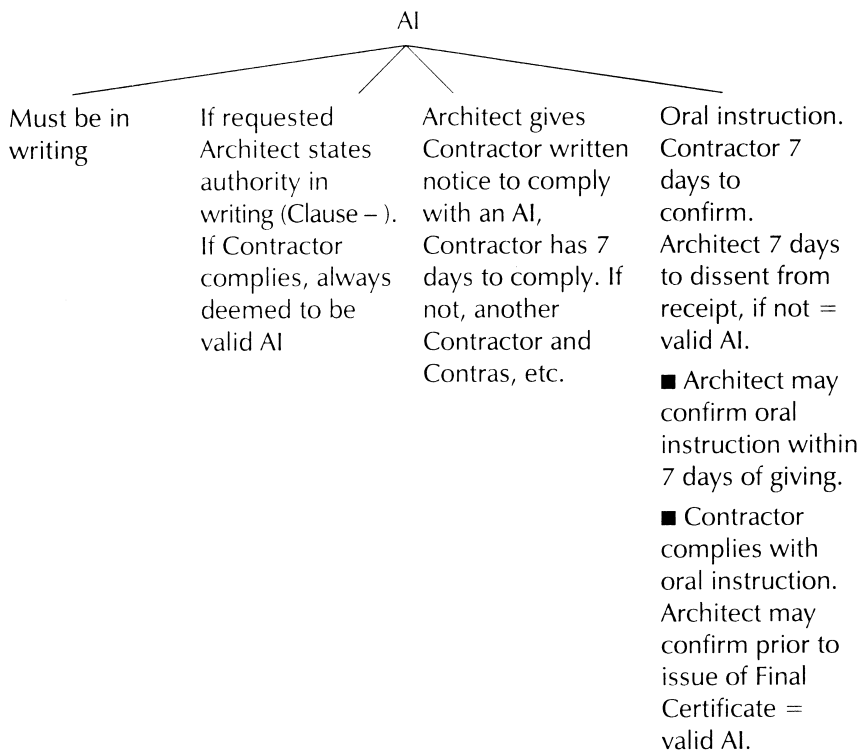
.2 Non-written (verbal) instruction – of no immediate effect. Contractor to confirm the instruction to the Architect within 7 days. Architect has 7 days from receipt of confirmation to dissent in writing, if not becomes valid AI.



.1 Architect may confirm an oral instruction within 7 days – no need for Contractor to confirm – is valid AI from the date of the Architect's written confirmation.

.2 No confirmation of an oral instruction but the Contractor complies – Architect *may* confirm in writing prior to the issue of the Final Certificate – deemed to be a valid AI on the date when given orally.

This course of action imposes considerable risk of loss upon the Contractor and much reliance on the Architect's memory!



Clause 5: Contract documents – other documents – issue of certificates

5.1 Contract Drawings and Bills to remain in the custody of the Architect or QS and be available at all reasonable times (usually normal working hours) for the inspection of the Contractor and Employer.

5.2 Immediately the Contract is executed, the Architect to provide free to the Contractor:

.1 1 copy of the Contract Documents certified on behalf of the Employer.

.2 2 further copies of the Contract Drawings.

.3 2 copies of the unpriced BQ.

5.3.1 As soon as possible after the execution of the Contract:

.1 Architect to provide free to the Contractor, 2 copies of all descriptive schedules, etc., necessary for use in carrying out the Works.

.2 Contractor to provide free to the Architect, 2 copies of the master programme. Amendments made within 14 days of Extension of Time award (clause 25.3.1), i.e. to be kept updated in accordance with Architect's Extension or Time awards. (Useful to show when information will be required.) Or from the date of a confirmed acceptance of a 13A Quotation.

Note: A network will show the effects of delays far more clearly than a bar chart.

The following points should also be noted:

(a) There is no definitive statement indicating the form of the programme or what it is to show. The type of programme and information shown is, thus, at the option of the Contractor (in the absence of any agreement denoting specific type of programme and information required). Thus a simple bar chart, a network or any other type of chart will be compliant. Normally, it is suggested that the programme should be of a type in common usage, clearly denoting key dates and work sequences, etc. BQ may note form of programme required.

(b) If a Contractor disagrees with an extension or other Completion Date modification by the Architect, in order to further his claim, it would be perhaps prudent not to amend the programme

to comply with the Architect's award but to revise the programme to comply with the Contractor's own estimate of the appropriate Extension of Time and to indicate by this means the procedure for completion by that date.

Indeed, it should be borne in mind that there is no provision in the Contract for the Contractor to amend the programme to take account of the Architect's reduction of an Extension of Time (due to work being omitted).

.2 Nothing in the supplementary documents (schedules, master programme, etc.) may impose any obligation beyond those imposed by the Contract Documents.

5.4 Architect to provide free to the Contractor, 2 copies of all necessary drawings and details, supplementary to the Contract Drawings, to enable the Contractor to execute the Works.

5.5 Contractor to keep on site and available for the Architect (or representative) at all reasonable times:

(a) 1 copy of Contract Drawings
(b) 1 copy of unpriced BQ
(c) 1 copy of Schedules, etc.
(d) 1 copy of master programme (if applicable)
(e) 1 copy of drawings and details

Reasonable times likely to be construed as site working hours (or normal working hours, if longer).

5.6 Upon final payment, the Contractor to return to the Architect all drawings, schedules, etc., which bear Architect's name, if requested to do so.

5.7 Limits to use of documents.

Documents to be used for the purposes of the Contract only and for no other projects.

Employer, Architect and QS may use the BQ rates or prices only for the purposes of the Contract – also may not divulge them except for the purposes of the Contract.

5.8 Normally, all Certificates must be issued to the Employer by the Architect who must immediately send a duplicate copy to the Contractor.

Exception:
35.15.1 failure of NS/C to complete by appropriate date.

Following *L. B. Merton* v. *Stanley Hugh Leach Ltd* (1985) it should be noted that the following terms are implied:

(a) the Employer will not hinder or prevent the Contractor carrying out his obligations under the Contract or from executing the Works in an orderly and regular way,

(b) the Employer undertakes that the Architect will do all required to enable the Contractor to carry out the work,

(c) where the Architect is required to supply the Contractor with drawings, etc. during the course of the work, those drawings, etc. must be accurate.

5.9 Contractor to provide free to the Employer, drawings and other information describing Performance Specified Work as built and maintenance as specified in the BQ or AI(s) for expenditure of the appropriate provisional sum.

Clause 6: Statutory obligations, notices, fees and charges

6.1 .1 Overriding obligation to comply with any and all Statutory Requirements, including the regulations of statutory undertakers.

.2 *If* the Contractor finds any divergence between the Statutory Requirements and the Contract Documents, Drawings, etc., or AIs he must immediately inform the Architect, in writing, specifying the divergence.

Note: the role of 'if', not 'when', and the implications as discussed previously.

.3 If the Contractor gives notice or by some other means the Architect discovers such divergence, he has 7 days from receipt of any notice in which to issue instructions about the matter. If such instructions require the Works to be varied, this constitutes a valid Variation (Clause 13.2).

.4 .1, .2, .3, Emergency compliance with Statutory Requirements prior to instructions being received:

Contractor to supply necessary materials and to execute necessary emergency work.

Contractor to inform the Architect immediately of the situation and the steps being taken.

Such materials and work are then deemed to be pursuant to an AI, provided that the necessity for the emergency work was due to a divergence as described – valuation will be made accordingly (Clause 13.2).

.5 Provided that the Contractor has complied with the requirements regarding divergence, he is not liable where the Works do not comply with any Statutory Requirements, provided that they do comply with the Contract Documents, including Drawings.

Note: This liability avoidance is contractual only, i.e. expressly restricted to liability to the Employer.

.6 If the Contractor or Architect finds a discrepancy between the Statutory Requirements and any Contractor's Statement:

immediately give the other written notice specifying the discrepancy,

Contractor to inform the Architect of the amendment proposed to remove the divergence, and Architect to issue appropriate instructions.

Contractor's compliance with AIs issued under this Clause to be at no cost to the Employer (except as provided in Clause 6.1.7).

.7 Any changes in Statutory Requirements after the Base Date which necessitate a change to Performance Specified Work to be treated as an AI requiring a Variation (Clause 13.2) and valued accordingly.

No Contractor may construct a building which does not comply with the applicable Statutory Requirements.

6.2 Fees and charges – Contractor to pay and indemnify the Employer in respect of all statutory fees and charges.

Such fees and charges, including all taxes except VAT, are added to the Contract Sum unless they:

.1 arise due to a statutory undertaker being a NSup or NS/C; or

.2 are priced in the Contract Bills; or

.3 are a provisional sum in the Contract Bills.

6.3 The contractual provisions regarding assignment and sub-letting (Clause 19) and NS/Cs (Clause 35) do not apply to statutory undertakers carrying out their statutory obligations. For this purpose they are not Sub-Contractors within the meaning of the Contract.

Clause 6A: Provisions for use where the Appendix states that all the CDM Regulations apply

6A.1 The Employer shall ensure:

that the Planning Supervisor carries out all the duties of a planning supervisor under the CDM Regulations

where the Contractor is not the Principal Contractor, that the Principal Contractor carries out all the duties of a principal contractor under the CDM Regulations.

6A.2 Where the Contractor is a Principal Contractor he must comply with all the duties set out in the CDM Regulations, in particular the Health and Safety Plan.

6A.3 Where the Employer appoints another Principal Contractor the Contractor shall comply, at no extra cost, with all reasonable requests and no extension of time shall be given.

6A.4 The Contractor shall provide, and ensure that any sub-contractor provides, any information required for the health and safety file required by the CDM Regulations.

Clause 7: Levels and setting out of the Works

The Architect is obliged to determine and provide the Contractor with all requisite levels and dimensions for the execution of the Works.

The Contractor is responsible for correcting at his own cost any setting out errors for which he is responsible, i.e. his inaccuracies in setting out.

Provided that the Employer has consented, the Architect may issue an instruction permitting an inaccurately set out building to be completed with an appropriate price reduction by the Contractor.

Trespass: If setting out causes a trespass on adjoining property, the injured party has an action:

(a) against the Contractor if the trespass is caused by setting out error(s) on his part,

(b) against the Employer (who may be able to recover from the Architect) if the trespass is caused by inaccurate drawings or other information supplied by the Architect.

See *Kirkby* v. *Chessum & Sons Ltd* (1914).

Note: The Contractor may be required to insure against the risks involved:

(a) Clause 20.2

(b) Clause 21.2.1.

Clause 8: Work, materials and goods

8.1 Bills to describe all materials, goods and workmanship, thus the BQ acts as the specification document. For Performance Specified Work, the materials and goods must accord with the Contractor's Statement.

'So far as procurable' modifies this overall requirement – may be best to give alternatives, if applicable – e.g. paint manufacturer's list, in the Preambles. If this is not done, the phrase may be deemed to mean the nearest substitute to the specified item, if unavailable.

Materials and goods must be to the Architect's reasonable satisfaction, in accordance with Clause 2.1.

This clause has led to the wide use of the term 'or equal and approved' – this means the Architect *may* approve other goods, not *must*.

See *Leedsford Ltd* v. *Bradford Corporation* (1956).

Where described therein, workmanship must be to the standards in the BQ or Contractor's Statement; otherwise, workmanship must be to a standard appropriate for the Works. Workmanship must be to the Architect's reasonable satisfaction, in accordance with Clause 2.1.

.3 All work shall be carried out in a proper and workmanlike manner and in accordance with the Health and Safety Plan. (Following: Court of Appeal – *Greater Nottingham Co-Operative Society Ltd* v *Cementation Piling and Foundations Ltd* (1988).)

.4 Contractor must have the Architect's written consent (not to be unreasonably withheld or delayed) to substitute any materials or goods for those described in any Contractor's Statement. The Contractor retains all responsibilities for any properly substituted materials or goods.

8.2.1 Architect may require the Contractor to provide vouchers to prove that the goods and materials comply with the specified requirements as Clause 8.1.

.2 If the Architect is not satisfied with materials, goods or workmanship included in work which has been executed and which is required to be to his reasonable satisfaction (in accordance with Clause 2.1), the Architect must express such dissatisfaction within a reasonable time from the execution of the (alleged) unsatisfactory work.

Two issues arise – how is the Architect's dissatisfaction to be expressed (and to whom) and how is the Architect to know when each item of work is executed in order to be able to judge the reasonable time period? Sensibly, the Architect should express any dissatisfaction in writing to the Contractor (with copies to any other relevant participants – especially the Quantity Surveyor). The Architect's knowledge of progress of the Works, through monitoring procedures, should indicate the (approximate) time at which the (alleged) unsatisfactory work was executed.

8.3 AI may be issued for the Contractor to open up work for inspection or to test goods and materials.

Costs to be added to the Contract Sum or may be provided in the BQ (Provisional Sum) – including costs of making good.

However, if the tests, etc., prove the work/materials to be defective, the Contractor must bear the costs.

8.4 The four sub-clauses of Clause 8.4 give the Architect authority to order action to be taken by the Contractor if any work, materials or goods are not in accordance with the Contract (i.e. are found not to comply with the specification). The authority is additional to, and does not affect (is without prejudice to), the general powers of the Architect.

.1 Architect may issue an AI for removal from the site of work, goods or materials not in accordance with the Contract requirements.

Note: (a) The Architect should give the reason for the AI, as removal is a Variation under Clause 13.1.1.3 where the goods, etc., *are* in accordance with the Contract.

(b) By Clause 27.2.1.3, the employment of the Contractor may be determined if the defective items are not removed, provided that the items are material to the Works.

(c) Defects becoming apparent due to, *inter alia*, Clause 17.2 unspecified materials, etc., must be made good at the Contractor's expense.

Note: Following *Holland Hannen and Cubitts (Northern) Ltd* v. *Welsh Health Technical Services Organisation* (1985), an Architect must take care over instructions issued regarding apparently defective work. The authority given the Contract Clause 8.4, is for the Architect to instruct the Contractor to remove the defective work, etc.; the Contractor remains under an obligation to complete the work in accordance with the Contract.

.2 Architect may, given agreement of the Employer and after consultation with the Contractor (who must consult any NS/Cs affected), allow work, materials or goods which are not in accordance with the Contract to remain as part of the Works. The Architect must confirm such permission in writing to the Contractor but the permission will:

(a) not constitute a Variation and

(b) command an appropriate deduction against the Contract Sum.

.3 Architect may, after consultation with the Contractor (who must consult any NS/C affected), issue AIs requiring Variations which are reasonably necessary due to instructions to remove defective items from site (Clause 8.4.1) or allowing defective items to remain part of the Works (Clause 8.4.2). Such AIs:

(a) cannot provide grounds for addition to the Contract Sum and

(b) cannot provide grounds for an extension of time.

.4 Architect may, given due regard to the Code of Practice following Clause 42, issue AIs to open up work for inspection/test in order to establish the likelihood/extent of any further examples of work, materials or goods which do not comply with the Contract. The scope of such opening up must be reasonable having regard to the Code of Practice and the criterion of the Architect's reasonable satisfaction.

Irrespective of the results of the inspections/tests, no addition to the Contract Sum may be made (under Clauses 8.3 and 26). However, if the inspections/tests showed that the work, materials and goods did comply with the Contract, the work of opening up, inspections/tests and making good constitutes a Relevant Event for which the Architect must award an extension of time under Clause 25 (NB Clause 25.4.2).

8.5 If any work is not carried out in a proper and workmanlike manner, as required by Clause 8.1.3, the Architect, after consultation with the Contractor (who must consult any NS/C affected), may issue AIs as necessary (which may require a Variation). Such AIs:

(a) cannot provide grounds for addition to the Contract Sum and

(b) cannot provide grounds for an extension of time.

8.6 Architect may (not unreasonably or vexatiously) issue an AI for the dismissal *from the Works* of any person employed thereon. This

means removal from that particular project, *not* dismissal from employment.

A person is defined in this context as 'an individual or firm (including bodies corporate)' so firms and individuals may be dismissed.

Note: (a) Interim payments include only items of work properly executed in accordance with the Contract requirements – as this decision of compliance is that of the Architect, in theory the QS may not deduct from his recommendation for payment unless an AI as to unsuitability exists.

In such circumstances, however, the QS may be held not to be fulfilling his role as a professional (expert) and so should include a note of his valuation of any 'suspected defective work'. It is then for the Architect to deduct any appropriate amounts at certification.

See *Sutcliffe* v *Thackrah* (1974).

(b) From several House of Lords decisions, the Contractor gives warranties or implied terms:

(i) that the workmanship will be of a good standard,

(ii) that materials and goods supplied will be free from latent and patent defects (including any under a nomination), and that they

(iii) will be suitable for the purposes for which they are supplied.

These may be expressly excluded, or excluded by the circumstances of the Contract. The Standard Form does *not* refer to these matters and so, unless other Contract Documents give specific reference, they will be implied terms.

See *Young & Marten Ltd* v. *McManus Childs Ltd* (1969) and *Gloucestershire C.C.* v. *Richardson* (1969).

Unfair Contract Terms Act, 1977 – in reference to exemption clauses – Contractor should ensure that the above warranties are passed on to suppliers – note that if the Architect insists on nominating a supplier who will not accept these warranties, the Contractor has no liability in respect of the items in question except for patent defects (defects obvious on reasonable examination).

Limits application of exemption clauses in regard to consumer transactions/sales, including trading on one party's standard conditions – s3. However, contracts let by tender do not constitute consumer sales.

Clause 9: Royalties and patent rights

9.1 All sums payable in respect of patented items are deemed to have been included in the Contract Sum by the Contractor where described by or referred to in the Contract Bills.

Contractor to indemnify the Employer against any claim for infringement of patents by the Contractor.

9.2 Where Contractor uses patented items due to his compliance with an AI, he is not liable for any patent infringements.

Any royalties, damages, etc., so arising to be paid by the Contract must be added to the Contract Sum.

Note: (a) Where patents are infringed by the Contractor and the articles in question are not referred to in the Contract Bills, the Employer may incur liability, depending on the circumstances, provided that the articles were for proper inclusion in the Works.

(b) *Prima facie*, the Employer is not liable in respect of AI provision unless the AI constitutes a Variation.

(c) For the implementation of this clause, nominated items are presumed to be the responsibility of the Architect – the Contractor will not usually be fully conversant with the contents of the nomination at the time of tender – *note*, however, SMM7.

Clause 10: Person-in-charge

Contractor to keep a *competent* person-in-charge on the site (usually taken as normal working hours or actual site working hours). This person is given the power of Agency on behalf of the Contractor in respect of receipt of AIs and CoW directions – hence the common title 'Site Agent'.

All relevant persons should be informed who the Site Agent is and who is the deputy (the person who will assume the responsibilities in the absence of the Agent). Any changes in these personnel should be notified immediately.

Clause 11: Access for Architect to the Works

Access is to be for the Architect and his representatives and at all reasonable times. This applies to the site and all workshops, etc., including those of Sub-Contractors, where items for the project are being made, so far as procurable by the Contractor.

This will, of course, include the CoW, engineers and QS (especially for valuation purposes).

Such access may be subject to reasonable restrictions of the Contractor or any sub-contractor in order that their proprietary rights ('trade secrets', etc.) are protected.

Clause 12: Clerk of works

Employer is entitled to appoint a CoW.

CoW acts solely as an inspector on behalf of the Employer but under the directions of the Architect.

Contractor to give adequate facilities for the CoW to perform his duties.

CoW directions:

(a) given to the Contractor,

(b) no immediate effect,

(c) to be valid must be in respect of a matter about which the Conditions expressly empower the Architect to issue instructions,

(d) confirmed in writing by the Architect within 2 working days of being given to be of any effect – if so confirmed, then from date of confirmation – deemed to be an AI.

Contractor has no contractual power to object to a CoW.

Provided that the Architect has properly briefed the CoW, the Employer is responsible for him.

Leicester Board of Guardians v. *Trollope* (1911) shows that the Architect is responsible for his design being followed – not avoided by a CoW being on site.

Clause 13: Variations and provisional sums

13.1 Defines Variations:

.1 Alteration or modification of design, quality or quantity of the Works, including:

.1 addition, omission or substitution of any work

.2 alteration of any kind or standard of any materials or goods to be used in the Works

.3 removal from site of any work executed or materials or goods for the Works which *are* in accordance with the Contract (brought on site by the Contractor).

.2 The imposition by the Employer of any obligations or restrictions in regard to the matters set out in Clauses 13.1.2.1 to 13.1.2.4 the addition to or alterations or omission of any such obligations or restrictions so imposed or imposed by the Employer in the Contract Bills in regard to:

.1 access to the site or use of any specific parts of the site

.2 limitations of working space

.3 limitations of working hours

.4 the execution or completion of the work in any specific order.

Note: If sections are to be completed by specific dates in advance of the overall completion date, then the Sectional Completion Supplement must be used.

.3 Specifically excludes omitting Contractor's measured work and the substitution of a Nominated Sub-Contractor to execute that work.

Note: Must be a PC or provisional sum for a valid nomination.

Any omissions must be genuine, otherwise the Contractor may claim loss of profit for the 'omissions'.

13.2 Subject to the Contractor's right of reasonable objection (Clause 4.1.1) Architect may issue AIs requiring Variations.

Architect *may* sanction in writing any Variation made by the Contractor *not* pursuant to an AI.

'No Variation required by the Architect or subsequently sanctioned by him shall vitiate this contract.'

This does *not* mean that the Architect may order any changes he likes and still maintain the Contract intact.

An *excessive* Variation ordered by an AI would not be regarded as a Variation under the Contract, thus payment would be on *quantum meruit*.

Lord Kenyon in *Pepper* v. *Burland* (1792):

'If a man contracts to do work by a certain plan, and that plan is so entirely abandoned that it is impossible to trace the Contract, and to what part of it the work shall be applied, in such case the workman shall be permitted to charge for the whole work done by measure and value, as if no Contract had ever been made.'

13.3 Architect to issue AIs regarding:

.1 expenditure of provisional sums included in the contract Bills,

.2 expenditure of provisional sums included in a NS/C (applies where nomination occurs from expenditure of a provisional sum as Clause 13.3.1).

Valuation of Variations

JCT 98 introduces three mechanisms by which a Variation can be valued. Two of these are relatively new and follow developments elsewhere (notably in the New Engineering and Construction Contract); these are the 13A Quotation and the Contractor's Price Statement (Alternative A). The third mechanism, of valuation by the Quantity Surveyor, is the traditional JCT approach (Alternative B).

13.4.1.2 Alternative A – Contractor's Price Statement.

13.4.1.2A1 The Contractor may submit a Price Statement in respect of a Variation (except, confusingly, where a quotation has been accepted under 13A, a '13A Quotation'). If this is the valuation route the Contractor must submit a statement to the Quantity Surveyor within 21 days of receipt of the Architect's Instruction. The statement should include the price for the work, based on the valuation rules of 13.5. It *may* also include the Contractor's direct loss and expense and any extension of time (under 13A quotation rules these are mandatory).

13.4.1.2A2 The Quantity Surveyor must notify the Contractor, within 21 days, of the statement's acceptability. If it is not accepted, reasons, in a similar format to the statement, must be given

and an amended statement provided. The Contractor then has 14 days to accept the amendment; if not either party may refer to adjudication.

13.4.1.2A4.3 If not referred to adjudication then the variation is valued by the Quantity Surveyor under 13.4 Alternative B.

13.4 Alternative B
If no 13A Quotation is sought and no Alternative A Contractor's Price Statement submitted, or if the 13A Quotation, or Contractor's Price Statement or amended Price Statement is rejected, then the Variation must be valued by the Quantity Surveyor in accordance with the rules in 13.5.

13.4.1.2 .1 Valuation of Variations – by the QS – in accordance with Clause 13.5 (unless otherwise agreed by the Contractor and the Employer – this would constitute a Variation of the Contract and so the parties to the contract must agree to it). Also applies to work executed by the Contractor for which an Approximate Quantity is included in the BQ.

Note: The payment rules are applicable only to Variations as defined by the Contract. If in doubt, therefore, the Contractor should implement the authority for an AI procedure as Clause 4.2.

See *Myers* v. *Sarl* (1860): Drawings, even if prepared in the Architect's office and stamped, must be signed by the Architect to be valid authority to execute work. Possibly, however, the signature of a clerk preparing the drawings on behalf of the Architect would suffice.

(b) Valuation of Variations and valuation of work for which an Approximate Quantity is included in the bills of quantities included in the Numbered Documents (as annexed to Agreement NSC/A) – Nominated S/C's work – to be in accordance with the relevant provision of NSC/C (Sub Contract form); unless otherwise agreed by NS/C and Contractor, with Employer's approval.

.2 Valuation of work constituting a PC Sum arising due to AIs regarding expenditure of a provisional sum for which the Contract has had a tender accepted (Clause 35.2) must be valued in accordance with that successful tender, not the normal Variation provision.

13.5 .1 Variations constituting additional or substituted work and work for which an Approximate Quantity is included in the BQ which can be valued by measurement – valuation to be of:

.1 *similar* character, executed under *similar* conditions does not *significantly* change quantity of work in Contract Bills – rates and prices in BQ shall determine the valuation.

.2 similar character, *not* similar conditions and/or significantly changes quantity of work in BQ – rates and prices in BQ to form basis for valuation (i.e. *pro rata* prices) with a fair allowance for the difference.

.3 *not* of similar character to BQ – fair rates and prices.

Rather contentious – can varied work really be of similar character? What is a significant change in quantity? How much to *pro rata*? What is a fair valuation? Perhaps a guide is to read 'identical' for 'similar'.

.4 Approximate Quantity is close to the quantity of work required – rates and prices in BQ to be used.

.5 Approximate Quantity is not a reasonably accurate forecast of the quantity of work required – *pro rata* rates/prices to be used.

Clauses 13.5.1.4 and .5 apply only if the work is the same in all respects as that described in the BQ except for the quantity required. Hence, if the specification/conditions of the work change, the full valuation of Variations rules apply.

.2 Variations requiring omission of work from BQ: valuation of work omitted to be at BQ rates.

.3.1 Measurement to be in accordance with the principles used to prepare the BQ (SMM7).

.2 Allowances to be included in respect of any appropriate percentages or lump sums in BQ (e.g. profit, attendances on NS/Cs).

.3 Appropriate adjustment to be made for preliminaries. This provision does not apply in respect of compliance with an AI for the expenditure of a provisional sum for defined work (see SMM7 General Rules 10.1 to 10.6).

.4 Where additions or substitutions cannot properly be valued by measurement, valuation shall comprise:

.1 Prime cost of the work plus percentage additions as set out by the Contractor in the BQ (usually separate percentages for labour, plant, materials). Prime cost – calculate in accordance with 'Definition of the Prime Cost of Daywork carried out under a Building Contract' current at the Date of Tender.

.2 Specialist trades definition of Prime Cost of Daywork to be used as appropriate.

(Electrical Contractors' Association – Electrical Contractors' Association of Scotland – Heating and Ventilating Contractors' Association.)

Vouchers stating:

time daily spent on the work,
workmen's names (usually including grade),
plant,
materials,

must be sent to Architect, or his authorised representative for verification not later than the end of the week following that during which the work is executed. Verification is usually by signature of the appropriate person – if in doubt send to the Architect.

.5 If a Variation *substantially* changes the conditions under which other work is executed, that other work may be valued in accordance with the rules for valuing Variations.

The provision also applies to other work subject to changes due to:

(a) compliance with an AI for expenditure of a provisional sum for undefined work

(b) compliance with an AI for expenditure of a provisional sum for defined work – where the work executed differs from the work described in the BQ

(c) execution of work for which an Approximate Quantity is included in the BQ – where the quantity executed is different from that stated in the BQ.

.6.1 Valuation of Performance Specified Work – to include allowance for addition/omission of any work involved in preparation and production of drawings, schedules or other documents.

.2 Valuation of additional/substituted work related to Performance Specified Work:

(a) work of similar character – BQ (or Analysis) rates or prices with allowances for changed conditions/quantities changed significantly from those in BQ or Contractor's Statement.

(b) no work of similar character in BQ or Contractor's Statement – a fair valuation.

.3 Valuation of omission of work relating to Performance Specified Work – at rates/prices in the BQ or the Analysis.

.4 Any valuations under Clause 13.5.6.2 and .3 must include any appropriate adjustments of preliminaries.

.5 Valuations of additional/substituted work relating to Performance Specified Work by daywork – the proviso to Clause 13.5.4 applies (vouchers, etc. – see above).

.6 If compliance with an AI requiring a Variation or expenditure against a provisional sum differs from the information in the BQ (both in regard to Performance Specified Work) and substantially changes the conditions under which any other work is executed, such work affected shall be treated as being the subject of an AI requiring a Variation and valued under the provisions for valuing Variations (Clause 13.5).

.7 Excluding additions, omissions and substitutions of work, the valuation of work or liabilities directly associated with a Variation which cannot be reasonably valued as above, shall be the subject of a fair valuation, e.g. part load delivery charges where the bulk of the items in question have already been delivered.

An allowance for disturbance to the regular progress of the works and/or for any direct loss and/or expense may be included in the valuation of Variations under Clause 13.5 only where it is *not* reimbursable under any other Contract Clause.

Usually, such 'disturbance cost' will be considered under Clause 26 – the provision of clause 13.5 being used only as a 'last resort'.

13.6 QS to allow Contractor to be present and take all necessary notes when QS is measuring work to value Variations.

13.7 Contract Sum to be adjusted to take account of all valuations of Variations.

Thus, where a Variation has been executed but not measured and valued, it is reasonable to include an 'on account' valuation in interim payments until formal valuation has been finalised.

Note: The valuation of Variations, howsoever arising, is to be executed by the QS (including provisional sum items) unless the Employer and Contractor themselves agree something different. The Architect is involved only where a Contractor claims for reimbursement of loss/expense due to the regular progress of the works being materially affected (disturbed).

Clause 13A: Variation Instructions – Contractor's quotation in compliance with the instruction

By Clause 13.2.3 an Instruction requiring a variation may state that the treatment and valuation of the variation are to be in accordance with 13A. The Contractor has 7 days to disagree and then the Instruction must be valued by 13.4 Alternative A or B.

13A.1.1 The Instruction shall provide sufficient detail to allow the Contractor to provide a Quotation (a 13A Quotation).

13A.1.2 The Contractor has 21 days from receipt of the Instruction to submit his 13A Quotation (including 3.3A Quotations (NSC) in respect of any NSC) and that 13A Quotation remains open for acceptance for 7 days.

13A.2 The 13A Quotation is an all-inclusive price for the variation, including:

.1 the value of the work (including NSC work) plus allowances for preliminary items

.2 the adjustment to time for completion

.3 the amount in lieu of any ascertainment under Clause 26 of direct loss and expense

.4 the cost of preparing the 13A Quotation.

Where specifically requested the 13A Quotation shall provide indicative information statements on

.5 the additional resources required

.6 the method of carrying out the Variation.

13A.3.1 The Employer may accept a 13A Quotation and the Architect shall immediately confirm to the Contractor 'a confirmed acceptance'.

13.4 If the 13A Quotation is not accepted the Architect either instructs that the Variation is carried out, and valued via either Alternative A or B, or that the work is not to be carried out. If the work is not carried out the Contractor shall be paid a fair and reasonable amount in respect of the preparation of the Quotation.

Clause 14: Contract Sum

14.1 'The quality and quantity of the work included in the Contract Sum shall be deemed to be that which is set out in the contract Bills'.

Note: Clause 2.2 – The Bills of Quantities must be in accordance with SMM7. Any items not so included must be specifically noted with an indication of how measured, usually indicated thus:

'Notwithstanding SMM *Clause No.*, *work item* is measured *description of how measured for BQ*.'

Such a statement will usually occur in the Preambles section of the BQ.

Clause 14.1 is upheld in its expressed limitation of authority of the BQ by:

English Industrial Estates Corporation v. *George Wimpey* & *Co. Ltd* (1973)
Gleeson MJ Ltd v. *London Borough of Hillingdon* (1979).

14.2 Contract Sum fixed as a lump sum; the only adjustments permissible are those set out in the Conditions of Contract (e.g. valuation of Variations).

Subject to QS's preparation errors which are covered by Clause 2.2.2.2, any errors (arithmetic, etc.) are deemed to have been accepted by the parties and are non-adjustable.

Note:

(a) Provisions of Code of Procedure for Single Stage Selective Tendering, 1998.

(b) Professional responsibilities, especially negligence.

(c) JCT Standard Form is a Lump Sum Contract with provision for interim payments. Although the Lump Sum nature is diluted by items in the Bills of Quantities the Contractor agrees to carry out the work for the Contract Sum – not to carry out the work for the rates in the Bills. These rates are only for the valuation of variations.

Clause 15: Value added tax – supplemental provisions

15.1 Defines VAT – introduced by Finance Act 1972. Under the control of the Customs and Excise.

15.2 Contract Sum is always *exclusive* of VAT.

15.3 Where any items become *exempt* from VAT after the Base Date – Employer to pay the Contractor the loss of input tax he would otherwise have recovered.

Clause 16: Materials and goods unfixed or off-site

16.1 Unfixed materials/goods delivered to, placed on or adjacent to the Works and intended therefore may be removed only for use on the Works, unless removal has been agreed in writing by the Architect. Such consent not to be unreasonably withheld.

Unfixed materials/goods (as above) – value of which has been included in an Interim Certificate which has been paid are the property of the Employer. The Contractor is in the position of a bailee, expressly responsible for loss or damage to them; but subject to Clause 22B or C if applicable (fire, etc., Employer to insure).

Until an Interim Certificate, as denoted above, is honoured, the property in the goods remains with the appropriate party as per the sale agreement, governed by the Sale of Goods Act (usually the Contractor).

Following *Dawber-Williamson Roofing Ltd* v. *Humberside County Council* (1979); under sub-contract in which no express terms cover the passing of property in materials/goods on site, the title does not pass until the materials/goods are fixed.

See *Stansbie* v. *Troman* (1948): where items on site are owned by the Employer, common law requires the Contractor to take reasonable care to protect them from damage, theft, etc. This, probably, also applies to Sub-Contractors' items on site.

16.2 Applies to materials/goods stored off site – often applies to nominated items due to their high value. Once the Employer has paid the Contractor for them (clause 30.3) and so the property has passed to the Employer, the Contractor has responsibilities:

(a) to remove them only for incorporation in the Works

(b) for costs of storage, handling, insurance until delivered to the Works, whereupon Clause 16.1 applies

(c) for loss or damage.

Note: S.16 Sale of Goods Act – property in unascertained goods cannot pass to the purchaser unless and until the goods are ascertained.

Naturally, many of these responsibilities are passed on by the Contractor to the Supplier or Sub-Contractor in most cases.

In the absence of any express terms in a building Contract, materials on site do not become the property of the Employer until

they have been made part of the project; 'fully and finally incorporated into the Works' is a common phrase in this regard.

Clearly in the 1998 JCT standard form, this general principle is overridden by the express provisions of the Contract – Clause 16.

The requirement for listed items, either uniquely identified or not, of Clause 16 materials has implications for certificates and payments (Clause 30.3).

Clause 17: Practical Completion and defects liability

17.1 As soon as the Architect considers that Practical Completion of the Works has been achieved, he must issue a Certificate to that effect provided that the Contractor has provided any as-built drawings, etc. concerning Performance Specified Work in accordance with Clause 5.9. For all the purposes of the contract, Practical Completion is deemed to have occurred on the day named in that Certificate.

Practical Completion is not defined in the contract but is normally understood to be when the Works are complete for all practical purposes, any outstanding items of work being of only a minor or remedial nature such that they would not materially affect the proper functioning of the building.

Note: Practical Completion is distinct from and not applicable to the doctrine of Substantial Completion where, if a party can show that he has 'substantially performed' his obligations, he can successfully sue for the price under an entire or lump sum contract provided that he gives appropriate credit for any deficiencies in the whole, including uncompleted obligations.

See *Appleby* v. *Myers* (1867) – following *Cutter* v. *Powell* (1795) – Blackburn J:

'There is nothing to render either it illegal or absurd in the workman to agree to complete the whole, and to be paid when the whole is complete, and not till then.'

If a builder failed to complete an entire contract he could claim neither *quantum meruit* nor in equity.

Sumpter v. *Hedges* (1898) – A.L. Smith LJ:

'The law is that where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered.'

Dakin H. & Co. Ltd v. *Lee* (1916): Under a lump sum building contract, defects or omissions amounting only to negligent performance (not abandonment of the contract, etc.) did not preclude a successful claim for the contract sum less only the amount necessary to make the work accord with the specification.

Naturally the question is one of degree and for this rule to apply the omissions or defects should be of a relatively minor nature.

Hoenig v. *Issacs* (1952) – Denning LJ:

'It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. Where a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions.'

Thus, it may be concluded that the JCT Standard Form 1998 Edition is a lump sum contract with provision for Interim Payments.

Note: following observations in *Dakin* v. *Lee* and *Hoenig* v. *Isaacs*:

(a) the builder cannot recover if he abandons the contract (subject to the express terms of the agreement)

(b) contracts which provide for retention money to be paid on completion might require entire performance in the strict sense – but, probably, in relation only to the retention releases rather than Interim Payments under the Contract.

(c) *J. Jarvis & Sons Ltd* v. *Westminster Corporation* (1970): Practical completion:

'What is meant is the completion of all the construction work that has to be done.'

(d) *H.W. Nevill (Sunblest) Ltd* v. *Wm Press & Son Ltd* (1980):

'I think that the word "practically" in Clause 15(1)[JCT 63] gave the Architect discretion to certify that William Press had fulfilled its obligation under Clause 21(1) where very minor, de minimis, work had not been carried out but that if there were any patent defects in what William Press had done, the Architect could not have given a Certificate of Practical Completion.'

17.2 The Appendix provides for the usual 6 months DLP to be varied.

Defects, shrinkages and other faults which appear within the DLP and are due to materials and workmanship not in accordance with the Contract must be:

(a) Specified on a schedule of defects by the Architect, to be delivered as an AI to the Contractor not later than 14 days from the expiration of DLP.

(b) made good by the Contractor at his own cost (unless subject to an AI, with the Employer's consent, not to make good any such defects and to reduce the Contract Sum accordingly) and within a reasonable time.

17.3 Despite the provision of Clause 17.2, such defects etc., including damage caused by frost prior to Practical Completion, may be the subjects of an AI for their making good – Contractor to comply within a reasonable time and normally at his own cost. (Again, subject to a possible AI not to make good, and, then to reduce the Contract Sum accordingly.)

No such AIs may be issued after delivery of the schedule of defects or 14 days from the expiration of DLP.

This Clause enables individual defects, usually of a more major nature, to be required to be made good prior to the issue of the full defects list.

There is no provision for an interim defects list except by this AI provision but the issue of such a list is quite common in practice.

Thus, it is sensible and usual for the defects schedule to be prepared and issued as late as possible such that all defects arising may be properly included.

Any defects which appear after the expiration of DLP are not covered by the Contract and so any action for their making good would have to be at common law.

Note: Statutes of Limitations provisions.

17.4 When the defects specified by the AIs and/or the schedule of defects have, in the Architect's opinion, been made good, he must issue a Certificate of Completion of Making Good Defects.

This Certificate is a prerequisite for:

(a) Final Certificate – Clause 30.8,

(b) release of the balance of retention – Clause 30.4.1.3

17.5 Contractor must make good only frost damage which is due to frost prior to Practical Completion. If frost damage becomes apparent after Practical Completion the Architect must certify that such damage is due to frost which occurred prior to Practical Completion for the Contractor to be required to make it good under the Contract. If no such Certificate is issued, the Contractor is entitled to claim payment for the work involved.

Clause 18: Partial possession by Employer

18.1 Prior to the date(s) of issue of the Certificate(s) of Practical Completion, the Employer may wish to take possession of any part(s) of the Works. If the consent (not unreasonably withheld) of the Contractor has been obtained, then notwithstanding anything express or implied elsewhere in the Contract, the Employer may take possession. Upon such taking of possession, the Architect must issue a written statement to the Contractor, on the Employer's behalf, which identifies the part(s) of the Works taken into possession ('relevant part') and which specifies the date on which the Employer took possession ('relevant date').

In such instances, the following must occur:

.1 Practical Completion is deemed to have occurred and the DLP to have commenced on the relevant date for the relevant part, for the following purposes only:

(a) Clause 17.2 – schedule of defects

(b) Clause 17.3 – AIs re defects

(c) Clause 17.5 – damage by frost

(d) Clause 30.4.1.2 – Retention ($\frac{1}{2}$ release).

.2 Certificate of Completion of Making Good Defects of the relevant part to be issued at the appropriate time (see usual provisions regarding the issue of this Certificate).

.3 The obligation to insure the relevant part under Clause 22A (contract insuring) or Clause 22B.1 or 22C.2 (Employer insuring) terminates from the relevant date. Where Clause 22C applies, the obligation of the Employer to insure under Clause 22C.1 includes the relevant part from the relevant date.

.4 Liability to pay liquidated damages in respect of the relevant part ceases on the relevant date. Any such liability (Clause 24) in respect of the remainder of the Works which arises on or after the relevant date is reduced on a pro-rata basis. (The value of the relevant part pro-rata the Contract Sum.)

English Industrial Estates Corporation v. *George Wimpey & Co. Ltd* (1973) stresses the importance of the Architect's Certificate.

Clause 19: Assignment and sub-contracts

Note: the difference between assignment and sub-letting.

Assignment — the transfer of one party's rights and obligations under a contract to a third party. The consent of the other party to the original contract is often required (e.g. debt factoring). Obligations cannot be transferred unless attached to some right(s).

Sub-letting — where one party's contractual obligations are carried out on his behalf by a third party. The original parties to the contract retain full rights and responsibilities under that contract. Often, the third party will be in a contractual (Sub-Contract) relationship with the party for whom he carried out obligations vicariously.

19.1.1 Neither party may assign the Contract without the written consent of the other.

.2 If the Appendix states that Clause 19.1.2 applies and if the Employer transfers his freehold or leasehold interest in the premises comprising the Works or grants a leasehold interest in such premises, at any time after Practical Completion, the Employer may assign to the new freeholder or leaseholder the right to bring arbitration or litigation proceedings (in the name of the Employer) to enforce any of the terms of this Contract.

Any enforceable agreements regarding this Contract made between the Employer and Contractor prior to any such assignment remain intact and, via estoppel, are part of the assignment. (This is an expression of a basic legal premise regarding transfers of title '*nemo dat quod non habet*'.)

Note:

(a) This provision for assignment by the Employer does not require the written consent of the Contractor.

(b) The rules of Limitation will remain.

(c) The assignment must be executed correctly – in accordance with the Contract, naming the assignee correctly, etc. (of particular importance to groups of companies).

19.2.1 Any Sub-Contractor which is not a NS/C is a Domestic Sub-Contractor.

.2 The Contractor must have the written consent of the Architect to sub-let any part of the Works. Such consent must not be unreasonably withheld.

Following Clause 2.1, the Contractor retains overall responsibility for the execution and completion of the Works in accordance with the Contract, irrespective of any sub-letting.

Note: LA common requirements to sub-let only to local firms – usually within a prescribed area.

There is no requirement for the Architect to approve domestic Sub-Contractors.

19.3 .1 Work measured in the Contract Bills and priced by the Contractor, where the BQ requires that work to be carried out by a person selected by the Contractor from a list contained in the BQ.

.2.1 The list must contain at least 3 persons. The Employer (or the Architect on his behalf) or Contractor may, with the consent of the other party, add persons to any such list prior to the execution of a binding Sub-Contract in respect of that work.

.2 If, prior to the execution of the Sub-Contract, less than 3 persons named in a list are able and willing to carry out the work:

either the Employer and Contractor by agreement add further names to the list to make it at least 3 names long,

or the work may be carried out by the Contractor who may sub-let it to a Domestic Sub-Contractor under Clause 19.2.

.3 A person selected from such a list is to be a Domestic Sub-Contractor.

Note: If a list is altered by having names added, such additions must be inserted in the BQ and initialled by the Employer and Contractor as they represent changes in the terms of the Contract.

19.4.1 Any domestic sub-contract must provide for the employment of that Domestic Sub-Contractor to be determined immediately that the employment of the main Contractor is determined under the contract.

.2 Any domestic sub-contract must provide that:

.1 Unfixed materials/goods on site of the Domestic Sub-Contractor must not be removed except for use on the Works, unless the Contractor has consented in writing to such other removal. The consent must not be withheld unreasonably.

.2 Where, in accordance with Clause 30, the value of unfixed materials/goods on site has been included in an Interim Certificate against which the Employer has *discharged* payment to the Contractor (usually, by making the payment), those materials/goods are deemed to be the property of the Employer. The Domestic Sub-Contractor may not deny that the property in the materials/goods has passed to the Employer.

.3 If the Contractor pays the Domestic Sub-Contractor for unfixed materials/goods on site prior to the Employer's properly discharging payment to the contractor for them, the property in those materials/goods, passes to the Contractor upon the payment's being made to the Domestic Sub-Contractor.

.4 The Operation of Clauses 19.4.2.1 to 3 is without prejudice to the provision of Clause 30.3.5.

Clause 19.4.2 is intended to overcome difficulties found to exist over the title to unfixed materials/goods on site in *Dawber-Williamson Roofing Ltd* v. *Humberside County Council* (1979), in instances where domestic sub-contracts include retention of title provision ('Romalpa Clauses' – *Aluminium Industrie Vaassen* v. *Romalpa* (1976)). Clauses 19.4.2.2 and unfixed materials/goods on site for which payment has been discharged under the provisions of the main Contract, even in cases where the Contractor does not have good title to those materials/goods to pass on – this is the objective of the 'not deny' stipulation in Clause 19.4.2.2.

Note: The requirement is to discharge payment not to make the payment for valid title to pass; this provision is to accommodate set-off, etc.

19.5.1 Provisions for Nominated Sub-Contractor – see Part II of the Contract.

The Contractor retains overall responsibility for executing and completing the Works in accordance with the Contract irrespective of work executed by NS/Cs unless the Contract states otherwise.

.2 Unless the Contractor is acting as a Nominated Sub-Contractor (Clause 35.2) he is not required to do any work which is to be carried out by a Nominated Sub-Contractor.

N.W. Regional Hospital Board v. *Bickerton* (1969): If a first nomination fails before the work under a PC Sum is completed, there is a duty upon the Architect to re-nominate.

Note: Non-compliance with the sub-letting provisions (Clause 19.2 etc.) is a ground for determination of the contractor's employment (Clause 27.1.4).

British Crane Hire Ltd v. *Ipswich Plant Hire Ltd* (1975): If there is a 'course of dealing' between the parties (frequent transactions probably using a standard contract) or if the terms of agreements are standard (e.g. national plant hire agreement), even if not specifically included in forming a contract, they may be implied to give the relationship 'business efficacy'.

Clause 20: Injury to persons and property and indemnity to Employer

See also Practice Note 22.

20.1 The Contractor to be liable for and must indemnify the Employer against any expense, liability, loss, claim or proceedings at statute or common law for personal injury or death due to the carrying out of the Works.

The only exception is the extent to which negligence on the part of:

(a) the Employer

(b) any person for whom the Employer is responsible

(c) any person(s) employed or engaged by the Employer to whom Clause 29 refers

caused the injury/death. (Thus if the Employer's negligence is 30% to blame for the injury, the indemnity covers 70% of the Employer's loss.)

20.2 Similar to Clause 20.1, but:

(a) refers to real or personal property

(b) excludes the Works etc. as Clause 20.3

(c) excludes damage to existing structures, contents etc. under Clause 22C.1 – Employer to insure

(d) damage must be due to any negligence, breach of statutory duty, omission or default of the Contractor or persons for whom the Contractor is responsible. Includes all persons authorised to be on the site except:

(i) the Employer

(ii) persons employed, engaged or authorised by the Employer

(iii) persons employed, engaged or authorised by any local authority

(iv) persons as (iii) but employed, etc. by a statutory undertaker and who are executing work solely in pursuance of its statutory rights or obligations.

20.3.1 'Property real or personal' in Clause 20.2 subject to partial possession, excludes the Works, materials on site and work executed up to and including the earlier of:

(a) the date of issue of the Certificate of Practical Completion, or

(b) the date of determination of the employment of the Contractor (whether or not disputed) under Clauses 27 or 28 or 22C.4.3, if applicable.

Thus the Contractor is responsible for these items and so should effect appropriate insurance.

.2 If partial possession has occurred under Clause 18, the relevant part is excluded from the Works or work executed under Clause 20.3.1.

The purpose of indemnity is to protect against legal responsibility or to compensate; insurance proves a fund to enable the indemnifying party to make any payments which may arise. Insurance does not affect the obligations of the parties. Thus, it is usual for indemnity and insurance provisions to be considered together, the former apportioning risks and the latter dealing with the settlement of claims in respect of prescribed liabilities.

Law Reform (Married Women and Tortfeasors) Act, 1935:

Clause 20 covers tortious liability, thus the Act is of relevance. If there were joint (two or more) tortfeasors and only one were sued by a plaintiff and, thereby, had to pay damages, that tortfeasor could recover from the other, joint tortfeasors a contribution to the damages paid in proportion to the liabilities of each tortfeasor in respect of the tortious act.

Such does not apply if one joint tortfeasor is to indemnify the other(s); the party who is to indemnify the other(s) bears the full liability.

Here the contractor must indemnify the Employer.

See also:

Farr AE Ltd v. *Admiralty* (1953)
A.M.F. International v. *Magnet Bowling Ltd* & *G.P. Trentham Ltd* (1968).

Clause 21: Insurance against injury to persons or property

See also Practice Note 22

21.1.1.1 The Contractor must take out and maintain insurance in respect of liabilities placed upon him under Clauses 20.1 and 20.2, i.e.:

(a) for personal injuries etc., arising from the Works (except if due to Employer's, etc. negligence)

(b) for damage to real or personal property arising from the Works due to the negligence, etc. of the Contractor, etc. Note exclusions of persons causing the damage under Clause 20.2; item (d).

.2 Insurance for injuries to or death of Contractor's employees which occur during the course of their employment must comply with the provisions of the Employers' Liability (Compulsory Insurance) Act 1975 including any amendments, etc., to that act.

The minimum insurance cover required for all other claims under Clause 21.1.1.1 for any one occurrence or series of occurrences arising out of one event is stated in the Appendix.

Beyond the scope of the provisions of the Contract, the Contractor is required to comply with all statutory provisions, including those regarding insurance, to be effected by an employer.

21.1.2 The Contractor and Sub-Contractors must send documentary evidence to the Architect for inspection by the Employer that the insurances required by Clause 21.1.1.1 have been taken out and maintained whenever reasonably required to do so by the Employer.

On any occasion, the Employer may require (not unreasonably or vexatiously) such documentary evidence to be relevant policy (policies) and premium receipt(s).

.3 If the Contractor defaults in:

(a) taking out the insurance, or

(b) maintaining the insurance

as required under Clause 21.1.1.1., the Employer may effect the appropriate insurance and recover the premium amounts (paid or payable) from the Contractor:

(a) by deduction from payments to the Contractor under this Contract, or

(b) as a debt of the Contractor.

21.2.1 If the Appendix states that insurance under this Clause (21.2.1) may be required by the Employer, upon being so instructed by the Architect, the contractor must take out and maintain a Joint Names Policy (the joint names being those of the Employer and the Contractor) for the amount of indemnity stated in the Appendix. A policy of insurance taken out for the purposes of clause 21.2 should extend until the end of the DLP. The insurance is against:

'. . . any expense, liability, loss, claim or proceedings which the Employer may incur or sustain by reason of any damage to any property other than the Works and Site Materials caused by collapse, heave, vibration, weakening or removal of support or lowering of groundwater . . .'

due to the execution of the Works.

Exceptions are injury or damage:

.1 for which the Contractor is liable under Clause 20.2

.2 due to errors or omissions in the design

.3 which reasonably can be foreseen to be inevitable (due to the nature or the manner of its execution (*Rylands* v. *Fletcher* (1868))

.4 for which the Employer should insure under Clause 22C.1, if applicable

.5 to the Works and Site Materials brought on to the site of the Contract for the purpose of its execution except insofar as any part or parts thereof are the subject of a Certificate of Practical Completion – the Employer then takes responsibility

.6 & .7 arising from war risks or the Excepted Risks (see definition of Excepted Risks in Clause 1.3)

.8 directly or indirectly caused by or arising out of pollution or contamination during the period of insurance. Then an exception to the exception – the Contractor is responsible

for sudden, identifiable, unintended and unexpected incidents.

.9 which result in the Employer incurring costs or paying sums in respect of breach of contract, again with an exception to the exception, where such costs or payment would have occurred in the absence of any Contract

This insurance covers the Employer's potential liability as a joint tortfeasor – if the Contractor wishes to insure in respect of his potential liabilities in this regard, he must do so in addition to the insurance required by this Clause.

Under a joint names policy, the insurers cannot recover payment to one insured party from the other insured party where the latter's action caused the loss (i.e. subrogation cannot occur).

See *Gold* v. *Patman & Fotherington Ltd* (1958).

The insurance also will provide protection for the Employer where there is no negligence on the part of the Contractor, etc.

It would be prudent for the insurance under Clause 21.2.1 and that effected by the Contractor in respect of Clause 20.2 to be with the same insurer, thereby avoiding potential argument between insurers about which is liable.

.2 The Clause 21.1.1 insurance to be placed with insurers approved by the Employer. Contractor to send policy (policies) and premium receipt(s) to the Architect for deposit with the Employer.

.3 Amounts paid by the contractor to effect these insurances are to be added to the Contract Sum.

.4 If the Contractor defaults in respect of these insurance requirements, the Employer may effect the insurance required.

21.3 Damage and injury caused by Excepted Risks are excluded from:

(a) indemnity provisions of Clauses 20.1 and 20.2

(b) insurance requirements of Clause 20.1.1

Thus, the Excepted Risks are assumed by the Employer.

Clause 22: Insurance of the Works

See also Practice Note 22.

If it is not possible to effect insurance in respect of all the 'Specified Perils' (see Clause 1.3 for definition), the matter should be resolved at Tender stage and the Contract amended accordingly (this should not be necessary).

Which of the three alternative Clauses will be used depends upon the circumstances:

22A	Contractor to insure (new building)
22B	Employer to insure (new building)
22C	Employer to insure – alterations/extensions to an existing structure

The explanation for the three alternatives is that the Employer may choose to insure new building work since an Employer may be better placed to secure an economic policy; and that only the Employer can insure existing buildings.

Each insurance comprises a Joint Names Policy for All Risks Insurance for the Works. Clause 22C insurance further comprises a Joint Names Policy for insurance of the existing structure and their contents owned by the Employer or which are the Employer's responsibility against loss or damage caused by the Specified Perils.

22.1 Which Clause, 22A, 22B or 22C is to apply must be stated in the Appendix.

Note: A new building, if attached to an existing building by a link bridge or similar connection, depending on the nature of the connection of the buildings, may be deemed to be an extension to the existing building for insurance purposes. Hence, care must be taken to ensure that the correct insurance is stipulated and effected otherwise, due to the nature of insurance contracts (*uberrimae fidae*), the 'apparent' insurance may be void.

22.2. Sets out relevant definitions of terms, namely:

All Risks Insurance – which gives cover against any physical loss or damage to work executed and Site Materials.

Costs of repairing, replacement or rectification are excluded in respect of:

.1 defects due to

.1 wear and tear

.2 obsolescence

.3 deterioration, rust or mildew;

.2 work executed or Site Materials lost or damaged through defective design or work execution, etc. of those items, and any work executed which is lost or damaged as a consequence of such failure where the lost or damaged work relied for support or stability on the items which failed;

Note: Site Materials do not feature in the second part of this sub-Clause.

See also: *D & F Estates Ltd* v. *Church Commissioners for England* (1989).

.3 loss or damage caused by or arising from

.1 any consequence of war, invasion etc., nationalisation, requisition, loss, destruction or damage to property by or under orders of any government, public, municipal or local authority;

.2 disappearance or shortage, only if revealed when an inventory is made or is not traceable to an identifiable event;

.3 an Excepted Risk.

If the Contract is in Northern Ireland two further exclusions apply:

.4 civil commotion;

.5 Terrorists acts – a terrorist is a member of or somebody acting for an organisation which is proscribed under the Northern Ireland (Emergency Provisions) Act, 1973; terrorism is violence for political ends including violence to scare the public or a section thereof.

Site Materials – all unfixed materials and goods delivered to, placed on or adjacent to the Works and intended for incorporation therein.

Note: No definition of temporary works is given but, normally, is defined as works executed by the Contractor to enable the permanent Works to proceed.

The insurance does not provide cover for temporary works, plant and similar items of the Contractor, etc.; insurance of such items should be effected by the Contractor (and Sub-Contractors).

All risks insurance policies are not standard. The Contract lists risks to be covered by the insurance, but it is probable that the working of policies will vary (as may the cover offered). It is

essential to check that the requisite cover is afforded by the policy (perhaps particularly by scrutiny of exclusion clauses in the policy) prior to actually effecting the insurance. The JCT has checked to ensure that the required cover can be obtained.

22.3.1 The assured (Contractor under Clause 22A; Employer under Clauses 22B and 22C) must ensure that the Joint Names Policy(s) (under the applicable of Clauses 22A.1, 22A.3, 22B.1, 22C.1, 22C.2):

(a) provide for recognition of each NS/C as an insured under the relevant Joint Names Policy, or

(b) include a waiver by the insurers of their rights of subrogation (if any) against any NS/C.

Thus, under alternative (b), the insurer waives any right to sue any NS/C for damage caused by the NS/C and covered by (and thence reimbursed under) the Joint Names Policy.

The recognition or waiver for NS/Cs is in respect of loss or damage to the Works and Site Materials caused by Specified Perils under Clauses 22A, 22B and 22C.2. Where Clauses 22C.1 applies, the recognition or waiver applies to loss or damage to the existing structures and relevant contents caused by Specified Perils. Any such recognition or waiver applies up to and including the earlier of:

(i) date of issue of Certificate of Practical Completion of the Sub-Contract Works – NSC/C, Clause 2.11

(ii) date of determination of the employment of the Contractor (whether disputed or not) under Clause 27, 28, or 22.C.4.3 if applicable.

The provisions of Clause 22.3.1 also apply to any Joint Names Policy effected under the Contract where the party who was required to insure has not effected the insurance and the Joint Names Policy has, in consequence, been taken out by the other party (e.g. Employer has effected the insurance under Clause 22A.2).

22.3.2 The provisions of Clause 22.3.1 regarding recognition or waiver apply also to Domestic Sub-Contractors. Such recognition or waiver continues up to and including the earlier of:

(i) the date of issue of any certificate or document which states that the Domestic Sub-Contract Works are practically complete, or

(ii) the date of determination of the Contractor's employment as Clause 22.3.1.

The provisions of Clause 22.3.1 do not apply where the Joint Names Policy is effected under Clauses 22C.1 or 22C.3.

Clause 22A: Erection of new buildings – All Risks Insurance of the Works by the Contractor

22A.1 Contractor to take out and maintain a Joint Names Policy for All Risks Insurance. The minimum scope of cover is denoted in Clause 22.2. The amount of cover required is the full reinstatement value of the Works plus any percentage to cover professional fees as stated in the Appendix.

Subject to Clause 18.1.3., the insurance must be maintained up to and including the earlier of:

(a) the date of issue of the Certificate of Practical Completion,

or

(b) the date of determination of the employment of the Contractor under Clause 27, 28 or 28A (whether the validity of such determination is contested or not).

Note:

(i) Especially during times of high inflation, it is essential to ensure that the cover is adequate for the full reinstatement value, as required – including Variations, etc.

(ii) Where an Extension of Time is awarded, it is essential to ensure that the insurance cover is extended up to and including the new Completion Date.

(iii) If the required All Risks Insurance cannot be obtained, prior to executing the Contract, the parties should either amend the definition of All Risks Insurance to accord with the cover which can be obtained or state the risks which are to be covered by the insurance in the Contract.

.2 Employer must approve the insurers with whom the contractor takes out the Joint Names Policy under Clause 22A.1. Contractor to send to the Architect, for deposit with the Employer:

(a) the Policy,

(b) the premium receipt for the Policy,

(c) any endorsements necessary to maintain the Policy, as required by Clause 22A.1, and

(d) premium receipts for any such endorsements.

If the Contractor defaults in taking out and maintaining the insurance required under Clauses 22A.1 and 22A.2, the Employer may:

(a) effect insurance by a Joint Names Policy against any risks regarding which the Contractor's default occurred,

(b) recover the premium amounts (paid or payable by the Employer to effect the necessary insurance) from the Contractor:

(i) by deduction from payments to the Contractor under this Contract, or

(ii) as a debt of the Contractor.

Note: Any amounts paid by the Employer to effect insurance under the Contract in the event of the Contractor's failure to effect the required insurance can be recovered from the Contractor either as a debt (so, ultimately, by litigation) or by set-off, etc., against monies due from the Employer to the Contractor under this contract; under JCT 80 such sums *cannot* be transferred from one project between the parties to another project. The usual means of recovering such sums is by contra-charge or set-off against monies due under Interim Certificates issued subsequently; set-off is a common law right.

22A.3.1 If the contractor maintains a Contractor's all risks insurance independently, such insurance will discharge the Contractor's obligations to insure under Clause 22A.1 provided that:

(a) the scope of the cover is at least that required by Clause 22.2,

(b) the amount of cover is adequate for the Work's full reinstatement value plus any percentage for professional fees (as Clause 22A.1), and

(c) it is a Joint Names Policy in respect of the Works.

The annual renewal date of such Contractor's all risks policy must be supplied by the Contractor and stated in the Appendix.

The Contractor is not required to deposit such policy and premium receipts with the Employer provided that, when reasonably required to do so by the Employer, the Contractor can send documentary evidence that the policy is being

maintained to the Architect for inspection by the Employer. Further, such inspection arrangements can be invoked by the Employer on any occasion in respect of the policy and premium receipts.

22A.3.2 The provisions of Clause 22A.2 (set-off, etc.) apply in respect of the Employer's rights to insure should the Contractor default in respect of taking out and maintaining the insurance required under Clause 22A.3.1 (contractor's annual all risks insurance).

22A.4.1 If any loss or damage which is covered by the insurance under Clauses 22A.1, 22A.2 or 22A.3 occurs, immediately upon discovering the loss or damage the Contractor must give written notice to the Employer and to the Architect stating the nature, extent and location of such loss or damage.

.2 The occurrence of such loss or damage must be ignored in calculating amounts payable to the Contractor under or due to the Contract.

.3 The Contractor must reinstate work damaged, replace or repair Site Materials which have been lost or damaged, remove and dispose of any debris and proceed with the proper execution and completion of the Works once any inspection required by the insurers regarding a claim made under the Joint Names policy under Clauses 22A.1, 22A.2 or 22A.3 has been completed. Again, the Contractor is required to work diligently to effect the repairs, etc.

.4 The Contractor must authorise the insurers to pay to the Employer all monies from the insurance under Clauses 22A.1, 22A.2 or 22A.3 regarding loss or damage. The authority is in respect of the Contractor and all those Domestic Sub-Contractors and NSCs who, under Clause 22.3, are recognised as insured under the Joint Names Policy. Those monies (less any element for professional fees) must be paid to the Contractor by the Employer as authorised by interim Certificate issued by the Architect (but not the provisions of Clause 22A.4.5).

.5 The only monies which the Contractor is entitled to receive in respect of the repairs etc. are those paid under the insurance. Thus, the Contractor must bear any costs incurred in excess of those monies paid under the insurance in the execution of the repairs, etc. (Any Variation, however, would be valued by the appropriate method and the Contract Sum adjusted accordingly.)