Chapter 1
Introduction

1.1 Structure of the book

The book has been arranged in three parts:

Part 1 deals with general principles relating to time, liquidated damages and financial claims of various kinds.
Part 2 looks at the relevant clauses in JCT contracts.
Part 3 looks at the equivalent clauses in other standard contracts and in some standard sub-contracts.

1.2 Types of claims

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

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

[1] *The Concise Oxford Dictionary.*

Building Contract Claims, Fifth Edition. David Chappell.

1.2.1 Contractual claims

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

1.2.2 Common law claims

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

1.2.3 *Quantum meruit* claims

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

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

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

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

Where there is a contract

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

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

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

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

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

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[2] (1971) 9 BLR 20.
[3] (1987) 9 Con LR 139.
[4] *Amantilla Ltd v Telefusion PLC* (1987) 9 Con LR 139 at 145 per Judge Davis.
[5] *Sir Lindsay Parkinson & Co. Ltd v Commissioners of Works and Public Buildings* [1950] 1 All ER 208.

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

Where there is no contract

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

In another case[7] a contractor submitted a tender for the design and construction of a factory. The contractor was informed that if certain insurance monies became available, its tender would be accepted. Before any such monies were available, the contractor was requested to, and did, carry out some design work and other design work was carried out without an express request but with the employer's full knowledge. There was no contract and it was held that all the design work had been carried out as a result of an express and implied request and that the contractor was entitled to a reasonable sum in payment.

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

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

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[6] (1981) 24 BLR 94.
[7] *Marston Construction Co Ltd v Kigass Ltd* (1989) 15 Con LR 116.
[8] *Laserbore v Morrison Biggs Wall* (1993) CILL 896.
[9] *Costain Civil Engineering Ltd and Tarmac Construction Ltd v Zanin Dredging and Contracting Company Ltd* (1996) 85 BLR 85.
[10] (2000) 73 Con LR 100.

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

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

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

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

In another interesting case[11] a letter of intent was sent to the contractor. It was somewhat unusual in nature. A letter of intent is usually an assurance by one party to the other which, if acted upon, will have limited contractual effect such that reasonable expenditure will be reimbursed. Usually, either party is free to stop work at any time. In this instance the letter imposed substantial and detailed obligations on both parties. The contractor had the option whether or not to start work but, once started, it would have to continue. The letter envisaged that both parties would continue to negotiate about the form of contract. In the event, no form of contract was finally agreed. The judge referred to the letter of intent as a 'provisional contract' which was intended to be superseded. He concluded that the reasonable remuneration should be that which would be payable under the building contract once entered into. The rates were to be derived from the bills of quantities and any extra remuneration to be derived from the terms of the intended JCT contract.

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

[11] *Hall & Tawse South Ltd v Ivory Gate Ltd* (1997) 62 Con LR 117.
[12] *ERDC Group Ltd v Brunel University* (2006) 109 Con LR 114.

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

1.2.4 *Ex gratia* claims

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

1.3 The basis of claims

1.3.1 General

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

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

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

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

1.3.2 Contractual claims

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

1.3.3 Extension of time and loss and/or expense

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

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

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

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

1.3.4 Unexpected problems

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

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

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[14] *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106. See in particular page 120; *Methodist Homes Housing Association Ltd v Messrs Scott & McIntosh*, 2 May 1997, unreported.
[15] [1956] 2 All ER 148 HL.
[16] *Davis Contractors Ltd v Fareham Urban District Council* [1955] 1 All ER 275 at 278 CA.

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

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

1.4.1 The contract terms

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

1.4.2 Agency

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

[17] *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190 upheld on appeal [2010] ScotCS CSIH 68.
[18] It should be noted that the Codes of Professional Conduct of both the Royal Institute of British Architects and the Architects' Registration Board require architects to conclude written terms of engagement.

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

1.4.3 Architect's discretion

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

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

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

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

[19] *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616.
[20] *Partington & Son (Builders) Ltd v Tameside Metropolitan Borough Council* (1985) 5 Con LR 99 at 108. per Judge Davies.

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

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

1.4.4 Architect's liability to the contractor

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

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

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

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

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

[21] *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190 at paragraph 148 per Lord Drummond Young.
[22] *City Inn Ltd v Shepherd Construction Ltd* [2010] ScotCS CSIH 68.
[23] *Croudace Ltd v London Borough of Lambeth* (1986) 6 Con LR 70.
[24] *F G Minter Ltd v Welsh Health Technical Services Organisation* (1979) 11 BLR 1 at 13 per Parker J partially reversed by the Court of Appeal, but not on this point (1980) 13 BLR 7.
[25] (1987) 4 Const LJ 125.

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

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

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

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

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

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

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[26] (1987) 4 Const LJ 125 at 130 per Judge Fox-Andrews.
[27] [1976] 1 All ER 785.
[28] [1974] 1 All ER 859.
[29] [1975] 3 All ER 901.
[30] [1901] 1 KB 624.
[31] [1975] 3 All ER 901 at 924 per Lord Salmon.
[32] (1988) 44 BLR 33.
[33] *Galliford Try Ltd v Mott MacDonald Ltd* (2008) 120 Con LR 1, which includes a very thorough consideration of the duty of care.

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

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

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

It expressly approved the first instance judgment saying:

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

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

Subsequent cases[39] provide firm support to the idea that the reliance principle established in *Hedley Byrne & Co Ltd v Heller and Partners Ltd*[40] is capable of extension

[34] *Smith v Eric S Bush* [1989] 2 All ER 514.
[35] (1986) 6 Con LR 85.
[36] (1986) 6 Con LR 85 at 111 per May LJ.
[37] (1986) 6 Con LR 85 at 101 per May LJ.
[38] See, for example: *Ludbrooke v Barrett* (1877) 46 LJCP 798; *Stevenson v Watson* (1879) 48 LJCP 318; *Demers v Dufresne* [1979] SCR 146; *Trident Construction v Wardrop* (1979) 6WWR 481; *Yuen Kun Yen v Attorney-General of Hong Kong* [1988] AC 175; *Edgeworth Construction Ltd v F Lea & Associates* [1993] 3SCR 206.
[39] *Henderson v Merritt Syndicates* [1995] 2 AC 145, (1994) 69 BLR 26; *White v Jones* [1995] 1 All ER 691; *Conway v Crow Kelsey & Partners* (1994) 39 Con LR 1.
[40] [1964] AC 465.

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

1.5 Quantity surveyor's powers

1.5.1 Valuation of variations

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

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

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

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

1.5.2 Direct loss and/or expense

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

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[41] [2001] 1 Lloyd's Rep 308.

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

[43] See Chapter 14.

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

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

1.5.3 Quantity surveyor's duty

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

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

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

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

1.5.4 Duty to the employer

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

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

1.5.5 Quantity surveyor's liability to others

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

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

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

1.5.6 Commercial settlements

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

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