Chapter 11

Extension of time under JCT standard form contracts

11.1 Standard Building Contract (SBC)

The current JCT Standard Building Contract is the 2005 version (Revision 2 2009).

11.1.1 Clauses 2.26–2.29

These clauses deal with extension of the contract period and are now headed 'Adjustment of Completion Date'. Schedule 2 'Variation and Acceleration Quotation Procedures' also includes provisions for fixing a new date for completion. The Guide published to accompany the contract states that the change in heading from the straightforward 'Extension of time' of clause 25 of the 1998 edition of the form is a more open recognition of agreements to accelerate the Works under the Schedule 2 Quotation procedure. 'Pre-agreed Adjustment' is a defined term used in clauses 2.26–2.29 when referring to a revised completion date fixed by acceptance by the architect on behalf of the employer of a variation or acceleration quotation. It should be noted that references to extending time and fixing a new date for completion is taken to mean the date for completion of the Works or, if the Works are divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.1.2 Commentary

The current extension of time clauses contain some significant and many minor changes to clause 25 of JCT 98.

Clause 2.27.1

This clause is much misunderstood or more accurately, it is not read properly, but it is the key clause in the extension of time provisions. The contractor is required to give notice to the architect of every delay. It should be noted that the contractor is to give notice not only when the progress of the Works is being delayed, but also

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when it becomes reasonably apparent that it is likely to be delayed in the future. It has to be obvious to a contractor, acting in a reasonable manner, that the progress of the Works is being or is likely to be delayed. The reference to progress must refer to actual progress. Clearly, measuring whether it has been delayed should be a straightforward matter of fact. It is probably relevant to compare the contractor's actual progress to the progress indicated in the contractor's programme although a failure to comply with the programme would be unlikely, without more, to conclusively demonstrate delay to progress. Strange as it may seem, the contractor has no obligation to comply with its own programme and it may, for example, progress the Works faster than shown on the programme.[1] 'Apparent' means that something is clearly seen or understood and that is the criterion which will determine whether or not the contractor has complied with its obligation to notify. Once it becomes reasonably apparent that the progress is actually being delayed or is likely to be delayed, the contractor must notify the architect. The contractor is to give the notice 'forthwith'. 'Forthwith' has been variously defined as: as soon as it is reasonable to do so[2] or 'without delay or loss of time'.[3] It appears that the meaning will be adjusted depending on the context. In most building contracts it conveys the fact that the action required must not be delayed. It does not necessarily mean 'immediately.'[4] Clause 1.7.1 states that all notices must be in writing.

The contractor's notice must specify the cause of delay. Although often overlooked, it is important for the contractor to identify the precise activity (or activities) which is delayed together with its relation to the project's critical path and it is certainly in the contractor's interest to do so. This notice was held not to be a condition precedent to giving an extension of time by the architect under JCT 63[5] and the decision may apply to SBC also.[6] In any event under SBC wording (clause 2.28.5), the architect has power to give an extension in the absence of such written notice once the date for completion has passed; failure by the contractor to give written notice merely means that the architect does not need to make a decision on extensions until a later date, i.e. on the review of the completion date not later than the expiry of 12 weeks from the date of practical completion whether or not the contractor has notified the relevant event. It is less clear whether the architect is entitled to give an extension of time before practical completion in the absence of written notice. On balance, that the architect cannot do so appears to be the better view.

The contractor's notice is to state not just the cause or causes of the delay; it must also state the material circumstances. It is important that the notice should go into some detail regarding why the delay is occurring or is likely to occur and the form of such delay. The cause of the delay should be interpreted as meaning all the factors giving rise to the delay. The 'material circumstances' will include such things as the progress and the proposed order of Works and anything else which might affect progress at the time of the delay. The knock-on effect of the delay, with consequent

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[1] *Glenlion Construction Ltd v The Guinness Trust* (1987) 39 BLR 89.
[2] *London Borough of Hillingdon* v *Cutler* [1967] 2 All ER 361.
[3] *Roberts v Brett* (1865) 11 HLC 337.
[4] 'Immediately' normally means that an action must be performed with all reasonable speed: *Alexiadi v Robinson* (1861) 2 F & F 679.
[5] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.
[6] But see the discussion on 'Notices' in Chapter 6, Section 6.6.

likely further disruption, would also be a material circumstance. It is not sufficiently appreciated that the duty is not limited to notifying the causes of delay listed as relevant events; it is a duty to give notice of delay, however it is caused. What that means in practice is that the contractor must notify all delays and their causes even if the delay is entirely of the contractor's own making. It must notify breakdowns of machinery, shortage of labour and delays in supplies. The idea is that the architect is in possession of all the information required to monitor the progress of the Works.

The information must be provided even if it is uncertain whether the current completion date will be affected. Further, if the contractor fails to give notice of a delay which it clearly should have been able to anticipate, the architect can in fact say that the contractor has not used its best endeavours to prevent delay in progress, which it is bound to do by the terms of clause 2.28.6.1. Anecdotal evidence suggests that it is rare, virtually unknown, for a contractor to give notice of delays unless it believes that a relevant event giving rise to an extension of time is involved. The purpose of the notice is simply to warn the architect of the situation, and it is then up to the architect to monitor it.[7] It may be possible for the architect to take some action which may eradicate the delay completely.

In short, the contractor must give prior notice of all delays which it is reasonable for it to expect. The architect then has sufficient time to take appropriate steps to rectify the situation and provide the contractor with the opportunity to bring the contract back on programme. This may be by way of omitting work under clause 3.14 if it is practicable to do so and if, of course, the employer agrees. If the contractor fails to give notice (even of its own delays), it is in breach of contract and the architect is entitled to take such a breach into account when giving a future extension of time.[8]

A simple example will make clear how the principle works. Take the case of an architect who has been given a specific written request for information by the contractor at the right time, neither too early nor too late. The architect has overlooked the request. A week before the information is required, it is reasonably apparent to the contractor that it is not likely to arrive, but it does nothing. On the day it is required, it has still not arrived, but it is not until a week later and the job is seriously delayed that the contractor sends the architect a notice of delay. By the time the architect has diverted staff onto the task and the information is produced, a further two weeks have passed making a total of three weeks delay. The contractor is clearly in breach, because it failed to notify the architect that the work was likely to be delayed a week before the delay occurred. In fixing a new completion date, the architect is entitled to take the contractor's breach into account by asking the question: what would have been the length of delay had notification been received at the correct time? It would still have taken two weeks to produce the information, but the preparation would have been able to start a week before it was required. The contractor would have been delayed one week and that is all the architect need consider in fixing a new completion date. Events are rarely quite as straightforward as that and, in practice, there may be numerous other factors to be considered.

[7] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.
[8] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

The contractor must identify in its notice of delay any event which it believes is a relevant event. If it does not do so, the architect's duty to consider the notice does not commence. This requirement acknowledges and reinforces the point that the notice of delay may contain causes of delay which are not relevant events. The notice must state the causes of delay which, the contractor believes, entitle it to an extension of time. The relevant events identified must be listed in clause 2.29.

Clause 2.27.2

The Contractor has a quite onerous obligation under this clause. It must give particulars of the expect effects of each relevant event notified (but not of other delaying factors). Either in its original notice or, where that is not practicable, as soon as possible after the notice, the contractor must state in writing to the architect, particulars of the expected effects on progress. Each relevant event must be assessed by the contractor separately as if no other event had occurred. The contractor is expressly required to give its own estimate of the expected delay in completion of the Works beyond the completion date. This is a particularly onerous task. The contractor must address each delay separately and its effects even if two or more delays are acting together. Contractors will commonly, indeed invariably, promote their views of the delay, but rarely split so as to deal with each delay as a separate item. The contractor must give enough information to enable the architect to form an opinion. So it is not sufficient for the contractor merely to estimate the effect on the completion date, it must also show the effect on every relevant activity between the event and the completion date. It is arguable that a contractor cannot properly comply with this requirement without providing before and after print outs of its computerised programme.

Clause 2.27.3

The contractor is required to inform the architect of any material (i.e. significant) change in any of the submitted particulars and estimate of delay and give whatever further information the architect may reasonably require. The contractor must keep the architect up to date with developments on site which are relevant to the notified delay. For example, it may be an ongoing delay for which the contractor must update the architect on a regular basis. The contractor's duty is not dependent upon the architect's request. Failure to so update the architect will amount to a breach of contract on the part of the contractor which the architect is entitled to take into account in estimating any extension of time. The architect's time limit for dealing with applications for delay only begins when the required particulars have been received from the contractor. The intention of these provisions is to provide sufficient information to allow the architect reasonably to arrive at an informed opinion. Although the architect may not have been on the site at the time of the delay, there is no doubt that an architect must use whatever records are available from any source.[9] The architect cannot avoid dealing with the contractor's delay notices

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

because the contractor has failed to provide information which the architect already has or of which the architect is well aware.

Importantly, it should be noted that it is expressly stated that the architect may require the further information at any time. It has been held in relation to adjudication proceedings that the phrase 'at any time' must be given its plain and natural meaning[10] and there is no restriction as to time.[11] The question under consideration was whether adjudication could take place concurrently with legal proceedings about the same matter. Because adjudication was stated to be available 'at any time', the words meant what they said even though the same issue was being decided by the court. In this instance, it is suggested that the words must also be given their plain meaning within the context of the clause. The effect of that appears to be that the architect may require further information at any time up to the date on which the architect gives a definitive decision on extensions of time. The architect is required to review the extension of time position up to 12 weeks after the date of practical completion (clause 2.28.5). Therefore, the architect may require further information up to that time. There is an important qualification – that the architect's requirement must be reasonable.

Clause 2.28.1

The architect's duty to form an opinion about extension of time does not arise until the contractor has provided both the notice of delay and the particulars including an estimate of expected delay in completion. If the particulars are received before the date for completion, the architect must consider them. The architect has to decide two important things:

- whether any of the causes of delay specified by the contractor in the notice is in fact a relevant event, and
- whether completion of the Works is in fact likely to be delayed by the specified relevant event beyond the completion date.

Obviously, the architect may disagree that the cause specified by the contractor is a relevant event. If that is the case, the architect need not consider the next point. It is remarkable how often contractors fail to refer to any relevant event at all, presumably on the basis that they are entitled to an extension of time if they are delayed for any reason. Alternatively, contractors often specify relevant events by clause number without specifying any occurrence on site in relation to it. Where a contractor fails to identify the correct, or indeed any, relevant event, it is doubtful that the architect has any duty to identify it. There is nothing in the contract which suggests that the architect has such a duty. Rather, the architect's duty seems to be simply to check whether the contractor has named the correct relevant event and whether the notified cause falls under that relevant event.

An architect who concludes that the delay, however long it may be, has no effect on the completion date, must decide that no extension of time is applicable. That

[10] *Herschel Engineering Ltd v Breen Property Ltd* (2000) 16 Const LJ 366.
[11] *A & D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd* (2000) 17 Const LJ 199.

situation can occur when a delay occurs to an activity which is not on the critical path and which has a considerable amount of float to absorb the effects of the delay without the non-critical activity becoming critical. It is very easy for an architect to fall into the trap of thinking that a delay of two weeks equals two weeks extension of time. It is difficult to over-emphasise the importance of the completion date. A delay which does not affect the completion date does not entitle the contractor to an extension of time. Delay to an activity which may or may not have an effect on the completion date must be differentiated from delay to the completion date. The question was considered in a case where the architects and project managers were alleged to have been negligent in relation to some of the extensions of time given to the contractor. The case against the project managers failed because the court held that it was no part of the duty of the project managers to second guess the architect's decisions. Moreover, there was no evidence to show that, if the project managers had expressed a contrary view to that of the architects, the architects would have taken any notice. The architects were not generally held to be negligent in the giving of extensions of time except in one particular concerning a delay which did not affect the date for completion. The court summed up the situation as follows:

> '. . . had [the architect] directed its mind, when considering the question whether to grant a second extension of time on the Hydrotite Ground, to the issue whether the progress of the Works, as opposed to the activity "Wall and Floor Finishes", had been further delayed since the grant of the first extension of time on the Hydrotite Ground, it could only have concluded that it had not. It is thus, in my judgment, clear that in relation to the second grant of an extension of time on the Hydrotite Ground [the architect] negligently failed to direct its mind to the correct issue, and, if it had directed its mind to the correct issue, it could only have concluded that no further extension of time was appropriate.'[12]

It is entirely a matter for the architect's opinion whether a delay in the contract completion date is likely to occur or has occurred and also whether the cause of delay falls into the category of a relevant event and therefore something for which the architect should grant an extension. However, the architect does not have completely free rein in the matter and must exercise his or her opinion according to law. As soon as the architect is notified by the contractor of a delay, either occurring or predicted to occur, it is for the architect to carefully monitor the position. The situation has been summarised in this way:

> 'Clause 23 imposes on the architect the duty of considering whether completion of the works is likely to be or has been delayed beyond the date for completion by way of the causes there set out and if it has whether any and if so what extension should be granted. That duty is owed both to the contractor and the building owner. The architect is entitled to rely on the contractor to play his part by giving notice when it has become apparent to him that the progress of the works is delayed. If the contractor fails to give notice forthwith upon it becoming so apparent he is in breach of contract and that breach can be taken into account by the

[12] *The Royal Brompton Hospital National Health Service Trust v Frederick Alexander Hammond & Others (No 7)* (2001) 76 Con LR 148 at 214 per Judge Seymour.

> architect in deciding whether he should be given an extension of time. But the architect is not relieved of his duty by the failure of the contractor to give notice or to give notice promptly. He must consider independently in the light of his knowledge of the contractor's programme and the progress of the works and of his knowledge of other matters affecting or likely to affect the progress of the works . . . whether completion is likely to be delayed by any of the stated causes. If necessary he must make his own inquiries, whether from the contractor or others.'[13]

The extension of time clause under the form of contract being considered there was clause 23 of JCT 63. If the contractor feels that the architect has been unreasonable in reaching an opinion, its recourse is to adjudication or arbitration. On receipt of the contractor's written notice the architect must decide if the cause of delay is covered by clause 2.29. If in the architect's view it is not then, subject to the contractor's right to challenge that opinion by adjudication or arbitration, that is the end of the matter.

Of course, the architect must not arrive at the decision on a whim. The position should be carefully analysed and the effect of individual delays must be considered.[14] However, having reached a decision, that decision has a considerable status under the contract as indicated in the judgment in *Balfour Beatty v London Borough of Lambeth*:

> 'Lambeth was in my view entitled to criticise BB's case without putting forward an alternative. Since BB had not justified its case Lambeth was not obliged to justify the architect's extensions of time or certificates of non-completion. It was entitled to rely on them as they were apparently valid decisions by the architect and the parties by adopting the JCT conditions have agreed to be bound by them (subject to review by an Adjudicator or arbitrator). BB had to persuade the Adjudicator that the architect's decisions were wrong. Lambeth were not obliged to prove that they were right (although it is often prudent to do so).'[15]

The architect must then decide whether or not the delay is going to mean a likely failure to complete by the date for completion. The architect is entitled to consider clause 2.28.6.1, which provides that the contractor shall constantly use its best endeavours to prevent delay. The contractor's duty is to prevent delay, so far as it can reasonably do so, e.g. a delay in progress of the Works at an early stage may be reduced or even eliminated by the contractor using its best endeavours.

An interesting situation arises if the contractor is actually ahead of its own programme when a delay occurs. The correct position appears to be as follows:

> 'Provided the contractor has given written notice of the cause of delay, the obligation to make an extension appears to rest on the architect without the necessity of any formal request for it by the contractor. Yet he is required to do this only if the completion of the works "is likely to be or has been delayed beyond the Date for Completion", or any extended time for completion previously fixed. If a

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[13] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 93 per Vinelott J.
[14] *John Barker Construction Ltd v London Portman Hotels Ltd* (1996) 50 Con LR 43.
[15] [2002] BLR 288 at 303 per Judge Lloyd.

> contractor is well ahead with his works and is then delayed by a strike, the architect may nevertheless reach the conclusion that completion of the works is not likely to be delayed beyond the date of completion. Under condition 21 (1), the contractor is under a double obligation: on being given possession of the site, he must "thereupon begin the works and regularly and diligently proceed with the same", and he must also complete the works "on or before the Date for Completion", subject to any extension of time. If a strike occurs when two-thirds of the work has been completed in half the contract time, I do not think that on resuming work a few weeks later the contractor is then entitled to slow down the work so as to last out the time until the date for completion (or beyond, if an extension of time is granted) if thereby he is failing to proceed with the work "regularly and diligently".'[16]

Although these observations were *obiter*, it is thought that this sensible analysis accurately represents the law. It appears that the architect may take account of where the contractor actually is in terms of progress when compared with its programme and that if the contractor is ahead of its programme, the architect may take account of that in estimating the appropriate extension of time. The passage also reinforces the point that the contractor does not own the float element in the programme.[17] In a situation where causes of delay overlap or where they are concurrent (in the broad sense), the architect must consider each cause separately. The cumulative effect on progress must be taken into account: it is delay to progress and the completion date which are the important factors.[18]

An architect who decides that one or more causes are relevant events and that the completion date is likely to be delayed as a result must give an extension of time to the contractor. The following extract is still useful in putting the architect's task in perspective:

> 'Perhaps the greatest difficulty which may be encountered will be in deciding whether or not the notice, particulars and estimates, which the contractor is required to provide, are sufficient for the architect to make his decision on extending the completion date. This requires close co-operation between contractor and architect and architects ought to be decisive in the matter and not use alleged insufficiency of particulars and estimates as an excuse for delaying the issue of extensions of time'.[19]

The architect will have to consider matters of concurrency caused by delays resulting from different relevant events and from the contractor's own culpable delay. In estimating extensions of time under JCT 98 it was said:

> 'where optional clause 5.3.1.2 is not deleted, the architect will be assisted by the contractual obligation on the contractor to provide and keep up to date a master programme for the execution of the works'.[20]

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[16] *London Borough of Hounslow v Twickenham Garden Developments Ltd* (1970) 7 BLR 81 at 113 per Megarry J.
[17] *How Engineering Services Ltd v Lindner Ceilings Partitions PLC* 17 May 1995 unreported; *Ascon Contracting Ltd v Alfred McAlpine Construction of the Isle of Man Ltd* (2000) 16 Const LJ 316 at 338.
[18] See Chapter 2, Section 2.4 – Concurrency, for a detailed consideration of this point.
[19] The Aqua Group, *Contract Administration for the Building Team* (1996) 8th edition, Blackwell Science, p.114.
[20] The Aqua Group, *Contract Administration for the Building Team* (1996) 8th edition, Blackwell Science, p.114.

Precisely so, but there is no contractual obligation to provide a master programme. The relevant clause in SBC is 2.9.1.2. As noted elsewhere, it is a sensible practice for the architect to include such a requirement, and to specify the type of programme required, even where the contract does not expressly require one. It would seem reasonable that, as a minimum, the architect should require a programme in bar chart *and* in network form with key dates and resources clearly shown.

The architect is required to grant the extension of time by fixing as a new completion date for the Works a later date which the architect estimates to be fair and reasonable. It should be noted that the architect is only expected to estimate the length of extension and not to ascertain. Ascertainment would be impossible. 'Fair and reasonable' is a difficult concept to pin down. It has been examined by the court *in City Inn Ltd v Shepherd Construction Ltd* when considering the extension of time clause in the JCT 80 Standard Form of Contract as follows:

> 'The architect is not expected to use a coldly logical approach in assessing the relative significance of contractor's risk events and non-contractor's risk events; instead, as the wording of both clause 25.3.1 and clause 25.3.3.1 makes clear, the architect is to fix such new completion date as he considers to be "fair and reasonable". That wording indicates that the architect must look at the various events that have contributed to the delay and determine the relative significance of the contractor's and non-contractor's risk events, using a fairly broad approach. Judgment is involved. It is probably fair to state that the architect exercises discretion, provided that it is recognized that the architect's decision must be based on the evidence that is available and must be reasonable in all the circumstances of the case.'[21]

Clause 2.28.2

The architect must inform the contractor whether or not an extension is given. That is important. The architect cannot simply sit back and say nothing if there is no extension. In respect of each notification of delay and provision of particulars, the architect must notify the contractor in writing where the decision is not to fix a later completion date as a new completion date. It is important, because the architect's decisions are required before the provisions restricting the level of fluctuations or formula adjustment can be operated if the contractor is in default over completion, a point which should not escape those using SBC. The architect is allotted the same time period in which to make the decision whether it is positive or negative.

The architect must inform the contractor in writing of the decision as soon as 'reasonably practicable'. This term has a narrower meaning that whether something is actually physically possible. It is narrower even than 'practicable' alone. In essence the obligation is to inform the contractor within a time period which is not delayed, but which takes all the circumstances into account and applies the test of reasonableness. In any event, the architect has a maximum of 12 weeks in which to notify the decision. The 12 weeks runs from receipt by the architect of the required particulars.

[21] [2007] CSOH 190 and paragraph 13 per Lord Drummond Young.

The correct operation of these provisions really depends upon both architect and contractor being of one mind as to whether the information supplied by the contractor is sufficient to enable the architect to form an opinion. From the employer's point of view it is important that the architect should decide in due time, because of the fluctuations provisions: see schedule 7, paragraphs A.9.2.2, B.10.2.2 and C.6.2.2, the effect of which is that, unless the architect carries out his or her duties promptly, the right of the employer to freeze the contractor's fluctuations on the due date for completion is lost.

However, if there are less than 12 weeks left between receipt of the contractor's particulars and the completion date, the architect must endeavour to reach a decision and fix a new date for completion no later than the current completion date. The intention clearly is that the contractor should always have a date for completion towards which it can work. Contractors sometimes attempt to intimidate architects by waiting until the last moment to provide the required particulars and then maintaining that the architect is obliged to come to a decision before the completion date no matter how little time is left. That kind of contractor is seriously misguided. The contract is clear. Clause 2.28.2 states that the architect must *endeavour* to notify the contractor of the new date for completion before the current completion date. The obligation to endeavour to do something means that the architect must strive or attempt to do it. If there is a very short period left before the completion date, it may not be reasonably practicable for the architect to come to a decision in time no matter how strong the endeavour. It appears that the architect has no power under clause 2.28 to make the decision after the completion date and the decision will have to be made as part of the review under clause 2.28.5. The contractor may be disappointed, but it is the author of its own misfortune.

If it seems that the architect would be able to make a decision if a further week or so were available, he may decide to make the best decision practicable (which may well be conservative) before the completion date and then use the additional period thus created to come to a more considered decision. Thus, an architect faced with making a decision just one week before completion date may be able to give two weeks extension of time and the extra two weeks may enable the architect, on mature reflection, to give a further one week. However, the architect is not obliged to act in this way.

Some architects have adopted the practice of amending clause 2.28 so as to do away with the time limits. This is not a wise idea, if only because of the fluctuations provisions. Fluctuations are only to be frozen at completion date if the printed text of clause 2.26–2.29 is unamended and forms part of the conditions: see schedule 7, paragraphs A.9.2.1, B.10.2.1 and C.6.2.1. In the absence of a fixed period, an adjudicator or arbitrator, if called upon, may decide that the architect ought to come to a decision in less than 12 weeks.

Clause 2.28.3

If the architect's decision is that an extension of time is to be given, the architect, in fixing the new completion date, must state two things. The first thing is the amount of extension of time given in respect of each relevant event and the second thing is the reduction in time attributed to each relevant omission. Previous JCT contracts

(e.g. see JCT 98 clause 25) did not require the architect to state the period of time attributable to each relevant event. That was sensible, because to allocate time periods against relevant events is generally not in the employer's interests. The contractor always, of course, demands these details, because without them it is difficult to challenge the architect's decision unless it is grossly wrong. Moreover, the contractor often mistakenly believes that an extension of time is a pre-requisite to claiming loss and/or expense.

It used to be the case that an architect, in giving an extension of time, would set out the reasoning behind it in considerable detail. Of course this merely encouraged the contractor to respond, pointing out where the architect was wrong, in equal detail. The exchange would never come to an end while the architect continued to respond. Fortunately, very few architects now provide the contractor with such details of the reasons for an extension of time (or for its rejection). The contract does not require it and it is doubtful whether it actually assisted the contractor. Obviously, the architect would be obliged to reveal calculations during an adjudication or arbitration if the decision had to be defended, but by that time the contractor must have already made its decision to challenge, based on its own opinion and perhaps that of its expert.

From the new wording, it seems that the architect must list all the relevant events notified by the contractor even if the architect has discounted some of them. Presumably the architect then has to allocate the extension of time among the notified relevant events, allocating 'nil' to relevant events which have been notified but for which the architect has not given any extension of time. Any reductions in time must be allocated to each relevant omission. Note the allocation of reductions is not to relevant events, but to relevant omissions. These are presumably architect's instructions requiring omissions.

A clause which appeared to give some credence to the argument that the period of time should be stated was clause 26.3 of JCT 98. However, that has been judicially questioned.[22] It is good to see that the JCT have now omitted any equivalent to JCT 98 clause 26.3, but unfortunate that the opportunity has been taken to require the allocation of weeks to relevant events which can only strengthen the common misconception that a contractor must secure an extension of time before seeking loss and/or expense.

Clause 2.28.4

Under JCT 98 it was clear that the architect could take account of omissions when deciding on the first extension application, because of the wording of the equivalent of the current clause 2.28.3.2. That is no longer the case. Under SBC the architect's powers under this clause may be exercised only after the first extension of time that the architect gives or after a revision to the completion date stated in a confirmed acceptance of a schedule 2 variation or acceleration quotation (pre-agreed adjustment).[23] It is unclear why this limitation has been imposed, because it made perfect

[22] *Methodist Homes Housing Association Ltd v Messrs Scott & McIntosh* 2 May 1997 unreported; considered in Chapter 13, Section 13.1.2.

[23] See Chapter 14, Section 14.5.5.

sense that, in deciding the first extension of time, the architect should be able to take into account any omissions. The term used in the contract is 'Relevant Omission' which is defined in clause 2.26.3 as omissions of work or obligations whether by instruction for variations or provisional sums for defined work. Under clause 2.28.4 the architect can only reduce extensions of time on account of omissions of work, etc. instructed since an extension was last given.

It is important to understand that each extension is deemed to take into account all omissions instructed from the date of the previous extension up to the date of the new extension. The architect cannot, in any event, fix any earlier date than the original completion date: clause 2.28.6.3. But if the architect has issued instructions which result in the omission of work or obligations under clause 3.14 such instructions may be taken into account and a completion date earlier than that previously fixed may be fixed if in the architect's opinion the fixing of such earlier completion date is fair and reasonable having regard to those instructions. The architect can, under this clause, reduce extensions previously granted and even extinguish them completely so as to return to the original date for completion but no earlier date than that can be fixed, no matter how much work or how many obligations are omitted. It should be noted that the architect's powers under clause 2.28.4 are not dependent upon the contractor giving a notice of delay. The architect can simply issue an instruction requiring an omission and then fix a new date for completion earlier than previously fixed, taking the omission instruction into account.

It is suggested that architects desiring to exercise the power to reduce extensions previously granted by taking into account the omission of work or obligations should fix the new date and notify the contractor as soon as possible. Experience suggests that architects are often somewhat parsimonious in giving extensions of time, because they know that they have the review period up to 12 weeks after practical completion in which to redress any under allowance: see below. Although that approach is understandable, especially if the architect believes that the client is litigious, it is not good practice. The ideal time is when issuing the relevant omission instruction. It is not sensible to leave it until the next extension of time.

Clause 2.28.5

This clause sets out the extension of time regime after the completion date which is quite separate from what has gone before. It gives the architect the opportunity to make a final decision on extensions of time. Some commentators believe that in *Temloc Ltd v Errill Properties Ltd* the Court of Appeal held that the requirement to do so within 12 weeks after practical completion is not mandatory. This is a wrong view of the judgment. What if the contractor provides no information at all to the architect until after the 12 weeks has expired? Strictly, the architect has no power to consider the submission and must so inform the contractor. There may, of course, be circumstances where the architect believes that, for various reasons, a further extension should be given after the deadline. It seems, at first sight, that the only way this can be achieved is if the employer and contractor together agree to waive the contractual limitation. This is best done in writing. Before the architect advises the employer to follow that route, there must be a clear advantage to the employer in so

doing. Whether in any particular case there will be such advantage depends on the surrounding circumstances. Whether or not the architect can validly make the final decision after the end of the 12 week period has not yet been definitively settled.[24]

This clause requires the architect to review the completion date. The review may be carried out after the completion date has passed, but it *must* be carried out after practical completion. In conducting the review the architect must take account of any known relevant events, whether or not specifically notified to the architect by the contractor. It is clear that the architect must take account of any relevant events which have occurred since the commencement of the contract. It is the architect's final opportunity to consider extensions of time and possibly prevent time becoming at large. It is at least arguable, on a strict reading of clause 2.28.5, that the architect can exercise this power only once. Therefore, if the architect chooses to do so after the completion date, but before practical completion, it may be that the power cannot be exercised again afterwards. In practice, an architect will usually wait until after practical completion to act under this clause. When the architect writes to the contractor, the contract now makes clear that the details required by clause 2.28.3 (allocation of extensions of time to each relevant event and reduction in time for each relevant omission) must also be given. It is common for architects to simply notify a new date under the previous clause (25.3.3) of JCT 98. In carrying out the review, the architect must do one of three things:

- Fix a completion date later than any date previously fixed. It may be argued that a strict reading of this clause precludes the architect from fixing a later completion date if time has not already been extended, because an unextended date for completion cannot be considered as a date 'previously fixed' and it is not so described in the definitions clause 1.1. In JCT 98, the completion date was defined as the date 'fixed and stated', but in SBC it is simply defined as 'as stated'. It is difficult to believe that the JCT actually intended that result. It does not make any commercial sense and most architects will, and probably should, be prepared to fix a later date under this clause even if no previous extension of time has been given. Indeed that interpretation sits perfectly well with the requirement that the architect must fix the later date whether that is as a result of reviewing a previous decision or otherwise. The 'otherwise' can only sensibly refer to the situation where there was no previous decision and the date being reviewed is the original completion date. In a subtle variation of clause 2.28.1, where the architect is required to give a fair and reasonable extension of time, the architect under clause 2.28.5 must fix a new date if in his opinion it is fair and reasonable to do so. Thus in this clause the architect must decide if the action is fair and reasonable rather than the extension of time itself. One wonders if this interpretation is really what was intended. The architect must have regard to any of the relevant events and it matters not whether any relevant event has been notified by the contractor. Therefore, if one ignores the slight inconsistencies noted above, the architect has a very wide scope to fix a new date for completion.
- Fix a completion date earlier than previously fixed. For the purpose of clause 2.28.5, it makes sense that the definition of completion date in clause 1.1 does not

[24] See the discussion in Chapter 2, Section 2.2.4.

make reference to any fixing of such date. Notwithstanding that, clause 2.28.6.3 prohibits the architect from fixing a date earlier than the completion date in the contract. The architect must have regard to any omission instructions issued since he or she last granted an extension of time. Once again, the architect must decide if the action is fair and reasonable rather than the extension of time itself.

- Confirm to the contractor the completion date previously fixed.

In practice, the architect should write to the contractor soon after practical completion, reminding it of the 12 week period and that the architect has no power to make any extension of time after the expiry of the period. The contractor should be given a date by which any final submissions should be made; this is not the time for the submission of large numbers of weighty lever arch files.

Clause 2.28.6

This clause contains a number of important provisos as sub-clauses. The first two apply to the contractor and the second two apply to the architect. The introductory wording strongly suggests that compliance with the first two provisos (the use of best endeavours and the doing of everything reasonably required) is a condition precedent to the issue of valid extensions of time.

Clause 2.28.6.1

This clause places a substantial obligation upon the contractor. It must use its best endeavours to prevent delay to progress and to the completion date. This is a matter which the architect must take into account when deciding upon extension of time. It has been said that when a contractor undertakes to use its best endeavours, it undertakes to do everything within its power to prevent delay to the progress of the works irrespective of extra cost. Supporters of this point of view point to the use of the phrase obliging the contractor to do 'all that may reasonably be required' in the second part of the proviso, which is in contrast to the obligation to use best endeavours.[25] There appears to be no relevant construction industry case, but in other contexts 'using best endeavours' has been held to mean doing everything prudent and reasonable to achieve an objective.[26] The Court of Appeal held, in connection with the obtaining of planning permission, that 'best endeavours' obliged a person to take 'all those reasonable steps which a prudent and determined man, acting in his own best interests and desiring to achieve that result would take.'[27]

Clearly, it is a lesser obligation than to 'ensure' or to 'secure', which words impart an absolute liability to perform the duty set out.[28] Likewise, an obligation to use 'reasonable endeavours' is less onerous than an obligation to use 'best endeavours'. Where there are a number of courses of action that it would be reasonable for the contractor to take, an obligation to use reasonable endeavours requires it to take any one of the reasonable courses. In contrast, an obligation to use best endeavours prob-

[25] *Transfield Pty v Arlo International* (1980) 30 ALR 201.
[26] *Victor Stanley Hawkins v Pender Bros Pty Ltd* (1994) 10 BCL 111.
[27] *IBM (UK) Ltd v Rockware Glass Ltd* [1980] FSR 335.
[28] *John Mowlem & Co v Eagle Star Insurance Co Ltd* (1995) 62 BLR 126.

ably requires the contractor to take all the reasonable courses available.[29] In practice it is likely that 'best endeavours' means simply that the contractor must continue to work regularly and diligently and nothing more. Provided the contractor is working regularly and diligently and has not contributed to the delay through its fault, the contractor can be said to have used its best endeavours. The addition of the word 'constantly' clearly increases the contractor's obligation to the extent that it must never cease to use its best endeavours. It is likely that that the contractor's failure to constantly use its best endeavours will disqualify it from any extension of time for the particular relevant event.

Clause 2.28.6.2

The previous proviso applies to the contractor at all times. This second proviso applies if there is a delay. In the case of a delay the contractor must do everything reasonably required to the satisfaction of the architect in order to proceed with the Works. This is probably the contractor's obligation as part of its duty to proceed regularly and diligently in any event. However, the architect has no power to order that acceleration measures be taken either under this provision or any other provision in the contract. Schedule 2 provides a procedure by which the Works may be accelerated if the contractor's quotation is acceptable, but that is a far cry from giving the architect power to accelerate. If this or the previous proviso obliged the contractor to accelerate, there would be little need for an extension of time clause. Indeed, it is doubtful whether a contractor has any obligation at all to increase resources on a project over and above the level necessary to complete the work for which the contractor originally tendered. There would be no necessity for a relevant event dealing with architect's instructions requiring additional work if the contractor was obliged to increase its labour to carry out the additional work. The key word in this proviso is 'reasonably'. It is thought that it would be completely unreasonable for the architect to require the contractor to expend large additional sums in order to comply with this proviso. However, it does seem to cover such things as the architect requesting the contractor to adjust its programme of work or to move operatives from one part of the building to another.

Clause 2.28.6.3

This clause makes clear that the architect cannot fix a completion date earlier than that stated in the Contract Particulars. What that means is that, no matter how much work is omitted, the contract period as set out by reference to the date of possession and the date for completion in the contract cannot be shortened.

Clause 2.28.6.4

This is a complex little clause necessitated by the schedule 2 provisions to extend or reduce the contract period. Under paragraphs 1.2.2 and 2.1.1 of schedule 2, dealing

[29] *Rhodia International Holdings Ltd & Another v Huntsman International LLC* [2007] EWHC 292.

with quotations for a variation or for acceleration respectively, the contractor is required to identify any adjustment to the contract period or any time which can be saved. After acceptance by the employer the architect issues a confirmed acceptance stating the adjustment of time and the resulting revised completion date. This is then the pre-agreed adjustment defined in clause 2.26.3 and noted earlier. What clause 2.28.6.4 does is to make plain that the architect cannot make a decision under clauses 2.28.4 or 2.28.5.2 (both dealing with omissions) which alters the length of a pre-agreed adjustment. There is an exception to that and it is in the case of a variation quotation in which the variation is the subject of an omission.

11.1.3 Grounds for extension of time

SBC, clause 2.29 lists the grounds (relevant events) on which the architect is entitled to revise the date of completion by the contractor. The corresponding provision in IC and ICD is clause 2.20. Similar provisions are to be found in DB (clause 2.26), PCC (clause 2.21) and MP (clause 18.1). They divide into two groups:

– *those which are the responsibility of the employer or the architect*:
  SBC clauses 2.29.1–2.29.6 inclusive.
– *those which are the fault of neither party*:
  SBC clauses 2.29.7–2.29.13 inclusive.

The grounds for extending time are as follows:

Variations: clause 2.29.1

This ground includes anything else, including architect's instructions which are to be treated as requiring a variation, whether or not so intended. Architect's instructions requiring a variation are empowered by clause 3.14 and are clearly covered by this ground. In addition, departures from the stipulated method of preparation of the contract bills, errors or omissions in the same and inadequacies in design in the Employer's Requirements (if used) and the correction of discrepancies in those Employer's Requirements are to be treated as variations under clause 2.14.3 and clause 2.16.2 respectively.

Architect's instructions: clause 2.29.2

The instructions referred to are:

(i) Clause 2.15 – Discrepancies in drawings, contract bills, etc.
(ii) Clause 3.15 – Postponement of any work to be executed under the contract.
(iii) Clause 3.16 – Expenditure of provisional sums (except in connection with defined work).
(iv) Clause 3.17 – Inspections and tests.
(v) Clause 3.18.4 – Opening up after discovery of defective work.
(vi) Clause 3.22.2 – Action to be taken concerning antiquities following an architect's instruction. Unlike the position under PCC the action expected of the

contractor under clause 3.22.1, is not a relevant event. Actions under clause 3.22.1 include using best endeavours not to disturb the find, ceasing work if appropriate, taking necessary steps to preserve the object and its location and informing the architect of its discovery and whereabouts.

(vii) Clause 5.3.2 – In connection with a variation quotation.

Compliance with an architect's instruction for the expenditure of a provisional sum for defined work is expressly excluded.[30] That is because the contractor has been given sufficient information to enable it to make an appropriate allowance in planning its work at tender stage.

Deferment of possession of site: clause 2.29.3

This ground was added to JCT 80 in July 1987. The addition was in response to a substantial demand because failure by the employer to give possession of the site by the date of possession was, and still is, quite common. The clause dealing with possession of the site was amended accordingly so as to enable the employer to defer giving the contractor possession of the site for a period of up to six weeks unless a shorter period was stipulated in the appendix (now the Contract Particulars). Presumably to achieve greater clarity, the deferment clause has now been separated from the clause requiring the employer to give possession as clause 2.5.

It is important to emphasise that the employer only has this power if it is expressly so provided in the Contract Particulars. The deferment is stated to be 6 weeks or whatever shorter period is stipulated by the employer. In view of the often unpredictable nature of demolition, site clearance works and tenants, to say nothing of unlawful squatters, it seems risky to reduce this period. Indeed, in some instances, employers would be wise to increase the six weeks and make the necessary amendment to references to six weeks in order to state the extent of the deferment power. Where the employer does defer the giving of possession, there will be entitlement to extension of time. It is considered that deferment is a positive activity which the employer should signal by giving written notice although clause 2.5 does not expressly so state. It should be noted that, on a strict reading of clauses 2.5 and 2.29.3, the extension can only be given where the employer has actually exercised the right to defer. This relevant event probably does not apply if the employer, without formally deferring possession, has simply failed to give possession on the due date.

Approximate quantity not a reasonably accurate forecast: clause 2.29.4

This ground was added by Amendment 7 (issued July 1988) as part of the incorporation of reference to the 7th edition of *Standard Method of Measurement* (SMM7). It proceeds on the perfectly reasonable basis that a contractor will plan its work using, among other things, the quantities in the bills of quantities. Where such quantities are described as 'approximate', it is because the architect and/or the quantity surveyor

[30] See Chapter 14, Section 14.5.4 under the sub-heading: *Valuation of approximate quantities, defined and undefined provisional sums.*

either does not know, or has not quite decided upon, the amount required. All the contractor can do is to use the approximate quantities as if they gave a reasonably accurate forecast of the quantities required. If they give a significantly lower forecast, it will presumably need additional time to carry out the work.

The question that inevitably arises in these circumstances is: what is a reasonable forecast? Although the reference in the relevant event is to 'work' and so impliedly excludes materials, the answer is likely to depend to a large extent upon the nature of the materials measured in the contract bills and the likely effect of a difference in quantity, because changes in quantity will invariably lead to changes in the amount of work required. It will be an unusual situation if the contractor is entitled to an extension of time because the actual quantities are less than the forecast. However, the wording of the clause leaves that possibility open. If 20 tonnes of mass concrete approximately are measured in foundations, it may be considered trivial if a further 2 tonnes of mass concrete have to be placed at the same time. Concrete in reinforced beams or other materials, such as slate wall cladding may be susceptible in cost to comparatively small increases in amounts of additional work required.

Suspension by the contractor of performance of his obligations: clause 2.29.5

This ground is included to comply with the last part of s.112 of the Housing Grants, Construction and Regeneration Act 1996 which entitles a contractor to suspend performance of its obligations on seven days written notice if the employer does not pay a sum due in full by the final date for payment. The suspension part of s.112 is dealt with by clause 4.14. This relevant event covers s. 112(4) which states:

> '(4) Any period during which performance is suspended in pursuance of the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.'

The relevant event is more generous than the Act which apparently provides that if a party suspends performance for six days, the effective extension to the period for completing the work is to be six days. This ignores any time the contractor may need to get ready to recommence. The wording of clause 2.29.5, read with clause 4.14 clearly requires the architect to consider all the delay including remobilisation and not just the actual period of suspension. The relevant matter in clause 4.24.4 includes the proviso that the suspension must not be frivolous or vexatious. Although that is perfectly reasonable, it does suggest, by the deliberate absence of those words in the relevant event that even a frivolous or vexatious suspension may entitle the contractor to an extension of time. Of course that would be an argument entirely without merit and could be demolished fairly easily by reference to the contractor's obligation to use its best endeavours to prevent delay. Clearly, a frivolous or vexatious suspension would be in breach of that obligation. This is probably an oversight by JCT and it is suggested that the additional words should be added to the relevant event.

Impediment, prevention or default by the employer: clause 2.29.6

This was added to JCT 98 by Amendment 4 in January 2002. It is obviously intended as a catch all clause to avoid any possibility of time becoming at large due to an act of prevention or the like on the part of the employer. It excludes such part of any act or omission of the employer as was caused or contributed to by the default of the contractor, its servants, agents or sub-contractors. The key words in this relevant event seem strange bedfellows. To 'impede' is to 'retard' or 'hinder'. To 'prevent' is to 'hinder' or 'stop'. A 'default' has been variously defined. It certainly covers a breach of contract, but it may go further than that in some circumstances.[31] The JCT has taken the opportunity to reduce the number of relevant events, because many are now covered by clause 2.29.6. It will be useful to list the former relevant events so covered since they are likely to be the most common reasons why a contractor will cite this relevant event. They are:

Late instructions and drawings

There are two parts to this former relevant event. The first part is where an information release schedule is used, and the architect fails to comply with what is now clause 2.11. This means that if the architect does not provide the information as set out in the schedule, the contractor has a ground for extension of time provided other criteria are met. That is very straightforward, easy to understand and to operate.

The second part of the relevant event refers to the failure of the architect to comply with what is now clause 2.12. Clause 2.12 deals with the situation if an information release schedule has not been provided or if information is required which is not listed on the schedule. Assessing delays under this ground is less easy than when considering the architect's failure to comply with the information release schedule, because there are no dates to act as benchmarks on which information should have been provided. It is rather a matter of judgment by the architect who must decide when the information should have been provided under clause 2.12 and whether or not it was done. To make matters more difficult, the architect's obligation is to provide the information to the contractor to enable it to carry out and complete the Works by the completion date, but there are two qualifications:

- If the contractor's rate of progress is such that it will not finish by the due date, the architect may have 'regard' to this fact. It appears that this means that the architect is entitled to slow down the rate of provision of information to match the contractor's progress. That is not a practice to be advocated, not least, because months later it may be unclear whether the contractor's slow progress provoked the slower delivery of information or if it was a result of it.
- If the contractor looks likely to finish before the completion date, the architect is not obliged to furnish information to allow this to happen.[32]

[31] See Chappell, Cowlin and Dunn, *Building Law Encyclopaedia* (2009) Wiley-Blackwell p.146 for a fuller consideration of the term.

[32] This echoes the judgment in *Glenlion Construction Ltd v The Guinness Trust* (1987) 39 BLR 89.

The question of terms to be applied as to the time within which further drawings, details or instructions are to be given have been considered by the courts although not in relation to a JCT contract. It has been stated that such information must be given within a reasonable time, but it has been made clear that this is a limited duty. Although the case was concerned with the duty of an engineer, it is thought that the principle applies equally to architects:

> 'What is a reasonable time does not depend solely upon the convenience and financial interests of the [contractors]. No doubt it is in their interest to have every detail cut and dried on the day the contract is signed, but the contract does not contemplate that. It contemplates further drawings and details being provided, and the engineer is to have a time to provide them which is reasonable having regard to the point of view of him and his staff and the point of view of the employer as well as the point of view of the contractor.'[33]

This is a sensible approach to the matter. On the one hand, the architect must take into account the time necessary to enable the contractor to organise sufficient labour, goods, materials, plant and other resources and to carry out any necessary prefabrication so as to have everything ready on site when needed to complete the Works in accordance with the contract. On the other hand, the contractor cannot expect to ask for information one day and to receive it the next. The contractor must allow the architect time to produce the information, bearing in mind that this is not the only project with which the architect is concerned.

The current date for completion must always be borne in mind when analysing the particular circumstances. Mr Justice Vinelott had this to say of the provision of information clause in JCT 63 with its rather more substantial clause calling for a 'specific written application' to be made:

> 'What the parties contemplated by these provisions was first that the architect was not to be required to furnish instructions, drawings, etc., unreasonably far in advance from the date when the contractor would require them in order to carry out the work efficiently nor to be asked for them at a time which did not give him a reasonable opportunity to meet the request. It is true that the words "on a date" grammatically govern the date on which the application is made. But they are . . . capable of being read as referring to the date on which the application is to be met. That construction seems to me to give effect to the purpose of the provision – merely to ensure that the architect is not troubled with applications too far in advance of the time when they will be actually needed by the contractor . . . and to ensure that he is not left with insufficient time to prepare them. If that is right then there seems . . . to be no reason why an application should not be made at the commencement of the work for all the instructions etc which the contractor can foresee will be required in the course of the works provided the date specified for delivery of each set of instructions meets these two requirements. Of course if he does so and the works do not progress strictly in accordance with this plan some modification may be required to the prescribed timetable and the subsequent furnishing of instructions and the like . . . It does not follow that

[33] *Neodox v Borough of Swinton & Pendlebury* (1958) 5 BLR 34 at 42 per Diplock J.

> the programme was a sufficiently specified application made at an appropriate time in relation to every item of information required, more particularly in light of the delays and the rearrangement of the programme for the work.'[34]

This is another sensible analysis and, although it refers to JCT 63 and the wording is now somewhat different, it gives a useful pointer to the way the courts are likely to deal with this kind of question. Clause 2.12.1 requires the architect to provide further drawings or details which are reasonably necessary to explain and amplify the contract drawings and to enable the contractor to carry out and complete the Works in accordance with the contract, i.e. by the completion date. If there were not express terms of the contract requiring timely provision of information, there would be an implied term to the same general effect.

However, clause 2.12.3 stipulates that if the contractor has reasonable grounds for believing that the architect is not aware when the contractor should receive information, it must inform the architect, giving sufficient time to prepare the information. The contractor need only notify the architect so far as is reasonably practicable, but it is difficult to envisage many circumstances when it would not be practicable. To that extent, the fulfilling of this requirement by the contractor may prove a hurdle to some claims for delays under this head.

Work not forming part of the contract

The meaning of 'work not forming part of the contract' has been defined as follows:

> 'For some purposes the work does form a part, literally, of the contract; but for other purposes it does not. It is not work which the employer can require the Contractor to do. All that he can require is that the Contractor affords attendance etc. on those who do the work . . . [and that] I take the pragmatic view that the relevant work is work not forming part of the contract.'[35]

Clause 2.7 is a strangely worded clause. There are two separate situations. The first is covered by clause 2.7.1, where the employer engages others to carry out part of the Works and the contract bills contain information to enable the contractor to understand the extent and nature of the work concerned. The work could be anything, but in practice it is usually more convenient if such work is easy to identify and preferably separate from other work. The clause used to refer to 'artists and tradesmen'; a reference to the fact that it could be used if a building was to receive a special work of art at a late stage in the project and the artist was to personally install it. The clause was also called the 'Epstein clause' after the famous sculptor. The contractor must permit the employer to carry out the work.

The second situation under clause 2.7.2 is where the employer engages others to carry out part of the Works and the contract bills do not contain information to enable the contractor to understand the extent and nature of the work concerned. In that instance, the employer may only arrange for the work to be done after

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

[35] *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* (1980) 15 BLR 8 at 19 per Judge Fay.

obtaining the contractor's consent. However, the contract is clear that the contractor's consent must not be delayed or withheld unreasonably. It used to be the subject of a specific relevant event, because the employment of two contractors on the same site had a great deal of potential for causing delay to the Works as a whole. The delay is arguably less likely where the main contractor knows at time of tender exactly what another contractor will be called upon to carry out. That is because the contractor will be deemed to have taken cognisance of the likely effect on the Works. However, where the main contractor has not been pre-warned about the size and scope of the work to be carried out by directly employed labour, there is considerable scope for claiming that the directly employed contractor caused delay.

Provision of materials by the employer

Unlike the execution of work by others, there is no contractual term which entitles the employer to provide materials or goods. There was no such term under JCT 98. Nevertheless, JCT 98 had a relevant event to deal with the eventuality. Invariably the supply will be initiated by the employer, possibly in the belief that a source of supply has been located that will result in a financial saving. An interesting scenario would be created if the materials subsequently were found to be defective. It can reasonably be argued that the supply of materials and goods can only refer to materials and goods which are in accordance with the contract. Therefore, the supply by the employer of materials and goods which are not in accordance with the contract amounts to a failure to supply, because they should not be used by the contractor (who should reject them).

However, if the employer has elected to supply, the election will almost certainly have been taken prior to tendering and certainly prior to executing the contract. Other than stating that the employer will supply stated materials and goods, it is unlikely that they will be specified in detail. In the absence of a specification and if they were to be supplied by the contractor, there are certain terms which would be implied, such as that such materials and goods will be appropriate for their purpose. Where the employer is responsible, through the architect, for specification and if no specification is given, it is considered that the contractor would be not be liable if an inferior product was supplied, because the employer would be relying on the architect, not the contractor, in such matters.[36] Clearly, if the materials or goods supplied were obviously so inferior that they would seriously jeopardise the project or even become a danger, the contractor would have a duty to warn the employer.

But a difficult problem would arise if either the materials and goods appeared to be in accordance with the contract or, if there was no specification, they appeared to be satisfactory and were built into the construction and subsequently they were found to be defective and required replacement causing delay and additional expense. The employer could not require the contractor to supply replacement materials or goods without first issuing an instruction through the architect which would have the effect of adding these items to the contract at a very late stage. The cost of the materials or goods could be dealt with by the variation clause (5) and all the other

[36] *Rotherham Metropolitan Borough Council v Frank Haslam Milan and Co Ltd* (1996) 59 Con LR 33.

costs would amount to direct loss and/or expense under clause 4.23. An appropriate extension of time would be indicated under the category of architect's instructions requiring a variation or possibly late instructions. If there was a specification and the employer's materials or goods were shown not to comply, an extension under this ground would be appropriate. That would certainly be the situation if the employer did not require the architect to issue an instruction, but simply supplied replacement materials or goods. Alternatively, the contractor could bring a common law claim against the employer for breach of contract and simply recover all its loss and/or expense as damages.

Failure to give ingress or egress

Under the current SBC this would certainly rank as prevention. The former clause was not as extensive as appeared at first sight. An extension of time could only be granted under the clause where there is failure by the employer to provide access to or exit from the site of the Works across any *adjoining or connected* land, buildings, way or passage which was in the employer's own *possession and control*. It did not, therefore, cover failure to obtain a right of way across an adjoining owner's property, or where access to the highway was obstructed. It did not extend to the situation where protestors impeded access to a site.[37]

There was a further limitation in the clause which referred to access in accordance with contract bills or the contract drawings. There was a very strong presumption that the undertaking to provide the access must be stated in the bills or drawings, and in that case any extension of time would be dependent upon the contractor giving whatever notice was required by the provision in the bills of quantities before access was to be granted. The clause was unusual, because it apparently extended the architect's powers as agent to act for the employer in agreeing access. A delay notified under the current relevant event 2.29.6 would simply specify the delay and that it was caused by the employer's failure to provide ingress to or egress from the site. Whereas the former relevant event might be seen as limiting the circumstances in which an extension of time could be given, it is likely that claims for lack of ingress or egress are now possible on a much broader basis.

Compliance or non-compliance with the forerunner to clauses 3.23 and 3.24

Clause 3.23.1 refers to the employer's obligation to ensure that the CDM co-ordinator carries out his or her duties under the *CDM Regulations 2007* and, if the contractor unusually is not the principal contractor under the regulations, to ensure that it carries out its duties also. The employer's obligation to ensure is onerous. It should be noted that the ground encompassed both compliance and non-compliance so that the proper carrying out of duties could also attract an extension of time if a delay was caused thereby. The problem for the employer was (and is) that the CDM co-ordinator has duties under the regulations which may have to be carried out after the issue of any architect's instruction. Therefore, each instruction could attract an

[37] *LRE Engineering Services Ltd v Otto Simon Carves Ltd* (1981) 24 BLR 127.

extension of time under this ground even if it did not qualify under another clause. Under SBC, the question for the contractor will be simply whether the employer has complied with clauses 3.23 and 3.24 and, if not, has any delay to progress of the Works resulted.

Change in statutory requirements necessitating alteration or modification of performance specified work

Provision for performance specified work and hence this relevant event was added to the 1980 version of the contract by Amendment 12 (issued July 1993). SBC has dispensed with performance specified work and, therefore, an extension of time under this ground cannot now arise.

Statutory undertaker's work: clause 2.29.7

This ground deals with delay caused by the carrying out by a statutory undertaker of work under its statutory obligations in relation to the Works, or its failure to do so. In JCT 98, the equivalent relevant event referred to work carried out by a local authority or statutory undertaker. The reference to a local authority has now been omitted. Statutory authorities are organisations such as water, gas and electricity suppliers which are authorised by statute to construct and operate public utilities. Although it is not beyond doubt, it is unlikely that a local authority could be classed as a statutory undertaker except, perhaps, when carrying out certain specific activities in relation to roadworks.

In *Henry Boot Construction Ltd v Central Lancashire Development Corporation*,[38] the court was concerned with a forerunner to this clause and the question of whether or not statutory undertakers were artists, tradesmen or others engaged by the Employer for the purpose of JCT 63, clauses 23(h) and 24(1)(d) (in SBC simply referred to as 'work not forming part of the contract' in clause 2.7). The court was bound by the decision of an arbitrator that, in that instance, the statutory undertakers carrying out particular work under special circumstances were carrying it out under a direct contract with the employer. In other words, they were not executing the work because relevant legislation obliged them to do so, but because they had contracted with the employer to carry it out. Therefore, the court held that the undertakers were engaged by the employer to carry out work which did not form part of the main contract. Having reached that decision, it followed that extensions of time should be granted to the contractor on the basis of delays by artists and tradesmen engaged by the employer in respect of delays on the part of the undertakers. That enabled the contractor to claim direct loss and/or expense from the employer under the same grounds.

The case is mentioned, not because it brought about any change to the meaning of this clause, but because it has often been thought to do so. Statutory undertakers often carry out work other than under statutory obligation. Where that occurs, if they have been directly engaged by the employer, any extension of time would be

[38] (1980) 15 BLR 8.

made under clause 2.29.6. A claim for direct loss and/or expense could be made on the same grounds under clause 4.24.6. Obviously, no extension of time would be applicable if the statutory undertakers had been engaged directly by the contractor other than in pursuance of their statutory obligations. Therefore, whether or not, or under which particular clause an extension of time should be given for delays caused by statutory undertakers depends on the nature of the work being done and the surrounding circumstances.

If a statutory undertaker lays electricity supply cables in the road which provides access to the site, not for the purposes of the contract Works but for another site nearby, there would be no grounds for extension of time. It makes no difference that the statutory undertaker concerned might be under a statutory obligation to lay the service, because it would not be carrying out the work in relation to the Works. Any suggestion that such activities amount to *force majeure* and, therefore, could be grounds for an extension of time on that basis does not bear scrutiny.

Exceptionally adverse weather conditions: clause 2.29.8

It is not unknown for architects and contractors to disagree over this ground. The change in wording in the 1980 Form from 'inclement' to 'adverse' was intended to make it clear that the ground was intended to cover any kind of adverse conditions including unusual heat or drought. Notwithstanding that, it is common to hear the ground being referred to as 'inclement weather'. When one hears the ground so described, it raises the serious thought that the person speaking does not really understand the purpose of the ground, having omitted the key words: 'exceptionally' and 'adverse'. Adverse weather is any kind of weather that impedes the progress of the Works. For example, where tall cranes are being used on site, any wind at all is adverse and after a certain wind speed is reached it will be positively dangerous to operate the cranes at all.

A crucial factor is the kind of weather that ought to be expected at the site at the time when the delay occurs. Architects will often request the contractor to provide meteorological reports for the previous 10 or 15 years. Reference to such weather records are normally used to show that the adverse weather was 'exceptional' for that area or for the time of year. In that instance exceptional refers to exceeding what may be reasonably expected based on the evidence of past years. Even if it can be demonstrated with reference to appropriate historical records that the weather is exceptionally adverse for the time of year it must also be such that it interferes with the Works at the particular stage they have reached. It matters not that the Works have been affected only because they have been delayed through the contractor's own fault.[39]

If despite the weather, work could continue then it cannot be successfully maintained that the Works have been delayed by the exceptionally adverse weather. For example, there may be torrential downpour lasting several days, but if all the contractor's work is inside the building and if the building is watertight, the downpour will have little or no effect on progress. The contractor is expected to programme the Works making proper allowance for normal adverse weather, i.e. the sort

[39] *Walter Lawrence v Commercial Union Properties* (1984) 4 Con LR 37.

of weather which is to be expected in the area and at the time of year during the course of the Works. The contractor's programme for those parts of the Works which may be affected by adverse weather, whether in the form of excessive heat, rain, wind or frost should acknowledge the fact that interruptions are likely to occur, and should allow for them. If the contractor is aware at the time of tender that it is tendering for a project which is to be constructed during the winter and if it is constructed in the winter, it is no use it complaining to the architect and requesting an extension of time on the ground of exceptionally adverse weather when the Works are delayed on account of snow. The contractor will be expected to have allowed for snow and ice in winter and for higher, occasionally hot, temperatures in the summer. However, if the contractor can show that the winter weather was more severe than it could have reasonably anticipated, an extension of time should be given. That is always assuming that the date for completion was delayed as a result.

On a strict reading of the relevant event, it is only the 'exceptional' aspect of the adverse weather which will attract an extension of time. Thus, if 10 days of snow in January is just on the borderline between usual and exceptional and a project suffers 15 days adverse weather, the contractor is not entitled to an extension of time for the consequences on the completion date of the whole 15 days, but only for the extra five days. On any view, the common practice whereby clerks of works keep records of 'wet time' so that every couple of months the architect can give an extension of time covering the total period of wet time is insupportable.

Loss or damage occasioned by one or more of the specified perils: clause 2.29.9

The purpose of this ground appears to be to give the contractor sufficient additional time to fulfil its obligations to repair damage caused by one of the specified perils: fire, lightning, explosion, storm, flood, escape of water from a water tank, apparatus or pipe, earthquake, aircraft or other aerial devices, or articles dropped therefrom, riot and civil commotion, but excluding what are called the Excepted Risks: Definitions are contained in clauses 1.1 and 6.8.

An important question which follows from this definition is whether or not the contractor is entitled to an extension of time if the events are caused by the default or negligence of the contractor's own employees. On a plain reading of the wording it would appear that the contractor is still entitled to an extension.

Civil commotion or terrorism: clause 2.29.10

'Civil commotion' means, for insurance purposes, 'a stage between a riot and a civil war'.[40] There must be an element of turbulence and it is thought that the activities of protesters in public places may amount to civil commotion. It used to be referred to as one of the excluded risks if the contract was to be carried out in Northern Ireland. That is no longer the case and Northern Ireland has its own Adaptation Schedule to deal with the matter.

[40] *Levy v Assicurazioni Generali* [1940] 3 All ER 427 at 431 per Luxmore LJ, approving an extract from Welford and Otterbarry's *Fire Insurance* (1932) 3rd edition at p. 64.

There are three possibilities in relation to terrorism. The first is that the Works are delayed because terrorism has been experienced. For example, part of the Works may be damaged by an explosion.

The second is that terrorist action may be threatened and, as a result, the area of the site may have to be cleared. It is thought that the threat of terrorism would have to be more substantial than just the fact that other terrorist incidents have occurred in the area. A specific terrorist threat directed at the project or a threat to an area which, if it were carried out, would affect the project would qualify. It seems that an extension of time would be applicable where the contractor or its operatives received direct threats of injury if work did not cease and the contractor stopped work accordingly.

The third is that terrorist action may have been carried out or threatened and the relevant authorities (government, police or army) may cause delay to the works as a direct result of the way in which the act or threat is dealt with. The activities of the relevant authorities which would qualify under this ground would include such measures as evacuation of premises and restriction of access. For example, there may be a threat to a particular building and the police may evacuate the surroundings for a period. If the building site is part of the evacuated area, there will be a delay to the Works and, to the extent that the date for completion is affected, an extension of time must be given. This ground is not restricted to the site of the Works and, therefore, it is likely that any such threat or action which affected the execution of the Works in any way (such as the forced evacuation or destruction of the contractor's offices) would give entitlement to extension of time.

Strikes and similar events: clause 2.29.11

The full list of events is given in the clause. So far as strikes are concerned, extension of time may be given for any delaying circumstance which affects the contractor and its work on the site or persons preparing design for the contractor's designed portion including a strike affecting any trade involved in preparing or transporting any goods and materials which are required for the Works. The reference to design is a new insertion in this relevant event necessitated by the inclusion in SBC of the contractor's designed portion option. It is not immediately obvious how a strike might affect designers employed in the contractor's office or, indeed, an independent firm of architects engaged by the contractor to provide such services. The clause is drafted to cover all strikes whether official or unofficial, but it does not cover 'working to rule' or any other obstructive practice which is not actually a strike. An unofficial strike has been described as any strike or other industrial action which is not authorised or endorsed by a trade union.[41] A strike or other event referred to in the subclause must be one in which the trades mentioned in it are directly involved. It was held that a strike by workers employed by statutory undertakers which are directly engaged by the employer to execute work which did not form part of the Works was not covered by the forerunner of this clause in JCT 63.[42] The reference to

[41] Section 237(2) of the Trade Union and Labour Relations (Consolidation) Act 1992.
[42] *Boskalis Westminster Construction Ltd v Liverpool City Council* (1983) 24 BLR 83.

local combination of workmen is an antiquated phrase which may possibly be held to cover activities which fall short of a strike and occur in a specific area. However, it is thought more likely to refer to a small localised strike.

It is probable that a situation where deliveries to site are delayed, not due to a strike, but due to some form of secondary picketing does not fall under this relevant event.

This relevant event has been considerably shortened from its predecessor in JCT 98. References to availability of labour and delay in securing goods or fuel have been omitted. The result is that the event is potentially much broader in its application.

Government action: clause 2.29.12

The action must be taken by the government after the base date. The 'Base Date' is that date written into the Contract Particulars. In the case of JCT 80 before its amendment of 11 July 1987, the reference was to the 'Date of Tender' which referred to 10 days before the date fixed for receipt of tenders by the employer (clauses 38.6.1 and 39.7 in their original form), which did not always in practice provide a firm date if the date for receipt of tenders was amended.

This provision might, for example, be relied upon wherever the British Government exercises any statutory power as set out in this ground, for example the closure of some access roads during the foot and mouth epidemic to the extent that such roads were essential means of access to the site of the Works. The action must directly affect the execution of the Works. In deciding whether the exercise of statutory power has a *direct* effect, it is suggested that the architect should use the same approach as when considering *direct* loss and/or expense (see Chapter 5). Essentially, this amounts to the exercise of common sense.

A particular significance of this ground is that this relevant event prevents the contract being brought to an end by frustration. The matter is simply dealt with by an extension of time. Since the event is taken out of the realm of *force majeure*, even a long suspension of work on this ground would not entitle the contractor to terminate its own employment under clause 8.11.

Force majeure: clause 2.29.13

Force majeure is a term originating in French law. It is wider in meaning than 'Act of God', which has been described as 'an overwhelming superhuman event'.[43] It seems that the event relied upon as *force majeure* must make the performance of the contract wholly impossible. In this sense, there are marked similarities to the doctrine of frustration of contract. In practice, however, all the surrounding circumstances must be taken into account. The dislocation of business caused by the general coal strike of 1912 has been held to be covered by the term and also covered the breakdown of machinery, but not delay caused by bad weather, football matches or a funeral.

[43] *Oakley v Portsmouth & Ryde Steam Packet Co* (1856) T1 Exchequer Reports 6 1F.

> 'These are the usual incidents interrupting work and the defendants, in making their contract, no doubt took them into account.'[44]

There seem to be no reported cases which deal expressly with *force majeure* in the context of JCT contracts although there are cases which simply consider the term itself. The most useful English authority is *Lebeaupin v Crispin*, which throws light on the way in which this term should be interpreted. Mr Justice McCardie said:

> 'This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control. . . . Thus war, inundations and epidemics are cases of *force majeure;* it has even been decided that a strike of workmen constitutes a case of *force majeure* . . . [But] a *force majeure* clause should be construed in each case with a close attention to the words which precede or follow it and with due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument.'[45]

On that authority, it seems that care must be taken when interpreting *force majeure* in JCT contracts, particularly having regard to the other relevant events. Where the term *force majeure* is used in contracts such as SBC, IC, ICD and DB, its meaning will effectively be restricted, because many things which would normally fall under the category of *force majeure* are included under specific headings. Such matters as strikes, fire and exceptional weather are examples.

11.1.4 A ground no longer included

A ground which has now disappeared from SBC is the *Inability to obtain labour and goods*. Under JCT 98 the clause was mandatory and not merely an optional ground for extension. The date at which any shortage was to be unforeseeable was the base date. There were two sub-clauses. One dealing with labour, the other dealing with materials. In order to qualify as a relevant event, not only was the shortage to have been unforeseeable, the inability to obtain labour or materials must have been for reasons which were beyond the contractor's control. Although there were certain fairly rare instances when the contractor would not be able to obtain certain materials no matter what measures it took or what price it was prepared to pay, it will always be able to obtain labour. Sometimes it would have to pay a grossly inflated price or it may have been obliged to bus them in to site from some distance away, but it would always have been able to secure labour.

On that basis, this clause could never bite and it was effectively redundant. However, a contract must be construed so as not to defeat the parties' intentions.[46] The parties clearly intended the inability to obtain labour to be grounds for an extension of time. Therefore, in order to make sense of this particular event it was necessary to make some implication regarding the availability of labour or materials at prices which could reasonably be assumed by the parties at the base date. This was a peculiarly difficult event to consider in practice. The clause was popular with contractors, even

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[44] *Matsoukis v Priestman & Co Ltd* [1915] 1 KB 681.
[45] [1920] 2 KB 714.
[46] *Hydrocarbons Great Britain v Cammel Laird Shipbuilders* (1991) 53 BLR 84.

if the ability to activate it was restricted. The clause was never popular with employers, who saw it as an easy way for contractors to gain extra time, or with architects, who had severe difficulties in operating it. It was commonly deleted even though this prevented the fluctuations clauses being frozen during a period of culpable delay, something of which most architects seemed blissfully unaware.

11.2 Intermediate Building Contract (IC and ICD)

The current JCT Intermediate Building Contract is the 2005 version (Revision 2 2009) and the JCT Intermediate Building Contract with contractor's design (Revision 2 2009).

11.2.1 Clauses 2.19 and 2.20

These clauses deal with extension of the contract period and, as under SBC, they are now headed 'Adjustment of Completion Date'. The content of the clauses is virtually identical in IC and ICD; therefore, reference will be made to IC only. It should be noted that references to extending time and fixing a new date for completion is taken to mean the date for completion of the Works or, if the Works are divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.2.2 Significant differences

These provisions are effectively a shortened version of clauses 2.26–2.29 inclusive of SBC, but there are significant differences set out below:

(1) In clause 2.19.1, the requirement for the contractor to provide particulars of the expected effects of delays and its own estimate of the resulting delay in completion which is set out in detail in SBC has been omitted. It is replaced by an obligation under clause 2.19.4.2 to provide information required by the architect as is reasonably necessary. This is a broader provision. Therefore, although there remains an obligation upon the contractor to provide the architect with the information needed in order to give a proper extension of time, there is no obligation on the contractor to provide its own estimate of the extension to which it believes it is entitled. Because the contract refers to information 'reasonably necessary', it leaves the door open for the contractor to argue that certain information for which the architect might ask is not reasonably necessary. The word 'required' (by the architect) is used, but it does not appear to place an obligation on the architect to ask for the information or to specify what is needed in this instance, although 'required' can be used in that sense; if that had been intended the word 'requested' would presumably have been used.
(2) The specific time limit within which the architect must deal with extensions of time is omitted and IC reverts to the old form of words used in IFC 98 which

require the architect to estimate the length of the delay beyond completion date as soon as he or she is able to do so. It is unfortunate that IC continues some of the old unsatisfactory wording of IFC 98, particularly the use of the words to describe the period of time within which the architect must estimate the length of the delay and give extensions of time. The requirement that the architect is to give the extension as soon as he or she is able might be thought, wrongly, by architects to allow them effectively to take as long as they wish to give an extension. It would have been better to have a more precise wording used.

However, if the contractor promptly fulfils its obligation to provide the architect with all the information reasonably necessary in order for the architect to make a decision the architect will have no excuse for failure to estimate the length of the delay in completion and make a decision quickly. In arbitration or adjudication, the question of when the architect was 'able' to form an opinion so as to give an extension of time would be subjected to severe scrutiny. Certainly, an architect who exceeded the time allowed under SBC (12 weeks) would be expected to make out a very good case for the time taken.

Delays may be said to fall into two classes: those that are a single definable cause of delay with a finite result, which is immediately apparent, and those that are a continuing cause of delay extending over a considerable period or even over the whole currency of the contract. An example of the first case may be a single major variation, which must be carried out before further work can continue. The architect must, in such a case and provided that the contractor has given a written notice of delay, give an extension of time, if not immediately, then within a reasonable time, and failure on the architect's part to do so may lead to the contract being considered 'at large' so far as time is concerned with the consequent forfeiture of the employer's right to deduct liquidated damages. An example of the second case might be a continuing stretch of exceptionally adverse weather such as one might experience occasionally during the winter months. In some instances, the adverse weather may extend up to, or nearly up to, completion of the Works. In that case the architect would not be unreasonable in maintaining an inability to estimate the extent of the delay until the whole of the relevant work was completed. The true position is, probably, as follows:

> 'I think it must be implicit in the normal extension clause that the contractor is to be informed of his new completion date as soon as is reasonably practicable. If the sole cause is the ordering of extra work, then in the normal course extensions should be given at the time of ordering, so that the contractor has a target for which to aim. Where the cause of delay lies beyond the employer, and particularly where its duration is uncertain, then the extension order may be delayed, although even then it would be a reasonable inference to draw from the ordinary extension clause that the extension should be given a reasonable time after the factors which will govern the exercise of the [architect's] discretion have been established. Where there are multiple causes of delay, there may be no alternative but to leave the final decision until just before the issue of the final certificate.'[47]

[47] *Fernbrook Trading Co Ltd v Taggart* [1979] 1 NZLR 556 at 568 per Roper J. See also *Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC* [1952] 2 All ER 452.

These principles are sound common sense and good contract practice.

When the architect is considering the grant of an extension of time, the effect of the cause of delay is to be assessed at the time when the Works are actually carried out and not when they were programmed to be carried out. This appears to be so even if the contractor is in culpable delay during the original or extended contract period.[48]

(3) The architect is not required to fix a completion date but simply to give an extension of time. In other words, the architect must specify a period of extension and not a date for completion. It is not thought that this is of significance on the current wording of the clause.

(4) There is no express requirement for the architect who decides not to grant an extension of time, to notify the contractor. Obviously it is good practice to do so.

(5) The architect has no power to reduce extensions previously granted even if work has been omitted since the previous extension of time. It seems this would not affect the architect's right to take such omissions into account when next granting an extension of time, but there is no power equivalent to the power contained in SBC actually to withdraw or reduce an extension already made.

(6) In clause 2.19.2, the architect is expressly given power to extend time if any delays which are the responsibility of the employer or of the architect occur after completion date, but before practical completion. It seems likely that the architect may have that power in any event, but this provision puts the matter beyond doubt so far as this contract is concerned.[49]

(7) The provision for review of extensions following practical completion of the Works has been made discretionary and not mandatory, as in SBC, by the use of the word 'may' instead of 'shall' in clause 2.19.3. It will usually be in the employer's interest for the architect to carry out such a review, but it must be carried out within 12 weeks of practical completion. Although it has been noted above that the architect may not give an extension of time if a neutral event occurs after the completion date but before practical completion, it is clear that, during the 12 week review period under clause 2.19.3 the architect must be able to take into account all grounds for extension of time. That makes the restriction inherent in clause 2.19.2 rather pointless.

(8) The complex nomination procedures found in JCT 98 have been omitted from SBC. However, IC retains its provisions for naming sub-contractors (clause 3.7 and schedule 2). Sub-contractors may be 'named', either in the contract documents or by instructions for the expenditure of provisional sums. Except that the sub-contract must be on a prescribed standard form entered into after specified procedures, such sub-contractors become virtually domestic sub-contractors. There are no provisions for the certification of payments by the architect or for direct payment by the employer if the contractor defaults and there is no provision entitling the contractor to an extension of time for delay on their part. However, if the sub-contractor defaults in the performance of its work to the extent that its employment is terminated the contractor is to notify the architect

[48] *Walter Lawrence & Son Ltd v Commercial Union Properties (UK) Ltd* (1984) 4 Con LR 37.

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

who must then issue instructions either, (a) naming a replacement sub-contractor, or (b) instructing the contractor to make its own arrangements for the completion of the work, or (c) omitting the remaining work, in which event the employer may make other arrangements for completion. Whichever instruction the architect issues, the contractor will be entitled to an extension of time for the delaying effect of the instruction. If the sub-contractor terminates its own employment because of the contractor's default the architect must still issue an instruction, but such an instruction will not entitle the contractor to an extension of time.

Similarly, if the contractor finds that it cannot enter into a sub-contract with a sub-contractor named in the contract documents because of some problem over the particulars of the sub-contract as set out in those documents, the architect is to issue instructions either changing the particulars so as to remove the problem, or omitting the work or by substituting a provisional sum.

Where a sub-contractor is named in an instruction for the expenditure of a provisional sum, such an instruction will have been issued under clause 3.13 of the contract. Therefore, if the instruction causes delay to the completion date for any reason, the contractor will be entitled to an extension of time under clause 2.20.2.1.

(9) The relevant events in clause 2.20 are virtually identical to the relevant events in SBC and the commentary to SBC applies. The only difference is the addition of reference to instructions in connection with named sub-contractors in clause 2.20.2.2. It should also be noted that the 'strike' provisions (clause 2.20.11) in ICD contain reference to persons engaged in design for the contractor's designed portion while IC does not, of course, have that reference.

11.3 Minor Works Building Contract (MW and MWD)

The current JCT Minor Works Building Contract is the 2005 version (Revision 2 2009) and the JCT Minor Works Building Contract with contractor's design (Revision 2 2009).

11.3.1 Clause 2.7 (MW) and 2.8 (MWD)

These clauses deal with extension of the contract period. The content of the clauses is virtually identical in MW and MWD; therefore, reference will be made to MW only.

11.3.2 Significant differences

The most striking thing about the extension of time clause under this form is that it is very brief. The main differences are as follows:

(1) The contractor is not obliged to give notice of every delay. It need only, and it must, give notice of such delays as will prevent completion of the Works by the current completion date and resulting from reasons beyond the control of the

contractor. The contract uses the word 'thereupon'. The ordinary meaning of thereupon is soon or immediately after. If the contractor fails to notify the architect that the completion date will not be met, the contractor is in breach of contract and it is suggested that the contractor's failure to give notice is a matter which may be taken into account by the architect in determining the extension of time. In taking account of the failure, the question to be asked is whether the contractor's failure prejudiced the employer in any way. In other words, if the architect had been informed immediately, could any measures have been taken to reduce or eliminate the delay? The critical date is the date it became apparent that the Works would not be completed on time.

(2) The contractor must give notice in writing, but there is no provision for it to provide supporting information. Common sense dictates that the contractor must give sufficient information to allow the architect to understand what the delay entails, and probably a term would be implied to that effect. The architect is probably entitled to ask for particular further information. In practice, an architect will ask for any information required and if the contractor refuses to provide it, it seems that the architect must make the best of it. That does not mean that the architect is obliged simply to accept whatever the contractor may say. Almost the reverse is true. The architect must still be satisfied that what the contractor states in its notification of delay is more likely to be correct that otherwise. Unless the architect is satisfied on that point, the contractor's notice, at least insofar as that delay is concerned, must be rejected. It is thought that the contractor's refusal to provide information which the architect reasonably required would, not only severely disadvantage it so far as obtaining a sufficient extension of time is concerned but also, effectively preclude it from making any substantial criticism of the extension of time thereafter.

(3) No time limit is set on the exercise of the architect's duty to give an extension of time. It is reasonable to suppose that the duty must be performed as quickly as practicable, bearing in mind that the nature of this contract suggests that projects executed under it will be of short duration, and a term would probably be implied to that effect to give business efficacy to the contract. Two questions arise in relation to timing: can the contractor request, and can the architect give, an extension of time after the date for completion or the date of practical completion? As noted in (1) above, the contract seems to oblige the contractor to serve notice very promptly after the qualifying delay becomes apparent. It has been held that the contractor must do so before the current date for completion, but that notification after completion date will not necessarily invalidate any extension of time.[50]

Notification of an extension of time by the architect after the current date for completion or after practical completion is undesirable and clearly an extension of time is to be given as soon as practicable. However, it is clear that there will be occasions when the architect may give a valid extension although late by normal standards. It is suggested that the validity or otherwise of such extensions will depend, not on whether the extension was notified late as considered in isolation, but rather whether it was late in the context of the prevailing circum-

[50] *Terry Pincott v Fur and Textile Care Ltd* (1986) 3-CLD-05-14.

stances. These would include how soon the extension was given after the date on which the contractor notified the delay, whether the delay was ongoing and whether the delay was caused by something within the control of the employer or the architect.

(4) The architect's extension must be 'reasonable'. Other forms refer to 'fair and reasonable', but it is not thought that anything significant turns on the distinction.

(5) There is no list of delaying events. There is merely reference to reasons beyond the control of the contractor including compliance with any architect's instruction provided it is not issued as a result of the contractor's default. That should be broad enough to encompass almost anything. However, it is fundamental that the architect only has power to make extensions of time for the reasons set out in the contract and that those grounds will be interpreted very strictly particularly in regard to delays which are due to the employer or architect.[51]

The phrase '. . . other causes beyond the contractor's control . . . ', which is not dissimilar to the phrase in MW, has been held, under another earlier form of contract, not to be specific enough to include employer delays.[52] That raises the possibility of a successful challenge by a contractor that the architect's inability to extend time for employer delays other than architect's instructions renders time at large whenever such a delay becomes apparent. The fact that no such challenge has appeared in the law reports probably says more for the low value of work intended to be carried out under Minor Works Contracts than for the drafting of the clause. It is another reason why MW should never be used for projects whose parameters are broader than set out in the guidance note.

(6) It is certain that in some respects the extension of time clause in MW is wider than the equivalent clauses in SBC or IC. For example, SBC allows an extension of time if the Works have been delayed beyond the completion date by exceptionally adverse weather. In contrast, MW's reference to reasons beyond the contractor's control seems to allow an extension of time for any kind of adverse weather, even if not exceptional, because clearly the weather is beyond the contractor's control. If that is correct, any kind of delaying event outside the contractor's control will give grounds for an extension of time. But, is it implied that weather conditions, and other things, which the contractor could reasonably foresee would be deemed to be within its control? That seems to be an unlikely conclusion. It is more likely that the words will be given their ordinary meaning, i.e. what a reasonable person would understand the meaning to be in the light of the contract as a whole.[53] MW and MWD are simple contracts for relatively low value Works. The whole contract is written in straightforward terms without the use of overtly legal phraseology. There appears to be nothing to suggest that the plain words in this clause should be interpreted in any other than their ordinary sense. Therefore, when the contract refers to events outside the contractor's control, there is no reason to strain the meaning or to attempt to introduce some particular sophistication. In short, there is no need for any implication of terms

[51] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114.
[52] *Wells v Army & Navy Co-operative Society* (1902) 86 LT 764.
[53] *Harbinger UK Ltd v GE Information Services Ltd* [2001] 1 All ER (Comm) 166.

because the contract is perfectly workable (albeit perhaps very generous to the contractor) without such implication. Although it is a basic principle of law that a party who is permitted to sub-contract retains full responsibility for the performance of such sub-contractors, the point has not been without doubt and, surprisingly, it has been held (but not under MW or MWD) that sub-contractors were not within the contractor's control.[54] The last sentence of this clause was inserted to clarify the position that sub-contractors under these contracts are considered to be under the control of the contractor and that position has since been upheld.[55]

(7) There is no provision for the architect to carry out any review of extensions of time after the date of practical completion and it appears that, unless the delay is ongoing almost to practical completion, the architect has no general power to do so.

11.4 Design and Build Contract (DB)

The current JCT Design and Build Contract is the 2005 version (Revision 2 2009).

11.4.1 Clauses 2.23–2.26 inclusive

These clauses deal with extension of the contract period and are now headed 'Adjustment of Completion Date'. Schedule 2 'Supplemental Provisions' also includes provisions for fixing a new date for completion in paragraph 4. 'Pre-agreed Adjustment' is a defined term used in clauses 2.23–2.26 when referring to a revised completion date fixed by agreement between employer and contractor of a variation quotation under paragraph 4.4. It should be noted that references to extending time and fixing a new date for completion is taken to mean the date for completion of the Works or, if the Works are divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.4.2 Significant differences from SBC

These clauses closely follow the extension of time provisions in SBC. The principal differences are as follows:

(1) What are referred to as 'variations' in SBC are referred to as 'changes' in DB.
(2) Reference is to the employer fixing a new completion date not to the architect, because there is no architect named as such under DB. An architect can, of course, act as employer's agent and this arrangement is quite common, but an architect acting as agent is not acting in an independent capacity.[56] Under article 3 the employer's agent acts for the employer except to the extent that the employer

[54] *Scott Lithgow Ltd v Secretary of State for Defence* (1989) 45 BLR 1.
[55] *John Mowlem & Co v Eagle Star Insurance Co Ltd* (1995) 62 BLR 126.
[56] *J F Finnegan Ltd v Ford Seller Morris Developments Ltd* (1991) 53 BLR 38.

specifically notifies the contractor in writing. It will be rare for the employer to act personally under this clause, particularly if the employer's agent is an architect or other professional with experience of dealing with extensions of time.

(3) There are no references to defined work or approximate quantities, because except in the unlikely event that paragraph 3 of the supplemental provisions has been operated, there will be no bills of quantities and, therefore, no SMM7. If the employer has prepared bills of quantities to which paragraph 3 applies, paragraph 3.1 requires the employer to state the applicable method of measurement and paragraph 3.2 makes clear that errors in description or quantity in the bills must be corrected by the employer and the correction is to be treated as a change in the Employer's Requirements. Such a change would be ground for an extension of time if the completion date was delayed thereby. It is possible that the Employer's Requirements may stipulate that the Contract Sum Analysis must be in the form of bills of quantities and it is possible that SMM7 has been used, but errors in the contractor's own documents cannot form grounds for an extension of time.

(4) Clause 2.26.2 refers to employer's instructions. Among other things, this relevant event covers instructions in regard to the correction of discrepancies or divergences in or between various contract documents (excluding contractor generated documents), changes, the postponement of design or construction, provisional sums and antiquities. WCD 98 included a change in the statutory requirements after the Base Date as one of the relevant events. This refers to changes under clause 2.15.2 and it is now stated to be included under 2.26.2. Essentially this relevant event quite reasonably entitles the contractor to an extension of time if it has to make some alteration to its proposals due to events outside either party's control. However, clauses 2.15.2.1 and 2.15.2.2 both refer to amendments and modifications which are to be 'treated' as a change and, strictly, one would have expected them to be included in clause 2.26.1 which deals with changes and other matters which are to be 'treated' as changes. It is uncertain from the wording whether they are to be dealt with under 2.26.1 or 2.26.2.

The employer's power to give an extension of time for an employer generated delay should be clearly specified in relation to any particular event and it may be thought arguable that the employer has no such power where there is an element of uncertainty, as here. Although it is to be hoped that the JCT takes the next opportunity to clarify the position, it is unlikely that an extension of time could be challenged on this ground, because it is not a question of it being likely that the employer has no power to issue such extensions, but rather that the employer may have been given the power to give an extension of time for the same event under two separate relevant events. It is thought that the employer should be prepared to accept submissions under either relevant event. Clause 2.15.2.3 clearly refers to an instruction issued by the employer and, therefore, plainly falls under relevant event clause 2.26.2.

(5) Clause 2.26.10, referring to strikes and the like, adds a reference to persons who are engaged in the preparation of the design of the Works. This is an extension of the equivalent SBC clause to provide for an extension of time if the design element in this contract is affected by strikes and other occurrences in

this relevant event although it would be unusual for strikes to affect an independent consultant engaged by the contractor to design the Works.

(6) Clause 2.26.12 introduces a new relevant event dealing with delay in the receipt of any necessary permission of any statutory body. There is a requirement that the contractor must have taken all practicable steps to reduce the delay and it must be taken seriously. Realistically, this will probably amount to little more than requiring the contractor to make any necessary applications in good time, to reply promptly to queries and use best endeavours to obtain permissions or approvals. An architect in the position of making applications to statutory bodies cannot guarantee the result and neither can the contractor. The contractor will be entitled to an extension of time under this relevant event if it can show that the delay was not its fault. This relevant event refers to any kind of statutory permission or approval. Virtually all buildings require planning permission and they must satisfy the Building Regulations. There are, however, many other possible controls over such things as fire, water and entertainment.

11.5 Prime Cost Building Contract (PCC)

The current JCT Prime Cost Building Contract is the 2005 version (Revision 2 2009).

11.5.1 Clauses 2.18–2.21 inclusive

These clauses deal with extension of the contract period and are now headed 'Adjustment of Completion Date'. It should be noted that references to extending time and fixing a new date for completion is taken to mean the date for completion of the Works or, if the Works are divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.5.2 Significant differences

In structure and wording this extension of time provision is clearly based on clauses 2.26–2.29 of SBC. Indeed, it is more closely based than was the equivalent clause in PCC 98 on clause 25 of JCT 98. However, there are some important differences as follows:

(1) Under clause 2.19.4, the contractor must review the progress of the Works whenever the architect considers it to be reasonably necessary. This clause is very similar to clause 2.5.5 of PCC 98. It is not quite clear what is intended and the clause goes into no detail. The architect's right to have a review carried out does not depend on the contractor's notice of delay under clause 2.19.1. The clause stipulates that the review must be carried out with the architect. Therefore, there is no question of the contractor simply submitting a progress report. They must sit down together. During the review the architect may come to a conclusion

about the amount of additional resources necessary to main progress. This clause does not actually give the architect power to accelerate the Works. Indeed, it simply states that the cost of such additional resources *would* (presumably if used) be included in the prime cost. The key to this strangely worded provision lies in the philosophy of this particular contract. It is based on a rough estimate of cost for known work and contractors tender on the basis of recovery of the whole of the prime cost of the Works together with a sum to represent overheads and profit. The architect must issue instructions for the carrying out of all work including work in the original specification and/or drawings. It seems that, under clause 3.14, the architect can instruct the contractor to employ additional resources on the job. Clause 2.19.4 makes clear that, in such an instance, the employer pays in the usual way. This clause must be read in conjunction with clause 2.1.2 which requires the contractor to carry out the Works as economically as possible in all the circumstances, taking care not to engage more personnel than reasonably required. Seen in context, clause 2.19.4 provides a useful tool to enable the architect to review and improve the progress of the Works if the contractor's original allowance is thought to be too low.

(2) Unlike the position under SBC, there is no separate relevant event for variations. Clause 2.21.1.2 makes instructions issued under clauses 3.15 a relevant event. This clause empowers the architect to issue instructions requiring what this contract refers to as 'changes', but which other contracts (including SBC) refer to as variations.

(3) Although compliance with architect's instructions is a relevant event, instructions given to carry out work described in the specification or shown on the contract drawings are excluded to allow for the fact that the architect must instruct all work (see (1) above). If they were not excluded, the contractor would be entitled to an extension of time for carrying out the whole of the Works as though they had been added into the Works which are the subject of the contract.

(4) Compliance with clause 3.22.1, which deals with the action required of the contractor on discovery of antiquities and subsequent architect's instructions, are given a separate relevant event under clause 2.21.3. SBC only makes the architect's instructions the subject of a relevant event.

11.6 Management Building Contract (MC)

The current JCT Management Building Contract is the 2008 version.

11.6.1 Clauses 2.16–2.20

These clauses deal with extension of the contract period and are now headed 'Adjustment of Completion Date'. Schedule 6 'Acceleration Quotation Procedure' and Works Contract schedule 2, part 2 'Variation Quotation' also includes provisions for fixing a new date for completion. 'Pre-agreed Adjustment' is a defined term used in clauses 2.16–2.20 when referring to a revised completion date fixed by acceptance of a variation or acceleration quotation. It should be noted that references to extending

time and fixing a new date for completion is taken to mean the date for completion of the project or, if the project is divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.6.2 Significant differences

The wording of these clauses reflects the structure of the management contract. However, it is now structured much more closely to the SBC extension of time provisions, than the previous 1998 edition was to JCT 98. This clause refers to the project as a whole, but demonstrates the relationship with the works contracts which together form the project. The procedures for notifying delays and giving extensions of time are virtually identical to SBC. The relevant events are termed 'Relevant Project Events' as follows:

(1) There are only two grounds, but the first one is so broad that it could be argued that the second is superfluous:

   (i) The first ground encompasses any cause which impedes the proper discharge by the management contractor of its obligations. This is stated to include compliance or non-compliance by the employer with clause 3.23 dealing with the CDM Regulations, any impediment, prevention or default, whether by act or omission of the employer or persons for whom the employer is responsible (the consultant team is expressly stated) and the deferment of possession (if applicable). This ground could hardly be wider and it certainly includes all those employer-generated occurrences which could result in time becoming at large if the architect had no power to deal with them.[57]

   (ii) The second ground is any relevant event under the works contract conditions (referred to as a 'Relevant Works Contract Event') which entitles any works contractor to an extension of time. The exception is the relevant works contract event in clause 2.19.8 which entitles a works contractor to an extension of time due to impediment, prevention or default of the management contractor. Clearly, the management contractor cannot be entitled to an extension of the project completion date due to its own default. Included in that event would be delay by other works contractors which, being employed by the management contractor fall into the category of management contractor's persons as defined under clause 1.1 of the Management Works Contract (MWC) and the Management Building Contract.

   There is an interesting proviso that no cause or relevant works contract event must be considered as a relevant project event *to the extent* that it is caused or contributed to by any default of the management contractor or management contractor's persons. It is rather difficult to unravel the precise nuances of this clause, particularly in the light of judicial opinion that an architect should not

[57] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114.

take into account the contractor's own delays.[58] It appears, however, that the architect is not to entirely discount a ground, just because the management contractor has contributed to it by its default; rather the architect must still consider so much of the ground as is unaffected by the default. This promises to be a skilful balancing task.

Judicial pronouncements which consider what effect is to be given to contractor's own delays focus on situations where there may be several grounds for delay, some originating from the employer or which are acceptable neutral events and some which are entirely the responsibility of the contractor. This clause is concerned with individual grounds and whether a default of the management contractor had any influence on the ground. Therefore, if it is clear that there was a delay of five days caused to an activity by some act of prevention by the employer, it is to be reduced if it can be shown that the management contractor was responsible for part of that delay. The effective delay may then be, say, three days. It is the three day period which is taken into account in reckoning the appropriate project extension. The best way to look at this is to consider it as being part of the basic calculation to see the values of the individual delays before considering all the delays applied to the whole project.

(2) Clause 2.20 is a very curious clause indeed. It obliges the management contractor to notify the architect of any decision which the management contractor proposes to make in regard to an extension of time for a works contractor. The notice must give the architect sufficient time to disagree in writing before the management contractor has to notify the works contractor. What then? Although MCWC clause 2.18.1 requires the contractor to consult with the architect after receiving notice from the works contractor, that is not the same as requiring agreement. To consult is to seek advice or an opinion and sufficient information must be provided and sufficient time must be allowed for the advice to be given.[59] However, the opinion or advice need not be followed. There is nothing to prevent the management contractor proceeding to give the extension of time as originally proposed.

It is difficult to see what purpose is served by this clause. It does not invariably follow, of course, that an extension of time under the works contract confers a right to an extension under MC. However, clause 2.19.2 states that such a relevant event becomes a relevant project event and, therefore, the management contractor has a basic case for an extension of time for the project whether the architect dissents or not. As with every delay, the management contractor has to decide whether it is convinced that it is correct. If so, it must give the extension of time to the works contract and notify the architect, if appropriate under clause 2.20. It is then for the architect properly to carry out the duty to extend time.

11.7 Construction Management Trade Contract (CM/TC)

The current JCT Construction Management Trade Contract is the 2008 version.

[58] *John Barker Construction Ltd v London Portman Hotels Ltd* (1996) 50 Con LR 43.
[59] *Fletcher v Minister of Town and Country Planning* [1947] 2 All ER 496.

11.7.1 Clauses 2.25–2.28

These clauses deal with extension of the contract period and are now headed 'Adjustment of Completion Period'. Schedule 2 'Acceleration Quotation and Variation Quotation' also includes provisions for fixing a new date for completion. 'Pre-agreed Adjustment' is a defined term used in clauses 2.25–2.28 when referring to a revised completion date fixed by acceptance of a variation or acceleration quotation. It should be noted that references to extending time and fixing a new date for completion is taken to mean the date for completion of the Works or, if the Works is divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.7.2 Significant differences

The structure and wording of this extension of time clause is clearly derived from SBC. That is to be expected, because each trade contractor is in direct contract with the employer. The functions carried out by the architect in the SBC clause are carried out by a construction manager whose role is essentially to manage all the consultants and trade contractors. Items to note are:

(1) Under clause 2.26.1, written notice must be given by the trade contractor whenever it becomes reasonably apparent that the commencement, progress or completion of the Works is likely to be delayed. It is, therefore, clear that the trade contractor must give this notice even if it has not started on site, provided only that its start is delayed. It is unlikely that the completion will be delayed without a corresponding delay to either commencement or progress and it is difficult to see what the insertion of the word 'completion' achieves.
(2) Reference is made throughout to the 'Completion Period' rather than to the completion date. That is because, although the period for carrying out the work is fixed, the commencement and completion dates may change. The result is that this contract makes no express provision for extending the completion date if the commencement date is delayed. Effectively, all the construction manager can do in any given circumstance is to extend the period available for carrying out the work. In practice, a delayed commencement may have no effect on the length of the contract period, the whole period being merely moved back in time.

The relevant events echo those in SBC, except that for obvious reasons there is no reference to deferment of possession. The commentary on SBC is generally applicable here.

11.8 Major Project Construction Contract (MP)

The current JCT Major Project Construction Contract is the 2005 version (Revision 2 2009).

11.8.1 Clause 18

MP is expressed to be intended for use by employers who have in-house contractual procedures and undertake major projects on a regular basis. The contract is less detailed than some other standard forms, such as SBC. Essentially, this is a contract in which the contractor carries out any design which is required beyond what is contained in the employer's requirements. The contractor is also expected to take on more risk than usual. Whatever may be the intention of the draftsman, it is the intentions of the parties as expressed in the contract to which a court must give effect.[60] It should be noted that references to extending time is taken to mean the date for completion of the project or, if the project is divided in the contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

11.8.2 Significant differences

The extension of time clause bears a passing resemblance to the equivalent clause in DB. However, there are some significant differences which should be noted:

(1) The grounds for extension of time are briefer than under DB clause 2.26. Missing are exceptionally adverse weather conditions, strikes, lockouts and civil commotion, and delays caused by statutory undertakers.
(2) Although there is a requirement that the contractor must notify the employer of delays due to any cause, therefore including delays which are due to the contractor's own inefficiencies, the method of notification is not specified in the clause. That is because clause 5 provides that all communications between the parties must be in writing.
(3) The contractor is called upon to form an opinion about whether the delay is one of those in clauses 18.1.1–18.1.8. If the opinion is positive, the contractor must supply supporting information. The clause does not specify when this information must be provided, but if it is to be workable, the information must be provided at the same time or very shortly after the notice. Once the contractor has reached a positive conclusion, it has no choice in the matter. Clause 18.3.1 is quite specific that the information must demonstrate to the employer the effect upon progress and completion. Therefore, if the information, viewed objectively, does not do that, the contractor is in breach of its obligations.
(4) Clause 18.4 is important. On receipt of the clause 18.2 notification, the employer has 42 days in which to notify the contractor of an adjustment to the completion date or state why the employer considers there should be no adjustment. Unlike the position under DB clause 2.25.1, the trigger for action by the employer is not the receipt of sufficient information, but receipt of the original notice. However, the employer must calculate the adjustment by reference to the information from the contractor and *may* take other information (e.g. the employer's

[60] *Schuler A G v Wickman Machine Tool Sales Ltd* [1974] AC 235.

own knowledge), into account. Therefore, it seems that in stating why the completion date is not to be adjusted, it may be sufficient for the employer to state that the supporting information did not demonstrate any effect upon progress or completion or indeed that it was not received. This clause is an improvement upon DB, because the employer must do something on receipt of the notice, even if it is merely to refuse an extension of time, whereas under DB the employer could theoretically do nothing until after the completion date if the supporting information supplied was not sufficient.

(5) The most significant clause is 18.5. This states that any notification by the employer under clause 18.4 may be reviewed by the employer 'at any time' if further documentation is received from the contractor or if the effects of an identified cause of delay become more apparent. It can be compared with the right to refer a dispute to adjudication 'at any time' under s. 108(2)(a) of the Housing Grants, Construction and Regeneration Act 1996 which was held to mean that there was no restriction as to time.[61] Therefore, it appears that if the contractor submits further information, even after the clause 18.6 review, the employer can review a previous decision.

(6) Clause 18.6 divides the review process into two parts. First, the contractor must provide any further information within 42 days after practical completion. The employer has 42 days from receipt of the information to carry out the review of previous extensions of time. The employer must either notify further adjustment or the fact that there is no adjustment.

(7) When considering an adjustment to the completion date, the employer must put into effect any agreements about acceleration, cost savings and value improvements and changes. The employer must also 'have regard to' any breach of clause 15.3 by the contractor. Clause 9.3 is a 'reasonable endeavours' clause. This is less onerous than the usual JCT 'best endeavours' and the contractor is entitled to have regard to its own financial interests.[62]

(8) The contract seems to have adopted one of the principles of the SCL extension of time protocol[63] in clause 18.7.3 by requiring the employer to give the contractor an extension of time even if the project is delayed concurrently by an unlisted cause or something for which the contractor has agreed under the contract to take the risk, such as exceptionally adverse weather. It is thought that such an approach is generally not supported by legal authority where the concurrent causes are operating on the same activity.[64] Nevertheless, the principle is enshrined in this contract and the employer must comply.

11.9 Measured Term Contract (MTC)

The current JCT Measured Term Contract is the 2005 version (Revision 2 2009).

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[61] *A & D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd* (2000) 17 Const LJ 199.
[62] *UBH (Mechanical Services) Ltd v Standard Life Assurance Co* (1990) BCLC 865; *Phillips Petroleum Co UK Ltd v Enron Europe Ltd* (1997) CLC 329.
[63] See Chapter 2, Section 2.7.2.
[64] The point is considered in Chapter 2, Section 2.4.

11.9.1 Clause 2.10

This contract is for use by employers who have a regular flow of maintenance and minor works. Work is instructed from time to time and valued on the basis of a schedule of rates. The contract assumes that a contract administrator will administer the contract. The work is to be instructed by order and, under clause 2.6, each order must state a commencement and completion date.

11.9.2 Significant differences

The extension of time clause in MTC is very short and entirely different to SBC and other JCT contracts:

(1) Clause 2.10.1 combines a requirement that the contractor must give notice forthwith in regard to anything causing or likely to cause delay with an obligation that the contractor must use its best endeavours to complete the order by the completion date. The clause does not expressly state that the notice must be in writing and clause 1.6 which deals with notices does not require all notices to be in writing. In practice, it is very much in the interests of the contractor that it gives all notices in writing whether or not expressly so required by the contract. There is no provision for the contractor to provide supporting information. It will be implied that the contractor must give sufficient information to allow the contract administrator to understand what the delay entails. The contract administrator is probably entitled to ask for particular further information.

(2) Clause 2.10.2 gives the grounds which will entitle the contractor to an extension of time:
   (i) Suspension by the contractor resulting from non-payment.
   (ii) Reasons beyond the contractor's control (including compliance with an instruction not necessitated by the contractor's default).

   These grounds are similar, except for suspension, to the grounds in MW and MWD. Although such grounds appear to be extremely wide, and in one sense they are, it is likely that those grounds will be interpreted very strictly particularly in regard to delays which are due to the employer or architect.[65]

(3) The contract administrator is required to fix a fair and reasonable date for completion.

(4) It is likely that most of the periods fixed by the contract administrator, when issuing orders, will be relatively short and it makes sense that the extension of time provisions are quite short also. However, a point which should not be overlooked by a contractor looking to maximise any extension of time is that the dates for commencement and completion are imposed upon the contractor. This is in contrast to most contracts where the contract period is agreed and entered into the contract documents before execution. Clause 2.1 states that on receipt of the order, the contractor must carry it out. There is no restriction on

[65] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114. See the discussion on this point in regard to MW and MWD in Section 11.3.2 above.

the contract administrator's power to fix the completion date in the order other than the completion date must be reasonable. It is in the contractor's interests to submit a formal written objection to the completion date in an order as soon as it is received if the contractor believes that it is not reasonable in all the circumstances. Whether or not such a date is reasonable or indeed whether an extension to the period is fair and reasonable is something which either party may refer to adjudication or arbitration.

(5) Clause 2.10.2 makes clear that the contractor must complete by the completion date even if an extension of time places the date for completion after the end of the contract period set out in the Contract Particulars.

11.10 Constructing Excellence Contract (CE)

The current JCT Constructing Excellence Contract is the 2006 version (Revision 1 2009). Clauses 5.7–5.16 are relevant.

11.10.1 Comments

This contract is said to be appropriate for use for the procurement of construction work and related services, for use throughout the supply chain, if the parties wish to produce collaborative and integrative working or for partnering. It may be used for procuring professional services. The terms 'Purchaser' and Supplier' are used instead of the more familiar 'Employer' and 'Contractor' respectively. There is no named architect or contract administrator, but there is provision for a purchaser's representative under clause 3.5 who has the power to act for the purchaser in relation to the project. It can be used if the supplier is to carry out design and if it is desired to complete the work in sections.

A key provision is the 'Overriding Principle' set out in clause 2.1. In essence, this clause states that the parties' intention is to work together in collaboration, co-operation, good faith and in a spirit of mutual trust and respect. The clause specifically states that the parties must give each other, and welcome, feedback on performance. The idea is to create a spirit of openness and co-operation and each party agrees to deal with lapses and to support behaviour which complies with the requirements. Clause 2.9 takes the position further and states as the parties' intention that a court, adjudicator or other forum must take account of the overriding principle when making an award. The effect on the courts of such a clause is largely unknown. For the purposes of this book the CE contract will be considered purely in the context of procurement of construction work from a building contractor.

This contract is prepared on an entirely different basis from SBC or other JCT traditional contracts. The contract provides for the insertion of dates for commencement and completion of the services and for liquidated or unliquidated damages. What the contractor carries out is termed 'Services' rather than the 'Works'. Clause 5.3 provides that a risk allocation schedule may apply. If so, it is to be completed (schedule A or B) and the contractor particulars completed accordingly.

(1) The relevant provisions are based on a set of 'Relief Events'. These events operate to relieve the supplier, in appropriate instances, in respect of both time and money. Clause 5.9 makes clear that if one of the relief events occurs or is likely to occur and either the purchaser or the supplier becomes aware of the fact, whoever becomes aware must notify the other. Clause 1.5.1 stipulates that all notices must be in writing. The notification must be carried out immediately; that is, with all reasonable speed depending on the surrounding circumstances.[66] Under this form, the duty to mitigate the effects is placed on both parties equally. Both parties are expected to co-operate in agreeing what to do.

It is almost inevitable that it will be the supplier who is in a position to mitigate any effect, although it is clear that if the purchaser is able to do something, it must be prepared to do it. However, it is a matter for agreement and the contract cannot compel the parties to agree.[67] There is a further stipulation in clause 5.10 in that if either the purchaser or the supplier is a member of the project team, they must promptly notify the team also if it appears that the relief event will affect any member. Any information as to the effect of the event and any supporting information must also be provided to the team in these circumstances so that they can consider the effect on any other project participant.

The purchaser and the supplier are required to give serious consideration to any recommendations which the team may make. That, of course, is a far cry from stating that the recommendations have to be followed or even that they must be taken into account. They must simply be considered. It is suggested that the consideration will be much the same as the consideration required to be given to tenderers who have submitted a valid tender in accordance with the invitation to tender.[68]

If the purchaser was not aware of an event, because of late notification by the supplier, clause 5.16 provides that the parties must take account of the supplier's delay by ignoring the additional effect of such delay. If the supplier fails to notify at all or does not provide a clause 5.11 statement (see (2) below), the purchaser must, so far as possible, make its own assessment of the effect of an event and notify the supplier. The parties must then use reasonable endeavours to agree the effect, presumably the effect notified by the purchaser and if either considers it to be appropriate, they must meet to discuss their differences.

(2) Whichever of the parties notifies the other, it falls to the supplier, under clause 5.11, to provide a statement showing the effect of the event on the completion date and/or on the cost of carrying out the services. This statement must be provided no later than 10 business days from the notification unless that parties otherwise agree. A 'Business Day' is defined in clause 1.1 as any day which is not a Saturday, Sunday or public holiday. In view of the reference to 'notification', it is thought that the operative date is the date the notice is received rather than the date on which it is issued. The supplier must also provide the purchaser with whatever other information it reasonably requests to support the statement.

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[66] It is not sufficient if the action is performed within a reasonable time: *Alexiadi v Robinson* (1861) 2 F&F 679.
[67] *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* (1974) 2 BLR 100.
[68] *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83.

(3) In conformity with the underlying spirit of this contract, the purchaser and the supplier must use reasonable endeavours to agree the effects of any notified event and to agree the action to be taken to minimise such effects. Clause 5.13 somewhat unnecessarily states that they must meet to discuss any differences if they think it appropriate. If they do agree, or as the clause says if the effects are 'decided', they must, presumably jointly, provide written confirmation of any change to the target cost, the guaranteed maximum cost, the contract sum and/or to any date for completion. They may also alter the risk allocation schedule. The reference to agreeing or deciding the effects is not particularly clear. To agree suggests, as here, that two parties are involved whereas, to decide suggests a view taken by one party.

(4) Clause 5.14 raises problems. It appears that it is a matter for the purchaser to decide whether the effect of any event is too uncertain so that it cannot be forecast reasonably accurately. In so deciding, it seems that the purchaser can override the procedure in clause 5.13. However, the clause proceeds to require the parties to agree what assumptions must be made in order to estimate the effect. There is provision for subsequently amending a wrong assumption.

(5) Although they are not particularly difficult to understand individually, these are somewhat complex clauses when viewed as a whole. In summary the position seems to be this:

As soon as either purchaser or supplier is aware that there is a relief event, they must notify the other and if either is a member of the project team, the team must be notified. The supplier must provide a statement of the effect of the event in terms of cost and time and provide any information which the purchaser reasonably requests. The parties must try to agree what can be done to reduce the effect of the event, but then they must try to agree on the effect on cost and on time. The contract is silent on the position if the parties fail to agree. The whole contract is predicated on the basis that the parties will agree. However, if the supplier fails to notify or is late in notifying the event, the purchaser can make its own assessment which it must try and agree with the supplier.

(6) The relief events are limited. They are dealt with in clause 5.7 as follows:

- *instructions*
  These are purchaser's instructions requiring the equivalent of a variation to the services or the project.
- *act or omission of the purchaser*
  This is intended to be a catch-all clause similar to the impediment and prevention clause in SBC. The wording is very broad, but whether it will be judged too broad to cover all acts of purchaser prevention which might give rise to a claim is something to be decided by the courts in due course.
- *risk in the risk allocation schedule*
  This is more complex. It will qualify as a relief event if a risk occurs which is mentioned in the risk allocation schedule, but only so far as the consequences of the particular risk are not said to be the supplier's responsibility. There are yet more provisos:
  - the supplier can only recover costs if the consequences of the risk are greater than any amount which the risk allocation schedule shows as included in the target cost or contract sum, and

- the supplier can only seek an extension of time if the time consequences of the risks are greater than any period in the risk allocation schedule stated as the responsibility of the supplier.

- *other risks*
  The difficulty in interpreting this provision will vary depending on the particular circumstances. It appears to provide that any risk which is not in the risk allocation schedule may qualify as a relief event if it was not reasonably foreseeable at the time the contract was executed (this is the normal proviso for recovery of damages for breach of contract). The risk must also be beyond the supplier's control. Excluded, presumably on the basis that they are within such control, are the supplier's act, omission or insolvency or of any member of the supply chain or any sub-supplier. The risk constitutes a relief event only to the extent set out in the Contract Particulars, where the percentage of cost or time which is allowable is to be inserted. This is in accordance with the spirit of this contract which sets out to clearly allocate risks between the parties. Whether it is successful in so doing will become clearer as more projects are carried out using this form of contract.