Chapter 13

Loss and/or expense under JCT standard form contracts

13.1 Standard Building Contract (SBC)

13.1.1 Background

The provisions in SBC that may give rise to loss and/or expense claims by the contractor are contained in clauses 4.23–4.26 inclusive. They deal with loss and/or expense caused by matters materially affecting regular progress of the Works. Once the contractor decides to trigger this clause, it imposes specific obligations, not only on the contractor but also on the architect and quantity surveyor which is something that is not always appreciated. Once the claims machinery has been triggered by the contractor, the architect and/or quantity surveyor must carry out the duties imposed upon them. The clause confers on the contractor a clear and enforceable right to financial reimbursement for 'direct loss and/or expense' suffered or incurred as a direct result of certain relevant matters provided that the contractor strictly complies with the procedures laid down by the provisions. That proviso cannot be overemphasised. The contractor's entitlement to recovery under the clause depends on two things:

(1) the correct operation of its machinery
(2) deferment of possession or that regular progress of the Works has been materially affected by one or more of the relevant matters in clause 4.24.

It is therefore vitally important that all those concerned, contractors, architects and quantity surveyors, should fully understand the way in which these clauses are intended to work. It must always be borne in mind that the detailed provisions in clauses 4.23–4.26 are not simply a matter of meaningless procedure. There is a very clear purpose behind them. The clauses are both procedural, in the sense of instructing the parties what they should do at each stage of the process, and contractual, in the sense that they set out the respective rights and obligations which the parties have assumed in respect of one another.

For example, the contractor must make application if it wishes to recover the amount of loss and/or expense it believes is due. This application must be submitted within a relatively strict time frame. The purpose is so that the architect and the quantity surveyor can carry out contemporary investigations and, if thought appro-

Building Contract Claims, Fifth Edition. David Chappell.

priate, require the contractor to keep specific records. In addition, it is important that the employer knows the likely extent of any additional expenditure at the earliest possible moment so that measures can be taken to secure additional finance or reduce the cost of the project.

In addition there is provision in schedule 2, which deals with variation and acceleration quotations, which allows the contractor's estimate of the amount of loss and/or expense it will incur in carrying out an instruction to be accepted. This provision is considered in Chapter 14, Section 14.5.5.

Although most of these clauses deal with the contractor's rights to financial reimbursement for relevant matters which are breaches of contract by, or which are within the control of, the employer or the employer's persons (as defined in clause 1.1 which of course includes the architect), it is important to note that many of the matters to which the clause refers are not breaches of contract by the employer or by the employer's persons. For example, the following grounds for loss and/or expense are expressly empowered under the contract:

4.23	deferment of possession (if clause 2.5 applies)
4.24.1	variations
4.24.2.1	architect's instructions under clause 3.15 and 3.16 (postponement and provisional sums)
4.24.2.2	architect's instructions under clause 3.17 (opening up and testing)
4.24.2.3	architect's instructions under clause 2.15 (discrepancies or divergences)
4.24.3	clause 2.22 (antiquities)
4.24.4	contractor's suspension under clause 4.14.

Therefore, it follows that none of these relevant matters are breaches of contract which would entitle the contractor to recover damages at common law. It is clear that these clauses constitute the only right to reimbursement for such matters. Therefore, if the contractor should lose its right to reimbursement under these clauses, it will be unable to recover any money at common law despite clause 4.26 which expressly preserves all the contractor's other rights and remedies.

The loss and/or expense provisions consist of four important clauses:

4.23	This is the engine room of the provisions. The machinery which must be operated if the contractor wishes to recover direct loss and/or expense is set out together with responses required from the architect and/or quantity surveyor. Failure to operate this clause correctly and in due time will preclude the contractor from recovery of loss and/or expense under the contract.
4.24	This clause lists the relevant matters which are the grounds that may entitle a contractor to loss and/or expense.
4.2.5	This clause is highly significant and requires amounts to be added to the contract sum as they are certified. The architect and quantity surveyor are not entitled to wait until the whole of the contractor's claim has been ascertained. This has an important effect when read with clause 4.4 which provides for certification and payment of amounts found due to the contractor as soon as the amount is ascertained.

4.26 This clause preserves all the contractor's rights and remedies so that it is not confined to the rights and remedies expressly stated in the contract.[1] As noted above, the contractor may not be able to claim at common law in respect of some of the relevant matters.

13.1.2 Relationship to extensions of time

There is no connection between extensions of time and loss and/or expense other than that some of the grounds for extending time are echoed in the provisions for loss and/or expense. It by no means follows that an extension of time is necessary before an application for loss and/or expense can be made. However, there is the common but mistaken belief that there is some automatic connection between the giving of an extension of time and the contractor's entitlement to reimbursement. There is not, and there never was, any such connection.[2] An extension of time has only one effect. It extends the period allowed to the contractor for carrying out and completing the Works. Obviously, in so doing, it also defers the date from which the contractor becomes liable to pay liquidated damages to the employer. Contrary to popular belief, an extension of contract time does not in itself entitle the contractor to any extra money. The correct position is still the following:

> 'JCT 80 clause 25 entitles the contractor to relief from paying liquidated damages at the date named in the contract. It does not in any way entitle him to one penny of monetary compensation for the fact that the architect has extended the contractor's time for completion. He is not entitled to claim even items set out in "Preliminaries" for the extended period.'[3]

The reference to 'Preliminaries' is very relevant, because many contractors wrongly imagine that an extension of time gives an automatic entitlement to a continuation of their preliminary costs.

The JCT 98 contract used to have a clause (26.3) which provided that if and to the extent that it was necessary for the purpose of ascertainment of direct loss and/or expense, the architect must state in writing to the contractor what extension of time, if any, has been granted in respect of those events which are also grounds for reimbursement under the loss and/or expense clause. There was no logical justification for the inclusion of this provision, which appeared to give support to the idea that loss and/or expense was irretrievably linked to extensions of time. The informa-

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[1] This is important in view of the Court of Appeal decision in *Lockland Builders Ltd v John Kim Rickwood* (1995) 77 BLR 38, which seems to suggest that in the absence of express provision, contract machinery and common law rights can co-exist only in circumstances where the contractor displays a clear intention not to be bound by the contract. The more recent Court of Appeal decision in *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd* (1998) 87 BLR 52 takes a different view and, in any event, clause 4.26 puts the matter beyond doubt.

[2] See *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106; *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190 upheld on appeal [2010] Scot CS CSIH 68.

[3] John Parris, *The Standard Form of Building Contract* (1985) 2nd edition, Blackwell Science, in Section 10.03: The relationship of JCT 80 clause 25 to clause 26.

tion was of no relevance to the contractor and could not have any relevance to the ascertainment of direct loss/or expense. An extension of time looks ahead and produces what is at best an estimate of what the architect believes is likely to occur some weeks or even months ahead, i.e. the effect of delays upon a future completion date. In contrast, the ascertainment of direct loss and/or expense is an exercise in looking back, sifting evidence to determine what occurred in the past. Plainly, that is why the architect's duty in giving extensions of time is simply to estimate it whereas in determining loss and/or expense the duty is to ascertain it.

However, although it is good to see that SBC has abandoned the content of the old clause 26.3, it is disturbing to see that the extension of time provisions of SBC provide in clause 2.28.3.1 that the architect, in giving an extension of time, must state the length of extension of time attributed to each relevant event. It is not the contractor's task to ascertain the amount of loss and/or expense, that is a matter for the architect or quantity surveyor. It is impracticable to require the architect to provide the contractor with a breakdown of extensions of time between causes of delay, because this information does not affect the extension of time. If, as so often happens, there are a number of concurrent causes of delay, to apportion the overall extension between those various causes will often be impossible as well as unnecessary.[4] The former clause 26.3 apparently merely required the architect to specify the relevant events taken into account without apportioning them. The clue was in the words 'If and to the extent it is necessary for ascertainment'. It is difficult to think of any situation where that would have applied. The views of the court in *Methodist Homes Housing Association Ltd v Messrs Scott & McIntosh* are relevant.[5] The judgment was very short, but to the point. The judge said that the action was founded on a claim by the contractors for loss and/or expense due to disruption under clause 26 of the JCT 80 form. He upheld the essential argument of the claimants that a certificate of extension of time under clause 25 had no bearing on a claim based on disruption under clause 26. He went on to consider clause 26.3, which was very similar to clause 26.3 of JCT 98, in these terms:

> 'It is true that clause 26.3 provides that in certain circumstances the Architect shall state in writing to the Contractor what extension of time has been made under clause 25 but it is instructive that this provision only operates "if and to the extent that it is necessary for ascertainment under clause 26.1 of loss and/or expense".
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> In the end, [Counsel] for the pursuers, was, I think constrained to accept that there was no essential link between clause 25 and clause 26, but he nonetheless sought to persuade me that if reference was made to the Notification Certificates themselves and to the claim document (all of which were lodged in processes and incorporated in the pleadings) it could be seen that the extensions of time granted and the claim proceeded on exactly the same "Architect's Instructions". Having looked at these documents with [Counsel], however, I regret that I am quite unable to take that view. And even if they did, I am not sure that I fully understand

[4] *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106.
[5] 2 May 1997, unreported.

the significance bearing in mind the distinct purposes of Clause 25 and Clause 26 respectively.'

13.1.3 Clause 4.23: The key clause

It is always dangerous to try to put the words of any document in simple terms, because, inevitably some of the meaning is lost and parts are rendered imperfectly. However, in the interests of providing the general meaning of this sub-clause, it is useful to set it out in fairly broad but simple words before discussing the clause in detail. Having read the following simplified explanation, the reader must then turn to the words in the contract itself in order to understand the commentary:

> If, in carrying out the Works, the contractor suffers loss or expense, or believes it is likely to do so, due to deferment of possession or because regular progress is substantially delayed or disrupted by any of the relevant matters, the contractor may apply to the architect if there is no other term in the contract by which it can receive payment.
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> If the contractor makes an application, the architect must form an opinion about it and if the architect agrees that regular progress has been or will be substantially affected, either the architect or the quantity surveyor (if the architect gives the instruction) must calculate the amount of loss or expense suffered. There are three conditions: the contractor must apply as soon as it should have been aware of the likely affect on progress; the contractor, if requested, must provide the architect with information; and the contractor, if requested by the architect or the quantity surveyor, must provide cost information.

13.1.4 Detailed commentary on the clause

The contractor's application

Although it is in the employer's interests that the architect gives the contractor an extension of time where the contractor has been delayed by one of the relevant events, the same is plainly not true so far as loss and/or expense is concerned. The architect has no duty to advise the contractor to apply for loss and/or expense and, indeed, an architect giving such advice may be in breach of duty to the employer. Whether or not the contractor decides to make such application is entirely its affair. However, the contractor is not entitled to any loss and/or expense whatsoever unless it makes an application under clause 4.23. Two aspects of the application deserve careful consideration: its content and timing.

Content of application

What must be included in the application is set out in clause 4.23. There is no set format and it is left to the contractor to devise a format to suit itself. The contractor's application must be in writing. It should state that the contractor has incurred or is likely to incur direct loss and/or expense as a result of deferment of possession of

the site or regular progress being materially affected by one or more of the matters listed in clause 4.24. It may be that the application is sufficient if it refers to the general grounds and identifies the occurrence, stating that loss and/or expense is being or is likely to be incurred.

The first notice that many architects have that there is likely to be a claim is often tagged onto the end of a notification of delay and claim for extension of time. The contractor will often simply include additional words to the effect that it is also seeking loss and/or expense on the same grounds. Occasionally, clause 4.23 will be mentioned. Although it can be argued with some force that such a casual approach on the part of the contractor is woefully insufficient to comply with the obligation to make application under clause 4.23, in practice the prudent architect will decide whether the notice, inadequate though it is, is enough to alert the architect to the fact that the contractor is, or will be, seeking to recover loss and/or expense in respect of particular occurrences.

The key question is whether the contractor's notice contains enough information to enable the architect to understand the occurrences and decide whether to require records to be taken at an early stage. Notices from the contractor giving no information save that a claim for loss and/or expense is to be expected should be rejected by the architect, because they neither comply with clause 4.23 nor provide the architect with any useful information.

A bare notice, that a contractor is likely to be claiming loss and/or expense, should be countered by a letter from the architect, pointing out that the letter does not contain sufficient information to constitute an application under clause 4.23 and asking if the contractor wishes to add anything further. If the contractor opts not to provide further information, the contractor's bare notice will have no contractual standing and should be ignored when the architect has to consider in the future whether the contractor has made application in due time.

The application should clearly specify on which of deferment of possession or the relevant matters listed in clause 4.24 reliance is being placed. The contractor ought to provide as much information as possible about the surrounding circumstances. At the very least, the architect should expect to receive details of the actual events which are the grounds for the claim. The application will not comply with clause 4.23 if it merely refers to the clause numbers as in: 'We are suffering loss and/or expense as a result of prolongation of the Works caused by clauses 4.24.1, 4.24.5 and 4.24.6 relevant matters.' That kind of wording, all too common, will leave the architect entirely ignorant of what occurrences lie behind the application. Specific written applications must be made in respect of each occurrence. Some contractors make a practice of issuing a standard letter of delay, extension of time and loss and/or expense application every time something which might fall under one of the relevant matters occurs. If the standard application contains the information required by clause 4.23, it must be considered, however many such standard applications are received. However, if the standard letter does not satisfy the requirements of clause 4.23 it must be rejected. Where such an application does not satisfy clause 4.23, submitting it is a fruitless exercise. It is necessary to make only one written application for loss and/or expense arising out of any single occurrence. Past, present and future loss and/or expense arising from that one occurrence will be covered. The former JCT 63 clause was re-drafted:

> 'to require applications to be made "as soon as it has become, or should reasonably have become apparent to him [the contractor] that the regular progress of the works or any part thereof has been or is *likely to be affected*" by specified events . . . and to state "that he has incurred *or is likely to incur* direct loss and/or expense" . . . '.[6]

The contractor's written application must refer to genuine and sustainable grounds for its submittal. Although the point unaccountably seems to be ignored in the construction industry, the making of an application under clause 4.23 for large sums of money which is not genuine and which the contractor knows not to be genuine is nothing short of attempted fraud.

Timing of application

Clause 4.23 contains a proviso which requires compliance with three sub-clauses before the clause takes effect. Application at the right time is clearly a condition precedent to the contractor's entitlement to payment.[7] Architects must not forget that they owe a duty to employers to reject claims which do not fulfil the time criterion. It is not that they may ignore such claims; rather that they have no power to consider them. Clause 4.23.1 requires that the contractor's written application should be made as soon as it has become, or as soon as it should reasonably have become, apparent to the contractor that regular progress of the Works or any part of the Works has been or was likely to be materially affected. Therefore, the application must be made as early as possible and, except in exceptional circumstances, before regular progress of the Works is actually affected.

Read strictly, clause 4.23.1 allows application to be made after regular progress has been affected. However, a contractor who deliberately delays until that point will be in breach of the clause. The intention which lies behind the clause is that the architect should be kept informed at the earliest possible time of all matters likely to affect the progress of the Works and which the contractor is citing as grounds for claiming loss and/or expense. It is obvious that if the contractor notifies the architect in good time, the architect will be able to take any available action to minimise or completely eradicate the loss and/or expense and the contractor may find it difficult to establish a convincing reason why it could not give earlier notice.

In a case dealing with the standard trade contract (TC/C) in which the loss and/or expense clause (4.21) was broadly similar to that in SBC save that a long stop of two months had been inserted, a court came to the surprising conclusion that the obligation to make application timeously was not so strict:

> 'It does seem however that the wording is such that the two-month long-stop period and indeed general periods run from one of two stages, namely either when

[6] *F G Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 BLR 7 at 20 per Stephenson LJ; (italics in judgment).

[7] *Hersent Offshore SA and Amsterdamse Ballast Beton-en-Waterbouw BV v Burmah Oil Tankers Ltd* (1979) 10 BLR 1; *Diploma Constructions Pty Ltd v Rhodgkin Pty Ltd* [1995] 11 BCL 242; *Wormald Engineering Pty Ltd v Resource Conservation Co International* [1992] 8 BCL 158; *Opat Decorating Service (Aust) Pty v Hansen Yuncken (SA) Pty* [1995] BCL vol 11, 360, *City Inn Ltd v Shepherd Construction Ltd* [2001] Scot HC 54; decision upheld on appeal: [2003] BLR 468, see also Chapter 6, Section 6.6 for a discussion on this point.

> it has become apparent or when it should reasonably have become apparent that the progress of the works was or was likely to be affected. There is no reason to construe this part of the sub-sub-clause in any way other than in effect giving the contractor the option of making its application under cl 4.21 at the later of the two alternative stages, if as a matter of fact they turn out to be different. Thus, the date when the regular progress of the works was actually affected may well be later than the date when it became reasonably apparent that the regular progress of the works was likely to be affected. Depending on the facts, it may be that the time for making any given application under cl 4.21 can await a time when actual delay to the relevant part or the whole of the works has materialised.'[8]

It is suggested that these words cannot be applied to the provisions dealing with time of application in SBC. Indeed, the decision is surprising even in its own context. The primary purpose of the whole machinery of application is to bring to the architect's attention that regular progress of the Works is likely to be affected by specific causes and that it will be costly to the employer, so that the architect can take some action to avoid it. Therefore, it seems, despite the conclusion in this case, there can be no excuse if the contractor's written application is made after the regular progress has been disrupted if it was reasonable for the contractor to make the application earlier. Even if it was not reasonable for the contractor to apply before the occurrence began to affect progress, the application must be made as soon as the trouble occurs, and not just within a reasonable time of it occurring. The words 'reasonable time' are conspicuously absent from this clause.

The making of an application under clause 4.23 should be the result of a considered decision made by the contractor and it should not be simply an automatic response to every architect's instruction and every occurrence on site. Obviously, in some instances, it will be difficult for the contractor to determine whether progress is likely to be affected. That is particularly the case if progress has already been disrupted and it may seem that the fresh occurrence has not added to the effect. The basic criterion is that when it has become apparent to the contractor that regular progress has been or is likely to be affected that is when the application should be made. There may also be other factors:

> 'Notice of intention to claim, however, could not well be given until the intention had been formed . . . [and] it seems to me that the contractors must at least be allowed a reasonable time in which to make up their minds. Here the contractors are a limited company, and that involves that, in a matter of such importance as that raised by the present case, the relevant intention must be that of the board of management [i.e. directors] . . . in determining whether a notice has been given as soon as practicable, all the relevant circumstances must be taken into consideration . . . . One of the circumstances to be considered in the present case is the fact that it was not easy to determine whether the engineer's orders . . . did or did not involve additional work . . . '.[9]

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[8] *WW Gear Construction Ltd v McGee Group Ltd* (2010) 131 Con LR 63 at 75 per Akenhead J.

[9] *Tersons Ltd v Stevenage Development Corporation* (1963) 5 BLR 54 at 68 per Wilmer LJ. It should be noted that the court was there concerned with the ICE Conditions (4th edition, 1955) and the question of whether certain notices were given 'as soon as practicable'.

Similar circumstances can be envisaged in relation to architect's instructions although it is doubtful whether a contractor will need to consult its board of directors before every application for loss and/or expense. If the architect is in doubt whether the contractor's application has been made in due time, a useful test is for the architect to consider whether the alleged lateness of the application prejudices the employer's interests in any way.

Loss and/or expense

The clause refers to the contractor incurring direct loss and/or expense. Consequential losses are not covered by the clause. What the contractor is claiming under this clause may be equated with the common law right to damages. There must be a cause, which is probably not a breach of contract, and a loss or some expense suffered or incurred by the contractor. This is a relatively simple concept but not fully understood by many contractors or architects. (This matter is fully discussed in Chapters 5 and 8).

Reimbursement under other contract provisions

Clause 4.23 refers to the loss and/or expense as something for which the contractor would not be reimbursed by a payment under any other provision of the contract. The purpose is to prevent double payment as might arise, for instance, where increased costs of labour and materials during a period of delay to completion are already being recovered under the fluctuations provisions of the contract.

Where the claims arise as a result of architect's instructions requiring a variation, care must be taken to distinguish between the costs which are included in the quantity surveyor's valuation under clause 5 and those for which reimbursement may be obtained under this clause.[10] There is, however, another aspect to this phrase which is often overlooked. Contractors often claim on a 'this or that' basis, hopeful that what they miss under one clause they will recover under the other. This strategy may be successful, but the use of 'would not' rather than 'has not' before 'reimbursed' is significant. The effect is that if the contractor is entitled to be reimbursed under any other clause, it is not entitled to be reimbursed under clause 4.23 whether or not it has actually received reimbursement under any other clause. It seems that if the contractor is entitled to recover under clause 5, it must persevere in its attempts for it cannot recover as loss and/or expense what amounts to a shortfall in clause 5.

Effect on regular progress

The whole basis of the loss and/or expense clause is that deferment of possession has given rise to loss and/or expense or that the regular progress of the Works or any part has been or is likely to be materially affected by any one or more of the relevant matters listed in clause 4.24. In other words, it is the effect of the stated matter upon

[10] See clause 5.10.2 and the full discussion of variations under JCT standard form contracts in Chapter 14.

the regular progress of the Works, i.e. any delay to or disruption to the regular progress of the contract which is important. Some commentators suggest that the effect of this clause is to confine the contractor's entitlement to the loss and/or expense resulting from delay to progress but that it does not cover disruption or such things as loss of productivity. If that is correct, it is only prolongation costs which a contractor is able to claim under this clause.

This view may be doubted and it is important to address this point directly. What such commentators appear to be saying is that it is only when the completion date is delayed that a claim is possible, but that is not what the clause says. For example, regular progress can be affected other than by delay alone. To exclude other effects pays no attention to the words used and offends against common sense and the straightforward commercial intention of the contract. There can be a disturbance to regular progress, resulting in loss of productivity in working, without there being any delay as such either in the overall progress or in the completion of the Works. There may well be a delay to the particular activity, but if it is not critical, it will not affect the completion date. However, regular progress in that activity will be affected and the contractor is entitled to reimbursement of loss and/or expense to the extent that it can demonstrate the loss.

It would have been simple to use express words to confine the entitlement to delay to regular progress affecting the completion date. The draftsman chose not to do so, preferring the broader expression actually used. The clause cannot be interpreted so as to confine the contractor's right to reimbursement to circumstances that delay the completion date. It covers circumstances that may give rise, for instance, to reduced efficiency of working without progress as a whole being delayed.

It should be noted, however, that this is not the same as saying that merely because the work has proved to cost more or to take longer to complete than was anticipated entitles the contractor to additional payment. It must be possible for the contractor to demonstrate that the cause is directly attributable to one or more of the relevant matters set out in clause 4.23 and the effect upon regular progress of the Works.

The words 'regular progress' have caused difficulty. They are obviously related to the contractors obligation under clause 2.4 to proceed with the Works regularly and diligently. This requirement has been the subject of considerable judicial comment:

> 'These are elusive words on which the dictionaries help little. The words convey a sense of activity, of orderly progress, of industry and perseverance; but such language provides little help on the question of how much activity, progress and so on is to be expected. They are words used in a standard form of building contract and in those circumstances it may be that there is evidence of usage among architects, builders and building owners or others that would be helpful in construing the words. At present, all I can say is that I remain somewhat uncertain as to the concept enshrined in those words.'[11]

This is not particularly helpful to the contractor. So far as the related phrase 'due diligence' is concerned, a court had this to say:

[11] *London Borough of Hounslow v Twickenham Garden Developments Ltd* (1970) 7 BLR 81 at 120 per Megarry J.

> 'If there had been a term as to due diligence, I consider that it would have been, when spelt out in full, an obligation on the contractors to execute the works with such diligence and expedition as were reasonably required in order to meet the key dates and completion date in the contract.'[12]

However, 'regularly and diligently' has been defined more comprehensively by the Court of Appeal:

> 'What particularly is supplied by the word "regularly" is not least a requirement to attend for work on a regular daily basis with sufficient in the way of men, materials and plant to have the physical capacity to progress the works substantially in accordance with the contractual obligations.
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> What in particular the word "diligently" contributes to the concept is the need to apply that physical capacity industriously and efficiently towards the same end.
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> Taken together the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work.'[13]

Whether or not the contractor has progressed regularly and whether or not such progress has been, or is likely to be, materially affected is a matter for the opinion of the architect in each case. This judgment must be exercised objectively and according to principles laid down by law. In carrying out this duty, the architect will be greatly assisted by the contractor's programme provided that it was submitted at the beginning of the project and that it is comprehensive. It is not enough, however, to simply request a programme. If it is to be of maximum assistance, the programme should be in the form of, or at least demonstrate, a critical path network, showing all activities, logic links and the associated resources.

The contractor's progress may already not be regular, due to factors within its control or which do not give it any entitlement to claim. That is not fatal to its claim under this clause although it will present severe evidential problems. Among other things, the contractor will have to demonstrate what regular progress should have been and further prove that, irrespective of its own failures in this respect, regular progress would have been affected by the matter specified.

The reference to any part of the Works clearly emphasises the distinction between the extension of time and loss and/or expense clauses. Extensions of time must relate to delay in completion of the contract as a whole or, where sections are used, to any defined section. Financial reimbursement for the effect on regular progress under clause 4.23 may relate to circumstances affecting any part of the Works, even down to individual operations. The essential difference between the clauses has been neatly summed up in a Scottish case:

> 'Although it took various forms the essential argument presented by counsel for the pursuers, as I understood it, was that a certificate of extension of time issued

[12] *Greater London Council v Cleveland Bridge & Engineering Co Ltd* (1984) 8 Con LR 30 at 40 per Staughton J. At appeal, the court affirmed the judgment at first instance.

[13] *West Faulkner Associates v London Borough of Newham* (1995) 11 Cost LJ 157 CA at 161 per Simon Brown LJ.

> under clause 25 had no direct bearing on a claim based on disruption under clause 26. While there might, indeed, be many situations on the ground which would result in both clauses being invoked, the purpose of an extension of time certificate was to avoid a claim for liquidate damages rather than found a claim for disruption.
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> In my opinion one has only to look at the terms of the two clauses to see that this argument is self evidently correct. The operation of clause 25 depends on the occurrence of a "Relevant Event", as there defined whereas the operation of clause 26 depends on whether "*the regular progress of the Works or any part thereof has been or is likely to be materially affected by any one or more of the matters referred to in clause 26.2…*"."[14]

Regular progress must have been, or be likely to be *materially* affected. 'Materially' has been defined as, among other things, 'significant or important',[15] and it is suggested that this definition is applicable here. Trivial disruptions such as are bound to occur on even the best-run contract are clearly excluded. The circumstances must be such as to affect regular progress of the Works in a significant or important degree. The affectation must be of some substance. A more recognisable and serviceable word is 'substantially', although perhaps less precise. The particular point at which disruption becomes significant or important is impossible to define in general terms. It must depend upon the circumstances of the particular case.

Provision of further information

Clause 4.23.2 requires the contractor to supply such further information as should reasonably enable the architect to form an opinion about the effect on regular progress. It is clear that the clause does not come into effect until the architect makes a request for the information. It is in the contractor's own interest to provide as much relevant information as possible at the time of its written application and not to wait until the architect asks for it under this sub-clause. The information which the architect is entitled to request is that which should reasonably enable him or her to form an opinion. The clause does not refer to reasonable information. Therefore, the point is not strictly whether the information is reasonable, but whether whatever is provided will reasonably enable the architect to form an opinion. In many instances it will amount to the same thing so that if the information is not reasonable, the architect cannot reasonably form an opinion. Importantly, an architect is not entitled to delay matters by asking for more information than is reasonably necessary.

In requesting further information it is thought that the architect must attempt to specify the precise information required, for example pages 3 and 4 of the site agent's diary or the time sheets for 27 and 28 July 2011, rather than simply requiring the contractor to 'prove' its claim. The contractor is entitled to know what would satisfy the architect and enable the architect to form a view. This appears to be the position in law, it certainly should be the aim of the architect, who otherwise might be accused of delaying tactics.

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[14] *Methodist Homes Housing Association Ltd v Messrs Scott & McIntosh* 2 May 1997, unreported.
[15] *The Concise Oxford Dictionary.*

Provision of details of loss and/or expense

Clause 4.23.3 requires the contractor to submit to the architect or the quantity surveyor (if so instructed) details of the loss and/or expense which are reasonably necessary for ascertainment. This does not necessarily mean the submission of an elaborately formulated and priced claim, although it may well be in the contractor's interest to provide it, particularly if it is expected that the matter may move to adjudication or arbitration. Clause 26.1 of JCT 98 expressly allowed the contractor to submit a quantified claim if it so wished, but although that express provision has now gone, there is nothing to prevent the contractor from doing so. It is the duty of the architect or the quantity surveyor to ascertain the amount of the direct loss and/or expense and it is necessary for them to look to the contractor to provide the relevant factual information. The clause does not come into effect until a request is made to the contractor. It is suggested that such details might include comparative programme/progress charts in network form pin-pointing the effect upon progress, together with the relevant extracts from wage sheets, invoices for plant hire, etc.[16]

Contractors should think carefully before rejecting requests for further information from the architect or the quantity surveyor. The architect's or the quantity surveyor's requests for further information must be reasonably precise. When it receives the request, the contractor should be able to understand with a fair degree of accuracy what it must provide. It is not thought to be sufficient if the architect or the quantity surveyor simply asks for 'proof' or says that the contractor must provide 'more details'. Endless vague requests of this kind are all too common as a delaying tactic. Although it should be obvious, it bears repeating that neither the architect nor the quantity surveyor should ask the contractor for information which they already possess. As a basic rule, the contractor should be requested to provide no more than is strictly necessary, indeed clause 4.23.3 states as much, and the necessary information must be particularised by the architect or the quantity surveyor. On receipt of the request the contractor should know that when it is provided, ascertainment of the whole claim can be completed without delay.

It is probable that the contractor is entitled to expect the requests to be properly structured and to relate to the contractor's application (if sufficiently detailed). Therefore, it is probably unreasonable for an architect to ask for further information in a piecemeal fashion. Thus if the architect asks for and receives information, the contractor can expect the architect to make further detailed requests regarding some of the information provided, but not usually for information completely unrelated to what has been produced. Of course, the contractor may get to a point when it sincerely believes that it has provided everything the architect reasonably ought to need and, at that point, the contractor may refuse to provide anything further. However, there is a serious danger associated with that approach and the contractor should be sure of its ground and not simply be tired of digging out old records. It has been said:

> 'If [the contractor] makes a claim but fails to do so with sufficient particularity to enable the architect to perform his duty or if he fails to answer a reasonable

[16] The documentation side of claims is considered in Chapter 10.

> request for further information he may lose any right to recover loss or expense under those sub-clauses and may not be in a position to complain that the architect was in breach of his duty.'[17]

These are sensible words which highlight not only the contractor's responsibility, but also the consequences if it refuses to help itself. In such a case it is left with only itself to blame. A question that often arises is whether there is any time limit on the provision of information by the contractor; essentially whether a contractor, dissatisfied with the results of the ascertainment can continue to submit further information right up to the issue of the final certificate and expect it to be considered by the architect and the quantity surveyor. It appears that there is no express restriction on the provision of information. In *Skanska Construction UK Ltd v The ERDC Group Ltd*, the court, when considering a similar JCT contract provision, said:

> 'I cannot accept that the contract terms, properly construed, prohibit the provision and receipt of further information, documentation or details about direct loss and expense after the six month period following practical completion. Such a stringent time-bar would in my view require to be expressed in clear and unambiguous language, which I have been unable to find in the contract terms. On the contrary, the wording of [the clause] suggests that the [contractor] are correct in their contention that the contractual provisions simply provide a time table to which the parties are expected to adhere.'[18]

This suggests that, although the provisions in clause 4.5 generally requiring information to be submitted no later than six months after practical completion are not to be strictly enforced in the face of the submission of important new information, a commonsense view must be taken. That would include considering whether the contractor has already had adequate notice and opportunity to submit more information, whether the information is truly fresh or simply a rehash of information already submitted and whether it is new information which is being submitted or simply a new argument based on existing information. If the architect was obliged to wait until the contractor acknowledged that it had submitted all its arguments, it would be unlikely that the final certificate would ever be issued.

Formation of architect's opinion

The contractor initiates the process by submitting a written application in accordance with clause 4.23. If the application is correctly made in accordance with the terms of the contract, the architect must act by forming an opinion. If the architect forms the opinion that the contractor has suffered or is likely to suffer direct loss and/or expense due to deferment of possession or, because regular progress has been substantially affected by matters as stated in the contractor's application, then as soon as that is done, the architect must start the next stage: the ascertainment of the resulting direct loss and/or expense.

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[17] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 104 per Vinelott J.
[18] [2003] SCLR 296 at paragraph 29 per Lady Paton.

Some contractors argue that the architect's opinion must be reasonable, but that is not what the contract says. The only reference to 'reasonable' in this context, is in clause 4.23.2, but that clause refers to the contractor's obligation to submit information that should reasonably enable the architect to form an opinion. This has been noted above. It is not the opinion nor the information which must be reasonable. It is the enabling which must be reasonable.

It should be noted that it is the architect's opinion which is of prime importance. The making of an application in itself does not entitle the contractor to money if, in the architect's opinion no money is due. The process of ascertainment by architect or quantity surveyor cannot begin unless the architect has formed the opinion that deferment of possession has resulted in direct loss and/or expense or that one or more of the relevant matters have materially affected regular progress.

It is often said that the contractor is not obliged to make a claim under this clause, but merely to provide information to the architect which will found a claim. If what is being suggested is that the contractor is entitled simply to provide the architect with large bundles of documents and expect the architect to effectively produce the claim, that suggestion is misconceived. It has already been seen that the contractor must identify the occurrences on which it relies and also the relevant matters under which it alleges the occurrences fall. That is the basis, the nub, of the claim. Without that, the architect can do nothing. In *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd and Others* the position of a party receiving pleadings in litigation from another party was considered:

> 'The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare an answer to it.'[19]

The architect is in a somewhat similar position on receiving an application under clause 4.23. The basic purpose of the application may accurately be characterised as to enable the architect to know what case the contractor is making in sufficient detail to enable the architect to form an opinion. In *F G Minter Ltd v Welsh Health Technical Services Organisation*,[20] both the High Court and the Court of Appeal analysed the contractual machinery of the claims provisions of JCT 63 by arranging the steps in chronological order. It is possible to relate the stages to SBC as follows:

(1) deferment of possession or a relevant matter under clause 4.24
(2) incurring of direct loss and/or expense
(3) written application by the contractor under clause 4.23
(4) the forming of an opinion by the architect about whether the direct loss and/or expense would or would not have been reimbursed under another provision and whether there has been or is likely to be a material effect on regular progress (to assist this process the architect may require further information from the contractor)
(5) the ascertainment of loss and/or expense
(6) certification of the amount properly due
(7) payment by the employer.

[19] (1994) 72 BLR 26 at 33 per Saville LJ.
[20] (1980) 13 BLR 7.

Because the timeous submission of the contractor's application is a condition precedent to the contractor's entitlement under these provisions, if the contractor's application is not made at the proper time, then the architect must reject it, whatever its merits may be, and the architect has no power under the terms of the contract to form an opinion about it. Moreover, an architect who proceeds to consider a late application by the contractor may be liable to the employer, particularly if the relevant maters being considered are not such as the contractor could use to formulate a claim at common law for breach of contract. The architect can deal only with the relevant matters which are included in the contractor's application; the architect has no authority to deal with any things affecting regular progress that are not included in a written application from the contractor albeit the architect may be fully aware of them.

Matters within the architect's knowledge

Depending on circumstances (such as the presence of a permanent clerk of works), the architect may not have more than a general knowledge of what is happening on site. This view has some judicial support:

> 'the architect is not permanently on the site but appears at intervals, it may be of a week or a fortnight . . . '.[21]

However, there are occasions when the architect may have substantial information and must make use of such information in forming an opinion, because the architect is not a stranger on the Works [22] Nevertheless, it is the contractor who is responsible for progressing the Works in accordance with the requirements of the contract and the architect's instructions. The practical effect of the contractor's obligation to notify as soon as the regular progress is likely to be materially affected is quite significant.[23] The architect is entitled to assume, unless notified to the contrary, that work is progressing smoothly and efficiently and that there are no current or anticipated problems. For instance, if the architect issues an instruction requiring extra work and the contractor carries it out without comment, the architect is probably entitled to assume that the effects of that instruction can be absorbed by the contractor into its programme of work without any consequential delay or disruption.[24] That is not invariably the case. In *London Borough of Merton v Stanley Hugh Leach Ltd* it was said:

> 'Although I accept that the architect's contact with the site is not on a day to day basis there are many occasions when an event occurs which is sufficiently within the knowledge of the architect for him to form an opinion that the contractor has been involved in loss or expense.'[25]

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[21] *East Ham Corporation v Bernard Sunley & Sons Ltd* [1965] 3 All ER 619 at 636 per Lord Upjohn when speaking of the architect's duty to 'supervise' work.
[22] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.
[23] *Jennings Construction Ltd v Birt* [1987] 8 NSWLR 18.
[24] *Doyle Construction Ltd v Carling O'Keefe Breweries of Canada* (1988) *Hudson's Building and Civil Engineering Contracts* (1995) Sweet & Maxwell at 4.133.
[25] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 96 per Vinelott J, quoting the interim award of the arbitrator.

That is undoubtedly true and it is particularly so where the architect has personal knowledge of the problem. A clear example of that is when an architect is late providing important information to the contractor, knowing that it will create a delay to a critical activity. Other examples are if the architect instructs substantial variations in the Works or issues postponement instructions.

Ascertainment

The word 'ascertainment' is defined as meaning 'find out (for certain), get to know'.[26] Ascertainment is not simply something which can be left to the unfettered judgment of the architect or the quantity surveyor. They have a duty to find out the amount of the direct loss and/or expense for certain, not to estimate or best guess it. The loss and/or expense that has to be found out must be that which is being, or has been actually incurred.[27] Many applications for loss and/or expense are settled by the quantity surveyor on the basis of figures included in the contract bills. Such figures have no relationship to the actual costs and if they are used, it flies in the face of what the contract clearly sets out. In many instances, claims settled on this basis give the contractor somewhat less recompense than that to which it is entitled, because the figures in the contract bills may well be wildly inaccurate forecasts.

Obviously, there may be instances where the contractor has poor records and an assessment is the best that can be done. However, such instances should be the last resort. It is thought that the architect cannot refuse to certify anything at all to the contractor on the ground that proper information is not available if it is clear that the contractor has incurred loss and/or expense, but the precise evidence is not available. In such circumstances, the architect should be careful and conservative in certification.

Clause 4.23 makes clear that the architect may carry out the ascertainment or may instruct the quantity surveyor to ascertain the direct loss and/or expense. In these circumstances it will be difficult for the architect to certify anything other than the amount ascertained by the quantity surveyor. However, responsibility for certification of the amount lies with the architect who may be held to be negligent if certifying without taking reasonable steps to be satisfied of the correctness of the amount.[28] What such steps may be will depend on all the circumstances, but the architect should, at least, go through the basis of ascertainment with the quantity surveyor to be satisfied that the correct principles have been put into effect. There is nothing in the contract which suggests that the architect is bound to accept the quantity surveyor's opinion or valuation when exercising certifying function.[29]

It is essential that the architect's instruction to the quantity surveyor is precisely set out in writing. The quantity surveyor's agreement to assist must also be in writing

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[26] *The Concise Oxford Dictionary.*
[27] *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd* (1995) 76 BLR 65. See the consideration of this point in Chapter 7, Section 7.3.
[28] *Sutcliffe v Thackrah* [1974] 1 All ER 859.
[29] *R B Burden Ltd v Swansea Corporation* [1957] 3 All ER 243.

so as to establish the quantity surveyor's responsibility to the employer should the ascertainment be carried out negligently. In any event, the employer must be informed of this arrangement, since fees will be involved and, although the contract speaks of the architect instructing the quantity surveyor, the reality is that it can only be done with the agreement of the employer. It is not unknown for an employer, anxious to avoid paying the quantity surveyor the fees for carrying out the ascertainment, to refuse to sanction the instruction and to demand that the architect carries out the ascertainment without assistance. The architect's response to that will depend on the architect's terms of engagement. Usually, an architect's terms of engagement expressly exclude the ascertainment of the contractor's claims. Therefore, the architect might well point out that ascertainment of the claim is not included in the list of architectural services and that dealing with complex cost calculations of that kind is outside the average architect's expertise.

13.1.5 Commentary on the relevant matters

What is often thought of as the classic statement of the interrelationship of time and money was set out in *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* it was said of JCT 63 provisions equivalent to those now found in SBC, clauses 2.26–2.29 and 4.23–4.26:

> 'The broad scheme of these provisions is plain. There are cases where the loss should be shared, and there are cases where it should be wholly borne by the employer. There are also those cases which do not fall within either of these conditions and which are the fault of the contractor, where the loss of both parties is wholly borne by the contractor. But in the cases where the fault is not that of the contractor the scheme clearly is that in certain cases the loss is to be shared; the loss lies where it falls. But in other cases the employer has to compensate the contractor in respect of the delay, and that category, where the employer has to compensate the contractor, should, one would think, clearly be composed of cases where there is fault upon the employer or fault for which the employer can be said to bear some responsibility.'[30]

This is sometimes pointed to as a masterly exposition of the position and so it is, but only if the reader accepts the premise that extension time and loss and/or expense clauses are linked. Of course they are not linked and it is clear that they are for different purposes. The paragraph, therefore, although much quoted is not very helpful or, at least, must be treated with caution.

There are now seven broad categories in clauses 4.23 and 4.24 which set out grounds for entitlement to loss and/or expense. The JCT has taken the opportunity to reduce the number of relevant matters, because many are now covered by clause 4.24.6 which contains the catch all impediment, prevention or default. Starting with deferment and then in the order in which the relevant matters appear in clause 4.24, they are as follows:

[30] (1980) 15 BLR 8 at 12 per Judge Edgar Fay.

Deferment of possession of site: clause 4.23

The employer is entitled 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 Contract Particulars. The deferment is stated to be six weeks or whatever shorter period is stipulated by the employer. It is probably unwise to reduce the period. It is considered that deferment is a positive activity which the employer should signal by giving written notice although that is not expressly stated in clause 2.5. On a strict reading of clauses 2.5 and 2.29.3, this ground can only apply where the employer has actually exercised the right to defer. It should be noted that clause 4.23 refers to the contractor incurring loss and/or expense due to deferment of possession. In order for the relevant matters to apply, they must be the cause of a material effect on regular progress. Obviously, deferment will have an immediate effect on regular progress. But, it may be that the contractor will have to use a considerable degree of ingenuity to found a successful claim for loss and/or expense resulting from deferment of possession. That is because deferment does not extend the contract period; it simply moves it in time with dates for possession and completion continuing to bear the same relationship to each other. If the contractor is given early notice of deferment, it is likely to incur far fewer costs than if the deferment is only notified a few days before start on site. Issues to be considered are plant hire for site, the possibility of using operatives elsewhere, delivery dates and key dates for various sub-contractors and the possibility of increased costs and interest charges.

Variations: clause 4.24.1

This ground includes all variations, including architect's instructions and other things which are to be treated as requiring a variation, whether or not they are so intended. Architect's instructions requiring a variation are empowered by clause 3.14 and they 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 the Employer's Requirements are to be treated as variations under clause 2.14.3 and clause 2.16.2 respectively. Expressly excluded are variations which are the subject of a confirmation acceptance of a variation quotation. These are variations under schedule 2, paragraph 4. Valuations of variations and instructions are dealt with in clause 5, which is discussed in Chapter 14. In considering entitlement to payment under this ground, it must be remembered that clause 4.23 does not cover a situation where the contractor would be reimbursed under any other clause. Particular care must be taken when considering entitlement under this ground, because clause 5.6.3.3 includes provision for the quantity surveyor to adjust the preliminary items. It is sometimes difficult to decide whether a relevant matter should be reimbursed as additional preliminaries or as loss and/or expense. However, the practice, which is prevalent among some contractors, of submitting a claim in the alternative (variation or loss and/or expense) is prohibited by the distinction referred to above in 'Reimbursement under other contract provisions'.

Architect's instructions: clause 4.24.2

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.

They are briefly discussed below:

(i) The discrepancies or divergences referred to in clause 2.15 are those which occur in or between the contract drawings and/or the contract bills and/or architect's instructions and/or any of the further information issued by the architect. It should be noted that discrepancies in the printed form or between the printed form and any other document are not grounds for recovery of loss and/or expense. This is probably because clause 1.3 makes clear that the printed form takes precedence over the other documents in any event.

The main ground for reimbursement of loss and/or expense is likely to be discrepancies in or between the contract documents (other than the printed form). Architect's instructions and further drawings and documents are issued during the progress of the Works. Therefore, if they differ from each other or from the contract documents, the discrepancy is likely to be discovered virtually on issue and will be promptly corrected by an architect's instruction under clause 2.15 with little or no effect on the progress of the Works. The contractor's obligation is not to find discrepancies, but merely to notify the architect if it does find them.[31] Therefore, the contractor may not discover a discrepancy until after that portion of the work has been constructed. That does not prevent the contractor from claiming on this ground, provided it complies with the requirements of clause 4.23.

(ii) The postponement clause 3.15 is sometimes misinterpreted. What it does is to give power to the architect to issue instructions for the postponement of any work to be executed under the provisions of the contract. So it refers to postponement of work, nothing else. Clause 3.15 does not empower the architect to issue an instruction postponing the date in the Contract Particulars for possession of the site.

Before the introduction of clause 2.5 allowing the employer to defer possession for up to six weeks, the contractor's right to possession of the site on the date in the Contract Particulars was absolute.[32] Possession refers to the whole of the site and, in the absence of sectional possession, the employer is not entitled to give possession in parcels.[33] It is sometimes thought that the employer can get away with giving the contractor what is referred to as

[31] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.
[32] A fuller consideration of this topic is to be found in Chapter 4, Section 4.6.
[33] *Whittal Builders v Chester-le-Street District Council* (1987) 40 BLR 82.

'sufficient possession'. In other words, enough possession of the site to enable the contractor to start work and to proceed for a period until possession of more of the site is necessary. This view must be treated with caution. The contractor's right to possession is an express term of the contract (see clause 2.4) and in any event there is at common law an implied term in any construction contract that the employer will give possession of the site to the contractor in time to enable it to carry out and complete the work by the contractual date for completion.[34]

In *London Borough of Hounslow v Twickenham Garden Developments Ltd*,[35] Mr Justice Megarry said 'The contract necessarily requires the building owner to give the contractor such possession, occupation or use as is necessary to enable him to perform the contract'. Even if the 'sufficient possession' argument has any validity, sufficient possession will usually mean possession of the whole of the site. That is because the contractor may wish to do very many things on the site other than simply constructing the building. He may wish to check the condition of the site or decide the best place to store materials or place site offices. Unless full possession is given, the contractor is deprived of the ability to consider the site as a whole.

Accordingly, subject to the employer's right to defer possession, if activated, any failure by the employer to give possession on the due date is a breach of contract, entitling the contractor to bring a claim for damages at common law in respect of any loss that it suffers as a consequence.[36] In an Australian case it was held that, where there was failure to give possession of the building site to a contractor, this constituted a breach of contract, and on the facts the contractor was entitled to treat the contract as repudiated.[37] Although clause 4.24.2 refers to instructions issued under clause 3.15, such instructions have also been held to arise as a matter of fact.[38]

Whether a postponement instruction gives rise to any loss and/or expense at all or to what extent it does so must be the subject of careful investigation by the architect or, if so instructed, the quantity surveyor. For example, if the instruction is issued relatively early, so that the contractor can use its best endeavours to prevent any delay, if it is of short duration and if, most importantly, it applies to non-critical activities, the effect upon regular progress may be negligible.

(iii) This deals with instructions for the expenditure of provisional sums. This usually entails adding work and/or materials. Essentially, the contract treats this as an instruction for additional work and it is dealt with accordingly. Compliance with an architect's instruction for the expenditure of a provisional sum for

[34] *Freeman & Son v Hensler* (1900) 64 JP 260.
[35] (1970) 7 BLR 81.
[36] *London Borough of Hounslow v Twickenham Garden Developments Ltd* (1970) 7 BLR 81. See Chapter 4 for claims at common law.
[37] *Carr v Berriman Pty Ltd* (1953) 27 ALJR 273.
[38] See *M Harrison & Co (Leeds) Ltd v Leeds City Council* (1980) 14 BLR 118, where an instruction expressed as a variation order was held to be in fact an order for postponement and *Holland Hannen & Cubitts (Northern) v Welsh Health Technical Services Organisation* (1981) 18 BLR 80, where a notice which was apparently intended to notify the contractor of defective work was held to instruct postponement.

defined work is expressly excluded.[39] That is because the contractor has been given sufficient information to enable it to make appropriate allowance in planning its work at tender stage. A further type of architect's instruction, regarding antiquities, is included in the next relevant matter.

(iv) This former 'matter' under JCT 98 is now partly dealt with in clause 4.24.2.2 dealing with architect's instructions and, to the extent to which that relevant matter does not cover the point, it will be swept up in the impediment and prevention clause. Clause 3.17 empowers the architect to require work to be opened up for inspection and to instruct the contractor to arrange for or to carry out the testing of materials and work to ensure that they comply with the contract. It should be noted that under the former JCT 98 clause 8.3 and under the present SBC clause 3.17, the default position is that the cost of such opening up and testing is to be added to the contract sum unless the inspection or tests show that the materials or work are not in accordance with the contract. The wording appears to lay the burden of proving that materials or work are not in accordance with the contract on the architect. Normally, that should not be a problem, because such things ought to be matters of fact. However, it emphasises the need to have representatives of both contractor and architect on site when the opening up takes place.

An interesting situation arises if the specification or bills of quantities direct that work must not be covered up until after inspection by the architect. Failure to observe that provision will clearly place the contractor in breach of contract and, therefore, the architect may instruct that the work is to be opened up. However, the contractor will still be entitled to payment under this relevant matter if the work is found to be in accordance with the contract. The solution to this problem lies in the employer's ordinary entitlement to damages for the contractor's breach. The damages are clearly the money that the employer has to pay out under clauses 4.23 and 3.17. Although there is no machinery in the contract to enable the employer to recover such money, there seems to be no reason why the employer cannot do so, after giving the relevant notices, by setting-off the amount paid out against the amount payable under the certificate after giving the necessary notices. A contractor which failed to comply with a requirement to allow inspection before covering up would be ill-advised to seek loss and/or expense under this ground.

Antiquities: clause 4.24.3

This ground concerns the action to be taken in regard to the discovery of antiquities on the site. It is worthy of note that the action expected of the contractor under clause 3.22.1, which is likely to be prior to any instruction issued by the architect, is not a relevant event although it is a ground for loss and/or expense in this relevant matter. The architect's instructions under clause 3.22.2 regarding dealing with

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

antiquities are included here rather than under the relevant matter 4.24.2 devoted expressly to architect's instructions.

Clause 3.22 generally provides for what is to happen if fossils, antiquities and other interesting objects are found on site or during excavation. The contractor is required to use its best endeavours not to disturb the object and to cease work as far as is necessary and to take all necessary measures to preserve the object in its position and condition. The contractor must inform the architect or the clerk of works. The architect is then required to issue instructions and the contractor may be required to allow a third party, such as an expert archaeologist, to examine, excavate and remove the object. All this will almost undoubtedly involve the contractor in direct loss and/or expense. In JCT 98, prevision for recovery of such loss and/or expense was not dependent on the contractor's application. That has now been changed and, sensibly brought under clause 4.23.

Claims under this ground are not uncommon and are likely to increase. Modern technology, and especially aerial survey, is constantly revealing new archeological sites. The provisions of the Ancient Monuments and Archaeological Areas Act 1979, which came into force in 1982, affect contractors working in 'areas of archaeological importance', which is a concept introduced by Part II of the Act. Moreover, if an 'ancient monument' was suddenly discovered in the course of contract Works, where one was unexpected, the possibility of its being scheduled under the Act (and thus protected) could not be completely discounted. In fact, this has happened only rarely. Instead, the relevant government department might make financial help available for the relocation of piling or the rafting-over of the remains, and in such a case the contractor would obviously have a claim.

Suspension by the contractor of performance of his obligations: clause 4.24.4

This ground is almost identical to relevant event clause 2.29.5 and the remarks there are equally applicable here. However, there is a notable difference or addition. This relevant matter includes the proviso that the suspension must not be frivolous or vexatious. This addition has been discussed under relevant event 2.29.4. The words are not necessary, because a frivolous or vexatious suspension would be unlikely to fall under the criteria set out in clause 4.14. Therefore, the words should be added to the relevant event also.

The contractor may suspend performance of its obligations after seven days written notice if the employer does not pay it sums due. It is noteworthy that the Housing Grants, Construction and Regeneration Act 1996, from which the power to suspend derives, does not expressly entitle the contractor to recover any losses resulting from the suspension.[40] Nor is such recovery to be easily implied. It is virtually certain that a contractor which resorts to suspension, in an attempt to recover money owed, will be put to expense by the suspension and also by the re-organisation and mobilisation of resources necessary if the suspension comes to an end on payment of the amount due. This matter allows the contractor to be paid such sums as might otherwise be difficult to recover.

[40] This is due to be amended by the *Local Democracy, Economic Development and Construction Act 2009* to give the contractor the right to recover reasonable costs. At the time of writing the Act has yet to come into force.

Approximate quantity not a reasonably accurate forecast of the quantity of work: Clause 4.24.5

This matter was introduced with the use of the Standard Method of Measurement edition 7 (SMM7). Quite simply, it is intended to cover the situation where an approximate quantity has been included in the bills of quantity, but the quantity of work actually executed under that item is different; either greater or less. As long as the approximate quantity is reasonably accurate, the contractor has no claim. What is 'reasonably accurate' will depend upon all the circumstances, but as a rule of thumb an approximate quantity which was within 10% of the actual quantity probably would be difficult to demonstrate as unreasonable. The contractor's entitlement will usually be based on the extra time it requires over and above the time it has allowed for doing the quantity of work in the bills.

The approximate quantity may be an unreasonable estimate, because the actual quantity is substantially less than in the bills. Theoretically, the contractor will also have grounds for a claim under this head, but it will take considerable ingenuity to put together. It should be noted that this clause expressly refers to 'work'. The conclusion is that increases in materials will not entitle the contractor to claim. Generally, it is only an increase in work or labour which will require extra time to execute, but there may be circumstances where increases in the quantity of materials may result in additional off-site and un-quantified work, such as in the drawing office or the fabrication shed. It appears that the contractor will have no claim for such matters, at least under this head. It must be claimed under clause 4.14 and treated as a variation.

Impediment, prevention or default by the employer: clause 4.24.6

This ground is identical to relevant event clause 2.29.6 and the remarks there are generally applicable here. Because this ground is very broadly drafted to include breaches of contract on the part of the employer, it brings within the contractual machinery, and therefore, within the powers of the architect to deal with under this clause, many occurrences for which the contractor formerly would have had to mount a common law claim. However, such claims are still subject to any provision as to notice, etc., which are imposed by the contract. The JCT has taken the opportunity to reduce the number of relevant matters, because many are now covered by this clause 4.24.6. It will be useful to consider the former matters so covered since they are likely to be the most common reasons why a contractor will cite this relevant matter. They are:

Late instructions drawings, details or levels

This ground deals with the failure of the architect to provide the contractor with information in due time in accordance with the provisions of the contract. There are two parts to this ground. One covers the situation if there is an information release schedule; a situation so rare as to be virtually non-existent. The other covers the general and usual situation where the architect is obliged to provide information to

enable the contractor to complete the Works in accordance with the contract. Among the important terms of the contract with which the contractor must comply is the date for completion.

There are two parts to this ground in another sense, because the architect's obligation is not only to provide correct information, but also to provide it at the correct time. The 'matter' simply concerns a failure of the architect to comply with what is now clauses 2.11 and 2.12 and, therefore, embraces the failure with regard to time or correct information. Either failure may cause a delay which may affect the completion date. The commentary on this ground under SBC in Chapter 11, Section 11.1.3 is relevant.

Work not forming part of the contract

The former matter dealt with by clause 26.2.4 of JCT 98 covered two situations. The first was where the employer carried out work not forming part of the contract or arranged for such work to be done by others while the contract works were being executed by the contractor. In addition it covered the situation where the employer had undertaken to provide materials or goods for the purposes of the Works. This situation is now covered by SBC clause 2.7 which provides that, where the work in question is properly described in the contract bills, the contractor must permit such work to be done.

In that situation, it will probably only be if the work concerned causes an unforeseeable delay or disruption to the contractor's own work that any claim will be possible under this relevant matter. That is because the contractor, having had due warning in the contract bills, will have been able to make proper provision in the contract sum and in its programme for the effect on the Works of such work by others. However, clause 2.7.2 provides that if the work in question is not adequately described in the contract bills but the employer wishes to have such work executed, the employer may arrange for it to be done with the consent of the contractor, which is not to be unreasonably withheld. In that event, it is almost inevitable that a claim will arise under this ground, because the contractor will not have been able to make proper allowance in its programme or in its price.

Occasionally, but comparatively rarely, the contractor may be able to found a claim on work carried out by statutory undertakers. This will only be possible if such work is carried out by them as a matter of contractual obligation, rather than under statutory duty.[41] The usual legal position of statutory undertakers is that they are under a statutory duty to carry out certain work and, when so doing, their obligation, if any, 'depends on statute and not upon contract.'[42] When statutory undertakers are acting in accordance with their statutory duties, the contractor is precluded from making any claim for loss and/or expense under the contract terms even if their work does adversely affect the contractor's progress. Obviously, such work may entitle the

[41] This follows from the decision in *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* (1980) 15 BLR 8, which is of relevance to SBC regarding the meaning of words in this subclause 'Work not forming part of the contract'.

[42] *Clegg Parkinson & Co v Earby Gas Co* (1896) 1 QB 56.

contractor to an extension of time under clause 2.26. However, in one case a dispute arose and the arbitrator found as a fact that in the circumstances of that contract the statutory undertakers were engaged under contract and that most, if not all, of the work being carried out by the statutory undertakers was not being performed as part of their statutory duties, but was being executed by them expressly at the employer's request and expense and under contract. The court remarked of the situation:

> 'These statutory undertakers carried out their work in pursuance of a contract with the employers; that is a fact found by the arbitrator and binding on me . . . . In carrying out [their] statutory obligations they no doubt have statutory rights of entry and the like. But here they were not doing the work because statute obliged them to; they were doing it because they had contracted with the [employers] to do it.'[43]

The second part of clause 26.2.4.2 of JCT 98 was very odd. It referred to the supply or failure to supply materials and goods which the employer had agreed to supply for the Works. But the contract made and makes no such provision, although perhaps it should. Therefore, any such agreement would have to be the subject of a separate contract, preferably committed to writing and by both parties. A further point is that, as a supply only contract, it would not fall under the Housing Grants, Construction and Regeneration Act 1996.[44] The ground was not simply the employer's failure to carry out the work or supply materials. The contractor was also entitled to claim if the employer executed the work or supplied the materials perfectly properly and at the right time. The criterion was whether the execution of work or the supply of materials and goods, whether or not at the correct time, materially affected regular progress of the Works. This placed a considerable burden on the employer and made the employer's decision to employ others upon the Works something akin to writing a blank cheque.

Failure to give ingress to or egress from the site

Under the current SBC this would rank as prevention. The former clause was not as broadly drafted as first appeared. It echoed the relevant event and merely provided for 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 cover failure to obtain a right of way across an adjoining owner's property, or in cases of obstruction of the highway. Neither did it extend to the situation where protestors impeded access to a site.[45] It covered the situation where either there was a provision in the contract bills and/or drawings, or an agreement had been reached between the contractor and the architect, permitting the contractor means of access to the site. The contractor was obliged to comply with any notice provisions.

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[43] *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* (1980) 15 BLR 8 at 20 per Judge Edgar Fay.
[44] See s. 105(2)(d) of the Act.
[45] *LRE Engineering Services Ltd v Otto Simon Carves Ltd* (1981) 24 BLR 127.

The clause did not apply where the employer may have undertaken to obtain access across land which is not in the employer's possession and control. In such a case failure by the employer to obtain access would probably give rise to a claim at common law, but not under the terms of the contract. There was a further limitation in the clause which referred to access in accordance with contract bills or the contract drawings. It is doubtful that the former 'matter' will act as a limitation on the circumstances in which the contractor might successfully apply for loss and/or expense. It appears that claims for lack of ingress or egress are now likely to be possible on a broader basis than formerly.

Compliance or non-compliance with duties in relation to the CDM Regulations

Clauses 3.23 and 3.24 provide, among other things, that the employer will ensure that the CDM co-ordinator carries out all duties under the Construction (Design and Management) Regulations 2007 and, where the contractor is not the principal contractor for the purpose of the Regulations, that the principal contractor carries out all its duties under the CDM Regulations. It will be usual for the main contractor to be the principal contractor for the purposes of the Regulations and the employer's duty will just relate to the CDM co-ordinator. The obligation placed upon the employer to 'ensure' is virtually to guarantee that the CDM co-ordinator will carry out the CDM co-ordinator's duties.[46] It should be noted that the contractor's entitlement to recover loss and/or expense did not depend on the employer's failure to comply with the relevant obligations. Compliance could also be a ground, provided of course that the other conditions were satisfied.

13.1.6 Certification of direct loss and/or expense

So far as the contractor is concerned, clause 4.25 is very important. It provides for any amounts which are ascertained to be added to the contract sum. It refers to amounts being ascertained from time to time. Clearly, the clause does not envisage that the architect is entitled to wait until the whole of the contractor's application has been dealt with before certifying anything. As parts of the total application are ascertained, the architect or the quantity surveyor must add them to the contract sum. Even if clause 1.3 of the contract did not expressly provide that the contract must be read as a whole, it would be implied[47] and clause 4.25 must be read in conjunction with clause 4.4 which makes clear that as soon as any amount is ascertained in whole or part, it must be taken into account in the next interim certificate. Not only is this an excellent provision from the point of view of the contractor's cash flow, it also acts as a means of reducing the employer's possible liability for financing

[46] That has been the view of the court where a party has an obligation to 'ensure' or 'secure' the doing of something: *John Mowlem & Co Ltd v Eagle Star Insurance Co Ltd* (1995) 62 BLR 126 CA, confirming the judgment of the Official Referee. The court made clear their view that 'to ensure' meant exactly what it said and amounted to more than an obligation to use best endeavours.

[47] *Brodie v Cardiff Corporation* [1919] AC 337.

charges.[48] It should be noted that loss and/or expense amounts are expressly stated not to be subject to retention in clause 4.16.2.2.

13.1.7 Contractor's other rights and remedies

Clause 4.26 acts to preserve the contractor's common law and other rights.[49] This is in addition to the rights expressly given under clause 4.23 which provide a particular remedy or set of remedies for deferment and the relevant matters in clause 4.24, but subject to the contractor complying strictly with the provisions set out in clause 4.23. In particular, the contractor's right to claim damages for breach of contract on the same grounds are preserved.[50] The right to claim reimbursement for direct loss and/or expense under the terms of the contract is not connected to any rights or remedies which the contractor may possesses in law. If it were not for clause 4.23, there would be many instances when the contractor would certainly suffer loss and expense but be quite unable to recover it. Occasionally it may be that because of the limitations imposed by the contract machinery the contractor will be advised to pursue remedies outside the contract.[51] However, it has already been remarked that many of the relevant matters do not fall into the category of breaches of contract.[52]

13.2 Intermediate Building Contract (IC and ICD)

13.2.1 Main points

The provisions in IC and ICD that may give rise to loss and/or expense claims by the contractor are contained in clauses 4.17–4.19 inclusive. It will be seen that these clauses are essentially based on SBC clauses 4.23–4.26. They are identical in wording under IC and ICD. The main features are:

- The contractor's entitlement to reimbursement under the contract is limited to deferment of possession of the site or specified relevant matters materially affecting the regular progress of the Works.
- The contractor must submit a written application to trigger the process.
- The contractor must provide supporting information reasonably necessary to achieve the end envisaged by the clause.

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[48] See *F G Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 BLR 7, and the discussion in Chapter 7, Section 7.3.10.

[49] The Court of Appeal decision in *Lockland Builders Ltd v John Kim Rickwood* (1995) 77 BLR 38, suggested that where a party's common law rights were not expressly reserved, they could co-exist with the contractual machinery only where the other party displayed a clear intention not to be bound by the contract. This view seems to ignore earlier contrary authority: *Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern)* Ltd (1974) 1 BLR 73; *Architectural Installation Services Ltd v James Gibbons Windows Ltd* (1989) 46 BLR 91. The more recent Court of Appeal decision in *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd* (1998) 87 BLR 52 appears to set the matter straight.

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

[51] See Chapter 4.

[52] Chapter 1, Section 1.2.2.

- The architect must form an opinion about whether or not the contractor has incurred or is likely to incur direct loss and/or expense.
- The architect, or the quantity surveyor if so instructed, must ascertain the amount of the loss and/or expense.

13.2.2 Significant differences

Contractor's application

It is probable that the timely submission of the contractor's application is not a condition precedent to the recovery of loss and/or expense although there is a requirement for submission within a reasonable time of it becoming apparent that the contractor will incur loss and/or expense. It is likely that late application under this contract is something which the architect is entitled to take into account in forming an opinion. For example, a very late application may mean that there is an absence of good records and the architect cannot form a realistic view of the claim. It is thought that, in such circumstances, the architect is entitled to discard unreliable information and consider only what is capable of substantiation.

Provision of information by the contractor

Unlike the position under SBC, it is not clear whether or not the obligation of the contractor to provide information in support of its application is subject to any request from the architect or quantity surveyor. The words 'required by' at first sight may appear to mean 'needed by', but the words may also mean 'demanded by'. It is thought that, in the circumstances surrounding the making of an application, this latter interpretation is the correct one. The point is not without doubt and the best that can be said is that the point is ambiguous and in the absence of clear words, it behoves the architect or the quantity surveyor to set out the request for information as precisely as possible. If the contractor is to recover under the clause it must provide whatever information is 'reasonably necessary' to enable the architect and/or the quantity surveyor to carry out their own obligations. The wording strongly suggests that it is a condition precedent and, indeed, it is difficult to see how any validation or ascertainment can be carried out without the necessary information. The contractor is advised to provide all the information it judges to be necessary without waiting for the request.

Certification

Unlike the SBC, there is no express provision that sums ascertained must be added to the contract sum as the ascertainment proceeds rather than waiting until the process is complete nor is there any equivalent to SBC clause 4.4 which provides for inclusion of ascertained sums in the next interim certificate in the same way. Nevertheless, it will probably be implied that the architect cannot simply sit on a large sum ascertained for want of completing the ascertainment of a substantially

lesser sum. Clause 4.9.2 which provides for the issue of interim certificates at intervals after practical completion at intervals of two months reinforces that view.

Discrepancies

It is merely to be noted that this ground has been made virtually identical to the corresponding ground in SBC. There was a significant different between the equivalent provisions in JCT 98 and IFC 98.

Named persons as sub-contractors

This is a complex topic. The effect of certain architect's instructions, regarding named sub- contractors, upon regular progress is made a ground for claim. The special position of named sub-contractors in IC and ICD is a subject for another book.[53] In short, the contractor must engage, as sub-contractors, any persons or firms who are named either in the contract documents or in an architect's instruction for the expenditure of a provisional sum, to carry out specified parcels of work. The naming process is a complex process, involving the use of a standard form of invitation to tender, tender and articles of agreement (Form ICSub/NAM) and standard conditions of sub-contract incorporated into the sub-contract by reference (Form ICSub/NAM/C), together with an optional form of Named Sub-Contractor/Employer Agreement (ICSub/NAM/E).

Named sub-contractors under IC and ICD effectively become domestic sub-contractors to the main contractor. Once the naming procedure has been completed it is unusual for the architect to have any further involvement with the administration of the sub-contract. The architect does not direct the main contractor as to the payments to be made to the named sub-contractors nor is the architect required to certify practical completion of their work. Matters such as extensions of time for the sub-contractor and settlement of its account are matters between the sub-contractor and the main contractor and neither the architect nor the quantity surveyor under the main contract will be involved. The times when the architect may become involved and may be required to issue instructions are when particular problems occur as specified in schedule 2. In certain circumstances the main contractor may be entitled to reimbursement of any direct loss and/or expense arising from the effect of such instructions on the regular progress of the Works. However, schedule 2 sometimes expressly precludes any loss and/or expense. Therefore, it should be noted that the instruction will amount to a relevant matter only to the extent stated in clause 3.7 and schedule 2. These are the principal situations:

(i) Where a sub-contractor has been named in the contract documents but the contractor is unable to enter into a sub-contract with the named firm in accordance with the particulars in the contract documents, the contractor must notify the architect immediately, specifying the problem with the particulars.

[53] Readers are referred to David Chappell, *JCT Intermediate Building Contracts 2005* (2006) 4th edition, Blackwell Publishing.

An architect who is reasonably satisfied with the reason given may issue an instruction to the contractor to do one of three things:

- change the particulars in order to remove the problem, or
- omit the work from the contract, in which case the employer may have the work carried out by another contractor under a separate contract, or
- omit the work from the contract documents and substitute a provisional sum, which would then allow the architect to name another sub-contractor.

Instructions issued by the architect under either of the first two options are variation instructions which entitle the contractor to the direct loss and/or expense arising from the effects of the instruction on the regular progress of the Works. Such effects would include the employment by the employer of others to do the work and any impact upon the contractor's regular progress. If the third option is followed the 'naming' of a replacement sub-contractor involves a provisional sum and the position is as set out in (ii), following.

(ii) If a sub-contractor is named in an architect's instruction for the expenditure of a provisional sum, any direct loss and/or expense caused to the contractor by the effect of the instruction on regular progress of the Works is recoverable under clause 4.18.2.1 which expressly refers to clause 3.13. For example, if the named sub-contractor's availability does not fit the main contract programme, it is almost inevitable that the contractor will suffer disruption and/or delay to progress. The main contractor may make a 'reasonable objection' to entering into the sub-contract under schedule 2, paragraph 5.3. It appears that if the contractor lodges such an objection, the architect will be obliged to instruct a different sub-contractor unless the employer is inclined to test whether the contractor's objection is reasonable before an adjudicator. There is no provision which allows the architect to nevertheless instruct the contractor to proceed.

If the contractor does not object, but simply enters into the appropriate sub-contract, it is open to question whether the contractor is still entitled to recover under this clause any loss and/or expense suffered or whether the contractor must forego any losses not claimable under the sub-contract. On balance, the wording of the contracts suggests that the latter is the better view. There may be an implied term that if the contractor is obliged to accept a sub-contractor, an appropriate extension of time will be granted.[54]

(iii) If the employment of a named sub-contractor is terminated by the main contractor because of the sub-contractor's default or insolvency, the contractor must to notify the architect who may then issue an instruction as follows:

- to name another sub-contractor to complete the work, or
- to require the contractor to make its own arrangements for completion of the work, in which case the contractor may sub-let the remaining work to a sub-contractor of its own choice, or
- to omit the remainder of the work from the contract, in which case the employer may employ another contractor to carry it out.

If the original sub-contractor was named in the contract documents the exercise of the first option by the architect will entitle the contractor to an extension of time for any resulting delay, but the contractor will not be entitled to recover

[54] *Fairclough Building Ltd v Rhuddlan Borough Council* (1985) 3 Con LR 38.

any direct loss and/or expense. Architects' instructions issued under the other options entitle the contractor to an extension of time if appropriate and to recovery of direct loss and/or expense if incurred as a result of the effect on regular progress. Entitlement to both extension of time and loss and/or expense would apply to the first option also if the sub-contractor was named in an instruction regarding the expenditure of a provisional sum.

If the first option is adopted, the contract sum is to be adjusted to take account of the increase or decrease in price between what would have been payable to the original sub-contractor and what is now payable to the replacement sub-contractor if one is appointed. However, the cost of rectifying the defects in the work of the original named sub-contractors is to be excluded.

If the second option is pursued, the contractor will be entitled to be paid in accordance with the valuation of variations. Provided the employer is prepared to indemnify the contractor against reasonable legal costs, the contractor must pursue the original sub-contractor under the dispute resolution procedures in order to recover the additional expense which the employer is required to meet. In the absence of such indemnities, the contractor is still obliged under paragraph 10.2.1 to take whatever other reasonable action is available to recover such expense.

The named sub-contractor provisions in IC and ICD are quite complicated to understand. The principle is that the architect is entitled to name a sub-contractor. Once the contractor has entered into a contract with that sub-contractor, it is, to all intents and purposes, a domestic sub-contractor and the architect is no longer involved except through the contractor. This arrangement is only upset if the sub-contractor ceases to perform for any reason. It is at that point that the contract has to make complicated provision for dealing with the problem. The complications in this form stem from the contradictory position which arises when one party tries to dictate to another party, not only that it will use a particular sub-contractor but also, that it will take complete responsibility for it. This is what bedevilled the JCT 63 attempt to incorporate nominated sub-contractors and ultimately resulted in a nine-page clause in JCT 98. It is clear that the courts disliked nomination and naming under IC and ICD is similar in principle.

13.3 Minor Works Building Contract (MW and MWD)

13.3.1 Main points

Neither MW nor MWD contain the equivalent of SBC clauses 4.23–4.26 or IC and ICD clauses 4.17–4.19. There is no clause which entitles the contractor to apply to the architect for recovery of loss and/or expense. The reason may be because the simple work content, low value and short contract periods for which the forms are intended are unlikely to result in major loss and/or expense claims. That may be the theory, but in practice MW and MWD generates claims as frequently if not to the same extent as more complex forms. MW and MWD are very popular forms of contract; no doubt due in part at least to their brevity compared with other forms.

It is essential, however, that the forms should be used as intended. It is not unknown for these contracts to be employed for projects with contract sums far in excess of the recommended limit.[55] In such cases, the likelihood of substantial claims is greatly increased.

Although there are two versions of the contract (MW and MWD), the only relevant clause is the same in both contracts. For simplicity's sake reference will be to MW only from here onwards in this Section. Despite the fact that the contract does not allow the contractor to instigate a claim for loss and/or expense, it states in clause 3.6.3 that the architect must include, in the valuation of an instruction regarding an omission, addition or change in the Works, the amount of direct loss and/or expense incurred by the contractor provided that the regular progress of the Works has been affected. It cannot be emphasised too much that the loss and/or expense must result from the issue of what might normally be termed a variation instruction. Instructions about other things do not fall to be valued under this clause. The clause makes no specific reference to 'ascertainment', but the reference to 'incurred' clearly means that it is the actual amount and not some theoretical or formulaic figure which is intended.

The practice of some architects who include the contractor's preliminary costs in certificates following an extension of time is wrong. The contractor is not entitled under the contract to recover these costs and an architect who certifies them may be negligent. However the practice is very common and contractors will often claim 'prelims' as a matter of course under these contracts after an extension of time is given for any reason.

There is no provision for the architect to request information nor is there a stipulation that the contractor must provide it although it is clearly in the contractor's interests to provide whatever information the architect needs. Provided that the instruction requires a variation, the calculation of the amount due to the contractor under these contracts will follow the same route as loss and/or expense under any other JCT contract. Although the contractor is not entitled to initiate the claim, once the architect requests information to permit the ascertainment of loss and/or expense, in practice, it will allow the contractor to effectively submit a claim for the money to which it believes it is entitled.

Clause 3.6.2 requires architect and contractor to endeavour to agree a price prior to carrying out any instruction. It is only if they fail to agree that clause 3.6.3, requiring the architect to value, is triggered. Therefore, it is plain that any price agreed under clause 3.6.2 is deemed to include any loss and/or expense and the architect has no power to add further amounts or indeed to interfere with any agreed price. It seems that neither party can revisit the agreement in the future even if it becomes clear that the contractor seriously underestimated the amount of loss and/or expense it would incur.

From time to time, it has been stated that, other than the very limited recovery allowed by clause 3.6, the contractor cannot recover and loss and/or expense it incurs due to matters such as failure by the architect to provide information or give instructions at the right time or postponement of part of the work. Such a view is misconceived. The contractor may always exercise its right to claim damages for breach of contract. However, the exercise of such right is outside the machinery of the contract

[55] See David Chappell, *The JCT Minor Works Building Contracts 2005* (2006) 4th edition, Blackwell Publications.

and, therefore, the architect has no power to consider a claim made on that basis. The contractor cannot claim at common law in respect of the full range of relevant matters included in clause 4.24 of SBC, because some of those relevant matters are not breaches of contract. In practice, architects often do consider common law claims on behalf of their clients, but an architect in this position is exceeding the architect's contractual duties and specific authorisation from the client must first be obtained, preferably in writing.

The architect's power to issue instructions is enshrined in clause 3.4. The clause is very broadly drafted, but it is likely that the courts will interpret the provisions quite narrowly. Nevertheless, the clause should be interpreted to allow the architects to issue all instructions necessary to enable the architect to administer the contract efficiently. It is likely that the architect has power under this clause to issue instructions for the postponement of work. Although such an instruction would almost inevitably entitle the contractor to an extension of time, it is difficult to see on what ground the contractor would be entitled to any costs involved. The instruction does not require a variation and, therefore, it would not rank as an instruction for which the architect must include loss and/or expense. Moreover, no empowered instruction is a breach of contract and, therefore, the contractor would be unable to mount a claim at common law. The same could be said of an instruction to open up the work for inspection if the inspected work was found to be in accordance with the contract.

Even if an architect is authorised by the employer to consider common law claims, any amounts which the architect may consider to be due cannot be included in the certification process, because it is not money due under the terms of the contract. Instead, it must be paid directly by the employer to the contractor preferably after correspondence between the parties recording their agreement.[56]

13.3.2 The provision summarised

- The architect is the instigator of the process when valuing a variation instruction.
- Regular progress of the Works must be affected by compliance with the instruction.
- There is no express requirement that the contractor must provide information to enable the architect to form an opinion or ascertain the amount.

13.4 Design and Build Contract (DB)

13.4.1 Main points

The provisions in DB that may give rise to loss and/or expense claims by the contractor are contained in clauses 4.20–4.23 inclusive. The JCT Design and Build Contract

[56] See Chapter 4 for a consideration of certain common law claims.

is superficially very like SBC. Indeed, it is obviously based on that contract. The superficial resemblance is misleading, because the form is based on a different philosophy. Put shortly, the contract is contractor driven like its predecessor WCD 98. That means that some of the important actions carried out by the architect or the quantity surveyor under a traditional contract are carried out by the contractor. The architect, or to be precise the employer's agent appointed under DB, simply checks to make sure that the contractor is correct. For example, the contractor is responsible for valuation, determining the amount of payment and ascertainment of loss and/or expense.

This difference of approach is very marked when comparing SBC clauses 4.23–4.26 and clauses 4.20–4.23 in DB. The first part of the clause is identical with the substitution of 'employer' for 'architect' and the contractor may if it wishes make an application to the employer in writing. It will be seen, however, that the second part of the clause is quite different. There is no requirement for the architect or anyone else to form an opinion or to ascertain the amount of loss and/or expense. There is simply the bald statement that the loss and/or expense incurred must be added to the contract sum. Since it is the contractor's responsibility to make application for interim payment under clause 4.9, it must also calculate the actual loss and/or expense it has suffered. Effectively, the burden of proving that the ascertainment is wrong is laid on the employer under clauses 4.10.3 and 4.10.4. This position is emphasised by the wording of clause 4.20.2 which is not quite an amalgam of clauses 4.23.2 and 4.23.3 of SBC, but which simply obliges the contractor to provide in support of its application the information requested by the employer which the employer reasonably requires. There is no reference to the purpose for which it is required. Contrast with the equivalent clause in SBC wherein it is made very clear that the information and details are required to reasonably enable the architect to form an opinion or as are reasonably necessary for the quantity surveyor to ascertain. The proviso as to timing of the application is identical to SBC. It is thought that both clauses 4.20.1 and 4.20.2 are conditions precedent to the contractor's entitlement to loss and/or expense, following as they do the words: 'provided always'.[57]

13.4.2 Other significant differences

Development control requirements

A very significant clause 4.21.5 is inserted which provides grounds for entitlement if there is any delay in receipt of permission or approval for the purposes of development control requirements. An important qualification in the entitlement is that the permission must be necessary for the Works to start or to be carried out. In addition, the contractor must have taken all practicable steps to avoid or reduce the delay. What steps a contractor can in practice take are severely limited. Probably all it can do is to make the appropriate development control requirements submission as soon as possible. Development control requirements has a broader meaning than simply

[57] Whether or not the notice provisions in contracts should be considered conditions precedent is considered in Chapter 6, Section 6.6.

planning requirements, but the phrase is not so broad as to encompass all kinds of statutory requirement. The contractor will usually formulate its application under this head when it has been left to make the planning submission and approval has been delayed. Planning approval may be delayed for many reasons and it is always safer for the employer to secure the approval before letting the contract. Attempts to avoid the problem by deleting this ground can be fraught with difficulty, because several clauses refer to this topic and there is a danger that the matter may be dealt with inadequately.[58] Under DB, as under SBC, the effect of finding antiquities is dealt with in a separate relevant matter.

Discrepancies

There is no ground which is equivalent to SBC clause 4.24.2.3 dealing with discrepancies in or between documents. The logic is inescapable: if the contractor is responsible for the whole of the documentation, it cannot blame the employer if there are discrepancies. The contractor may of course be able to seek redress from the consultants it directly employs. Dealing with discrepancies in the Employer's Requirements should be treated as a 'change' in accordance with clause 2.14.2.

Changes

Clause 4.21.1 is similar to the equivalent clause in SBC (4.23.1) except for the terminology: 'variation' in SBC, 'change' in DB. A change under DB has a very restricted meaning and refers only to a change in the Employer's Requirements. The employer has no power under the contract to change the design or the construction directly – a point frequently overlooked by employers and their agents. More importantly, this clause is the vehicle by which the contractor can recover if there is a delay in statutory requirements in general and particularly where, under clause 2.15.2, a change in statutory requirements after base date is to be treated as an instruction of the employer requiring a change.

Instructions

The most significant ground is probably the employer's instruction requiring the expenditure of a provisional sum. It is only the expenditure of provisional sums included in the Employer's Requirements which may be instructed, but they are often provided with little explanation about their purpose. It follows, therefore, that although the contractor must programme the Works with reasonable skill and care so that completion by the due date can be achieved, in practice it may be unable to judge the amount of work included in a provisional sum with any confidence. In such circumstances, it is entitled to make only such allowance in the programme as can be justified; which may be nothing at all in many instances. The practical consequence may be that an employer's instruction requiring the expenditure of a

[58] *Update Construction Pty Ltd v Rozelle Child Care Ltd* (1992) 9 BLM 2.

provisional sum will have effect on the programme as though it was a simple addition of work and/or materials.

Decisions, information and consent

Under SBC, the former clause included in JCT 98 to cover the situation where the architect has failed to provide instructions and information in due time has been omitted, because it is now covered by the catch-all prevention and impediment clause. The equivalent clause in WCD 98 has also been removed for the same reason. Key differences of approach are that under DB, the employer is not obliged to provide drawings, details or levels and of course there is no reference to an information release schedule, but the employer must provide decisions, information and consent under the contract. This restricts the contractor's opportunities to claim, because not only is it rightly prevented from claiming because it has not obtained drawings at the right time, but it cannot claim if the employer is late in giving a decision which the employer is not strictly obliged to give under the contract.

13.4.3 Supplemental provisions

There is additional provision for loss and/or expense in paragraph 5 where the supplemental provisions in schedule 2 are stated in the Contract Particulars to apply. It should be noted that clauses 4.20–4.23 are modified, but not superseded, by this provision and that any loss and/or expense which is recoverable under paragraph 4 (valuation of changes) is not recoverable under this provision. If the supplemental provisions are stated in the Contract Particulars to apply, the contractor will be expected to initiate this procedure without further prompting. The consequences for a contractor who should do so, but who fails to proceed in accordance with this clause, are severe.

The procedure is triggered as soon as the contractor becomes entitled to have some loss and/or expense added to the contract sum. The contractor must include the amount in the next application for payment. The amount claimed must be referable to the period immediately prior to the application and since the previous application. The contractor must act quickly. It must include an estimate of the amount in the next application for payment. Use of the word 'estimate' acknowledges that it may not be a precise figure. With each successive application, the contractor must continue to submit estimates until the loss comes to an end and each estimate must refer only to the period prior to the application. On receipt of each estimate, the employer must give a written notice to the contractor within 21 days. The notice must state either:

- that the employer accepts the estimate; or
- that he wishes to negotiate the amount; or
- that the provisions of clause 4.20 apply.

The clause does not stipulate a time limit for the negotiations, but there is no reason why a suitable time limit should not be inserted by the parties. Before sending the notice, the employer may request information reasonably required to support the

contractor's estimate, but both request and receipt of the information must take place within the 21 days.

When agreement is reached or, failing agreement, the amount of loss and/or expense has been determined by another stipulated method, the sum must be added to the contract sum. No further amount may be added for loss and/or expense in respect of the same time period. If the contractor fails to submit estimates in accordance with the timetable, paragraph 5 ceases to apply and loss and/or expense is dealt with under clause 4.20. However, the amounts are not payable until the final account and final statement are agreed. Moreover, the contractor is not entitled to any interest or financing charges incurred before the issue of the final account and final statement.

There is much to commend in paragraph 5. If the employer is well-organised and sensible, the contractor should have few opportunities to claim. The provision provides a kind of fast track claims procedure which ensures the contractor will receive loss and/or expense quickly if it provides estimates quickly. The parties are encouraged to agree on the amount and it is in their interests to do so. The similarity to claims provisions in the Association of Consultant Architects Form of Building Agreement (ACA 3) form of contract should be noted.

13.5 Prime Cost Building Contract (PCC)

13.5.1 Differences

General

The provisions in PCC that may give rise to loss and/or expense claims by the contractor are contained in clauses 4.16–4.19 inclusive. The layout and wording of the first of these clauses are now very similar to the equivalent provisions in SBC and the same comments apply. There are some differences in PCC clause 4.17 as set out below:

Variations

There is no relevant matter dealing separately with variations or as PCC terms them: changes.

Instructions

Instructions are issued by the architect for all work to be carried out. Therefore, there is no reference to instructions requiring the expenditure of provisional sums. The issue of instruction under clause 3.14 is a relevant matter, but qualified by the proviso that the clause does not extend to instructions to carry out work in the specification and/or the drawings. This might be thought to be a clumsy piece of drafting, but nonetheless it is clear in meaning. Other instructions closely follow the pattern in SBC except that instructions under clause 3.15 requiring changes are included.

13.6 Management Building Contract (MC)

13.6.1 Comments

Schedule 2 of MC allows the management contractor to recover, in addition to the management fee, reimbursement of all its expenditure in connection with the contract. Therefore it has no need of a claims clause as traditionally understood. Clause 8.5 simply provides for the contractor to pass the works contractor's written application for reimbursement of direct loss and/or expense to the architect. Borrowing something from standard JCT wording, the clause goes on to make clear that it is for the architect alone to form an opinion about the application and then, if appropriate, to ascertain or instruct the quantity surveyor to ascertain the amount. Unlike traditional JCT contracts, the ascertainment must be carried out in collaboration with the contractor. To 'collaborate' is to work in combination with another. It appears, therefore, that although the architect alone will decide in principle if the works contractor is entitled to payment under this clause, the architect must agree the amount to be paid with the contractor. In general, that is not likely to cause immense problems, but there may be occasions when they cannot agree. The contract is silent on that point and presumably the parties would be left to try and resolve the difference by reference to one of the dispute resolution procedures in the contract.

13.7 Construction Management Trade Contract (CM/TC)

13.7.1 Significant differences

The loss and/or expense provisions are contained in clauses 4.23 and 4.24. These provisions are strikingly similar to clauses 4.23, 4.24 and 4.26 of SBC and the comments on that clause are also applicable here.

13.8 Major Project Construction Contract (MP)

13.8.1 Main points

The provisions in MP that may give rise to loss and/or expense claims by the contractor are contained in clause 27. This clause is not like SBC clauses 4.23–4.26 either in general structure or wording. The first notable thing is that in two clauses (27.1 and 27.8) it is made abundantly plain that no loss and/or expense can be claimed or paid under this clause in connection with a change or variation.

The grounds for loss and/or expense (referred to as 'matters') effectively fall under the heading of employer defaults. There are only three grounds and the first deals expressly with breach or act of prevention by the employer, the employer's representatives, advisors, etc. The second deals with interference with regular progress by others on the site. Such others, by definition, are those for whom the employer, and

not the contractor, is responsible. The third ground simply brings a rightful suspension by the contractor, under s.112 of the Housing Grants, Construction and Regeneration Act 1996 due to lack of payment, into a category of events giving right to entitlement. Without that inclusion, a contractor which properly suspends performance of its obligations would have great difficulty in obtaining financial recompense.[59] Clause 27.8 expressly excludes from ascertainment of loss and/or expense, any element to the extent that it has been contributed to by a cause other than a change or the three grounds expressly set out in clause 27.2. It should be noted that clause 27.8 has been re-worded from the 2003 version. A strict interpretation of the previous wording led to the conclusion that if loss and/or expense had been caused by two things, one of which was an acceptable ground under clause 21.2 (now clause 27.2) and another which was not an acceptable ground under clause 21.2 (27.2), the whole of such loss and/or expense was excluded from calculation of any amount due to the contractor. It was a potentially onerous clause. The new wording makes clear that the exclusion operates only to the extent that it has been contributed to by a cause other than a change or the three grounds set out in clause 27.2. That is almost certainly what was originally intended and it is a good example of the way in which a relatively simple clause can cause difficulties.[60]

There is the usual provision for the contractor to notify the employer as soon as it becomes aware that regular progress is or is likely to be affected by one or more of the grounds, but it is significant that it is not made a proviso or condition (clause 27.3). Therefore, the contractor's failure to notify the employer strictly in accordance with this clause is unlikely to prevent the employer from ascertaining loss and/or expense. This clause contains a requirement for the contractor to mitigate its losses by taking all practicable steps. This is probably more onerous than the ordinary duty to mitigate.

Unlike the position under most JCT forms, the contractor is required to make its own assessment of the loss and/or expense it has incurred and it must present this with supporting information to the employer. The supporting information is such as is reasonably necessary to enable the employer to ascertain the loss and/or expense. The contractor is responsible for updating this package on a monthly basis until it has provided information relating to the whole of the loss and/or expense. There appears to be no sanction if the contractor fails to provide the information monthly other than that it will not receive the relevant loss and/or expense which is probably sanction enough. Ascertainment is intended to be a fast track process. The employer must respond to the contractor within 14 days of receiving the information and notify the contractor of the amount ascertained. It is expressly stated in clause 27.5 that the ascertainment must be made by reference to the contractor's information. The clear message here is that if the contractor fails to provide adequate information, the employer will be unable to properly ascertain the amount due and the contractor may receive less than it expects. However, the ascertainment must be in sufficient detail to allow the contractor to identify the differences.

[59] At the time of writing, the Local Democracy, Economic Development and Construction Act 2009 which amends the Housing Grants, Construction and Regeneration Act 1996 to overcome this omission, has not yet come into force.

[60] The difficulty is similar to what lay behind the development of what is now SBC clauses 6.1 and 6.2 and which originally were missing the all important 'to the extent'.

The extension of time review procedure is echoed in clause 27.6 which requires the contractor to provide any documentation in support of further ascertainment no later than 42 days after practical completion. That does not mean that the contractor who is dissatisfied with an ascertainment has to wait until after practical completion to submit more information. It is simply stating the latest date by which the contractor must have made such submission. The employer must respond within 42 days of receipt of the new material. Thus, the contractor may make its initial submission in week 30 of a 70 week project. The employer must respond within 14 days. If the contractor is dissatisfied, it may submit new material and the employer must now respond within 42 days. The process can be repeated until 42 days after practical completion after which the contractor may not submit further information and the employer must make a final assessment within a further 42 days.

Clause 27.7 makes the employer liable to pay to the contractor any loss and/or expense ascertained in accordance with this clause.

13.9 Measured Term Contract (MTC)

13.9.1 Main points

The nearest to a loss and/or expense clause in this contract is clause 5.8. This clause merely provides that, if the contractor is instructed by the contract administrator to interrupt the work contained in an order so as to carry out other work first, agreed lost time or other costs must be valued as daywork. There are two things to note about this clause. The first is that only the time that is agreed will be eligible and the second is that no other cause of interruption or delay will entitle the contractor to additional payment. No doubt it is assumed that there will be few or no instances of loss and/or expense of such a substantial nature that they would warrant a complex ascertainment procedure. If the order periods are generally short, that may well be true. However, if the contractor does incur substantial losses, its recourse would appear to be to the common law, provided that the contractor can bring the cause of the loss into the category of employer's breach of contract or some other default.

13.10 Constructing Excellence Contract (CE)

13.10.1 Main points

There is no separate provision for the recovery of direct loss and/or expense under this contract. It is all dealt with under the relief event procedure in clauses 5.7–5.16 inclusive. This has been fully considered in Chapter 11, Section 11.10.1.