Chapter 15

Claims under the General Conditions of Government Contracts for Building and Civil Engineering Works (GC/Works/1(1998))

15.1 Introduction

GC/Works/1(1998) is a form of contract which is much used by many government departments and by some private organisations for construction work. The current version was first published in 1998 and the latest impression is the fourth published in 2003. The conditions can be used in various forms: as a full bill of quantities form of contract, without quantities and in varying design and build formats. They are substantially different from SBC. A significant point is that, unlike SBC and other JCT contracts, GC/Works/1(1998) is not a contract which is freely negotiated between the parties. It is drafted specifically on behalf of the relevant government departments and with the employer's interests as a primary concern. Therefore, it is to be classed as an employer's 'written standard terms of business' for the purposes of section 3 of the Unfair Contract Terms Act 1977 which limits the extent to which liability for breach of contract, negligence or breach of duty can be avoided or restricted by contract terms. This can have a serious impact on the construction of the contract. Although the Act does not apply to the Crown, GC/Works/1(1998) is often used by employers who are not technically the Crown. Indeed, the contract is often used by private clients who appreciate its drafting. Because it is a contract put forward by the employer, any unresolved ambiguities in GC/Works/1 will be construed *contra proferentem* against the employer.

The general principles involved in making and considering claims under GC/Works/l(1998) are identical to those already considered in connection with claims under SBC, IC and ICD as discussed in earlier chapters. The role taken under JCT contracts by the architect or the contract administrator are here taken by the project manager who is indicated by the initials 'PM' throughout. Particular differences between this contract and the JCT series are discussed below.

15.2 Extension of time and liquidated damages

Clauses 36 and 55 deal with extensions of time and liquidated damages respectively.

Building Contract Claims, Fifth Edition. David Chappell.

15.2.1 Extension of time

Clause 36 deals with adjustments to the date for completion. The 'Date for Completion' is the date calculated from the date of possession of the site. The date of possession must be notified by the employer to the contractor within the period or periods specified in the abstract of particulars.

15.2.2 Commentary

Either the contractor or the PM can initiate action under this provision. Usually, the contractor will request an extension of time, but it is not entitled to do so after completion of the Works. Clause 36(1) stipulates that such a request must include grounds for the request. The degree of detail is not specified, but at the very least it must contain sufficient information to enable the PM to understand why the contractor considers it is entitled to an extension of time. In practice, a contractor will be wise to submit a very detailed request. This clause does not expressly empower the PM to require further information but, if such power is needed, it can probably be implied from the wording of clause 25 requiring the contractor to keep records required by the PM.

Clause 36(1) makes clear that a PM who considers that there has been or is likely to be a delay which will prevent or has already prevented completion of the Works by the date for completion can take unilateral action. It is very important that the PM understands that, because failure to make an extension of time in appropriate circumstances may result in time becoming at large.[1] GC/Works/1(1998) is the only building contract which sets out the PM's power in this respect in such clear terms.

The PM must notify the contractor of the decision about extending time as soon as possible, but no later than 42 days from the date notice is received from the contractor. It is worth giving this provision careful consideration. The PM cannot simply assume that 42 days are available from the date of receipt of notice in which to decide on the extension of time. If it is possible to come to a decision earlier than 42 days, the PM must do so or be in breach of the provision. It should be noted that the PM has power under this clause to extend time for any section.

In giving an extension, the PM must state whether the decision is final or merely interim. Doubtless most of the decisions taken during the progress of the Works will be interim. Where a decision is interim, the PM must review it regularly until in a position to give a final decision. The PM has just 42 days from the date when the Works are actually completed to come to a final decision about all outstanding (i.e. those not already decided) and interim extensions of time. The PM cannot withdraw any extension already given nor can the period of extension be reduced unless it is done purely to take account of an omission which has been instructed and which has not already been taken into account in arriving at previous extensions of time. It appears, therefore, that, unlike the position under JCT 98, the PM is not confined

[1] See Chapter 2, Section 2.2.

to omissions instructed since the last extension was given; the final decision can take account of an omission which the PM instructed, but failed to consider when giving earlier extensions. It is clear that the final decision under clause 36(4) is intended to be the PM's opportunity to sweep up all outstanding or ill-considered delays.

Clause 36(5) provides what the contractor must do if it believes any decision is insufficient. It has 14 days from receipt of the decision within which to submit what the clause refers to as a 'claim' to the PM. The claim must specify the grounds which the contractor thinks entitle it to an extension of time. On receipt, the PM has 28 days in which to respond and it is clear from the wording that the PM must respond, whether or not the decision is that a further extension is warranted. The contractor's right to submit a claim under this clause cannot extend to a final decision given by the PM after the date of completion under clause 36(4). The decision under clause 36(4) is an opportunity for the PM to review all matters and express a final decision which the contractor may challenge only by adjudication or arbitration. If clause 36(5) extended to embrace a final decision by the PM, it would not be the final decision.

Clause 36(6) requires the contractor to endeavour to prevent delays and to minimise unavoidable delays and to do everything required to proceed with the Works. This is very much to the same effect as JCT 'best endeavours' provisions.[2] It goes on to say, in clause 36(2)(b), that the contractor is not entitled to an extension of time if the delay is caused by its negligence, default, improper conduct or lack of endeavour. After considerable reflection on this clause, it appears that, read strictly, the contractor can be denied an extension under this clause only if the reasons stated are the cause of the whole of the particular delay being examined. If the contractor's default is the cause of only part of the delay, the contractor must be given an extension for the whole delay. This is the straightforward meaning of the words used. In practice, of course, an extension of time is often reduced (in the sense of part of the delay being discounted) for these reasons. In order for that approach to be valid, it is suggested that the clause should have included the words 'to the extent that'. As the clause currently stands, it is thought that the contractor is entitled to an extension of time unless the default is the cause of the whole of the delay in question.

The grounds for extension of time are expressed broadly:

Execution of modified or additional work

An instruction under clause 40(2)(a) would qualify as this ground. The same ground may, of course, give rise to a money claim under clauses 41(2), 42(2)(b) and 42(6).

Act, neglect or default of the employer or the PM (excluding contractor's fault)

This ground would extend to cover the acts, etc. of those for whom the employer or the PM were vicariously responsible in law. A probably unnecessary proviso has been added to make clear that the original cause must not be any default or neglect of the contractor or any of its employees, agents or sub-contractors. At first sight, this kind

[2] See the comments in Chapter 11, 'clause 2.28.6.1', in Section 11.1.2 on this topic.

of proviso might appear designed to get around the ordinary rules of causation[3] and that appears to be the case. On its ordinary meaning, the phrase 'not arising because of' is the same, or nearly so, as 'not arising as a result of'. This is to remove from the scope of this clause any situation where the default or neglect of the contractor has created a situation following which the employer or PM might perform some act, neglect or default which will cause the contractor to be delayed. The phrase 'not arising because of' is much broader than 'not caused by'. The former envisaging a situation which, created by the contractor, permits or probably invites action by the employer or the PM; the latter being a situation which inevitably leads on to the employer's or the PM's actions.

Strike or industrial action outside the control of the contractor or its sub-contractors and which delays or prevents the carrying out of the Works

This ground includes any strike or any other kind of industrial action. It is probably worded broadly enough to encompass a work to rule. There are only two stipulations: it must delay or prevent execution of the Works and it must be outside the control of the contractor or its sub-contractors.

Accepted risks or unforeseeable ground conditions

The definition of the term 'Accepted Risks' in clause 1(1) means the risks of pressure waves caused by the speed of any aerial machine, ionising radiations or contamination by radioactivity from any nuclear fuel or from its combustion, hazardous properties of any explosive nuclear assembly and war, hostilities, civil war and the like. Unforeseen ground conditions are the conditions referred to in clause 7.

Any other circumstances outside the control of the contractor or its sub-contractors and which could not have been reasonably contemplated, excluding weather conditions and contractor's fault

The wording is wide, although it is probably aimed at what is usually called 'acts of God', which is an overwhelming superhuman event, and also at circumstances covered in other forms of contract by the term *force majeure.* This is a French law term which in English law 'is used with reference to all circumstances independent of the will of man, and which it is not in his power to control'[4] The term *force majeure* has been held to apply to dislocation of business caused by a nationwide coal strike and also accidents to machinery. It did not cover delays caused by bad weather, football matches or a funeral, on the basis that these were quite usual incidents interrupting work and the contractors ought to have taken them into account in making the contract.[5]

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[3] Causation is considered in Chapter 8.
[4] *Lebeaupin v Crispin* [1920] 2 KB 714.
[5] *Matsoukis v Priestman & Co Ltd* [1915] 1 KB 681. See also Chapter 16, Section 16.2.3 on the subject of *force majeure.*

Delays caused by persons with whom the employer contracts directly under clause 65 fall under this ground. It should be noted that weather conditions are expressly excluded from this ground, therefore, long spells of very hot weather or excessively cold weather conditions are at the contractor's risk. Even if a circumstance would otherwise be eligible for consideration under this ground, it will be excluded if it could reasonably have been contemplated. This ground has a similar proviso to the one included in clause 36(2)(b) and the commentary is also applicable.

Failure by the planning supervisor to carry out duties under the CDM Regulations

This is straightforward but it should be noted that, under the CDM Regulations 2007, the name has been changed to the CDM co-ordinator and the relevant duties are also changed. It is assumed that users of the contract will amend this clause accordingly. This ground only applies if the CDM co-ordinator fails to carry out the relevant duties under the Regulations. There may be many occasions when proper operation of the CDM co-ordinator's duties may cause a delay, but the contractor has accepted that risk.

Exercise of the contractor's rights to suspend performance of its obligations

This ground complies with s. 112 of the Housing Grants, Construction and Regeneration Act 1996 which provides for extension of the contract period or the fixing of a new date for completion if the suspension provision has been operated correctly.

15.2.3 Liquidated damages

Liquidated damages are dealt with by clause 55 which provides for the payment of such damages by the contractor if it fails to complete the Works or a section, if appropriate, before the date for completion or any extension of that date included in a decision by the PM under clause 36.

15.2.4 Commentary

The liquidated damages clause under this form is very straightforward. There are no certificates of the PM or written requirements of the employer made conditions precedent to recovery of the damages as found in JCT forms of contract. Instead, it is sufficient that the contractor fails to complete by the appointed date for completion or any extension of the contract period. In practice, no doubt the PM will always notify the employer that the time has arrived when liquidated damages can be charged. The rate is to be the rate stated in the abstract of particulars and it should be noted that, under the provisions of clause 55(1), clause 55 only applies if a rate is inserted. This overcomes the uncertainty which may prevail if no figure is inserted and there is a dispute whether the liquidated damages is nothing or whether the

clause has no effect.[6] The effect of clause 55(1) is that if the employer omits to insert any rate for liquidated damages, the clause will not apply at all and the employer will be free to revert to unliquidated damages to the extent that they can be proved. However, clause 55(1) will not assist an employer who puts any rate at all (even '£nil') in the abstract of particulars.[7]

Liquidated damages may be deducted by the employer from any money paid as advance under clause 48. Where there is insufficient money to achieve a deduction of the total amount, the contractor must pay the difference. If the contractor fails to pay, the sum is said to be recoverable under clause 51. Clause 51 purports to allow set-off across contracts, but it is doubtful whether it would be effective if challenged. That is because s. 10 of the Unfair Contract Terms Act 1977 makes any term in a contract ineffective if it attempts to exclude liability on another contract. Although the point does not appear to have been tested in the courts, it seems likely that clause 51 would be such a term. A term purporting to give the employer power to set off across contracts is capable of being viewed as an exclusion of liability.

Clause 55(5) is inserted for the avoidance of doubt. It makes clear that the employer will waive its rights to recover liquidated damages, if at all, only by formal notice. Therefore, the contractor will be unable to argue that the employer's conduct led it to believe that the employer was waiving its rights in this respect. That is what happened under ICE 6th edition terms where an employer stated to the contractor during site meetings, that liquidated damages would not be imposed so that the contractor, in turn, did not seek damages from its sub-contractors, the employer was estopped from subsequently changing its mind and attempting to impose damages after all.[8] It is doubtful whether that situation could arise under GC/Works/1(1998).

However, by going on to state that neither payments, concessions nor instructions to the contractor nor any other act or omission of the employer will operate to affect the employer's rights and they will not be deemed a waiver of rights, the clause seems to go too far. It appears unlikely that what it seems to be saying is what was intended. It seems to be saying that the employer's right to recover liquidated damages will not be affected by acts or omissions of the employer. That is clearly wrong. Liquidated damages will not be recoverable by the employer if the employer is at all responsible for failure to achieve the completion date unless there is power to give an appropriate extension of time and that extension has been given:

> '[The] cases show that if completion by the specified date was prevented by the fault of the employer, he can recover no liquidated damages unless there is a clause providing for extension of time in the event of delay caused by him.'[9]

What this means is that if completion of the Works or any section (if the Works are divided into sections) by the contract date or dates for completion has been prevented by any act or default of the employer, the employer cannot recover liquidated damages from the contractor, unless the PM has in a decision given an extension of

[6] *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30.
[7] *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30.
[8] *London Borough of Lewisham v Shepherd Hill Civil Engineering* 30 July 2001, unreported.
[9] *Astilleros Canarios SA v Cape Hattera Shipping Co Inc and Hammerton Shipping Co SA* [1982] 1 Lloyd's Rep 518 at 526 per Staughton J.

time on the ground of that act or default: see clause 36(2)(b). This is also the situation if there is power to extend time but it has not been properly exercised.[10]

It has already been noted that GC/Works/l(1998) is not a negotiated contract, but is a contract which has been drawn up on behalf of the government departments that use it and that, therefore, it is to be construed *contra proferentem* against the employer, whose document it is. It has been said:

> 'The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly *contra proferentem.* If the employer wishes to recover liquidated damages for failure by the contractor to complete on time in spite of the fact that some of the delay is due to the employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer . . . '.[11]

The court held that if the contract had provision for time to be extended on the grounds of employer default and there was such default, a failure to extend on that ground would be fatal to a claim for liquidated damages. Liquidated damages are not recoverable where the PM, who should have extended time, has failed to do so.

In *Miller v London County Council*,[12] a building contract not on the same terms as modern JCT or GC/Works/1 contracts, provided that the whole of the Works should be completed by 15 November 1931. Clause 31 of the contract was important. It provided that

> 'it shall be lawful for the engineer, if he shall think fit, to grant from time to time, and at any time or times, by writing under his hand such extension of time for completion of the work and that either prospectively or retrospectively, and to assign such other time or times for completion as to him may seem reasonable'.

Clause 37 provided that should the contractor fail to complete the Works in due time, it should pay liquidated damages for delay at a specified rate. The order to commence was given on the 16 April 1931 and the contractor had seven months in which to finish. In fact the work was not completed until 25 July 1932. On 17 November 1932, the engineer issued a certificate granting an extension of time to 7 February 1932, and subsequently certified a sum of £2,625 as payable by the contractor to the employer under clause 37 for the delay period from 7 February to 25 July 1932. The court considered the words of clause 31 and the effect of the contract being put forward by London County Council:

> 'The question of construction with which I am faced is not, to my mind, a simple one. "Prospectively" means, "as one looking forward"; "retrospectively" means, "as one looking backward." It is plain that the engineer is entitled to defer the grant of an extension of time to a stage when he is looking backward at something. The question is—at what? . . . .

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[10] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114.
[11] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114 at 121 per Salmon LJ.
[12] (1934) 50 TLR 479.

> I have come to the conclusion that the words of clause 31 do not give to the engineer the power for which the defendants contend. The words "to assign such other time or times for completion as to him may seem reasonable" are not, in my opinion, apt to refer to the fixing of a new date for completion *ex post facto*. I should rather paraphrase them in some such words as "to fix a new date by which the contractor ought to complete the work." If I am right, this phrase, coming after the word "retrospectively," throws some light upon its meaning. Next, it is important to observe that, without words in the contract to make the matter clear, it might be a matter of dispute whether the engineer was or was not bound to grant each extension of time at the time of the delay.
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> In my judgment, the word "retrospectively" may well have been intended to make it clear that an extension granted (in the words of Mr. Hudson's book) "within a reasonable time after the delay has come to an end" is a valid extension. It may also be read as empowering the engineer to grant an extension after the contract date for completion has gone by, but I do not read it as meaning that the engineer may fix a new date for completion and grant extensions of time at some date subsequent not only to the contract date, but to the substituted date. In my opinion, clause 34, which clearly contemplates that the engineer will be in a position to give a certificate of completion as soon as or very shortly after the work is complete, supports the view that it was the intention of the parties that all extensions of time should be granted before the substituted date for completion arrived. I also think that the language of clause 37 is more consistent with the view which I have adopted than with that put forward on behalf of the defendants . . . .
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> If I am wrong in thinking that the clause cannot properly be interpreted in the sense contended for by the defendant Council, it is, in my judgment, at least ambiguous, and . . . upon this view, it must be construed according to that one of two possible meanings which is more favourable to the plaintiff, on the ground that it was the defendant Council who prepared – and put forward the contract. It follows from the view which I have expressed that the power to extend the time was not in this case exercised within the time limited by the contract and the defendants are not in a position to claim liquidated damages.'[13]

GC/Works/1(1998) clause 37 provides for early possession of any part of the Works which the PM has certified as completed if it is either a section or some other part of the Works agreed by the parties or the subject of the PM's instruction regarding early possession. In a similar way to the provisions for 'partial possession' under JCT contracts, there is provision in clause 37(4) for a reduction in the rate of liquidated damages where early possession is taken of a part of the Works or section. The rate of damages is to be reduced pro rata the value of the part taken into possession in proportion to the remaining part. Therefore, if liquidated damages are expressed as £1,000 per week for the whole of the Works and early possession is taken of, say, 30% of the value of the Works, the employer must reduce the liquidated damages by 30%. Without such provision, the employer would not be entitled to simply reduce the rate of liquidated damages pro rata.[14]

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[13] (1934) 50 TLR 479 at 482–3 per Du Parcq J.

[14] *Stanor Electric Ltd v Mansell Ltd* (1988) CILL 399.

15.3 Prolongation and disruption

15.3.1 Introduction

There is no direct equivalent of SBC, clause 4.23, because in this contract, provisions for recovery of disruption and prolongation expenses are scattered over a number of clauses. Very sensibly, recovery of expense associated with instructions is to be recovered, broadly speaking, with the valuation of such instructions. This overcomes a potential grey area familiar to all users of SBC. Clauses specifically dealing with expense associated with instructions are: 41(2), 42(2)(b), 42(6) and 43(1)(a). The principal clause for recovery of expense is clause 46. Its objective is to reimburse the contractor for any *expense* in performing the contract as a result of regular progress of the whole or part of the Works being materially disrupted or prolonged as an unavoidable result of one or more of the specified matters.

15.3.2 Clauses 46 and 47

Clauses 46 and 47 deal with prolongation and disruption, and finance charges respectively.

15.3.3 Commentary

Prolongation and disruption

Although clause 46 is not long, it is not drafted as simply as might be desired and careful reading is required before its full implications are clear. A point to note is that the clause refers only to 'expense'; and it must be an expense which is more than is actually provided for in the contract or which the contract reasonably contemplates. The wording makes plain that this is an objective test. It might be paraphrased as 'the expense which is beyond what the wording of the contract reasonably contemplates.' It is important to understand that the contemplation of the contractor is not relevant. The question whether or not the contract contemplated the test is to be answered by an objective test. A qualifying expense must be an expense which the contractor would not have incurred in some way other than one of the matters listed and, like the provision for loss and/or expense under JCT contracts, it must have been 'properly and directly' incurred by the contractor. Therefore, consequential loss is excluded. There is a proviso that the expense must not be a consequence of any default or neglect on the contractor's part or on the part of any of its employees, agents or sub-contractors. That would have been implied in any event.

Although not easy to identify, there are six matters that may give rise to a claim for prolongation and disruption expenses under the clause, three of which are grouped together. They are:

(1) The carrying out of work under clause 65 (other works).
(2) Delay in being given possession of the site. If this ground was not included, the contractor would be left to claim damages for breach of contract and, if the delay

was long enough, it may be able to accept delay in receiving possession as a repudiatory breach. The inclusion of the ground in clause 46 does not, of course, preclude the contractor from exercising its common law remedies in any event.[15]

(3) Delay in respect of
- decisions, agreements, drawings, levels etc. or any other design material to be provided by the PM
- the carrying out of any work or the supplying of any thing by the employer or obtained from anyone except the contractor
- any instruction from the employer or the PM about the issue of a pass to a person or any instruction from the employer or the PM under clause 63(2) (nomination). There is a proviso that the employer and the PM must be entitled to a reasonable time for consideration and decision and that their discretion is not to be fettered. Inevitably, this ground will operate to fetter their discretion to some extent and, because of the nature of discretion, this proviso is unlikely to change that.

(4) Advice, other than required by the CDM Regulations, given by the planning supervisor.

It has already been noted that the CDM Regulations 2007 require the appointment of a CDM co-ordinator, not a planning supervisor and it is assumed that the necessary contractual amendments will have been made.

A further stipulation is that one or more of these matters must unavoidably result in the regular progress of the Works being materially disrupted or prolonged. Strictly, this means that there can have been no other outcome no matter what action the contractor took. However, it is thought that 'unavoidably' should be given the commercial meaning of unavoidably in the context of the ordinary nature of construction operations and not unavoidable in a strict sense. For the contractor to be successful in contending that regular progress has been disrupted or prolonged, it must first be prepared to establish that it was, as a matter of fact, making regular progress.[16]

The contractor must satisfy two conditions before it is entitled to payment:

(1) The contractor must give notice to the PM immediately it becomes aware that regular progress of any part of the Works has been or is likely to be disrupted or prolonged. 'Immediately' in that context means that the contractor must act with all reasonable speed.[17] Obviously, a commercial interpretation must be given to 'immediately', but it is certainly a matter of days rather than weeks. It is likely that the courts will apply notice provisions of this kind strictly.[18] Contrast this with words such as 'as soon thereafter as is practicable', when a broad interpreta-

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

[16] Some guidance on the contractor's obligations in working regularly and diligently has been given in *West Faulkner Associates v London Borough of Newham* (1995) 11 Cost LJ 157. See the discussion in Chapter 13, 'Effect on regular progress' in Section 13.1.4.

[17] *Hydraulic Engineering Co Ltd v McHaffie, Goslet & Co* (1878) 4 QBD 670 CA.

[18] There is little judicial authority in the English courts other than *Hersent Offshore SA and Amsterdamse Ballast Beton-en-Waterbour BV v Burmah Oil Tankers Ltd* (1979) 10 BLR 1, but there are two Commonwealth cases on the topic: *Jennings Construction v Birt* [1987] 8 NSWLR 18 and *Wormald Engineering Pty Ltd v Resources Conservation Co International* [1992] 8 BCL 158. See also the discussion in Chapter 13, 'Timing of application' and 'Matters within the architect's knowledge' in Section 13.1.4.

tion can be expected.[19] The only difficulty in this instance is establishing that the contractor has become 'aware' on a particular date. It is important that the contractor does give notice immediately from the purely practical standpoint that the PM may want to give instructions so as to reduce any possible claim. If the notice is given only after the event, the PM will be powerless to influence matters. In addition, clause 25 provides for the contractor to keep such records as may be necessary for the QS, PM or employer to ascertain claims. It seems that the contractor must comply with the PM's reasonable instructions regarding the particular records to be kept. If the notice is given late, the PM will be unable to give instructions in that regard. All notices must be in writing (clause 1(3)). The notice must specify the causes or likely causes and it must include a statement that the contractor is entitled to an increase in the contract sum. The information which the contractor must provide to the PM is not precisely stated, but it is clear that it must be set out in sufficient detail so that the basis of its claim is readily identifiable (clause 46(3)(a)).

(2) The contractor must provide to the QS full details of all expenses incurred and evidence that they *directly* resulted from one of the occurrences in clause 46(1). He is to provide the details as soon as reasonably practicable, but in any event within 56 days of incurring the expense (clause 46(3)(b)).

The respective duties of the PM and the QS can be deduced from this without too much difficulty.

The PM need take no action until the notice referred to in clause 46(3)(a) is received from the contractor. The notice triggers the process and it is then for the PM to verify that the notice has been correctly served. The notice must specify the circumstances and it must state that the contractor is, or expects to be, entitled to an increase in the contract sum under clause 46(1). Applying these criteria, it should be relatively easy to decide whether the contractor has complied.

If the contractor complies with clause 46(3) in its entirety, it is for the QS to notify it within 28 days from receipt of all the details and evidence of the amount due. The ascertainment of expense is placed in the hands of the QS under clause 46(1).

'Expense' is defined in clause 43(6) as money expended by the contractor, but it does not include interest or finance charges. It has sometimes been argued that what is to be included in 'expense' is limited to money paid out. On that view, loss of profit would clearly be excluded. It is not thought that this is a correct view, because in law the word 'expense' is not necessarily restrictive to the extent of excluding loss. That was the view in *Re Stratton's Deed of Disclaimer*[20] where the phrase under consideration was 'at the expense of the deceased'. That phrase has marked differences, of course, from the phrase in GC/Works/1(1998) 'incurs any expense'. Different wording was considered in a charterparty case where the Court of Appeal took a more restrictive approach when considering the phrase 'any expense in shifting the cargo' was at issue.[21] There were several clauses in the charterparty which drew a distinction between 'expense' or 'expenses' on the one hand and 'time occupied' on the other. In

[19] *Tersons v Stevenage Development Corporation* (1963) 5 BLR 54. In *Hersent Offshore v Burmah Oil* (1979), 10 BLR 1, four months was held to be outside the period envisaged by those words.
[20] [1957] 2 All ER 594.
[21] *Chandris v Union of India* [1956] 1 All ER 358.

the circumstances, the then Lord Justice Denning was firmly of the opinion that 'expense' in the context meant 'money spent out of pocket and does not include loss of time'.[22] It is thought that expenses actually incurred would include any true additional overhead costs to the contractor, for example, the cost of additional supervision, and the cost of keeping men on site, and on the wider interpretation the amount recoverable would extend to fixed overheads such as head-office rent and rates and so on.[23]

Although these clauses expressly exclude interest or finance charges however they are described, clause 47 deals with the circumstances in which the contractor may recover finance charges.

Finance charges

There are two circumstances in which the employer must pay finance charges to the contractor. They are that money has been withheld from the contractor because:

(1) either the employer, the PM or the QS has not complied with a time limit set out in the contract or any agreed variation to it; or
(2) the QS varies a decision after already having notified the contractor.

An example of item (1) would be a failure to pay within a prescribed time period. An example of (2) would be a decision by the QS concerning the amount of expense by which the contract sum was to be increased. In the latter case, if it did not result in money withheld, there would be no liability for finance charges. Therefore, a mistake which gave the contractor too much money and was subsequently varied, would not qualify. This position is dealt with in clause 47(4) which expressly requires the QS to take any overpayment into account. Therefore, the QS is entitled to set-off interest earned on overpayment against charges on underpayment.

Clause 47(5) provides that the employer is not liable to pay finance charges resulting from acts, neglect or default of the contractor or sub-contractors, any failure by the contractor or sub-contractors to supply relevant information or any disagreement about the final account. This is a most important and sensible clause which put the onus on the contractor, among other things, to provide appropriate back-up information and to do it promptly. The finance charges are set in accordance with the percentage to be inserted in the abstract of particulars compounded quarterly on set dates above Bank of England rate to the clearing banks.

Clause 47(3) is unusual. It singles out failure to certify money as a trigger for finance charges provided that it results from one of the circumstances set out in clause 47(1). The applicable period for the charges is between the date on which the certificate should have been issued and the date when, in fact, it was issued under clause 50. Clause 47(6) is noteworthy. It is an attempt to exclude liability for interest and finance charges under the guise of what are usually termed special damages.[24] Whether it would be effective if challenged under the Unfair Contract Terms Act 1977 is uncertain.

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[22] *Chandris v Union of India* [1956] 1 All ER 358 at 360 per Denning LJ.
[23] See also the discussion in Chapter 5, Section 5.1 in relation to 'loss and expense'.
[24] See the consideration of damages in Chapter 5, Section 5.2.

15.4 Valuation of instructions

15.4.1 Commentary

For the purpose of these clauses, instructions are considered to encompass variation instructions (VI) and other instructions. Clause 40(1) helpfully makes clear that if the PM issues further drawings, details, instructions, directions and explanations, they must be treated as instructions for the purposes of the contract. The variation or modification of all or any of the specification, drawings or bills of quantities or the design, quality or quantity of the Works is dealt with under clause 40(2)(a). Clause 40(5) allows the PM in any VI to require the contractor to submit a quotation for the cost of compliance. Valuation of VIs is dealt with under clause 42 and other instructions are valued under clause 43. Clause 41(2) places an obligation on either the PM or the QS to include the cost of any disruption to or prolongation of both varied and unvaried work in the valuation of an instruction. There is no provision for the cost of such disruption or prolongation to be dealt with under clause 46. Therefore, unless the cost is included in the valuation under clause 41(2), the contractor cannot claim it elsewhere.

Alternative systems of arriving at the value of a VI are prescribed by clause 42(1):

- acceptance of a lump sum quotation; or
- valuation of the variation by the QS.

Where the PM has required a quotation, the quotation must show how it has been calculated, but the calculation apparently need not be very detailed. All that is required is that it shows the direct cost of compliance and the cost (not described as 'direct') of any disruption or prolongation resulting from compliance. However, although that may simply amount to two lump sum figures, the contractor is obliged to include sufficient other information to enable the QS to 'evaluate' the quotation. Evaluation involves ascertaining an amount[25] while to 'value' is to estimate a value or to appraise.[26] It seems, therefore, that the QS's duty is more onerous when a quotation has been required and that is precisely right of course. Clause 42(3) allows 21 days from receipt for the PM to notify the contractor whether or not a quotation is accepted. If the QS is not prepared to agree the contractor's quotation, the QS may negotiate and agree some other figure. Clause 42(4) makes clear that if either the contractor fails to provide the lump sum quotation or the parties fail to agree, the PM must instruct the QS to proceed to value the VI. It appears, however, that clause 42(1) gives the QS the option of accepting a quotation or valuing the variation as though no quotation had been given.

The principles of valuation of variations are very similar those under the JCT contracts as explained in chapter 13. Clause 42(5) states that where a QS who is required to value a VI must do so in accordance with the following rules:

[25] *The Concise Oxford Dictionary*.
[26] *The Concise Oxford Dictionary*.

- By measurement and valuation at the rates and prices for similar work in the bills of quantities.
- If it is not possible to value by measurement and valuation, at rates and prices deduced from the rates and prices.
- By measurement and valuation at fair rates and prices having regard to current market prices, if it is not possible to value by the rates and prices for similar work.
- Where it is not possible to value alterations or additions by any of the foregoing methods, then it must be valued by value of materials used and the plant and labour used following the basis of charge for daywork in the contract. Clause 42(12) deals with the contractor's obligation to produce vouchers, but there is no obligation for the QS formally to verify the vouchers. Nevertheless, the contemporary vouchers or daywork sheets will usually be the best evidence of the time and resources spent by the contractor.

Where a VI results in a saving to the contractor, the saving must be passed onto the employer by decreasing the contract sum to the amount determined by the QS. It is clear that the QS is given considerable discretion. In the case of a variation which would normally be valued in accordance with options 42(5)(a) or 42(5)(b), clause 42(11) permits the QS to ascertain the value by measurement and valuation at fair rates and prices if the QS is of the opinion that the VI was issued at a time or is of such content that it is unreasonable to value it in the normal way.

The QS must take account of any disruptive effect on work which is not within the direct scope of the VI. Strictly this must be done by adjusting the rates of the work which has been disrupted not by adding to the value of the VI itself.

Useful deadlines are imposed. Clause 42(7) stipulates that no later than 14 days after the QS requests it, the contractor must provide any information the QS requires to enable the valuation of a VI or to determine any expense in complying with any other instruction. There is a corresponding requirement on the QS who must respond with the valuation not later than 28 days after receiving the information requested. Cynics may say that the QS can delay the valuation by the simple expedient of requesting more and more information. Although no provision can be foolproof, the draughtsmen of this contract seem to have devised a quite subtle method of avoiding common abuses by imposing deadlines on both parties. The contract ensures that if a valuation has not been notified to the contractor within 42 days of a request for information by the QS, either the contractor or the QS must be in breach. It seems that clause 41(4) read in conjunction with clauses 42(7) and (8) does not entitle the QS to request information on more than one occasion in respect of each VI. Moreover, the quantity surveyor has a duty to value if the contractor fails to provide the information. Such valuation, of course, will be based on whatever information is available. It is no part of the quantity surveyor's duty to guess what the contractor could have provided.

If the contractor disagrees with the valuation under clause 42(5) it must give reasons and its own valuation to the QS within 14 days of receipt of notification otherwise it is to be treated as having accepted the QS valuation and the contractor is precluded from any further claim for the same VI.

Clause 43 provides for the adjustment of the contract sum in two sets of circumstances, as follows.

Clause 43(1)(a)

This is effectively a provision for the recovery of additional expense. The contract sum must be increased by the amount of any expense which is more than what is actually provided for in the contract or which the contract reasonably foresees as a result of any instruction other than a VI. The expense must be incurred by the contractor properly and directly.

The scope of this clause is broad. Expense incurred consequent on complying with an instruction under many headings set out in clause 40(2) would be reimbursable. Clause 40(2) authorises the PM to issue instructions in regard to:

(a) Variation of the specification, drawings or bills of quantities, or the design, quality or quantity of the Works.
(b) Discrepancies within the specification, drawings and bills of quantities or between any of them.
(c) Removal from the site of any things intended to be incorporated and the substitution of such things by any other things.
(d) Removal of work and the carrying out of replacement work.
(e) Order in which the Works should be carried out.
(f) Hours of working, overtime or night work.
(g) Suspension of carrying out of the Works in whole or in part.
(h) Replacement of operatives.
(i) Opening up of work for inspection.
(j) Making good of defects.
(k) Clause 38 cost savings.
(l) The carrying out of emergency work.
(m) Use or disposal of excavated material.
(n) Actions after discovery of antiquities and the like.
(o) Actions for the avoidance of nuisance and pollution.
(p) Contractor's quality control accreditation.
(q) Any other matter which the PM thinks necessary.

It is easy to see that the contractor could incur expense following an instruction to change the hours of working or to suspend part or the whole of the Works. Indeed every instruction issued by the PM could potentially involve the contractor in expense. The expense must be directly incurred. In other words it must be akin to damages at common law.[27]

The contract mechanism (clause 43(2)) does not require the contractor to make a claim or even an application for reimbursement as would be the case under the JCT contracts. The trigger is the compliance on the part of the contractor with an instruction. The straightforward meaning of the words of the clause are that the operative date is the date on which the instruction has been entirely complied with rather than the date on which compliance begins. The contractor is to submit the information referred to in clause 41(4) within 28 days of compliance. There are two points of note. The first is that nothing prevents the contractor submitting information before compliance is completed except for the second point which is that the

[27] See also Chapter 5, Section 5.2 on the meaning of 'direct'.

information referred to in clause 41(4) is the information required by the QS so that valuation etc. can take place. 'Required' is a curious word. It can have an active or passive connotation. If the information must be actively required by the QS, the provision becomes a nonsense, because the contractor cannot know what information to provide until the QS has informed it. If the QS does not inform the contractor until after 28 days from compliance, the contractor cannot possibly comply with the timetable. The only sensible interpretation to give to 'required' in clause 41(4) is passive. In other words, the contractor must provide the information which, viewed objectively, the QS will need (require) in order to determine the expense.

The contractor has 14 days, from receipt of the notification by the QS of the expense which has been determined, in which to notify the QS of the reasons for any disagreement with the amount and to submit the contractor's own estimate of what the amount should be, otherwise the contractor will be taken to have accepted the QS determination. Clause 43(4) shares exactly the same wording as clause 46(6) and the comments on that clause are also applicable here.

Clause 43(1)(b)

This deals with the situation where the contractor makes a saving in the cost of the execution of the Works as a result of complying with an instruction (excluding a VI). The contract sum is to be decreased by the amount of that saving. Whether the instruction results in an addition or reduction to the contract sum, the amount is to be calculated by the QS. The QS would be expected to do this in accordance with the usually recognised principles discussed elsewhere in this book.