Chapter 16

Claims under the ACA Form of Building Agreement (ACA 3)

16.1 Introduction

The first edition of a *Form of Building Agreement* (ACA) and a matching Form of Sub-Contract was published in October 1982 by the Association of Consultant Architects. It was drafted by one of the original co-authors of this book, Professor Vincent Powell-Smith who also authored a guide to the Form. The first edition received some criticism, some of which it must be said was probably due to unfamiliarity of the commentators with the radically simple structure and language. The second edition of the Agreement (ACA 2) was published in 1984 with considerably revised text taking valid criticisms into account. It was revised again in relatively minor aspects in 1990, more significantly in 1995 and in 1998 the third edition (ACA 3) was published to take account of the Housing Grants, Construction and Regeneration Act 1996. Further revisions have been made, the latest at the time of writing being in 2003. ACA 3 can be used for design and build contracts, as well as the usual traditional contracts where the architect produces all the design and construction information. It can be used with various combinations of drawings, schedules of rates, specification and bills of quantities. A particular feature is the inclusion of alternative clauses and the option to amend time periods for carrying out various duties. Although still not immune to criticism, the contract is relatively easy to understand, and it is very flexible in use.

Its most vociferous critics have been contractors who have tended to look upon ACA 3 as an onerous contract. Such criticism and the reluctance of some contractors to tender on the basis of this contract has resulted in it being less widely used than anticipated or indeed than as merited given the quality of the drafting. In fact, it is a useful contract form and the powers and duties of the parties are clearly set out. It should pose fewer problems for contractors than some other contract forms, because the drafting leaves the parties in no doubt about their responsibilities. Hence, contractors can identify the risks very clearly and price accordingly.

From an employer's point of view it has a disadvantage, which it shares with GC/Works/1(1998) and any independently drafted contract, in that the ACA Form is not a negotiated document (unlike the JCT Forms) and will be construed by the courts *contra proferentem.* The effect of that is that any ambiguities in it which are not capable of being resolved by any other method of construction may be construed

Building Contract Claims, Fifth Edition. David Chappell.

against the party putting it forward, usually the employer. Moreover, ACA 3 will be construed as the employer's 'written standard terms of business' for the purposes of s. 3 of the Unfair Contract Terms Act 1977. The Act limits the extent to which liability for breach of contract, negligence or breach of duty can be avoided or restricted by contract terms. The JCT Forms are not so affected, because they are agreed by the whole industry; the ACA Form is not agreed by all sides of industry; it is simply an independently drafted contract.

The provisions of ACA 3 differ from the corresponding JCT provisions and, indeed, the provisions of other standard forms and, therefore, they will be considered in some detail. For example, the extension of time provision under clause 11.5 is available in two options, one of which is very narrow and excludes adverse weather, strikes and unforeseeable shortages in the availability of labour and materials. It merely covers events which are the responsibility of the employer either directly or through agents and which would set time at large in the absence of a provision to extend time. The second option is on more traditional lines and includes risks which are the fault of neither party; thus the employer is voluntarily taking the risks in those instances.

Claims for money arising as a result of acts, omissions or defaults of the employer or of the architect are covered in clause 7 and roughly equate to claims for loss and/or expense under JCT forms although arguably less inclusively than under SBC, IC or ICD. The basic principles involved in assessing such claims under ACA 3, whether for time or for money, are the same as when dealing with claims under SBC.

Damages claimable as a result of the contractor failing to complete the Works by the completion date or any extended date are available either as the usual liquidated damages or as unliquidated damages, which is quite unusual. Valuation of the architect's instructions is fairly straightforward, but with a few minor twists.

16.2 Extension of time and liquidated damages

The related matters of extensions of time and liquidated damages are included in clause 11. Both the grounds for extension of time and the calculation of damages are available in two options. The same clause gathers together all the provisions about time including provisions for postponement and, very unusually, for acceleration of the Works. Acceleration measures, where available under JCT contracts are subject to quotation and agreement.

16.2.1 Extension of time

This is dealt with in clauses 11.5–11.7.

16.2.2 Commentary

Clause 11.1 states that the employer must give the contractor possession of the site on the dates set out in the time schedule. This is said to be subject to clauses

11.6 and 22.4 and to anything in clause 1.3. Clause 11.6 is a procedural clause dealing with the granting of extensions of time and it is difficult to see any relevance to the employer's obligation to give possession of the site. Clause 22.4 certainly refers to possession of the site and stipulates that the contractor must give up possession upon service of notice of termination by either party. However, since this is dealing with the contractor's obligation to give up possession (after having received it), the clause does not directly affect the employer's duty to give possession in the first place. Making some action 'subject to' something else has the effect of modifying the first action or the right to take it in the light of something else. In this instance, the conclusion is that neither clause 11.6 nor clause 22.4 can give rise to restrictions on the first sentence of clause 11.1 except in the unlikely event that contractual termination takes place before the employer is due to give possession of the site.

The reference to clause 1.3 is more understandable, because clause 1.3 allows bespoke provisions to be inserted. It is possible that one of these provisions may affect the employer's duty although in light of the fundamental nature of the employer's duty to give possession, it is difficult to envisage a provision being inserted in clause 1.3 which affected the employer's duty while yet allowing possession to be given. If the employer is in breach of the requirement to give possession, the contractor may have a claim under clause 11.5 in either alternative or at common law. The contractor's duty is to immediately commence and proceed with the Works 'regularly and diligently and in accordance with the Time Schedule' until they are fit and ready for taking-over. If the Works (or a section of them) are not ready by the date shown in the time schedule (or as extended under clause) the architect is to certify to that effect in writing under clause 11.2. This is equivalent to the non-completion certificate in SBC, IC and ICD.

16.2.3 Grounds for extension of time

The grounds are given in clause 11.5 which is set out in alternative forms.

Alternative 1

This alternative provides for extremely restricted grounds for extension of time; restricted in fact to such grounds as would be likely to set time at large if there was no provision for extending time. The grounds on which extension of time can be claimed are, broadly speaking, all defaults of the employer or the architect. Usually, a failure on the part of the architect properly to exercise the duty to extend time for an employer act or default will result in the date fixed for completion ceasing to be applicable. The contractor's obligation will be to complete the Works within a reasonable time; usually referred to as time becoming 'at large'.[1]

Alternative 1 provides that an extension of time shall be granted to the contractor only in two sets of circumstances:

[1] *Percy Bilton Ltd v Greater London Council* (1982) 20 BLR 1.

- in the case of a failure by the CDM co-ordinator, the principal contractor (unless the contractor acts in either or both roles) or a designer to comply with all reasonable diligence with the CDM Regulations, or
- where there is 'any act, instruction, default or omission of the Employer, his servants or his agents, or of the Architect on his behalf, whether authorised by or in breach of this Agreement'. The contractor's entitlement to an extension of time on these grounds is qualified: the act, etc. relied on must in the reasonable opinion of the architect prevent the taking-over of the Works by the date stated in the time schedule. Obviously this is a limiting factor since the contractor must not only establish that there is a cause of delay, i.e. some act, etc., but also that this is causing delay in the architect's reasonable opinion. However, the reasonableness or otherwise of the architect's opinion is open to review in adjudication or arbitration and, indeed, in litigation as appropriate. It is thought that the inclusion of the word 'reasonable' means that the opinion must be objective and that, in forming the opinion, the architect must carry out a logical analysis in a methodical way.[2]

The clause also contains procedural provisions for the giving of notices by the contractor. Immediately it is reasonably apparent that the taking-over is being or is likely to be prevented by one of the acts specified in the clause, the contractor must serve written notice on the architect. The notice must specify the particular act, instruction, default or omission relied on. It is uncertain whether the wording is effective to include failures in respect of the CDM Regulations. Clearly, such failures are intended to be the subject of notice and it is likely that a court would assume that the parties expected the contractor to issue a notice in respect of such failures also even if not expressly included in the wording. In any event, the contractor must submit to the architect full and detailed particulars of the extension of time to which it believes it is entitled.

The contractor is under a further duty to keep the particulars up to date, by submitting such further particulars as necessary or requested by the architect, to enable the architect to carry out the duty to consider what extension of time is due. It should be noted that the architect is entitled to request the information 'from time to time', therefore, there is no limit placed on the timing of the requests. In turn, the provision of information by the contractor will have an effect on the timing of the architect's decision under clause 11.6. It is clear, as under other standard forms, that the architect may be in the position of deciding whether or not the architect's own actions or inactions have contributed to a delay. This is a very difficult position for the architect, because the more extension of time given to the contractor, the less damages the employer is entitled to recover and the contractor may well have grounds for seeking financial recompense. An architect who gave an extension of time on the grounds that the architect failed to provide information in due time may subsequently face legal action by the employer seeking to recover the amount of damages that otherwise, without such extension, would be recoverable from the contractor.

This option is limited in extent, because it does not cover events outside the control of the employer, the architect or the contractor. No extensions of time are possible for exceptionally adverse weather conditions, strikes and unforeseeable shortages in

[2] *John Barker Construction Ltd v London Portman Hotel Ltd* (1996) 50 Con LR 43.

the availability of labour or materials. No doubt contractors invited to tender under ACA 3 incorporating this option will adjust their tender prices accordingly. Contracts, after all, are about the distribution of risk and provided that the risk is known, it can usually be priced.

It used to be contended that the clause did not cover default, etc., by anyone (other than the architect) for whom the employer is vicariously responsible in law. However, that argument has little chance of success on current wording.

Alternative 2

The second alternative in clause 11.5 is drafted more widely and it has much more in common with JCT contracts although it has marked differences. It is more traditional and more likely to find favour with contractors. Whether that will translate into a lower tender is open to question.

There are eight grounds for extension of time in this alterative. Where they are similar to grounds already dealt with under JCT contracts, they are not explained in detail again here. The grounds are:

(a) *Force majeure.* This must relate to some matter which is not within the control of the person relying on it and it is certainly wider than the English law term 'act of God'. It has been said that:

> 'This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control. . . . Thus, war, inundations and epidemics are cases of *force majeure*; it has even been decided that a strike of workmen constitutes a case of *force majeure*.'[3]

It seems that any direct legislative or administrative interference would, of course, come within the term: for example, an embargo.

Force majeure in the context of ACA contracts has a rather more restricted meaning that might seem to be the case at first sight because many matters – such as war, governmental delays, etc., which are otherwise dealt with in the term – are covered expressly by the provisions of this clause. It seems that severe weather conditions are not within the term *force majeure* although major strikes probably are.[4]

(b) Loss or damage to the Works by a list of events which are usually categorised as insurance risks.

(c) War, hostilities (whether war be declared or not), invasion, act of foreign enemies, rebellion, revolution, insurrection, military or usurped power, civil war, riot, commotion or disorder. These are self-explanatory risks not specifically included in JCT contracts.

(d) Delay or default by governmental agency, local authority or statutory undertaker in carrying out work in pursuance of its statutory obligations in relation to the

[3] *Lebeaupin v Crispin* [1920] 2 KB 714, in which McCardie J quoted with approval the definition of the French writer Goirand.

[4] *Matsoukis v Priestman & Co* [1915] 1 KB 681, where *force majeure* was held to include the general coal strike and the breakdown of machinery.

Works. It should be noted that there are no grounds for extension of time if a statutory undertaker, such as a water supplier, is carrying out its work as part of contractual obligations.[5] The only delay that will qualify for extension of time under this head is that caused by a statutory undertaker carrying out work in pursuance of its obligations in relation to the Works.

(e) Any act, instruction, default or omission of the employer or of the architect acting for the employer, whether authorised by or in breach of the contract. For example, failure to give possession of the site (which is a breach of contract) is within this provision. This is included in alternative 1.

(f) Failure of the CDM co-ordinator, the principal contractor (if not the contractor), or a designer to comply with their duties under the CDM Regulations. A sub-contractor or supplier carrying out design functions is expressly excluded.

(g) Any instruction issued following the discovery of antiquities.

(h) Determination of a named sub-contract as a result of its breach or repudiation by the sub-contractor. This is a valuable right for the contractor which is not applicable to ordinary domestic sub-contracts.

The contractor will certainly prefer this alternative in preference to the more restricted alternative 1.

There is an important limitation on the contractor's right to an extension of time under this alternative: the onus of proof is on the contractor. It is stated to be entitled to an extension of time on one or more of the grounds only to the extent that it proves to the satisfaction of the architect that the taking-over of the Works by a specific date stated in the time schedule is prevented. The change in wording is noteworthy. The contractor is required to prove 'to the satisfaction of the Architect'. There is no mention of the architect's 'reasonable opinion'. The standard of proof required in this instance the balance of probabilities. On the face of it, it is arguable that where the second alternative is used the architect's satisfaction need not be reasonable.

The proviso to the clause is important and governs all those events listed above except in respect of delays caused by acts or omissions of the employer or the architect acting on the employer's behalf. (The reason for the exception is clear: without the exception it might be argued that the employer would be liable to forfeit any right to liquidated damages if the contractor failed to give notice.[6])

Except in that excepted situation, no account is to be taken of any of the other listed grounds unless the contractor gives written notice to the architect immediately it becomes reasonably apparent that the taking-over is being or is likely to be prevented. It follows that no notice is required where the delaying cause is acts or omissions of the employer or the architect acting on the employer's behalf. For the other causes, the notice must be specific. It must specify the circumstance or circumstances relied on and must be followed up as soon as possible by full and detailed particulars of the extension of time to which the contractor believes itself entitled. Again, the contractor must keep the particulars up to date as necessary or as requested by the architect may require to enable the full and proper discharge of the architect's duties

[5] *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* (1980) 15 BLR 8.
[6] *Dodd v Churton* [1897] 1 QB 562.

under this clause. An important question is whether the giving of notice is a condition precedent to the granting of an extension of time in all but the excepted case. A strict interpretation of the wording suggests that it is a condition precedent in this instance.[7] In any event, the contractor must not delay the giving of notice in all cases.

Clause 11.6 deals with the exercise of the architect's duty in granting an extension of time and it applies to both alternatives. There are two situations. The first case is dealt with in clause 11.6(a) and it is the normal situation. After the architect has received the contractor's particulars referred to in clause 11.5 the architect must make a decision about an extension of time. The architect is to do so 'so soon as may be practicable, but in any event not later than 60 working days after receipt' of the contractor's particulars. It is open to the parties to insert a different time period at the time the contract is executed. It appears that the period of 60 working days does not begin to run until the receipt of the last particulars referred to in clause 11.5, i.e. those submitted on the architect's request, or which are necessary to update the position. As noted earlier, the wording of clause 11.5 appears to allow any number of requests at any time if the architect is so minded. Given a difficult architect, the commencement of the 60 day period could be very flexible.

The second situation concerns act, instruction, omission, etc. where the contractor has failed to provide the particulars referred in clause 11.5. The contractor's failure to submit the required particulars is not fatal to its claim for an extension. In this case, the architect may exercise duties to extend the contract period at any time, i.e. until the architect becomes *functus officio*, which is the case after the issue of the final certificate under the contract. The architect must act if the contractor fails to give the necessary particulars in order to preserve the employer's right to liquidated damages and prevent time becoming at large. The giving of initial notice is made a proviso under alternative 2 of clause 11.5 except in respect of acts, instructions, omission, etc. Therefore, whatever may be the true position in regard to the other seven grounds, the giving of a notice under this ground is not a condition precedent. Under alternative 1 of 11.5, the giving of notice is not made a proviso and it is thought that it is not a condition precedent either although it is accepted that, since the other alternative would be struck out, a court would not be entitled to look at it to assist in the construction of the remaining clause.[8]

The clause proceeds to set out the architect's duty to grant the contractor such extension of time as the architect estimates to be fair and reasonable. The duty is similar to the duty of an architect under SBC. There are two provisos. The first proviso is important. Where the Works are divided into sections, an extension of time given for the taking-over of one section does not necessarily entitle the contractor to an extension for the taking-over of another section or of the Works as a whole. There is a common misconception that an extension of time for one section has a knock-on effect on other sections. That is particularly the case where the employer has unwisely specified specific dates for possession of subsequent sections which are actually dependent on the first section. In order to achieve a practical outcome,

[7] This question is discussed in Chapter 6, Section 6.6.2.

[8] There is some authority to say that deleted words may be examined as an aid to the construction of words left in, but the weight of authority seems to favour the contrary view that words crossed out may not be considered. See *Wates Constructon (London) Ltd v Franthom Property Ltd* (1991) 7 Const LJ 243.

dependent sections should have their dates for possession expressed as related to the relevant takeover dates.[9]

The second proviso is to the effect that the contractor cannot rely on delays attributable to negligence, default or improper conduct by the contractor itself or by its 'sub-contractors or suppliers at any tier' or its or their servants or agents in order to secure an extension of time. That would be the case in any event under the general law, but it is useful to have the position set out clearly to put the matter beyond doubt. Note that the contractor is not entitled to any extension of time for delays caused by sub-contractors or suppliers (named or domestic) even to the limited extent laid down by the House of Lords in *Westminster Corporation v J Jarvis & Sons Ltd*,[10] as regards nominated sub-contractors under the 63 JCT Form. The words 'at any tier' are sufficient to enlarge the scope of this clause to include sub-sub-contractors.

The final sentence of clause 11.6 makes clear that the architect is empowered to take into account any omission instructions which have been issued when deciding upon the length of extension of time. An omission instruction may, of course, and usually will, if issued early enough, effect a saving of time; and the architect can take account of any such instructions provided only that they are issued before taking-over of any section or of the Works. It is doubtful that an instruction issued after taking-over would rank as an instruction properly issued under the terms of the contract in any event.[11] Therefore, an omission instruction may have the effect of discounting what would otherwise be an extension of time. For example, the architect may have decided that certain instructions and other events entitle the contractor to 15 days extension of the contract period. However, the effect of an omission instruction may be to remove 5 days from the time necessary to complete the Works. Therefore, the architect would be entitled to grant an extension of time of only 10 days.

Clause 11.7 deals with a review of extensions of time granted. The architect has a duty to confirm the dates for the taking-over of the Works or any section which have been previously stated, adjusted or fixed. Alternatively, the architect may fix a later date than previously fixed, whether as a result of reviewing any clause 11.6 decisions or because there has been some act, instruction, default or omission of the employer or the architect which has occurred after the date stated in the clause 11.2 certificate. The architect must then notify the contractor of the final decision. The reference to a 'final decision' indicates that the architect has power to act only once under this clause. No deadline is specified for the exercise of this duty. The architect must act 'within a reasonable time after the taking over of the Works'. What is a reasonable time is always a vexed question. At one extreme the power must be exercised before the architect is *functus officio* (which would be the case on the issue of the final certificate). However, that appears to be a time greater than is reasonable. In deciding a reasonable time, the architect must take all the factors into account; for example, the availability of necessary information to allow the carrying out of the review. As a matter of practicality, the contractor cannot be allowed a limitless period in which

[9] See Chapter 2, Section 2.6 for a discussion on the effect of dividing the Works into sections.
[10] (1970) 7 BLR 64.
[11] *New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd* [2001] BLR 74.

to supply information. This provision differs from the similar provision under SBC, because under this clause the architect cannot reduce an extension of time already granted but only confirm the date previously stated, or fix a date which is later than previously stated. Moreover, SBC stipulates 12 weeks from practical completion in which the architect must act.

Clause 11.8 is unusual in being an acceleration clause. Where so-called acceleration clauses occur in other contracts, they tend to amount to no more than a provision which allows the employer to seek a quotation from the contractor for accelerating the progress of the Works. Essentially, under other contracts, acceleration is by agreement only. Naturally the parties (employer and contractor) can always opt to agree acceleration measures whether or not expressly included in the contract provisions. The unique character of clause 11.8 is that it empowers the architect, at any time, to issue an instruction to bring forward or postpone dates shown on the time schedule for the taking-over of the works or any section or part.

Although clause 11.8 does not expressly state this (and, therefore, the contractor is not concerned about it), it is implied in the architect's terms of engagement that the employer's agreement must be obtained before giving an acceleration or postponement instruction. There is no provision for the contractor to object, but the architect must not issue the instruction unreasonably. Therefore, any instructed acceleration must not only be possible, it must be a practical proposition. If the architect issues such an acceleration or postponement instruction, the contractor must comply with it immediately and the clause 11.3 provision regarding liquidated or unliquidated damages applies from the adjusted date.

The architect must ascertain and certify a fair and reasonable adjustment to the contract sum in respect of the contractor's compliance with an acceleration or postponement instruction, together with any damage, loss and/or expense which the contractor suffers or incurs as a direct result of the instruction. Although the adjustment to the contract sum may comprise an addition or a deduction, in practice, both acceleration and postponement measures will result in the contractor incurring additional costs. There is a proviso to the effect that the architect may require the contractor to give an estimate of the cost of complying with the instruction before it is issued. If the architect requests such an estimate, the relevant provisions of clause 17 (other than the reference to extension of time) will apply.

If the architect adjusts the completion date either by granting an extension of time under clause 11.6 or by issuing an instruction for acceleration or postponement under clause 11.8, clause 11.9 states that the contractor must submit a revised time schedule to the architect within 10 working days of the architect's notice or instruction for the architect's consent. The revised time schedule then takes the place of the original time schedule. The clause does not state what is to happen if the architect cannot consent for some reason. The contract appears to rely upon the common sense of the parties to come to an agreement.

16.2.4 Liquidated damages

Provision for recovery of liquidated damages by the employer if the Works are not fit and ready for taking-over by the date or dates in the time schedule is contained

in Clause 11.3, alternative 1. When one is used to the terminology, the provision is unremarkable. The rates are in the time schedule. The period for which liquidated damages may be deducted runs from the date of taking-over stated in the time schedule, or any adjusted date, to the date of taking-over under clause 12 or under the provisions of clause 13. Where the rate is stated in the time schedule as 'per week' it is only full weeks which may be counted. It is not permissible to amend the rate by calculating the damages pro rata as a proportion of a week.[12] Inserting the words 'per week or part of a week' does not rectify the position; it makes it worse. 'Per week or part of a week' means that the rate is to be applied for each full week and also for any part of a week. Subject to proof to the contrary, such a description amounts to a penalty which would be unenforceable. The liquidated damages figure stated will be exhaustive of the employer's rights to claim compensation which arise directly out of the delay in completion.[13] In common with SBC, IC and ICD, deduction of liquidated damages is subject to the condition precedent of the issue by the architect of a clause 11.2 certificate that the Works (or a section) are not fit and ready for taking-over. If such certificate is issued and, of course, subject to a written withholding notice in accordance with clause 16.6, the clause permits the employer to deduct liquidated damages at the rate or rates stated in the time schedule. The employer may deduct liquidated damages from the amount that is certified as payable to the contractor from time to time. Alternatively, the employer may recover the liquidated damages from the contractor as an ordinary debt by one of the dispute resolution procedures in the contract.

16.2.5 Unliquidated damages

Alternative 2 of clause 11.3 is unusual in that it is a provision for the recovery of unliquidated damages. In other words, it is a provision for the recovery of the ordinary kind of damages to which the employer would be entitled at common law for the contractor's breach of contract. To that extent, it may be argued that it is always open to the parties to strike out all the provisions for liquidated damages and that would give the same effect, because it is liquidated damages which is a contrived or agreed remedy and the absence of a liquidated damages clause would leave the employer free to resort to common law remedies. The importance of this clause is that, subject to the issue of a withholding notice under clause 16.6, it confers on the employer a right to deduct such damage, loss and/or expense from the amount which would otherwise be payable to the contractor in any certificate, i.e. it confers an express right of set-off on the employer, who will quantify the amount. There is no express provision for the employer to recover the damages as a debt, because if recovery is pursued through one of the dispute resolution procedures in the contract, the employer would be in exactly the same position as for any other common law claim for damages – the breach and the damages would have to be proved.

The clause provides that, subject to the issue of a clause 11.2 certificate, the employer is entitled to recover from the contractor such damage, loss and/or expense

[12] *Bramall & Ogden v Sheffield City Council* (1983) 1 Con LR 30.
[13] *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30.

as may be suffered arising out of the contractor's failure to meet its obligations under clause 11.1. The big difficulty will be in calculating the damages. The clause gives no assistance in this regard, but the damages will be the equivalent of unliquidated damages at common law, which are recoverable on proof of actual loss. Therefore, the employer will have to calculate the amount of damages directly flowing from the delay in completion based on the principles set out in *Hadley v Baxendale*.[14] Only damages within the reasonable contemplation of the parties at the date the contract was executed will ordinarily be eligible. The wording of the clause is very broad; and the use of this provision is unlikely to find favour with contractors who might be well advised to resist it. It is a substantial departure from normal procedures in the construction industry although an employer, who might find it difficult to pre-estimate what might be a substantial loss, must find it attractive.

16.2.6 Adjustment of damages for delay

Clause 11.4 is applicable whichever of the alternative versions of clause 11.3 is used. It is important in those instances where the architect has issued a clause 11.2 certificate, the employer has deducted liquidated or unliquidated damages and the architect then grants a further extension of time and adjusts the taking-over date to a later date. The clause stipulates that the employer is to repay any excess damages so deducted for the period between the former taking-over date and the later date as adjusted. The issue of a further extension of time will clearly invalidate any existing clause 11.2 certificate. Unlike the position under SBC, IC and ICD, there is no express provision for the architect to issue a further clause 11.2 certificate after a further extension of time. Because the issue of such certificate is a condition precedent before either liquidated or unliquidated damages can be deducted, it is thought that the wording of clause 11.2 is probably wide enough to allow the architect to issue further certificates following fresh extensions of time. The previous edition of this contract contained an entitlement for the contractor to have interest added to the retention repaid. That provision has now been removed and, without such express provision, it is not thought the contractor would have any right to interest in these circumstances.

16.3 Prolongation and disruption

16.3.1 Introduction

The opportunity for this type of claim is more limited than under some other standard forms. The principle of a claim for damage, loss and/or expense is related to disruption of the regular progress of the Works or of any section or things which delay their execution in accordance with the dates stated in the time schedule, where the disruption or delay is caused by any act, omission, default or negligence of the

[14] (1854) 9 Ex 341.

employer or of the architect or a failure to comply with the CDM Regulations 2007 by certain parties.

16.3.2 Clause 7 Employer's liability

Clause 7 enables the contractor to make a claim for damage, loss and/or expense.

16.3.3 Commentary

Basic provisions

This clause entitles the contractor to claim reimbursement for any damage, loss and/or expense which it suffers or incurs in consequence of delays and disruptions caused by any act, omission or default (save architect's instructions) of the employer or the architect or a failure to comply with the CDM Regulations 2007 with all reasonable diligence by the CDM co-ordinator, the principal contractor (other than the contractor itself) or a designer which is not the contractor, a sub-contractor or supplier. Delays and disruptions which result from architect's instructions, a common ground of claim, are dealt with separately by clauses 8 and 17. The machinery of clause 7 is echoed by the very similar procedures in supplemental provisions in JCT DB Contract. In issuing the contract form, the ACA originally stated that under it 'the contractor cannot claim . . . additional money for a series of things that most clients consider to be normal building risks'. The scope of this clause is limited mainly to actions or defaults of the employer and the architect; matters which normally would be considered to be matters which the contractor could, in any event, pursue against the employer at common law.[15]

An important point and one often overlooked by contractors and architects alike is that the contractor is only entitled to have the relevant amounts included in interim certificates if the contractor complies precisely with the provisions of clauses 7.2 and 7.3. That is clear from clause 7.5. If the contractor fails to comply with the contract machinery which lays down procedures for the giving of notice and the submission of estimates, the contractor will be unable to recover any such amounts until the final certificate. Worse, the contractor will be unable to recover any interest or finance charges in respect of the intervening period.

The wording used in these provisions repays careful scrutiny. It is too easy to assume that these provisions are the same as the equivalent provisions in SBC. That would be a wrong and possibly costly assumption for both parties. There are several interesting points. It has already been noted that the scope for claims is severely limited. When considering 'damage, loss and/ or expense', it is arguable that the contractor is entitled to recover more for the same default than would be claimable under SBC. There is an important difference in the wording used in ACA 3 compared to the equivalent provision in JCT Forms. In ACA 3 clause 7 the words 'damage, loss and/or expense' are not qualified by the word 'direct'. On one view the use of the

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

phrase 'in consequence of such disruption or delay' indicates that a claim under clause 7 would also extend to cover consequential loss and cover those heads of claim which, if made as damages at common law, are not excluded if the employer, at the time of entering into the contract, knew or must be taken to have known were liable to result from the act, omission, default or negligence complained of.[16] In passing, it should be noted that the word 'damage' is omitted from the first mention of loss and/or expense in clause 7.3 although retained later in the same clause and in clauses 7.1, 7.2, 7.4 and 7.5. However, it is also omitted in clause 17.1(c). Presumably the first omission is simply a typographical error.

The common law position regarding damages for breach of contract has been put quite simply as follows:

> 'The governing purposes of damages is to put the party whose rights have been violated in the same position, so far as money can do, as if his rights had been observed.'[17]

Although the basic principle is quite clear, the way that principle is interpreted in various situations can raise problems. The defaulting party is not liable for all loss actually resulting from a particular breach. The law sensibly sets a limit to the loss for which damages are recoverable. The limit is sometimes defined by reference to 'foreseeability' or sometimes by reference to whether a particular effect is 'within the contemplation of the parties'. In both practical and legal terms the contractor's entitlement is to recover only that part of the resulting loss that was reasonably foreseeable or within the contemplation of the parties as liable to result from the breach relied on. This entitlement is to be judged at the time the contract was entered into.[18] Therefore, it appears that under clause 7.1 the amount potentially claimable by the contractor includes all foreseeable consequential loss. Loss of profit would be included.[19]

Act, omission or default

The words 'act, omission, default or negligence' are very important because some of the concepts enshrined in them are very difficult to express. Although the reference is only to employer and architect, it is likely that the clause includes others for whom the employer is vicariously responsible in law. Negligence presents very little practical difficulty, because once the facts are established it is usually clear whether a duty of care in the legal sense arises and, if it does, whether it has been broken. In the vast majority of situations covered by clause 7, the contractor would have a right of action against the defaulting party, but the scope of this phrase is not to be limited by considering whether the contractor could sue employer or architect direct.

The legal meaning of 'default' has been considered, albeit in the very different context of a contract for the sale of real property:

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[16] *Hadley v Baxendale* (1854) 9 Ex 341.
[17] *Victoria Laundry (Windsor) v Newman Industries, Coulson & Co* [1949] 1 All ER 997 at 1002 per Asquith LJ.
[18] *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] 1 All ER 525. See the more comprehensive consideration of this in Chapter 5, Section 5.2.
[19] *Wraight Ltd v P H & T Holdings Ltd* (1968) 13 BLR 27.

> 'Default must, I think, involve either not doing what you ought or doing what you ought not, having regard to your relations with the other parties concerned in the transaction; in other words, it involves the breach of some duty you owe to another or others. It refers to personal conduct and is not the same thing as breach of contract.'[20]

In the context of a construction industry contract, when construing similar words to the present in an indemnity clause and having cited with approval the above passage, it was said that:

> 'default would be established if one of the persons covered by the clause either did not do what he ought to have done, or did what he ought not to have done in all the circumstances, provided of course . . . that the conduct in question involves something in the nature of a breach of duty so as to be properly describable as a default'.[21]

This appears to be the correct interpretation to be put upon the word 'default' in clause 7.1, and this view was reinforced by *Greater London Council v The Cleveland Bridge and Engineering Co. Ltd*,[22] which emphasised that 'default' is a narrower term than breach of contract. However, when considering the wording of a bond, the Court of Appeal in *Perar BV v General Surety & Guarantee Co Ltd*[23] held that 'default' did not mean anything other than a breach which was its common meaning and the meaning to be derived from the context of the bond and the reference to damages. Therefore, in this contract, the precise meaning currently remains open to debate.

CDM Regulations 2007

The ground which centres on the failure of certain parties to comply with the CDM Regulations 2007 is referring to a breach of statutory duty. Such breaches are not usually actionable unless so stated in the relevant legislation or the statutory duty is made into a contractual duty by including in the contract a term to the effect that the obligation to comply with the Regulations is a term of the contract. In this instance, it is expressly made the subject of a claim by the contractor under clause 7.1.

It should not be imagined that it is easy to establish a claim under clause 7, and it is important to note that the contractor must be able to show that it 'suffers or incurs damage, loss and/or expense' in consequence of the disruption or delay occasioned by the employer's (or architect's) act, omission, etc. or the failure to comply with CDM Regulations. The damage, loss and/or expense must have been caused by the breach and not merely be the occasion for it.[24]

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[20] *In re Bayley Worthington & Cohen's Contract* [1909] 1 Ch 648 at 656 per Parker J.
[21] *City of Manchester v Fram Gerrard Ltd* (1974) 6 BLR 70 at 90 per Kerr J.
[22] (1987) 8 Con LR 30.
[23] (1994) 66 BLR 72. In this case, the court declined to follow *Northwood Development Company Ltd v Aegon Insurance Company (UK) Ltd* (1994) 10 Const LJ 157, which held that 'default' was wider in meaning than 'breach' and included non-fulfilment of the contractor's obligation under the contract, whether or not the contractor was in breach.
[24] *Weld-Blundell v Stephens* [1920] AC 956.

In other words, the loss, etc. must follow directly and in the natural course of things from the event that gives rise to it; and the event giving rise to the claim is the act, omission, default or negligence of the employer or of the architect or the failure to comply with CDM Regulations resulting in delay or disruption.

Time schedule

A further difficulty for the contractor is that the disruption or delay must be referable to the dates stated in the time schedule. The time schedule is thus the yardstick against which delays and disruption are to be measured and if there is no measurable impact on the time schedule, the contractor will have no basis for claim under this clause. The time schedule is a feature peculiar to ACA 3, although similar in some respects to the abstract of particulars under GC/ Works/1(1998). The time schedule is not the same thing as the contractor's programme. The time schedule is a contract document whereas the contractor's programme may be described as a contractual document, if required under the terms of the contract, but no more. The time schedule is printed at the back of the form of agreement. There are alternatives: one providing for the normal situation where the Works are completed as a whole; the other for the situation where the Works are divided into sections. Where the Works are to be completed as a whole, the time schedule contains the following information:

(a) Date for possession (clause 11.1).
(b) Date for taking-over and commencement of maintenance period (clause 11.1) (taking-over appears to be similar to practical completion except that the architect seems to be able to decide that the Works are fit and ready for taking-over at a somewhat earlier stage than that at which they would be eligible for certification as having achieved practical completion under JCT forms).
(c) Weekly rate of liquidated damages (clause 11.3). (If a daily rate is required the necessary amendments must be made to the wording. However, this item is to be deleted where the employer wishes to exercise the option of recovering unliquidated damages based on actual loss for late completion.).
(e) Length of maintenance period (clause 12.2).

Similar information is required for the alternative version of the time schedule used with the Works divided into sections. The final part of the time schedule which is common to both alternatives is headed 'Issue of Information'. Under the traditional contract procedure, where the architect is to be responsible for the preparation and issue of all drawings and specifications, etc., the architect should set out under this heading the drawings, details documents or other information which the architect will supply to the contractor together with the dates of proposed issue. This is a similar document to the information release schedule subsequently introduced into JCT 98 and SBC. The same reservations apply to this document as to the SBC information release schedule. In both cases, the architect is called upon to decide the order in which the contractor will require the information as well as accurately forecasting the dates on which it will be required. When the right of the contractor to set about construction of the Works in any order it sees fit is taken into

account,[25] the architect has an impossible task; which is why the production of an information release schedule under SBC is rare.

There is an alternative heading for use where the contractor is to supply drawings, etc., in which case the contractor is to complete it. Regular progress of the Works is to be judged against the dates in the time schedule and, under clause 7, failure by the employer or the architect to comply with those dates may give rise to a claim and will almost certainly do so if delay or disruption results.

Procedure

The claims procedure is set out in clauses 7.2 and 7.3. It is fairly straightforward, but the contractor must take care to comply with it precisely if it wishes to be reimbursed as the contract proceeds. The steps are as follows:

- The contractor must give written notice to the architect of any event giving rise to a claim. These are the events set out in clause 7.1. It should be noted that, unlike the position under SBC, the notice must be given by the contractor whenever such an event occurs even if, for one reason or another, the contractor does not wish to make a claim. Under SBC, the contractor need not make application if it does not wish to recover any loss and/or expense.
- Clause 7.2 requires the notice to be given immediately it becomes reasonably apparent that any event giving rise to a claim is likely to occur or has occurred. This is quite an onerous duty with which the contractor must comply if it wishes to recover damage, loss and/or expense as the work progresses.
- When the contractor makes its next interim application for payment after the issue of the notice, it must submit to the architect an estimate of the adjustment to the contract sum that it requires to take account of the damage, loss and/or expense which it has suffered prior to the date of submission of the estimate. The use of the word 'estimate', although often taken to mean 'an approximate judgment' or even 'a best guess' is here used in its strictly accurate sense.[26] Clause 7.4 requires the contractor to provide the documents, vouchers and receipts which are necessary to substantiate the estimate or as may be required by the architect'. The clause rather quaintly calls for 'such documents . . . as shall be necessary for computing the [estimate]' Since the estimate is already computed when the documents are to be provided, the purpose of the documents is not strictly to compute the estimate, but to substantiate it. It is difficult to know what may be required by the architect other than the information needed to substantiate the estimate, yet there is no doubt that, on its face, the clause empowers the architect to ask for anything. It is likely that the clause would be interpreted narrowly to embrace merely what the architect requires in order to form a view about the contractor's estimate. In practice, it is likely that most contractors will submit claims in traditional fashion together with substantiating documentation.
- The architect has 20 days, or however long the parties have agreed, to accept or reject the estimate. That period runs, not from the date of the contractor's applica-

[25] *Greater London Council v Cleveland Bridge & Engineering Co Ltd* (1984) 8 Con LR 30.

[26] See *Crowshaw v Pritchard & Renwick* (1899) 16 TLR 45, where the court considered that a contractor's estimate, dependent on its terms, may amount to a firm offer and then acceptance by the employer will result in a binding contract.

tion for payment, but from receipt by the architect of the estimate properly supported by other documents. Therefore, if the contractor is slow providing those supporting documents, the acceptance of the estimate and the inclusion of the amount in the next certificate will also be delayed. There is no provision for discussion or negotiation of the estimate, but in practice, no doubt, the stark wording of the contract will be modified by some discussion, albeit brief in view of the short timescale. If the architect accepts the estimate, the contract sum is to be adjusted accordingly and no more adjustments of the contract sum or payments can be made in respect of the same event. Therefore, if the contractor suffers damage, loss and/or expense, it must give immediate notice and then calculate the amount of its losses during the period up the next application for payment. But if the contractor makes a mistake and under-estimates the amount of its loss, acceptance by the architect will mean that the contractor will not be able to claim the shortfall thereafter either under the contract or by reference to dispute resolution. If the contractor underestimates, it has completely lost the chance to recover that money. Therefore, it is crucial that the contractor is accurate in its estimates. Obviously, if the architect rejects the contractor's estimates, the contractor still has the right to have the dispute referred to one of the dispute resolution methods in the contract.

- Clause 7.3 deals with the situation which may arise if one event results in continuing losses. If there are continuing losses, the contractor must submit further estimates with each subsequent interim application for payment in respect of the damage, loss and/or expense which it has suffered or incurred since the submission of its previous estimate. If the architect accepts these estimates, in each case the amount must be added to the contract sum but the contractor is not entitled to any further amounts for that same event in respect of the same period.
- It is clear from clause 7.4 that the contract sum must be adjusted and the amount included in the next interim certificate after the contractor's estimate has been accepted.
- The contents of clause 7.5 show why it is important that the contractor strictly complies with the contractual mechanism for claiming which is set out in clauses 7.2–7.4. The clause states that if the contractor fails to comply with clauses 7.2 and 7.3 (the submission of notices and estimates), the contractor is not entitled to any adjustment of the contract sum until the issue of the final certificate. Moreover, the contractor is not entitled to any interest or financing charges for the intervening period. In case there should be any doubt about the position, the clause makes clear at the outset that the architect has no power to make any adjustment to the contract sum in respect of the damage, loss and/or expense which the contract failed to claim or failed to claim in accordance with the contract.

It is clear that clause 7 entitles the architect to decide on the merits of what would normally be a common law claim provided that it arises from acts, omissions, defaults or negligence of the employer or architect.

The scheme of clause 7 is very simple and straightforward. If operated correctly, the provisions should prove of benefit to contractors and employers alike. The idea is to ensure that the contractor has a reasonable expectation of cashflow. In exchange for this expectation, it has to accept that the amount claimed and certified each month will not necessarily be an exact reflection of the actual amount of damage, loss and/or expense suffered, but most contractors would be willing to trade ultimate

precision but long-delayed payment against certainty of regular payment of money due provided the regular payments are a reasonable approximation of the amounts due. The penalties if the contractor fails to operate the mechanism properly are severe – payment delayed until the final certificate.

The system imposes duties on both sides: the contractor must make a quick and accurate estimate of its losses, but the architect has little time in which to check the estimate and reach a conclusion. As noted above, the 20 days runs from receipt of the necessary substantiating documents and payment of the amount can be delayed if the documents are not provided. Clearly there is also room for argument about the cause of the delay, but the existence of the time schedule as a specified measure of progress does away with some of the practical difficulties encountered under the claims clauses of other contracts.

Provisions for the ascertainment of loss and/or expense are found in some other clauses. Clause 10 provides that the contractor must permit work to be done by others on the site. It is headed 'Employer's Licensees' and deals with work to be done on site by the employer or the employer's employees, agents and contractors as well as work done by statutory undertakers such as water, gas and electricity suppliers. Clause 10.4 provides that if the regular progress of the Works or any section is disrupted or delayed by reference to the dates on the time schedule by the employer's licensees, the contractor is entitled to recover any resulting loss, damage or expense under the provisions of clause 7.4. Importantly, there is no claim to be made in respect of statutory undertaker's work carried out under clause 10.3. If the statutory undertakers are acting under their statutory powers, they fall under clause 10.3. If, on the other hand, they are acting under a contract with the employer, they fall under clause 10.2, in which case the contractor will have the right to found a claim for loss and/or expense as above.[27]

Clause 11.8 also allows a claim for loss and/or expense. In broad terms it entitles the architect to issue an instruction to bring forward or postpone dates shown on the time-schedule for the taking-over of any part of the Works. It then states that the architect must ascertain and certify a fair and reasonable adjustment to the contract sum, if appropriate, to cover compliance by the contractor with the instruction together with any damage, loss and/or expense suffered by the contractor arising out of the instruction. There is a proviso that, if before giving the instruction the architect requires the contractor to give an estimate of the adjustment to the contract sum then, except for the provisions relating to extensions of time, clause 17 applies just as if the instruction was included in clause 17.1.

16.4 Valuation of instructions

16.4.1 Introduction

The instruction and valuation clauses of this contract are closely connected. There is a lot of cross-referencing of clauses but once that has been absorbed, the provisions

[27] *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* (1980) 15 BLR 8, decided under JCT terms, is relevant.

are reasonably straightforward. There is no definition of 'variations' and indeed the term is not used by ACA 3. There is no express provision for a quantity surveyor and it is assumed that the architect will carry out all valuations. Where the architect is unable to carry out valuations, there is nothing to prevent the employer or the architect engaging a quantity surveyor to carry out the task and advise the architect, but it is the architect who must issue the relevant valuations under the terms of the contract.

16.4.2 Clauses 8 and 17

Clause 8 deals with the issue of architect's, usually written, instructions and gives the extent of the architect's authority in this respect. Oral instructions can only be issued in an emergency, the primary meaning of which is a 'sudden juncture demanding immediate action'.[28] Clause 17 deals with the valuation of architect's instructions.

16.4.3 Commentary

Clause 8.1 deals with the architect's power to issue instructions. The architect has power to issue instructions in connection with a list of items until taking-over of the Works. So far, this is the same position as understood under JCT contracts.[29] However, the end of the clause stipulates that, after taking-over, the architect may issue instructions at any time up to the time the contractor has completed its obligations in respect of the maintenance period (which is the equivalent of the rectification period under JCT contracts). The two provisions appear to be inconsistent, but it seems that the instructions issued after taking-over relate only to instructions empowered by clauses 8.1(a), (b), (c) and (d). It should be noted that although the list of possible instructions appears to be contained within clause 8.1, clause 8.2 lists the architect's instructions which may give rise to payment which includes instructions issued under other clauses. These other clauses are in fact summarised under clause 8.1(g). The full list is as follows:

- opening up of work for inspection or testing, if the work is found to be in accordance with the contract (clause 8.1(c))
- addition, alteration or omission of obligations or restrictions in regard to working space, working hours, access to the site or use of parts of the site (clause 8.1(d))
- alteration or modification of the design, quality or quantity of the Works as described in the Contract Documents, including additions, omissions or substitutions or the removal of materials or goods brought to site by the contractor for the Works (clause 8.1(e))
- any matter connected with the Works (clause 8.1(f))
- resolving ambiguities or discrepancies falling within clause 1.5 which could not reasonably have been foreseen or found at the date of the making of the contract

[28] *The Concise Oxford Dictionary.*
[29] *New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd* [2001] BLR 74.

by a contractor of the degree of skill care and diligence specified in clause 1.2 (clause 8.1(g))
- resolving an infringement of statutory requirements under clause 1.6 (clause 8.1(g)
- matters relating to adverse ground conditions or artificial obstructions at the site as referred to in the optional clause 2.6(clause 8.1(g))
- provision of samples under clause 3.5 (clause 8.1(g))
- the finding of antiquities, etc. under clause 14.2 (clause 8.1(g)).

Clause 8.2 makes clear that it is only those clauses which may give rise to a payment under clause 17. Even though clause 8.1(g) refers to a series of clauses elsewhere in the contract, clause 8.2 lists the particular clauses which may give rise to adjustment of the contract sum. However, it should not be thought that, if the contractor can bring the event within one of the clauses referred to in clause 8.2, clause 17 automatically applies. There are two important qualifications on the contractor's entitlement to payment for compliance with the architect's instructions:

- The instruction must require the contractor to carry out work or do some other thing which is not provided for, or reasonably to be inferred from, the contract documents or must require the omission of work or of any obligation or restriction. This appears to be quite an onerous provision. Although it is not unusual to find a reference to reasonable inference from documents, it is thought that in practice the necessary inference would have to be clear.
- The instruction must not have arisen out of or in connection with or must not reveal any negligence, omission or default of the contractor or of any subcontractor or supplier or their servants or agents. It makes perfect sense that the instruction does not qualify for payment if it arises from any default of the contractor. It is less clear what is intended by the reference to an instruction revealing any default. Why should a contractor be deprived of payment in respect of an instruction which, perhaps in passing, indicates some default of the contractor which in any event has no connection to the instruction or the reason for the instruction? This wording is something which the ACA might look at again.

Only if these conditions are satisfied will compliance with an architect's instruction rank for payment.

The valuation provisions in clause 17 are not drafted in the same way as the standard valuation clauses under JCT contracts.[30] The system is based on the giving of estimates by the contractor and the acceptance, or otherwise, by the architect. Clause 17.1 provides that, if the architect issues an instruction under one of the clauses referred to in clause 8.2 which, in the opinion of either the architect or the contractor, requires an adjustment to the contract sum and/or will affect the time schedule, before complying, the contractor must provide the architect with various estimates as follows:

[30] Compare this provision with the 'Supplementary Provision' S6 of WCD 98 (since revised as 'Supplemental Provision' 4 of DB, Chapter 14, Section 14.8.5) and the clause 13A quotation procedure of JCT 98 (since revised as 'Variation and Acceleration Quotation Procedures' under SBC, Chapter 14, Section 14.5.5), both drafted after the ACA provisions.

- the value of the adjustment with all necessary supporting calculations; and
- the length of any extension of time to which the contractor may be entitled under clause 11.5; and
- the amount of any loss and or expense which the contractor may have suffered or incurred arising out of or in connection with the instruction (note that 'damage' appears to have been deliberately omitted from this clause).

The contract default position is that the estimates must be provided with 10 working days of receipt of the relevant instruction. There is provision for that period to be amended in the contract. The contract also provides that the architect and the contractor may agree a different period at the time the estimates are required.

In submitting estimates, the contractor must carry out its own valuation of the appropriate adjustment to the contract sum. However, this is not an opportunity for the contractor to quote for as much as it can get for carrying out the instruction. If that were the case, there would be little point in enshrining the process in the contract. It is clear that the calculation carried out by the contractor must, where practicable, be based on any relevant rates in the schedule of rates or other relevant document. Clause 17.2 imposes on architect and contractor a duty to take reasonable steps to agree the contractor's estimate. Although there is nothing in the contract to allow the parties to agree figures which are different to those shown in the contractor's estimate, it is likely that, in practice, such agreement will not simply amount to acceptance or rejection, but will involve some discussion on both sides until they arrive at mutually acceptable figures. A clue is to be found in the reference to agreement 'on all or any of the matters' in clause 17.3.

If agreement is reached, it is stated to be binding on employer and contractor and the contractor must comply with the instruction immediately. The architect must grant an extension of time equivalent to the agreed period and the agreed adjustment must be made to the contract sum. The contract is silent about the timing of the extension of time and the adjustment and it is suggested that the extension must be granted immediately, because there is no justifiable reason not to do so. The adjustment to the contract sum ought to be made so as to enable the amount to be taken into account in the next certificate.

Agreement is to be reached within fiveworking days of receipt of the contractor's estimates by the architect. Clause 17.3 deals with the situation if agreement is not reached. Five days is not long. If there is failure to reach agreement about any of the matters set out in the estimates:

- the architect may instruct the contractor to comply with the instruction and it must be valued by the architect under clause 17.5; or
- the architect may instruct the contractor not to comply.

Clause 17.4 stipulates that if the architect withdraws the instruction, the contractor has no claim arising from the instruction or from any failure to reach agreement. The costs of preparing the estimates may be substantial and it seems unfair to expect the contractor to shoulder all the costs resulting from what is essentially the employer's change of mind. Some other contracts allow the costs of preparation of an estimate in such circumstances to be recoverable from the employer.

Clause 17.5 applies in two situations: (1) where the architect, either before or after issuing an instruction, issues a written notice to dispense with the contractor's

obligation to submit estimates under clause 17.1 and (2) where there is a failure to agree estimates within five working days and the architect has decided to give an instruction under clause 17.3 to comply with the original instruction. If either of these two situations apply, the architect must ascertain and certify a fair and reasonable adjustment to the contract sum which, if appropriate, is to be based on the schedule of rates. This ascertainment must include any loss or expense arising out of or in connection with the instruction. The architect must also grant a fair and reasonable extension of time under clause 11.6.

Clause 17.6 deals with the failure of the contractor to comply with clause 17.1. The consequences are severe. If the contractor does not submit estimates under clause 17.1, and if the architect has not waived compliance under clauses 17.5 or 8.3 (emergency oral instructions), the contractor has no entitlement to payment in respect of the instructions until the final certificate. It loses its right to payment in interim certificates for compliance with the architect's instructions. To make matters worse, the contractor also forfeits any right to interest or finance charges for the period prior to the issue of the final certificate. In case an architect should feel sorry for a contractor in this situation, the contract makes clear that the architect has no authority to make any additions to the contract sum in respect of the instruction in question.

If it is practicable for the contractor to submit estimates and these can be agreed, the contractor should benefit from strict operation of these provisions. They are designed to provide rapid cash flow. If estimates cannot be submitted, the provisions of clause 17.5 are intended to fill the gap and ensure that the contractor is remunerated within a reasonable time for the additional work carried out. It is believed that few difficulties have been encountered in practice. The final certificate provisions should be viewed as an incentive to the contractor to comply with the requirements of the valuation clause.

Clause 19.2 provides for the issue of the final certificate. Unlike the position under SBC, IC and ICD, it is purely financial in its effect. It is to be issued by the architect within 30 working days (unless another period is inserted) after completion by the contractor of all its obligations under the agreement.

Before the final certificate is issued, the contractor must submit its final account for the Works to the architect within 30 working days of the expiry of the maintenance period, and this submission must include any outstanding claims. Any outstanding claim must be supported by the necessary vouchers, etc. and what is required is a claim which is properly calculated and backed up by such supporting evidence as the architect may require. If the contractor is not satisfied with the amount stated in the final certificate, it may refer the matter to adjudication for a rapid decision or it may chose whichever of the arbitration or litigation options applies. The parties can agree to use clause 25A and attempt to settle the matter by conciliation. However, the agreement of both parties is required for this route. That would be the position in any event if clause 25A did not exist. The existence of clause 25A may be considered to be a reminder to the parties that there are other ways of settling differences which may be cheaper for all concerned in the long run.