Chapter 17

Claims under the ACA Standard Form of Contract for Project Partnering (PPC2000)

17.1 Introduction

As the name suggests, the first edition of this contract was published in 2000. It has been updated in 2003 and again in 2008 which is the version current at the time of writing. It is an unusual contract in that it is multi-party and can be executed by a mixture of client, constructor (i.e. the main contractor), consultants and certain sub-contractors. It is intended as a partnering contract and it is recommended by Constructing Excellence as a means of encouraging collaborative working. It is endorsed by the Construction Industry Council.

The intention behind the contract is that the various parties work together as a team and that more specialists can join the team later by signing a special agreement for that purpose. A key aspect is the creation of a core group, identified in the agreement. This group deals with design and costs and attempts to resolve disputes. There is an obligation to give early warning of difficulties so that the core group can act swiftly. The agreement includes provisions for incentives and key performance indicators.

The ACA has published a helpful guide to this contract together with SPC2000. The usual note of caution must be expressed that, helpful as the guide is, it has no legal effect on the interpretation of the contract. Where, as here, it is written by the author of the contract there is always the danger that the guide states what the author intended the contract to mean rather than what, strictly construed, it actually means.

Most building contracts are designed merely to govern what happens during the construction phase. One of the features of PPC2000 is that it is executed by all the relevant parties, including consultants, as early as possible in order to govern the entire procurement process. Before work begins on site, the Commencement Agreement is executed by the parties. But, this is not to be done until the preconditions set out in clause 14.1 are satisfied. The commencement agreement contains all the variable details similar to the ones to be found in the Contract Particulars in JCT contracts.

Building Contract Claims, Fifth Edition. David Chappell.

17.2 Extension of time and damages

17.2.1 Extension of time

Provisions for extension of time are contained in clause 18 which has the general title of 'Risk Management'. The procedure is set out in clause 18.4 and the grounds in clause 18.3. The date of possession, completion date and other detailed arrangements for the project are to be found in the project timetable which is to be submitted by the constructor, reviewed by the core group and approved by the client under clause 6.2. Clause 6.5 provides that with effect from the date of the commencement agreement, the members of the partnering team must carry out their agreed activities regularly and diligently and in accordance with the project timetable. This obligation is subject to the following clauses:

- clause 6.6 which provides that the client representative may postpone, accelerate or re-sequence the project
- clause 17 which sets out change procedures
- clause 18 which sets out provisions for extension of time
- clause 20.17 which provides for contractor suspension on non-payment, and
- clause 26.6 which deals with suspension or abandonment of the project.

17.2.2 Grounds for extension of time

The grounds for extension of time are to be found in clause 18.3. Some are client/consultant defaults; others are neutral events but they are not divided into groups. The grounds are as follows:

Default or failure of client or consultant (clause 18.3(i))

This is a catch-all type of clause similar in intent to SBC clause 2.29.6 and ACA 3 clause 11.5(e) Alternative 2. The principal purpose is to avoid time becoming at large for lack of a suitable clause enabling the architect to give an extension of time for a client default. There are a number of provisos attached to this ground:

- An exception is made to the extent that the delay is caused or contributed to by the constructor or any party for whom the constructor is responsible. That would be implied in any event, if not as a matter of law, as a matter of common sense.
- The delay must extend beyond any time limit in the partnering terms or project timetable. It is interesting that the reference is not simply to the completion date. Clearly the intention is to allow reference to be made, when assessing the delay, to any and all stipulations as to time inserted in these documents.
- The constructor must have given early warning to the client under clause 3.7 not more than five working days after the end of the particular time limit. Clause 3.7 requires early warning to be given by any partnering team member 'as soon as it is aware'. No doubt the constructor will be aware within five days after the end of

the time limit concerned but, if not aware within the five days, it seems that the constructor would lose its entitlement to an extension of time under this ground. For the purposes of this clause 18.3(i), it is the five day period which will prevail even if, under clause 3.7, the constructor is not aware and, therefore, not obliged to give early warning.

Discovery of an antiquity (clause 18.3(ii))

This ground depends on the presence of the antiquity not being reasonably apparent from an inspection of the site before the date of the commencement agreement or from any relevant surveys whether carried out by the constructor or provided to it. Whether the antiquity was reasonably apparent will be a question of fact on which the client representative will have to take an objective view.

Delay in third party consents listed in the commencement agreement (clause 18.3(iii))

The third party consents, such as planning or landlord's consents which will entitle the constructor to an extension of time are restricted to those listed in the commencement agreement. There is a proviso that the constructor must have taken all proper and timely steps to avoid or reduce any delay, but it is obliged to do this in any event as its general duty to mitigate its losses, but especially by reference to its duty in the first paragraph of clause 18.3 to use its best endeavours to minimise delays.

Change in law or regulation of the country (clause 18.3(iv))

This is a straightforward ground which places on the client the risk of a change of law or regulation in the country where the site is situated. The constructor would have to satisfy two conditions: demonstrate that the change did cause a delay and that it could not reasonably foresee it.

Weather conditions (clause 18.3(v))

To qualify for an extension of time, the weather conditions must have caused a delay and the local meteorological office records must show that the conditions are exceptionally adverse for the time of year. This means that it might be extremely hot and dry, cold and frosty, exceptionally high winds preventing use of a tower crane, or torrential rain leading to flooding.

Delay by local authority, statutory body or utility (clause 18.3(vi))

The delay must be a result of the carrying out of work in accordance with statutory duties and it must be work concerning the project. Delay caused by work being done in relation to an adjacent site would not qualify under this ground. The clause very sensibly sets out some criteria to be satisfied which other contracts leave for the parties to work out for themselves. The constructor must have done everything it

should have done in supplying information, placing orders and facilitating the work as soon as reasonably practicable to do so and must not have been responsible for delay or disruption to the authority or body concerned.

Opening up or testing (clause 18.3(vii))

Although it does not expressly so state, it must be implied that the opening up for inspection or testing refers only to what has been instructed by a consultant. Extension of time under this ground is subject to two exceptions:

- if the inspection or testing reveals something which is not in accordance with the partnering documents (equivalent to contract documents under other contracts)
- if the inspection or testing was reasonable, because non-compliance of a similar kind to what the inspection or testing was intended to investigate had already been discovered elsewhere in the project.

Insured loss or damage (clause 18.3(viii))

This ground covers a range of insurances referred to in clause 19.1. Clause 19.1 refers back to the relevant entries in the commencement agreement. Broadly, they refer to insurance of the project, existing structures and third party property. The constructor is entitled to an extension of time if the insurance was to be taken out by the constructor and the delay is caused by one or more of the insured matters.

Strike etc. (clause 18.3(ix))

This is a broad clause referring to strike or other industrial action by a party which is not a partnering team member. Applying the normal rules of construction, the clause covers a strike or any other industrial action provided only that it is not a strike.[1] The description could hardly be broader. The only stipulation about the party is that it is not a partnering team member. Therefore, the clause embraces any kind of strike or industrial action by any party outside the partnering team if it adversely affects the date for completion. This would seem to include the inability to supply materials to site because the supplier of raw materials to the manufacturer had engaged in a strike or other industrial action. This does not appear to be affected by the usual rules regarding foreseeability.

Government exercise of statutory power (clause 18.3(x))

The statutory power must directly affect the carrying out of the project by restricting labour, materials, goods or equipment required for the project. The effect must be

[1] *Expressio unius est exclusion alterius*. The express mention of a particular thing may indicate an intention to exclude other things: *Blackburn v Flavelle* (1881) 6 App Cas 628.

direct. If the exercise of the power merely affects something which itself restricts labour etc., it does not form a ground for extension of time.

Client's failure to allow access or possession of the site (clause 18.3(xi))

Clause 15.3(i) stipulates that the constructor must take possession of the site or the relevant parts under licence from the client. That merely gives expression to the position under the general law. The possession is subject to any constraints in the commencement agreement and the project timetable. Clause 6.4 states that the project brief, the commencement agreement and the project timetable must state any restrictions on possession and any arrangements for deferred or interrupted possession. This ground is made subject to those provisions. In order to bite, the possession and access must be under the client's control.

Suspension of obligations or the project (clause 18.3(xii))

Two kinds of suspension are grounds for extension of time. The first is suspension by the contractor under clause 20.17, because the client has failed to make a payment by the final date for payment. This provision is included in the contract under s. 112 of the Housing Grants, Construction and Regeneration Act 1996. The second kind is suspension of the project under clause 26.6 which requires suspension of the project by the client under certain circumstances. The circumstances are that it has become impossible to proceed with the project because of damage to the project caused by:

- a clause 19.1 insurance risk
- civil commotion
- act or omission of government, local authority or statutory body
- hostilities, or
- terrorist activity.

After due notice and proper consideration, if no solution is proposed or approved within 20 days of notice, the client must suspend. It has been said that '[i]n matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at excessive or unreasonable cost.'[2]

Use or threat of terrorism (clause 18.3(xiii))

This ground is the use or threat of terrorism affecting or reasonably likely to affect the project or people engaged on it. It also includes activities around the site. However, unlike SBC, it does not expressly include the response of the authorities to terrorism and the wording of the clause is not wide enough to allow any such implication.

[2] *Moss v Smith* (1977) 76 LGR 284 at 293 per Maule J.

Breach of contract by the client or any consultant (clause 18.3(xiv))

The constructor must have given early warning under clause 3.7 as soon as it became aware of the breach.

Delay, damage or obstruction by a clause 10.11 specialist (clause 18.3(xv))

The clause 10.11 specialist is one appointed directly by the client who is responsible for its performance. This is equivalent to employer's licensees under ACA 3 and directly employed contractors (who used to known as 'artists and tradesmen') under SBC. The direct appointment of specialists by the client is tantamount to an invitation to the constructor to make a claim for extension of time and additional costs. It is better if all construction operations are firmly under the control of the constructor who takes full responsibility therefor.

Other event referenced in the commencement agreement (clause 18.3(xvi))

This is to allow for any additional ground which may be inserted into the commencement agreement by agreement between the parties.

17.2.3 Procedure

The first paragraph of clause 18.3 is important. It lays an obligation on the constructor to use its best endeavours to minimise delay or increased cost at all times. It is no accident that the provision is placed at the very beginning of the clause. It governs the list of grounds which follow and it is clear that the extent to which the constructor has used best endeavours must be taken into account in considering whether it is entitled to extension of time. The paragraph continues by expressly stating that the constructor is entitled to an extension if 'despite the Constructor's best endeavours' one or more of the grounds adversely affect the date for completion. Therefore, if the constructor has not used its best endeavours, its entitlement is reduced by the amount which the use of best endeavours could have prevented the delay.

The entitlement to extension of time is made subject to compliance with the procedures in clause 18.4. That is to say that it is dependent on compliance. Compliance is a condition precedent to entitlement. Clause 18.4 sets out three actions which the constructor must perform:

(1) Give notice to the client representative as soon as becoming aware of any of the grounds in clause 18.3. With the notice, the constructor must include relevant evidence and cost information and detailed proposals for overcoming the events and minimising the effect on time and cost, which must be consistent with the partnering documents. This is an unusual requirement, not present in other contracts. Not only is the constructor to use its best endeavours to avoid delays, but if despite such best endeavours there is delay, the constructor is obliged to submit proposals to minimise the delay and the cost. The proposals must be 'detailed' that is to say that they must not merely be vague expressions of intent.

However, it is clear that the constructor is entitled to submit proposals which will be at a cost although presumably less cost than if the proposals were not carried out (clause 18.4(i)).

(2) Carry out the proposals unless the client representative instructs otherwise. The representative has five working days from the date of notification to so instruct. The wording leaves open the question of whether the date of notification is the date when the notice is sent or when it is received. Strictly, the date of notification is the date on the notice and not the date when the notice is received. The client representative should count the five days from the date of the notice, but the constructor would be well-advised to count the days from the date of receipt. The constructor is not required to carry out the proposals if they are changes which must be dealt with under clause 17 (clause 18.4(ii)).

(3) Provide reasonable additional evidence and cost information as requested by the client representative. The clause provides the additional stipulation that evidence and information must be provided if it becomes available after notification. In which case, a specific request from the representative is not required (clause 18.4(iii)).

The client representative is given only 20 days to respond to notification in accordance with clause 18.4(i) and (iii) and to give a fair and reasonable extension of time. He is also to deal with certain increases in cost which are dealt with in Section 17.4 of this Chapter. The contract is very clear that if either client or constructor dispute the extension of time, the dispute must be notified under clause 27.1 within 20 working days from the date of the response. If there is no referral of the dispute, the constructor is entitled to the extension of time set out in the response. If there is a referral, the constructor is entitled to the extension of time pending the resolution of the dispute. Unlike some other contracts, there is no provision for the client representative to carry out a review of extensions of time after practical completion. In the absence of a referral, the parties are stuck with the representative's decision.

17.2.4 Damages

The contract contains no express provisions for the client to recover liquidated damages if the constructor fails to complete the project by the date for completion in the commencement agreement. Nevertheless, the client has common law remedies for breach of contract and the client will be able to recover damages on that basis. Obviously, the absence of liquidated damages means that the client will have a significant task to prove the breach before proving every element of cost. There is no provision for the client to deduct any such damages from the amount due for payment, other than under clause 20.6 which reflects the statutory requirement for withholding notice.

17.3 Loss and/or expense

The recovery of what would usually be termed 'loss and/or expense' is clearly linked to extensions of time under this contract. This has the advantage of expressing in the

contract what many contractors and quantity surveyors do routinely (although wrongly) when acting under JCT contracts and ACA 3. However, it runs the risk of creating confusion around the purpose of giving an extension of time.

Clause 18.4 provides that, when giving notice of a clause 18.3 event, the constructor must provide cost information available and further cost information as the client representative requests or which becomes available to the constructor after giving the notice. In responding, the representative must not only give a fair and reasonable extension of time but also fair and reasonable site overheads in accordance with clause 18.5 and any other fair and reasonable increase in the agreed maximum price under clause 18.6. It is notable that what is to be ascertained is a 'fair and reasonable' amount. This is in contrast with the provision under SBC which requires the architect to ascertain the amount incurred. It is thought that the insertion of the words 'fair and reasonable' give scope to the client representative to use some discretion under this contract when ascertaining. However, it should be noted that clause 18.6(iii) restricts the constructor's entitlement to additional payment, on account of any of the events in clause 18.3, to what is set out in clauses 18.5 and 18.6. It is not clear whether this provision is intended to act as a bar on the constructor exercising its common law rights to claim damages for breach of contract. In any event, it is thought the wording is not sufficiently clear to achieve that objective.

Clause 18.5 provides that where certain events listed in clause 18.3 result in an extension of the completion date, additional site overheads must be added and they are to be proportionate to the site overheads agreed in the price framework as time based. The events which will give rise to additional site overheads are all the events in clause 18.3 except for those concerning third party consents, weather conditions, delay by local authorities and statutory bodies, insured loss and damage, strike or other industrial action and government exercise of statutory power. This is subject to any agreed adjustment in the commencement agreement. It is not clear why the client would want to adjust these events, because the exceptions listed are all neutral events for which the client is not responsible and there appears little reason for the constructor to be given additional money as well as time.

Clause 18.6 refers to the same events with the same exceptions and subject to adjustments in the same way as clause 18.5. Where the events give rise to what the clause refers to as 'unavoidable additional work or expenditure', such work and expenditure must be included in the constructor's proposals under clause 18.4 calculated, if possible, on the basis of the price framework. There are two points of note. The first is that the entitlement is said to be irrespective of whether the event gives rise to an extension of time. This appears to be effectively a claim for disruption costs. The second point is that the work or expenditure must not be within the scope of head-office (in clause 18.6 referred to as 'central office') or site overheads. In calculating the amounts, the following conditions apply:

- The constructor must keep the amount of work and costs to a minimum. This is little more than the ordinary duty to mitigate costs.
- The amounts should be presented on an open book basis without additional profit, head-office overheads or loss of profit related to other projects.
- The constructor is limited to payments described in clauses 18.5 and 18.6 in respect of any of the events listed in clause 18.3.

It is expressly stated in clause 18.8 that the constructor is deemed to have satisfied itself about the extent of the site and boundaries together with what is referred to as the nature of the environment surrounding the site to the extent that it directly affects the project. It is difficult to see what the draftsperson may have had in mind when drafting this clause. Presumably, the intention is to prevent the contractor being able to state that it did not know that it was trespassing onto adjacent land, particularly where there are no clear walls, fences or other demarcations.

In practice, the only way in which a constructor can satisfy itself about the extent of the site is to ask the client. In turn, the client will probably have to consult its solicitor who must examine the deeds. The actual line of a boundary is often very difficult to determine and it can be the source of a great deal of argument between neighbours. Even deeds and deed plans are often remarkably vague about such things as boundaries. In these circumstances it seems unreasonable, to say the least, to expect the constructor to take responsibility for determining something about which even the client's solicitor may be unsure.

Important aspects of the surrounding environment could be such things as rivers likely to flood or ground subject to landslip. It is doubtful that the wording of the clause is sufficient to make the contractor liable for the consequences of flooding or slippage of land.

Clause 18.9 is obviously intended to place the cost of dealing with ground formation and structures (except for antiquities) onto the constructor with no grounds for an extension of time under that head.

It is a unique feature of this contract that any extension of time in accordance with clause 18 also entitles each affected consultant to an equivalent extension to perform the relevant consultancy services and amends the entitlement to payment. There is a proviso that the constructor's extension must not be due to the consultant's default or failure which seems entirely reasonable.

17.4 Changes

Parties are often beguiled by the phraseology and expressed intentions of partnering contracts to believe that they do not obey the same rules as other building contracts. The rules for interpretation of partnering contracts, however, are exactly the same as for other contracts. Clause 15.2 is very important. It states that after signature of the commencement agreement, the constructor must carry out and complete the project in accordance with the partnering documents and that the client must pay the agreed maximum price which is subject only to reduction in respect of agreed shared savings under clause 13.2 and other increases and decreases in accordance with the partnering terms. The partnering documents are defined in Appendix 1. The separate documents making up the partnering documents are listed in clause 2.2. They are to be read as a whole. Among them is the important price framework. Clause 12.4 makes clear that the constructor's profit, head-office overheads and site overheads are to be fixed at the amounts in the price framework subject to such variations as the client and constructor may agree and form part of the agreed maximum price.

A change is defined in Appendix 1 as a change in any part of the project by addition, omission or variation or by the expenditure of a provisional sum in the price

framework. Changes are dealt with under clause 17. Clause 17.4 provides that, if the client representative instructs a change, but the client and constructor have not agreed cost or time implications within 20 working days from the date of the instruction, it is for the client representative to ascertain the time and cost effects. This must be done on a fair and reasonable basis using where possible any prices for similar work in the price framework. This is similar to the provisions in other contracts where existing prices are to be used to price variations or to be used as a basis of such prices. A feature which is unique to this contract is that clause 17.7 provides that any change and any effect on the agreed maximum price if agreed or calculated in accordance with clause 17, is binding on all the partnering team members. The price framework is a key document. Clause 20.5 provides that the amount payable in respect of each application for payment made by the constructor is to be calculated in accordance with the price framework in order to establish the value of the constructor's services, pre-possession activities or the part of the project properly progressed, including unfixed materials, goods and equipment less amounts previously paid, and adjusted for shared savings under clause 13.2 and any link between payment and the achievement of KPI targets in accordance with clause 13.5.

Clause 17.1 permits any member of the partnering team to propose a change if it is in the best interests of the project. It is not clear how one is supposed to demonstrate that, albeit the clause requires it to be demonstrable. Such proposals are to be considered by the client together with the client representative as advised by the other members of the team. If the proposal falls under the category of continuous improvement, it must be considered by the core group. The core group are the people identified in the project partnering agreement. If the client approves, the change is to be notified to the constructor.

The client may propose a change at any time under clause 17.2. The procedure is that the client notifies the change to the constructor and the team members. The constructor has 10 working days within which to submit a change submission. In view of what the submission must contain, 10 days is very short. There is provision for the parties to agree a longer period. If the change is proposed before the date of the commencement agreement, it must include the effect on amounts payable for the constructor's services. Otherwise, it must include the effect on the agreed maximum price calculated on the price framework and on progress and the completion date calculated from the partnering and the project timetable. Clause 17.6 makes clear that the submission must minimise any adverse effect on the agreed maximum price. This seems to be an unnecessarily long way of saying that the submission should be as cheap and quick as possible. It goes on to refer to the spirit and content of the partnering agreement and the roles of the partnering team members. It must be questioned whether such considerations will weigh heavily on a constructor who is looking at making a loss on the project. It should be noted that the constructor must submit a change submission in two other situations following the constructor's objection: under clause 5.4 if the client representative confirms or amends an instruction; and/or under clause 8.11 if the lead designer confirms or amends a design.

On receipt of the constructor's change submission, clause 17.3 requires the client to consider it with the client representative advised by the other members of the team. The client must try to agree it or some variation of it with the constructor. The client has only five working days to notify the constructor to proceed with the change

or that the change is being withdrawn. If the notification instructs the constructor to proceed, it is open to the client to reserve some or all of the submission for later agreement or variation. The parties may agree to extend the five-day period for the client's notification. Clause 17.5 permits the client to directly instruct the constructor to proceed with a change without waiting for the change submission if the client considers that the change is urgent or simple. However, the constructor must still submit the change submission which is to be dealt with in the usual way.

Where it is agreed that a change results in an adjustment of the time for performance, an equivalent adjustment must be made to any consultant services which are affected. Consultants' payments may be amended in accordance with the relevant consultant payment terms.