Chapter 19
Sub-contract claims

19.1 Introduction

This chapter considers sub-contract claims arising under eight forms of sub-contract, namely, the:

- JCT Standard Building Sub-Contract Conditions (SBCSub/C)
- JCT Standard Building Sub-Contract with Sub-Contractor's Design Conditions (SBCSub/D/C)
- JCT Intermediate Named Sub-Contract Conditions (ICSubNAM/C)
- JCT Intermediate Sub-Contract Conditions (ICSub/C)
- JCT Intermediate Sub-Contract with Sub-Contractor's Design Conditions (ICSub/D/C)
- JCT Design and Build Sub-Contract Conditions (DBSub/C)
- JCT Management Works Contract Conditions (MCWC/C)
- ACA Form of Sub-Contract (ACA/SC).

The legal principles which apply to claims under the main contract forms equally hold good for sub-contract forms. This is something which is often misunderstood and claims under sub-contracts are often treated as though they are subject to a completely different set of rules to those governing claims under main contracts. There is nothing to prevent a sub-contractor bringing its claims as claims for damages under the common law and reference should be made to Part One of this book for general principles. Therefore, only claims made under the express provisions of the sub-contracts are considered here. Indeed, many of the sub-contract provisions are now very similar to the equivalent provisions of the relevant main contracts and the reader will be directed to those provisions when appropriate.

19.2 JCT Standard Building Sub-Contract Conditions (SBCSub/C)

19.2.1 Introduction to the form

Sub-contractors working under this form are usually termed 'domestic' indicating that they are sub-contractors whom the contractor has chosen and for whom the contractor bears full responsibility. Domestic sub-contractors are work and material

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sub-contractors. The form is published for use where the main contract is the JCT Standard Building Contract SBC. Until the publication of SBC in 2005, the JCT Standard Building Contract contained a clause permitting the employer to nominate sub-contractors and a nominated sub-contract form and ancillary forms were published to achieve that end. Nomination was removed when SBC was published.

An early form of domestic sub-contract was DOM/1 which was introduced in 1980. The form lasted for over 20 years and through a succession of amendments. The JCT Standard Form of Domestic Sub-Contract was published in 2002 (DSC/C).

19.2.2 Extensions of time under (SBCSub/C)

Extensions of time, now referred to as 'Adjustment of Period for Completion' are dealt with by clauses 2.16–2.19. Schedule 2 'Variation Quotation' also includes provisions for fixing a new date for completion and the change in heading from the straightforward 'Extension of Time' of previous editions of the form is probably a more open recognition of agreements under the variation quotation procedure. 'Pre-agreed Adjustment' is a defined term used in clauses 2.18.4 and 2.18.6.4 when referring to a revised completion date fixed by acceptance of a variation quotation. It should be noted that references to extending time and fixing a new date for completion is taken to mean the date for completion of the sub-contract works or, if the sub-contract works are divided in the sub-contract into sections, of any section. Unless there is a particular reason to do so, reference will not constantly be made to sections in this commentary.

19.2.3 Commentary

Progress

An important clause in SBCSub/C is clause 2.3 which provides that the sub-contract works are to be carried out and completed in accordance with the programme details and reasonably in accordance with the main contract Works progress, all being subject to receipt by the sub-contractor of notice to commence. The words of clause 2.3 are similar to clause 2.1 of DSC/C and of clause 11.1 of DOM/1 before that. They have been construed very broadly by contractors over the years as obliging the sub-contractor to work in accordance with the contractor's progress on the Works and that if the contractor's progress slowed or quickened, the sub-contractor was obliged to follow suit. It has been held, under clause 11.1 of DOM/1, the relevant words of which were reproduced in clause 2.1 of DSC/C, that the sub-contractor may plan and perform the work as it pleases if there is no indication to the contrary, provided that it finishes by the time fixed in the contract. The sub-contractor's only obligation so far as programming requirements are concerned are those requirements expressly contained in the sub-contract itself.[1] It is likely that the same

[1] *Pigott Foundations v Shepherd Construction* (1996) 67 BLR 48.

principle applies in the case of other similarly worded sub-contracts and it certainly applies to SBCSub/C.

General points

The text should be compared with clauses 2.26–2.29 of SBC, which it closely resembles. The commentary to the extension of time provisions in SBC is generally applicable and the comments below will concentrate on the differences between the positions under the two forms. To a great extent, the differences arise from the contractual relationship. The only parties to the sub-contract are the main contractor and the sub-contractor. There is no contractual relationship between sub-contractor and employer. The practical consequence for present purposes is that the sub-contractor's claims against the main contractor will be passed up the contractual chain to the employer, if the claim is one for which the employer is responsible to the contractor. Despite the Contracts (Rights of Third Parties) Act 1999, third party rights are generally excluded from SBC and from SBCSub/C by clause 1.6 in each case which effectively restores the privity of contract position.

Notice

The notice provision in clause 2.17.1 is virtually identical with that in SBC clause 2.27.1. The sub-contractor must give written notice of delay to the main contractor. The sub-contractor must do this forthwith (i.e. as soon as it reasonably can).[2] In clause 2.17.1 the sub-contractor's obligation to give notice of the material circumstances is a qualified one. The material circumstances are to include the cause or causes of the delay, insofar as the sub-contractor is able to identify them. In practice, this qualification probably will make little difference, but it does offer the sub-contractor some limited protection against allegations that it has not included all the required information in its notice. The description of delay is more extensive than under SBC and refers to delay to commencement, progress or completion, whereas SBC refers solely to progress. Although it may be said that delay to commencement is included within delays to progress, that cannot really be said about delays to completion when all progress, delayed or otherwise, is finished. The notice must identify any relevant event.

Extension of time

It should be noted that the architect is not involved at all in giving extensions of time. The duty is the contractor's alone.

Time period

The contractor is given a time limit of 16 weeks from receipt of a notice of delay and of the required particulars from the sub-contractor in which to give an extension of

[2] *Hudson v Hill* (1874) 43 LJCP 273; *London Borough of Hillingdon v Cutler* [1967] 2 All ER 361.

time. It will be noted that this is four weeks longer than the architect is allowed under SBC. The reason is probably to allow the contractor to obtain the necessary extension of time from the architect before giving it an extension of time to the sub-contractor. Although that is sensible in theory, in practice, there are often arguments about whether the architect has received the full particulars and estimate of delay required. If there are fewer than 16 weeks left between receipt of the notice, particulars and estimate and the currently fixed completion date, the contractor must endeavour to give any extension no later than that date.

Clause 2.18.4 empowers the contractor to take into account any omission directions issued since the completion date was last fixed, so that the time necessary for completion has in the contractor's opinion been reduced as a result. This clause appears to permit the contractor to act without any notice from the sub-contractor. As soon as the contractor becomes aware that the omission of work has resulted in the sub-contractor requiring less time to complete the sub-contract works, it can act.

Sub-contract period

Clause 2.18.6.3 is vital; it parallels clause 2.28.6.3 of SBC, and means that, no matter how much work is omitted, the sub-contractor is always entitled to its original sub-contract period. Clause 2.18.6.3 prevents the contractor from fixing a shorter period for completion of the sub-contract works than the period stated in the sub-contract particulars. It is obvious that extensions cannot be reduced until after the first extension has been given. A question which sometimes arises is whether the contractor can 'set-off' an omission direction against the other grounds for extension in the first instance so as to give a reduced first extension. Common sense suggests that there is no good reason why the contractor cannot do so, but a strict reading of clause 2.18.4 indicates, by the word 'after', that a first extension must be given without any discounting to allow for omission directions. Each extension following must take account of omissions of work directed up to the date of the extension.

Clause 2.18.4.5, is a review clause, similar in purpose to clause 2.28.5 of SBC. The contractor has until 16 weeks after practical completion of the sub-contract works to make a final decision on extensions of time compared to the 12 weeks under SBC. The contractor can take into account any events entitling the sub-contractor to an extension of time which occur throughout the duration of the sub-contract and it must either: extend the period previously fixed for completion, subject to certain stipulations, shorten the period or confirm the period for completion previously fixed.

Best endeavours

The sub-contractor has an obligation under clause 2.18.6.1 to use constantly its best endeavours to prevent delay in the progress of the sub-contract works and to prevent the completion of the sub-contract works being delayed or further delayed. The sub-contractor is also required to do all that is reasonably required to the satisfaction of the contractor to proceed with the sub-contract works. These requirements echo the obligations of the contractor under SBC. They are essentially provisions requiring

the contractor to mitigate any losses, in this case of time, but it is suggested that as under SBC, the requirements in this proviso do not require the sub-contractor to spend substantial sums of money.[3]

Relevant sub-contract events

Clause 2.19 lists the relevant sub-contract events (as they are somewhat ponderously termed), the occurrence of which, in principle, gives rise to an extension of time. Grounds in clauses 2.19.1, 2.19.3, 2.19.5, 2.19.8–2.19.15 parallel those listed in SBC, clauses 2.29.1, 2.29.3, 2.29.5, 2.29.6–2.29.13 respectively and reference should be made to the commentary thereon.[4] However, clauses 2.19.2, 2.19.4, 2.19.6 and 2.19.7 have differences and will repay closer inspection.

Contractor's directions: clause 2.19.2

The directions referred to are divided into three groups:

Group 1: Directions given to comply with SBC clause 2.15 (discrepancies in drawings, contract bills, etc.); clause 3.15 (postponement of any work to be executed under the contract); clause 3.16 (expenditure of provisional sums (except in connection with defined work)); clause 3.22.2 (action concerning antiquities); and clause 5.3.2 (variations to work carried out following a variation quotation). Compliance with an architect's instruction for the expenditure of a provisional sum for defined work is expressly excluded.[5] That is because the contractor has been given sufficient information to enable it to make appropriate allowance in planning its work at tender stage.

Group 2: Directions for SBC clause 3.17 (inspections and tests) and clause 3.18.4 (opening up after discovery of defective work).

Group 3: Directions under SBCSub/C clause 3.10 (inspections and tests on the contractor's own initiative).

Approximate quantities: clause 2.19.4

Under SBC clause 2.29.4, the relevant event refers simply to the situation where the approximate quantity is not a reasonably accurate forecast of the amount of work which is required and has been carried out. Reference should be made to the comments on that provision. SBCSub/C takes a slightly different approach which, at first sight seems confusing. It splits the event into two categories. The first is in very much the same wording as under SBC except for the insertion of reference to the contract bills. The second seems to say the same thing but with the words in a slightly different order. However, the first category refers to the entitlement when the contract bills

[3] See the consideration of 'best endeavours' in Chapter 11, clause 2.28.6.1 in Section 11.1.2.
[4] See Chapter 11, Section 11.1.3.
[5] See Chapter 14, Section 14.5.4 under the sub-heading: *Valuation of approximate quantities, defined and undefined provisional sums.*

provided as part of the contract documents with SBC contain approximate quantities which are not reasonably accurate forecasts. The approximate quantities in the second category are those contained in bills of quantities provided by the contractor as part of the sub-contract. In both cases, the sub-contractor may have an entitlement to an extension of time if it is clear that the sub-contractor has been delayed.

Suspension by the contractor: clause 2.19.6

There is a relevant event in SBC to cover suspension by the contractor following a failure of the employer to pay sums properly due. The equivalent event in SBCSub/C is clause 2.19.5 which is suspension by the sub-contractor for failure of the contractor to pay. However, clause 2.19.6 is suspension by the contractor under SBC. The logic is quite straightforward and it effectively steps down the contractor's right to an extension of time, following a justified suspension, to the sub-contractor which clearly cannot continue if the contractor has suspended all its obligations under SBC.

Impediment, prevention or default by the employer: clause 2.19.7

There is a relevant event in SBC to cover impediment, prevention or default by the employer which then entitles the contractor to an extension of time if appropriate. There is a similar clause in the sub-contract clause 2.19.8 which entitles the sub-contractor to an extension of time if the contractor is responsible for any impediment, prevention or default and the comments to SBC are applicable here. Clause 2.19.7 refers to acts of prevention, etc. of the employer under SBC which cause delay to the sub-contract. It is conceivable that not every such act will delay a sub-contract and it is for the sub-contractor to show that it has been delayed.

19.2.4 Direct loss and/or expense claims under (SBCSub/C)

The loss and/or expense provisions are contained in clauses 4.19–4.22.

19.2.5 Commentary

Sub-contractor's claims

Clause 4.19 gives the sub-contractor a right to claim, not through but *from* the main contractor for direct loss and/or expense not covered by a payment under any other provision in the sub-contract. With the exceptions noted below, it almost parallels SBC clause 4.23 and, so far as claims made by the sub-contractor are concerned, for the most part the situation is exactly the same as with claims by the contractor under SBC clause 4.23.[6] It is good to see that JCT has corrected the anomaly in earlier sub-contracts which made no provision entitling the sub-contractor to any loss and/or

[6] See Chapter 13, Section 13.1.

expense if it properly suspends performance of its obligations under clause 4.11. Causation was an obstacle to bringing the claim as being due to a default on the part of the contractor, because the plain fact was and is that, on a failure to pay by the contractor, the sub-contractor is not obliged to suspend performance of its obligations. It may do so if it so wishes. Therefore, the suspension breaks the chain of causation. It is the suspension and not the failure to pay which causes the sub-contractor loss and/or expense.

Application

For a claim to be successful, the regular progress of the sub-contract works including any part which is sub-sub-contracted must be *materially* affected by any of the relevant sub-contract matters. The onus is on the sub-contractor to give written notice of the claim to the main contractor. This it must do as soon as it has become, or reasonably should have become, apparent to the sub-contractor of the material effect on progress. There is no provision for the contractor to decide the amount of loss and/or expense payable. The clause envisages that the amount of such a disturbance claim will be agreed between the parties by negotiation. It is the agreed amount of direct loss and/or expense which is recoverable from the contractor as a debt. It has sometimes been contended that if the parties are unable to agree, nothing at all is recoverable. That is a highly technical argument, which is entirely devoid of merit. The reference to the amount 'agreed' by the parties is an attempt to establish a simple mechanism by which the sum to be paid to the sub-contractor can be fixed. It is clearly the intention of the parties that the sub-contractor receives the amount of loss and/or expense to which it is entitled. To the extent that the parties fail to agree, the dispute is referable to adjudication or arbitration. In practice, of course, it is very unlikely that the contractor will agree any amount due to the sub-contractor, but failing agreement, there can be no automatic recovery of the sum suggested by the sub-contractor.[7]

The wording of clause 4.19 indicates that there are three conditions precedent. The first is compliance with the provisions as to written notice. Under the first proviso, the sub-contractor must make written application to the main contractor as soon as it has become, or should reasonably have become apparent. The second proviso requires the sub-contractor to submit such information in support of its application as is reasonably necessary to show that regular progress has been or is likely to be affected, but only on the request of the contractor. Therefore, a sub-contractor which submits no supporting information is not in breach of its obligations under this clause unless it refuses to provide the information after the contractor has requested it. Obviously the contractor must be reasonable in what it requests. Whether or not such a request is reasonable is a matter which could conveniently be referred to adjudication.

The third proviso requires the sub-contractor to submit details of the loss and/or expense in order to enable that loss and/or expense to be ascertained and agreed. Again, the proviso is triggered only if the contractor requests the details. It is only in

[7] *Hermcrest Plc v G Percy Trentham Ltd* (1991) 53 BLR 104.

this proviso that any reference is made to ascertainment and it is not clear which party is to carry it out. In practice, the sub-contractor will submit its application with what it believes to be full supporting information and the sum to which it believes it is entitled. Following receipt, the contractor, having requested and received any further information required, will produce its own ascertainment. It is at that point that the procedure founders on the weak assumption that the parties will agree a figure. In default of agreement, the figure must be decided by one of the dispute resolution procedures and 'in an appropriate case, that agreement might be reflected by a formula-based calculation.'[8]

Relevant sub-contract matters

The relevant sub-contract matters are in clause 4.20 and they are similar to the relevant matters under SBC clause 4.24. Therefore, comments elsewhere in this book in relation to SBC are also applicable to this sub-contract. However, there are some points to note in the following matters:

Directions of the contractor: clause 4.20.2

The directions referred to are divided into six groups:

Group 1: directions given for the expenditure of provisional sums with the exception of provisional sums for defined work.
Group 2: directions for opening up and testing under SBC clause 3.17.
Group 3: directions for opening up and testing under clause 3.10 of the sub-contract.
Group 4: directions about discrepancies in the numbered documents or between them and the main contract documents.
Group 5: directions for the postponement of work under the sub-contract whether or not connection to a postponement under SBC.
Group 6: directions about antiquities.

Suspension by the contractor: clause 4.20.4

The comments dealing with the equivalent clause in the extension of time provisions are applicable here.

Approximate quantities: clauses 4.20.5 and 4.20.6

The comments dealing with the equivalent clause in the extension of time provisions are applicable here.

[8] *Norwest Holst Construction Ltd v Co-operative Wholesale Society Ltd* [1998] EWHC 339 (TCC) at paragraph 365 per Judge Thornton.

Impediment, prevention or default by the employer: clause 4.20.7

Comments elsewhere dealing with the equivalent clause in the extension of time provisions are applicable here.

Main contractor's claims

Clause 4.21 deals with claims by the main contractor against the sub-contractor in respect of disturbance of regular progress of the main contract Works by the sub-contractor or any of its persons, for example sub-sub-contractors. The contractor is required to give written notice. There is no reference to a written application and the contractor must act within a reasonable time of the effect becoming apparent. The clause is brief, but refers to the contractor's obligation to provide reasonable particulars of the effects on regular progress and details of the resulting loss and/or expense. Although the sub-contractor must reasonably request the loss and/or expense details before the contractor is obliged to provide them, the contractor must provide the supporting particulars about the effects on regular progress with the notice.

It is notable that the contractor's entitlement under this clause is to loss and/or expense. In contrast the entitlement of the sub-contractor under clause 4.19 is to *direct* loss and/or expense. On the basis that in a contract the use of different words is to be construed as denoting different things,[9] it can be argued that the absence of the word 'direct' when referring to the contractor's claims in two separate clauses is a deliberate indication of a broader scope of entitlement. It is thought that there is a real distinction to be drawn between what the contractor can recover and the direct loss and/or expense which the sub-contractor can recover under clause 4.19. It is suggested that the different descriptions of the damages must allow the contractor to recover consequential losses under this provision in the correct circumstances.[10]

When claims made are agreed under clause 4.21.2, the main contractor may deduct the amount agreed from monies due or to become due to the sub-contractor or, if necessary, recover the sums due as a debt. It is clear that agreement is essential under this clause, as under clause 4.19. Clause 4.22 preserves to both parties their other rights and remedies.[11]

19.2.6 Delayed completion by the sub-contractor

The main contractor's right to claim against a sub-contractor for delay in completion of the sub-contract works is set out in clause 2.21. The all-important date of practical completion is covered in clause 2.20.

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[9] *John Jarvis v Rockdale Housing Association* (1986) 36 BLR 48.
[10] *Millar's Machinery Co Ltd v David Way & Son* (1934) 40 Com Cas 204.
[11] i.e. claims at common law, see Chapter 4.

19.2.7 Commentary

The main contractor's right to claim for delayed completion of the sub-contract works is dealt with on a different basis from its right to claim for the effect of any act, omission or default of the sub-contractor upon regular progress of the main contract Works.[12] In effect, clause 2.21 sets out the contractor's entitlement to unliquidated damages. It is exceptionally rare for a contract to include liquidated damages in respect of sub-contract work. The reason is that, whereas under a main contract the contractor is in control of constructing the whole of the Works, the multitude of sub-contractors each capable of delaying others and being delayed themselves makes it well nigh impossible to arrive at a rate of liquidated damages which represents a genuine pre-estimate of the effect of delay by any single sub-contractor.

The expedient of simply stepping down the full amount of liquidated damages from the main contract may occasionally represent an accurate representation of future loss, but more often, the contractor's delay will be a complex interaction of delays by many sub-contractors, suppliers and the contractor itself. Although it is not easy to arrive at an accurate amount of unliquidated damages in respect of any particular sub-contractor, it does free the contractor to concentrate on a particular sub-contractor's delay without the problems which may arise if, as undoubtedly will be the case, a sum set as liquidated damages is actually a penalty and unenforceable.[13]

Clause 2.21 is very simple. If the sub-contractor does not complete the sub-contract works within the period for completion in the sub-contract particulars, the sub-contractor must pay or allow the contractor the direct loss and/or expense caused by the failure to complete. In order to recover, the contractor must serve notice on the sub-contractor within a reasonable time of the expiry of the period for completion. In such circumstances, there appears to be no reason why a reasonable period should not be a few days, perhaps up to a couple of weeks at the most.

Unlike some other provisions considered in this chapter, there is no express stipulation that the amount of damages is to be agreed. At first sight, this appears to enable the contractor to simply set-off the amount it considers to be due from any other payments. However, clause 2.21 states that the sub-contractor must 'pay or allow' the amount of loss and/or expense. This phrase has been considered by the Court of Appeal. The Court was examining the equivalent clause (12) in the DOM/1 form of domestic sub-contract which is an ancestor of SBCSub/C. Clause 12 dealt with the failure of the sub-contractor to complete on time. Like clause 2.21 of SBCSub/C, clause 12.2 of DOM/1 provided that on receipt of the contractor's written notice that it had failed to complete on time, the sub-contractor must 'pay or allow' a sum equivalent to the damage suffered. It was argued that the phrase in question allowed the contractor to set-off the damages against sums due to the sub-contractor. The Court disagreed:

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[12] See the consideration of clause 4.21 above.

[13] See the detailed discussion about penalties in Chapter 3, Section 3.2.

> '[Counsel] has to assert that clause 12.2 provides an independent provision for set-off, not requiring the notice and the calculations envisaged in clause 23.2. He relies, therefore, on the words in clause 12.2, "The sub-contractor shall pay or allow to the contractor". "Pay" obviously obviates set-off – the money is paid, there is nothing to be set off – but "allow", he says, must mean allow by way of set-off.
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> I am unable so to construe clause 12.2 primarily because what the defendants are claiming to set off is the figure which they claim is the sum due to them, whereas what the sub-contractor is bound to pay or allow under clause 12.2 is the sum properly due to the contractor: the two are by no means necessarily the same. There may well be disputes as to whether or not, or by how long a period, the sub-contractor failed to complete the sub-contract works in time, and there may well also be disputes as to whether the damage claimed by the contractor was caused by the delay of this particular sub-contractor. Even, therefore, with consideration being limited to claims for liquidated sums by reference to the liquidated and ascertained damages payable to the employer, there is ample scope for disagreement about what is truly due under clause 12.2. I read clause 12.2 as requiring the sum to be paid but it can only be allowed in so far as it is agreed. The sub-contractor cannot be bound to allow it so far as it is disputed. In so far as the sum is agreed to be due, allowed in this sense to be due, it will fall within clause 23.1 and the contractor will be entitled to deduct it under clause 23.1 from any money otherwise due to the sub-contractor.
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> It is to be noted that in clause 12.2 there is no equivalent to the provision at the end of clause 29.4 which would enable the contractor, when calculating any payment to be made to the sub-contractor, to deduct his own estimate of the amount of the loss or damage which he claims to have suffered.'[14]

That is a somewhat surprising result and may be confined to SBCSub/C and similar domestic sub-contracts. However, it is clear authority that, even under clause 2.21 and without express words, the contractor can only deduct those amounts which have been agreed with the sub-contractor.

Clause 2.20 is important. It is an odd feature of this clause that nothing in the clause actually fixes the date for practical completion. The best that can be said is that practical completion is 'deemed' to have taken place in certain circumstances. Although it is a matter for the sub-contractor to notify the contractor when, in the opinion of the sub-contractor, practical completion has taken place and the reasonably necessary information for the health and safety file has been provided, the contractor has 14 days in which to dissent. The contractor must give reasons and, of course, these reasons must be carefully considered, because in any subsequent adjudication on the issue, it will be the validity or otherwise of the contractor's reasons which will determine the issue. If the contractor does not dissent, practical completion is to be deemed to have taken place on the date notified by the sub-contractor. The clause refers to practical completion 'for all the purposes of this Sub-Contract'. A crucial purpose is, of course, the application of clause 2.21.

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[14] *Hermcrest Plc v G Percy Trentham Ltd* (1991) 53 BLR 104 at 115 per Dillon LJ.

If the contractor dissents, it is effectively up to the contractor to decide when practical completion is deemed to have taken place. The contractor must be satisfied that the sub-contract works are complete and the material has been supplied for the health and safety file. It must then give written notice to the sub-contractor. The only constraint is that the date cannot be later than the date of practical completion of the whole of the main contract Works. There is provision for the parties to agree the date, but in light of the contractor's dissent, that seems unlikely. The clause expressly refers to the possibility of the date being determined under one of the dispute resolution procedures. Presumably, it is only when determined under such procedures that the date can be said to be the date of practical completion rather than a deemed date.

19.3 JCT Standard Building Sub-Contract with Sub-Contractor's Design Conditions (SBCSub/D/C)

19.3.1 Introduction to the form

This form was published at the same time as SBCSub/C. It is for use where the main contract Works are being carried out under SBC, the contractor is to design parts of the Works (contractor's designed portion) and a sub-contractor is designing part or all of the sub-contract works.

19.3.2 Commentary

The comments for SBCSub/C are also applicable to the clauses in this sub-contract with just two exceptions.

Strikes and similar events: clause 2.19.13

The comments covering the equivalent relevant event in SBCSub/C are also applicable here, but it should be noted that the event has been enlarged so that there is provision for an extension of time if the strike affects persons engaged to prepare the contractor's designed portion. This could affect the sub-contractor itself if it prepares the design in house, but would apply also if the design was prepared by a sub-sub-contractor such as a firm of architects or engineers.

Directions of the contractor: clause 4.20.2

The comments covering the equivalent relevant sub-contract matter in SBCSub/C are also applicable here, but there is an important difference in clause 4.20.2. Group .1 is enlarged to include directions of the contractor for the expenditure of provisional sums included in the 'Contractor's Requirements'. These are defined in clause 1.1 as the documents dealing with the sub-contractor's designed portion and included in the numbered documents. It is the document which steps down the relevant part of the Employer's Requirements under SBC to the sub-contractor.

19.4 JCT Intermediate Named Sub-Contract Conditions (ICSubNAM/SC)

19.4.1 Extension of time and direct loss and/or expense

The provisions for extensions of time and claims for and against sub-contractors named under clause 3.7 of IC and ICD are contained in clauses 2.12, 2.13 and 4.16–4.19 and provisions for practical completion and failure to complete are contained in clauses 2.14 and 2.15.

19.4.2 Commentary

The references to ICSub/NAM are to the Form of Tender and Agreement. This is divided into three parts:

(I) Invitation to tender (ICSub/NAM/IT)
(II) Tender (ICSub/NAM/T)
(III) Agreement (ICSub/NAM/A).

It is this last document which constitutes the sub-contract as actually executed by the main contractor and the sub-contractor, form ICSub/NAM/C containing the conditions of sub-contract being issued separately and incorporated by reference into the agreement.

Although the sub-contractors under this form are referred to as 'named', they must not be confused with the former nominated sub-contractors under JCT 98. There are considerable differences. For example, the architect is not required to certify amounts for payment to the sub-contractor, there is no provision for direct payment by the employer if the main contractor defaults on payment and the architect is not required separately to certify practical completion of the sub-contractor's work. The architect will only be involved if either the sub-contractor or the main contractor is so seriously in default under the sub-contract that either becomes entitled to terminate the employment of the other, in which case the architect is required to step in to deal with the situation that then arises. Sub-contractors under this form have more in common with domestic sub-contractors under form SBCSub/C.

The extension of time provisions are somewhat shorter than the equivalent provisions under SBCSub/C and more like the IC and ICD extension of time provisions – as one might expect. The general comments made elsewhere under SBCSub/C are relevant and comments to IC and ICD are applicable to ICSub/NAM/C, but the following should be noted:

- Clause 2.12.1 refers to it becoming reasonably apparent that the commencement, progress or completion of the sub-contracts works is being delayed rather than simply the progress under IC and ICD and it is the period rather than the date for completion which the contractor must consider when deciding whether to make an extension of time.
- Clause 2.12.3 allows the contractor up to 16 weeks after practical completion to review the extensions of time. IC and ICD allow only 12 weeks. It is not clear why it was thought necessary to provide for different periods other than the ultimate

extension of time allowed to the contractor under the main contract will undoubtedly have an effect on its view of extensions under the sub-contracts. Presumably, the extra 4 weeks is intended to permit the contract to receive a final decision on extensions of time at the very end of the 12 weeks under IC and ICD before considering how much time to allow to the relevant sub-contractors.[15]

- Clause 2.13.4 deals with approximate quantities. The first part refers to the entitlement when the contract bills provided as part of the contract documents with IC or ICD contain approximate quantities which are not a reasonably accurate forecast. The approximate quantities in the second part are those contained in bills of quantities provided by the contractor as part of the sub-contract. In both cases, the sub-contractor may have an entitlement to an extension of time if it is clear that the sub-contractor has been delayed.
- Clause 2.13.6 effectively steps down the contractor's right to an extension of time, following a justified suspension, to the sub-contractor which clearly cannot continue to perform if the contractor has suspended all its obligations under IC or ICD.
- Clause 2.13.7 refers to acts of prevention, etc. of the employer under IC or ICD which cause delay to the sub-contract. It is conceivable that not every such act will delay a sub-contract and it is for the sub-contractor to show that it has been delayed.
- The event in clause 2.13.13 has been enlarged so that there is provision for an extension of time if the strike affects persons engaged to prepare any design work for the main contract Works by or on behalf of the contractor. The precise meaning of this clause is obscure. It appears to entitle the sub-contractor to an extension of time only if delayed because the strike affects persons whom the contractor has engaged to prepare designs for the main contract Works. It appears to preclude the sub-contractor from any extension of time if it has sub-sub-contracted its own design work to another person who is delayed by a strike. However, on the basis that the sub-contractor itself has been delayed by a strike, presumably it could obtain an extension of time, because there is no doubt that it has been engaged by the contractor. It is a very unsatisfactory clause and it would benefit from redrafting.
- Clause 4.17.4 refers to suspension by the contractor under the main contract for the purposes of stepping down the entitlement.
- Clauses 4.17.5 and 4.17.6 refer to approximate quantities in the contract bills in the main contract and the bills of quantities in the sub-contract.
- Clause 4.17.7 refers to impediment, prevention or default by the employer.

19.5 JCT Intermediate Sub-Contract Conditions (ICSub/C)

This is the sub-contract form for use with IC where the sub-contractor is not required to design. The numbering of the extension of time, loss and/or expense and practical completion and lateness clauses is identical to that in ICSub/NAM/C. The

[15] Whether the period of review of extensions of time is mandatory or merely directory has been considered in Chapter 2, Section 2.2.4.

content is virtually identical except that there is no reference to strikes affecting persons engaged in design in clause 2.13.13. Therefore, the comments to sub-contract ICSub/NAM/C are also applicable here.

19.6 JCT Intermediate Sub-Contract with Sub-Contractor's Design Conditions (ICSub/D/C)

This is the sub-contract form for use with IC where the sub-contractor is required to design part of the Works (the contractor's designed portion). The numbering of the extension of time, loss and/or expense and practical completion and lateness clauses is identical to that in ICSub/NAM/C. The content is virtually identical except that in clause 2.13.13 the reference to strikes includes strikes affecting persons engaged in preparing the contractor's designed portion. Presumably the reference to persons will also include the sub-contractor and anyone to whom the sub-contractor has sub-sub-contracted such design. Therefore, the comments to sub-contract ICSub/NAM/C are also applicable here.

19.7 JCT Design and Build Sub-Contract Conditions (DBSub/C)

This is the sub-contract form for use with DB.

19.7.1 Extension of time and direct loss and/or expense

The numbering of the extension of time, loss and/or expense and practical completion and lateness clauses is identical to that in SBCSub/C.

19.7.2 Commentary

The content is virtually identical to SBCSub/C save that references to clauses in the main contract are adjusted to refer to clauses in DB and the comments to SBCSub/C are generally applicable with the following significant changes:

Extension of time

Approximate quantities: clause 2.19.4

The relevant sub-contract event refers to the situation where the approximate quantity is not a reasonably accurate forecast of the amount of work which is required and has been carried out. Unlike the position under SBCSub/C, there is only reference to the bills of quantities in the sub-contract because there are unlikely to be bills of quantities associated with the main contract (DB). The bills referred to here are any bills which have been prepared by the contractor and included in the num-

bered documents. If the quantities are not a reasonably accurate forecast, the sub-contractor may be entitled to an extension of time. The entitlement would apply of course, only if the forecast was too low. Where the approximate quantities were in excess of what was actually required, it would be difficult (albeit perhaps not impossible in certain circumstances) for the sub-contractor to demonstrate that it resulted in a delay.

Strikes and similar events: clause 2.19.13

The comments covering the equivalent relevant event in SBCSub/C are also applicable here, but it should be noted that the event has been enlarged so that there is provision for an extension of time if the strike affects persons engaged to prepare the design of the main contract Works. This could affect the sub-contractor itself if it prepares the design in house, but would apply also if the design was prepared by a sub-sub-contractor such as a firm of architects or engineers.

Delay in the receipt of any statutory permissions: clause 2.19.15

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

Loss and/or expense

Clause 4.19.2 has been added in the procedural part. It provides that if the employer's right to defer possession, and where paragraph 5 of the supplemental provisions in schedule 2 also apply, and if the sub-contractor suffers direct loss and/or expense as a result of deferment of possession or as a result of any of the relevant sub-contract matters, the sub-contractor must provide the contractor with information to enable it to comply with paragraph 5. The purpose of this provision is to deal with the fast track situation which replaces the normal loss and/or expense provisions when paragraph 5 of the supplemental provisions apply. Clauses 4.20.5 and 4.20.6 have been inserted in the list of relevant sub-contract matters to echo the relevant sub-contract event items dealing with approximate quantities and statutory permissions respectively.

19.8 JCT Management Works Contract Conditions (MCWC/C)

This is the form for use with the Management Building Contract (MC) whether or not the works contractor has any design responsibility. The form was produced in 2008.

19.8.1 Extension of time

This is dealt with in clauses 2.16–2.19.

19.8.2 Commentary

Other than the terminology of management contractor and works contractor instead of contractor and sub-contractor, these provisions closely parallel the provisions of SBCSub/C. There are some points to note as follows:

Architect's dissent

The question of the architect's dissent has been discussed in Chapter 11, Section 11.6.2, when considering the extension of time provisions in the Management Building Contract MC. The works contract provides in clause 2.18.1 that the management contractor must consult the architect before either giving or refusing an extension of time to the works contractor. This is obviously because an extension of time given to the works contractor under MCWC will entitle the management contractor to an extension of time under MC (the second relevant project event). However, it is difficult to see the practical effect of consulting the architect, because the contract is clear that it is the management contractor's duty to consider whether the works contractor should have an extension of time. Therefore, it is open to the management contractor to consult the architect and, if the architect disagrees with the management contractor's view, to ignore the architect and proceed according to its own view. It seems that the management contractor cannot rely on the architect's opinion and it must take action as though the architect had never passed any opinion. No doubt the management contractor will carefully weigh anything the architect has to say, but final responsibility remains with the management contractor.

It is noteworthy that there is no requirement for the management contractor to consult or even notify the architect before the management contractor carries out its final review of extensions of time under clause 2.18.5. There is no reference to the architect's opinion or dissent nor to the terms of any such opinion or dissent being passed to the works contractor. In practice, the management contractor may be reluctant to give an extension of time in the face of the architect's contrary opinion.

Relevant events

The relevant events closely follow those in SBCSub/C, but there are some differences:

- There is no provision for approximate quantities in the contract bills as in SBCSub/C for the very good reason that there are no contract bills associated with the management contract.
- Clause 2.19.13 refers to effects of strikes on any person engaged in the preparation of designs for the works contractor.
- Clause 2.19.15 deals expressly with delay in obtaining consents from any statutory body. There are two important criteria: the consents must be necessary and the works contractor must have taken all practical steps to avoid or reduce the delay. In other words it must have done everything possible in practice (as distinct from in theory). This is the duty to mitigate, in different words. The most obvious statutory body is of course the local planning authority.

19.8.3 Clauses dealing with loss and/or expense

Loss and/or expense is dealt with in clauses 4.20–4.23.

19.8.4 Commentary

The commentary on SBCSub/C clauses 4.19–4.22 is relevant, as is the consideration of the position under clause 4.23 of SBC.[16] There are some points to note:

General

The wording and layout of these clauses are significantly different to the equivalent clauses in the 1998 edition. They follow what seems to be the standard JCT sub-contract clauses, but with minor changes.

Ascertainment

In the 1998 edition, the ascertainment was to be carried out by the architect or if the architect so instructed, by the quantity surveyor in consultation with the management contractor. Under the current works contract, there is no provision for ascertainment. Like other sub-contracts, the works contractor is only entitled to the *agreed* amount.

Relevant works contract matters

Clause 4.21.1 expressly excludes variations for which an acceleration or variation quotation has been accepted. That is obviously because such quotations already include allowance for loss and/or expense. There is no provision for approximate quantities in the contract bills as in SBCSub/C for the very good reason that there are no contract bills associated with the management contract.

[16] See Chapter 13, Section 13.1.

Claims between management contractor and works contractor

These provisions are very similar to the equivalent provisions in SBCSub/C.

19.8.5 Delayed completion by the works contractor

This is dealt with under clauses 2.20 and 2.21. Although modelled generally on the equivalent provisions in SBCSub/C, there are some significant differences.

19.8.6 Commentary

Unlike the position under SBCSub/C, although the works contractor has a duty to notify the management contractor when, in its opinion, practical completion has been achieved, it is the management contractor's duty to pass the notice to the architect with any comments which the management contractor feels it appropriate to make. It is the architect's opinion, obviously exercised according to law, which determines whether practical completion has been achieved. Presumably, the architect will take account of the management contract's views, but there is no stipulation in the contract which states that the architect and the management contractor must agree. It is for the management contractor to issue the certificate of practical completion with the architect's consent.

There are two points worth considering here. The first is that the management contractor has no power to issue the certificate of practical completion if the architect withholds consent. The second point is that it is unusual that the person on whose opinion the certificate is based does not actually issue it. Is the certificate the architect's or the management contractor's? Who is the certifier? The certifier is nominally the management contractor under clause 2.20.2, but the opinion is that of the architect. The standard definition of a certificate as the formal expression of a professional opinion[17] is not necessarily disrupted by these provisions, but it introduces an element of confusion. Although the management contractor is not entitled to issue the certificate without the architect's consent, is the management contractor entitled to refuse to issue a certificate embodying the architect's opinion if the management contractor disagrees with it? Probably not, however, the matter is not beyond doubt and it would have been so much easier for both MC and MCWC to provide that the architect, having taken into consideration the views of the management contractor, should certify practical completion of the works contract works and issue the certificate to the management contractor with a copy to the works contractor.

Other than the obvious changes in terminology, clause 2.21, which provides for the works contractor to pay or allow the amount of direct loss and/or expense to the management contractor, is similar to the equivalent clause in SBCSub/C. There is one addition, the purpose of which is not immediately obvious: the loss and/or expense must include any liquidated damages which the management contractor is obliged to pay to the employer as a result of the works contractor's failure to complete

[17] *Token Construction Co Ltd v Charlton Estates Ltd* (1973) 1 BLR 48.

on time. The clause makes clear that the liquidated damages is not necessarily the total amount to which the management contractor is entitled. This provision was no doubt thought advisable in view of the management contractor's particular duties under MC and to put beyond doubt that liability for the whole or the relevant portion of liquidated damages could be stepped down to whichever of the works contractors was responsible for the delay.

19.9 ACA Form of Sub-Contract (ACA/SC)

19.9.1 Introduction

This form of sub-contract was issued by the Association of Consultant Architects in October 1982 and is designed for use with the ACA Form of Building Agreement.[18] The form current at the time of writing is the third edition revised in 2003. It is not a negotiated contract and, therefore, in some circumstances may be interpreted *contra proferentem* (against the employer). It may also be caught by the Unfair Contract Terms Act 1977.

The contractor under ACA 3 is not obliged to use this sub-contract, but it is clearly drafted to correspond to the ACA 3 provisions and it is sensible to use it, because it steps the respective rights and liabilities up and down as appropriate. The opportunities for claims are considered below.

19.9.2 Extensions of time

The sub-contract provisions for extensions of time are contained in clause 7. It also deals with commencement and progress of the sub-contract works, the consequences of failure to complete on time and the contractor's power to accelerate or postpone the sub-contract works.

19.9.3 Commentary on the extension of time clause

The sub-contractor's obligation as set out in clause 7.1 is to commence the sub-contract works within 10 working days of receipt of the contractor's written instruction (a period which the parties may agree to change before executing the contract). The sub-contractor's duty is to proceed regularly and diligently in accordance with the sub-contract time schedule. The clause expressly makes provision for the sub-contractor to finish before the date for completion if it so wishes. These duties are expressly made subject to the content of the rest of clause 7. Whether the sub-contractor has proceeded regularly and diligently with the sub-contract works is a question of fact in each case.[19]

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[18] See Chapter 16 for consideration of the ACA Building Contract (ACA 3).
[19] See Chapter 13, 'Effect on regular progress' in Section 13.1.4.

Grounds for extension of time

Clause 7.2 deals very concisely with extensions of time. The sub-contractor is entitled to extensions of time only on the grounds stated. The grounds are divided into three categories:

(a) Circumstances entitling the contractor to an extension of time

This ground does not make explicit reference to the main contract, but clearly it is only under the main contract that the contractor can become entitled to an extension of time. It is extremely unlikely that ACA/SC will be used to sub-contract work under any form of main contract other than ACA 3 and what follows assumes that is the case. The extension of time provisions in ACA 3 are in clause 11.5, but there are two alternative versions of clause 11.5.

Alternative 1 is a very restricted version, restricted in fact to such grounds as would be likely to set time at large if there were no provision for extending time. These grounds are, broadly, all defaults of the employer or the architect, but also expressly include failure by the CDM co-ordinator and the principal contractor (if not the main contractor) to comply with their duties.

Alternative 2 lists eight grounds.[20] It is essential, therefore, that the sub-contractor is made aware of the alternative which is in operation under the main contract.

There is a requirement for written notice from the sub-contractor and for full and detailed particulars. The wording makes clear that this is a condition precedent to any entitlement to an extension of time on the part of the sub-contractor. The notice and particulars must be given at the same time and in the manner that ACA 3 requires them to be given by the contractor to the architect. It is not clear why the requirement is worded in this way rather than the actual timing and manner being set out in the sub-contract. ACA 3 requires 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, to serve written notice on the architect. 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 are necessary or as 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 without any limit placed on the timing of the requests. However, it is not thought that the wording in clause 7.2 is strong enough to permit the contractor to exercise a similar power under ACA/SC.

(b) Act, instruction, default or omission of the contractor

The sub-contractor is not required to give notice under this ground, but in practice notice will be given if only to remind the contractor that an extension of time is due.

[20] In both cases refer to the commentary on the ACA main contract terms: see Chapter 16, 'Grounds for extension of time' in Section 16.2.3.

It is for the sub-contractor to prove that the contractor has prevented completion of the sub-contract works by the due date. The proof required is said to be to the satisfaction of the contractor, but it is not considered that this amounts to anything more onerous than the usual standard of proof: the balance of probabilities. Otherwise, this ground is self-explanatory.[21]

(c) Instruction to postpone under clause 7.5

Clause 7.5 is an unusual clause because it empowers the contractor to accelerate the sub-contract works by bringing forward the date for completion or to postpone the completion of all or any part of the sub-contract works, and it requires the sub-contractor immediately to take the necessary measures to comply with the instruction if the contractor has acted reasonably. Any postponement instruction entitles the sub-contractor to an extension of time. Again, no notice from the sub-contractor is required.

Procedure

Except in relation to the first ground (a), it is for the contractor to take the initiative in granting an extension of time although, as already noted, it would be unusual for the sub-contractor not to let the contractor know if it believed itself entitled to an extension of time under any of the three categories. The only criterion is that the extension must be a fair and reasonable estimate. Clause 7.4 is important. It states that, in considering any extension of time, the contractor is entitled to take any omission of work from the sub-contract into account. That can be done at any time, but it must be before the taking over of the Works. Normally, the contractor would take omissions into account when considering an extension of time, but the wording seems wide enough to allow the contractor to reduce extensions of time already granted if it is able to point to an omission of work.

There is no general power of review, but where the architect has carried out a review of extensions of time under clause 11.7 of ACA 3 and fixed a later date for completion of the Works, the contractor must (in the first edition of the Form the word was 'may') also review extensions of time previously granted, but only in respect of the first category (clause 7.2(a)).

Sub-contractor's failure to complete on time

Clause 7.6 importantly provides that if the contractor gives an extension of time to the sub-contract works or issues an instruction accelerating or postponing them, the sub-contractor must submit a revised time schedule to the contractor within seven working days of the contractor's notice or clause 7.5 instruction. If approved by the contractor, the revised schedule will thereafter apply as the time schedule. Clause 7.3

[21] Reference should be made to Chapter 16, Section 16.3.3, which considers whether there must be a legal wrong involved.

provides that if the sub-contract works are not completed in accordance with clause 7.1, the contractor must give a written notice to the sub-contractor. What this means is that, if the sub-contractor does not complete by the completion date and there is no extension of time or the extension of time does not extend to practical completion of the sub-contract works, the contract must issue the notice of non-completion.

In failing to complete the sub-contract works by the date for completion in the time schedule (including any revision to such schedule), the sub-contractor is in breach of contract. Unlike the position under JCT sub-contracts, there is no provision under ACA/SC for the contractor to recover from the sub-contractor any damages caused by the failure to complete in time. That does not mean that the contractor is without a remedy: it is open to the contractor to bring a common law action against the sub-contractor for damages for breach of contract using one of the dispute resolution procedures.

19.9.4 Damage, loss and/or expense

This is dealt with in clause 9 of the sub-contract and, to a lesser extent, by clause 5.

19.9.5 Commentary

The financial claims are very similar to those in clause 7 of the ACA main contract[22] and effectively step down the procedure in the main contract form. Clause 9.1 requires the sub-contractor to give to the contractor any notices, particulars or estimates which the contractor has a duty to give to the architect under ACA 3. The sub-contractor must do this in sufficient time to enable the contractor to claim any adjustment to the contract sum or any damage, loss and/or expense on to which the contractor is entitled.

In order to be able to comply with this clause, the sub-contractor must be aware of the contents of the main contract. Clause 1.2 states that the sub-contractor is deemed to have full knowledge of all the contractor's obligations under the main contract whether express or implied. It goes on to state that the sub-contractor must carry out and complete the sub-contract works in such a way that no omission or default by the sub-contractor will cause or even contribute to a breach by the contractor of obligations under the main contract. It is sometimes argued that a deeming provision in itself is not sufficient to overcome clear evidence to the contrary: in this instance that the sub-contractor was not in possession of all the information relative to the main contract. Of course, the purpose of a deeming provision is precisely to put something beyond doubt and to avoid a party being able to argue to the contrary. The sub-contractor, having freely entered into the sub-contract would almost certainly be bound by such a clause. Leaving that question aside, a sensible sub-contractor would ensure, before executing this sub-contract, that it had all the necessary information about the main contract, that it had read and understood it and that it

[22] Considered in Chapter 16, 'Grounds for extension of time' in Section 16.2.3.

was satisfied that it would be able to comply, not only with clause 2.1, but also with clause 9.1.

Clause 9.2 allows the sub-contractor to claim if regular progress is disrupted or delayed by anything (excepting architect's instructions)[23] which would entitle the contractor to claim damage, loss and/or expense against the employer under clause 7 of the main contract. The procedure is not spelled out, but it appears that the sub-contractor must request the contractor to recover damage, loss and/or expense from the employer. There is a proviso that the sub-contractor must comply with its obligations under clause 9.1, but little else to indicate how the provision is supposed to work in practice. It is plain from the wording that claims under this clause extend to both disturbance and prolongation.

The wording of the clause, besides being lacking in procedural information, reads strangely in parts. An example is the middle of the clause which states that the contractor must recover the damage, loss and/or expense if the sub-contractor so requests. Read strictly, that is a duty imposed on the contractor to recover the damage etc. One might have expected the wording to be couched in somewhat different terms and to refer to the contractor's obligation to attempt to recover or to submit to the employer and that everything recovered should be paid to the sub-contractor. To state that the contractor 'shall' (must) recover is leaving no alternative. No doubt in interpreting this clause, the courts would construe the words as meaning that the contractor must do everything reasonably practicable in order to achieve recovery for the sub-contractor. A sub-contractor seeking to claim from a contractor on the grounds that the contractor failed to recover damage, loss and/or expense even after a request by the sub-contractor is unlikely to get very far. In practice, the provision probably means little more than that the contractor must pass on the sub-contractor's claims.

Clause 9.3 deals with the situation where under clause 9.2 the contractor recovers some money for any circumstance which affects the sub-contract works. The contractor must pay the sub-contractor a proportion of any money which it recovers by adding it to the sub-contract sum. The precise amount is left to the contractor's opinion. The clause provides for the proportion to be nil. The clause simply states that the proportion must be fair and reasonable. The contractor's opinion must be exercised according to law and it is something which could be challenged in adjudication, arbitration or litigation. It is arguable that this provision is caught under the Housing Grants, Construction and Regeneration Act 1996 as being essentially a pay-when-paid provision (under s. 113).

Clause 9.4, which is similar to clause 7.1 of ACA 3, deals with claims by the sub-contractor against the main contractor for damage, loss and/ or expense that the sub-contractor suffers or incurs as a result of any act, omission, default or negligence of the contractor or its employees, agents or sub-contractors which disrupts the regular progress of the sub-contract works, or delays them in accordance with the dates stated in the sub-contract time schedule. Claims resulting from the contractor's instructions to the sub-contractor are excluded and they are dealt with under clause 5 which is considered below to the extent that it is relevant.

[23] Architect's instructions are dealt with separately by main contract clause 8: see the commentary about that in Chapter 16, Section 16.4.3.

This is a claim directly against the contractor from the sub-contractor and it deals with claims which the main contractor cannot pass on to the employer. Clause 9.4 permits the sub-contractor to make a contractual claim against the contractor for matters which would otherwise fall into the category of common law claims for damages for breach of contract and negligence. Although the clause states that the sub-contractor is entitled to recover the damage, loss and/ or expense as a debt, the provision provides no machinery for the ascertainment or the recovery of such claims. In the absence of such mechanism, the sub-contractor is in little or no better position than if clause 9.4 had been omitted altogether. In other words, the clause says very little to assist the sub-contractor in its claim. In practice, the sub-contractor no doubt will make an application to the contractor for payment of the amount of damage, loss and/ or expense the sub-contractor claims, but if the contractor does nothing or rejects the claim, the sub-contractor will be forced to seek adjudication, arbitration or legal proceedings in order to secure payment.

The provisions are no more helpful to the sub-contractor than provisions in JCT sub-contracts which stipulate that amounts must be agreed before being due for payment.

Claims resulting from instructions

Clause 5.2 requires the sub-contractor to provide estimates to the contractor in respect of instructions if the contractor is required to provide estimates to the architect under the main contract and asks the sub-contractor for them. If the contractor is bound by its estimates under the main contract, the sub-contractor will be similarly bound under the sub-contract.

Clause 5.3, which entitles the sub-contractor to recover payment and what amounts to loss and/or expense for carrying out the contractor's instructions, is made subject to clause 5.2. That means that if the sub-contractor submits an estimate at the contractor's request, to be submitted as, or as part of, the contractor's estimate to the architect, agreement by the architect will prevent the sub-contractor from making any other claim in respect of the same instruction under clause 5.3.

The sub-contractor is not required to apply for payment. Clause 5.3 simply states that the contractor must ascertain and pay a fair and reasonable adjustment to the sub-contract sum. The ascertainment must be based on the sub-contract pricing schedule, if applicable, for the compliance. The contractor must also include an amount for damage, loss and/or expense incurred by the sub-contractor 'arising out of or in connection with' the instruction. That phrase has been construed broadly by the courts.[24]

No guidance is given about the way in which the contractor must set about the ascertainment, but there are two provisos:

- The subject matter of the instruction must not have arisen from 'or shall not reveal' any negligence, omission or default of the sub-contractor or its employees.
- If the instruction was originally issued to the contractor under the main contract, any adjustment of the sub-contract sum must not be greater than the adjustment

[24] *Ashville Investments Ltd v Elmer Contractors Ltd* (1987) 37 BLR 55.

of the contract sum in respect of the sub-contract works as certified by the architect under the main contract.

The effect is plain albeit the second proviso could have been more clearly drafted. Essentially, the proviso is concerned with ensuring that the contractor does not have to pay the sub-contractor more than the contractor receives in respect of the instruction. Once again, it is arguable that this provision is caught by s.113 of the Housing Grants, Construction and Regeneration Act 1996.