Chapter 4

Basis for common law claims

4.1 General

Most of the claims which are considered in this book are concerned with a claim by the contractor for additional time or financial reimbursement under particular contract clauses which provide that such time or reimbursement will be available under certain conditions. For example, the contractor's right to claim for direct loss and/or expense under SBC clause 4.23. However, the contractor may opt to claim damages at common law for breach of contract or, for example, under the law of tort. Such damages may be claimed instead of or in addition to any loss and/or expense available under the express terms of the contract. The contractor's rights in this regard are preserved by the terms of the contract itself. For example, SBC clause 4.26 makes clear that the provisions in loss and/or expense clauses 4.23–4.25 are without prejudice to any other rights or remedies which the contractor may possess (Clause 4.19 of IC and ICD is to the same effect).

In practice what this amounts to is that SBC, IC and ICD (and, indeed, probably other current standard forms) allow the contractor to make additional or alternative claims for damages based on the same facts as those which it has put forward as part of an application for loss and/or expense under the terms of the contract. This means that the contractor can look for a remedy under a contract term without thereby prejudicing its right to claim at common law on the same grounds.

This has a significant effect on the contractor's options. The contractor is not obliged to make a claim under such a clause in respect of those grounds specified in the clause which are also breaches of contract (e.g. the architect's failure to provide information in due time). Instead, the contractor may opt to wait until the Works are complete and make a claim for damages for all breaches of obligations under the contract. Common law claims are frequently based on implied terms in the contract. It is clear that the contractor can only recover its loss once. But where the contractor has failed to comply with particular requirements of the contract terms, such as an obligation to give notice within a reasonable time of becoming aware that regular progress is being or is likely to be affected, a common law claim may avoid the contractual restrictions imposed upon the contractual claim.[1] There is nothing to prevent a contractor from pursuing both claims in tandem provided that it can make good such claims.[2] Moreover, it should be noted that settlement of a claim made under

[1] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.
[2] *Fairclough Building Ltd v Vale of Belvoir Superstore Ltd* (1990) 28 Con LR 1.

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contractual terms will not preclude the contractor from pursuing a claim for damage arising from the same facts provided only that *additional* damages are claimed and that there is no element of double recovery.[3]

In that context, it is important to remember that not all the matters which under a standard form contract will trigger a claim for direct loss and/or expense are breaches of contract. For example, architect's instructions may entitle a contractor to loss and/or expense, but the giving of an instruction cannot be a breach, because it is expressly empowered by the contract. Therefore, a failure on the part of the contractor to properly operate the provisions of the clause giving a contractual remedy will sometimes leave it without any remedy at all.

Some of the most frequent common law claims are considered below. No standard form contract is a self-sufficient document; it must be read against the background of the general law, and common law claims can arise under any of the standard form contracts in current use. A claim made under the terms of the contract must be in accordance with those terms. Where the contractor makes a claim under a specific contract provision, such as SBC clause 4.23, it must comply with any conditions precedent relating to the timing of applications or the information to be provided. If it is compliant, the contract will be entitled to the remedy prescribed by the contract. It is important to understand that such a remedy may fall short of what the contractor might obtain by claiming at common law for breach of contract. Notably, the contract may exclude what tends to be referred to as 'consequential loss'.[4]

Under most standard form contracts, the architect has power only to ascertain and certify contractual claims; that is to say those claims which arise under the relevant contract clauses. The architect has no power to ascertain, much less certify, amounts due to the contractor in respect of common law claims. It is common for an architect to be expected to certify sums agreed by the employer in response to a contractor's common law claim. However, architects should decline to do so. Not only is the architect powerless to so certify (and therefore such a certificate would be worthless), but the act of purported certification would wrongly suggest that the architect has had a major part to play in arriving at the certified sum and in the event that such sum was later challenged by the employer, the architect would be placed in an unsupportable position. Under JCT terms of contract, it is plain that the arbitrator and probably the adjudicator may decide claims based on tort alone (as well as breach of contract) and the limitation is that the tort must arise out of the transaction which is the subject matter of the contract.[5] Sometimes a contractor will submit a claim which relies partly on the contractual machinery and partly on damages for breach of contract. If the contractor has properly separated the contractual and common law parts of the claim, the architect will be able to deal with the one and decline the other. However, very often the two elements will be mixed together. In that case, the architect must request the contractor to disentangle its claim and submit only the contractual part.

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[3] *Whittal Builders Ltd v Chester-le-Street District Council* (1996) 12 Const LJ 356 (reporting the 1985 *Whittal* case).

[4] *Saintline Ltd v Richardsons, Westgarth & Co Ltd* [1940] 2 KB 99.

[5] *Re Polemis and Furness, Withy & Co* [1921] 2 KB 560; Arbitration Act 1996.

However, under ACA 3 (see Chapter 16) it is clear that the architect has power to assess what would otherwise amount to common law claims as well, albeit only those claims against the employer and not claims against the contractor. ACA 3 clause 7.1 refers specifically to claims resulting from 'any act, omission, default or negligence of the Employer or of the Architect', and the contractor is entitled to recover in accordance with the provisions of this clause. There are particular procedural requirements which the contractor must observe. However clause 7.5 makes clear that failure to comply with those provisions delays the time of settlement of the claim. Moreover, in such circumstances, the contractor would have no contractual claim for interest or financing charges. It is not entirely clear whether the contractor's rights and remedies at common law would be preserved in respect of claims for breach of contract.[6]

Many if not all situations of employer default, which previously would have had to have been dealt with as common law claims for breach of contract, can now be considered as part of loss and/or expense. This has been made possible by the introduction of clause 4.24.6 into SBC (see Chapter 13, Section 13.1.7) and clause 4.18.5 into IC and ICD. Of course, as noted earlier, the architect only has such power under JCT and ACA 3 contracts if the contractor makes the claim under the terms of the contract and not as a common law claim for breach of contract.

The final certificates issued under SBC, IC and ICD (see clauses 1.9.4 in each contract) are conclusive evidence that any reimbursement of loss and/or expense under the contract terms is in final settlement of all the contractor's claims arising out of any of the relevant matters whether breach of contract, duty of care or otherwise, thus precluding any common law claims for anything included in any of the relevant matters. Because the clauses noted in the previous paragraph are quite comprehensive, the issue of the final certificate under any of these contracts will effectively put an end even to common law claims unless presented with exceptional ingenuity. In the absence of a final certificate or in situations where the final certificate is not conclusive (such as MW and MWD) common law claims will be subject only to the Limitation Act 1980. Therefore, the contractor may pursue such common law claims at any time within the period of limitation, i.e. six years for actions based on simple contract or tort or 12 years if the contract is a deed. The limitation period is usually taken to run from practical completion so far as the contractor is concerned.[7]

4.2 Implied terms

4.2.1 General principles

The terms in printed or oral contracts to which the parties are deemed to have applied their minds and agreed are referred to as 'express terms'. When one refers to

[6] *Lockland Builders Ltd v John Kim Rickwood* (1995) 77 BLR 38; *Strachen & Henshaw v Stein Industrie (UK) Ltd* (1998) 87 BLR 52.

[7] *Tameside Metropolitan Borough Council v Barlow Securities Group Services Ltd* [2001] BLR 113 CA.This part of the first instance judgment was not overturned on appeal.

'implied terms' it is understood that one is referring to terms which are not express, but which a court would imply into a particular contract. It is a somewhat complex topic which is comprehensively treated in the standard texts dealing with the law of contract. Implied terms usually fall into one of the following categories:

- By statute, for example under the Housing Grants, Construction and Regeneration Act 1996, the Supply of Goods and Services Act 1982 and the Defective Premises Act 1972.
- By local custom.
- Particular trade usage in a trade or profession where there is a long-standing practice in support. The usage must be certain, long-standing, well known in that trade or profession and it must be a practice which fair minded people would adopt.[8]
- At common law. In building contracts it is generally implied that a contractor will supply good and proper materials,[9] construct the work in a good and proper manner and that the finished structure will be reasonably fit for its intended purpose so far as that purpose as been made known to the contractor and provided that there is no independent designer.[10]
- To give business efficacy, if the contract was not workable without the term.
- If a term is the presumed intention of the parties which 'goes without saying'. This is often referred to as the 'officious bystander test'. The idea is that if, when the parties were agreeing their terms, an officious bystander had been asked if a particular term was included, the bystander would have testily replied 'Yes, of course'.
- If there is a 'course of dealing' between the parties, similar terms will be implied into a new contract made on the same basis.[11] This is a fairly rare occurrence although one which is argued by contractors where the parties have omitted to execute a contract. In order for there to be a course of dealing, the parties must have contracted together on identical terms on a large number of previous occasions and the contract for which it is contended the previous terms apply must be of the same type as the previous contracts. It is not sufficient to found a course of dealing if there are only two or three previous occasions or if previous contracts were different in nature.
- Where parties have used their own interpretation.

In practice, in the context of building contract claims, the concern is with those terms which will be implied into the contract by the courts, in order to make the contract commercially effective.[12]

A term will not be implied into a contract simply because the court thinks it would have been reasonable to insert it. There can never be an implied term to give business efficacy to a contract if there is an express term dealing with the same matter.[13] It is sometimes erroneously thought that this principle applies to all implied terms. It

[8] *Symonds v Lloyd* (1859) 141 ER 622.
[9] *Young & Marten Ltd v McManus Childs Ltd* (1969) 9 BLR 77.
[10] *Hancock v B W Brazier (Anerley) Ltd* [1966] 2 All ER 901; *Test Valley Borough Council v Greater London Council* (1979) 13 BLR 63; *Viking Grain Storage Ltd v T H White Installations Ltd* (1985) 3 Con LR 52.
[11] *McCutcheon v David McBrayne Ltd* [1964] 1 WLR 125.
[12] *The Moorcock* (1889) 14 PD 64.
[13] *Les Affréteurs Réunis v Leopold Walford* [1919] AC 801.

does not apply to those terms which are to be implied by law, i.e. under statute or at common law. Moreover, the courts will not imply a term into a contract, which is otherwise perfectly clear, simply to sort out a problem for one or both parties. That is the case even where it is clear that the parties had not sufficiently applied their minds to the problem before executing the contract. That was the situation in *Trollope & Colls Ltd v North-West Metropolitan Regional Hospital Board* [14] where a delay in a phased contract had unexpected results. The position has been aptly put in a well-known passage:

> 'An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract . . . '.[15]

4.2.2 Prevention and co-operation

Implied terms were considered in some detail in *London Borough of Merton v Stanley Hugh Leach Ltd*.[16] One of the many points at issue concerned the implication of certain implied terms. The contractor was asking the court to agree that the following terms should be implied into a contract such as JCT 63:

(i) that the employer would not hinder or prevent the contractor from carrying out its obligations in accordance with the terms of the contract and from executing the Works in a regular and orderly manner;
(ii) that the employer would take all steps reasonably necessary to enable the contractor to discharge its obligations and to execute the Works in a regular and orderly manner.

The court was quite clear that the terms ought to be implied:

> 'The implied undertaking not to do anything to hinder the other party from performing his part of the contract may, of course, be qualified by a term express or to be implied from the contract and the surrounding circumstances. But the general duty remains so far as qualified. It is difficult to conceive of a case in which this duty could be wholly excluded'.[17]

A somewhat older case is to the same effect:

> 'There is an implied term by each party that he will not do anything to prevent the other party from performing the contract or to delay him in performing it. I agree that generally such a term is by law imported into every contract.'[18]

The principle was reiterated in *Cory Ltd v City of London Corporation.*[19] So far as the second term which the contractor wished to imply in *Merton v Leach* is concerned, the court said:

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[14] (1973) 9 BLR 60
[15] *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* (1973) 9 BLR 60 at 70 per Lord Pearson.
[16] (1985) 32 BLR 51.
[17] (1985) 32 BLR 51 at 80 per Vinelott J.
[18] *Barque Quilpé Ltd v Brown* [1904] 2 KB 264 at 274 per Vaughan Williams LJ.
[19] [1951] 2 All ER 85.

> 'As regards the second of these two terms it is well settled that the courts will imply a duty to do whatever is necessary in order to enable a contract to be carried out.'[20]

Other courts have reached much the same conclusion. In *Mackay v Dick* it was said:

> 'Where in a written contract it appears that both parties have agreed that something should be done which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing though there may be no express words to that effect.'[21]

A well-known extract from *Luxor (Eastbourne) Ltd v Cooper* essentially says the same thing:

> 'If A employs B for reward to do a piece of work for him which requires outlay and effort on B's part . . . generally speaking, where B is employed to do a piece of work which requires A's co-operation . . . it is implied that the necessary co-operation will be forthcoming.'[22]

Therefore, it appears to be well settled that both employer and contractor must co-operate to the extent necessary to enable the contract to be performed. In many instances governed by modern sophisticated building contracts, co-operation by the employer may amount to little more than refraining from hindering the contractor in the execution of the Works. However, there are exceptions to these principles. More correctly, the principles should be applied with a degree of caution and with a view to what is necessary to make the contract work. The guidance set out in *Mona Oil Equipment Co v Rhodesia Railway Co* is useful:

> 'I can think of no term that can properly be implied other than one based on the necessity for co-operation. It is, no doubt, true that every business contract depends for its smooth working on co-operation, but in the ordinary business contract, and apart, of course, from express terms, the law can enforce co-operation only in a limited degree – to the extent that it is necessary to make the contract workable. For any higher degree of co-operation the parties must rely on the desire that both of them usually have that the business should be done.'[23]

None of the standard form contracts in current use displaces these two implied terms mentioned, and thus the employer is liable at common law for breach of them. This can have important practical implications, and consideration must be given to one of the most common grounds of common law claim arising under a building contract.

In *Holland Hannen & Cubitts v WHTSO,*[24] also in JCT 1963 form, a term was implied that 'the employer would do all things necessary to enable the contractor to carry out and complete the works expeditiously, economically and in accordance with the contract.' In *Thomas Bates & Son Ltd v Thurrock Borough Council*[25] a term

[20] (1985) 32 BLR 51 at 81 per Vinelott J.
[21] (1881) 6 App Cas 251 at 263 per Lord Blackburn.
[22] [1941] AC 108 at 118 per Lord Simon.
[23] [1949] 2 All ER 1014 at 1018 per Devlin J.
[24] (1981) 18 BLR 80.
[25] [1976] JPL 34.

was implied that where the employer is to provide goods for the Works, they will be supplied in time to enable the contractor to carry out the Works expeditiously and in accordance with the contractor's planned progress.

Every building contract contains an implied term that the employer will give possession of the site to the contractor in sufficient time to enable it to complete the Works by the due date.[26] All the standard form building contracts have express terms to the same effect. The employer's failure to give possession as provided in the contract is a breach for which the contractor will be entitled to damages in respect of any resultant loss.

The most usual implied term founding a claim from the contractor is the employer's duty not to carry out any acts of prevention and to do everything reasonably necessary to allow the contract to be properly performed. Where domestic work is concerned, employers are often guilty of interference with the contractor's work. In such circumstances, the employer may be relatively unsophisticated so far as building contracts are concerned and may require a great deal of support and guidance from the architect. In practice, the co-operation tends to be required between contractor and architect. The principal area is probably the supply of further information by the architect to enable the contractor to carry out and complete the Works in accordance with the contract. If that co-operation is lacking, the contract cannot be completed expeditiously.

4.2.3 Employer's liability for architect's breaches

The court in *Merton v Leach* was of the view that the employer's implied undertaking to do all things necessary to enable the contractor to carry out the work 'extends to those things which the architect must do to enable the contractor to carry out the work and that the building owner is liable for any breach of this duty on the part of the architect.'[27]

Although most instances of co-operation will be between architect (rather than employer) and contractor, the employer will only be liable for the architect's breach of the duty to co-operate so far as those functions performed by the architect acting as the employer's agent are concerned and not usually when the architect is acting as certifier, because in the latter case the employer may not be vicariously liable. The architect's position under a JCT contract has been set out thus:

> 'Under the standard conditions, the architect acts as the servant or agent of the building owner in supplying the contractor with the necessary drawings, instructions, levels and the like and in supervising the progress of the work and ensuring that it is properly carried out . . . To the extent that the architect performs these duties the building owner contracts with the contractor that the architect will perform them with reasonable diligence and with reasonable skill and care. The contract also confers on the architect discretionary powers which he must exercise with due regard to the interests of the contractor and the building owner. The building owner does not undertake that the architect will exercise his

[26] *Freeman & Son v Hensler* (1900) 64 JP 260. Possession is dealt with in more detail in Section 4.6 of this chapter.
[27] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 81 per Vinelott J.

> discretionary powers reasonably; he undertakes that although the architect may be engaged or employed by him, he will leave him free to exercise his discretion fairly and without proper interference by him . . . '.[28]

However, there may be instances when the employer does become liable for acts or omissions by the architect in the exercise of discretionary powers. There is an implied term that the employer will do all that can reasonably be done to see that the architect exercises certification duties properly.[29] More recently the following useful analysis has been given:

> '[The contract administrator], although employed by [the employer], was given authority by the parties to the contract to form and express the opinions and issue the certificates as and when required by its terms. He was not the agent for [the employer] in so acting so that [the employer] was liable as principal to [the contractor] for what he did or did not do in his capacity as certifier. On the other hand [the employer] was the party who could control him if he failed to do what the contract required. Since the contract is not workable unless the certifier does what is required of him, [the employer] as part of the ordinary implied obligation of co-operation, was under a duty to call [the contract administrator] to book . . . if it knew that he was not acting in accordance with the contract. . . . the duty does not arise until the employer is aware of the need to remind the certifier of his obligations. . . . A mere failure by the certifier to act in accordance with the contractual timetable is not a failure on the part of the employer to discharge an implied obligation positively to co-operate and cannot be a breach of contract by the party whose employee is the certifier. On the facts set out in the award [the employer] could not therefore have been in breach of contract. In arriving at this conclusion I bear in mind the argument that the existence of an arbitration clause which confers on the arbitrator wide powers to open up etc means that a failure to issue a final certificate can be put right . . . '.[30]

4.2.4 Implied terms in building contracts

The Sale of Goods Act 1893 contains terms which existed in common law before the law relating to the sale of goods was codified into statute. Until relatively recently, there were no similar terms to be implied in construction. This was partly due to the fact that the common law did not recognise buildings on land as anything separate from the land on which they stood.

Under s.12 of the Sale of Goods Act 1979, a condition is implied into the sales of chattels, that the seller has a right to sell the goods, that the buyer shall enjoy quiet possession of them and that they are free from any charge or encumbrance to a third party.

In *Test Valley Borough Council v Greater London Council*, it was held by the High Court that the question:

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[28] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 78 per Vinelott J.
[29] *Perini Corporation v Commonwealth of Australia* (1969) 12 BLR 82; *Rees & Kirby Ltd v Swansea City Council* (1985) 5 Con LR 34 CA.
[30] *Penwith District Council v V P Developments Ltd*, 21 May 1999, unreported, at paragraph 36 per Judge Lloyd.

> 'whether there were implied terms of the said agreement that the respondents would provide completed dwellings which were constructed (a) in a good and workmanlike manner; (b) of materials which were of good quality and reasonably fit for their purpose and (c) so as to be fit for human habitation.'[31]

was to be answered in the affirmative. This view was also confirmed by the Court of Appeal. The question of implied terms in construction work was considered by the House of Lords in *IBA v EMI and BICC*, when the principles set out above were approved. Two propositions were put forward in the course of that case:

> 'It is now well recognised that in a building contract for work and materials, a term is normally implied that the main contractor will accept responsibility to his employer for material provided by nominated sub-contractors. The reason for the presumption is the practical convenience of having a chain of contractual liability from the employer to the main contractor and from the main contractor to the sub-contractor. . . . . Accordingly, the principle that was applied in *Young and Marten* in respect of materials ought in my opinion to be applied here in respect of the complete structure, including its design.'[32]

Contractors' common law claims are often founded on breach of an implied term. There are many examples through the courts. In *Bacal Construction (Midlands) Ltd v Northampton Development Corporation*[33] the contractors recovered damages for the employer's breach of an implied term or warranty that the ground conditions would accord with the basis on which they were instructed to design. The contract was substantially in JCT 63 form, and the Court of Appeal held that the necessary re-designing of the foundations and the additional work caused by the discovery of tufa did not rank as variations for the purposes of the contract. The court, in an analysis which was accepted by the Court of Appeal, said:

> 'Bacal have submitted that there are strong commercial reasons for implying such a term or warranty in the contract as they have suggested. First, before designing the foundations of any building, it is essential to know the nature of the site conditions. Secondly, where the contract is for a comprehensive development of the kind here in question, the contractor must know the soil conditions at the site of each projected block in order to be able to plan his timetable and estimate his requirements for materials. These are matters which relate directly to the contract price. Thirdly, if the work is interrupted or delayed by unforeseen complications, the contractor is unlikely to be able to complete his contract in time.'[34]

4.3 Variation of contract

Variation of the contract is commonly confused with variation of the contract Works. This is probably because the standard form contracts refer expressly to variations

[31] (1979) 13 BLR 63 at 69 per Phillips J.
[32] (1980) 14 BLR 1 at 44 per Lord Fraser.
[33] (1976) 8 BLR 88.
[34] (1975) 8 BLR 88 at 100 per Buckley LJ.

and variation clauses. Some architects and contractors have no understanding of the meaning of a variation of the contract and have never encountered the term. Variation, as a term encountered in the clauses of most standard form contracts, refers to the power of the architect to instruct the contractor to carry out either an addition or change in the Works which the contractor has undertaken to carry out. Such a clause is SBC clause 5.1 which defines 'Variation' as understood in that contract. However, when one refers to 'variation of the contract' reference is being made to a change in the terms of the contract itself.

Although, as in SBC clause 3.14.1, the architect is given power to issue instructions requiring variations of the Works, the architect has no power to vary the terms of the contract.[35] The parties to a contract may agree to change any of the terms of that contract, provided only that such changes are not actually unlawful or do not result in the contract becoming void or voidable. Where the parties agree to a change in the terms, what they are doing is to form another contract which varies the first. Therefore, unless the new contract is made as a deed, there must be consideration. Usually, there is sufficient evidence of consideration in such cases, but to avoid any doubt, it is wise for the contract varying the first to be executed as a deed. Perhaps the most common example of varying the contract is when the parties agree to bring a contract to an end after practical completion by an agreement which, not only settles various disputes but also varies several contract terms in order to achieve that position. Another common example is an agreement to accelerate where the contract does not provide for it.[36]

All the standard form building contracts have variation clauses. However, not all of them (MW and MWD for example) have entirely comprehensive variation clauses and the architect is often limited in the variations which can be instructed. If an architect purports to issue an instruction requiring a variation which is not empowered under the terms of the contract, the contractor should not comply with the instruction, because compliance would amount to a breach of contract albeit the contractor in such circumstances may (but rarely) be able to found a claim against the architect in person. If variations are not specifically authorised by the terms of the contract, any change in the work will be a variation of contract which both parties to the contract must agree.

4.4 Omission of work to give it to others

It is beyond doubt that a contractor is entitled to carry out the whole of the Works in the contract. If the employer attempted to prevent the contractor carrying out any part of the Works, it would be a breach of contract. Most standard form building contracts provide that the architect may instruct the omission of parts of the Works. However, such clauses do not entitle the architect to omit work so that it can be carried out more cheaply by another contractor. If the contract so provides, the work may be omitted, but only if it is not to be done at all, not in order to give it to someone

[35] *Sharpe v San Paulo Railway* (1873) 8 Ch App 597.
[36] See Chapter 2, Section 2.5.2.

else. The usual quoted authorities are two Australian cases.[37] However, there are other cases to the same or similar effect. An American case[38] concerned a contract which provided for the omission of work. The American appeal court held that the 'omission' meant work which was not to be done at all and did not include work which was taken from the contractor and given to another contractor to carry out. There are now English cases to the same effect.[39] In *AMEC Building Ltd v Cadmus Investment Company Ltd* which concerned an appeal from an arbitration award on various matters, the court held that the architect's power to omit a provisional sum cannot be exercised so as to omit work if the employer intends to have the omitted work carried out by another contractor.[40] The authorities were reviewed in a later case where it was said:

> 'The justification for these decisions is in my judgment to be found in fundamental principles. A contract for the execution of work confers on the contractor not only the duty to carry out the work but the corresponding right to be able to complete the work which it contracted to carry out. To take away or vary the work is an intrusion into and an infringement of that right and is in breach of contract . . . reasonably clear words are needed in order to remove work from the contractor simply to have it done by somebody else; whether because the prospect of having it completed by the contractor will be more expensive for the employer than having it done by somebody else, although there can well be other reasons such as timing and confidence in the original contractor. The basic bargain struck between the employer and the contractor has to be honoured, and an employer who finds that it has entered into what he might regard as a bad bargain is not allowed to escape from it by the use of the omissions clause so as to enable it then to try and get a better bargain by having the work done by somebody else at a lower cost once the contractor is out of the way (or at the same time if the contract permits others to work alongside the contractor).'[41]

That puts the matter in a nutshell.

Where part of the Works are to be done and materials to be supplied by a nominated sub-contractor or materials are to be supplied by nominated suppliers, that allocation cannot be changed by the architect. The principle holds good that the contractor is entitled to do the work set out for him to do under the contract. Therefore, the architect cannot decide that work, previously measured as part of the work which the contractor must carry out, is to be carried out by a nominated sub-contractor. On the other hand, if work is stipulated to be carried out by a named sub-contractor, the main contractor cannot be forced to do it nor can he decide to do it itself.[42]

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[37] *Carr v J A Berriman Pty Ltd* (1953) 27 ALJR 273 and also *Commissioner for Main Road v Reed & Stuart Pty Ltd & Another* (1974) 12 BLR 55.

[38] *Gallagher v Hirsch* (1899) NY 45.

[39] *Vonlynn Holdings Ltd v Patrick Flaherty Contracts Ltd* 26 January 1988, unreported; *AMEC Building Ltd v Cadmus Investment Co Ltd* (1997) 13 Const LJ 50.

[40] (1997) 13 Const LJ 50 at 64–7.

[41] *Abbey Developments Ltd v PP Brickwork Ltd* [2003] EWHC 1987 (TCC) at paragraphs 45 and 47 per Judge Lloyd.

[42] *T A Bickerton & Son Ltd v North West Metropolitan Regional Hospital Board* [1970] 1 All ER 1039.

Difficult situations can arise where an employer wishes to omit work on the grounds that money is not currently available to carry it out or where an employer is uncertain about whether the work should be done and wishes to see the building in operation for a few months before proceeding or because there are technical reasons for the omission and giving the work to others. Sometimes an employer will feel that the contractor is not performing well and wants to give the work to another, more capable, contractor. The employer may omit work intending never to have it done at all. Subsequently, after practical completion and perhaps after the defects rectification period has ended, the employer may decide that the work should be carried out after all and instruct another contractor to do it. Although these possibilities have been suggested as being within the employer's discretion,[43] a court thought it unlikely:

> 'It remains to be decided (but it is very doubtful) that work could be omitted simply because the owner is dissatisfied with the performance of the contractor, since the contract itself could and should, and in many cases does, make provision for what is to happen if the contractor's performance is so poor that the employer, having lost confidence in the contractor's ability to complete the work in accordance with the contract, is entitled then to take the whole or part of the work then outstanding away from the contractor in order that it can be done by others more satisfactorily. But such a provision for termination, or partial termination, is something which must be the subject of clear words, because otherwise it would be an intrusion into the contractor's right to finish the work. . . . The editor of Hudson refers to the possibility that there may be "sound technical or commercial reasons for omitting the work" which would justify an otherwise unlawful omission. It is as difficult to see how that can be imported legitimately into a contract as it is to see how to give effect to the policy that you may not omit work but to have it done by someone else. Could it be implied – if so, does this mean that an employer would be liable to be interrogated as to its motives every time there was a variation by way of omission or which was seen as a prelude to or paving the way to an omission? . . . The test must therefore be whether the variations clause is or is not wide enough to permit the change that was made. If, with the advantage of hindsight, it turns out that the variation was not ordered for the purpose for which the power to vary was intended then there will be a breach of contract. So the motive or reason is irrelevant . . . '.[44]

In practice, it may be quite difficult to decide whether an employer requires the architect to issue an omission instruction to achieve a permanent omission of work or whether it is simply a way of having the work done by others at a cheaper cost. It can be particularly difficult if the work is actually carried out after practical completion when the original contractor has left site. The correct view seems to be that if the employer has engaged others to carry out previously omitted work, at any time

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[43] I N Duncan Wallace, *Hudson's Building and Engineering Contracts*, 11th edition (1995) Sweet & Maxwell at paragraph 4.202.

[44] *Abbey Developments Ltd v PP Brickwork Ltd* [2003] EWHC 1987 (TCC) at paragraphs 48, 49 and 50 per Judge Lloyd.

before the issue of a final certificate which is conclusive about the finally adjusted contract sum, the original contractor ought to be able to mount a claim against the employer for any damages suffered as a result of the breach.

Where a main contractor brings others onto the site to supplement the labour of a sub-contractor, already lawfully on site, without that sub-contractor's consent, the main contractor is in breach of contract which may be repudiatory in nature so as to entitle the sub-contractor to leave site.[45]

4.5 Extra work

The contractor is not entitled to payment simply because it carries out work which is additional to that which it originally contracted to execute. This is widely misunderstood. Moreover, a contractor will often claim extra payment on the grounds that it has provided better quality than the architect specified. It is not entitled to payment and indeed, in both instances, it is in breach of contract, because the contractor has done something different from that which it undertook to do under the contract.[46] Although the law will not allow an employer without payment to gain a benefit from work which has been instructed to be carried out, the contractor is not entitled to payment for work which has not been instructed.

Occasionally, there may be a dispute, because the architect insists that certain work is included in the contract but the contractor refuses to accept it and demands that it be treated as an extra. Groundworks sometimes fall into this category. If the architect refuses to issue an instruction requiring a variation and the work is substantial, the contractor's remedy may be to refuse performance unless an instruction is issued and, in the absence of such instruction, to treat the contract as repudiated and sue for damages.[47] This could be a dangerous course of action with the risk of huge losses if the contractor is wrong. If the contractor proceeds with the work and attempts to make a claim at a later date, it may find that a court or arbitrator will find that it has acted in accordance with the architect's view of the contract and that the contractor is not entitled to extra payment. It may be that the contractor can proceed under notice to the employer that it is proceeding without prejudice to its right to claim payment. Sometimes it may be held that the employer has implicitly promised to pay if the work is, as a matter of law, additional to the contract.[48]

A contractor may contend that certain work is not included in the contract and refuse to carry it out unless the architect issues an instruction or the employer agrees to pay for it. This can be a very tricky situation. The architect may simply issue a letter requiring the contractor to comply with the contract and execute the work within, say, seven days. If the contractor fails to comply the employer may engage others to do the work and charge all the additional costs to the original contractor. Alternatively, the architect may issue the instruction or the employer

[45] *Sweatfield Ltd v Hathaway Roofing Ltd* (1997) CILL 1235.
[46] *Holland Hannen & Cubitts v Welsh Health Technical Services Organisation* (1981) 18 BLR 80.
[47] *Peter Kiewit Sons' Company of Canada Ltd v Eakins Construction Ltd* (1960) 22 DLR (2d) 465.
[48] *Molloy v Liebe* (1910) 102 LT 616.

may agree to pay, but if it is subsequently found that the work was included in the original contract, the architect's instruction will be valued at £nil, because it does not relate to extra work and the employer will not be obliged to pay the extra, because the employer will not have received consideration in return for the promise to pay.[49]

Architects may only instruct such variations as the contract expressly provides. They have no automatic right to order variations.[50] Although an architect acts as agent for the employer, it is with only limited authority. So far as the contractor is concerned, the authority is limited to what is stated in the contract. Where the power to instruct is not expressed in precise terms; for example in MW and MWD, it will be implied that the architect can only issue instructions which are within the scope of the contract.[51] If an architect issues instructions which are not empowered by the contract, the contractor should not comply. If, nevertheless, the contractor does comply with unauthorised instructions, it is in breach of contract. Moreover, if the contractor does comply, it is conceivable that the architect may become personally liable to the contractor for the price. How the contractor would make such a claim against the architect, however, is unclear, because, to the contractor's clear knowledge, the instruction would concern Works which are the property of the employer. Where the architect appears to have the employer's authority to order a variation, even if unauthorised by the employer, the employer will normally be liable to the contractor for the price and the employer may in turn look to the architect for reimbursement.

Where the contract (such as MW or MWD) does not precisely list the instructions which the architect has power to give, the contractor may have a real problem if the architect gives an instruction and the contractor is not sure whether it is empowered under the contract. Under MW and MWD, the architect is simply empowered to issue instructions, but the courts are apt to construe such clauses as narrowly as is consistent with a workable contract. If the contractor accepts an instruction which the architect is not empowered to give, it is a breach of contract as already noted. Some contracts have clauses which permit the contractor to require the architect to specify the empowering clause and this protects the contractor, even if the architect is wrong. However, neither MW nor MWD have such a clause.

If the employer gives a direct instruction to the contractor, it would not be authorised under most standard forms, which reserve the power to issue instructions to the architect or the contract administrator (of whatever discipline). It is often suggested that the giving and receiving of such an instruction would create a separate little contract by which the contractor would be entitled to payment on a *quantum meruit* basis. That, indeed, may be one analysis of the position. Another view is that the employer and the contractor have agreed to vary the original contract and the contractor would be entitled to payment in accordance with the existing contract terms. However, the latter construction would itself give rise to a difficulty in that the architect would be called upon to certify payment for something of which he or she had no detailed, or perhaps any, knowledge.

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[49] *Sharpe v San Paulo Railway* (1873) 8 Ch App 597.
[50] *Cooper v Langdon* (1841) 9 M & W 60.
[51] *Sir Lindsay Parkinson & Co Ltd v Commissioners of Works and Public Buildings* [1950] 1 All ER 208.

4.6 Possession of site

4.6.1 General position

There is an implied term in every building contract that the employer will give possession of the site to the contractor in sufficient time to enable the contractor to complete the Works by the contractual date stipulated for completion. Under the terms of JCT contracts, there is express provision for the contractor to be given possession on the date specified in the Contract Particulars.

4.6.2 Sufficient possession

The question often arises whether the contractor must have possession of the whole site or whether it is enough if it has possession of sufficient of the site to begin to carry out the Works. It has been said:

> 'The contract necessarily requires the building owner to give the contractor such possession, occupation and use as is necessary to enable him to perform the contract, but whether in a given case the contractor in law has possession must, I think, depend at least as much on what is done as on what the contract provides . . . '.[52]

It is sometimes argued that this is authority for what is sometimes referred to as 'sufficient possession' and, therefore, the employer need give only that degree of possession which is necessary to enable the contractor to carry out work. However, the statement is clearly *obiter*, and must be treated with caution because Megarry J had already said at the beginning of the previous paragraph that 'I do not think that I have to decide these or a number of other matters relating to possession.' *Keating* is also often called in aid in this connection and it seems to support the view that the employer is not in breach of the obligation to give possession, if sufficient possession is given, all the circumstances having been taken into account. [53]

Keating's main authority seems to be a Canadian case.[54] However, that case does not appear to support the view. The contract referred to did not contain a clear possession clause:

> '. . . s. 52 merely stipulates that the site of the work is to be provided by the appellant; it does not provide for the degree of possession of the site that was to be afforded to the respondent. It is obvious that in order to be able to perform his obligations under a construction contract, the contractor must have access to the site of the work and must also have, at least to a certain extent, possession of that site.'[55]

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[52] *London Borough of Hounslow v Twickenham Garden Developments Ltd* (1970) 7 BLR 81 at 107 per Megarry J.
[53] Stephen Furst and Vivian Ramsey, *Keating on Building Contracts* (2006) 8th edition, Sweet & Maxwell at 755.
[54] *The Queen v Walter Cabot Construction* (1975) 21 BLR 42.
[55] (1975) 21 BLR 42 at 50 per Pratte J.

Again:

> '. . . the appellant failed to observe an implied term that the respondent would have a sufficient degree of uninterrupted and exclusive possession of the site to permit it to carry out its work unimpeded and in the manner of its choice.'[56]

In the context of a contract which does not contain a possession clause that may be a correct statement of the law. However, Canadian decisions are not binding in England and they may not even be persuasive, particularly when there is authority within the English jurisdiction. Moreover, most English building contracts contain express clauses requiring the employer to give possession of the site to the contractor on the date of possession written into the contract. The fact that some of the JCT contracts expressly allow the employer to have specific other contractors on the site indicates an acceptance under such contracts that, without such express terms, other contractors have no rights to enter onto the site, because the contractor has exclusive possession of the whole site.

It is difficult to see how an employer who fails to give possession of the whole site can rely on the 'sufficient possession' argument. As a practical necessity, sufficient possession will usually mean possession of the whole of the site. Without possession of the whole site, the contractor may be prevented from properly planning its work. The contractor may wish to do things on the site other than simply constructing the building. It will certainly need to check the condition of the site or to decide where materials should be stored or where to place site offices. Unless full possession is given, the contractor is deprived of the ability freely to organise the work: 'a contractor is entitled to plan the work as it pleases.'[57] In *Freeman & Son v Hensler* it was stated:

> 'I think there was an implied condition on the part of the defendant that he would hand over the land to the plaintiffs to enable them to carry out what they had contracted to do, and that it applied to the whole area.'[58]

This concerned a contract in which nothing was said about possession. The court considered the matter so important that they were prepared to imply a term that possession of the whole site must be given. Obviously, a contract may contain express terms which restrict the contractor's possession of the site, but in the absence of such terms, there is little doubt that in most cases possession means possession of the whole of the site.

4.6.3 Failure to give possession

If the employer fails to give possession on the date stated in the contract, it is a breach of contract and, indeed, if extended in time, it may be a repudiatory breach, because without possession of the site it is clear that the contractor cannot execute the Works. It is a breach not only of the express terms of the JCT contracts but also

[56] (1975) 21 BLR 42 at 50 per Urie J.
[57] *Greater London Council v Cleveland Bridge and Engineering Co Ltd* (1984) 8 Con LR 30 at 39 per Staughton J.
[58] (1900) 64 JP 260 at 261 per Collins LJ.

a breach of the term that would be implied at common law in the absence of an express term.

Such a repudiatory breach entitles the contractor to accept the repudiation, and to commence an action for damages. Such damages would normally amount to the loss of the profit that it would otherwise have earned,[59] but the contractor may have suffered other damage and it would be entitled to recover all the damages flowing directly from the breach under the usual principles.[60] It is seldom that a contractor would elect to treat the breach as an opportunity to bring its obligations to an end; it is more likely that a contractor in this position will rely on its common law right to claim damages, while keeping its employment under the contract alive. Indeed, JCT contracts now provide for the contractor to claim loss and/or expense (which amounts to damages) in the event of any act of prevention on the part of the employer (e.g. SBC clause 4.24.6). In short, where the employer is responsible for preventing the contractor from taking possession of the site on the due date, the contractor is entitled to damages for the breach as the least of its remedies.[61] In practice, such damages may be slight if the failure lasts no more than a few days. The right to possession of the site on the date given in the Contract Particulars admits of no qualification.

In *The Rapid Building Group Ltd v Ealing Family Housing Association Ltd*,[62] a case which arose under a JCT 63 contract, the employer was unable to give possession of the site on the due date. The north east corner was occupied by a man, woman and a dog. They were squatting in an old motor car with various packing cases attached in an area of some size. The employer took eviction proceedings, but it was at least 19 days before the site was cleared of squatters so as to enable the contractors to occupy the whole of the site. The Court of Appeal held that the employer was in clear breach of the contractual clause providing for possession of the site to the contractor, because of the employer's failure, for whatever reason, to remove the squatters until an appreciable time after possession should have been given. Although the contractors entered on the site, the trial judge found that they were unable to clear it and so the breach caused appreciable delay and disruption, which entitled the contractors to damages. The judge referred to the area as 'significant'.

This case should be contrasted with *Porter v Tottenham Urban District Council*,[63] another decision of the Court of Appeal, where the contractor was wrongfully excluded from the site by a third party for whom the contractor was not responsible in law and over whom it had no control. There was no possession clause, and the court held that there was no implied warranty by the council against wrongful interference by a third party – an adjoining owner – with the only access to the site. The *Rapid Building* case is also to be distinguished from *LRE Engineering Services Ltd v Otto Simon Carves Ltd*,[64] where the point at issue was whether main contractors were in breach of a sub-contract term requiring that 'access . . . shall be afforded', and this was denied to the sub-contractors because of unlawful picketing during a steel strike.

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[59] *Wraight Ltd v P H & T Holdings Ltd* (1968) 13 BLR 27.
[60] See Chapter 5, Section 5.2.
[61] *London Borough of Hounslow v Twickenham Garden Developments Ltd* (1970) 7 BLR 81.
[62] (1984) 1 Con LR 1.
[63] [1915] 1 KB 776.
[64] (1981) 24 BLR 127.

The phrase 'possession of the site' was considered in *Whittal Builders v Chester-le-Street District Council*.[65] It was held that the phrase meant possession of the whole site and that, in giving piecemeal possession, the employer was in breach of contract so as to entitle the contractor to damages. The words of Mr Recorder Percival in the first *Whittal* Case , are also in point:

> 'Taken literally the provisions as to the giving of possession must I think mean that unless it is qualified by some other words the obligation of the employer is to give possession of all the houses on 15 October 1973. Having regard to the nature of what was to be done that would not make very good sense, but if that is the plain meaning to be given to the words I must so construe them.'[66]

These words appear to be a very clear and precise statement of the law. He proceeded to look at the contract and found that the Appendix (the forerunner of the current Contract Particulars) had been amended to refer to '. . . 18 dwellings at any one time'. The Appendix was, of course, part of the printed form which took precedence over other documents.

4.6.4 Deferring possession

Under JCT terms (both in 1963 and 1980 Editions, before the 1987 amendment) there used to be no power for the architect or the employer to postpone the giving of possession of the site. This problem is less likely to arise under SBC, IC and ICD contracts because these contracts contain a clause which provides that the employer, not the architect, may defer the giving of possession for a period not exceeding six weeks or whatever lesser period is stated in the Contract Particulars from the contract date of possession. There is an appropriate Contract Particulars entry and SBC clauses 2.29.3 and 4.24.6 contain an appropriate relevant event and relevant matter respectively. IC and ICD have similar provisions.

If the employer fails to give possession and the deferment provision is not stated to apply or if the employer fails to operate the provision or if the failure lasts longer than the period stipulated by the provision, the employer will be in serious breach as if the deferment provision had not been included.

The position is straightforward under the terms of ACA 3, because clause 11.1 provides:

> '. . . the Employer shall give to the Contractor possession of the site, or such part or parts of it as may be specified, on the date or dates stated in the Time Schedule . . . '.

Failure to give possession under ACA 3 is, of course, a breach of contract on the employer's part, but it seems that the architect's powers under that contract are sufficiently wide to enable the architect to postpone the giving of possession. Moreover, under ACA 3 terms, the architect can give the contractor an extension of time for late possession under clause 11.5 (in either of its alternatives).

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[65] (1987) 40 BLR 82 (the second case).
[66] (1985) 11 Con LR 40 at 51.

The wording is sufficiently wide to cover failure to give possession in accordance with clause 11.1 and disturbance to regular progress and loss and expense involved can be dealt with under clause 7.1, which again refers to 'any act' disrupting regular progress.

The position appears to be the same under GC/Works/1(1998): see clauses 34, 36(2)(b) and 46(1)(b) and the discussion of claims arising under GC/Works/1(1998) in Chapter 15.

4.7 Site conditions

4.7.1 Basis of claim

Essentially, there are two avenues for claims in respect of site conditions:

- if the contractor is given incorrect information about site conditions by the employer, and
- under the provisions of SBC clause 2.13 which requires that the bills of quantities have been prepared in accordance with the Standard Method of Measurement, 7th edition.

4.7.2 Provision of incorrect information

A statement, supposedly of fact, made by the employer or the architect or quantity surveyor on behalf of the employer and which it is intended that the contractor will act upon is a 'representation'. Such statements are commonly made in tender documents. If the statement is untrue, it is a 'misrepresentation'. A misrepresentation may be the basis of a claim if it is made part of the contract or if it was an inducement to the contractor to enter into the contract. Otherwise, contrary to popular belief, it has no relevance. A misrepresentation can be fraudulent, negligent, innocent or under statute. The significance lies in the remedies available. Misrepresentations made by or on behalf of the employer may entitle a contractor to a claim for negligent misrepresentation and/or breach of warranty and/or under the Misrepresentation Act 1967, as amended.

An important result of the Misrepresentation Act 1967 is that the remedies which were formerly restricted to cases of fraud or recklessness now apply to all kinds of misrepresentations unless the party who made the representation can prove 'that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true'.[67] The general common law rule that the employer does not warrant that the drawings, bills of quantities or specification are accurate or that the site is fit for the works or that the contractor will be able to construct on the site is thought not to excuse the employer from liability for misrepresentation.[68] Most of the cases on which such common law principles are founded

[67] Section 2(1) of the Misrepresentation Act 1967.
[68] *Appleby v Myers* (1867) LR 2 CP 651; *Thorn v London Corporation* (1876) 1 App Cases 120.

are based on nineteenth century cases which must be treated with caution in the light of the 1967 Act. Architects are liable at common law for any fraudulent or negligent misstatement or representation[69] and also liable under the 1967 Act and it is thought that the scope of such liability is increasing.[70] Section 3 of that Act restricts the employer's power to exclude liability for misrepresentation.

> 'If any agreement (whether made before or after the commencement of this Act) contains a provision which would exclude or restrict—
> (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
> (b) any remedy available to another party to the contract by reason of such a misrepresentation;
> that provision shall be of no effect except to the extent (if any) that, in any proceedings arising out of the contract, the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case.'[71]

A representation followed by a warning that the information given may not be accurate will not usually be sufficient to protect the employer, because it is a clear intention to circumvent section 3 of the Act. Indeed, such a statement may convert the representation into a misrepresentation.[72] In many instances a representation is made in the preliminaries section of bills of quantities or specification, as a statement about the subsoil, underground services or aspects of the site. When the contract is executed, such representations become terms of the contract and if they are incorrect, the contractor may have a claim for damages for breach of contract or possibly for breach of warranty where it was not expressly made part of the contract.[73]

If the representation is fraudulent, i.e. 'knowingly, without belief in its truth, or recklessly, careless whether it is true or false',[74] the contractor may be able to recover more substantial damages under section 2(1) of the 1967 Act, which probably entitle it to recover all losses even those which are unforeseeable so long as they are not too remote. A very clear example of fraudulent misrepresentation is to be found in the old case of *Pearson v Dublin Corporation*.[75] This concerned a complex project for the construction of an outfall sewer and associated works for a lump sum price. A key point was that an existing wall continued to a depth of 9 feet below a datum. This was shown on information provided by the employer's engineers. The true situation was that the wall scarcely reached 3 feet in depth. This caused the contractor considerably more expense than expected. It emerged that the engineers had carried out no proper survey and themselves doubted the accuracy of the information they provided. The court held that this amounted to fraud. The contract required the contractor to satisfy itself regarding the dimensions of the existing work and stated that the employer was not responsible for the accuracy of statements it had made about the existing structure. However, none of this was enough to provide a defence

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[69] *Hedley Byrne & Co v Heller and Partners Ltd* [1964] AC 465.
[70] See the fuller discussion of this point in Chapter 1, Section 1.4.4.
[71] Substituted by s. 8(1) of the Unfair Contract Terms Act 1977.
[72] *Cremdean Properties Ltd v Nash* (1977) 244 EG 547.
[73] *Bacal Construction (Midlands) Ltd v Northampton Development Corporation* (1976) 8 BLR 88.
[74] *Derry v Peek* (1889) 14 App Cases 337.
[75] [1907] AC 351.

to the allegation of fraud. Had it not been fraud, it might have succeeded. Whether such a defence would be enough now is doubtful.

It is clear that, depending on the precise circumstances, the contractor may be able to found a claim against the employer on the ground of misrepresentations made during pre-contractual negotiations on the part of the employer or any person authorised by the employer with regard to the site and allied conditions. In *Morrison-Knudsen International Co Inc v Commonwealth of Australia,* the contractor claimed that the basic information provided at pre-tender stage regarding the soil at the site was false, inaccurate and misleading. The contractor alleged that the clays at the site, contrary to the information provided, contained large quantities of cobbles. The court had to consider a preliminary issue and concluded:

> 'The basic information in the site document appears to have been the result of much technical effort on the part of a department of the defendant. It was information which the plaintiffs had neither the time nor the opportunity to obtain for themselves. It might even be doubted whether they could be expected to obtain it by their own efforts as a . . . tenderer. But it was indispensable information if a judgment were to be formed as to the extent of the work to be done . . . '.[76]

However, somewhat confusingly it has been held that a contractor is not entitled to rely on a ground investigation report if it was merely referred to on a drawing. The court held that it was not incorporated into the contract, but merely noted to identify a source of relevant information for the contractor. This was insufficient to override a clause in the contract which placed on the contractor the obligation to satisfy itself about the nature of the site and the sub-soil.[77] The general situation remains deeply unsatisfactory.

It is possible for a contractor to successfully found a claim for damages for negligent misrepresentation, breach of warranty or under the Misrepresentation Act 1967 on the basis of representations made or warranties given by the employer or on its behalf. Such things as statements made in the preliminaries section of the bills of quantities regarding the sequence of operations, statements in letters written by the architect and possibly by the quantity surveyor, and certainly statements made by representatives of the employer at meetings held prior to the contract being executed may all be called in aid in appropriate circumstances.[78]

4.7.3 SBC clause 2.13

The second avenue also involves an important consideration: whether the employer has a duty to provide accurate information about the site as part of the duty to provide correct bills of quantities. The mere fact that negotiations take place before a contract is executed does not preclude a duty of care, but whether such a duty exists will be a matter of fact in each case. An important factor will be whether it is clear

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[76] *Morrison-Knudson International Co Inc v Commonwealth of Australia* (1972) 13 BLR 114 at 121 per Barwick CJ.

[77] *Co-operative Insurance Society v Henry Boot Scotland Ltd*, 1 July 2002, partially reported (2003) 19 Const LJ 109.

[78] *Holland Hannen & Cubitts (Northern) Ltd v Welsh Health Technical Organisation* (1981) 18 BLR 80.

that the contractor relied upon the employer to provide accurate site information.[79] Bills of quantities commonly attempt to place all the risks associated with uncertain ground conditions on the contractor. This is despite the fact that an average tendering contractor is in no position to carry out the kind of investigations necessary to establish the true state of the ground. Where bills include clauses stating that tenderers should carry out their own investigations and carry all risks associated with dealing with unstable ground, the reality is that few contractors would seriously contemplate carrying out full scale investigations prior to tendering. Indeed, despite what the bills of quantities may state, it is doubtful whether an employer would be prepared to allow a succession of tenderers to excavate trenches and sink boreholes at will all over the site.

The position was explored by Dr John Parris in relation to clause 2.2.2.1 of the JCT Standard Building Contract 1980 which provided that 'the Contract Bills . . . are to have been prepared in accordance with SMM6'.

> 'This seems to require the employer to provide the contractor with information in his possession about potentially difficult site conditions. Other provisions require the employer to provide specific information. The contractor may have a claim against the employer, should site conditions not be as assumed . . . SMM7 states that information regarding trial pits or bore holes is to be shown on location drawings under "A. Preliminaries/General Conditions" or on further drawings which accompany the bills of quantities or stated as assumed. Rock is classified separately.'[80]

It appears that, in such circumstances, the contractor may have a claim against the employer, if site conditions are not indicated in the tender documents and turn out to be different to what the contractor has assumed. In *C Bryant & Son Ltd v Birmingham Hospital Saturday Fund*,[81] the contractor undertook to erect a convalescent home under an early version of the JCT standard form. Clause 11 of the contract provided:

> 'The quality and quantity of the work included in the contract sum shall be deemed to be that which is set out in the bills of quantities, which bills, unless otherwise stated, shall be deemed to have been prepared in accordance with the standard method of measurement last before issued by the Chartered Surveyors' Institution.'

The standard method of measurement in question provided that, where practicable, the nature of the soil must be described and that attention must be drawn to any existing trial holes and that details of excavation in rock must be given separately. Although the bills of quantities referred to drawings and the site conditions about which the contractor was to satisfy itself, excavation in rock was not shown separately. The court held that the contractor could treat the rock excavation as an extra.

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[79] *Dillingham Construction Pty Ltd v Downs* (1972) 13 BLR 97.
[80] John Parris, The Standard Form of Building Contract: JCT 80, 2nd edition 1985, reproduced in the 3rd edition, p. 306 (2002) with the necessary changes, Blackwell Publishing.
[81] [1938] 1 All ER 503.