

DAVID CHAPPELL

FIFTH
EDITION

Building Contract Claims

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Fifth Edition

David Chappell

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Preface

It was with pleasure, flecked with trepidation, that, in 1997, I accepted the invitation to enlarge the scope and update the third edition of this popular book.

Much of the original text was retained, but updated in the light of case law; the number of case references was almost doubled and, at the wish of the late Professor Powell-Smith, footnotes were included; a change which has proved very popular. Some restructuring took place within chapters to establish a comprehensible system of sub-headings and a few topics, such as liquidated damages (the subject of many disputes), global claims, causation and concurrency, were given greater importance. The scope of the book was extended to include more contracts.

In the fourth edition, the opportunity was taken to carry out further fundamental changes to the structure of the book, bringing general principles to the beginning of the book and dealing with their application to specific contracts later. The text also was substantially revised and almost a hundred additional cases added. New contracts were added including: the JCT Construction Management and Major Projects contracts, the JCT Standard Form of Domestic Sub-Contract and the Engineering and Construction Contract.

In this fifth edition the structure of the book has been slightly amended to give greater prominence to important topics such as notices, mitigation and the measure of damages and more has been said about the way in which a contractor should put together a claim. Account has been taken of the JCT 2005 suite of building contracts and sub-contracts. The Constructing Excellence, Measured Term and the ACA Project Partnering contracts have been included for the first time and the latest NEC contract has been considered. As before, when dealing with JCT contracts the style has been to use the JCT Standard Building Contract 2005 (SBC) as the basis and highlight important differences in the other forms. In some instances there are few similarities. Reference has been made to more than a hundred additional legal cases. In previous editions, the text of relevant contract clauses was reproduced. In this edition, the decision has been taken to remove them. The reason is two-fold: it removes from the book many pages of clauses which many readers will not require and it is assumed that readers have a copy of the relevant contract beside them. At the time of writing, the latest official amendments have been taken into account as follows:

Main contract forms:

SBC	Revision 2
IC and ICD	Revision 2
MW and MWD	Revision 2
DB	Revision 2
PCC	Revision 2
MC	Revision 2

MP	Revision 2
CM/TC	Revision 2
CE	Revision 1
MTC	Revision 2
GC/Works/1 (1998)	
ACA 3	2003 Revision
PPC2000	2008 Amendment
NEC 3	June 2005 (with 2006 amendments)
Sub-contract forms:	
SBCSub/C	Revision 2
SBCSub/D/C	Revision 2
ICSub/NAM/C	Revision 2
ICSub/C	Revision 2
ICSub/D/C	Revision 2
DBSub/C	Revision 2
MCWC/C	
ACA/SC	2003 Revision

Reference has also been made to the *Housing Grants, Construction and Regeneration Act 1996* as recently amended by Part 8 of the *Local Democracy, Economic Development and Construction Act 2009* and the *Arbitration Act 1996* where appropriate. It should be noted that, at the time of writing, the 2009 Act is not yet in force.

It should also be noted that in the reproduction and commentary on the JCT standard forms, for brevity 'Architect' is used to stand for 'Architect/ Contract Administrator'. Throughout the book, contractors and sub-contractors have been assumed to be corporate bodies and they have been referred to as 'it'.

Building contract claims combine a good understanding of the law and of building practice. Certain principles can be discerned and this book is an attempt to explain the principles and to show how those principles should be applied to the popular standard contracts. Standard contracts not only set out the powers and duties of the parties and of various consultants, they also often give procedures which must be followed to enable the participants to carry out the duties and exercise the powers. However, it must not be thought that standard building contracts are excused from the operation of the general law of contract. They are contracts, like any others and subject to the same rules. Thereby hangs the solution to many perceived problems.

In my experience, many claims fail because the basic principles are misunderstood and contractors and sub-contractors do not appreciate the amount of effort required to properly substantiate a claim. A loss of money or lack of profit alone cannot substantiate a claim, although it is usually the trigger. The book is addressed to all parties involved in construction. It is not always possible to give a definitive answer to every question, either because the courts have not considered the matter or because there have been apparently conflicting judgments. Where there is doubt, the doubt is expressed and, if practicable, I have taken a view of the situation.

This book was the idea of the late Professor Vincent Powell-Smith LLB(Hons) LLM DLitt FCI Arb DSLP MCL FSI Arb and John Sims FRSA FRICS FCI Arb MAE. These two eminent practitioners in this field were responsible for the first and second editions and their names were kept on the cover in recognition of this in the third

and fourth editions although Vincent had died when I came to write the third edition and John took no part in the writing thereafter. It is a pleasure to formally acknowledge their inspiration and work without which, of course, there would be nothing of which to write a fifth edition. However, nothing of the original text now remains and it has been thought appropriate for their names to be taken off the cover for this edition.

One of the great perks of writing a preface is that it provides the opportunity to thank the people who have assisted me. I am extremely grateful for the help given to me by Michael Cowlin LLB(Hons) DipOSH Dip Arb FCIArb Barrister (not practising) who has assisted me by locating cases and quotations, commenting on various portions of the text and making many helpful suggestions. Michael Dunn BSc(Hons) LLB LLM FRICS FCIArb provided relevant citations and contracts and many useful comments. He went far and beyond what I could expect by giving me the benefit of a very detailed criticism of the material included in the Appendix and suggestions for its improvement. I am grateful for their expertise, but the responsibility for using or not using their suggestions is mine. I am grateful also to Caroline Dalziel LLB(Hons) Solicitor who was meticulous in preparing the Table of cases. My wife, Margaret, has shown her usual patience throughout the long writing process.

I have endeavoured to state the law from available sources at the end of February 2011.

David Chappell
Wakefield

February 2011

Acknowledgements

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Contract abbreviations

ACA 3	Association of Consultant Architects Form of Building Agreement 2003
ACA/SC	Association of Consultant Architects Sub-Contract 2003
CE	JCT Constructing Excellence Contract 2009
CM 02	JCT Construction Management Contract 2002
CM/TC	JCT Construction Management Trade Contract 2009
DB	Design and Build Contract 2005
DBSub/C	JCT Design and Build Sub-Contract Conditions 2009
DOM/1 and DOM/2	Standard Form of Sub-Contract for Domestic Sub-Contractors
DSC/C	Standard Form of Domestic Sub-Contract 2002
GC/Works/1 (1998)	General Conditions of Government Contracts for Building and Civil Engineering Works 1998
IC	JCT Intermediate Building Contract 2009
ICSub/C	JCT Intermediate Sub-Contract Conditions 2009
ICSub/D/C	JCT Intermediate Sub-Contract with Sub-Contract Design Conditions 2009
ICSub/NAM/C	JCT Intermediate Named Sub-Contract Conditions 2009
ICD	JCT Intermediate Building Contract with Contractor's Design 2009
IFC 98	JCT Intermediate Form of Building Contract 1998
IN/SC	IFC 98 Domestic Sub-Contract Conditions
JCT 63	JCT Standard Form of Building Contract 1963
JCT 98	JCT Standard Form of Building Contract 1998
MC 98	JCT Management Contract 1998
MC	JCT Management Building Contract 2005
MCWC/C	JCT Management Works Contract Conditions 2009
MP	JCT Major Project Construction Contract 2009
MPF 03	JCT Major Projects Form of Contract 2003
MTC	JCT Measured Term Contract 2009
MW 98	JCT Agreement for Minor Building Works 1998
MW	JCT Minor Works Contract 2005
MWD	JCT Minor Works Contract with Contractor's Design 2005

NAM/SC NEC 3	IFC 98 Named Sub-Contract Conditions 1998 New Engineering and Construction Contract 2003 revisions
NSC/C	JCT Standard Form of Nominated Sub-Contract Conditions 1998
PCC	Prime Cost Building Contract 2009
PCC 98	JCT Standard Form of Prime Cost Contract 1998
PPC2000	Association of Consultant Architects Standard Form of Contract for Project Partnering
SBC	JCT Standard Building Contract 2009
SBCSub/C	JCT Standard Building Sub-Contract Conditions 2009
SBCSub/D/C	JCT Standard Building Sub-Contract with Contractor's Design Conditions 2009
SMM7	Standard Method of Measurement of Building Works, 7th edition
SPC2000	Association of Consultant Architects Standard Form of Specialist Contract for Project Partnering
TC/C 02	Trade Contract for use with the JCT Client and Construction manager Agreement 2002
WCD 98	JCT Standard Form of Contract with Contractor's Design 1998
Works Contract/2	JCT Works Contract Conditions 1998