Part I Preliminaries

1 Introduction

1.1 What is a contract?

Law

Everyone is subject to the law of the country in which they live. In general, the law is divided into two parts: criminal law and civil law. If we break the criminal law, we may find ourselves having an interview with the police. There are also Acts of Parliament that make doing things or failure to do other things a criminal offence. The Health and Safety at Work Act 1974 is an example of one such Act. Most people understand that very well.

The civil law governs the way we should behave to our neighbour. We all have rights and duties to each other. They are sometimes set out in Acts of Parliament and sometimes they are derived from the judgments of the courts. Law that is found in the judgments of the courts is usually referred to as the 'common law'. These are duties and rights that are there whether we like it or not.

Tort

In general 'tort' is a civil wrong for which the person suffering the wrong is entitled to take action through the courts for compensation. It is based on the duty that everyone owes to one another. There are many wrongs that most people will recognise and that will come under the headings of 'tort'. Such things as negligence, trespass, nuisance and defamation are concepts in general use; although not always properly understood.

Contract

As well as these legislative or common law rights and duties, two people may agree additional rights and duties to each other. For example, I may agree to

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buy a clock from a shop for £100. I have a right to receive a clock, but a duty to pay £100 for it to the shop. The shop has a right to the £100, but a duty to supply the clock. Where there are agreed rights and duties on both sides we call it a contract. Of course there are all kinds of other things that also might have to be agreed, such as the style, make and colour of the clock and the date on which I must pay. That is why even the simplest contracts can become quite complicated.

Breach of contract

We usually say that two people have 'entered into' a contract or that a contract has been 'executed' if documents have been signed. Contracts are legally binding, which means to say that usually once the contract is agreed, neither person can say: 'I've changed my mind now' without serious consequences. If one person does something that the contract does not allow or fails to do something that the contract requires, it is referred to as a 'breach' of contract.

For example, if I only pay £95 for the clock, or if the clock is supplied in a different colour or style, or if it does not work. These are all breaches of contract. It is not always appreciated that it would also be a breach of contract if I was supplied with a better clock worth £150 when we had agreed a particular clock for £100.

The person who is not in breach is usually referred to as the 'injured party' or the 'innocent party'. The injured party is entitled to receive payment from the person in breach to make up for the breach. That is called 'damages'. The amount of money to be paid is normally calculated to put the injured party back in the same position as if the breach had not occurred. Sometimes that is easy, for example, I could be ordered by a court to pay the additional £5 together with any other costs I had caused as a result of my failure to pay the full £100 for the clock. Sometimes it is not possible, but a court tries to do what it can to rectify the situation.

Repudiation

If the breach of contract is particularly serious, it may be what is called 'repudiation'. That is a breach that is so serious that it shows that one of the persons wants nothing more to do with the contract. Extreme examples would be if I refused to pay anything for the clock or the shop took my money but refused to provide any clock at all. In building terms, it might amount to a contractor walking off site, never to return, half-way through the project or the employer telling the contractor that he would not be paid any more money.

Faced with repudiation, the injured party has the choice of, either accepting the repudiation and seeking damages through the courts, or saying that the contract is still in place and carrying on with it (called 'affirmation'). The injured party is still entitled to seek damages even after affirmation. Obviously, there are many instances where it is just impossible to carry on as if nothing had happened; for example if the contractor walks off site.

Essentials of a contract

People sometimes get confused between a promise by one person to do something for another and a contract. In order for there to be a contract there must be three things:

- Agreement.
- An intention to create legal relations.
- Something given by both persons.

Agreement is usually demonstrated by showing that one person made an offer and another person accepted it. Using the clock example: if I offer £100 for the clock and the shopkeeper accepts, there is an agreement.

An intention to create legal relations is usually assumed in commercial dealings and it is for the person who says that there was no such intention to prove it. In a social context, people do not always intend to create legal relationships. If Tim says to Lucy that if she joins him at a restaurant that evening, he will buy her a meal, that is not a contract and the arrangement can be broken with impunity.

Something given by both persons is fairly straightforward. In the case of the purchase of the clock, I agree to give the shopkeeper £100 and the shopkeeper agrees to give me the clock. This can be expressed in various ways. For example, it can be said that the shopkeeper promises to give me the clock if I give the shopkeeper £100. In a construction contract, the contractor promises to construct the building and the employer promises to pay whatever is stated in the contract as the Contract Sum. In legal terms, it is usually referred to as 'consideration'. This consideration can take forms other than the ones just described. For example, one person may agree to pay another, if that second person agrees to stop doing something or not to do something he or she was about to do. The important thing is that both persons contribute something; not necessarily of apparent equal value.

When talking about contracts, it is customary to refer to the 'parties' to the contract. That is convenient when reference to 'persons' would not be appropriate – for example, where one or both parties are corporate bodies such as local authorities, universities or limited companies.

Two types of contract

There are two types of contract:

- Simple contracts.
- Deeds or specialty contracts.

Most contracts are simple contracts. If it is desired to make a contract in the form of a deed, it is necessary to observe a particular procedure. Before 1989, all deeds had to be made by fixing a seal to the document. That could be in wax, but more often it was simply a circular piece of red paper embossed with the name of the relevant party. Nowadays, the procedure is laid down by statute.

Essentially, the document must clearly state that it is a deed and the parties must sign in one of the prescribed ways. The alternative ways are usefully set out in JCT contracts on the attestation page.

A deed is a very serious form of contract. Its attributes are:

- There is no need for consideration. In other words, a promise that one party will do something for the other becomes legally binding.
- The limitation period is 12 years (see Chapter 4, Section 4.4 below).
- Statements in a deed are conclusive as to their truth as between the parties to the deed.

Therefore, a contract should not lightly be entered into as a deed.

1.2 Purpose of building contracts

Broadly, the purpose is to get a building erected. The contract sets out the rights and the duties of the parties: what each may do and what each must do. It also sets out the procedure for certain things. For example, how the contractor can have the time allowed for constructing the building extended, or how the architect can get an instruction carried out if the contractor is slow, or on what grounds either party may bring their duties under the contract to an end. In SBC, there will be an employer (who employs the contractor) and the contractor (who carries out the construction work). There is also a contractor administrator who is often, but not necessarily, an architect (and assumed to be so in this book) and who does the things allocated in the contract and a quantity surveyor who is principally concerned with valuing the work.

1.3 Types of construction contracts

Construction contracts can be analysed into three types relating to costs:

Fixed price contracts

This is where the contractor undertakes to do the specified work for a sum not adjustable in the price of goods or labour. This is the common situation when a contractor quotes for the installation of a shower or other minor building work. It is commonly thought that if a contractor submits what he terms an 'estimate', he will not be bound by the price. Indeed, if the final price is much higher, the contractor will often remark that what he originally gave was 'just an estimate'. That is certainly the colloquial meaning and the understanding in the industry generally. However, a contractor's estimate, depending on its terms, can amount to a firm offer so that acceptance by the employer will result in a binding contract. It is sometimes suggested that there is some custom that an estimate is not to be treated as an offer. There is no such custom. On the other hand, a 'quotation' is always an offer to do work for a specific sum that, on acceptance, becomes a binding contract.

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Remeasurement contracts

This is where the price is based on quantities and there is an express right for the work to be remeasured after completion. The ICC contract is one such. SBC with approximate quantities is also a remeasurement contract as is the 'with quantities' version in practice.

Lump sum contracts

SBC is a lump sum contract in that a specific total figure is quoted, but it should be noted that the price is subject to alteration for:

- variations;
- fluctuations in price of goods and services;
- revaluation of prime or provisional sums;
- loss and/or expense.

John Parris memorably said that the only JCT contract that has ever been known to come out at the Contract Sum was that for the renovation of All Souls' Church in Langham Place, London and that may justly be regarded as a miracle of divine grace.

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It is also possible to analyse building contracts by procurement method.

Traditional

In general, this is where the client commissions an independent architect who may have been the architect who produced designs and construction information, to administer the project during the construction period and deal with the final account. A contractor will have been chosen to carry out the project. If the building is other than small and straightforward, the architect will advise the client to appoint other consultants to deal with particular items, such as quantities, cost estimating, structural calculations and building services design. The contractor may have a minor degree of design responsibility.

The essentials of traditional procurement are that the architect is the independent adviser to the client responsible for the design. The contractor is only responsible for executing the work in accordance with the drawings and specifications produced by the architect and other professionals.

Project management

It has much in common with the traditional system. However, the architect may not be the leader of the team, The project manager, of course, can be an architect. Essentially, the project management system places most emphasis on planning and management. Therefore, a person, whether architect, engineer or surveyor, with the relevant project management skills is required. The project manager is likely to appear in one of two principal roles; either simply as the technical agent of the employer for the purposes of the project or as the professional with the authority to manage the project, including organising and

co-ordinating all consultants. In either case, the project manager acts as a link between the client and the design team. Depending upon the particular kind of project management chosen, the contract administrator may be the project manager or the architect.

Design and build

This is a system that places responsibility for both design and construction in the hands of the contractor. There are variations in the name and there are subtle differences in meaning. *Design and build*, for example, refers to the basic system where a contractor carries out the two functions. *Design and construct* includes design and build and other types of construction such as purely engineering works. *Develop and construct* often describes a situation where a contractor takes a partially completed design and develops it into a fully detailed design. *Package deal* can be used to refer to either of these. In theory, the term suggests that the contractor is responsible for providing everything in one package and it is particularly apt when referring to an industrialised building. *Turnkey* contracting is a system in which the contractor really is responsible for everything, including furniture and pictures on the walls if required. The idea is that the employer simply turns the key and begins using the building – hence the name.

Unless the building is very simple, the contractor will seek an architect to carry out the design. From the client's point of view, an independent adviser is required to look after the client's interests before, during and after construction.

Design and manage

This is comparatively rare. Single-point responsibility rests with a professional who may be architect, engineer or surveyor. Besides being responsible for the design of the project, the professional also manages the project in the sense of managing the other professionals and also the construction process in the form of, probably, a number of sub-contractors and suppliers. In this situation, the architect must be careful to explain to the employer that if the employer requires independent professional advice, another architect must be appointed. This type of procurement is suitable where relatively small projects require very detailed control over every aspect of the design detailing.

Management contracting

In this system the contractor is selected at an early stage. It is not normally responsible for carrying out any of the construction work. The contractor simply has a management function for which a fee is paid. The construction work is divided into a number of packages with the contractor's advice and tenders for these individual packages are invited as appropriate to suit the programme. The works contractors are in contract with the management contractor and the employer pays only the works contracts' costs without the addition of any

contractor's overheads or profit. In this respect the system has something in common with prime-cost contracting.

This is the system most often referred to as 'fast track'. The idea being that work begins on site as soon as sufficient information has been produced to enable the first works contractors to start. The architect and other consultants are then involved in a constant race against time to produce the remainder of the drawings in time for the succeeding works packages.

Construction management

This system calls upon the contractor to act simply in a management capacity for which a fee is paid. The design team is often appointed directly by the employer, but in some instances the contractor may appoint. In such cases, the system has some of the flavour of project management. The key difference between this system and management contracting is that the individual works contractors (they are usually termed 'trade contractors' under this system) are in contract with the employer.

Although details vary, the construction manager is usually responsible for managing not only the trade contractors, but also the other consultants. Some very large projects have been carried out using this system, which calls upon the same kind of skills from the design team as required under the management contract.

1.4 Characteristics of a standard form

Bespoke contracts

A bespoke contract is like a bespoke suit or a house designed for a specific family. Both are designed to match precisely the requirements of the purchaser.

In theory, it is much better to have every construction contract specially drafted to suit the detailed requirements of employers and/or contractors. In practice, such contracts would have their own particular disadvantages. They would each be much more expensive than a standard 'off the peg' contract. Instead of buying them for £40 and £50, it would cost several thousand pounds each time. Producing a bespoke contract would take time while requirements were thoroughly investigated and all the terms carefully drafted to ensure that all eventualities were covered.

Contractors may be loath to tender on the basis of an unfamiliar contract and if they tender they may submit an increased price to reflect the unknown contract. Architects will be unused to administering strange contracts and may well charge additional fees for doing so. Mistakes and wrong assumptions can be made as the parties begin to understand how each new contract works. Just as they all get used to it, the project will be complete and the next project will have a different bespoke contract. The situation would not be quite as bad as that of course, because every contract would have certain things in common. It is out of the common elements that the standard form emerges.

Standard forms

Standard forms of contract are relatively inexpensive. But the standardised versions of anything are based on a notion of a majority requirement. This is the main disadvantage of a standard form of contract. Acknowledging that one form will not suit every case, the JCT produces several different standard forms each one designed for a particular category such as Design and Build, Prime Cost and Traditional (see the list in Section 1.5 below). Even the 'Traditional' category has three distinct versions. Standard forms of contract are like standard suits, standard cars or standard housing. They are good enough across a broad spectrum of applications, but they are seldom entirely appropriate. The more complex the application the more unlikely it is that a standard solution will be right.

A big advantage with standard forms is that they are usually drafted by people with particular expertise in that particular field and the forms evolve over the years to suit changes in legislation and in line with decisions handed down by the courts. The result is, or should be, that the best parts of the forms are retained, mistakes are removed and omissions are rectified. Moreover, architects and contractors become used to them.

There is a danger that arises out of the number and variation of standard forms. Few if any architects and quantity surveyors can really get to grips with the differences. Architects and project managers commonly use forms with which they are familiar but that may not always be suitable for the procurement route and attendant circumstances. Too many architects always use the same standard form no matter what the circumstances. That may amount to professional negligence. It is possible to drive from Birmingham to Winchester in a tank, but to go by car is infinitely preferable. Therefore, the choice of the right standard form is important.

Hybrid

In order to avoid the substantial expense of having a form of contract especially drafted, but to overcome the problems inherent in a standard product that may be nearly but not quite suitable, employers sometimes have standard forms amended to suit their detailed requirements. That seems to be a sound idea in principle. However, the best advice is never to amend standard forms. That is principally because it is difficult to ensure that any amendment works correctly in the context of the form as a whole and there is a real danger that, say, the deletion of a clause is not carried through to delete all references to it and to amend anything else that depends upon that clause. Modern building contracts are complex documents with a multitude of interlocking provisions. Moreover, the person charged with administering the contract must be aware of the detailed effect of the amendments. Amendments are often necessary to 'customise' a standard form, but they should be carried out only by specialists who should clearly explain the effects of the amendments.

1.5 Commonly used contracts

A list of available JCT building contracts and sub-contracts at the time of writing is shown in Table 1.1.

The most commonly used JCT contracts are probably:

SBC – For use for larger Works that are designed for the employer and the contract is administered by an architect/contract administrator. The Works can be carried out in sections and there is provision for the contractor to design parts of the Works.

IC and ICD – For use for Works without complex services up to a value of about £450,000 where fairly detailed contract terms are required and that are designed for the employer and the contract is administered by an architect/contract administrator. The Works can be carried out in sections and, in ICD, there is provision for the contractor to design parts of the Works.

MW and MWD – For use for simple Works up to a value of about £200,000 where detailed contract terms are not required and that are designed for the employer and the contract is administered by an architect/contract administrator. In MWD, there is provision for the contractor to design parts of the Works.

DB – For use where the contractor is to design and build the project in accordance with the Employer's Requirements. The Works can be carried out in sections.

There are other contracts in use:

THE ACA FORM OF BUILDING AGREEMENT (ACA 3) – A relatively straightforward contract suitable for any size and value of project, basically a traditional contract with several options, some of which will effectively turn it into a design a build contract.

THE ACA STANDARD FORM OF CONTRACT FOR PROJECT PARTNERING (PPC2000) – An unusual contract in that it is multi-party and can be entered into by a mixture of client, contractor, consultants and certain sub-contractors. It is intended to be a partnering contract and it is recommended by Constructing Excellence as a means of encouraging collaborative working. It is endorsed by the Construction Industry Council. Although theoretically suitable for all sizes and values of project, its full benefits will only be experienced when used for projects over about £800,000.

THE GENERAL CONDITIONS OF GOVERNMENT CONTRACTS FOR BUILDING AND CIVIL ENGINEERING WORKS (GC/WORKS/1 (1998)) – Although originally drafted for government use, this contract has become quite popular for ordinary commercial projects. It is suitable for all kinds of major project work and there are several versions including design and build.

ENGINEERING AND CONSTRUCTION CONTRACT (NEC 3) – A contract that has become very popular for civil engineering work and it is used, and

Table 1.1 JCT Building contracts and sub-contracts (sub-contracts shown in italic).

Standard Building Contract (SBC)
With Quantities (SBC/Q)
With Approximate Quantities (SBC/AQ)
Without Quantities (SBC/XQ)

Standard Building Sub-Contract with sub-contractor's design Agreement (SBCSub/D/A)
Standard Building Sub-Contract with sub-contractor's design Conditions (SBCSub/D/C)
Standard Building Sub-Contract Agreement (SBCSub/A)
Standard Building Sub-Contract Conditions (SBCSub/C)

Intermediate Building Contract (IC)
Intermediate Building Contract with contractor's design (ICD)

Intermediate Sub-Contract Agreement (ICSub/A)
Intermediate Sub-Contract Conditions (ICSub/C)
Intermediate Sub-Contract with sub-contractor's design Agreement (ICSub/D/A)
Intermediate Sub-Contract with sub-contractor's design Conditions (ICSub/D/C)
Intermediate Named Sub-Contract Tender & Agreement (ICSub/NAM)
Intermediate Named Sub-Contract Conditions (ICSub/NAM/C)
Intermediate Named Sub-Contractor/Employer Agreement (ICSub/NAM/E)

Minor Works Building Contract (MW)
Minor Works Building Contract with contractor's design (MWD)

Minor Works Sub-Contract with sub-contractor's design (MWSub/D)

Design and Build Contract (DB)

Design and Build Sub-Contract Agreement (DBSub/A)
Design and Build Sub-Contract Conditions (DBSub/C)

Major Project Construction Contract (MP)

Major Project Sub-Contract (MPSub)

Construction Management Trade Contract (CM/TC)
Construction Management Appointment (CM/A)
Management Building Contract (MC)

Management Works Contract Agreement (MCWC/A)
Management Works Contract Conditions (MCWC/C)
Management Works Contractor/Employer Agreement (MCWC/E)

Prime Cost Building Contract (PCC)
Measured Term Contract (MTC)
Framework Agreement (FA)

Constructing Excellence Contract (CE)
Constructing Excellence Project Team Agreement (CE/P)

Repair and Maintenance Contract Commercial (RM)

Pre-Construction Services Agreement (PCSA)

Building Contract for a Home Owner/Occupier (HOB)
Building Contract and Consultancy Agreement for a Home Owner/Occupier (HOC)

in some places strongly advocated, for building work. The philosophy of this form is intended to be different from that of the more common JCT and other contracts and, in wording, grammar, clause numbering and approach, it is very different from other contracts. It has been the subject of criticism by legal commentators and in court. The form is said to comply fully with the AEC (Achieving Excellence in Construction) principles. The title page records that the Office of Government Commerce (OGC) recommends the use of NEC 3 by public sector construction procurers on their construction projects. It has a number of options capable of turning it into different kinds of contract, e.g., target, management and cost reimbursable contracts.

1.6 Important background to SBC

3 The first standard form of building contract in the United Kingdom came into use towards the end of the nineteenth century. It had just nineteen clauses. After 1903 until 1977, it became known as 'the RIBA contract'. After that, it was called the 'JCT contract'. Despite the change, the judges took a long time to adjust and the law reports are full of references to 'the RIBA contract' for many years afterwards.

From 1903, the Standard Form of Building Contract was put together by a body consisting of representatives of the RIBA, the Construction Confederation (CC) as it is now called, and the Institute of Building (IOB), as it then was. In 1931, the IOB withdrew, so that henceforth, the body was a 'Joint' one consisting of the RIBA and the National Federation of Building Trades Employers (NFBTE), now the CC. In 1952, the Royal Institution of Chartered Surveyors (RICS) became involved and by the year 1963, the Joint Contracts Tribunal consisted of representatives of ten bodies in the construction industry. Bodies representing sub-contractors eventually joined. The Standard Form was substantially rewritten in 1939, 1963 and 1980. Following a great many published amendments, it was revised in 1998 and again substantially revised in 2005. The current version (2011) was amended principally to take account of changes
4 in legislation.

1.7 SBC and variants

SBC is available in 3 versions:

- Standard Building Contract With Quantities 2011 (SBC/Q).
- Standard Building Contract With Approximate Quantities 2011 (SBC/AQ).
- Standard Building Contract Without Quantities 2011 (SBC/XQ).

SBC/Q is the version that will be considered in this book.

SBC/AQ is used where approximate quantities are to be provided that are subject to remeasurement. The reason for using this version may be because there is insufficient time to produce the detailed drawings necessary for the preparation of accurate bills of quantities or it may be that

the nature of the project means that quantities cannot be known with accuracy until the construction work is in progress. Obviously, there can be no Contract Sum and the final cost cannot be known until the Works are complete or nearly so.

SBC/XQ is used where it is thought that the nature of the Works does not warrant quantities and, therefore, drawings together with a specification or work schedules have been provided. Effectively, the contractor is being asked to prepare its own quantities from the information provided. Whether contractors are prepared to submit a price on that basis rather depends on the overall value of the Works and whether any contractor is short of work.

All of these versions are suitable for use by private and local authority employers.