

1 Introduction

1.1 Some general things about contracts

The law is divided into parts

The construction industry is mostly concerned with the civil law. 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 which is found in the judgments of the courts is usually referred to as the 'common law'. The common law is the system of law which has grown up over the centuries and which is still in the process of evolution. The courts themselves have an order of precedence so that lower courts must follow the decisions of the higher courts. In order to make this work properly, one would imagine that a central system of reporting the judgments of the courts would be in place. In fact, there are a multitude of different organisations producing law reports. Although most of the important judgments are picked up by one or other of these systems, some cases are not reported at all while others are reported by three or four different series of reports. It can be difficult to keep track of the courts' decisions, but this is how the principles of law have been established.

There are also Acts of Parliament such as the Housing Grants, Construction and Regeneration Act 1996 (now amended by a later Act). Often the courts have to rule on the meaning of words in an act of Parliament. Some acts make doing things or failure to do other things a criminal offence for which persons may be fined or imprisoned. Some acts related to the construction industry fall into this category; especially acts dealing with health and safety.

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 which everyone owes to one another. There are many wrongs which most people will recognise and which will come under the headings of 'tort'. Most

people have heard of negligence, trespass, nuisance and defamation, but there are also some lesser known torts such as interference with contractual rights and breach of statutory duty.

Contract

In addition to legislative or common law rights and duties, two people may agree to have additional rights and duties to each other. For example, I may agree to give Mrs Z advice for a fee of £200. Mrs Z has the right to receive the advice, but a duty to pay me £200 for it. I have a right to the £200, but a duty to provide the advice. If there are agreed rights and duties on both sides, we call it a contract. Of course there may be all kinds of other things which also might have to be agreed, such as the subject matter of the advice, its timing and the date on which Mrs Z must pay me. Even seemingly simple contracts can become quite complicated. If documents have been signed, it is usually said that a contract has been 'executed'. In ordinary language we might say that two people have 'entered into' a contract. 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.

Breach of contract

If a person does something which the contract does not allow or fails to do something which the contract requires, it is referred to as a 'breach' of contract.

For example, if I do not give the advice which I agreed to give or if the advice is given late or wrong, these are all breaches of contract. 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 referred to as '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, If Mrs Z only pays me £150 for my advice, she could be ordered by a court to pay the additional £50 together with any other costs I had suffered as a result of her failure to pay the full £200 for the advice. Sometimes it is not possible to put someone back in the same position, because the problem is not the shortfall in money but, say, my failure to give proper advice at the right time. The court would try to do what it can to rectify the situation by hearing evidence about what my breach had cost Mrs Z. In such cases the courts have to look into other questions such as to what extent the costs resulting from my breach were reasonably foreseeable at the time we entered into the contract.

Repudiation

If the breach of contract is particularly serious, it may be what is called 'repudiation'. That is a breach which is so serious that it shows that one of the persons does not intend to be bound by the contract any longer. Extreme examples would be

if Mrs Z refused to pay anything for my advice or if I refused to give her any advice. In the construction industry, a contractor walking off site, never to return, half way through the project would be repudiation or if the employer told 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 architect stops work half way through preparing construction drawings.

Essentials of 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 shown by one person making an offer and another person accepting it. If I offer to give some advice for £200 and Mrs Z accepts we are in agreement.

An intention to create legal relations is usually assumed in commercial dealings and anyone who says that there was no intention has the task of proving it. In a social context, people do not always intend to create legal relationships. If Thomas says to Emma that he will treat her to a meal in a nice restaurant that evening, That is not a contract. If Thomas breaks the arrangement Emma has no redress.

Something given by both persons is fairly straightforward. In the case of my advice I agree to give Mrs Z advice and she gives me £200 in return. 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, the money or service given 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. Notably:

- There is no need for consideration. In other words, a promise that one party will do something for the other becomes legally binding without any corresponding promise by the other party.
- The limitation period is 12 years (see Chapter 3 below).
- Statements in a deed are conclusive about their truth as between the parties to the deed.

Therefore, it is wise to think very carefully before entering into a contract as a deed.

1.2 Some background to MW and MWD

The JCT Agreement for Minor Works was first published in 1968; it was revised in 1977. The headnote explained that it was intended for minor building works or maintenance work, based on a specification or a specification and drawings, to be carried out for a lump sum. It was inappropriate for use with bills of quantities or a schedule of rates.

Despite its limitations, it was widely used for small projects and even for larger ones, its main attraction being its brevity and apparent simplicity. The evidence suggests that architects were becoming increasingly dissatisfied with the length and complexity of the then current main JCT standard form contract (JCT 63) and then (as now) wished to use simple contract conditions wherever possible.

The Minor Works form was extensively revised by a JCT working party in 1979 and a new edition was published in January 1980 and reprinted with corrections in October 1981. It was revised again in April 1985, January 1987, March and October 1988, September 1989, January 1992 and March 1994. Amendment MW9:1995 was issued to take account of the Construction (Design and Management) Regulations 1994 and Amendment MW10:1996 dealt with more insurance changes; Amendment MW11:1998 made significant changes arising out of the Latham Report and the Housing Grants, Construction and Regeneration Act 1996. In effect, MW 80 in its revised form was a completely new set of contract conditions. The headnote to the form as issued in 1980 set out its purpose:

The Form of Agreement and Conditions is designed for use where minor building works are to be carried out for an agreed lump sum and where an

Architect or Contract Administrator has been appointed on behalf of the Employer. The Form is not for use for works for which bills of quantities have been prepared, or where the Employer wishes to nominate sub-contractors or suppliers, or where the duration is such that full labour and materials fluctuations provisions are required; nor for works of a complex nature or which involve complex services or require more than a short period of time for their execution.

Users found this headnote misleading and it was withdrawn in August 1981 and replaced by Practice Note M2, which is much more indicative of the scope of the contract.

A new form of contract was printed at the end of 1998. It was based on the 1980 edition with JCT Amendments MW1 to MW11, together with some changes and corrections. The new form was still recognisably derived from MW 80 and it was referred to as MW 98. There were a further five amendments to MW 98 since publication. In 2005, the whole suite of JCT contracts was revised and MW 98 became MW with a variant (MWD) incorporating a contractor's designed portion (CDP). The contract was revised in 2007 and again in 2009. In 2011 MW and MWD were revised again and reprinted to take into account the changes made by Part 8 of the Local Democracy, Economic Development and Construction Act 2009. For work carried out in Northern Ireland a short adaptation schedule is available.

1.3 When to use MW and MWD

The criteria for use of the form are set out inside the front cover of the form. They are set out below with comments:

- *Where the work involved is simple in character.* The form is relatively short and it is not sufficiently detailed for use where anything complex, whether in the structure of the building itself or in the services, is envisaged. More complex buildings often raise issues of valuation, extensions of time and financial claims. Even with the terms which the law will imply into this contract (see Chapter 3), it is not suitable for complex work.
- *Where the work is designed by or on behalf of the employer.* In the MWD, unsurprisingly, there is an addition dealing with the situation where the contractor is required to design part of the work. MWD is a much needed alternative. Some architects and quantity surveyors believe that contractor's design can be imported by means of a carefully inserted clause in the specification; that is not correct.
- *Where the employer is to provide drawings and specification or work schedules to define adequately the quantity and quality of the work.* It should be noted that the contractor's obligation is to carry out the work shown collectively in the contract documents. There is no provision for guaranteed quantities as in some of the forms intended for larger Works.

- *Where it is intended that an architect/contract administrator is to administer the conditions.* The phrase ‘contract administrator’ is sufficiently wide to include any person so designated by the parties. In theory, this could even be the employer, but there are problems with that approach (see Chapter 6).

When not to use

The contract is said not to be suitable if bills of quantities are required, although often the work schedules appear to be bills of quantities by another name. It is not suitable for use if it is desired to have some of the work carried out by named specialists, because there are no clauses to govern the process. Clearly, the use of nominated or named sub-contractors as such would require substantial amendments to the form as printed, although MW envisages that the contractor may sub-let with the architect’s consent. It has sometimes been suggested that the control of specialists can be achieved by means of the employer contracting directly with the specialist. This may have other unfortunate consequences. Possible ways of dealing with the situation are explored in Chapter 9.

The contract is not suitable where detailed control procedures are needed, because there are no detailed procedures. Detailed control would be needed for a complex building.

MW is not suitable if the contractor is to design part of the Works; MWD should be used. However, MWD cannot be used as a design and build contract. That is a pity, because the industry is sorely in need of a design and build contract for simple work.

The criteria no longer, as in former editions, give advice about the value of contracts for which MW is suitable. The value was never as important as the simplicity of the work and the contract period. No period is suggested either. Very tentatively, an upper limit of about £150,000 and a contract period no longer than six months might be suggested so far as the current form is concerned.

MW not that simple

MW should not be used merely on account of its apparent simplicity or because, sensibly, the architect dislikes the complex administrative procedures of the Standard Building Contract (SBC) or the more detailed provisions of the Intermediate Building Contract (IC). The brevity and simplicity of MW is more apparent than real because its operation depends to a large extent on the gaps in it being filled by the general law. Some of the more obvious gaps can be plugged by drafting (or getting an expert in construction contracts to draft) suitable clauses. To take one example: nowhere in MW is there any provision dealing with contractor’s ‘direct loss and/or expense’ claims as found in SBC and IC, except for the provisions which require the valuation of variations to include any direct loss and/or expense incurred by the contractor due to regular progress of the Works being affected by compliance with a variation instruction.

This does not mean that the contractor must allow for the possibility of claims in its tender price or that, in appropriate circumstances, it cannot recover them. It merely means that there is no contractual right to reimbursement and that the architect has no power under the contract to deal with them. As explained in Chapter 23, the contractor can pursue such claims in adjudication, arbitration or by means of legal action. In Chapter 15 there are appropriate suggestions for dealing with this familiar construction industry problem.

1.4 How to use

Within its limitations of use (see above in this chapter), MW can be used with a wide variety of supporting documents. Taken together, they are termed the contract documents. In principle, they may consist of any documents agreed between the parties to give legal effect to their intentions.

A number of options are set out in the second recital and they may be conveniently considered as follows:

- The contract drawings and the contractor's schedule of rates;
- The contract drawings and the specifications priced by the contractor;
- The contract drawings and work schedules priced by the contractor;
- The contract drawings, the specification and the schedules – one of which is priced by the contractor.

One of these options, together with the Agreement and Conditions, form the contract documents. They must *each* be signed by or on behalf of the parties.

Before embarking on a project, the options must be studied carefully to arrive at the combination which is most suitable for the work. Note that the third recital provides that the contractor must price either the specification or the work schedules or provide its own schedule of rates.

The contract drawings

On very small Works, for which of course MW is very well suited, it may be quite acceptable to go to tender merely on the basis of MW and drawings. This system can be very satisfactory, provided that all the information required by the contractor for pricing purposes is included on the drawings. The architect is not precluded from issuing further information by way of clarification as necessary; indeed it is the architect's duty to do so, but the contractor cannot expect the architect to provide every detail no matter how minute. The contractor is expected to use its own practical experience in constructing the works.

Since there is no specification or schedules, the contractor will be expected to provide its own schedule of rates. If this is not intended, the third recital must be deleted in its entirety. The significance of the priced document is that it is to be used to value variations, if relevant.

The contract drawings and the specification priced by the contractor

In practice, this is a very common way of dealing with small projects. If the specification is to be priced, great care must be exercised in preparing it. This system involves the contractor in taking off its own quantities with reference to both drawings and specification and the cost of so doing is likely to be reflected in the tender figure. The organisational expertise which is incorporated into the specification will determine how useful the priced document will be in the valuation of variations.

The contract drawings and work schedules priced by the contractor

This is the variant of the last system. Since the Works must be specified somewhere, it is likely that the specification element will be incorporated into the schedules. Alternatively, depending on the type of work, it may be feasible to put all the specification notes on the drawings. The schedules will normally be quantified, making this system much easier to price from the contractor's point of view. Indeed, often the schedules are really bills of quantities under another name. The contractor needs to take care, however, that its price is inclusive of everything required to carry out the Works. This is true even if some items are missed off the schedules but shown on the contract drawings. The point can be a difficult one. It is discussed in section 1.8 below: correction of inconsistencies.

2.4 (2.5)

The contract drawings, the specification and the work schedules, one of which is priced by the contractor

In practice, this combination would be used on larger Works when the work schedules would take the form of bills of quantities. The contractor would then normally price the schedules rather than the specification. Once again, the contractor must take care that it prices for everything the contract requires it to do since even if the work schedules are in the form of bills of quantities, the employer does not warrant their accuracy, neither does the contract provide that the quantities, if given, take precedence over drawings or specification. Thus, if five doors are listed in the schedules, but it is clear the drawings show seven doors, the contractor must price for seven doors and will be taken to have done so.

In principle, a work schedule is always to be preferred over a schedule of rates. The former is capable (or should be capable) of being priced out and added together to arrive at the tender figure. A difficulty may arise because it requires a broad measure of agreement on the method of carrying out the Works. The contractor will have difficulty in pricing a schedule of work if it considers that a totally new approach will show greater efficiency. Some two-stage method of tendering will probably yield best results in such cases when the contractor can be expected to input its suggestions before the schedules are drawn up. Whether two-stage tendering is justified on small projects is another matter.

On the other hand, the figures in a schedule of rates cannot be added together to give the tender figure, and the contractor's own schedule cannot be accepted

unless it has justified the calculation of the overall sum from the basis of the schedule. To do otherwise would reduce the valuation of variations to a farce. A schedule of rates is most useful where the total content of the work is not precisely known at the outset. MW can be used in this way, with a little adjustment, but it is better to consider some other forms such as SBC With Approximate Quantities or the Prime Cost Contract (PCC).

Second recital The numbers of the contract drawings must be inserted in the space provided. On large contracts, when bills of quantities are used, it is usual to designate as contract drawings only those small-scale drawings which show the general scope and nature of the work. Under this contract, however, the situation is very different. The total number of drawings is likely to be relatively small and the contractor will need all of them in order to prepare its tender. Since the contractor's basic obligation is to 'carry out and complete the Works in a proper and workmanlike manner and in compliance with the Contract Documents ...' the architect must be sure that the contract documents taken together do cover the whole of the Works. Therefore, the contract drawings must be:

2.1.1

- The drawings from which the contractor obtained information to submit its tender.
- Sufficiently detailed so that, when taken together with the specification and/or work schedules, they include all workmanship and materials required for the project.

2.3 (2.4)

The further information which the architect must provide may consist of drawings, details and schedules. Provided that they are merely clarifying existing information, there is no financial implication. If, however, they show different or additional or less work or materials than those shown in the contract documents, the contractor will be entitled to a variation on the Contract Sum. None of the 'further information' constitutes a contract document.

1.5 What is the contract?

What MW and MWD say

Second recital (third recital) There are still a great many people who think that when reference is made to the 'contract' the reference is to the printed form MW or MWD properly filled in and signed by the parties. Actually, the contract usually consists of a bundle of documents which are referred to in MW or MWD as the 'Contract Documents'. The contract documents consist of the contract drawings, the specification, the work schedules, the printed form and, if neither the specification nor the works schedules have been priced, a schedule of rates. If MWD is being used the documents will also include the Employer's Requirements.

Incorporating other documents

In addition, other documents may be made part of the contract by what is termed 'incorporation'. To do that, it is necessary to clearly state in the printed

*Second recital
(third recital)*

form that these other documents are to be incorporated in the contract. A good example of incorporation of other documents is contract drawings which must be listed leaves space for the contract drawings to be listed but, if there is insufficient space to list them, they may be listed on a separate sheet which must be clearly identified in the space and attached to the back of the printed form. It is a good idea and avoids any doubt if the sheet is signed and dated by the parties although the form does not mention that.

It is unfortunately common for document-happy employers and their advisors to try to incorporate all kinds of other documents. For example, if there has been correspondence between employer and contractor after tender stage, it might be thought useful to include it. Generally, the inclusion of extraneous pieces of correspondence as part of the contract only serves to confuse the issues if a dispute arises and may even be a cause of the dispute as the parties form radically different ideas of what they said, or intended to say, in the correspondence. If the contents of letters are judged to be so important, it is better to have what was said formally agreed and the contract documents amended accordingly.

Occasionally, an attempt will be made to incorporate the whole of a contract simply by reference to it in a letter, e.g. 'on the JCT Minor Works Contract terms and conditions'. That cannot work properly, because it overlooks the fact that there are many blanks in the printed form (such as the recitals and the contract particulars) which must be filled in before the contract makes any sense.

Incorporating terms by reference is a dangerous practice. It ignores the fact that not only may there be earlier versions still in existence but there may be different editions of a contract so that it is impossible to say with certainty which amendment applies. The result is that since the parties are rarely in agreement regarding which contract is referred to, there is in many cases no contract and the one who has done work will simply be entitled to a *quantum meruit* (see Chapter 3, section 3.5).

1.6 How to complete the contract form

It cannot be stressed too much that the form must be completed carefully. Although it may not very much appeal, it is a job for the architect or other person who will actually administer the contract. It is unusual for a quantity surveyor to be appointed on this contract but where a quantity surveyor is appointed, possibly to produce the work schedules, it is useful to seek his or her advice. However, it is not a task for the quantity surveyor alone, still less for the employer's solicitor who may or may not have a full understanding of MW and MWD but who will certainly not have experience in administering a building contract in progress.

It should be noted that although the specification or work schedules usually state in the preliminaries section how the contract form is to be completed, most of that information must be provided by the architect even if a quantity surveyor produces the schedules. That means that the architect is effectively completing MW or MWD when providing that information. Theoretically, when an acceptable tender

is received, the architect simply copies the information in the preliminaries into the contract form. Realistically, the process of accepting a tender may not be straightforward, certain things may be changed and the transfer of information from preliminaries to the contract form may be subject to adjustment. This section explains how to complete the contract form and the actions are summarised in Table 1.1.

First page

Conveniently, the part of the Contract requiring completion is at the beginning of the document and extends to and includes the attestation. Before and while completing the contract, it is essential to read the relevant clauses with great care to see that, in filling in the blanks and deleting, the results are exactly what is intended. The document is complicated and the architect should never 'take a stab' at an entry. If there is any doubt, the advice of a contract expert should be obtained. This may entail rather more than referring to the quantity surveyor (if appointed).

On the first page the date of the agreement should be left blank until the last party signs. The date must be the date on which the last party signs even if that is when the Works are very far advanced or even completed. Obviously, every effort must be made to have the contract signed before work starts on site. It becomes more difficult afterwards.

Recitals

The first recital is important, because it gives a description of the Works and the location. The description must be entered carefully but not in too great detail, because there must be scope for the architect to issue instructions requiring variations without altering the character and scope of the Works.

MWD second recital requires the insertion of the parts of the Works which the contractor is to design. The description must be clear and unambiguous. For example, if the contractor is to design the heating system, it may be enough to simply say 'heating system', but the clearer the description the less chance there is of disputes later. So instead of simply inserting 'heating system,' it would be prudent to make clear that it includes all boilers, pipes and radiators including space and domestic hot water heating and anything else particular to the Works. If the space is insufficient, reference must be made to a separate sheet firmly attached to the contract, signed and dated by the parties.

The second recital, MWD third recital, requires the contract drawing numbers to be entered. If there is insufficient space, the reference to a clearly identifiable list of numbers of all contract drawings must be inserted. The list must be firmly attached to the contract, signed and dated by the parties. It is essential that the contract drawings are exactly the same as the tender drawings. Any post tender amendments should be shown by means of an addendum sheet signed, dated and attached to the contract. Depending on what documents are to be attached to the contract, the reference to drawings, specification or work

Table 1.1 Filling in the MW form (MWD variations shown).

Item or clause	Comment
Articles of Agreement	Names and addresses of the parties inserted. Date to be inserted when the last party executes the contract.
First recital	The description of the Works must be brief but sufficient to identify them clearly.
Second recital (Third recital)	The contract drawing numbers must be filled in or an attached list of numbers identified. Delete inappropriate documents.
Second recital (MWD)	Insert extent of CDP work or refer to and identify attached signed sheet.
Third recital (Fourth recital)	Delete inappropriate documents.
Article 2	Contract Sum in words and figures inserted.
Article 3	Insert the name and address of the architect or contract administrator (if not an architect) and delete the alternative.
Article 4	Insert the name of the principal designer if it is not the architect and if all the CDM Regulations apply, otherwise delete.
Article 5	If all the CDM Regulations apply, insert the name of the principal contractor if it is not the main contractor, otherwise delete.
Article 6	This may be deleted if the contract is not a 'construction contract' as referred to in the Housing Grants, Construction and Regeneration Act 1996 (as amended).
Article 8	Amend reference to 'English' to a different jurisdiction if required.
Contract particulars Fourth recital (Fifth recital)	Insert the date chosen as the base date, having considered schedule 2, paragraphs 1.1, 1.2, 1.5, 1.6, 2.1 and 2.2.
Contract particulars Fourth recital (Fifth recital)	State whether Employer is a 'contractor' under the Construction Industry Scheme.
Contract particulars Fifth recital (Sixth recital)	State whether notifiable under the CDM Regulations.
Contract particulars Sixth recital (Seventh recital)	If there is a framework agreement, state date title and parties otherwise delete.
Contract particulars Seventh recital (Eighth recital)	State whether some or all of the supplemental provisions apply and if paragraph 6 applies state the senior representatives of employer and contractor charged with resolving potential disputes.
Contract particulars Article 7	Delete to show if arbitration is to apply. If no deletion, legal proceedings will apply.

Table 1.1 (Continued)

Item or clause	Comment
Contract particulars 2.2 (2.3)	Insert date of commencement. Do <i>not</i> insert 'to be agreed'. Insert date for completion. Do <i>not</i> insert 'to be agreed'.
Contract particulars 2.8 (2.9)	Insert amount of liquidated damages and the period, e.g. 'day' or 'week'. Do <i>not</i> use the words 'per week or part thereof'.
Contract particulars 2.10 (2.11)	The default period for the rectification period is three months. If a different period is required, it should be inserted.
Contract particulars 4.3	The default figure is 95%. If desired, a different figure may be inserted.
Contract particulars 4.5	The default figure is 971/2%. If desired, a different figure may be inserted.
Contract particulars 4.8.1	The default period is three months. If a longer or shorter period is desired, it should be inserted.
Contract particulars 4.11 and schedule 2	Delete if fluctuations are not to apply.
Contract particulars 4.11 and schedule 2, para. 13	Enter the percentage if an additional sum is to be paid, otherwise enter 'Nil'.
Contract particulars 5.3.2	Insert the amount of insurance cover required.
Contract particulars 5.4A, 5.4B and 5.4C	For new Works choose 5.4A. For works to existing structures choose either 5.4B, or 5.4A and 5.4C and delete the other(s).
Contract particulars 5.4A.1, 5.4B.1 and 5.4C	If the percentage to cover professional fees is not to be 15%, insert another figure.
Contract particulars 7.2	Insert name of adjudicator if desired or write 'not used'. Delete four of RIBA, RICS, CC, AICA, CI Arb.
Contract particulars Schedule 1, para. 2.1	Delete two of RIBA, RICS, CI Arb.
Clause 1.7	Amend if not the law of England.

schedules may be deleted. Every contract document must be signed and dated by both parties to avoid any later dispute regarding what is or what is not a contract document. In practice, this means signing every drawing and the cover of the specification and/or schedules. It is suggested that each document is endorsed: 'This is one of the contract documents referred to in the Agreement dated...' or that some other form of words to the same effect be used.

The third recital (MWD fourth recital) confirms that the contractor has supplied either a priced specification or work schedules or a schedule of rates. The two which do not apply must be deleted. No entries or deletions are required in the fourth to seventh recitals (MWD fifth to eighth recitals) inclusive which refers to matters identified in the contract particulars.

Articles

Article 1 simply sets out the contractor's obligation in brief and requires no insertions. The Contract Sum (excluding VAT) must be inserted in Article 2 in words and figures. The Contract Sum is always this figure. If the contract states that amounts are to be added to, or deducted from it, the figure becomes the adjusted Contract Sum. The name and address of the architect must be inserted in Article 3. That is usually the name of the firm. The alternative description, 'Contract Administrator' is used here and throughout the contract where the person is not entitled to use the description 'Architect' Therefore if the name of an architect is inserted, the words 'Contract Administrator' must be deleted. If the name of someone other than an architect is inserted, the word 'Architect' must be deleted. If the architect ceases to act as contract administrator for any reason, the employer must nominate a replacement within 14 days.

If the CDM Regulations apply, Article 4 states that the architect will act as the principal designer, unless the name of another person is entered as principal designer. If another person is entered, delete the words 'Architect/Contract Administrator'. Article 5 states that the contractor will be the principal contractor for the purposes of the CDM Regulations unless another person's name is inserted. If another person is entered, delete the word 'contractor'.

Article 6 does not require any insertions or deletions. It merely states the right of either party to refer any dispute to adjudication. If the employer is a residential occupier, Article 6 may be deleted, but not otherwise. The adjudicator can be named in the contract particulars, agreed between the parties or nominated by one of the nominating bodies listed. Articles 7 and 8 refer to the right of the parties to refer disputes to arbitration or legal proceedings respectively. The choice is to be made in the contract particulars. Some people delete the Article not required, but that is not necessary. What is important is that the choice is correctly indicated in the contract particulars. If Article 8 is chosen, amend 'English courts' to some other jurisdiction if appropriate

Contract particulars

It is important that the contract particulars are completed so as to correspond precisely with the information given to the contractor at tender stage. If any changes were agreed for example, in the date of possession, the changed information must be faithfully recorded. The words 'to be agreed' or sometimes 'TBA' should be avoided. Inevitably they are never agreed. The best chance of agreement is always before, not after, the contract is signed. In some instances, leaving the entry blank will trigger a default position which may not be what is required. Most of the entries are self-evident, but special care should be taken with the following:

- Fourth recital* ■ The base date must be inserted (see Chapter 2, section 2.7).
(fifth recital ■ Whether the employer is a 'contractor' for the purposes of the Construction
and 4.2) Industry Scheme. Generally, an employer under MW or MWD will not be a
 3 contractor in this sense, but to make sure it is best to check with the legislation.

- Seventh recital* ■ Note the default position that if no deletions are made against a paragraph, that paragraph is to apply.
(*eighth recital*)
- Article 7 ■ It should be noted that a deletion must be made to show whether arbitration is or is not to apply. If no deletion is made, arbitration will not apply.
- 2.2 (2.3) ■ Enter the dates by which the Works should be commenced and completed or a method of unambiguously calculating them, e.g. ‘Date for Completion is 15 weeks from the Date for Commencement’. There is no real way of avoiding writing the ‘Date for Commencement’. TBA or ‘two weeks after notice to commence’ should be avoided.
- 4 ■ When entering the rate of liquidated damages, the period concerned, e.g. ‘per day’ or ‘per week’ must be stated. The phrase ‘per week or part thereof’ must not be used. It does not, as commonly thought, mean that the damages are to be calculated pro-rata for part of a week. It means that the same damages are applicable for just one day as for a whole week; which is probably not enforceable. If ‘pro-rata’ is intended write: ‘per week or pro-rata’. If the word ‘Nil’ is entered for the rate, no liquidated damages will be recoverable. If the rate is left blank the position is uncertain. It may be that no damages can be recovered.
- 2.8 (2.9) ■ Decisions about levels of insurance and the like should be the subject of discussion between the employer and an insurance expert such as an insurance broker. Few architects have any degree of expertise in insurance matters and should refrain from advising the employer.
- 5.3, 5.4A, 5.4B, ■ An adjudicator can be named in the contract particulars. Whether or not that is done, the chosen nominating body must be indicated by deleting the others.
5.4C, 5.5
- 5 ■ If arbitration has been chosen instead of legal proceedings, one of the bodies must be chosen to appoint the Arbitrator by deleting the others. The default appointer is the President or a Vice-President of the Royal Institute of British Architects.
- 7.2

Attestation

There are three attestation pages preceded by a page of mercifully brief notes. The attestation pages are simply the pages on which the parties to the contract sign to signify their agreement to the contract terms. ‘Attestation’ means the witnessing of an act or an event. When the parties attest, they are said to ‘execute’ the contract. There are three pages, because there are two options and four ways in which to carry out the second option. The first option is to execute the contract under hand (referred to as a ‘simple’ contract). The second option is to execute the contract as a deed (referred to as a ‘specialty’ contract). The differences are set out in Chapter 1, Section 1.1). The notes are very clear.

The conditions

It may be appropriate to amend certain of the clauses in this section:

- 1.1 ■ Amend the definition of Public Holiday if a different definition is applicable.
1.7 ■ Amend the clause if the law of England is not required.

1.7 Priority of documents

It is important to understand the relative importance of the various contract documents. This is crucial when there is a dispute and it is necessary to discover what was agreed. Unfortunately, it is common for parts of documents to be in conflict with other documents. That is particularly the case when they have been assembled in a hurry, perhaps after a long and difficult negotiation following tender stage.

1.2 The most important document is the printed form containing the articles, recitals, contract particulars and the conditions. If there is a conflict between this document and any other document, the printed form takes precedence. For example, if the specification states that the employer may terminate the contractor's employment after only five days instead of seven days from the date of the architect's default notice that will not be effective unless the change has actually been made in the clause in the printed form.

1.2 It is not permissible to simply pick out a clause in isolation in order to prove a point. Unless they are in conflict, all the parts of the printed form must be read together, because some clauses may qualify others. For example, the contractor's obligation to pay the amount stated as the Contract Sum must be read with the clause which empowers the architect to issue instructions requiring variations and then to value them.

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3.6

Work included

Another related question concerns what work has been included in the Contract Sum. Is it the work shown on the contract drawings or is it the work in the specification or in the schedules of work? The answer is that the contract requires the contractor to carry out and complete the Works in compliance with the contract documents, the construction phase plan, statutory requirements and, under MWD, the Employer's Requirements. Therefore, if something is included in one of the documents but not in the others, the contractor is obliged to include it in the construction and is deemed to have included it in the Contract Sum. This can lead to problems in practice, because contractors usually simply price the specification or the schedule of works. Many contractors do not realise that even if these documents do not include something present on a drawing, they must price for it. So if the contract documents comprise drawings and specification and the architect has shown a wood block floor finish on the drawings but missed it from the specification and the contractor has only priced what is in the specification, the contractor will be obliged to provide the wood block finish as specified at no additional cost.

Articles 1
2.1.1 (2.1)

1.8 Inconsistencies and divergences

Errors and discrepancies in the Employer's Requirements

2.1.2 Under MWD, the contractor is not responsible for anything in the Employer's Requirements. In particular, it is not responsible for checking to see that any design contained in the Employer's Requirements is 'adequate'. Very often

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Employer's Requirements include very substantial design of the project leaving the contractor with little more than to detail elements of construction. What this means is that the contractor is entitled to assume that the design will work and to proceed accordingly.

- 8 It is doubtful that the contractor is entitled to ignore a design error that is, or becomes, obvious. Indeed, it may well be that the contractor has already dealt with some design flaws in the Employer's Requirements when preparing the tender. However, if any inadequacy in the Employer's Requirements comes to light, the correction of a design error on the part of the employer could well involve quite significant variation and cost.

Discrepancies in general

- 3.6.1 If there is any inconsistency between the contract drawings, the specification, schedules of work and Employer's Requirements (if under MWD), it must be corrected, presumably by the architect and the change must be treated as a variation. Under MWD, if there is an inconsistency between any of the documents prepared by the contractor for the CDP work, the contractor must correct it at its own cost after the architect has first expressed satisfaction with the contractor's proposal. The architect's satisfaction must be reasonable (see Chapter 5). There is nothing in the contract which compels either architect or contractor to notify the other about inconsistencies, but no doubt the contractor will be alive to inconsistencies in the architect's documents and the architect will keep a close eye on the CDP documents. However, if neither architect nor contractor notice an inconsistency in the architect's documents until the problem has taken on three-dimensional form in the building itself, the employer will normally be responsible for the cost of rectification. If neither architect nor contractor spot an inconsistency in the contractor's CDP documents, the contractor will have to rectify the problem at its own cost.

Importance and priority

The contract documents provide the only legal evidence of what the parties intended to be the contract between them. They are, therefore, of vital importance. In the case of dispute, the adjudicator, the arbitrator or the court will look at the documents in order to discover what was agreed.

- 2.1.1 (2.1) The contractor is obliged to carry out the Works in accordance with the contract documents. The question often arises: what is the position if the documents are in conflict? The printed form must be read as a whole; nothing contained in the contract drawings, the specification, the schedules, any framework agreement or, if MWD is being used, the Employer's Requirements will override or modify the printed conditions. If, therefore, the specification was to contain a clause purporting to remove the contractor's entitlement to extension of time due to late receipt of information, it would be ineffective because of this provision, which has the effect of reversing the normal rule that type prevails over print. The effectiveness of a clause worded in this way has been upheld in the courts on many occasions.
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Although the contract effectively sorts out priorities as between the printed form and the other contract documents, it gives no further guidance as far as priorities among the other contract documents are concerned. Clause 2.4 simply states that Any inconsistency in or between the contract drawings and the contract specification and the work schedules must be corrected and if such correction results in addition, omission or other change, it must be treated as a variation.

2.4 (2.5)

The particular circumstances of each case will determine exactly how the inconsistency is to be treated. Two main types of inconsistency are common:

1. Where workmanship or materials are covered in one of the contract documents, but omitted from the other
2. Where workmanship or materials shown in one of the contract documents are in conflict with what is shown in the other.

This consideration will be confined to a contract based on drawings and specification which the contractor has priced. If a schedule is also included, the principle is the same but the facts may be more complicated. The first thing to establish is what the contractor has legally agreed to do. It is this:

The Contractor shall carry out and complete the Works in accordance with the Contract Documents.'

Article 1

2.1.1 (2.1)
Second recital
(third recital)

The same obligation to comply with the 'Contract Documents' is repeated and that clearly means the documents noted in the contract, that is, in this case, the contract drawings, the contract specification and the conditions. If, therefore, the inconsistency is, for example, the fact that a handrail is shown without bracket on the drawings, but brackets are specified in the specification, or vice versa, it will be deemed that the contractor has allowed for the brackets in its price. This is the case even if the brackets are not in the specification, which the contractor has priced, but are shown on the drawing. In this example, even if the brackets are not shown or mentioned on either document, it is likely that the contractor must supply brackets (presumably the cheapest it can find to do the job) at no additional cost, because it will usually be implied that the contractor has allowed in its price for everything which are understood must be done. Much, however, will depend on any general terms which have been included in the specification. An expression such as 'The whole of the materials whether specifically mentioned or otherwise necessary to complete the Works must be provided by the contractor' would tend to place the responsibility for omissions squarely on the contractor provided that they could be considered 'necessary' to complete the Works. In this case, brackets are obviously necessary to support the handrail.

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If the documents are in conflict, the position is rather complicated. Since neither drawings nor specification have priority, it is not clear as to which of them the contractor has had reference in formulating the price. It is tempting to consider that the key document is the specification, since the contractor has priced it. This is a wrong view of the situation. In pricing the specification, the contractor must consider all the documents. It is thought that, if the documents are in conflict, it is for the architect to instruct the contractor as to which document

Article 1 and
clause 2.1.1
(2.1)

is to be followed in the particular instance, and the contractor is not to be allowed any addition to the Contract Sum nor is there to be any omission, the contractor being deemed to have included for whichever option the architect chooses.

3.6 If, however, the architect solves the problem by omitting the work or changing it to something other than is contained in either of the contract documents, it must be valued in accordance in the usual way. Although this view may be thought to impose undue hardship on the contractor in certain circumstances, particularly as the inconsistency is due to the architect's oversight, it is the only interpretation that takes account of the contract as a whole. The contractor bears a great responsibility to examine all the documents thoroughly when pricing. This analysis has an odd result. Although the contract refers to treatment of the correction as a variation, it is difficult to envisage any situation in which the contractor would be entitled to have such a variation valued at anything other than a £nil amount. If the contract is on the basis of drawings and priced schedules which are in fact fully developed bills of quantities, the situation remains the same. That is because under the MW and MWD contracts the employer does not warrant that the bills of quantities are accurate. This, of course, is in complete contrast to SBC and points out one of the great dangers to the contractor in using this form for Works of a greater value than that for which it is intended.

2.4 (2.5)

1.9 Custody and copies

There is no specific provision in the contract regarding the custody of the contract documents and the issue of copies to the contractor. It is probably sensible for the architect to keep the original, but if the employer wishes to have it, the architect should be sure to have an exact copy. Although there is no express requirement in the contract, it is good practice for the architect to make a copy for the contractor and certify that it is a true copy. This can be simply done by binding all the contract documents together and inscribing the certificate on each document including the drawings. It is sufficient to state 'I certify that this is a true copy of the contract document dated ...'.

It must be implied in the contract that the architect provides the contractor with two copies of the contract drawings and specification and/or schedules, otherwise the contractor would be unable to carry out the Works. It is usual to provide such copies free of charge.

2.3 (2.4) Any further drawings, details or schedules which the architect is to provide are not contract documents. They are intended merely to amplify or clarify the information in the contract documents. The architect is obliged only to supply such drawings as are 'necessary for the proper carrying out of the Works'. It is an implied term of the contract that such additional information will be issued at the correct time and that the information will be correct. Failure to do so is a breach on the architect's part for which the employer may be responsible. The contractor would have a legitimate claim for an extension of time without the

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necessity for any prior application for the information. If the contractor suffers disruption, it may also have a claim for damages for breach of contract which it could pursue at common law.

1.10 Limits to use

The contract contains no specific terms to safeguard the architect's interests in the drawings and specification and there is no express prohibition on the employer from using the contractor's rates and prices for purposes other than this contract.

14 The general law, however, covers the position. The architect retains the copyright in drawings and specification (unless specifically relinquished) and neither the contractor nor the employer may make use of them except for the purpose of the project. Strictly, the architect may ask the contractor to return all copies after the issue of the final certificate, but in practice it is seldom worth the trouble to receive a collection of torn, stained and unreadable pieces of paper.

The confidentiality of the contractor's rates and prices is safeguarded by the general rule that neither employer nor architect may divulge confidential information to third parties. This is especially true when two parties are bound together in a contractual relationship and to divulge the information would clearly cause harm. The contractor's prices are a measure of its ability to tender competitively and secure work. To divulge its rates to a competitor is a serious matter. In practice, it is not easy for the contractor to ensure, for example, that the quantity surveyor, if appointed, does not make use of its prices to assist in estimating the cost of other contracts, but that is probably of little consequence.

It may be thought prudent to include a clause in the specification to cover the limitations on the use of documents. It does no harm to remind the parties of their obligations in this respect. Clause 2.8.3 of IC 11 with appropriate adjustments could be used.

1.11 Notices, time and the law

3.4 All communications referred to in the contract must be in writing. That includes all notices, certificates and instructions. In the case of instructions it should be noted that the contract does allow them to be issued orally, but they must be confirmed in writing within two days. If the method of service of a notice or any other document is not specified in the contract, it may be served by any effective means. That is by any means which has the desired effect. It can be served to any agreed address. If the parties, for one reason or another, cannot agree the address in each case, service can be achieved by pre-paid post to the intended recipient's last known main business address. If the recipient is a corporate body, the address should be its registered or principal office. There appears to be nothing to prevent second class postage being employed although it would not be in the sender's interest to do so. The Civil

1.6

Procedure Rules are only binding in legal proceedings, but they provide a useful set of guidelines. Under the CPR:

First class post:	is deemed served the second day after it was posted.
Delivery by hand:	is deemed served the day after it was delivered or left at the permitted address.
Fax:	is deemed served, if transmitted on a business day before 4pm, on that day; or in any other case, on the business day after the date on which it is transmitted.
Other electronic method:	is deemed served on the second day after the day on which it is transmitted.

If a document is served personally after 5 pm on a business day or at any time on a Saturday, Sunday or a bank holiday, it will be treated as being served on the next business day ('business day' being any day except Saturday, Sunday or a bank holiday).

Where anything is stated to be done within a number of days after or from a certain date, the counting of days begins immediately after that date. Therefore, 'seven days after receipt of a notice' means that if the notice is received on the 4th of the month the seven days start on the 5th and expire at the end of the 11th of that month. Any day which is a public holiday is excluded from the reckoning. Therefore, in the example, if the 8th was a public holiday, the seven days would expire at the end of the 12th of the month.

1.4

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1.7

The law applicable to the contract is the law of England. That is the case whatever may be the nationality of any of the parties to the contract or anyone connected to it. Even if the Works are carried out in Germany under this contract (unlikely) or in France (even more unlikely) the applicable law will still be the law of England. Obviously, the parties may change the applicable law, for example to the law of Northern Ireland.

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1.5

In common with other forms of contract, MW and MWD exclude the rights of third parties. This effectively reinstates the position as it was before the Act came into force, i.e. only parties to the contract can have any rights under it (see Chapter 2, section 2.6).

1.12 Common problems

Problems can arise with the contract documents which have been prepared for signature or execution as a deed by the architect. The contractor must check them over carefully, checking the printed contract against the information given in the tender documents and noting any discrepancies.

Mistakes in the documents

If the contractor discovers mistakes or inconsistencies, it should not execute the documents until the matter is rectified. Box 1.1 is a suitable pro forma letter for the contractor to send to the architect.

Box 1.1 Letter from contractor to architect if mistakes in contract documents and no previous acceptance of tender.

Dear Sir

PROJECT TITLE

We are in receipt of your letter of the [*insert date*] with which you enclosed the contract documents for us to sign/execute as a deed [*delete as appropriate*].

There is an error on [*describe nature of error and page number of document*]. This is not consistent with the tender documents on which our tender is based and we are not prepared to enter into a contract on the basis of the Contract Documents in their present form.

Therefore, we return the documents herewith and we look forward to receiving the corrected documents as soon as possible.

Yours faithfully

Starting before the contract is signed

Another problem arises where, as is not uncommon, work starts on site before the contractual formalities are completed. It is bad practice to allow this to happen.

17 It may be that there is already a binding contract in existence, the parties hav-
 18 ing agreed on the minimum essential terms and there being an unequivocal
 19 acceptance by the employer of the contractor's tender. Alternatively, there may
 be no contract at all, and in that event and if no contract came into being, the
 work done would have to be the subject of a *quantum meruit* ('as much as it is
 worth') claim and the contractor would be entitled to a fair commercial
 rate. However, calculating the amount due is often quite complicated. In gen-
 eral, if a formal contract is signed after work has begun, its terms would be
 retrospective. That is to say that all the Works, including the work done before
 the contract came into existence, would be treated as having been done under
 the terms of the contract, even though some work was carried out before the
 contract was signed.

It is better to avoid the potential difficulties, and a contractor who is asked to start work before the contractual formalities are completed is well advised to write to the architect appropriately: see Box 1.2.

Box 1.2 Letter from contractor to architect if contractor asked to commence before contract documents signed.

Dear Sir

PROJECT TITLE

Thank you for your letter of the [*insert date*] from which we note that the employer requests us to commence work on site pending completion of the contract documents.

It is our understanding that we are already in a binding contract with the employer on the basis of our tender and the employer's acceptance of the [*insert date*] on terms incorporated by the tender and letter of acceptance.

If the employer will send us written confirmation of agreement with our understanding of the situation as expressed in this letter, we will be happy to commence as requested.

Yours faithfully