
Chapter 1

Background and Introduction

The purpose and use of JCT sub-contracts

The Joint Contracts Tribunal (JCT) was established in 1931 and for 75 years has produced standard forms of contracts, guidance notes and other standard documentation for use in the construction industry. In 1998, the JCT became incorporated as a company limited by guarantee and commenced operation as such in May 1998.

Currently, JCT forms require the agreement of eight constituent bodies before they are issued by the JCT. Those bodies are:

- The Association of Consulting Engineers
- The British Property Federation
- The Construction Confederation
- The Local Government Association
- The National Specialist Contractors Council
- The Royal Institute of British Architects
- The Royal Institution of Chartered Surveyors
- The Scottish Building Contract Committee Limited

The above listed bodies are intended to be reasonably representative of the interests across the construction industry, namely, the employers, the consultants, the contractors and the sub-contractors; and the JCT forms are naturally a reflection of these competing interests.

In 2005, the JCT authorised the publication of an entirely new suite of contracts and sub-contracts, etc.

Amongst the sub-contracts that have been issued are the following sub-contracts which are the subject matter of this book:

- Design and Build Sub-contract
- Major Project Sub-contract
- Intermediate Sub-contract
- Intermediate Sub-contract with sub-contractor's design
- Intermediate Named Sub-contract
- Minor Works Sub-contract with sub-contractor's design
- Short Form of Sub-contract
- Sub-subcontract

The only JCT sub-contract that has currently been issued that is not covered by this book is the Standard Building Sub-contract which is the subject matter of a separate book¹ by one of the authors of this book.

In January 2008, the JCT Works Contracts under the JCT Management Contract were published. These works contracts are for individual works packages and are not sub-contracts as such and are therefore outside the scope of this book.

The Design and Build Sub-contract

The Design and Build Sub-contract is only suitable for sub-contracts where the main contract is the 2005 edition of the JCT Design and Build Contract. This sub-contract is in effect a modern-day version of the well known DOM/2 form of sub-contract.

Within this book the JCT Design and Build sub-contract will be referred to as DBSub (the designation given to it by the JCT).

This sub-contract can be used even where the sub-contractor is not to carry out any design work at all, and can be used for either lump sum or remeasurement contracts.

The sub-contract can be used when the main contract works are to be carried out in Sections as detailed in the main contract.

The sub-contract comprises two documents:

- Agreement (denoted by the JCT and in this book as DBSub/A).
- The conditions (denoted by the JCT and in this book as DBSub/C).

DBSub/A incorporates by reference (under article 1 of DBSub/A) the DBSub/C sub-contract conditions; therefore it is not necessary in formulating a sub-contract to include the said conditions in the documents to be exchanged. Despite this, and particularly where the parties do not regularly use this form of sub-contract, it is probably sensible that the DBSub/C is included in the documents to be exchanged so that each party has a complete set of the documentation applicable to the sub-contract.

The Major Project Sub-contract

The Major Project Sub-contract is only suitable for sub-contracts where the main contract is the JCT Major Project construction contract. Within this book the JCT Major Project Sub-contract will be referred to as MPSub (the designation given to it by the JCT).

This sub-contract can be used whether or not the sub-contractor is responsible for design, and can be used for either lump sum or remeasurement contracts.

The sub-contract can be used when the main contract works are to be carried out in Sections as detailed in the main contract.

¹The JCT 05 Standard Building Sub-Contract written by Peter Barnes and published by Blackwell Publishing.

This sub-contract does not have a separate Agreement document, but relies on a section within the sub-contract called the Sub-contract Particulars to provide the information that would normally be included in the appendix to a pre-2005 JCT form.

The Intermediate Sub-contract

This sub-contract is suitable for sub-contracts where the main contract is the JCT Intermediate Building Contract, *or* where the main contract is the JCT Intermediate Building Contract with contractor's design, but, even where the main contract form with contractor's design is used, the Intermediate Sub-contract is only for use when the sub-contractor is not liable for design.

Within this book the Intermediate Sub-contract will be referred to as ICSUB (the designations given to it by the JCT).

This sub-contract can be used when the main contract works are to be carried out in Sections as detailed in the main contract.

This sub-contract cannot be used where the sub-contractor is to be named or where the sub-contractor is to carry out any design work, but can be used for either lump sum or remeasurement contracts.

The sub-contract comprises two documents:

- The agreement (denoted by the JCT and in this book as ICSUB/A).
- The conditions (denoted by the JCT and in this book as ICSUB/C).

ICSUB/A incorporates by reference (under article 1 of ICSUB/A) the ICSUB/C sub-contract conditions; therefore it is not necessary in formulating a Sub-contract to include the said conditions in the documents to be exchanged. Despite this, and particularly where the parties do not regularly use this form of sub-contract, it is probably sensible that the ICSUB/C is included in the documents to be exchanged so that each party has a complete set of the documentation applicable to the sub-contract.

The Intermediate Sub-contract with sub-contractor's design

This sub-contract is suitable for sub-contracts where the main contract is the JCT Intermediate Building Contract with contractor's design.

Within this book, the Intermediate Sub-contract with sub-contractor's design will be referred to as ICSUB/D (the designations given to it by the JCT).

This sub-contract can be used when the main contract works are to be carried out in Sections as detailed in the main contract.

This sub-contract is to be used where the sub-contractor is to design all or part of the sub-contract works, and can be used for either lump sum or remeasurement contracts.

This sub-contract is not to be used where the sub-contractor is to be named.

The sub-contract comprises two documents:

- The agreement (denoted by the JCT and in this book as ICSUB/D/A).
- The conditions (denoted by the JCT and in this book as ICSUB/D/C).

ICSub/D/A incorporates by reference (under article 1 of ICSub/D/A) the ICSub/D/C sub-contract conditions; therefore it is not necessary in formulating a sub-contract to include the said conditions in the documents to be exchanged. Despite this, and particularly where the parties do not regularly use this form of sub-contract, it is probably sensible that the ICSub/D/C is included in the documents to be exchanged so that each party has a complete set of the documentation applicable to the sub-contract.

The Intermediate Named Sub-contract

This sub-contract is suitable for sub-contracts where the main contract is the JCT Intermediate Building Contract *or* where the main contract is the JCT Intermediate Building Contract with contractor's design.

Within this book the Intermediate Named Sub-contract will be referred to as ICSub/NAM (the designations given to it by the JCT).

As its name implies, this sub-contract is to be used where a sub-contractor is named (by the employer) to carry out the sub-contract works.

The Intermediate Building Contract and the Intermediate Building Contract with contractor's design are the only contracts in the JCT suite of contracts that allow for the naming of a sub-contractor. It should be noted that a named sub-contractor does not have the status that a nominated sub-contractor had under the JCT 98 Main Contract Form², and after it is appointed a named sub-contractor effectively simply becomes a domestic sub-contractor. The procedure for appointing a named sub-contractor and the status of a named sub-contractor is dealt with later within this chapter.

This sub-contract can be used when the main contract works are to be carried out in Sections as detailed in the main contract.

It is not suitable for any sub-contract work that forms a part of the contractor's designed portion, but can be used where the sub-contractor is required to design all or part of the sub-contract works. In other words, any design carried out by a named sub-contractor cannot be design that forms part of the contractor's designed portion.

This sub-contract can be used for either lump sum or remeasurement contracts.

The Sub-contract comprises four documents:

- the invitation to tender (denoted by the JCT and in this book as ICSub/NAM/IT);
- the tender (denoted by the JCT and in this book as ICSub/NAM/T);
- the agreement (denoted by the JCT and in this book as ICSub/NAM/A); and
- the conditions (denoted by the JCT and in this book as ICSub/NAM/C).

As noted above, a named sub-contractor only applies where the main contract is the JCT Intermediate Building Contract or the JCT Intermediate Building

²It is not possible to nominate sub-contractors under the JCT 05 Standard Building Contract, nor under any other JCT 05 main contract form.

Contract with contractor's design, and is a person (or company) named by the employer (or architect/contract administrator) who is to be employed by the main contractor³.

As noted earlier within this chapter, the named sub-contract procedure must not be used in relation to work (or its design) falling within the contractor's designed portion.

The process of a named sub-contractor being appointed starts with an invitation to tender being issued.

Invitation to tender (ICSub/NAM/IT)

The ICSub/NAM/IT is completed and sent to the proposed named sub-contractor by the employer or the architect/contract administrator, *not by the main contractor*.

The ICSub/NAM/IT sets out the information that is required to enable the prospective named sub-contractor to provide a tender, and that standard form advises the prospective named sub-contractor that he should not in any way seek to vary the basis upon which he is being asked to tender.

The sub-contractor then provides a tender.

Tender (ICSub/NAM/T)

Upon receipt of the invitation to tender form ICSub/NAM/IT, the proposed named sub-contractor provides his tender using form ICSub/NAM/T.

The sub-contractor's tender is to provide, amongst other things, the sub-contractor's price and the basis upon which that price is supplied, the required programme details, and any *additional* attendance items (the word 'additional' is used because a basic list of attendances that will be provided by the main contractor is given with the invitation to tender (ICSub/NAM/IT)).

Form ICSub/NAM/T is returned by the proposed named sub-contractor to the employer (or the architect/contract administrator); *it is not sent to the main contractor*.

It is only after this stage that the main contractor becomes involved with the named sub-contractor.

Main contractor's involvement with, the appointment of, and the status of the named sub-contractor

The main contractor first becomes aware of a prospective named sub-contractor when the sub-contractor's tender (and the invitation to tender) is included in:

- the original tender enquiry to the main contractor;
- an architect's/contract administrator's instruction for the expenditure of a provisional sum under the main contract; or
- in an architect's/contract administrator's instruction for the expenditure of a provisional sum naming a replacement named sub-contractor.

³There is the facility under the Major Project Form for there to be a named specialist, but no particular 'named specialist' procurement or appointment procedure is specified.

The Intermediate Building Contract and the Intermediate Building Contract with contractor's design set out the various procedures that must be followed by a contractor in respect of the appointment of a named sub-contractor (and those procedures deal with the situation where a contractor objects to the proposed named sub-contractor or the proposed terms of that sub-contractor).

It is for the main contractor and the prospective named sub-contractor to agree upon the actual terms of the sub-contract. Those terms will of course be based upon the ICSUB/NAM/IT and the ICSUB/NAM/T, and the main contractor therefore in effect accepts the named sub-contractor's tender, but there may be amendments and/or additions agreed to the terms contained in the above documents. Any such amendments and/or additions are to be noted in the numbered documents referred to under the second recital of ICSUB/NAM/A, and listed under the numbered documents section of the contract particulars of ICSUB/NAM/A.

When a sub-contract is entered into between a main contractor and a named sub-contractor, the sub-contract form used is the ICSUB/NAM. When this occurs, the named sub-contractor becomes, for all intents and purposes, a normal domestic sub-contractor of the main contractor, and the main contractor has the same liability in respect of the named sub-contract works as it would for the works of a normal domestic sub-contractor. The only exception to this position is if the contractor becomes aware of events that may lead to the termination of a named sub-contractor's employment, the contractor must notify the architect/contract administrator accordingly. If termination subsequently takes place because of the default or insolvency of a named sub-contractor, then, with the architect/contract administrator's consent, the contractor is entitled to some relief from the financial consequences of that event.

Named sub-contractor's liability to the employer

Use of the named sub-contractor procedure is intended primarily for work involving a design input by the named sub-contractor, and this may be the case even where the installation of the specialist work is not of a complex nature. Under paragraph 11.1 of schedule 2 of the main contract, the contractor is in such cases expressly relieved of responsibility to the employer for defects in the named sub-contractor's design of the sub-contract works. This relief, however, does not affect the contractor's obligation in regard to the supply of goods, materials and workmanship.

However, as noted above, any sub-contract that is placed is formed between the main contractor and the named sub-contractor. Consequently, there is no contractual link between the employer and the named sub-contractor.

Because there is no contractual link between the employer and the named sub-contractor, and as the contractor is relieved of responsibility for the named sub-contractor's design, the JCT suggests that an employer may consider using an intermediate named sub-contractor/employer agreement (ICSUB/NAM/E) which provides a direct contractual link between the employer and the named sub-contractor for use where the named sub-contractor is to carry out design work or is to procure or fabricate materials or goods prior to the letting of the main contract. Also, the use of ICSUB/NAM/E may be considered by the employer where the employer requires:

- undertakings from the named sub-contractor in respect of the sub-contract works and any related design work that the named sub-contractor is to carry out; and/or
- the named sub-contractor to give collateral warranties to purchasers/tenants/funders of the main contract works.

The Minor Works Sub-contract with sub-contractor's design

This sub-contract is suitable for sub-contracts where the main contract is the JCT Minor Works Building Contract with contractor's design.

Within this book the Minor Works Sub-contract with sub-contractor's design will be referred to as MWSUB/D (the designations given to it by the JCT).

This sub-contract is for use with small sub-contract packages with a straightforward content and a low risk involved, and is only to be used where the sub-contractor is required to design all or part of the sub-contract works.

This sub-contract does not have a separate Agreement document, but relies on the Recitals and the Articles to provide the information that would normally be included in an appendix to a pre-2005 JCT form.

The Short Form of Sub-contract

This sub-contract is suitable for any sub-contracts (other than for named sub-contractors) where the main contract is a JCT contract. However, it is not suitable where provisions which are fully back to back with a particular main contract are required.

Within this book the Short Form of Sub-contract will be referred to as ShortSub (the designations given to it by the JCT).

This sub-contract can be used when the main contract works and/or the sub-contract works are to be carried out in Sections, and can be used for either lump sum or remeasurement contracts.

This sub-contract does not have a separate Agreement document, but relies on the Recitals and the Articles to provide the information that would normally be included in an appendix to a pre-2005 JCT form.

The ShortSub is intended for use in respect of small sub-contract packages of straightforward content and with low risk involved. It is not suitable where the sub-contractor is to design any part of the sub-contract works.

The Sub-subcontract

This sub-contract is an entirely new concept for the JCT in that it is a tertiary contract. It is intended for use when a sub-contractor wishes to place a sub-contract with his own sub-contractor(s), i.e. the sub-subcontractor(s).

It is suitable for sub-subcontracts where the main contract is a JCT contract, and can be used with any sub-contract. However, it is not suitable where provisions which are fully back to back with a particular sub-contract are required.

Within this book the Sub-subcontract will be referred to as SubSub (the designation given to it by the JCT).

This sub-subcontract can be used when the main contract works and/or the sub-contract works are to be carried out in Sections, and can be used for either lump sum or remeasurement contracts.

This sub-subcontract does not have a separate Agreement document, but relies on the Recitals and the Articles to provide the information that would normally be included in an appendix to a pre-2005 JCT form.

Sub-contracting generally

All of the above contracts are sub-contracts or sub-subcontracts.

The relationship between the various contract forms referred to above is:

- The employer *contracts* with the contractor using, for example, the JCT Design and Build Contract, the JCT Major Project construction contract, the JCT Intermediate Building Contract, the JCT Intermediate Building Contract with contractor's design, or the JCT Minor Works Contract.
- The contractor *contracts* with each of his sub-contractors using either the Design and Build Sub-contract, the Major Project Sub-contract, the Intermediate Sub-contract, the Intermediate Sub-contract with sub-contractor's design, the Intermediate Named Sub-contract, the Minor Works Sub-contract with sub-contractor's design, the Short Form of Sub-contract, or alternatively (in most cases) the sub-contract form of his choice.
- The sub-contractor *contracts* with each of his sub-subcontractors using the Sub-subcontract, or alternatively the sub-subcontract form of his choice.

The key point in respect of the above relationships is that, although the term sub-contract or sub-subcontract is used under the second and third bullet points, so that they can be distinguished from the main contract, and so that it is apparent that a sub-contractor or sub-subcontractor is operating under the general *umbrella* of a main contract or sub-contract (as appropriate), in *all* of the above cases a *contract* is formed between two parties only.

With that in mind, it would be useful, therefore, to understand some basic principles of contract law.

Most aspects of the law of contract are set down in case law; however, there are some notable exceptions where provision is made in statute (for example the Sale of Goods Act 1979, the Unfair Contract Terms Act 1977, and the Supply of Goods and Services Act 1982).

Because of the nature of this book, the basic principles of contract law as provided below can naturally be dealt with in outline only.

Contract formation

What is a contract?

There are many definitions of a contract, but in simple terms it can be considered as being: 'an agreement which gives rise to obligations which are enforced or

recognised by law'. Under English law, only the actual parties to a contract can acquire rights and liabilities under the contract. This is known as 'privity of contract'.

In respect of a main contract situation, the practical consequences of the doctrine of privity of contract are two-fold:

- the main contractor carries responsibility for a sub-contractor's work, etc., so far as the employer is concerned; and
- the employer cannot take direct action in contract against the sub-contractor, unless there is a separate contract between the employer and the sub-contractor.

The effect that the Contracts (Rights of Third Parties) Act 1999 has upon this position in respect of the JCT sub-contracts considered in this book is dealt with later within this book.

How is a contract formed?

The essence of any contract is *agreement*.

In deciding whether there has been an agreement, and what its terms are, the court looks for an *offer* to do or to forbear from doing something by one party, and an unconditional *acceptance* of that offer by the other party, turning the offer into a promise.

In addition, the law requires that a party suing on a promise must show that he has given *consideration* for the promise, unless the promise was given by *deed*.

Further, it must be the intention of both parties to be legally bound by the agreement, and the parties must have the capacity to make a contract, and any formalities required by law must be complied with.

Both the consideration and the objects of the contract must not be illegal.

If there is *fraud or misrepresentation* the contract may be *voidable*, while if there is a *mutual mistake* about some serious fundamental matter of fact this may have the effect of making the contract *void*.

Finally, there must be sufficient *certainty of terms*.

The other matter that needs to be considered is the significance, or otherwise, of *letters of intent*.

These concepts are expanded upon below.

Offer and acceptance (and 'invitations to treat')

Background – the 'mirror image' rule

As stated above, for there to be an agreement the very starting point is an offer being made by one party and an acceptance of that offer by the other party. This is not always as simple as it sounds, particularly when there have been prolonged negotiations between the parties. The courts have developed their own rules for looking at such matters.

In terms of offer and acceptance, the courts adopt what is sometimes known as the 'mirror image' rule of contract formation. That is to say that there must be a

clear and unequivocal offer which is matched by an equally clear and unequivocal acceptance of that offer.

What is an 'invitation to treat'?

Before looking at what an offer is, it is important to be aware of the fundamental difference in legal status between an 'invitation to treat' and an 'offer'.

An invitation to treat is simply an expression of willingness to enter into negotiations which may lead to a contract at a later date.

Therefore, a tender enquiry would normally be taken to be an invitation to treat, that is, it is not an offer, but an invitation to another party to make an offer.

Therefore, when a contractor sends a tender enquiry to a sub-contractor, the tender enquiry would in effect be an invitation to the sub-contractor to provide an offer (or, in other words, submit a tender) to execute the required sub-contract works.

The question of whether a statement is an offer or an invitation to treat depends primarily on the intention with which the statement was made. The actual wording of that statement is not necessarily conclusive.

Thus, a statement may be construed as being an invitation to treat even if it contains the word offer⁴; whilst on the other hand a statement may be an offer although it is expressed to be an acceptance⁵, or where it requests the person to whom it is addressed to make an offer⁶.

Of course, if the invitation to treat expressly provides that the issuing party is not to be bound merely by the receiving party's notification of acceptance, but only when he has signed the document in which the statement is contained, then it cannot be construed as being an offer.

What is an 'offer'?

An offer is a statement by one party of a willingness to contract on definite stated terms and intended to be binding provided that these terms are, in turn, unequivocally accepted by the party or parties to whom the offer is addressed.

There is generally no requirement that the offer be made in any particular form; it may be made orally, in writing, or by conduct. Of course, if a dispute arose in the future then it would be beneficial for the offer to be in writing.

In whichever form an offer is made it must be sufficiently definite to be capable of resulting in a contract if accepted. Its terms and conditions must be clear and unequivocal, and it must be made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed. In this context a person includes a corporation because, in law, a corporation is a legal person; that is to say, a corporation is regarded by the law as a legal entity quite distinct from the person or persons who may for the time being be the member or members of the corporation.

Putting the above into context, it is generally the case that when the sub-contractor submits his estimate (i.e. his tender) this is an offer which the contractor can either accept or reject.

⁴*Spencer v. Harding* (1870) LR 5 CP 561.

⁵*Bigg v. Boyd Gibbins Ltd* [1971] 1 WLR 913.

⁶*Harvis Investments Ltd v. Royal Trust Co. of Canada* (1789) 3 TR 148; *British Car Auctions Ltd v. Wright* [1972] 1 WLR 1519.

With the above in mind, it must be noted by sub-contractors that the submission of a tender does not (normally) conclude a contract. Therefore, the preparation of a tender in response to a tender enquiry (which would, in the normal course of events, become an offer when submitted) may involve the sub-contractor in (sometimes considerable) expense, but the cost of tender preparation is not normally recoverable as a discrete cost. Obviously the cost of tender preparations is included within the head office overhead percentage that is added by sub-contractors onto their tenders, and the tender preparation costs so incorporated are therefore recovered by sub-contractors when their tenders are successful.

*Must the sub-contractor's tender match
the contractor's tender enquiry letter to be a valid offer?*

A sub-contractor's tender can still be a valid legal offer even where it does not comply with the contractor's stipulated tender enquiry requirements (assuming the offer is made in definite terms capable of being accepted).

For a sub-contractor's tender to fulfil the legal requirements of a valid offer it must simply be something which invites, and is intended by the person making the offer (i.e. the sub-contractor) to invite, acceptance. It simply falls to the contractor to either accept it or reject it.

How is the offer accepted?

For agreement to be reached there must be a clear and unequivocal acceptance of a clear and unequivocal offer. The acceptance must be unqualified, i.e. as noted earlier it must 'mirror' the offer.

Therefore, if in a tender enquiry a sub-contractor was required to use Welsh slates but submitted his tender on the basis of using Spanish slates, the contractor, upon receiving the sub-contractor's tender, accepted the sub-contractor's tender without qualification, then the contract, when formed, would be on the basis of the terms and conditions which formed part of the tender (i.e. based on using Spanish slates rather than Welsh slates).

In such a situation, if a future dispute arose, the contractor would not be able to rely on the terms and conditions forming part of the tender enquiry (i.e. that Welsh slates were required) because those terms and conditions would not form part of the contract between the parties.

Must acceptance be communicated to be effective?

As a general rule silence does not constitute acceptance⁷; neither does inactivity.

Given this, the general rule is that an acceptance has no effect until it is communicated (either in writing or orally) to the party making the offer. The main reason for this being that it could cause hardship to the party making the offer if he were bound without knowing that his offer had been accepted.

⁷*Felthouse v. Bindley* (1862) aff'd (1863).

What if the sub-contractor's tender is rejected by the contractor?

Another rule is that refusal of an offer puts an end to that offer⁸. Hence, if a contractor rejects a sub-contractor's offer (i.e. his submitted tender) it is, in legal parlance, extinguished and is no longer legally capable of being accepted.

Can an offer be withdrawn, and if so when?

An offer can be withdrawn at any time before it is accepted⁹. This rule even applies where an offer is stated to be open for a fixed time. Therefore, if a sub-contractor submitted a tender (or a quotation) and stated that it remained open for acceptance within 30 days, there would be nothing to prevent the sub-contractor from withdrawing that offer in a period less than 30 days (unless the express terms of the sub-contract stated otherwise).

Can an offer be accepted after the fixed time for acceptance has lapsed?

If an offer is stated to be open for a fixed time, then it cannot (without the agreement of the party making the offer) be accepted after that time.

However, if no time is stated in the offer, then the offer is taken to lapse after a reasonable time. The word 'reasonable' is, of course, open to interpretation, but is based on the facts of the particular case.

Can an offer by one party be accepted by the other party's conduct?

In certain circumstances, depending on the facts of each particular case, acceptance may be made by conduct¹⁰ (e.g. allowing possession, making payments in line with the agreed terms, etc.) or by performance¹¹ (e.g. by carrying out and completing the sub-contract works, etc.).

What is a counter-offer?

If the acceptance does not clearly and unequivocally accept the offer (e.g. it seeks to add to or vary the terms contained in the offer) then it is, simply, a counter-offer (not an acceptance) and this simply destroys the original offer.

A counter-offer has the same status as an offer in the formation of a contract, and consequently, a counter-offer must be clearly and unequivocally accepted before agreement has been reached.

Counter-offers should be distinguished from requests for information, which will not necessarily amount to a counter-offer¹². Care must be taken when requesting further information to ensure this is not construed, in fact, as being a counter-offer.

⁸ *Hyde v. Wrench* (1840) 3 Beav 334.

⁹ *Dickinson v. Dodds* (1876) 2 Ch D 463.

¹⁰ *G Percy Trentham v. Archital Luxfer Ltd* (1992) 63 BLR 44, CA.

¹¹ *Brogden v. Metropolitan Railway Co.* (1877) 2 App Cas 666.

¹² *Stevenson, Jaques & Co. v. McLean* (1880).

In respect of construction works, in particular, there are frequently a whole series of counter-offers made before an acceptance is made. This may be because the parties are negotiating about the terms or because they are each trying to impose their own terms.

This latter situation is often called the 'battle of the forms', and variants of this battle of the forms are at the base of many disputes between contractors and sub-contractors.

What is the 'battle of the forms'?

The expression 'battle of the forms' refers to an offer followed by a series of counter-offers where each party successively seeks to stipulate different terms, often based on their own standard printed terms. It is sometimes extremely difficult to determine whether or when a concluded contract came into existence, particularly where no formal contract is ever signed, and it is then left to the courts to determine the matter.

Clearly this is far from satisfactory, and it makes sense to ensure that the sub-contract terms are agreed and recorded in writing to avoid the need to rely on a court interpreting the intention of the parties from an analysis of the various exchanges of communication.

Agreement

As noted previously, the essence of any contract is agreement.

The test for the existence of an agreement is objective rather than subjective. In other words, the existence is tested on the facts, rather than on what may have been perceived to be the intention of the parties.

The principal justification for the adoption of this test is the need to promote certainty.

An agreement is reached either:

- when a statement of agreement is signed; or
- when one party makes an unambiguous offer capable of being accepted, and the other party accepts it unequivocally.

Consideration

Other than where a contract is executed as a deed (see further commentary later in this chapter) an agreement requires consideration to be exchanged between the contracting parties before it becomes binding.

The classic definition of consideration was expressed in *Currie v. Misa*¹³ in the following terms:

¹³*Currie v. Misa* (1875) LR 10 Ex 153.

'a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'

In the ordinary building sub-contract situation the consideration given by the contractor is the price paid or the promise to pay, and the consideration given by the sub-contractor is the carrying out of the works or promise to carry them out.

What are the rules regarding consideration?

The rules which make up the doctrine of consideration may be divided into three categories:

- (1) The first is that consideration must be sufficient but it need not be adequate.
- (2) The second is that past consideration is not good consideration (i.e. the general rule is that the consideration must relate to future works. Any acts already performed that are the subject matter of the agreement do not, generally, constitute good consideration and are unenforceable).
- (3) The third is that the consideration must move from the party to whom the promise has been made.

Executed as a deed

As noted above, consideration is not required in the case where a contract is executed as a deed. Contracts, other than made by deed, are termed simple contracts, whether made orally or in writing.

Fraud or misrepresentation

What is a misrepresentation?

A misrepresentation may be defined as an unambiguous, false statement of fact which is addressed to a party and which misleads that party and which materially induces that party to enter into a contract.

Whether made fraudulently or innocently, the general effect of such a misrepresentation is to render the contract voidable. As a general rule, simple silence is not an example of misrepresentation¹⁴.

The particular statement in question must be one of existing fact and the statement must be addressed to the party misled. This may either be by way of direct communication to that party, or it may be communicated to that party by a third party acting under the instruction of the party making the representation.

Note also that the statement must be a material inducement to make a party enter into the contract. A material inducement is one that would affect the judgment of a reasonable man in deciding whether to enter into the contract on those

¹⁴*Keates v. Cadogan* (1851) 10 CB 591.

terms (although a person who has been fraudulent cannot succeed with an argument that the representation was immaterial).

Finally, the ability of a party to exclude liability for misrepresentation is controlled by section 3 of the Misrepresentation Act 1967, which subjects any term which purports to exclude or restrict liability or a remedy for misrepresentation to a reasonableness test.

Are there any different types of misrepresentation?

Yes. There are four different types of misrepresentation.

(1) Fraudulent misrepresentation

Fraudulent misrepresentation is made when it is proved that a false representation has been made (a) knowingly or (b) without belief in its truth or (c) recklessly or carelessly whether it is true or false.

(2) Negligent misrepresentation (actionable at common law)

Negligent misrepresentation is actionable at common law where there is a *Hedley Byrne*¹⁵ relationship (i.e. some special relationship of proximity) between the parties. The existence of such a relationship depends upon a number of factors, including the knowledge of the party making the representation, the purpose for which the statement was made and the reasonableness of the reliance by the party receiving the representation.

(3) Negligent misrepresentation (arising under section 2(1) of the Misrepresentation Act 1967)

Section 2(1) of the Misrepresentation Act 1967 states that where a misrepresentation has been made by one contracting party to another, the party making the representation is liable to the other in damages unless he can prove that he had reasonable grounds to believe and did believe up to the time that the contract was made that his statement was true.

(4) Innocent misrepresentation

An innocent misrepresentation is a misrepresentation which is neither fraudulent, nor negligent.

What are the legal remedies for misrepresentation?

The principal remedies for misrepresentation are rescission (i.e. revoking the contract) and damages.

Rescission is in principle available for all types of misrepresentation. The effect of rescission is to put the parties as far as possible into the position which they would have been in if the contract had not been concluded.

Damages can be claimed for all types of misrepresentation. However, in respect of innocent misrepresentation only, the court has discretion to award damages in lieu of rescission under section 2(2) of the Misrepresentation Act 1967.

¹⁵ *Hedley Byrne & Co. v. Heller & Partners* [1963] 3 WLR 101, HL.

Mistake

What is mistake?

This is the position where the parties to the contract are mutually mistaken about some serious material fact fundamental to the contract which may render the contract void.

This is to be distinguished from circumstances where one party thought he was getting a better bargain than he actually did; this does not affect the contract's validity.

Mistake operates within very narrow confines.

A mistake can be mutual, unilateral or common.

A mutual mistake occurs when both parties make a mistake (i.e. A is offering one thing whilst B is accepting something different); a unilateral mistake occurs where only one party makes a mistake; and a common mistake occurs when both parties make the same mistake.

If both parties, or even one party, intended something different from that which the documents record, the courts have power to rectify or alter the document so as to give effect to the true agreement.

Void or voidable

A contract that is 'void' is a contract that has no legal effect (i.e. it is a nullity) as distinct from a contract that is voidable, which is simply a contract that is capable of being set aside (or rescinded) by one of the parties.

Certainty of terms

Even if there is clearly agreement through offer and acceptance, a contract may fail to come into existence because of uncertainty as to what has been agreed¹⁶.

Although it has been found that 'the parties are to be regarded as masters of their contractual fate in determining what terms are essential'¹⁷; and 'it is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant'¹⁸; it is generally considered that agreement as to parties, price, time and description of works is normally the minimum necessary to make the contract commercially workable.

Silence by the parties as to either price or time may not alone prevent a contract coming into existence, for if the other essential terms are agreed a reasonable charge or time for completion may be implied by the Supply of Goods and Services Act 1982.

Letters of intent

All too frequently, the desire or pressure to commence works quickly (either on or off site) is given priority by the parties over having a formal contract in place

¹⁶ *Scammell v. Ouston* (1941) 1 All ER 14.

¹⁷ *Pagnan v. Feed Products* [1987] 2 Lloyd's Rep 601, CA.

¹⁸ *Mitsui Babcock Energy Ltd v. John Brown Engineering Ltd* (1996) CILL 1189.

beforehand, and in such circumstances it is not uncommon for the work to start on the basis of a letter of intent issued by the contractor to the sub-contractor, sometimes whilst sub-contract negotiations continue over the sub-contract terms. There are, however, risks involved for both parties by proceeding on this basis, particularly if no formal sub-contract is ever concluded.

What is a letter of intent?

A letter of intent arises out of a situation where parties are in the course of negotiating a contract and they express in writing their intention to enter into a contract in the future.

Although there is often much debate regarding this matter, it is in fact a misconception that letters of intent are or can ever be contracts. A true letter of intent does no more than set out the parties' intention to enter into a contract at a later date.

Despite this, there have been circumstances when the courts have found that what one of the parties intended to be a letter of intent was actually a contract in its own right.

In reality, as identified in the *Monk v. Norwich Union*¹⁹ case, the question of the legal effect of letters of intent has only three possible outcomes. These are:

- that a simple contract may be formed under which each party assumes reciprocal obligations to each other;
- that there may be an 'if' contract, under which party A requests performance from party B and, if party B performs, he will receive remuneration (this is sometimes referred to as a 'quasi-contract'); or
- there is no contract formed at all.

How can a letter of intent be an ordinary contract?

The main consideration is whether the terms set out in the letter of intent are sufficiently certain for a contract to be formed, and to what extent the matters that still need to be resolved are contained within the letter of intent.

The intention of the parties from the surrounding circumstances is also relevant.

In the *British Steel v. Cleveland Bridge*²⁰ case, Judge Goff said:

'the question whether . . . [e] any contract has come into existence must depend on a true construction of the relevant communications which have passed between the parties and the effect (if any) of their actions pursuant to those communications.'

Even if some matters remain outstanding but all essential terms have been agreed, a contract may be formed. Authority for this is found in the *Mitsui v. John Brown*²¹ case, where it was stated:

¹⁹ *Monk Construction Ltd v. Norwich Union Life Assurance Society* (1992) 62 BLR 107.

²⁰ *British Steel Corporation v. Cleveland Bridge* [1984] 1 All ER 504.

²¹ *Mitsui Babcock Energy Ltd v. John Brown Engineering Ltd* (1996) CILL 1189.

'My review of the authorities leads me to the conclusion that there is no reason in principle why two parties should not enter into a binding agreement, even though they have agreed that some proposed terms should be the subject of further discussions and later agreement.'

From the above, it would appear that for a letter of intent to be enforceable in law as a contract the following elements must be present:

- The parties must have demonstrated their intention to contract – either from the content of the letter of intent or from their conduct.
- The parties must have agreed the essential terms (e.g. parties, description of works, price and time) with sufficient certainty so as to allow the contract to become commercially workable.
- Acceptance of the offer must be clear either by words or by conduct.

What if the letter of intent has a capped price or capped time period?

It should be noted that there are many instances where a letter of intent has a capped price or a cap on time. In such a situation, the courts have generally enforced spending limits in letters of intent strictly (see *Monk Construction v. Norwich Union*²², where the letter of intent authorised mobilisation and ordering of materials up to a maximum expenditure of £100,000, and the court held that Monk Construction could not recover proven costs for works performed in excess of that sum).

Does a letter of intent provide for adjudication?

This is a grey area and has caused much debate in the construction industry, particularly given the widespread use of letters of intent.

The question is does the letter of intent set out all the terms of the contract for the purposes of complying with section 107 of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA 1996) (in particular section 107(2)(c))?

Section 107(2) of the HGCRA 1996 provides that an agreement is in writing if:

- (1) it is made in writing;
- (2) it is made by an exchange of communications in writing; or
- (3) the agreement is evidenced in writing.

In interpreting the above, and at the date of writing, the surrounding case law²³ states that for an agreement to satisfy s107 of the HGCRA 1996 all of the terms of the contract must be evidenced in writing, not just the material ones. The court's view appears to be that the speed of adjudication demands certainty in respect of the construction contract's terms; it is not a forum for the parties to be arguing what the unwritten or obscure terms of the contract were.

²² *Monk Construction Ltd v. Norwich Union Life Assurance Society* (1992) 62 BLR 107.

²³ *RJT Consulting Engineers Ltd v. DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270.

From the foregoing, whether or not a letter of intent satisfies s107 of the HGCRA 1996 will depend entirely on the wording of the letter of intent in each case. Certainly, a pure letter of intent (which is not a contract in any event) will not satisfy this requirement. Even when a letter of intent goes further than this, it will only permit statutory adjudication to be used if it is a contract and if all of the material terms of that contract are recorded in writing²⁴.

Standard forms of contract and sub-contract

There are obvious benefits in using standard forms of contract and sub-contract. These include:

- There is no need to produce (and incur the legal costs of producing) ad hoc contracts and sub-contracts for every project.
- There is a degree of certainty regarding the interpretation of the clauses of the contract (particularly those standard forms that have been in existence for some time and where some of the more important clauses may have been tested in the courts).
- The parties know (with reasonable certainty) the consequences of various possible courses of action.

Standard forms of contract (perhaps less so of standard forms of sub-contract) can be traced back to the nineteenth century (if not earlier). However, it appears to be a fairly recent phenomenon, largely emanating from the Latham Report (*Constructing the Team*, 1994), that standard forms and sub-contracts are now seen as having a dual purpose. These are:

- To set out the rights and obligations of the parties.
- To ensure that the risk of the project is allocated to the party that can best manage that risk.

In this regard there have been great steps taken, particularly in respect of main contracts, but it is questionable whether that same progress has been made in respect of sub-contracts.

It is still prevalent that main contractors produce their own sub-contract forms, or, more commonly, issue their own amendments to the standard sub-contract forms.

Perhaps unfortunately, under the JCT main contract forms, there is nothing to prevent this from happening in the future, and because of this it is considered by some that main contractors under JCT contracts should be obliged to sub-let works using JCT sub-contracts.

For instance, the JCT Design and Build Contract simply states, under clauses 3.3.1 and 3.3.2, that:

²⁴The position in respect of contractual adjudications was considered in the case of *Treasure & Son Ltd v. Martin Dawes* [2007] EWHC 2429 (TCC).

Clause 3.3.1 'The Contractor shall not without the written consent of the Employer sub-let the whole or any part of the Works. Such consent shall not be unreasonably delayed or withheld but the Contractor shall remain wholly responsible for carrying out and completing the Works in all respects in accordance with clause 2.1 notwithstanding any such sub-letting.'

Clause 3.3.2 'The Contractor shall not without the written consent of the Employer sub-let the design for the Works. Such consent shall not be unreasonably delayed or withheld but shall not in any way affect the obligations of the Contractor under clause 2.17 or any other provision of this Contract.'

Clause 3.9 then notes that it shall be a condition of any sub-letting to which clause 3.3 applies that:

'3.9.1 the employment of the sub-contractor under the sub-contract shall terminate immediately upon the termination (for any reason) of the Contractor's employment under this Contract.

3.9.2 the sub-contract shall provide:

3.9.2.1 that no unfixed materials and goods delivered to, placed on or adjacent to the Works by the sub-contractor and intended for them shall be removed, except for use on the Works, unless the Contractor has consented in writing to such removal (such consent not to be unreasonably delayed or withheld) and that:

3.9.2.1.1 where, in accordance with clauses 4.8 and 4.13 or 4.14 of these Conditions, the value of any such material or goods has been included in any Interim Payment and that Interim Payment has been paid by the Employer to the Contractor, those materials or goods shall be and become the property of the Employer and the sub-contractor shall not deny that they are and have become the property of the Employer;

3.9.2.1.2 if the Contractor pays the sub-contractor for any such materials or goods before their value is included in any Interim Payment, such materials or goods shall upon such payment by the Contractor be and become the property of the Contractor.

3.9.2.2 for the grant by the sub-contractor of the rights of access to workshops or other premises referred to in clause 3.1 of these Conditions;

3.9.2.3 that if by the final date for payment stated in the sub-contract the Contractor fails properly to pay any amount, or any part of it, due to the sub-contractor, the Contractor shall in addition to the amount not properly paid pay simple interest at the Interest Rate for the period until such payment is made; such payment of interest to be on and subject to terms equivalent to those of clauses 4.10.6 and 4.10.12 of these Conditions;

3.9.2.4 where applicable, for the execution and delivery by the sub-contractor, in each case within 14 days of receipt of a written request by the Contractor, of such collateral warranties as comply with the Contract Documents;

3.9.2.5 that neither of the provisions referred to in clauses 3.4.2.1.1 and 3.4.2.1.2 shall operate so as to affect any vesting in the Contractor of any property in any Listed item required for the purposes of clause 4.15.2.1 of these Conditions;

3.9.3 the Contractor shall not give such consent as is referred to in clause 3.4.2.1 without the prior consent of the Employer under clause 2.21 of these Conditions.'

Therefore, in respect of the JCT Design and Build Contract, for example, and apart from the provisions under clause 3.9 above, the actual terms on which a contractor contracts with a sub-contractor are a matter for agreement between the contractor and the sub-contractor.

Very similar provisions operate in respect of the JCT Intermediate Building Contract, although under that main contract form the consent that the contractor is required to obtain is sometimes to be obtained from the architect/contract administrator and sometimes from the employer.

Therefore, in respect of both of the above main contract forms, other than for the few points specifically noted in the main contract conditions, the terms on which a contractor contracts with a sub-contractor are a matter for agreement between the contractor and the sub-contractor.

For example, the said main contract conditions do not require any particular conditions to apply in the sub-contracts in respect of, amongst other things:

- the consequences if an act or default of the sub-contractor causes the contractor to be in breach of the main contract;
- regular payments to the sub-contractor for work properly carried out;
- the recovery of any loss or expense caused to the sub-contractor by any act or default of the contractor or of the employer;
- the adjustment of the agreed period or periods for carrying out the sub-contract works where such adjustment is needed due to the occurrence of events outside the sub-contractor's control.

In respect of the Major Project construction contract and the ShortSub, there are no restrictions as to sub-contracting at all, apart from that under the Major Project construction contract the contractor is to appoint a named specialist to prepare any designs or execute any works that are identified by the requirements (within the main contract) as having to be undertaken by a named specialist. In such a situation the contractor is to notify the employer of the identity of any named specialist upon their appointment and shall supply to the employer a copy of the contract entered into by the contractor with the named specialist (other than for the financial details contained in it). In addition, the contractor is not to amend his contract with any named specialist or waive strict compliance by the named specialist with the performance of his obligations under such contract or estop himself from enforcing such obligations, without obtaining the prior written consent of the employer (consent that is not to be unreasonably withheld or delayed).