variety of other methods which both parties can use in order to try to settle their differences cheaply and quickly.[74] These include mediation,[75] conciliation, early neutral evaluation and the use of Dispute Boards.[76] The courts also now emphasise the importance of considering ADR.[77] The Technology and Construction Court itself has a scheme for early neutral evaluation and has introduced a court settlement process.[78]

1-055 **Encouragement of ADR.** There have been a number of decisions where the court has commented on the desirability of parties engaging in ADR. In appropriate circumstances, sanctions in the form of adverse costs orders have been applied to parties when the courts have considered that they have unreasonably refused to undertake ADR.[79]

74 See para.18–024.
75 See Section 11 of Ch.17.
76 See Section 12 of Ch.17.
77 See CPR r.1.4.2(e) and S. Blake, J. Browne and S. Sime, *The Jackson ADR Handbook*, 1st edn (Oxford: Oxford University Press, 2013).
78 See paras 7.5 and 7.6 of the *TCC Guide*, 2nd edn, 3rd revision (London, April 2014).
79 See *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002; *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288; [2014] 1 All E.R. 970; *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd* [2014] EWHC 3148 (TCC); [2014] T.C.L.R. 8.

CHAPTER 2

FORMATION OF CONTRACT

CONTENTS

1. ELEMENTS OF CONTRACT

2-001 The essence of a building contract, like any other 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 forbear from doing something by one party and an acceptance[1] of that offer by the other party, turning the offer into a promise.[2] The law further requires that a party suing on a promise must show that it has given consideration

1 See "Offer and Acceptance" at para.2-002.
2 See *Chitty on Contracts*, edited by H. Beale, 32nd edn (London: Sweet & Maxwell (2015), Vol.1, Ch.2. For application of the offer and acceptance analysis see *Tekdata v Amphenol* [2009] EWCA

for the promise, unless the promise was given by deed. There is consideration where:

> "...an act or forbearance of the one party or the promise thereof is the price for which the promise of the other is bought."[3]

In the ordinary building contract the consideration given by the employer is the price paid or the promise to pay,[4] and by the contractor is the carrying out of the works or promise to carry them out. The parties must have the capacity to make a contract,[5] and any formalities required by law must be complied with.[6] Both the consideration and the objects of the contract must not be illegal.[7] If there is fraud or misrepresentation then the contract may be voidable,[8] while if there is a mutual mistake about some serious fundamental matter of fact this may have the effect of making the contract void.[9] In addition there must be an intention to create legal relations.[10]

2. OFFER AND ACCEPTANCE

(a) Invitation to tender

2-002 The employer, often acting through its architect or engineer, sends out an invitation to tender for the proposed works. This document usually includes the proposed conditions of contract, plans, and a specification and often unpriced bills of quantities, i.e. a bill with the quantities of work set out but the price column blank. An invitation to tender is not normally an offer binding the employer to accept the lowest or any tender. It is comparable to an advertisement that one has a stock of books to sell or houses to let and such advertisements have been described as "offers to

Civ 1209; [2010] Lloyd's Rep. 357, Longmore LJ at [11] and Dyson LJ at [25].

3 P.H. Winfield, *Pollock's Principles of the Law of Contract*, 12th edn (London: Stevens & Sons, Ltd, 1946), p.130, adopted by Lord Dunedin in *Dunlop v Selfridge* [1915] A.C. 847 at 855, HL. See also, *Currie v Misa* (1875) L.R. 10 Ex. 153 at 162. For a case where forbearance was held to be valuable consideration see *Comyn Ching v Oriental Tube* (1979) 17 B.L.R. 47 at 79, CA; cf. *IBA v EMI and BICC* (1980) 14 B.L.R. 1, HL, where forbearance did not result in a collateral warranty.

4 For the consideration given where the employer was not to pay, see *Charnock v Liverpool Corp* [1968] 1 W.L.R. 1498 at 1505, CA. For performance of an existing contractual duty as consideration, see *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd* [1975] A.C. 154, PC; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705; *Pao On v Lau Yiu Long* [1980] A.C. 614 (PC); *Comyn Ching v Oriental Tube* (1979) 17 B.L.R. 47, CA; *Williams v Roffey Brothers* [1991] 1 Q.B. 1, CA; *Southern Carribbean Trading Ltd v Trafigura Beheer BV* [2005] 1 Lloyd's Rep. 128 at 149; *Re Selectmove* [1995] 1 W.L.R. 474 at 481, CA.

5 See Section 4 of this chapter.

6 See Section 3 of this chapter.

7 See Ch.6, Section 8.

8 See Ch.6, Sections 1 and 2.

9 See *Bell v Lever Bros* [1932] A.C. 161, HL, reviewed by Steyn J in *Associated Japanese Bank v Credit du Nord* [1989] 1 W.L.R. 255 at 264; *William Sindall v Cambridgeshire CC* [1994] 1 W.L.R. 1016, CA; *Great Peace Shipping v Tsavliris Salvage* [2003] Q.B. 679, CA; *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell, 2015),Vol.1, Chs 3 and 6. For rectification where there has been a mistake in expressing the contract, see para.12–015 and following. For the equitable powers of the court in cases of mistake, see *Solle v Butcher* [1950] 1 K.B. 671, CA; *Grist v Bailey* [1967] 1 Ch. 532; *Curtin v GLC* (1970) 114 S.J. 932, CA; *Magee v Pennine Insurance Co Ltd* [1969] 2 Q.B. 507, CA; *Laurence v Lexcourt Holdings* [1978] 1 W.L.R. 1128, HL; cf. *William Sindall v Cambridgeshire CC* [1994] 1 W.L.R. 1016 at 1035, CA; *Great Peace Shipping v Tsavliris Salvage* [2003] Q.B. 679, CA.

10 See *Edwards v Skyways Ltd* [1964] 1 W.L.R. 349.

negotiate—offers to receive offers—offers to chaffer".[11] It follows that the clause frequently inserted in tenders to the effect that the employer does not undertake to accept the lowest or any tender is probably unnecessary in law.[12] But an express offer to accept the lowest tender can be binding and have the effect of turning the invitation to tender into an offer.[13] It may possibly be a unilateral or "if" contract, being an offer which the offeror may be free to revoke until the offeree starts to perform its condition.[14] To be considered an offer in law, an invitation to tender must be construed as a contractual offer capable of being converted by acceptance into a legally enforceable contract.[15]

2-003 Where tenders are solicited from selected parties all of them known to the invitor and the invitation prescribes a clear, orderly and familiar procedure, a tenderer submitting a conforming tender before the prescribed deadline may be contractually entitled at least to have its tender opened and considered in conjunction with all other conforming tenders. An invitor who failed to open or consider such a tender was held to be in breach of contract.[16] A tenderer is always at risk of having its tender rejected, either on its intrinsic merits or on the ground of some disqualifying factor personal to the tenderer.[17]

2-004 Statements of fact in the invitation to tender about such matters as the quantities, the site or existing structures may, if a contract is entered into, have no legal effect at all, they may take effect as representations, they may form collateral warranties, they may give rise to a claim for negligent misstatement, or they may subsequently become incorporated into the contract.[18] It is a question partly of fact and partly of construction, to determine the nature and effect of such statements.

(b) Tender

2-005 The contractor's offer to carry out the works is usually termed a tender.[19] It may well happen that as a result of negotiation[20] it is the employer who eventually makes the offer. In any event a statement, to amount to an offer, must be definite and

11 Bowen LJ in *Carlill v Carbolic Smoke Ball Co* [1893] 1 Q.B. 256 at 268, CA; *Grainger & Son v Gough* [1896] A.C. 325 at 334, HL. See also the building contract case of *Moore v Shawcross* [1954] C.L.Y. 342; [1954] J.P.L. 431.

12 Cf. *Pauling v Pontifex* (1852) 2 Saund. & M. 59. For E.U. requirements for tenders, see para.15–001 and following.

13 Cf. *South Hetton Coal Co v Haswell Coal Co* [1898] 1 Ch. 465, CA, approved in *Harvela Ltd v Royal Trust Co* [1986] A.C. 207, HL; *Warlow v Harrison* (1859) 1 E. & E. 309.

14 See Lord Diplock in *Harvela Ltd v Royal Trust Co* [1986] A.C. 207 at 224, HL; *Daulia Ltd v Four Millbank* [1978] 1 Ch. 231 at 238, CA.

15 See *Gibson v Manchester CC* [1979] 1 W.L.R. 294, HL, where a statement that "the corporation may be prepared to sell the house to you at the purchase price of £2,725" was not an offer. For other examples of offers not capable of acceptance, see also, *Gerson v Wilkinson* [2001] Q.B. 514 at 530 where the offer stated "I am willing to make an outright sale for £319,000", and *iSOFT Group v Misys Holdings* [2003] EWCA Civ 229; [2003] All E.R. (D) 438 (Feb).

16 *Blackpool and Fylde Aero Club v Blackpool BC* [1990] 1 W.L.R. 1195, CA.

17 *Fairclough Building v Borough Council of Port Talbot* (1992) 62 B.L.R. 86, CA where, without personal impropriety, a director of a tenderer was the husband of the Council's Principal Architect.

18 For a full discussion, see Ch.6 and for negligent misstatement, see para.7–055 and following.

19 The term is here used in a completely different sense from that of the tender of goods or money which may amount to a defence under a contract—see *Chitty on Contracts*, edited by H. Beale, 32nd edn (London: Sweet & Maxwell, 2015), Vol.1, Ch.21, Section 5.

20 See "Negotiations for a contract" at para.2–023; "Acceptance" at para.2–019; "Negotiations after contract" at para.2–045.

unambiguous.[21] The person making the offer is for the purposes of this part of the law termed the offeror; the person to whom it is made, the offeree.

2-006 **Costs of tendering.** The cost to the contractor of preparing the tender, including any amended tender necessitated by bona fide alterations in the bills of quantities and plans, may be considerable, but in ordinary circumstances there is no implication that the tenderer will be paid for this work.[22] The tenderer hopes that the cost will be met out of the profits of contracts as are made as a result of successful tenders.[23]

2-007 The contractor may be able to recover a reasonable sum for work done at the employer's request which falls outside the normal work which a contractor performs gratuitously. This includes work carried out subsequent to the tender and used by the employer.[24] This was held to be on the basis of an implied promise to pay but may now be in quasi-contract or restitution.[25] If the employer invites a tender without any intention of entering into a contract and the contractor, believing the invitation to tender to be genuine, incurs expense in tendering, the contractor may have a claim for damages in fraud against the employer.[26]

2-008 **Costs of tender design.** As part of the process of tendering, in particular under design and build contracts, specialist contractors may carry out design. In the absence of agreement,[27] the costs of such works are part of the costs of tendering and are irrecoverable unless the employer makes some use of the design or causes the contractor to carry out work beyond what is normal in the circumstances.[28]

2-009 **Restrictive tendering arrangements.** There is United Kingdom and European Union legislation aimed at promoting competition, preventing restrictive tendering agreements and prohibiting national or local restrictions on contracting. This is discussed in Ch.15.

(c) Letters of intent

2-010 Documents so described are frequently sent. It is a question based upon the facts of each case whether the sending of a letter of intent can give rise to any, and if any,

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21 *Falck v Williams* [1900] A.C. 176, PC; *Harvey v Facey* [1893] A.C. 552, PC; *Bigg v Boyd Gibbins Ltd* [1971] 1 W.L.R. 913, CA. An acceptance must also be unambiguous; see *Peter Lind & Co Ltd v Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep. 234.

22 *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932. The principle is based on custom; see *William Lacey Ltd v Davis* at 934 and 935. For expenses of entering an architectural competition, cf. *Jepson & Partners v Severn Trent Water Authority* (1982) 20 B.L.R. 53, CA.

23 *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932 at 934.

24 *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932.

25 *British Steel v Cleveland Bridge* [1984] 1 All E.R. 504 at 511 and (1981) 24 B.L.R. 94 at 122; *Marston Construction Co v Kigass* (1989) 46 B.L.R. 109; cf. *Turriff Construction v Regalia* (1971) 9 B.L.R. 20; *Regalian Properties v London Dockland Development Corp* [1995] 1 W.L.R. 212; *M.S.M. Consulting v Republic of Tanzania* [2009] EWHC 121 (QB), (2009) 123 Con. L.R. 154, at [170]–[171]. See also Lord Goff of Chieveley and G. Jones, *Goff and Jones: The Law of Unjust Enrichment*, 8th edn (London: Sweet & Maxwell, 2011), Ch.16; *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell, 2015) Vol.1, para.29-077 and also para.4-031.

26 Cf. *Richardson v Silvester* (1873) L.R. 9 Q.B. 34. For fraud, see para.6–012.

27 For an example of such an agreement arising out of a letter of intent, see *Turriff Construction v Regalia* (1971) 9 B.L.R. 20. See also, *M.S.M. Consulting v Republic of Tanzania* [2009] EWHC 121(QB), (2009) 123 Con. L.R. 154, at [170]–[171].

28 By analogy with *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932 at 934.

what, liability.[29] The phrase "Letter of Intent" is not a term of art; its meaning and effect depend on the circumstances of each case:

> "Some are merely expressions of hope; others are firmer but make it clear that no legal consequences ensue; others presage a contract and may be tantamount to an agreement 'subject to contract'; others are contracts falling short of the full-blown contract that is contemplated; others are in reality that contract in all but name. There can therefore be no prior assumptions, such as looking to see if words such as 'letters of intent' have or have not been used."[30]

2-011 A letter of intent ordinarily expresses an intention to enter into a contract in the future but creates no liability in regard to that future contract. Construed in its factual context, it may have no binding effect. It may take effect as an executory ancillary contract entitling the recipient to interim costs if the intended future contract is not made and, perhaps, imposing liabilities, for instance, for the quality or suitability of work done. It may effect an "if" contract under which the writer asks the recipient to carry out a certain performance[31] and promises that, if it does so, the under will receive remuneration in return. But an "if" contract must contain the necessary terms. It may result in no contract, although the law may nevertheless impose an obligation on the party who makes a request to pay a reasonable sum for such work as has been done pursuant to the request if the intended future contract is not made. If the intended future contract is made, the rights of the parties are normally governed by that contract, with the letter of intent then ceasing to have effect.[32] Where the letter of intent includes an express provision giving a right to payment, it is common for an employer to cap its liability under a letter of intent and this may limit recovery.[33]

2-012 In *Turriff Construction v Regalia*,[34] a design and build contractor[35] offered to the employer to undertake certain urgent works of design necessary to obtain estimates and planning permission provided he obtained an assumption of liability to pay for such work. He indicated that he would regard receipt of a letter of intent as an acceptance of his offer. The employer sent a letter of intent and it was held that he was liable to pay for the work carried out. In *British Steel v Cleveland Bridge*,[36] suppliers of steel castings were held entitled to a reasonable sum in quasi-contract or

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29 See generally, S.N. Ball, "Work Carried Out in Pursuance of Letters of Intent—Contract or Restitution?" (1983) 99 L.Q.R. 572; M. Furmston, T. Norisada and J. Poole, *Contract Formation and Letters of Intent* (Chichester: John Wiley & Sons, 1998). For a case where acceptance of a letter of intent gave rise to a contract, see *Durabella v Jarvis & Sons* (2001) 83 Con. L.R. 145 at 150. See also, *Associated British Ports v Ferryways* [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595, at [24–27].

30 *ERDC Group Ltd v Brunel University* see *ERDC Group Ltd v Brunel University* [2006] B.L.R. 255 at 265. See also *Diamond Build Ltd v Clapham Park Homes Ltd* [2008] EWHC 1439 (TCC); 119 Con. L.R. 32, [41]–[50].

31 *A.C. Controls Ltd v British Broadcasting Corporation* [2002] 89 Con. L.R. 52 at 65.

32 This paragraph is based on *British Steel v Cleveland Bridge* [1984] 1 All E.R. 504; *Turriff Construction v Regalia* (1971) 9 B.L.R. 20 and *Monk Construction v Norwich Union* (1992) 62 B.L.R. 107, CA. See also, *Kleinwort Benson v Malaysia Mining* [1989] 1 W.L.R. 379 at 391, CA, for the concept of a "comfort letter"; *Associated British Ports v Ferryways* [2009] EWCA Civ 189; [2009] 1 Lloyd's Rep. 595, [24]–[27] where *Kleinwort Benson* was considered. See M. Furmston, T. Norisada and J. Poole, *Contract Formation and Letters of Intent: A Comparative Assessment* (Chichester: John Wiley & Sons, 1998).

33 *Mowlem Plc v Stena Line Ports Limited* and *Diamond Build Limited v Clapham Park Homes Limited* [2008] EWHC 1439 (TCC); 119 Con. L.R. 32.

34 (1971) 9 B.L.R. 20.

35 For a discussion of such contracts see para.1–034.

36 [1984] 1 All E.R. 504.

restitution. In *Wilson Smithett v Bangladesh Sugar*,[37] a letter of intent was construed as an acceptance of an offer binding both parties. In *Drake & Scull v Higgs and Hill*[38] a letter of intent was sent and the correspondence was held to have led to the agreement of an indemnity in respect of reasonable expenditure incurred.

(d) Estimates

2-013 There may be an offer although the contractor makes it on a document called an estimate. If an employer seeks a tender and a contractor submits a document described as an estimate that may still amount to an offer.[39] There is no custom that an estimate cannot amount to an offer and, if such a custom existed, it would unenforceable.[40] In a Canadian case, an employer was liable for the inaccuracy of an "estimate" of the cost of part of the works, it being intended as a reliable basis for a tenderer's calculations.[41]

(e) Standing offers

2-014 Tenders are sometimes invited for the periodic carrying out of work.[42] If the contractor tenders and there is an acceptance, the result depends upon the construction of the documents, but can have one of three well-known consequences.[43] First, there may be a contract for the carrying out of a definite amount of work during a certain period. Secondly, there may be a contract in which the employer agrees to order such work as it needs during the period. In such a case the employer is in breach of contract if during the period it place orders for the work elsewhere, and the contractor is in breach if it refuses to carry out the work during the period.[44] Thirdly, there may be a standing offer on the part of the contractor to carry out certain work during the period if and when the employer chooses to give an order.[45]

2-015 The contractor may revoke its offer for future orders unless there is consideration to keep it open or the documents are under seal,[46] but if before revocation an order in the terms of the agreement is given, a contract comes into existence for that order and the contractor must carry it out.[47] If no order at all is given during the period[48] or if less work is ordered than the probable amount indicated in the invitation to tender, whether because the work is given to another contractor or

[37] [1986] 1 Lloyd's Rep. 378.
[38] (1995) 11 Const. LJ 214.
[39] *Croshaw v Pritchard* (1899) 16 T.L.R. 45; sub nom. *Crowshaw v Pritchard*, H.B.C. (4th edn), Vol.2, p.274. See also *Sykes v Packham t/a Bathroom Specialist* [2011] EWCA Civ 608.
[40] H.B.C. Report, p.276.
[41] *Cana Construction v R.* (1973) 37 D.L.R. (3d) 418.
[42] Most of the cases deal with the supply of goods but the principle applies to contracts of work and labour; *R. v Demers* [1900] A.C. 103, PC.
[43] *Percival Ltd v LCC Asylums Committee* (1918) 87 L.J.K.B. 677 at 678. In *Bentley Construction v Somerfield Property* (2001) 82 Con. L.R. 163 a standing arrangement gave rise to a separate offer for each item of work which could be accepted or rejected.
[44] *Percival Ltd v LCC Asylums Committee* (1918) 87 L.J.K.B. 677 at 679; cf. *Att Gen v Stewards & Co Ltd* (1901) 18 T.L.R. 131, HL; *Kelly Pipelines v British Gas* (1989) 48 B.L.R. 126.
[45] *Percival Ltd v LCC Asylums Committee* (1918) 87 L.J.K.B. 677 at 678.
[46] *Offord v Davies* (1862) 12 C.B. (N.S.) 748; *G.N. Railway v Witham* (1873) L.R. 9 C.P. 16 at 19.
[47] *G.N. Railway v Witham* (1873) L.R. 9 C.P. 16.
[48] See *R. v Demers* [1900] A.C. 103, PC.

otherwise,[49] the contractor has no action for breach of contract.[50] Contracts of indefinite or very long duration may be construed as determinable upon reasonable notice, particularly if they are affected by inflation.[51]

(f) Rejection of offer

2-016 A rejection, which takes effect when it is communicated to the offeror, kills the offer so that it cannot thereafter be accepted.[52] It is a matter of construction whether a particular statement does or does not constitute a rejection. A counter-offer operates as a rejection killing the offer which it addresses, and a purported acceptance may in law be a counter-offer if it materially alters the terms proposed.[53]

(g) Revocation or lapse of offer

2-017 **Revocation.** An offer may be revoked at any time before acceptance unless consideration has been given to keep it open[54]; or the offeror is, in special circumstances, estopped from acting inconsistently with the existence of the offer.[55] Revocation of the offer is not effective until it has been communicated to the offeree.[56] An offeree who has acted on the offer cannot recover damages in tort if the offer is revoked before acceptance.[57]

2-018 **Lapse.** An offer can expressly state the time within which it is open for acceptance. If that time expires without acceptance, the offer lapses. Where negotiations were taking place between contractor and employer in the course of which the contractor's offer lapsed but the contractor proceeded to carry out the work without ever concluding an express contract with the employer, the contractor was entitled to recover a reasonable sum.[58] If no time is stated then the offer remains in force for a reasonable time and upon the expiry of that time it lapses.[59] What is reasonable depends on whether on the facts the offeree should, in fairness to both parties,

[49] See *Att Gen v Stewards & Co Ltd* (1901) 18 T.L.R. 131, HL.
[50] *Att Gen v Stewards & Co Ltd* (1901) 18 T.L.R. 131, HL; *Gilmour v McLeod* (1893) 12 N.Z.L.R. S.C. 334; *Pitcaithly & Co v Mclean & Son* (1911) 31 N.Z.L.R. 648.
[51] *Re Spenborough UDC's Agreement; Spenborough Corp v Cooke Sons & Co Ltd* [1968] Ch. 139; *Staffordshire Health Authority v South Staffordshire Waterworks* [1978] 1 W.L.R. 1387; cf. *Kirklees MBC v Yorkshire Woollen* (1978) 77 L.G.R. 448. For a case where it was held that the contract was not determinable on reasonable notice see *Balcombe Group Plc v London Development Agency* [2007] All E.R. (D) 32, [77]–[81]. See also, *Jani-King (GB) Ltd v Pula Enterprises* [2008] All E.R. (Comm) 451, at [58]–[66].
[52] *Tinn v Hoffman and Co* (1873) 29 L.T.R. 271 at 278; *Trollope & Colls v Atomic Power Constructions Ltd* [1963] 1 W.L.R. 333 at 337. See also *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell, 2015), Vol.1 para.2-093.
[53] *Trollope & Colls v Atomic Power Constructions Ltd* [1963] 1 W.L.R. 333 applied in *Butler Machine Tool v Ex-Cell-O Corp* [1979] 1 W.L.R. 401, CA. See also *Chitty on Contracts*, 32nd edn (London:, Sweet & Maxwell, 2015), Vol.1, para.2–097 and "Battle of forms" at para.2-022.
[54] *Byrne v Van Tienhoven* (1880) 5 C.P.D. 344.
[55] *Watson v Canada Permanent Trust Co* (1972) 27 D.L.R. (3d) 735 (British Columbia SC), applying the principle sometimes known as that stated in *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130. See para.12–002.
[56] *Byrne v Van Tienhoven* (1880) 5 C.P.D. 344; cf. *Dickinson v Dodds* (1876) 2 Ch D. 463, CA.
[57] *Holman Construction Ltd v Delco Timber Co Ltd* [1972] N.Z.L.R. 1081 (New Zealand SC), discussed at para.7–066.
[58] *Peter Lind & Co Ltd v Mersey Docks & Harbour Board* [1972] 2 Lloyd's Rep. 234.
[59] *Ramsgate Victoria Hotel Co v Montefiore* (1866) L.R. 1 Ex. 109.

be regarded as having refused the offer. The parties' conduct after the making of the offer is relevant.[60]

(h) Acceptance

2-019 **Unconditional acceptance.** There is an acceptance of the offer bringing a binding contract into existence when the offeree makes an unconditional acceptance.[61] The contractual acceptance has to be a final and unqualified expression of assent to the terms of the offer. The test as to whether there has been such agreement is an objective one so that conduct which demonstrates an apparent intention to accept can be sufficient, despite uncommunicated reservations on the part of the offeree.[62] If the offeree proposes any new terms then there cannot be an acceptance and this may amount to a fresh offer,[63] although a mere request for information about the terms of an offer does not amount to a counter-offer.[64]

2-020 In order for a concluded agreement to be reached it is not necessary for the agreement to have been perfected in every degree. What is required is that when objectively viewed it can be said that the parties have undoubtedly reached a point whereby a binding agreement has been concluded, taking account of what sensible businessmen would expect.[65]

2-021 **Specified means of acceptance.** Where there is specified means of acceptance, there may still be agreement if that specified means of acceptance has not been complied with where, on the usual principles, there was an offer and acceptance and the specified means of acceptance was not a condition precedent. The parties may enter into a contract but merely envisage that their agreement would be recorded in a more formal document.[66] The words "such settlement to be recorded in a suitably worded agreement" may not be a condition precedent to a concluded contract but may indicate that the terms of the settlement agreement would be committed to writing as a record of what had already been agreed.[67] A clause in a mediation agreement which stated that any agreement reached between the parties in the mediation could not be complete until reduced to writing and signed by or on behalf of each of the parties was effective to prevent an agreement when not complied with.[68] Where preliminaries in contract documents provided that there was no agreement until the parties entered into a deed, there was no agreement.[69] A contract came into existence by conduct despite the buyer failing to sign a draft contract

60 See *Manchester Diocesan Council for Education v Commercial & General Investments Ltd* [1970] 1 W.L.R. 241 at 248.
61 See *Nicolene v Simmonds* [1953] 1 Q.B. 543, CA. Problems as to the existence of a contract and as to its meaning when it is decided that there is a contract are closely related and it may be useful to refer to the next chapter on construction of contracts.
62 *Day Morris Associates v Voyce* [2003] All E.R. (D) 368 at [3S].
63 *Hyde v Wrench* (1840) 3 Beav. 334; cf. *Leslie & Co v Commissioners of Works* (1914) 78 J.P. 462; *Peter Lind & Co Ltd v Mersey Docks & Harbour Board* [1972] 2 Lloyd's Rep. 234; and see "Counter-offers" at para.2–016.
64 *Stevenson v McLean* (1880) 5 Q.B.D. 346.
65 *Adonis Construction v O'Keefe Soil Remediation* [2009] EWHC 2047 (TCC); (2009) C.I.L.L. 2784, [42].
66 *Immingham Storage v Clear Plc* [2011] EWCA Civ 89.
67 *Newbury v Sun Microsystems* [2013] EWHC 2180 (QB), [21].
68 *Brown v Rice* [2007] EWHC 625 (Ch).
69 *Jarvis v Galliard Homes* [2000] B.L.R. 33.

which required a signed contract as the prescribed mode of acceptance as an offeror can waive its prescribed mode of acceptance.[70]

2-022 **"Battle of forms".** This expression refers to an offer followed by a series of counter-offers where each party successively seeks to stipulate different terms, often relying on their own standard printed terms. "In some cases the battle is won by the man who fires the last shot",[71] the other party being taken to have agreed the final terms by its conduct in proceeding to perform the agreement without objection. Sometimes agreement is reached by an amalgamation of both parties' proposed terms and conditions construed together.[72] Such battles quite often occur with building contracts.[73] It is not possible to lay down a general rule that will apply in all cases where there is a battle of the forms. It depends on an assessment of what the parties must objectively be taken to have intended. The usual principles of offer and acceptance apply in battle of the forms cases. That has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships.[74] In some circumstances there may be an agreement to which neither party's standard terms apply.[75]

2-023 **Negotiations for a contract.** It is sometimes difficult to determine whether a concluded contract has come into existence when there have been negotiations between the parties but no formal contract has ever been signed. It is suggested that a useful approach is to ask whether the following can be answered in the affirmative:[76]

(a) In the relevant period of negotiation, did the parties intend to contract?[77]
(b) At the time when they are alleged to have contracted, had they agreed with

70 *A Ltd v B Ltd* [2015] EWHC 137 (Comm).
71 *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 W.L.R. 401 at 404, CA; *Tekdata v Amphenol* [2009] EWCA Civ 1209; [2010] Lloyd's Rep. 357.
72 *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 W.L.R. 401 at 405, CA.
73 e.g. (1985) *Rees Hough v Redland* 2 Con. L.R. 109; *Sauter Automation v Goodman* (1986) 34 B.L.R. 81; *Chichester Joinery v John Mowlem* (1987) 42 B.L.R. 100; *Tekdata v Amphenol* [2009] EWCA Civ 1209; *A.E. Yates Trenchless Solutions Ltd v Black and Veatch Ltd* [2008] EWHC 3183 (TCC); 124 Con. L.R. 188; *Transformers and Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC); [2015] B.L.R. 336.
74 *Tekdata v Amphenol* [2009] EWCA Civ 1209; [2010] Lloyd's Rep. 357, Dyson LJ, at [25]; applied in *Trebor Bassett Holdings v ADT Fire and Security* [2011] EWHC 1936 (TCC); [2011] B.L.R. 661, [157]; *Transformers and Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC); [2015] B.L.R. 336.
75 *Transformers and Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC); [2015] B.L.R. 336; *John Graham Construction Limited v F.K. Lowry Piling Limited* [2015] N.I.Q.B. 40.
76 See *Pagnan v Feed Products* [1987] 2 Lloyd's Rep. 601 at 610 and 619, CA and propositions applied by Megaw J in *Trollope & Colls Ltd v Atomic Power Constructions Ltd* [1963] 1 W.L.R. 333 at 336 and *RTS Flexible Systems v Molkerei* [2010] UKSC 14; [2010] 1 W.L.R. 753 which adopted the Pagnan principles at [46]–[54]. See also, *British Guiana Credit Corp v Da Silva* [1965] 1 W.L.R. 248, PC; *Bushwall Properties Ltd v Vortex Properties Ltd* [1976] 1 W.L.R. 591 at 603, CA.
77 For the requirement that the parties intended to create a legal relationship, see *Edwards v Skyways Ltd* [1964] 1 W.L.R. 349 and authorities referred to therein: an offer to make ex gratia payment does not carry necessary or even probable implication that the agreement is to be without legal effect. See also, *Horrocks v Forray* [1976]1 W.L.R. 230, CA; *Kleinwort Benson v Malaysia Mining* [1989]1 W.L.R. 379, CA; *Associated British Ports v Ferryways* [2009] EWCA Civ 189, [24]–[27]. The uncertainty of the terms may reflect on the intention to create legal relations: see *Baird Textile Holdings v Marks and Spencer* [2002] 1 All E.R. (Comm) 737.

sufficient certainty upon the terms which they then regarded as being required in order that a contract should come into existence?[78]

(c) Did those terms include all the terms which, even though the parties did not realise it, were in fact essential[79] to be agreed if the contract was to be legally enforceable and commercially workable?

(d) Was there a sufficient indication of acceptance by the offeree of the offer as was then made complying with any stipulation in the offer itself as to the manner of acceptance?[80]

2-024 On such an approach the court's task is to review what the parties said and did and from that material to infer whether the parties' objective intentions as expressed to each other were to enter into a mutually binding contract.[81]

2-025 All negotiations should be considered.[82] This is important, especially where there have been meetings at which oral statements were made showing that essential terms, not referred to in certain correspondence, were still awaiting agreement at the time of such correspondence.[83]

2-026 **Effect of performance.** Whilst performance of the transaction may make it easier to conclude that there was a binding agreement, such performance is not conclusive. If a transaction has been fully performed, there may be a concluded contract even though an analysis which identifies the coincidence of offer and acceptance cannot strictly be made:

> "The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often be difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised as inessential."[84]

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78 See *Metal Scrap Trade Corp v Kate Shipping Co Ltd* [1994] 2 Lloyd's Rep. 402 at 409, where the parties had reached an agreement which contemplated that further terms as to matters of detail were to be agreed before a binding agreement was reached.

79 "If some particulars essential to the agreement still remain to be settled afterwards there is no contract"; Lord Blackburn in *Rossiter v Miller* (1878) 3 App. Cas. 1124 at 1151, HL.

80 *Holwell Securities Ltd v Hughes* [1974] 1 W.L.R. 155, CA; *Wettern Electric v Welsh Agency* [1983] Q.B. 796 at 802; *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell 2015), Vol.1, para.2–063. For cases where the manner of acceptance was not complied with, see *Jonathan Wren v Microdec* (1999) 65 Con. L.R. 157 (acceptance by signature of both parties); *Picardi v Cuniberti* [2003] B.L.R. 487, TCC (letter to be returned signed); *Pretty Pictures v Quixote Films* [2003] All E.R. (D) 303, QB (signature required); *Maple Leaf v Vouvroy* [2009] EWCA Civ 1334; [2010] 2 All E.R. (Comm) 788 at [16] (mere fact that an agreement leaves a space for signatures is not a "prescription" that the agreement can only become binding on the appending of signatures); *Reveille Independent LLC v Anotech International (UK) Ltd* (2015) EWHC 726 (Comm) (memorandum stating it was not binding until signed by both parties was binding although not signed).

81 *R.T.S. Flexible Systems v Molkerei* [2010] UKSC 14; [2010] 1 W.L.R. 753; *Ove Arup & Partners International Ltd v Mirant Asia-Pacific Construction (Hong Kong) Ltd* [2004] B.L.R. 49 at 60.

82 *Pagnan v Granaria* [1986] 2 Lloyd's Rep. 547; *Pagnan v Feed Products* [1987] 2 Lloyd's Rep. 601, CA; *V.H.E. Construction Ltd v Alfred McAlpine Construction Ltd* (1997) C.I.L.L. 1253; *Drake Insurance v Provident Insurance Plc* [2004] Q.B. 601 at 632, CA.

83 *Hussey v Horne-Payne* (1879) 4 App. Cas. 311 at 316, HL; *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 Q.B. 711, CA.

84 Steyn LJ in *G. Percy Trentham v Archital Luxfer* [1993] 1 Lloyd's Rep. 25 at 27, CA; cf. *Pagnan v Feed Products* [1987] 2 Lloyd's Rep. 601 at 620, CA. *Stent Foundations Ltd v Carrillion Construction (Contracts) Ltd* (2000) 78 Con. L.R. 188; *Harvey Shopfitters Ltd v A.D.I. Ltd* [2004] 2 All E.R. 982, CA. In *R.T.S. Flexible Systems v Molkerei* [2010] UKSC 14; [2010] 1 W.L.R. 753 the Supreme

However:

> "The fact that the work was performed was not conclusive in itself that the parties must have entered into a contract however it is plainly a very relevant factor pointing in that direction. Whether the court will hold that a binding contract was made depends upon all the circumstances of the case, of which that is but one."[85]

(i) Essential terms

2-027 The parties are to be regarded as masters of their contractual fate in determining what terms are essential.[86] It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant.[87] Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.[88]

2-028 Essential terms may include parties, price, time and description of works and these are normally considered necessary to make the contract commercially workable. Lack of agreement as to parties can arise when companies have common directors and there is confusion as to which company is intended to be a contracting party.[89] It can also arise when there is an issue as to whether a contract is with an agent or its principal.[90] 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 then a reasonable charge or time for completion will be implied by the Supply of Goods and Services Act 1982.[91] The description of the works may be in wide terms[92] and it may be subject to the retrospective operation of a variation clause. Thus in *Trollope & Colls Ltd v Atomic Power Constructions Ltd*[93] an offer was made in February 1959 to carry out certain works for £x. In June 1959, while the parties were still negotiating the terms of the contract, work commenced and was still continuing in April 1960 when the parties agreed upon all the essential terms including a clause providing for the variation of the contract work. By April 1960, as a result of variations, the work to be carried out and the price to be paid if there was a contract differed from the work and price referred to in the Febru-

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Court considered Percy Trentham and Lord Clarke stated at [54] that there was no conflict between Steyn LJ's approach and the approach adopted by Goff J in *British Steel Corporation v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All E.R. 504. Each case depends upon its own facts.

85 *R.T.S. Flexible Systems v Molkerei* [2010] UKSC 14; [2010] 1 W.L.R. 753 at [54].

86 *Pagnan v Feed Products* [1987] 2 Lloyd's Rep. 601 at 611, CA.

87 *Pagnan v Feed Products* [1987] 2 Lloyd's Rep. 601 at 611, CA at 619; in *Mitsui Babcock Energy Ltd v John Brown Engineering Ltd* (1996) 51 Con L.R. 129 (signed agreement, reserving provisions which were not essential).

88 *R.T.S. Flexible Systems v Molkerei* [2010] UKSC 14; [2010] 1 W.L.R. 753 at [45].

89 Cf. *Damon v Hapag-Lloyd* [1985] 1 W.L.R. 435; *Badgerhill Properties Ltd v Cottrell* (1991) 54 B.L.R. 23.

90 See the *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 Q.B. 711, CA. See also para.14–031.

91 See para.3–053; see also, *Malcolm v Chancellor, Masters and Scholars of the University of Oxford, The Times,* 19 December 1990; *Drake & Scull Engineering Ltd v Higgs & Hill Northern Ltd* (1994) 11 Const. LJ (lack of agreed daywork could be overcome by a reasonable rate) and *Hescorp Italia SpA v Morrison Construction* (2000) 75 Con. L.R. 51 (completion date essential).

92 See para.4–044.

93 [1963] 1 W.L.R. 333.

ary 1959 offer, but it was held that a contract came into existence upon the terms finally agreed in April 1960.

(j) Subject to contract

2-029 If a purported acceptance is expressed to be "subject to contract", or some other words[94] are used which show that further negotiations or events are contemplated, there is no concluded contract.[95] The words "subject to contract" have acquired a definite ascertained legal meaning.[96] They mean more than that acceptance must be in writing and at the lowest those who use them guard against being contractually bound without further action on their part.[97] Very exceptionally the words may be used in relation to an agreement which is nevertheless binding.[98] There may be a concluded contract where the parties have agreed upon all the terms and merely agree that these shall later be embodied in a formal document.[99] The fact that a party starts work while a contract is being negotiated subject to contract does not, of itself, mean that there was contract on the terms agreed subject to contract. It all depends on the circumstances.[100]

2-030 **Waiver of "subject to contract".** In a "subject to contract" case, the question was often whether the parties have nevertheless agreed to enter into contractual relations on particular terms notwithstanding their earlier understanding or agreement. It is possible for an agreement "subject to contract" or "subject to written contract" to become legally binding if the parties later agreed to waive that condition, for they were in effect making a firm contract by reference to the terms of the earlier agreement or waiving the "subject to written contract" term or understanding.[101] Whether the parties agreed to enter into a binding contract, waiving reliance on the "subject

94 e.g. "subject to strike and lock-out clauses": *Love & Stewart Ltd v S. Instone* (1917) 33 T.L.R. 475; "subject to surveyor's report": *Marks v Board* (1930) 46 T.L.R. 424; "subject to satisfactory survey": *Astra Trust Ltd v Adams & Williams* [1969] 1 Lloyd's Rep. 81; "subject to satisfactory running trials": *John Howard & Co v J.P. Knight Ltd* [1969] 1 Lloyd's Rep. 364; "subject to appropriate amendments … to be mutually agreed": *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566; the use of the words "to be agreed" may not prevent a concluded contract: *Mamidoil-Jetoil Greek Petroleum v Okta Crude Oil Refinery* [2001] 2 Lloyd's Rep. 76 at 89; *Willis Management Ltd v Cable & Wireless Plc* [2005] 2 Lloyd's Rep. 597 at 604, CA.

95 *Rossiter v Miller* (1878) 3 App. Cas. 1124, HL; *Bozson v Altrincham UDC* (1903) 67 J.P. 397, CA; *Chillingworth v Esche* [1924] 1 Ch. 97, CA; cf. *Branca v Cobarro* [1947] K.B. 854, CA; *Smallman v Smallman* [1972] Fam. 25 at 32, CA; *Brown v Gould* [1972] Ch. 53; *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch. 146, CA; *Munton v GLC* [1976] 1 W.L.R. 649, CA. For a discussion of the principles relating to a contract subject to a suspensive condition, see *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 W.L.R. 1293.

96 *Chillingworth v Esche* [1924] 1 Ch. 97, CA. The words, once introduced, can only cease to apply if the parties expressly or by necessary implication so agree; see *Cohen v Nessdale* [1982] 2 All E.R. 97, CA.

97 *Fraser Williams v Prudential Holborn* (1993) 64 B.L.R. 1, CA; *Whittle Movers Limited v Hollywood Express Ltd* [2009] EWCA Civ 1189; *Bennett (Electrical) Services Ltd v Inviron Ltd* [2007] EWHC 49 (TCC) at [15].

98 As in *Alpenstow v Regalian* [1985] 1 W.L.R. 721. The cases in which the meaning of "subject to contract" has been displaced may be described as cases where *"something has gone wrong with the language"* so that the meaning can be resolved by the usual methods of construction: *Confetti Records v Warner Music* [2003] All E.R. (D) 61, Ch D.

99 *Rossiter v Miller* (1878) 3 App. Cas. 1124, HL; *Lewis v Brass* (1877) 3 Q.B.D. 667, CA; *Love & Stewart Ltd v S. Instone* (1917) 33 T.L.R. 475.

100 *R.T.S. Flexible Systems v Molkerei* [2010] UKSC 14; [2010] 1 W.L.R. 753, [47].

101 *R.T.S. Flexible Systems v Molkerei* [2010] UKSC 14; [2010] 1 W.L.R. 753, [55]–[56] referring to

to contract" term depends upon all the circumstances of the case, but the court will not lightly so hold.[102]

(k) Certainty of terms

Certainty of terms. In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty.[103] The courts will strive to construe terms so as to find the requisite degree of certainty and will strain to be the preserver and not the destroyer of bargains, especially where the parties have acted upon their apparent agreement.[104] The courts are reluctant to conclude that what the parties intended to be a contractual agreement is too uncertain to be of contractual effect: this is more so where a party has acted upon it.[105] 2-031

In some cases the meaning may not be capable of determination. Thus agreements for the sale of goods "on hire-purchase terms over two years",[106] and "subject to war clause",[107] have been held to be too vague.[108] However: 2-032

> "…a distinction must be drawn between a clause which is meaningless and a clause which is yet to be agreed. A clause which is meaningless can often be ignored while still leaving the contract good; whereas a clause which has yet to be agreed may mean that there is no contract at all because the parties have not agreed on all the essential terms."[109]

Reference to reasonable requirements or standards is not too vague. The court or arbitrator, when there is an arbitration clause can, in default of agreement, determine what is reasonable.[110] The presence of an arbitration clause may assist the courts to hold that a contract is sufficiently certain or is capable of being 2-033

Galliard Homes Ltd v J. Jarvis & Sons Ltd which cited with approval the statement of the authors of *Megarry and Wade: The Law of Real Property*, 5th edn (London: Sweet & Maxwell, 1984), pp.568–569.

102 *R.T.S. Flexible Systems v Molkerei* [2010] UKSC 14; [2010] 1 W.L.R. 753, [56].

103 Lord Maugham in *Scammell v Ouston* [1941] A.C. 251, at 255, HL; *Bushwall Properties Ltd v Vortex Properties Ltd* [1976] 1 W.L.R. 591, CA; cf. Lord Wright, *Hillas & Co Ltd v Arcos Ltd* (1932) 147 L.T. 503 at 504, HL and see "Valid meaning", at para.3–038.

104 *Scammell v Dicker* [2005] 3 All E.R. 838, CA.

105 *Maple Leaf v Vouvroy* [2009] 1 Lloyd's Rep. 475, not affected by appeal.

106 *Scammell v Ouston* [1941] A.C. 251, HL: "a rare case of uncertainty" *Scammell v Dicker* [2005] 3 All E.R. 838, CA.

107 *Bishop & Baxter v Anglo-Eastern Co Ltd* [1944] 1 K.B. 12, CA.

108 See also, *British Electrical, etc., Ltd v Patley Pressings Ltd* [1953] 1 W.L.R. 280: "Subject to force majeure conditions" too vague; *Nicolene v Simmonds* [1953] 1 Q.B. 543 at 552, CA; *Hong Guan & Co Ltd v R. Jumabhoy & Sons Ltd* [1960] A.C. 684 at 700, PC, a sale "subject to force majeure and shipment" valid; *Edwards v Skyways Ltd* [1964] 1 W.L.R. 349; *Three Rivers Trading Co v Gwinear and District Farmers* (1967) 111 S.J. 831, CA, sale of "400 tons (approx.)" of barley not void for uncertainty; *Mileform Ltd v Interserve Security Ltd* [2013] EWHC 3386 (QB) where the "exclusivity" term was too uncertain.

109 LJ *Nicolene v Simmonds* [1953] 1 Q.B. 543 at 551, CA; *Lovelock Ltd v Exportles* [1968] 1 Lloyd's Rep. 163, CA; *Shamrock SS Co Ltd v Storey* (1899) 81 L.T. 413, CA; *Hobbs Padgett and Co (Reinsurance) v J.C. Kirkland Ltd* [1969] 2 Lloyd's Rep. 547, CA; *Mamidoil-Jetoil Greek Petroleum v Okta Crude Oil Refinery* [2001] 2 Lloyd's Rep. 76, 89, CA (effect of "to be agreed" on certainty); *Willis Management Ltd v Cable & Wireless Plc* [2005] 2 Lloyd's Rep. 597, 604, CA; and *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] EWCA Civ 156, CA (where a shipping schedule and certain terms were to "be agreed during the negotiations of terms for 2010 terms"). See also "subject to contract" above at para.2–029.

110 See *Sweet & Maxwell Ltd v Universal News Services Ltd* [1964] 2 Q.B. 699, CA.

CHAPTER 16

VARIOUS LEGISLATION

CONTENTS

1. DEFECTIVE PREMISES ACT 1972

16-001 The Defective Premises Act 1972, which came into operation on 1 January 1974, imposes duties upon persons taking on work for or in connection with the provision of a dwelling.[1] The liability extends to contract work, work done without a contract but in circumstances where a quantum meruit may be claimed, to work done voluntarily, and to cases in which a building owner does the work.[2] The duties are additional to any duty otherwise owed[3] and cannot be excluded or restricted.[4] Thus it is still necessary to consider the position in contract and in tort[5] and under s.38 of the Building Act 1984.[6] The Act does not apply where there is

1 For a discussion of the Act and its origins, see *D.&F. Estates v Church Commissioners* [1989] A.C. 177 at 193 and following, HL; cf. *Murphy v Brentwood DC* [1991] 1 A.C. 398, HL for the Act's significance in relation to liabilities in negligence.
2 *Alexander v Mercouris* [1979] 1 W.L.R. 1270 at 1273, CA.
3 Defective Premises Act 1972 s.6(2). For a highly critical article by J.R. Spencer see "The Defective Premises Act 1972. Defective Law and Defective Law Reform" (1974) C.L.J. 307–323.
4 Defective Premises Act 1972 s.6(3).
5 See Ch.7.
6 See Section 4 of this chapter.

an "approved scheme".[7] For a period until 1979, the National House-Building Council's schemes were approved schemes for the purposes of s.2 of the Act. However, the last such scheme came to an end on 31 March 1979, thus removing a major potential restriction on the operation of the Act.[8] The Act had no retrospective effect, so persons who had taken on work before the Act came into force owed no duty to the claimants under the statute.[9]

The duty to build dwellings properly. Section 1(1) of the Act provides: **16-002**

> "A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—
>
> (a) if the dwelling is provided to the order of any person, to that person; and
> (b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;
>
> to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."

The Act applies to a "dwelling", which is not defined by the statute. It presumably applies to any building used or capable of being used as a residence and thus must have all the essential elements such as floors, doors, etc.[10] In a block of flats a "dwelling" comprises each apartment, together with its balcony to which the occupier of the apartment had exclusive access for living. The common parts and basement car park do not constitute part of the "dwelling".[11] Whilst the Act covers the conversion or enlargement of a building it does not include repair works to an existing dwelling.[12] The Act applies not merely to the "dwelling" but to "work for or in connection with the provision of a dwelling". Whilst this will be a question of fact in each case, the structural and common parts of a block of apartments fall within this description. Thus where two separate blocks of apartments were constructed by the same builder to the same specification and by the terms of the leases of each apartment, each occupier was liable to make payments to a management company responsible for the maintenance and repair of both blocks and each owner of an apartment had a right of access to the common parts of both blocks, then the structural and common parts provided in one block could be said to have been carried out in connection with the provision of an apartment in another block.[13]

At first sight, it might be thought that the standard to be achieved corresponds substantially with that required by the usual implied terms upon sale of a house in **16-003**

7 See Defective Premises Act 1972 s.2(1).
8 See Defective Premises Act 1972 s.2(1) and the House-building Standards (Approved Scheme, etc.) Orders 1973 (SI 1973/1843), 1975 (SI 1975/1462), 1977 (SI 1977/642), and 1979 (SI 1979/381). The 1979 Order was ineffective since the documents with the numbers referred to in it were never published. Other schemes can be approved under the Act. For the position where there is compulsory acquisition, see Defective Premises Act 1972 s.2(7).
9 *Alexander v Mercouris* [1979] 1 W.L.R. 1270, CA; *Rimmer v Liverpool CC* [1985] Q.B. 1 at 7, CA.
10 See *Halsbury's Laws*, 5th edn (London: Butterworths, 2011), Vol.6, para.275 as to a "building". In *Catlin Estates Ltd v Carter Jonas* [2005] EWHC 2315 (TCC) it was held that the Act applied to a building used or capable of being used as a dwelling not being a building which is used predominantly for commercial and industrial purposes (at [296]).
11 *Rendlesham Estates Plc v Barr Ltd* [2014] EWHC 3968 (TCC).
12 *Jacobs v Morton and Partners* (1994) 72 B.L.R. 92; *Saigol v Cranley Mansions* unreported 6 July 1985, CA; *Jenson v Faux* [2011] EWCA Civ 423, CA.
13 *Rendlesham Estates Plc v Barr Ltd* [2014] EWHC 3968 (TCC).

the course of erection.[14] But the section has been construed so that fitness for habitation is a measure of the standard required in the performance of the duty imposed, so that a claimant has to prove in all cases that the alleged defect makes the dwelling unfit for habitation. Where there are a number of defects consequent on the breach of duty, the test is whether the dwelling "as a whole" is fit for habitation[15] In *Harrison v Shepherd Homes Ltd* it was held that defects in the foundations had rendered properties unfit for habitation notwithstanding the fact that the damage to the properties themselves was relatively minor.[16] It was thought unreasonable to construe the section so that defendants were liable to a person who was not even the original purchaser for trivial defects.[17] A person within the section doing professional work has to do it in a professional manner. It is thought that all persons coming within the section are under a strict duty to fulfil its requirements, and that it would not be a defence to show that the work was done with proper care.

Section 1(1) imposes liability not only for misfeasance but also for non-feasance and so it applies to a failure to carry out necessary work as well as to carrying out work badly.[18] Further:

> "...if, when the work is completed, the dwelling is without some essential attribute—e.g. a roof or a damp course—it may well then be unfit for human habitation even though the problems resulting from the lack of that attribute have not then become patent."[19]

16-004 In *Rendlesham Estates Plc*[20] the court set out helpful guidance as to the standard to be applied in considering whether a dwelling is "fit for habitation". Thus it must be capable of occupation for a reasonable time without risk to the health or safety of the occupants and without undue inconvenience or discomfort to the occupants. In applying these tests, the date of completion of the work is the relevant date for these purposes and if the dwelling would not be approved under the Building Regulations as fit for occupation it would probably not be "fit for habitation". The defects must be considered as a whole when applying this test and must be considered in the light of all the types of person who might reasonably be expected to occupy the dwelling including babies and those who suffer from common conditions such as asthma or hay fever. The fact that a defect can be remedied at relatively modest cost does not mean there is no breach of the duty under s.1 of the Act. Serious inconvenience, such as frequent breakdowns of a lift, may render a dwelling unfit for occupation. Furthermore, a risk of failure within the design life of the building of a structural element of the dwelling or the building of which the dwelling forms part, which exists at the date of completion, whether patent or latent, may make the dwelling unfit for occupation.

16-005 It is a question in each case of whether a person has taken on work within the meaning of the Act. Thus ordinarily it will include the main contractor and any

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14 See para.3–029. Such seems to have been the intention of the Law Commission Working Paper No.40, "*Civil Liability of Vendors and Lessors for Defective Premises*".
15 *Bole v Huntsbuild Ltd* (2009) 127 Con. L.R. 154, CA.
16 [2011] EWHC 1811 (TCC). Ramsey J: "Whilst I do not consider that the damage to the properties has rendered them unfit for habitation, on balance, I am persuaded that any significant defects in foundations are properly matters which could be said to give rise to a lack of fitness for habitation" (at [164]).
17 *Thompson v Clive Alexander & Partners* (1992) 59 B.L.R. 77.
18 *Andrews v Schooling* [1991] 1 W.L.R. 783, CA; *Smith v Drumm* [1996] E.G.C.S. 192.
19 Balcombe LJ in *Andrews v Schooling* [1991] 1 W.L.R. 783 at 790, CA.
20 *Rendlesham Estates Plc v Barr Ltd* [2014] EWHC 3968 (TCC).

professional person, such as an architect, engineer or quantity surveyor and any subcontractor specifically employed on or in connection with the provision of the dwelling. However, it seems, other persons may be liable. Thus a person, not a qualified architect, who provides plans for the dwelling is, it is submitted, within the section, and so too is a supplier who makes up some component specifically for the dwelling in question. How far other suppliers who provide such goods as boilers suitable for use in dwellings to a builder can be liable must depend upon the application of the section to the facts of a particular case. It is not clear whether a local authority performing its duties under the building regulations can ever come within the section.[21]

However, the owner of a dwelling is not "taking on work for or in connection with the provision of a dwelling" merely by giving instructions or arranging for work to be done.[22] **16-006**

Defence of "instructions". Section 1(2) and (3) of the Act provide: **16-007**

> "(2) A person who takes on any such work for another on terms that he is to do it in accordance with instructions given by or on behalf of that other shall, to the extent to which he does it properly in accordance with those instructions, be treated for the purposes of this section as discharging the duty imposed on him by subsection (1) above except where he owes a duty to that other to warn him of any defects in the instructions and fails to discharge that duty.
> (3) A person shall not be treated for the purposes of subsection (2) above as having given instructions for the doing of work merely because he has agreed to the work being done in a specified manner, with specified materials or to a specified design."

There is no definition of the word "instructions" and it is difficult to understand its ambit. Subsection (3) helps in that it contrasts a mere agreement that work shall be done in a specified way with the giving of instructions.[23] At least it seems fairly clear that a person in the position of the purchaser in *Lynch v Thorne*[24] would ordinarily have a remedy under the Act. At the other end of the spectrum a contractor performing work under the Standard Form of Building Contract according to architect's instructions or in accordance with the contract documents is, it is submitted, and subject to the exception as to warning,[25] entitled to the defence provided by subs.(2). Between these extremes it must be a question of fact and degree in each case as to whether the communication relied on is an instruction or a mere agreement.

The Act does not itself impose a duty to warn and presumably does not refer to a mere moral duty. The result is, it is thought, that the exception as to a duty to warn must refer to a duty arising in contract or conceivably in tort.[26] **16-008**

Persons owing the duty. Section 1(4) of the Act provides: **16-009**

> "A person who—

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21 See also Defective Premises Act 1972 s.1(4), discussed at para.16-009. For local authorities' liability as landlords to tenants under s.4 of the Act, see, e.g. *Rimmer v Liverpool CC* [1985] Q.B. 1 at 10, CA; *McDonagh v Kent A.H.A.* (1981) 134 N.L.J. 567; *Smith v Bradford MC* (1982) 44 P. & C.R. 171, CA; *Lee v Leeds CC* [2002] 1 W.L.R. 1488, CA; *Dunn v Bradford Metropolitan DC* [2002] 3 E.G.L.R. 104, CA. As to the extent of a landlord's liabilities under s.4 see *Alker v Collingwood Housing Association* [2007] 1 W.L.R. 2230.
22 *Mirza v Baljit S. Bhandal* unreported 27 April 1999, but see s.1(4), para.16–009.
23 But see *Mirza v Baljit S. Bhandal* unreported 27 April 1999. See also *Zenstrom v Fagot* [2013] EWHC 288 (TCC).
24 [1956] 1 W.L.R. 303, CA, discussed in para.3–083.
25 See para.16-008 and following.
26 See Ch.7.

(a) in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings; or

(b) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment;

arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work."

In order to fall within subs.(a) above it is not necessary that the business need provide more than one dwelling. In other words the main object of the business need not be the provision or installation of dwellings. It may be a "one-off" activity for the business in question.[27] The section will evidently include the person often termed "the developer" within the ambit of those who take on work. It will also apply to each member of a partnership where the definition is satisfied as regards the partnership itself.[28]

16-010 Limitation of actions. Section 1(5) of the Act provides that any cause of action for breach of the duty imposed by the section shall be deemed for limitation purposes to have accrued at the time when the dwelling was completed. If after that time a person who has done work for or in connection with the provision of the dwelling does further work to rectify the work already done, any such cause of action in respect of that further work is deemed to have accrued at the time when the further work was finished.[29] Thus a fresh cause of action will accrue where further work is carried out which fails to rectify a defect in the original work, even though that further work is itself properly executed.[30] Thus the limitation period starts at a date different from that relevant to a claim in tort.[31] Section 14A of the Limitation Act 1980 does not apply to claims under the Defective Premises Act.[32]

16-011 Continuing duty upon disposal of premises. Section 3 of the Act imposes a continuing duty of care upon persons who have carried out works of construction, repair, maintenance or demolition upon premises after they have disposed of them. There are exceptions to the duty.[33]

16-012 Measure of damages. This is not dealt with by the Act. However, general damages for loss of use consequent upon a breach under the Act have been awarded.[34] Thus, it is submitted that all reasonably foreseeable losses that are the natural consequence of the breach are recoverable, which may include economic loss, as it is now understood,[35] as well as consequential economic loss.[36] However, general

27 *Mirza v Baljit S. Bhandal* unreported 27 April 1999.
28 See Ch.7.
29 For limitation generally, see Section 3 of this chapter.
30 *Alderson v Beetham Organisation Ltd* [2003] B.L.R. 217, CA.
31 See *Rimmer v Liverpool CC* [1985] Q.B. 1 at 15, CA.
32 *Samuel Payne v John Setchell Ltd* [2002] B.L.R. 489.
33 See also para.3–071. The matter is dealt with summarily as it is more suitable to a work on torts; see, e.g. M.A. Jones and A.M. Dugdale, *Clerk & Lindsell on Torts*, 21st edn (London: Sweet & Maxwell, 2015), para.12–84.
34 *Bayoumi v Protim Services Ltd* [1996] E.G.C.S. 187, CA. See also *Smith v Drumm* [1996] E.G.C.S. 192. For an article discussing these decisions see Murdoch and Murdoch, "New Light on Defective Premises" (1997) E.G. 9706 at 151.
35 See "Economic loss" at para.7–021.
36 See "Consequential economic loss" at para.7–024.

damages for loss of use of capital whilst the property is uninhabitable are not, it would seem, recoverable.[37]

In *Rendlesham Estates Plc*[38] the court rejected the suggestion that the damages for each apartment owner should be restricted to that owner's contribution to the management company of the apartment blocks of the cost of the necessary repairs. Instead each owner was entitled to the full cost of repairing the defect necessary to make his flat fit for occupation, including the cost of remedying the common parts where this was required to achieve that result. In order to avoid over-recovery of damages, the relevant judgment sum could only be enforced against the builder once and then on condition that damages were paid to the claimants' solicitor to hold the money for the benefit of the management company to enable it to carry out the necessary repairs. **16-013**

2. CONTROL OF POLLUTION ACT 1974 AND ENVIRONMENTAL PROTECTION ACT 1990

Noise on construction sites. Part III of the Control of Pollution Act 1974 concerns noise.[39] There are general statutory provisions (now in the Environmental Protection Act 1990 as amended) for summary proceedings to prevent noise amounting to a nuisance.[40] Additionally there are specific provisions in the Control of Pollution Act 1974 for control of noise on construction sites.[41] The local authority is empowered to serve a notice imposing requirements as to the way in which construction works are to be carried out. The notice must be served on the person carrying out the work; it is not sufficient that the notice came to the attention of that person.[42] Notices may in particular specify the plant or machinery which is or is not to be used, the hours during which the works may be carried out and the level of noise which may be emitted. There is a right of appeal to a magistrates' court.[43] A person who contravenes any requirement of the notice without reasonable excuse is guilty of an offence.[44] Such notices apply only to works being carried out or going to be carried out at the time of the notice. A fresh notice was required for works on the same site under a separate, later contract.[45] However, there is nothing in the Act that prevents the High Court from imposing by injunction an embargo which is more extensive than that prescribed by a notice under the Act.[46] **16-014**

There are provisions for a person intending to carry out construction work to apply to the local authority for consent, which the local authority may give subject **16-015**

37 *Bella Casa Ltd v Vinestone* [2006] B.L.R. 72.
38 *Rendlesham Estates Plc v Barr Ltd* [2014] EWHC 3968 (TCC).
39 See generally on noise on construction sites, A.J. Waite, "Statutory Controls on Construction Site Noise" (1990) 6(2) Const. L.J. 97.
40 Environmental Protection Act 1990 s.80–82, as amended by the Noise and Statutory Nuisance Act 1993 and s.86 of the Clean Neighbourhoods and Environment Act 2005; and see "Statutory nuisances" at para.16–022.
41 See Control of Pollution Act 1974 ss.60 and 61.
42 *Amec Building Ltd v London Borough of Camden* (1996) 55 Con. L.R. 82.
43 Control of Pollution Act 1974 s.70(1).
44 Control of Pollution Act 1974 s.60. *Amec Building Ltd v London Borough of Camden* (1996) 55 Con. L.R. 82.
45 *Walter Lilly v Westminster CC* [1994] C.I.L.L. 937, DC.
46 See *Lloyds Bank v Guardian Assurance* (1986) 35 B.L.R. 34, CA; cf. *City of London Corp v Bovis Construction* [1992] 3 All E.R. 697; (1988) 49 B.L.R. 1, CA.

to conditions or limitations.[47] Again there is a right of appeal to a magistrates' court. A person who knowingly carries out works or permits works to be carried out in contravention of any such condition is guilty of an offence.[48] There are also provisions regulating the level of noise that is acceptable emanating from new buildings to which a noise abatement order will apply.[49]

16-016 **The Environmental Protection Act 1990.** This Act (as amended by the Environment Act 1995) contains legislation of potential relevance to the construction industry relating, amongst other things, to integrated pollution control and air pollution control,[50] waste on land,[51] contaminated land,[52] and statutory nuisances and clean air.[53] The majority of the provisions of the 1990 Act are in force.[54]

16-017 **Pollution control.** Section 1 of the Act contains broad definitions of the "environment" and "pollution of the environment":

> "(2) The 'environment' consists of all, or any, of the following media, namely, the air, water and land; and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground.
>
> (3) 'Pollution of the environment' means pollution of the environment due to the release (into any environmental medium) from any process of substances which are capable of causing harm to man or any other living organisms supported by the environment."

16-018 By s.2(1) of the Act, the Secretary of State may, by regulations, prescribe any description of process for the carrying on of which, after a prescribed date, an authorisation is required under s.6.[55] Section 3 empowers the Secretary of State to make regulations establishing standards, objectives or requirements in relation to prescribed processes or substances, in particular as to releases of substances from prescribed processes.[56]

16-019 Section 79(1)(a) of the 1990 Act is directed at the presence in premises of some feature in itself prejudicial to health as a source of possible infection, disease or illness and does not extend to the layout of the premises, unavoidable use within the layout, or the facilities that ought to be installed.[57]

16-020 Authorisations under s.6 may, by s.7(1), be subject to specific conditions. Section 7 introduces a number of important concepts into the Act, including the objective of ensuring that, in carrying on a prescribed process, the best available techniques not entailing excessive cost (BATNEEC) will be used to prevent the release of prescribed substances into the environment and/or to render these and

47 Control of Pollution Act 1974 s.61.
48 Control of Pollution Act 1974 s.61. For an article on this section, see S. Chakravorty, "Section 61 of the Control of Pollution Act 1974" (1993) 9 Const. L.J. 170.
49 Control of Pollution Act 1974 s.67.
50 Environmental Protection Act 1990 Pt I.
51 Environmental Protection Act 1990 Pt II, not discussed further.
52 Environmental Protection Act 1990 Pt IIA, inserted by the Environment Act 1995 s.57.
53 Environmental Protection Act 1990 Pt III.
54 But see the relevant statutory instruments for the detailed and somewhat complex implementation of the Act. Sections 1–to 28 will be repealed by s.7(3) of the Pollution Prevention and Control Act 1999 when this Act comes into force. Ss.16–18 have now been repealed by Environment Act 1995 s.120(3) Sch.24 as appointed by art.3 to (SI 1996/186).
55 A series of regulations were made in 1991 and 1993–1996 prescribing various processes.
56 No such regulations have yet been made, but "plans" have been made under s.3(5).
57 *Birmingham CC v Oakley* [2001] 1 A.C. 617, HL. See also *Griffiths v Pembrokeshire CC*, *The Times*, 19 April 2000, DC—the smell of smoke, without there being any visible particles, was sufficient to constitute a smoke nuisance under s.79(1)(b) of the Environmental Protection Act 1990.

other substances harmless.[58] There is a similar implied condition in all authorisations.[59] The requirement of authorisation and what will be necessary to get it need to be borne in mind by those developing and designing premises where prescribed processes are carried on.[60]

16-021 **Contaminated land.** Sections 78A to 78YC of the 1990 Act[61] make provision for the regulation and remediation of contaminated land with the intention of "bringing together the requirements of a number of existing regimes dealing with issues relating to contaminated land".[62]

16-022 **Statutory nuisances.** Section 79(1) of the Act (as amended by the Environment Act 1995) defines as "statutory nuisances" various matters including any premises[63] in such a state as to be prejudicial to health or a nuisance; the emission of smoke, other fumes and noise from premises so as to be prejudicial to health or a nuisance, and noise which is prejudicial to health or a nuisance emitted from or caused by a vehicle, machinery or equipment in a street.[64] These provisions, and those for their enforcement, exist alongside those of the Control of Pollution Act 1974. Local authorities are given power by s.80 to serve an abatement notice and it is an offence to contravene such a notice.[65] The persons on whom an abatement notice shall be served are specified in s.80(2) and include, depending on the circumstances, the person responsible for the nuisance and the owner or occupier of the premises. Where an abatement notice has not been complied with, the local authority itself may abate the nuisance.[66] The provisions are relevant both to the design of premises and to site control during their construction.[67]

3. LIMITATION ACT 1980 AND LATENT DAMAGE ACT 1986

16-023 The Limitation Act 1980 imposes limits of time within which actions must be brought or they become barred.[68] The Act must be referred to for its full effect and in particular there are special provisions for personal injuries that are not discussed

58 Environmental Protection Act 1990 ss.7(2) and 7(10).
59 Environmental Protection Act 1990 s.7(4). See also s.7(7) for the further concept of the "best practicable environmental option".
60 See also Environmental Protection Act 1990 s.13 for enforcement notices where there is contravention of a condition of authorisation and s.14 for prohibition notices where a prescribed process involving an imminent risk of serious pollution of the environment is carried on.
61 Inserted by the Environment Act 1995 s.57. This Act also establishes the Environment Agency.
62 H.C. Official Report, SCB (Environment Bill), col.301, 23 May 1995.
63 The definition of s.79(1) is inclusive, subject to certain exceptions, and includes sewage treatment works: *Hounslow London BC v Thames Water Utilities Ltd* [2004] Q.B. 212.
64 This last statutory nuisance was added by amendment by the Noise and Statutory Nuisance Act 1993 with consequential amendments to ss.80 and 81. A steep internal staircase was held not to be "prejudicial to health" within the meaning of s.79(1) of the Act since the Act was not intended to cover mere likelihood of accident causing personal injury—*R. v Bristol CC Ex p. Everett* [1999] 1 W.L.R. 1170, CA.
65 Where the nuisance arises on industrial, trade or business premises, it may be a defence to prove that "the best practicable means" were used to prevent, or counteract the effects of, the nuisance.
66 Environmental Protection Act 1990 s.81(3).
67 Also relevant are the Noise Emission in the Environment by Equipment for use Outdoors Regulations 2001, as amended, implementing EU legislation.
68 The Law Commission published its Report, *Limitation of Actions* Law Commission No.270 (2001) which recommended substantial reform to the Limitation Act 1980.

in this book.[69] There are ordinary time-limits which are in certain instances subject to extension or exclusion.[70] There are important differences between claims in contract and claims in tort. The Act bars a claimant's remedy not its cause of action, and a defence of limitation must be specifically pleaded.[71] If a defence of limitation is raised, it is initially for the claimant to show that its cause of action accrued within the limitation period. If the claimant does so, the burden passes to the defendant to show that the apparent accrual of a cause of action is misleading and that in reality it accrued at an earlier date.[72]

16-024 An action is commenced for limitation purposes when the court issues a claim form at the request of the claimant.[73] The date of service of the claim form is irrelevant for limitation purposes although a claim form will not be valid unless it is served within due time.[74] A counterclaim is deemed to have commenced on the same date as the original action.[75]

16-025 **Contract.** The ordinary time-limit for an action founded on simple contract is six years from the date on which the cause of action accrues,[76] or 12 years for a contract by deed.[77] Time runs from the date of breach and not from its discovery since the accrual of a cause of action does not depend on any prior knowledge of its existence.[78] Nor does a mere procedural bar to the bringing of a claim prevent time from running in respect of the cause of action to which it relates.[79] If a person liable or accountable for a debt or other liquidated pecuniary claim acknowledges the claim in writing or makes any payment in respect of it, the right is treated as having accrued on and not before the date of the acknowledgment or payment.[80] An acknowledgement need not identify the amount of the debt so long as it can be

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69 For architects and professional men, see para.13–079.

70 Limitation Act 1980. The main extensions and exclusions relevant to building contracts are discussed under "Latent damage", "Fraud, concealment or mistake" and "Claims for contribution" below. See also, "Indemnities" at para.16-040.

71 *Ronex Properties v John Laing Construction* [1983] Q.B. 398, CA; *Ketteman v Hansel Properties* [1987] A.C. 189, HL; CPR Practice Direction supplementing Pt 16 para.13.1.

72 *Cartledge v Jopling* [1962] 1 Q.B. 189, CA upheld at [1963] A.C. 758 at 784, HL; *London Congregational Union v Harriss* [1988] 1 All E.R. 15, CA; cf. *Perry v Tendring DC* (1984) 30 B.L.R. 118 at 141.

73 CPR r.7.2(1). CPR Practice Direction 7A para.5.1 states that where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, the claim is "brought" on that earlier date for the purposes of the Limitation Act. For circumstances in which a claim form was allegedly lost by the court, see *Page v Hewetts Solicitors (A Firm)* [2012] EWCA Civ 805. For third party proceedings, see Limitation Act 1980 s.1 and see also "Arbitration" at para.16–044.

74 Where service is within the jurisdiction, the claimant must complete the step required for service of the claim form before midnight on the calendar day, four months after the date of its issue: see CPR r.7.5(1).

75 Limitation Act 1980 s.35(1).

76 s.5.

77 s.8.

78 *Gibbs v Guild* (1881) 8 Q.B.D. 296 at 302; *Cartledge v Jopling (E. & Sons) Ltd* [1963] A.C. 758 at 782, HL; *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 Q.B. 197.

79 *Sevcon Ltd v Lucas CAV Ltd* [1986] 1 W.L.R. 462, applied more recently in the context of a construction contract in *JJ Metcalfe v Dennison* unreported 6 December 2013.

80 See Limitation Act 1980 ss.29, 30 and 31. See *Amantilla Ltd v Telefusion Plc* (1987) Con. L.R. 137 for an example of the workings of s.29. It is not obvious that an open offer of a small amount of money in response to a claim of a much larger amount is an acknowledgement of the claim in that much larger amount: *City & General (Holborn) Ltd v Royal & Sun Alliance Plc* [2010] EWCA Civ 911; (2010) 131 Con. L.R. 1.

ascertained by calculation or by reference to extrinsic evidence.[81] However, the time limit may effectively be curtailed by a contractual limitation provision to the contrary.[82]

Where a contractor is liable under an entire contract to complete works, the **16-026** limitation period for defects runs, it is submitted, from the date of completion or purported completion, and not from any earlier date when that part of the works, the subject matter of the defects, was carried out.[83] It is thought that this also applies to a contract where payment is by instalments but the contractor's obligation is to carry out and complete the whole of the works. In the usual case a cause of action in contract against a designer arises when the design is first prepared or when production information is first issued to the contractor although a fresh cause of action may accrue if the designer is required to review the design at a later stage during the works. Such a duty arises if there is a good reason for such a review, which is to be determined objectively having regard to what a reasonably competent designer would do in the circumstances. A further duty to reconsider the design can arise in the light of defects manifesting themselves subsequent to practical completion. Breach of each fresh duty gives rise to a different cause of action. Where defective work has been carried out by a contractor, a cause of action will arise against an architect at the point in time when they ought to, but failed to, identify the defects in question.[84] For breaches by the employer against the contractor, time runs from the breach, so that, for example, if drawings and instructions are not supplied at the proper time, it runs, it is submitted, from the date when they should have been supplied. A set-off which is a defence to the claim cannot be defeated by a period of limitation not applicable to the claim.[85]

Most standard forms for construction works provide for interim certification of **16-027** sums due. Where such certificates are a condition precedent to the right to payment, the contractor's cause of action to be paid and to challenge the adequacy of the certificate accrues when the certificate is issued or ought to have been issued in accordance with the contract and not when the work giving rise to the certified sum is carried out.[86] Further, depending on the precise wording of the contract, a further cause of action may arise when the final certificate is issued or ought to have been issued even though the sum in issue happens to be the same as that arising under an interim certificate.[87]

Tort. The ordinary time limit for an action founded on tort is six years from the **16-028** date on which the cause of action accrues.[88] It seems that the same time limit ap-

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81 *Ross v McGrath* [2004] EWCA 1054.

82 *Inframatrix Investments Limited v Dean Construction Limited* [2012] EWCA Civ 64. Cf. *Elvanite Full Circle Limited v AMEC Earth & Environmental (UK) Limited* [2013] EWHC 1191 (TCC).

83 See *Tameside Metropolitan BC v Barlow Securities Group Ltd* [2001] B.L.R. 113, CA; *The Oxford Partnership v The Cheltenham Ladies College* [2007] B.L.R. 293, TCC.

84 *University Court of Glasgow v William Whitfield and John Laing Construction Ltd* (1988) 42 B.L.R. 66; *New Islington & Hackney HA v Pollard Thomas and Edwards* [2001] B.L.R. 74; *The Oxford Partnership v The Cheltenham Ladies College* [2007] B.L.R. 293, TCC. See *McGlinn v Waltham Contractors Ltd* (2007) 111 Con. L.R. 1 as to when an architect's obligation to inspect arises.

85 Limitation Act 1980 s.35. See also *Henriksens Rederi A/S v Rolimpex* [1974] 1 Q.B. 233, CA; *Tersons v Alec Colman Investments* (1973) 225 E.G. 230, CA.

86 *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] 1 W.L.R. 3850, CA.

87 *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] 1 W.L.R. 3850, CA.

88 Limitation Act 1980 s.2. An action for damages for an infringement of the European Communities Act 1972 of rights conferred by Community Law amounted to a breach of statutory duty and could

plies to an action for breach of statutory duty.[89] For negligence claims, where damage is an essential ingredient, the cause of action accrues when the physical damage occurs.[90] Progressive damage originating from one act or omission creates a single cause of action arising when more than insignificant damage has occurred.[91] It does not accrue when the negligent act is committed if damage does not then also occur. Nor does the cause of action accrue when the damage is discovered or should with reasonable diligence have been discovered.[92] In a case where there is a special relationship between the parties and a duty not to cause economic loss arises, the cause of action nevertheless arises when the physical damage occurs and not when the economic loss was suffered.[93] When the only damage is solely economic and does not result from negligent misstatement or advice then, in a case of defective design, the cause of action accrues when the defective design manifests itself and thereby affects the value of the building as measured by the cost of repairs or diminution in value.[94] It is no bar to the accrual of the cause of action that the employer does not have possession of the building because the works have not been completed.[95]

16-029 If the damage suffered is the incurrence of a contingent liability to a third party, there must be some additional and measurable loss suffered before time will begin to run. This will usually occur when the third party brings a claim, such that the contingent liability becomes an actual liability. However, additional loss has also been held to occur upon the incurrence of the contingent liability in two categories of case: those under the "damaged asset" rule and those under the "package of

therefore be considered "an action founded on tort" for the purposes of this section of the Limitation Act—*R. v Transport Sec Ex p. Factortame Ltd* [2001] 1 W.L.R. 942. On a similar point, see *Spencer v Secretary of State for Work and Pensions* [2009] Q.B. 358; [2009] 2 W.L.R. 593. See also Ch.15.

89 See "Limitation of actions" at para.16–010 for the time limit for a claim under the Defective Premises Act 1972.

90 See *Pirelli v Oscar Faber & Partners* [1983] 2 A.C. 1, HL. This is subject to ss.14A and 14B of the Limitation Act 1980 and the Latent Damage Act 1986—see para.16-033. Cf. *Invercargill CC v Hamlin* [1996] A.C. 624, where the Privy Council held that the cause of action for negligent inspection and approval of foundations accrued when the market value of the property depreciated by reason of the defective foundations. Note, however, that in New Zealand neither *Pirelli* nor *Murphy v Brentwood DC* [1991] A.C. 398 are regarded as representing the law.

91 See, for example, *Homburg Houtimport BV v Agrosin Private Ltd, The "Starsin"* [2004] 1 A.C. 715, HL. See also, *Knapp v Ecclesiastical Insurance Group Plc* [1998] P.N.L.R. 172, CA.

92 *Pirelli v Oscar Faber & Partners* [1983] 2 A.C. 1, HL. In *Murphy v Brentwood DC* [1991] A.C. 398 the House of Lords "re-interpreted" the decision in *Pirelli* as being one of economic loss rather than physical damage. However, the House of Lords did not say it had been wrongly decided. If it was a case of economic loss then, consistent with authority, the cause of action would have accrued on the date when the defective chimney was constructed to the defective design or, consistent with the Australian authority of *Council of the Shire of Sutherland v Heyman* 157 C.L.R. 424, on the date when the defect was discovered or discoverable. See the discussion in *New Islington and Hackney HA Limited v Pollard Thomas and Edwards Ltd* [2001] B.L.R. 74. This view has been confirmed by *Abbott v Will Gannon & Smith Ltd* [2005] B.L.R. 195, CA.

93 *Abbott v Will Gannon & Smith Ltd* [2005] B.L.R. 195, CA holding that *Pirelli* and *Ketteman* had not been impliedly overruled by *Murphy v Brentwood DC* [1991] A.C. 398, HL. *The Oxford Partnership v The Cheltenham Ladies College* [2006] EWHC 3156 (TCC); [2007] B.L.R. 293. For an explanation of the circumstances in which a duty not to cause economic loss arises see para.7–021.

94 *Tozer Kemsley and Millbourn (Holdings) Ltd v J. Jarvis & Sons Ltd* (1983) 1 Const. L.J. 79; *Tesco Stores Ltd v Costain Construction Ltd* (2003) C.I.L.L. 2062; *Invercargill CC v Hamlin* [1996] A.C. 624, PC approved in *Abbott v Will Gannon & Smith Ltd* [2005] B.L.R. 195, CA at [20].

95 *The Oxford Partnership v The Cheltenham Ladies College* [2007] B.L.R. 293, TCC.

rights" rule.[96] The "damaged asset" rule operates where the defendant's negligence causes an existing asset belonging the claimant to become encumbered, thereby reducing its value, e.g. by taking out a mortgage on a property.[97] The "package of rights" rule operates where the value of benefits that the claimant should have received under a transaction is, by the defendant's negligence, diminished or extinguished, e.g. by losing title to a property.[98] These categories are not mutually exclusive. For example, a sub-contractor who delivers defective works to a contractor may diminish the value of the contractor's package of rights under the sub-contract and also cause damage to a pre-existing asset belonging to the contractor, namely the contractor's interest in the benefit of the main contract.[99]

The damage which is necessary to found an action in negligence is normally **16-030** actual physical injury to person or property other than property which is the product of the negligence.[100] In most instances there will be no difficulty in determining when such damage occurs. Cases on this topic decided before the decision in *Murphy v Brentwood DC*,[101] as referred to in the opening paragraph of Ch.7, are thought to be obsolete (if not wrongly decided), except in so far as they remain relevant to claims in tort for professional negligence, or unless the "complex structure theory" can found a negligence claim where the damage is other than catastrophic.[102]

A cause of action for negligent misstatement or advice[103] may accrue when the **16-031** claimant acts on the statement or advice to its potential future detriment even if the

96 *Axa Insurance v Akther & Darby* [2010] 1 W.L.R. 1662.

97 *Forster v Outred & Co* [1982] 1 W.L.R. 86. The asset damaged need not be physical: *Co-operative Group Ltd v Birse Developments Ltd (In Liquidation)* (2014) 153 Con. L.R. 103; [2014] EWHC 530 (TCC).

98 *Bell v Peter Browne & Co* [1990] 2 Q.B. 495. The transaction need not be between the claimant and the defendant: *D.W. Moore v Ferrier* [1988] 1 W.L.R. 267.

99 *Co-operative Group Ltd v Birse Developments Ltd (In Liquidation)* (2014) 153 Con. L.R. 103; [2014] EWHC 530 (TCC).

100 See generally Ch.7. For a decision which highlights the distinction for limitation purposes between physical damage to other property and economic loss, see *Nitrigin Eireann Teoranta v Inco Alloys Ltd* [1992] 1 W.L.R. 498. *Nitrigin* was approved in *Robinson v P.E. Jones* [2010] EWCA Civ 9; (2011) 134 Con. L.R. 26 at [69].

101 [1991] 1 A.C. 398, HL.

102 For "Professional negligence;", see para.7–048. The "complex structure theory" was mooted in *D.&F. Estates v Church Commissioners* [1989] A.C. 177, HL and considered in *Murphy v Brentwood DC* [1991] 1 A.C. 398, HL and is discussed under "Other property" at para.7–014 but is probably best to be regarded as no longer tenable in the light of *Samul Payne v John Setchell Ltd* [2002] B.L.R. 489. The "obsolete" cases include *Dove v Banhams Patent Locks* [1983] 1 W.L.R. 1436; *Tozer Kemsley v J. Jarvis & Sons* (1983) 4 Con. L.R. 24; *Chelmsford DC v Evers* (1983) 25 B.L.R. 99; *Kensington and Chelsea v Wettern Composites* (1984) 31 B.L.R. 57; *London Borough of Bromley v Rush & Tompkins* (1985) 35 B.L.R. 94; *Ketteman v Hansel Properties* [1987] A.C. 189, HL; *London Congregational Union v Harriss* [1988] 1 All E.R. 15, CA; *University of Glasgow v Whitfield* (1988) 42 B.L.R. 66; and numerous cases against local authorities directly based upon *Anns v Merton LBC* [1978] A.C. 728, HL and now overruled by *Murphy v Brentwood DC* [1991] 1 A.C. 398, HL. Whilst these cases are obsolete they are still regularly referred to and analysed in the judgments. See, for example, *Tesco Stores Ltd v Costain Construction Ltd* (2003) C.I.L.L. 2062.

103 The original category of "negligent misstatement or advice" has been widened on high authority, notably Lord Steyn, to include the provision of services (usually professional but often merely specialised) generally. See in particular *MacFarlane v Tayside Health Authority* [2000] 2 A.C. 59, HL, where Lord Steyn states that the "extended Hedley Byrne principle" is "simply the rationalisation adopted by the common law to provide a remedy for the recovery of economic loss for a species of negligently performed services", an idea Lord Steyn first raised in *Williams v Natural Health Foods Ltd* [1998] 1 W.L.R. 830, HL. Identifying the date of the accrual of a cause of action based on a specific piece of advice or a specific statement is already problematic. Such problems only

actual financial loss occurs at a later date,[104] but it is a question of fact in each case when the damage occurs.[105] If it can be shown that a claimant is worse off in terms that can be measured financially at the date of receipt of the advice or negligent failure, the cause of action will accrue on that date, even though accurate measurement of damage would be difficult and some of the damage may be contingent.[106] A contingent liability (as opposed to contingent loss) to pay money may not constitute damage for these purposes until the contingency occurs although the very existence of a contingent liability may, dependent on the facts, cause earlier damage of another type.[107] A cause of action against a surveyor for a negligent survey has been held to arise when the claimant relies on the survey report by committing itself to acquiring the property.[108] If the result of a negligent misstatement is physical damage, it seems that the cause of action accrues when that damage occurs.[109]

16-032 **Claims under statute.** The time-limit for bringing an action for any sum recoverable by virtue of any enactment is six years from the date on which the cause of action accrued.[110] The date of accrual depends on the construction of the relevant statute.[111] In a claim against the local authority for damage suffered due to subsidence pursuant to s.278 of the Public Health Act 1936, the cause of action for compensation only accrued once damage was suffered.[112]

16-033 **Latent damage.** The Latent Damage Act 1986 amended the Limitation Act 1980 in the light of dissatisfaction resulting from *Pirelli v Oscar Faber & Partners*.[113] It had there been held that the date of accrual of a cause of action in tort caused by the negligent design or construction of a building was the date when the damage came into existence, and not the date when the damage was discovered or could with reasonable diligence have been discovered. The amendments effected by the

increase when the complaint concerns "services", and the application of the test provided by *Forster v Outred & Co* [1982] 1 W.L.R. 86 at 94, adopted by the House of Lords in *Nykredit Mortgage Bank Plc v Edward Erdman Ltd* [1997] 1 W.L.R. 1627, leads to surprising results. For an example of a TCC case applying the *Forster* test literally see *Tesco Stores Ltd v Costain Construction Ltd* (2003) C.I.L.L at [250]–[252] and *Gallagher v ACC Bank Plc* [2012] P.N.L.R. 29.

104 See *Forster v Outred & Co* [1982] 1 W.L.R. 86, CA; *D.W. Moore & Co v Ferrier* [1988] 1 W.L.R. 267, CA; *Bell v Peter Browne & Co* [1990] 3 W.L.R. 510, CA; cf. *Midland Bank Trust Co v Hett, Stubbs & Kemp* [1979] Ch.384; *Iron Trade Mutual Insurance v J.K. Buckenham* [1990] 1 All E.R. 808; *Law Society v Sephton & Co* [2006] 2 A.C. 543, HL; *Watkins v Jones Maidment Wilson* [2008] EWCA Civ 134; *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863.

105 *D.W. Moore & Co v Ferrier* [1988] 1 W.L.R. 267, CA; *First National Commercial Bank Plc v Humberts* (1995) 73 B.L.R. 90, CA; *Proctor & Gamble v Carrier Holdings* [2003] B.L.R. 255.

106 *Spencer v Secretary of State for Work and Pensions* [2009] Q.B. 358 at [369].

107 *Law Society v Sephton & Co* [2006] 2 A.C. 543, HL the ratio of which was considered in *Axa Insurance Ltd v Akther & Darby* [2010] 1 W.L.R. 1662. Thus, for time to begin to run there has to be measurable loss which is additional to the incurring of a purely contingent liability.

108 *Secretary of State for the Environment v Essex Goodman & Suggitt* [1986] 1 W.L.R. 1432; *Byrne v Pain and Foster* [1999] 1 W.L.R. 1849. See also, *Green v Eadie* [2012] Ch. 363; *Boycott v Perrins Guy Williams* [2011] EWHC 2969 (Ch).

109 See *Pirelli v Oscar Faber & Partners* [1983] 2 A.C. 1, HL; cf. *Dove v Banhams Patent Locks* [1983] 1 W.L.R. 1436; *Abbott v Will Gannon & Smith Ltd* [2005] B.L.R. 195, CA.

110 Limitation Act 1980 s.9.

111 See, e.g. *Swansea Council v Glass* [1992] Q.B. 844, CA.

112 *Smith Stone & Knight Ltd v City of Council of Birmingham DC* (1988) 13 Con. L.R. 118. See also, *Yorkshire Electricity Board v British Telecommunications Plc* (1986) 34 B.L.R. 9, HL for a case concerning the Public Utilities Street Works Act 1950.

113 [1983] 2 A.C. 1, HL.

Act extend the limitation period, for claims in tort but not in contract,[114] by three years starting from the date when the claimant had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.[115] "Knowledge" for the purposes of s.14A means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of proceedings. Knowledge that the damage is attributable in whole or in part to the acts or omissions of the defendant alleged to constitute negligence within s.14A(8)(a) means knowledge in broad terms of the facts on which the claimant's complaint was based and of the defendant's acts or omissions and knowing that there was a real possibility that those acts or omissions had been a cause of the damage.[116] The fact that a third party becomes aware of a latent defect does not result in the defect being patent to others who neither knew nor ought to have known of the defect.[117] Thus a party can be joined outside the primary limitation period.[118] There is an overriding time-limit for actions for negligence (other than for personal injury) of 15 years from the act of negligence to which the damage is alleged to be attributed.[119] Difficulties were also appreciated with successive owners, to whom the Latent Damage Act in certain circumstances gives a fresh cause of action.[120]

16-034 The Latent Damage Act was passed upon an understanding of the law as it stood as at about 1986. It now seems that the main provisions will have little effect in construction contract cases, since the kind of damage with which it was intended to deal is damage for which there is now no cause of action, i.e. damage to the building itself and damage which, once it becomes known, is an irrecoverable economic loss.[121] The Act is capable of applying to claims for negligent misstatement or advice where the claimant was for a time unaware of the fact or consequences of the defendant's negligence.[122] It might apply generally to claims for professional negligence.[123] One incidental consequence of the Act in the present state of the law is to impose an overriding time limit of 15 years for negligence claims other than those for personal injury irrespective, it seems, of latent damage.

114 *Iron Trade Mutual Insurance v J.K. Buckenham* [1990] 1 All E.R. 808; *Societe Commerciale de Reassurance v ERAS* [1992] 2 All E.R. 82, CA.

115 See *Haward v Fawcetts* [2006] 1 W.L.R. 682, HL.

116 *Haward v Fawcetts* [2006] 1 W.L.R. 682, HL; *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863, CA. In *Harris Springs Ltd v Howes* [2008] B.L.R. 229, TCC, neither a mere suspicion of a problem nor knowledge of the real possibility of a problem which requires expert assistance before a definite view can be taken as constituted actual knowledge. Thus a cause of action was not statute-barred where defects had first manifested themselves in 1995, even though the proceedings were commenced in 2006.

117 *Pearson Education v The Charter Partnership* [2007] B.L.R. 324, CA.

118 *Busby v Cooper* (1996) 52 Con. L.R. 94, CA.

119 See Limitation Act 1980 ss.14A and 14B, as amended. The sections do not apply if there is deliberate concealment within s.32(1)(b) of the 1980 Act—see s.32(5).

120 See Latent Damage Act s.3; *Perry v Tendring DC* (1984) 30 B.L.R. 118.

121 See generally Ch.7.

122 See *Iron Trade Mutual Insurance v J.K. Buckenham* [1990] 1 All E.R. 808; *Bell v Peter Browne & Co* [1990] 3 W.L.R. 510, CA; *Campbell v Meacocks* (1993) C.I.L.L. 886; *First National Commercial Bank v Humberts* (1994) 10 Const. L.J. 141. See also *The Mortgage Corp v Lambert* [2000] B.L.R. 271, CA; *Pearson Education v The Charter Partnership* [2007] B.L.R. 324, CA; *Hunt v Optima (Cambridge) Ltd* [2014] P.N.L.R. 29; [2014] EWCA Civ 714.

123 See, however, *Iron Trade Mutual Insurance v J.K. Buckenham* [1990] 1 All E.R. 808.

16-035 Consumer Protection Act 1987. There are special limitation provisions for actions for damages by virtue of Pt I of the Consumer Protection Act 1987.[124]

16-036 Fraud, concealment or mistake. Section 32 of the Limitation Act 1980 provides that where the action is based upon the fraud of the defendant, any fact relevant to the claimant's right of action has been deliberately concealed from the claimant by the defendant, or the action is for relief from the consequence of a mistake, the period of limitation does not begin to run until the claimant has discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it.[125] The deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.[126] The House of Lords has held that deliberate concealment after a cause of action has accrued postponed the commencement of the limitation period until the claimant discovered the concealment or could with reasonable diligence have discovered it.[127] Thus where a defendant: (i) takes active steps to conceal its own breach of duty after it has become aware of it, and (ii) it is guilty of deliberate wrongdoing and conceals or fails to disclose it in circumstances where it is unlikely to be discovered for some time, the defendant will be deprived of a limitation defence. Section 32 however does not deprive a defendant of a limitation defence for failure to disclose a negligent breach of duty which it was unaware of committing.[128] In a case where there was a concealed loss properly considered to be divisible from an unconcealed loss, a claimant may be able to rely on s.32 in respect of both losses even though the limitation period in respect of the unconcealed loss had expired.[129]

16-037 The statutory provisions relating to deliberate concealment were a reformulation of provisions in s.26 of the Limitation Act 1939, which referred to a cause of action being "concealed by the fraud" of the defendant. This had been interpreted by the court in terms of the 1980 reformulation.[130] Thus in *Clark v Woor*,[131] the claimants, who knew nothing of building and had no architect or other person to supervise the works, relied on the defendant, a builder, to treat them in a decent,

[124] Limitation Act 1980 s.11A, as inserted by s.6(6) and Sch.1 to the Consumer Protection Act 1987.

[125] For reasonable diligence, see *Peco Arts v Hazlitt Gallery* [1983] 1 W.L.R. 1315—a case of mistake. Section 32(1)(c) applies to mistakes of law as well as mistakes of fact—*Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349, HL. However, s.32(1)(c) only applies to cases where mistake is an essential ingredient of the cause of action. It does not apply to a mistake which is merely causally connected to the cause of action alleged: see *Test Claimants in the Franked Investment Group Litigation v Commissioners of the Inland Revenue and another* [2010] EWCA Civ 103; [2010] STC 1251, upheld by the Supreme Court on this point, *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2012] 2 A.C. 337.

[126] Limitation Act 1980 s.32(2). A breach of duty is not confined to a breach in the tortious or contractual sense or in the sense of an equitable or fiduciary duty but includes any legal wrongdoing of a kind which could properly be raised in an action to which s.32 applied; *Giles v Rhind (No.2)* [2008] 3 W.L.R. 1233, CA. In *Mortgage Express v Abensons Solicitors* [2012] EWHC 1000 (Ch) however, it was said that a limitation defence would only be lost where the party in default was aware of a fiduciary obligation owed which had been consciously breached.

[127] *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] A.C. 102, HL.

[128] See *Cave v Robinson Jarvis and Rolf (a firm)* [2003] A.C. 1 384, HL, reversing the decision of the Court of Appeal [2002] 1 W.L.R. 581 and overruling *Brocklesby v Armitage and Guest* [2001] 1 W.L.R. 598, CA.

[129] Per Rix LJ in *Williams v Lishman, Sidwell, Campbell & Price* [2010] P.N.L.R. 25, CA. Other members of the Court declined to express a view.

[130] See *King v Victor Parsons & Co* [1973] 1 W.L.R. 29, CA.

[131] [1965] 1 W.L.R. 650.

honest way in building them a house with best Dorking bricks. The defendant, an experienced bricklayer, could not get Dorking bricks and substituted, without the claimants' knowledge, Ockley bricks containing a substantial portion of seconds, which failed after eight years. It was held that there was that special relationship between the parties which brought the defendant's behaviour within the meaning of fraud as it was used in the 1939 Act so that the claimants were not barred by expiry of time.

These principles were subsequently developed in the Court of Appeal. Thus, it **16-038** was said that:

> "...if a builder does his work badly, so that it is likely to give rise to trouble thereafter, and then covers up his bad work so that it is not discovered for some years, then he cannot rely on the statute as a bar to the claim."[132]

The concealment must be deliberate or reckless "like the man who turns a blind eye".[133] But mere shoddy or incompetent work which was subsequently covered up in the due succession of building work was not sufficient. The conscience of the defendant had to be affected so that it was unconscionable for the defendant to proceed with the work without putting it right.[134] It was not sufficient, in the absence of very special circumstances, that the defendant ought to have known the fact or facts which constituted the cause of action against it, if the defendant did not have actual knowledge.[135] However, knowledge could be inferred from the evidence.[136] The mere existence of professional supervision and inspection on behalf of the employer did not prevent an issue of fact arising as to whether there had been fraudulent concealment.[137]

In a case decided under the 1980 Act, a contractor hacked back concrete nibs sup- **16-039** posed to support brickwork and took deliberate steps to conceal what was going on from the architect, engineer and clerk of works. The contractor was held to have deliberately concealed facts relevant to the claimant employer's right of action so as to postpone the start of the limitation period until the time when a bulge in the brickwork resulting from the hacking was discovered.[138] In another case, there was an equivalent finding in relation to defective joists, lack of bedding for drains and defective foundations.[139] In another case, an architect who, in designing foundations for a bungalow, was alleged to have deliberately rejected current wisdom as idealistic and to have taken a risk which he could not rationally justify, was held on the facts to have made no more than an "honest blunder". The judge said,

[132] *Applegate v Moss* [1971] 1 Q.B. 406 at 413, CA, where it was held that a developer was liable for the fraud of his contractor.

[133] *King v Victor Parsons & Co* [1973] 1 W.L.R. 29 at 34, CA.

[134] *William Hill Organisation v Bernard Sunley & Sons* (1982) 22 B.L.R. 1, CA; cf. *London Borough of Lewisham v Leslie & Co* (1978) 12 B.L.R. 22, CA; *Clarke & Sons v Axtell Yates Hallet* (1989) 30 Con. L.R. 123; *British Steel Plc v Wyvern Structures Ltd* (1996) 52 Con. L.R. 67.

[135] *King v Victor Parsons & Co* [1973] 1 W.L.R. 29 at 36, CA.

[136] *King v Victor Parsons & Co* [1973] 1 W.L.R. 29 at 36, CA.

[137] *London Borough of Lewisham v Leslie & Co* (1978) 12 B.L.R. 22, CA; cf. *William Hill Organisation v Bernard Sunley & Sons* (1982) 22 B.L.R. 1, CA.

[138] *Gray v T.P. Bennett & Son* (1987) 43 B.L.R. 63.

[139] *Kijowski v New Capital Properties* (1987) 15 Con. L.R. 1—this is, however, in other respects an "obsolete" case in the terms of *King v Victor Parsons & Co* [1973] 1 W.L.R. 29.

however, that he would have accepted that there had been deliberate concealment if he had not rejected the full allegation.[140]

16-040 Indemnities. Where there is an obligation to indemnify against loss,[141] the cause of action does not arise until the loss has been established,[142] so that the limitation period runs from the date when the liability or loss indemnified against is established or incurred.[143] This may be after the expiry of the ordinary limitation period.

16-041 Claims for contribution. Claims to recover contribution under s.1 of the Civil Liability (Contribution) Act 1978 are barred after two years from the date on which the right to contribution accrues. Such a right accrues when a judgment is given or an arbitration award made for the relevant damage against the party claiming contribution or,[144] if there is no judgment or award, on the date when it agrees with the recipient the amount to be paid.[145] In the case of an accepted Pt 36 offer, time runs from the date of acceptance of the offer and not the date on which that agreement is subsequently embodied in a consent order.[146]

16-042 Amendments. Amendments[147] to add or substitute a new claim[148] may only be made after the expiry of a relevant limitation period if the new cause of action arises out of the same or substantially the same facts as are already in issue in the original action.[149] Such an amendment takes effect from the date of the original document which it amends. If the claimant asserts a duty which was not previously pleaded and alleges a breach of such a duty this will usually amount to a new claim. If the claimant alleges a different breach of some previously pleaded duty it will be a question of fact and degree as to whether that constitutes a new claim. In the case of a construction project, if the claimant alleges breach of a previously pleaded duty causing damage to a different element of the building, it will generally amount to a new claim. It is necessary to examine the extent to which the facts of the first claim and those of the second claim overlap and to the extent to which they diverge. It is

[140] *Kaliszewska v John Clague & Partners* (1984) 5 Con. L.R. 62.
[141] For indemnities generally, see para.3–099.
[142] *Collinge v Hayward* (1839) 9 Ad. & El. 633 and other cases cited in *Halsbury*, Vol.49, 5th edn (London: Butterworths, 2008), para.1186; *County & District Properties v C. Jenner & Son Ltd* [1976] 2 Lloyd's Rep. 728.
[143] *R. & H. Green & Silley Wier v British Railways Board* (1980) 17 B.L.R. 94; *Telfair Shipping Corp v Inersea Carriers* [1985] 1 W.L.R. 553; cf. *National House Building Council v Fraser* (1982) 22 B.L.R. 143. See also, *County & District Properties Ltd v C. Jenner & Son* (1974) 3 B.L.R. 38; *Scott Lithgow Ltd v Secretary of State for Defence* (1989) 45 B.L.R. 1, HL.
[144] The time limit only begins to run against a tortfeasor when a judgment or award ascertains quantum and not merely the existence of the tortfeasor's liability: *Aer Lingus v Gildacroft Ltd and Sentinel Lifts Ltd* [2006] 2 All E.R. 290, CA.
[145] Limitation Act 1980 s.10.
[146] *The Chief Constable of Hampshire Constabulary v Southampton CC* [2014] EWCA Civ 1541.
[147] For amendments generally, see para.19–044.
[148] See "Causes of action" at para.19–033. On whether a claim for a new remedy is a new claim for the purposes of an amendment, see *Lloyds Bank v Rogers* [1999] 3 E.G.L.R. 83. A claim for damages is a new claim even if in the same amount as originally claimed if the claimant seeks, by amendment, to justify it on a different factual basis from that originally pleaded.
[149] Limitation Act 1980 s.35(3), (4) and (5); in effect adopting the narrower approach of Edmund Davies and Cross LJJ in *Brickfield Properties v Newton* [1971] 1 W.L.R. 862 at 879 and 881, CA; CPR r.17.4(2). The case of *Brickfield Properties* remains good law post-CPR: *Secretary of State for Transport v Pell Frischmann* [2006] EWHC 2909 (TCC) which also sets out a useful summary of the law at [38].

a matter of impression as to whether the test is satisfied.[150] The same facts and matters are not limited to those raised by the claimant in its original claim and can include facts and matters raised by the defendant opposing the amendments[151] or facts and matters raised by a co-defendant.[152] Where the duty, breach and damages claimed are the same and all that is sought to be amended is the identity of the document in which the obligation is contained, it is not a new claim.[153] Where an original claim alleged defects in an air-conditioning system, leave to amend after the expiry of the limitation period to add claims alleging defects in the walls of the same building was refused.[154] In another case, a claim for negligent misstatement was held to be conceptually different from a claim for a negligent act and therefore constituted a new cause of action. As the facts required to establish negligent misstatement differed significantly from the facts originally pleaded (although there was some degree of overlap), there was no jurisdiction to allow the proposed amendment.[155] However, an amendment to introduce a new remedy based upon the same breach of contract or duty does not constitute a new claim.[156] Even if the criteria are established the court has a discretion to refuse permission to amend if allowing the amendment would cause injustice.[157] The burden of persuading the court that it would be just and equitable to allow such an amendment is on the party seeking it.[158] The court has a discretion to permit a set-off or counterclaim to be added by way of amendment to a defence provided that no claim for relief had been made in the unamended defence, notwithstanding the fact that it is added outside the limitation period.[159] A proposed amendment to withdraw an admission after the expiry of the limitation period will be considered by reference to CPR rr.17.1(2) and 14.1.[160]

16-043 A new party may be added or substituted if this is necessary for the determina-

[150] These four propositions were derived by Jackson J in *Secretary of State for Transport v Pell Frischmann Consultants* [2007] EWHC 2909 (TCC) from various cases which are included amongst those listed here. *Steamship Mutual v Trollope & Colls* (1986) 33 B.L.R. 77, CA considering *Conquer v Boot* [1928] 2 K.B. 336, CA; *Brickfield Properties v Newton* [1971] 1 W.L.R. 862, CA; *Idyll v Dineman Davison* (1971) 1 Const. L.J. 294, CA; *Circle Thirty-Three Housing v Fairview Estates* (1984) 8 Con. L.R. 1, CA; *Murray Film v Film Finances* [1996] E.M.L.R. 539, CA; and *Welsh Development Agency v Redpath Dorman Long* [1994] 1 W.L.R. 1409, CA. See also *Hancock Shipping v Kawasaki* [1992] 1 W.L.R. 1025, CA; *Vincent v London Borough of Bromley* (1994) 43 Con. L.R. 157; *Chesham Properties Ltd v Bucknall Austin Project Management Services Ltd* (1996) 82 B.L.R. 92; *Borough of Blaenau Gwent v Robinson Jones Partnership Ltd* (1997) 53 Con. L.R 31. See further *Darlington Building Society v O'Rourke James Scourfield & McCarthy* [1999] P.N.L.R. 365, CA; *Latreefers Inc v Hobson* [2002] EWHC 1586; *Seele Austria v Tokio Marine Europe Insurance* [2009] B.L.R. 481. See also *Nokia Corp v AU Optronics Corp* [2012] EWHC 731 (Ch); *Berezovsky v Abramovich* [2011] EWCA Civ 153.
[151] *Goode v Martin* [2002] 1 W.L.R. 1828, CA.
[152] *Charles Church Developments Ltd v Stent Foundations* [2007] B.L.R. 81.
[153] *British Airways plc v Apogee Enterprises Inc* (2007) 111 Con. L.R. 200
[154] *Steamship Mutual v Trollope & Colls* (1986) 33 B.L.R. 77, CA; see also *Balfour Beatty Construction v Parsons Brown & Newton Ltd* (1991) 7 Const. L.J. 205, CA.
[155] *Hydrocarbons Great Britain v Cammell Laird Shipbuilders (No.2)* (1991) 58 B.L.R. 123.
[156] *Tilcon Ltd v Land and Real Estate Investments* [1987] 1 W.L.R. 46, CA; *Murray Film Finances v Film Finances Ltd* [1996] E.M.L.R. 539, CA.
[157] *Woodspring DC v J.A. Venn Ltd* (1985) 5 Con. L.R. 54. Where the matter is heavily documented, as is often the case in construction litigation, prejudice may be difficult to establish: *Royal Brompton v Hammond (No.2)* (1999) 69 Con. L.R. 132 at 143.
[158] *Hancock Shipping Company Ltd v Kawasaki Heavy Industries Ltd* [1992] 1 W.L.R. 1025, CA.
[159] *J.F.S. (UK) Ltd v Dwr Cymru Cyf* [1999] B.L.R. 17, CA; Limitation Act 1980 s.35(3).
[160] *White v Greensand Homes Ltd* [2007] B.L.R. 313, CA.

20-570 ***Schedule 8: Supplemental Provisions*** This Schedule deals with various miscellaneous matters.

CHAPTER 21

THE INFRASTRUCTURE CONDITIONS OF CONTRACT, 2014 EDITION

CONTENTS

A. INTRODUCTION

A Standard Form of Contract for heavy infrastructure work, typically involving civil engineering, has been issued by the Institution of Civil Engineers (ICE), the Civil Engineering Contractors Association (CECA) and the Association for Consultancy and Engineering (ACE) (with some name changes) since 1945, with new editions appearing regularly up to the 7th edn of 1999. In 2011 the ICE withdrew its support and the existing form was taken over by the remaining sponsors, the CECA and ACE, and re-published with minimal amendments as the Infrastructure Conditions of Contract. A commentary on that version appears in the 9th edn of this work. Given that the form continued to be widely used, particularly for the National rail network, the continuing sponsors embarked on a revision to 21-001

the conditions which were published, together with Guidance Notes, as the 2014 edn. This commentary deals only with the Main with-Quantities version, which is intended to be followed by similar revisions of all other variants as previously issued under the ICE brand, with priority being given to a target cost version, a design and build version and a form of sub-contract.

21-002 The ICE form had traditionally been used extensively in all types of heavy civil engineering work, both by Private Employers and by Local and Central Government Departments. Given that the contract procedures and the balance of risk were both familiar to and accepted by a wide range of parties, it was decided to maintain these in the new edition which has, however, introduced a complete overhaul of the conditions which had remained largely unchanged since their first introduction.

21-003 In the 2014 edition the conditions are substantially shortened, the text being about half the previous length. The clauses are re-numbered and reduced to 20, together with four supplementary clauses. In order to maintain the existing balance of risk and "feel" of earlier versions, the previous wording is adopted as far as possible. Many features of the earlier form have been maintained, with some editing, such as definitions and interpretation in Cl.1 and provisions dealing with termination and insurance in Cll.15 and 17. Other sections have been substantially re-arranged and collated into fewer but broader clauses containing related provisions previously distributed throughout the form. The very extensive provisions in the earlier editions dealing with resolution of disputes have been greatly simplified and re-written.

21-004 The many provisions under the earlier form dealing with risk have been collected together in one clause dealing both with risk in regard to the physical works and in regard to performance. Thus many provisions under the existing form giving rise to additional payment are collected together under the heading "Employer's Risks"; whilst those giving rise to an allowance of time only without additional payment are similarly collected under the heading "Shared Risks". For the measurement and valuation of the works, a decision was taken that the traditional practice of treating all billed work as subject to re-measurement was no longer justifiable. Instead the default position is that billed items are to be treated as lump sums with the option of providing for re-measurement or, via a supplementary clause, using milestone sums to be payable only upon achievement of stated criteria. The contract is thus intended to achieve both greater flexibility and certainty of outcome. For changes to the work, while the traditional mode of valuation using rates and prices contained in the bill is maintained, alternative provisions for advance valuation by the contractor are provided including any consequential extensions of time.

21-005 The now traditional and very lengthy provisions governing responsibility for nominated sub-contractors have been removed; but unlike the JCT form, from which nomination has entirely disappeared, provision for nomination is maintained on the basis the Contractor must accept full responsibility subject to reasonable objection. In the event of such objection and inability to proceed with the intended nominee, new provisions entitle the Employer to engage the intended Sub-contractor as a Direct Contractor, thus avoiding the possibility of substantial delay where procurement rules would otherwise require a lengthy re-tendering process.

21-006 Provisions dealing with programme, delay and extension of time substantially follow the earlier edition but with re-arrangement. With regard to claims for additional payment, all previous editions have made provision either for additional cost claims or for the Engineer to adjust the rates applicable to items of work affected by variations. The applications of these provisions was frequently

misunderstood and both are now superseded by a single provision allowing the Engineer to determine additional cost incurred through delay or disruption of the works.

Where disputes arise it is recognised that in a UK jurisdiction and increasingly **21-007** in foreign jurisdictions, there will be a statutory right to adjudication leading to an enforceable but reviewable decision. In the UK and most other jurisdictions the Adjudicator is allowed 28 days to give a decision, which may itself be extended. Given the longstanding tradition of an initial decision being rendered by the Engineer, it was decided to re-introduce this as an option which may be invoked by either party at any time, with the Engineer being required to give a decision on a matter referred to them within 14 days. Like an adjudication decision, the Engineer's decision is to be temporarily binding pending the decision of an Adjudicator or an Arbitral Tribunal; but if not so challenged, the decision will remain binding and may be enforced. Alternative provisions allow for adjudication, conciliation or arbitration generally at the option of the referring party.

The form also contains new measures which have been found to be beneficial in **21-008** other forms of contract. Thus, there is provision for collaboration and early warning designed to lead pro-actively to the adoption of measures aimed at avoiding or mitigating delay or additional cost. This may lead either to agreement or to the issue of appropriate instructions by the Engineer. Another new measure, by a supplementary clause, is provision for Employer Furnished Materials to be incorporated into the works by the Contractor. The Conditions are published together with a table of contents and index, a Form of Tender, Appendix, Form of Agreement and Form of Bond with Schedule. The form includes separate, unnumbered, Contract Price Fluctuations clauses.

B. THE NEW ICC CONDITIONS

1. Definitions and Interpretation

Definitions

1.1 In the Contract the following words and expressions shall have the meanings hereby assigned unless the context otherwise requires: **21-009**

(a) Appendix means the Appendix to the Contract;

(b) Bill of Quantities means the priced and completed Bill of Quantities;

(c) Contract means these Conditions of Contract together with the Appendix, the Works Data, the Bill of Quantities, the Form of Tender, the written acceptance of it, the Form of Agreement and such Supplementary Clauses as may be incorporated therein;

(d) Contract Price means the sum to be ascertained and paid in accordance with the provisions of the Contract for the construction and completion of the Works;

(e) Contractor means the party named as such in the Contract and includes the Contractor's personal representatives, successors and permitted assignees;

(f) Contractor Designed Works means the part or parts of the Permanent Works to be designed, constructed and completed by or on behalf of the Contractor;

(g) Contractor's Equipment means all appliances or things of whatsoever nature required in or about the construction and completion of the Works but does not include materials or other things intended to form or forming part of the Permanent Works;

(h) **Contractor's Proposals means the Contractor's proposals for the design and carrying out of the Works as set out in the Form of Tender;**
(i) **Cost means all expenditure reasonably and properly incurred or to be incurred in providing the Works whether on or off the Site including overhead finance and other charges properly allocated thereto but does not include any allowance for profit;**
(j) **Direct Contractor means a contractor, other than the Contractor, who is employed by the Employer to carry out work ancillary to but not forming part of the Works;**
(k) **Employer means the party named as such in the Appendix and includes the Employer's personal representatives, successors and permitted assignees;**
(l) **Employer Designed Works means the parts of the Permanent Works designed by or on behalf of the Employer;**
(m) **Employer's Requirements means the document identified as such and included in the Works Data;**
(n) **Engineer means the individual, firm or company so identified in the Appendix or any other individual or firm appointed as such by the Employer and notified in writing to the Contractor;**
(o) **Engineer's Representative means a person notified as such from time to time by the Engineer under sub-clause 5.5;**
(p) **Fixed Quantity means a quantity set out in the Bill of Quantities which is not subject to re-measurement;**
(q) **Permanent Works means the permanent works to be constructed and completed in accordance with the Contract;**
(r) **Re-measurement means the ascertainment of the actual quantities of work carried out for any item of work described in the Bill of Quantities as subject to re-measurement;**
(s) **Section means a part of the Works separately identified in the Appendix; a part of the Works is a part which is not separately identified;**
(t) **Site means the lands and other places on under in or through which the Works are to be constructed and any other lands or places provided by the Employer for the purposes of the Contract together with such other places as may be designated in the Contract or subsequently agreed by the Engineer as forming part of the Site;**
(u) **Site Information means the document so described containing information relating to the Site;**
(v) **Temporary Works means all temporary works of every kind required in or about the construction and completion of the Works;**
(w) **Tender Total means the total of the Contractor's tender for the design construction and completion of the Works**
(x) **Works means the Permanent Works and the Temporary Works and includes the Contractor's design work;**
(y) **Works Data includes, without limitation, the Employer's Requirements and the Contractor's Proposals;**

Definitions In Conditions

1.2 The following words and expressions are defined elsewhere in the Contract:
(a) **Commencement Date has the meaning stated in sub-clause 10.1;**

(b) **Contract Documents are the documents as referred to in sub-clause 1.1(b);**
(c) **Contract Language is as stated in the Appendix;**
(d) **Contractor Default has the meaning stated in sub-clause 15.1;**
(e) **Defects Correction Period and Defects Correction Certificate have the meanings stated in sub-clauses 10.5 and 13.4;**
(f) **Employer Default has the meaning stated in sub-clause 15.7;**
(g) **Employer's Risks are the risks referred to in sub-clause 8.5;**
(h) **Excepted Risks are the risks referred to in sub-clause 8.3;**
(i) **Force Majeure has the meaning stated in sub-clause 14.1;**
(j) **Governing law is as stated in the Appendix;**
(k) **Information Protocol means the document so identified in Clause 20;**
(l) **Milestone Sum has the meaning stated in Clause 21;**
(m) **Nominated Sub-Contractor has the meaning stated in sub-clause 7.1;**
(n) **Shared Risks are the risks referred to in sub-clause 8.7;**
(o) **Substantial Completion has the meaning stated in sub-clause 10.4.**

Singular and Plural

1.3 Words importing the singular also include the plural and vice-versa, as the context requires. Words importing the male gender include the female.

Meaning of days

1.4 References to days means calendar days unless otherwise stated.

Heading and Marginal Notes

1.5 Headings and marginal notes in these Conditions of Contract shall not be deemed to be part of or be taken into consideration in the interpretation or construction of the Contract.

Clause 1: Definitions and interpretation. The clause follows the format of the 2011 edn but the definitions have been re-written and are now divided into those stated in Cl.1.1 and those quoted in Cl.1.2 as appearing elsewhere in the conditions. Many are matters of identification but some substantive. Thus in Cl.1.1, (c) importantly defines the documents forming the contract and needs to be read with Cll.4.1 (documents mutually explanatory) and 4.2 (whole agreement); (f) is to be read with Cll.4.8, 6.3 and 6.4; (g) is to be read with Cl.16; (j) is to read with Cl.7.5; (n) and (o) are to be read with Cl.5; and (r) is to be read with Cl.11.3. **21-010**

Clause 1.1(i): Cost. While the term was previously found throughout the conditions where provision for compensation was included, additional cost is now payable under Cl.8.6 arising from an Employer's Risk as defined in Cl.8.5, or under Cl.13.3 which makes provision for payment of all other claims for additional cost. References to "cost" continue to appear in many other clauses.[1] **21-011**

Clause 1.1(t): Site. This is an important part of the definition, which links with the obligations in Cll.4.4, 8.5(c) and 10.2 and may be found also in other Contract Documents. Other than as may be expressly agreed by the Employer or the Engineer there is no obligation on the Employer to provide land beyond what is necessary to make the work possible to perform. It is therefore of importance for the Contrac- **21-012**

[1] See Sub-Cll.5.7, 5.8, 6.1, 8.4, 8.5, 11.8, 14.3, 15.6, 16.5, 16.7 and Cll.17 and 18.

tor to have a satisfactory definition of the Site. Uncertainty can arise in relation to land used indirectly for the purpose of Works, such as a borrow pit for providing fill material. The wording has been adopted from earlier editions and leaves some uncertainty as to the extent of the Engineer's discretion to extend the site.

21-013 **Clause 1.1(x)(q)(v): Works, Permanent Works, Temporary Works.** While the differences may be of considerable importance (see Cl.6.3) there is no clear distinction between temporary and permanent works. The two terms are not so defined as to be mutually exclusive, and there may well be items which could fall into both, such as a cofferdam which is to be incorporated into the permanent structure, or grouting around the periphery of a tunnel. The Standard Method of Measurement[2] does not clarify the difference. Where work which may be regarded as temporary is to be billed, the Contract should make clear that such work is to be regarded as Temporary Works for the purpose of responsibility. The contract may contain other uncertainties arising from use of the terms "Contractor's Equipment" in Cl.16 and "Plant and Equipment" in Cl.17, these expressions being inherited from earlier editions of the form.

21-014 **Clause 1.2(b): Contract Documents.** This should refer to Sub-Cl.1.1(c).

21-015 **Clause 1.2(e): Defects Correction.** This is identical to the former term "maintenance" appearing in an earlier edition of the ICE form.

2. Governing Law, Communications and Jurisdiction

Governing Law

21-016 **2.1 The Contract shall be governed by and interpreted in accordance with the laws of the country or jurisdiction stated in the Appendix.**

Language

2.2 The Contract Language shall be that stated in the Appendix. If any part of the Contract is written in any other languages, those parts written in the Contract Language shall prevail.

Communications

2.3 Communications, except where the Contract provides otherwise, may be in any form, including electronic form, provided that a permanent record exists. Unless otherwise agreed by the parties, communications shall be in the Contract Language.

Jurisdiction

2.4 The courts of the Country stated in the Appendix shall, subject to Clause 19 hereof, have jurisdiction over the Contract and over the enforcement of any decision of the Engineer or of an adjudicator appointed thereunder.

21-017 **Clause 2.1: Governing law.** The contract is intended to operate under any governing law which the parties may select and insert in the Appendix. The term

[2] The 3rd edn of the CESMM (see Cl.57 below) states in s.2 General Principles that all work which is expressly required should be covered in the Bill of Quantities.

"Jurisdiction" may include a part of a country for which a separate legal system is recognised, such as Scotland. In the event of failure to insert any governing law in the Appendix, the choice of law would be governed by the relevant rules of private international law which will generally select the laws of the country having the closest connection with the contract.[3] In the case of domestic use within the United Kingdom, this would be the laws of England or alternatively Scotland or Northern Ireland.

Clause 2.2: Contract language. This is an exception to the rule stated in Cl.4.1 that the documents forming the Contract are to be taken as mutually explanatory. 21-018

Clause 2.3: Communications in any form. A number of provisions within the conditions require "notice in writing",[4] although Cl.5.6, by which Instructions of the Engineer are to be in writing, similarly provides that an oral instruction may be confirmed such that a permanent record exists. What constitutes a "permanent record" is not defined and will no doubt be subject to advances in technology as well as decision of the courts. It seems likely that an email, despite the ability to delete from a particular system, should be regarded as permanent since it will continue to be recorded in the metadata attaching to the original communication. 21-019

Clause 2.4: Jurisdiction. This provision addresses the enforcement of decisions of the Engineer and an adjudicator under Cl.19 and is to be distinguished from the governing law of the contract. The extent to which this provision will be recognised by a foreign court will be dependent on the local law.[5] Note that Cll.19.2 and 19.5 provide, respectively, that decisions of the Engineer and of an adjudicator may be enforced as provided by Cl.2.4, so that refusal of the other party to comply with such a decision will not constitute a dispute falling within the arbitration provision in Cl.19.6. 21-020

3. Assignment and Subcontracting

Assignment

3.1 Neither party shall assign the Contract or any part of it or any benefit or interest therein or thereunder without the prior written agreement of the other party which agreement shall not unreasonably be withheld. Any purported assignment in breach hereof shall be of no effect. 21-021

Third Party Rights

3.2 Nothing in this Contract shall confer on any third party any benefit or right to enforce any term of the Contract pursuant to any applicable law or statute to the extent such law or statute may be derogated from. Any such law or statute that may otherwise be applicable shall be identified in the Appendix.

Subcontracting of Works

3.3 The Contractor shall not without the prior written agreement of the Employer sub-contract the whole of the Works. Any purported sub-contract in breach hereof shall be of no effect.

[3] Subject within the European Union to the Rome Regulations.
[4] Principally Cll.15 of the Termination for Default and 19 of the Resolution of Disputes.
[5] See *CRW v PT Perusahaan TBK* [2011] SGCA 33 (Singapore).

Contractor's Designer

3.4 The Contractor shall not change any Contractor's designer named in the Appendix without the Engineer's prior written consent which shall not be unreasonably withheld.

Sub-Contracting of Parts

3.5 Except as provided in the Appendix the Contractor may sub-contract any part of the Works or their design subject to the Engineer's consent which shall not be unreasonably withheld. Prior details of any work or design proposed to be sub-contracted and particulars of the sub-contractor or designer shall be notified to the Engineer at least 14 days before the proposed appointment. The Engineer shall respond either with his consent or his refusal with reasons within 7 days.

Labour Only Sub-Contractors

3.6 The employment of a labour-only sub-contractor does not require the Engineer's consent under Clause 3.5.

Liability for Sub-Contractors

3.7 The Contractor shall be liable under the Contract for all work sub-contracted by him and for all acts omissions defaults or neglects of any sub-contractor his agents servants or workers.

Removal of Sub-Contractor

3.8 The Contractor shall remove from the Works or their design any sub-contractor who mis-conducts himself or fails to conform with mandatory requirements for health and safety or whose conduct is prejudicial to health or safety.

21-022 **Clause 3.1: Assignment.** The prohibition on assignment without consent, which applied to the Contractor only in earlier editions, applies now to both parties and includes "any benefit or interest". This will prevent assignment of money due under the Contract. A purported assignment without consent is invalid both under the express words of the clause and as a matter of law.[6]

21-023 **Clause 3.2: Third party benefit.** Under English law the Contracts (Rights of Third Parties) Act 1999 permits the creation of third party rights but does not apply if the contract shows that there was no intention to create such rights which is clearly the effect of the clause. Third parties falling within the ambit of the Act might include Sub-contractors (in regard to payment) and subsequent purchasers (in regard to enforcement of performance obligations). If, on the contrary, third party rights are intended to be created, this clause should be deleted.[7] If the contract is used under a governing law other than English law, the relevant law relating to third party rights is to be identified in the Appendix and will apply to the extent derogation is not permitted.

21-024 **Clauses 3.3, 3.4, 3.5: Sub-contracting.** Clause 3.3 prevents sub-contracting of

[6] *Helstan Securities Ltd v Hertfordshire CC* [1978] 3 All E.R. 262; cf. *Linden Gardens v Lenesta Sludge Disposals* [1993] 3 W.L.R. 408, HL. For assignment generally, see Ch.13, para.13-001.

[7] See para.13-037 and following.

the whole of the Contract Works without consent; but unless prohibited by the Appendix, any parts of the works or their design may be sub-contracted under Cl.3.5 subject to giving 14 days notice to the Engineer and obtaining its consent. The Engineer's consent may be withheld only on reasonable grounds, which may be challenged. Similarly the Contractor may change its named designer only with the Engineer's consent. It is not clear whether sub-contacting without consent would give rise to any remedy other than such damages for breach as the Employer could establish or, in an extreme case, termination.

Clause 3.7: Contractor liable for Sub-contractors. The Contractor would be liable in contract for the acts or defaults of sub-contractors in any event but the words of the clause are wide enough to cover tortious acts as well, for which the Contractor may be held liable "under the Contract".[8] More significantly, this provision will apply equally to a Nominated Sub-contractor, in respect of which the Contractor's protection is limited, under Cl.7, to a right of "reasonable objection" as defined. 21-025

4. The Contract and Provision of Information

Contract Documents

4.1 The documents forming the Contract are to be taken as mutually explanatory. Any ambiguities or discrepancies shall be explained and adjusted by the Engineer who shall issue an instruction accordingly. 21-026

Whole Agreement

4.2 The Contractor and the Employer agree that the Contract sets out fully the rights, obligations and liabilities of each of them to the other arising under or in connection with the Contract or the Works. No statement by either party shall have effect unless made in writing and incorporated into the Contract

Provision of Documents

4.3 Upon award of the Contract the Contractor shall be provided with hard copies of the Contract Documents as specified in the Appendix.

Site information

4.4 The Employer warrants that he has provided with the Site Information all such data in his possession or control relating to the Site which is relevant to the Works or their design.

Inspecting of Site

4.5 The Contractor shall be deemed to have inspected the Site and its surroundings and to have obtained such information in connection therewith as is reasonably available; and to have satisfied himself, so far as is practicable, as to the form and nature of the Site including the sub-soil and hydrological conditions; and to have obtained for himself all necessary information as to risks, contingencies and other circumstances which may affect his tender.

[8] But would otherwise be no general liability in tort: see *D. & F. Estates v Church Commissioners* [1989] A.C. 177, HL and more recently *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9; [2011] B.L.R. 206; 134 Con. L.R. 26, CA.

Employer's Design and Further Instructions

4.6 The Employer's design shall be contained in the Works Data and in such further instructions, including drawings and specifications, as the Engineer shall supply to the Contractor, being necessary for the design and construction of the Works. The Contractor shall be bound by all such instructions. If they include any variation, it shall be dealt with in accordance with Clause 12.

Design Criteria

4.7 The Engineer shall provide to the Contractor such design criteria relevant to the Employer Designed Works or to any Temporary Works design supplied by the Engineer as may be necessary to enable the Contractor to comply with the Contract.

Contractor Designed Works

4.8 The Contract may require that parts of the Permanent Works shall be designed by the Contractor. In such case:

(a) The Contractor's design shall comply with the Employer's Requirements and with any Contractor's Proposals that have been accepted by the Employer prior to the date of the Contract;

(b) The Contractor shall submit to the Engineer for his acceptance such drawings specifications calculations and other design information as are necessary to satisfy the Engineer that the Contractor's design complies with the requirements of the Contract;

(c) The Engineer may require the Contractor to supply such further documents as may be necessary for the proper and adequate construction of the Works and, when accepted by the Engineer, the Contractor shall be bound by the same;

(d) The Contractor shall supply to the Employer, as provided by the Works Data and within the times as so stated such operational and maintenance manuals and as-built drawings as are sufficient to enable the Employer to operate and maintain the Permanent Works;

(e) Acceptance by the Engineer of the Contractor's design shall not relieve the Contractor of any of his responsibilities under the Contract;

(f) The Engineer shall be responsible for the integration and co-ordination of the Contractor's design with the whole of the Works.

Design Particulars

4.9 Upon acceptance by the Engineer of the Contractor's design, the Contractor shall supply to the Engineer all design documentation as specified in the Works Data.

Assessment of Risks

4.10 The Contractor shall be responsible for the interpretation of all information obtained relevant to the Site or to risks, contingencies and other circumstances which may affect his tender, whether such information is obtained by the Contractor or supplied by the Employer.

Copyright

4.11 Neither the Employer nor the Contractor shall acquire copyright or other intellectual property rights in the data supplied in accordance with this

sub-clause 4, but the Contractor and its sub-contractors, the Employer and any Direct Contractors and the Engineer shall be entitled to copy and use the same for the purpose only of the Contract and of providing and using the Works.

Clause 4.1: Documents mutually explanatory. This clause avoids the type of problem which can arise when some documents are given precedence over others.[9] The requirement for all documents to be construed mutually requires equal weight to be given to the printed document as compared to special or "bespoke" conditions, contrary to the general principle of interpretation.[10] However where the documents cannot be read consistently with each other, this provision would not, it seems, prevent the operation of the general principle. See also the notes to Cl.2.2 above. **21-027**

Clause 4.1: Documents forming the Contract. These consist of the Conditions, the Appendix, the Works Data, the Bill of Quantities, the Form of Tender and written acceptance thereof and the Form of Agreement and any Supplementary Clauses,[11] and any further documents that may be incorporated into the Contract. The task of mutual construction can pose particular problems where the parties incorporate correspondence and other documents in which views are expressed as to the effect of the intended contract. In such a case, although effect is to be given to all such documents, they must, it is submitted, be construed in the context of ascertaining the mutual intention of the parties at the date that the Contract is concluded. **21-028**

Clause 4.1: Ambiguities and discrepancies. An ambiguity[12] or discrepancy will ordinarily be resolved by the process of legal construction, if necessary on a reference to the Engineer under Cl.19.1. It is thought that the words need be given no wider meaning than "uncertainty" concerning the technical description of the Works. This is plainly an area in which the Engineer needs to impose certainty. Note that an instruction issued under Cl.4.1 will fall within Cl.13.3 as regards any resulting delay or disruption. **21-029**

Clause 4.2: Statements or representations. The "whole agreement" clause is intended to negate the effect of any statement which is not written into the Contract Documents. On modern authority, however, such a provision will not be apt to exclude implied terms which are to be regarded as expressing what the contract would reasonably have been understood to mean.[13] Nor will it exclude a claim for rectification. **21-030**

Clauses 4.4, 4.5: Site information and inspection. These provisions are to be read with Cl.4.10 and with Cl.8.5(a) by which physical conditions or artificial obstructions which could not reasonably have been foreseen by an experienced **21-031**

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9 See Standard Form of Building Contract, 2005 edn Cl.1.3; and see *English Industrial Estates v Wimpey* [1973] 1 Lloyd's Rep. 118, CA.

10 i.e. that hand written or typed documents take precedence over printed documents. See *Robertson v French* (1803) 4 East 130; *Glynn v Margetson* [1893] A.C. 351, HL and Lord Denning MR in *English Industrial Estates v Wimpey* [1973] 1 Lloyd's Rep. 118, CA.

11 Cll.1.1(c), (a), (y) and (b).

12 Note that the technical meaning of this term is a provision having two (or more) primary meanings.

13 *AG Belize v Belize Telecom* [2009] 1 W.L.R. 1988.