CHAPTER 2

CONSTRUCTION PROFESSIONALS

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SECTION 2.1: CONSTRUCTION PROFESSIONALS' APPOINTMENT

(1) Duties in General

2-001 Traditionally, Employers wishing to engage in a building or engineering contract would appoint an Architect or Engineer to design the work. The Architect or Engineer would then act for Employer while the works were carried out, and also be the certifier for the contract to carry out the works. Modern practice has now moved towards management of the project by a manager who may not have designed the works. The manager's role may also be wider than the role of contract administrator and certifier, and may include some of the planning, procurement and management functions which were traditionally the function of the Contractor.

Under the traditional approach the duties of an Architect or Civil Engineer were as follows:

(a) to advise and consult with the Employer (not as a lawyer) as to possible limitations on the use of the land to be built on, either (inter alia) by planning legislation, restrictive covenants or the rights of adjoining Owners or the public over the land, or by statutes and by-laws affecting the works to be executed;

(b) to examine the site, sub-soil, and surroundings;

(c) to consult with and advise the Employer as to the design, extent and cost of the proposed work;

(d) to prepare preliminary sketch plans and an outline or approximate specification, having regard to all the conditions known to exist and to submit them to the Employer for approval, with an estimate of the probable cost, if requested;

(e) to elaborate and, if necessary, modify or amend the sketch plans and then, if so instructed, to prepare drawings and a more detailed specification of the work to be carried out as a first step in the preparation of contract documents;

(f) to consult with and advise the Employer as to the form of contract to be used (including whether or not to use a measured contract and bills of quantities) and as to the necessity or otherwise of employing a Quantity Surveyor to prepare bills and carry out the usual valuation services during the currency of the contract;

(g) to bring the contract documents to their final state before inviting tenders, with or without the assistance of Quantity Surveyors and Structural Engineers, including the obtaining of detailed quotations from and arrangement of delivery dates with any nominated Sub-contractors or suppliers whose work may have to be ready or available at an early stage of the Main Contractor's work;

(h) to advise the Employer as to tenders received and the selection of the Main Contractor, and to arrange starting dates and the contract period, if this has not already been done;

(i) after work has started, to supply the builder with copies of the contract drawings and specification and any further working drawings, details or instructions which may be necessary for the work, including work to be done by nominated Sub-contractors; to make any further nominations which may be necessary; and to advise the Employer if any variation of the work becomes necessary or desirable;

(j) to supervise the work, doing their best to ensure in the Employer's interest that the contract is complied with in every respect; to value, with or without the assistance of a Quantity Surveyor, the work both for purposes of interim payment and final payment; and generally to administer the contract so that full effect is given to all its provisions; and

(k) to act as Certifier on such matters as the terms of the contract may require, up to and including the final certificate, for instance, questions of extension of time, practical completion, payment direct of Sub-contractors, and various claims for additional expense which the Contractor may be entitled to make under the terms of the contract.

This list of duties remains a good summary in the context of traditional contracting but it is not complete where the Construction Professional acts in the context of a more modern contractual scheme, such as Construction Management (where a manager acts for the Employer and manages a package of separate contracts for different parts of the work made directly between a number of contractors and the Employer), Management Contracting (where the Management Contractor manages the Project for a fee, but may not assume all the liabilities of a traditional Main Contractor), or projects where the design is carried out in whole or in part by the Contractor.

The duties of a Project Manager who is not a designer, but acts as the lead professional will not usually include design duties, (unless the design is subcontracted by the Project Manager to subconsultants) but may well be broader than those in the traditional list above in relation to managing cost, planning, procurement, and contract administration. A properly drafted appointment should ensure that to the extent that the Project Managers undertake duties traditionally undertaken by the Contractor, their duties and obligations are set out expressly. Thus it is important to identify:

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(a) Who is obliged to prepare and procure a binding contract with the Contractor and with any directly employed Trade Contractor.[1]
(b) Whether the Project Manager or the Contractor will programme the works.
(c) Whether the Project Manager takes responsibility for quality, on its own, or in conjunction with the design consultants.
(d) The Project Manager's obligation to control cost.[2]
(e) Whether the Project Manager carries out all aspects of administration and certification, or only some, and if so, which.
(f) The Project Manager's role in project meetings, risk assessment procedures.
(g) The Project Manager's responsibility for health and safety.
(h) The division of responsibilities between the Employer, the Project Manager and the Contractor or the Trade Contractors.
(i) What precisely is involved in any duty to "co-ordinate" or "manage" undertaken by the Project Manager.
(k) The role of the designers and other consultants, and the nature of the Project Manager's obligations to manage other consultants.

2-002 It is submitted that where the obligations and duties are not expressly set out, Project Managers will owe contractual duties of reasonable skill and care under their appointment to the Employers in respect of those tasks which they actually undertake. However, even where it is clear in the circumstances that such a duty is owed, difficulties will still arise in identifying contractual responsibilities where aspects of management in fact fell between two stools, and neither the Consultants nor the Employer made sure that some important issue was properly closed out.

This is a common issue in all types of professional engagements, particularly where large losses are caused by a failure to take a step which falls outside the services expressly listed in the appointment. If the professional in fact gives advice on areas outside the scope of the appointment on a few occasions there will be duty in respect of the advice given on those few occasions, however, much more is required for a general variation of the retainer to widen its scope to new areas.[3] The terms of the appointment and the services agreed to be performed will define the scope of duty. In general, the duty will change only if there is a contractual variation of the appointment. In a professional appointment where fees are payable for various tasks or types of expertise such a variation will be contractually effective if there is a simple agreement to pay for the time of a particular person with additional or different expertise, to pay for a report of a new kind, to pay for particular

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[1] In *Ampleforth Abbey Trust v Turner & Townsend Project Management Ltd* [2012] EWHC 2137 (TCC); [2012] T.C.L.R. 8 a Project Manager was found to be in breach of the duty owed to the Employer in failing to procure an executed building contract between the Employer and the Contractor and allowing the Contractor to commence construction works on the basis of letters of intent only. In cases such as that where there was no contract and both the Employer and Project Manager had involvement in the negotiations, it may be difficult to establish what responsibility, if any, is owed by the Project Manager.

[2] For cost functions of a project manager, see *Plymouth and South West Co-Op v ASM* [2006] EWHC 5 (TCC) 108 Con. L.R. 77, and *Great Eastern Hotel Company Limited v John Laing Construction* (2005) 99 Con. L.R. 45, [2005] EWHC 181, discussed under "Duties In Detail: Preparation of Quantities", Section 2.4, sub-section (8). For co-ordination of the other consultants, and contract administration, see *Chesham Properties Ltd v Bucknall Austin Project Managers Services* (1996) 82 B.L.R. 92, illustrated under "Duties In Detail, Administration of Contract", Section 2.4, sub-section (13), where *Great Eastern Hotel v John Laing Construction* [2005] EWHC 181 is also illustrated.

[3] *Mehjoo v Harben Barker* [2014] EWCA Civ 358.

tests, inspections, design studies, method statements or surveys, or to pay for expertise of a particular kind in relation to an identified project. It is in the interests of the project, particularly one where the method of contracting is not traditional so that the scope and coverage of each consultant's appointment requires careful definition, if at least one consultant is specifically obliged to identify what further reports, advice, or tests are necessary.[4]

The quality of the service provided by an IT consultant to the Employer is subject to the usual legal rules applicable to all construction professionals but the content of the duties to be performed is not the same. In *Stephenson Blake (Holdings) Ltd v Streets Heaver Ltd*[5] the court set out six particular duties, in some considerable detail, as follows:

> "(1) To ensure that the system conformed to the specification and if not, or it was impossible to recommend such a system, to warn the purchaser (ie. the client) in plain terms of the fact and its likely consequences. Checking the supplier's claims for his system was to be done by talking to other users, or testing the software.
>
> (2) To use due care and skill to ensure that the system recommended would carry out the functions for which it was required efficiently and would have an acceptable minimum of operational faults or bugs. In the alternative, if no supplier was capable of meeting these standards, the consultant's duty was to advise to that effect.
>
> (3) To use due care and skill to ensure that the hardware recommended would perform in conjunction with the recommended software in such a way that the purchaser's computer operations could be carried out with reasonable speed.
>
> (4) To use due care and skill to ensure that the suppliers recommended had the requisite skilled staff and could reasonably be expected to show the necessary stability, both financial and organisational, to maintain and support the system over a substantial period.
>
> (5) To use skill and care to ensure that the supplier recommended was in a position to deliver the required system in accordance with the purchaser's requirement.
>
> (6) To advise or warn about the impact, if any, of financial constraints on the purchaser's requirements."

Clearly, each individual engagement will turn on its own particular facts but this general list indicates the duties that the court may identify as impliedly agreed to be owed by a computer consultant where the fuller services are required by the Employer from inception to completion of a computer system.

2-003 It is important from the outset that Employers and their computer consultants agree on who is the Owner of the computer programme that a consultant provides to the Employer.[6]

Where a Contractor is employed on a Turnkey or EPIC basis to carry out the project as a whole, the designers may simply be specialist domestic sub-contractors of the Contractor, and all the project management functions may be undertaken by the Contractor's own personnel or by sub-consultants. There may therefore be no contractual relations between the Employer and the Construction Professionals, although it is common for there to be direct warranties given to the Employer by important designers. The duties of a design and build contractor to the Employer are discussed in Ch.3.

The law has traditionally identified professionals as a separate class, owing particular duties, and "professional negligence" is recognised as a particular kind of litigation, involving claims against those exercising the skill and care involved

[4] For the difference between a general retainer and employment for specific items of advice, see the discussion of the *SAAMCO* case in *Various Claimants v Giambrone and Law (A Firm)* [2015] EWHC 1946, Foskett J.

[5] [2001] Lloyd's Rep. P.N. 44.

[6] *Cyprotex Discovery Ltd v The University of Sheffield* [2004] R.P.C. 4.

in a particular profession. In modern projects however, the contracting parties are unlikely to be individual human beings but corporations, limited companies, partnerships, and other legal persons of very different kinds. Individuals possessing expertise and professional qualifications may be employed by any of the contracting parties, Contractor, Employer, Sub-contractor, or Supplier. Therefore, it may no longer be the case that legal entities supplying architectural, engineering or quantity surveying services are different in kind from Employers or Contractors by virtue of the fact that some or all of the individuals in that legal entity have a "professional" qualification. In industries such as oil and gas, power generation and transport both the Contractor and the Employer may have engineering expertise and be full of highly qualified Engineers. Nevertheless, the concept of professional duty which developed in the context of doctor and patient, lawyer and client, architect and client, is still applicable to Construction Professionals. As discussed in Ch.1, this may increase the extent of their duties of care in tort.

(2) Form of Appointment

2-004 No particular form is required for the appointment of independent advisers and consultants, whatever the legal status of the Employer. As with any contract it can be oral or partly oral.

In the Employer's interest, however, the contract relating to any major project in England and Wales should be under seal, so as to obtain the benefit of the longer period of limitation of 12 years should there be any breach of duty resulting, for instance, in defects in the work not discovered at the time of completion. However, as indicated below, Construction Professionals not only avoid agreements under seal but in fact generally contract on standard terms that reduce the limitation period.

In modern practice it is usual for Construction Professionals to make use of one of the many standard forms available from their professional bodies or others. Architects generally make use of one of the two main standard forms: the RIBA (Royal Institute of British Architects) Agreements have been in operation now for many years and were previously known as the Conditions of Engagement, which, for a while, were mandatory for all Architects who were members of the RIBA. With modern competition and the prevention of restricted trade practice, the use of the modern Architects Appointment is voluntary. The present edition was published in 2015. The ACA (Association of Consultant Architects) produced a number of forms from 2000 (including a domestic partnering contract in 2008, with an international version in 2007). Their current Standard Form of Agreement for the Appointment of an Architect is dated September 2012.

2-005 Engineers commonly provide their professional services by use of the ACE (Association for Consulting and Engineering) standard forms. The current edition dates from 2009.

The RICS (Royal Institute of Chartered Surveyors) has for many years been producing a wide variety of standard forms very commonly used by Construction Professionals. The 2008 edition provided appointment forms for Building Surveyors, CDM coordinators and Quantity Surveyors, but is currently being revised.

It has become extremely common in modern practice for all Construction Professionals to provide collateral warranties to the Employer when, for instance, the designed services are novated or assigned to other parties such as Contractors or Owners of the site and indeed to any other third party who may be affected by the

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Construction Professional's performance. The CIC (Construction Industry Council), amongst its range of contracts, produces a collateral warranty. The JCT forms provide collateral warranties for use with the JCT contract forms.

(3) Duration and Termination of Appointment

2-006 Unless there is agreement to the contrary, an appointment in explicit and unqualified terms for a particular project cannot be determined until the purpose of the appointment has been achieved.[7] However, it is not unusual for the contract of employment to contain provisions dividing the duties to be performed by the Architect in accordance with various stages of progress of the contemplated project and to give either party, in effect, the power of termination at the end of the various stages. An important example is the Conditions of Engagement contained in the scale of professional charges of the RIBA. In the absence of express provision, an Architect engaged informally on a particular project may in fact be employed under a series of informal appointments rather than to one appointment covering the whole project from start to finish. In general, until the time that the decision is taken to prepare contract documents with a view to obtaining a tender, the project is frequently of a tentative or exploratory character, and the Architect is likely to be employed almost on a day-to-day basis. However, in the event of clear agreement as to the purpose of the appointment, any termination of the employment before the purpose of the appointment has been achieved would amount to a breach of contract. Thus in *Thomas v Hammersmith BC*[8] Slessor LJ said:

> "I think it helpful first to consider what would have been the agreement between the parties if the appointment had been simpliciter to act as architect for the erection of the new town hall without any provision as to scale of charges, and if the council had then, before the work was completed, without cause other than their mere volition, terminated the agreement. In such case, I entertain no doubt that the architect would have been entitled to reasonable remuneration for the work which he had already done, and also to damages for the loss of remuneration which he had been prevented from earning until the work was finished. Although the contract in this assumed form would contain no express term to this effect, I think that it would be implied that the council, having employed the plaintiff to build their town hall, agreed with him that they would not prevent him from doing the work and so prevent him from earning his remuneration."

There are, therefore, many different types of employment. So an Architect or Engineer may be employed for: preliminary advice only, to make preliminary drawings, plans or designs; to provide drawings so as to obtain planning or other permissions; to obtain tenders only; to supervise only; or, in more general terms to carry a project through to completion.

SECTION 2.2: DUTIES AND LIABILITIES OF CONSTRUCTION PROFESSIONALS TO EMPLOYER

(1) Contractual Duties

2-007 The starting point for determining the duties owed by a Construction Professional to the Employer is the contract of appointment between those parties. That contract is relevant (obviously) in defining the contractual duties owed by the

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[7] *Thomas v Hammersmith BC* [1938] 3 All E.R. 203, 208B and 211, per Slessor and McKinnon LJJ; and *Edwin Hill & Partners v Leakcliffe Properties Ltd* (1984) 29 B.L.R. 43, per Hutchison J.

[8] [1938] 3 All E.R. 203.

professional but also in relation to non-contractual common law duties which may also be owed by the professional.

Construction Professionals are employed for their skill. In common with all professionals, there will be an implied term that they will carry out their services with the skill and care reasonably to be expected of competent members of the profession they belong to.

The common law implied term of reasonable skill and care was given statutory expression by the Supply of Goods and Services Act 1982 s.13. That provides that where the supplier under such a contract is acting in the course of a business, there is an implied term that it will carry out the service with reasonable skill and care. The statute did not abolish the common law duties and the cases on the common law duties of professionals remain relevant.

2-008 At common law, if no time is fixed for performance, a term that the professional should carry out the services within a reasonable time will be implied. This has also been codified under s.14(1) of the same Act. It provides that where, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract (and not left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties), there is an implied term that the supplier will carry out the service within a reasonable time. What is a reasonable time is a question of fact.[9]

Other statutorily implied terms may arise under the Housing Grants, Construction and Regeneration Act 1996 (HGCRA).[10]

As to other classes of implied terms, the general rules relating to the implication of terms into contracts apply. The cases considering the implication of terms into contracts between Employers and professional consultants do not add materially to this jurisprudence but are noteworthy in the context of the particular duties considered therein and are accordingly examined under those duties.

2-009 Very often (particularly where one of the standard forms of appointment has been used), the express terms of the contract will identify the particular duties which the professional has agreed to undertake. Thus, for example, art.2 of the ACA SFA/08[11] provides that the client appoints the Architect (and the Architect accepts the appointment) to provide services for the project as set out in Sch.2. Schedule 2 then lists (under two headings: Normal Services and Other Services) the services to be performed by the Architect (which may be struck out or incorporated as appropriate).

In Section 2.4 below, some of the more common services performed (and related duties owed) by Construction Professionals are considered. Traditionally, an Employer under a building or engineering contract would have had four main interests which they might have appointed their professional adviser to secure, namely:

(i) a design which is skilful and effective to meet the Employer's requirements, including those of amenity, durability and ease of maintenance,

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[9] Supply of Goods and Services Act 1982 s.14(2).

[10] Under the terms of s.104(2) the appointment of a Construction Professional is a "construction contract" under the Act just as much as a building contract if the other provisions of ss.104 and 105 have that effect.

[11] The Association of Consultant Architects Standard Form of Agreement for the Appointment of an Architect.

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reasonable cost and any financial limitations they may impose or make known, and comprehensive, in the sense that no necessary and foreseeable work is omitted;

(ii) obtaining a competitive price for the work from a competent Contractor, and the placing of the contract accordingly on terms which afford reasonable protection to the Employer's interest both in regard to price and the quality of the work;

(iii) efficient supervision to ensure that the works as carried out conform in detail to the design and specification; and

(iv) efficient administration of the contract so as to achieve speedy and economical completion of the project.

Employers continue to have such interests under more modern forms of contracting but the arrangements by which they seek to secure them are more varied than they used to be, as they are not necessarily limited to an Employer's appointment of a professional adviser.

(2) Common Law Duty of Care

2-010 It is now well-established law that professionals may be liable to their Employers or clients for breach of a common law duty of care (i.e. in negligence) as well as for breach of contract. Although this question had been a controversial, it was settled by the decision of the House of Lords in *Henderson v Merrett Syndicates Ltd*.[12] The case concerned claims by Lloyd's Names against their underwriting agents in respect of (pure) economic loss. In some cases, there was no direct contract between the Names and the managing agents in question (here the Names were described as indirect Names); and in some cases there was such a direct contract (here the Names were described as direct Names). In each case, the managing agents argued that the imposition of a duty of care in tort was inconsistent with the contractual relationship between the parties. In the case of the direct Names, the argument was that the direct contract legislated exclusively for the relationship between the parties, and that a parallel duty of care in tort was therefore excluded by the contract.[13] The House of Lords rejected this argument. Lord Goff of Chieveley, giving the leading speech, held that there could be a concurrent liability in contract and in tort, and that a claimant who had available to him concurrent remedies in contract and tort could choose that remedy which appeared to him to be most advantageous. It is clear from the judgment of Lord Goff that this applies whether the damage suffered by the claimant is physical damage or (pure) economic loss.[14]

Of course, the fact that the existence of a duty in contract is not a bar to the existence of a concurrent duty in tort does not of itself mean that such a duty will be held to exist. This point arises most acutely where one has to determine whether the defendant (here the professional) owes a duty of care to the claimant (here the Employer) to avoid causing the latter (pure) economic loss. This is discussed in detail in Ch.1. It is important to note, however, that in the UK at least it is far more likely that Construction Professionals will owe such a duty than Contractors or design and build Contractors. The Court of Appeal in *Robinson v P.E. Jones*

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[12] [1995] 2 A.C. 145 HL.

[13] See Lord Goff of Chieveley's summary of the argument at [1995] 2 A.C. 145, 177E.

[14] See, e.g. [1995] 2 A.C. 145, 190F–G.

Contractors[15] emphasised that *Murphy v Brentwood DC*[16] must be interpreted as generally excluding a concurrent duty in the case of a Contractor. While acknowledging that House of Lords authority in *Hedley Byrne v Heller* and *Henderson v Merrett Syndicates* makes it impossible to take the simple view that there cannot be a concurrent duty in tort not to cause economic loss, *Robinson* suggests that the concurrent duty only applies where there is a separate and additional assumption of responsibility, and that such a separate and additional assumption of responsibility will not be imposed on a Contractor, but can be imposed a professional. This raises acutely the issue of what a "professional" is, in the context of modern building contracts, since there are undoubtedly organisations, particularly specialist sub-contractors whose expertise is in a particular technology, which can and do contract as designer alone on one project, designer and supplier on another, and as Contractor or turnkey design and build Contractor on a third project.

The specific duties discussed in Section 2.4 below have often been held to exist in the context of a duty of care in tort.[17]

(3) Standards by Which Performance will be Judged

(a) Reasonable skill and care

2-011 Under the common law implied terms, under s.13 of the Supply of Goods and Services Act 1982 and in a common law duty of care, the standard of care required of a Construction Professional is one of reasonable skill and care. As to what that standard entails, in England, the House of Lords has adopted as definitive, in the case of professionals generally, the following direction to a jury by McNair J:

> "Where you get a situation which involves the use of some special skill or competence ... the test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill ... it is sufficient if he exercises the ordinary skill of the ordinary competent man exercising that particular art."[18]

In *J.D. Williams & Co Ltd v Michael Hyde & Associates Ltd*,[19] Ward LJ said that, as a statement of the required standard of professional care, he could do no better than repeat Bingham LJ's judgment in *Eckersley v Binney & Partners*, where he said as follows[20]:

> "From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skills. He should be alert to the hazards and risks inherent in any profession or task he undertakes to the extent that other ordinarily competent members of his profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent professional would bring, but need bring no more. The standard is that of the reasonably average. The law does not require of a professional man that he be a paragon, combining the qualities of polymath and prophet."

Of Architects as such it has been said in Canada:

> "As architect, he is in the same position as any other professional or skilled person, and whether it be in the preparation of plans and specifications, or the doing of any other professional work for reward, is responsible if he omits to do it with an ordinary and reasonable degree of care and skill."[21]

In considering the quotations from the above cases, the language used should not be misunderstood as justifying a lower ("ordinary") standard of professional skill in cases where a Construction Professional happens, whether by diligence or mere accident, actually to possess greater knowledge than an ordinary similarly situated professional. Thus a Construction Professional may have had reason to study the geology of a particular area or of a particular site due to difficulties on another occasion, or have accidentally obtained specific information not normally available to such a professional. In such a case there will be liability if the knowledge so obtained is not used with care.

> "[Counsel submitted] that it is the duty of a professional man to exercise reasonable care in the light of his actual knowledge, and that the question whether he exercise reasonable care cannot be answered by reference to a lesser degree of knowledge than he had, on the grounds that the ordinarily competent practitioner would only have had that lesser degree of knowledge. I accept [that] submission; but I do not regard it as a gloss upon the test of negligence as applied to a professional man. As it seems to me, that test is only to be applied where the professional man causes damage because he lacks some knowledge or awareness. The test establishes the degree of knowledge or awareness which he ought to have in that context. Where, however, a professional man has knowledge, and acts or fails to act in a way which, having that knowledge, he ought reasonably to foresee would cause damage, then, if the other aspects of duty are present, he would be liable in negligence..."[22]

2-012 However, in that same case, Webster J rejected what might be thought to be a related submission, namely that the standard to be applied was not that of the "ordinary skilled man exercising and professing to have that special skill" if the client deliberately obtained and paid for someone with especially high skills. He referred to a passage from the judgment of Megarry J in *Duchess of Argyll v Beuselinck*,[23] where the question was considered but not determined (in the context of the employment of a solicitor of "high standard and great experience"), and held that he was constrained by the clear words of the test as expressed in *Bolam* (and quoted above).[24] In the passage cited by Webster J, Megarry J drew a distinction between the point which he was considering and the situation where the professional was a specialist within a particular field. That distinction was accepted by HH Judge Bowsher QC in *Gloucestershire Health Authority v MA Torpy & Partners Ltd*.[25] There he rejected a submission by the claimant that the defendant consultants should be treated as specialists in incineration and waste handling technology, holding instead that the relevant standard was the degree of skill and care ordinarily exercised by reasonably competent general practitioner mechanical and engineering building service consulting Engineers acting within their claimed

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15 [2011] EWCA Civ 9; [2011] B.L.R. 206.

16 [1991] A.C. 391.

17 Notably the leading case on the duty of surveyors to home purchasers of modest means *Smith v Eric Bush* [1990] 1 A.C. 831.

18 Per McNair J in *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582, HL, 586; cited by the Privy Council in *Chin Keow v Government of Malaysia* [1967] 1 W.L.R. 813, 816; and by Lord Edmund-Davies in the House of Lords in *Whitehouse v Jordan* [1981] 1 W.L.R. 246, 258.

19 [2001] B.L.R. 99.

20 (1988) 18 Con. L.R. 1, 80; Bingham LJ dissented on the facts in that case.

21 Per Osier JA in *Badgley v Dickson* (1886) 13 A.R. 494, 500.

22 Per Webster J in *Wimpey Construction UK Ltd v Poole* [1984] 2 Lloyd's Rep. 499, 507; 27 B.L.R. 58, 78.

23 [1972] 2 Lloyd's Rep. 172, 183–184.

24 [1957] 1 W.L.R. 582.

25 (1997) 55 Con. L.R. 124.

sphere of competence. The judge appears to have proceeded on the basis that, had they been specialists in incineration and waste handling technology, the standard of care to be expected of them would be different from that to be expected of a general practitioner.

It should also be remembered that, in areas of skill such as construction (to a greater extent than in law or accountancy, for example), a degree of experiment and innovation is clearly not only acceptable but to be encouraged if technical progress is not to be stultified:

> "if you employ an architect about a novel thing, about which he has had little experience, if it has not had the test of experience, failure may be consistent with skill. The history of all great improvements shows failure of those who embark in them."[26]

A similar sentiment was expressed by HH Judge Newey QC in *Victoria University of Manchester v Hugh Wilson & Lewis Womersley*,[27] although he coupled it with the suggestion that Architects who are venturing into the untried or little tried would be wise to warn their clients specifically of what they are doing and to obtain their express approval.

2-013 On the other hand, professionals must keep reasonable pace with new developments in their field.[28]

Another important part of McNair J's direction to the jury in the *Bolam* case was as follows[29]:

> "Counsel for the plaintiff put it in this way, that in the case of a medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent…
>
> A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art … Putting it the other way around, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view."

The application of this test (referred to hereinafter as the "responsible body test", to distinguish it from the other part of the direction given to the jury in *Bolam*) to a professional negligence claim against Architects was approved by the Court of Appeal in *Nye Saunders and Partners v Bristow*.[30]

2-014 However, there are circumstances in which it has been held that the responsible body test in *Bolam* will not be appropriate. In *Gold v Haringey Health Authority*[31] (a medical negligence case), LLoyd LJ said obiter that he could see an argument that the responsible body test in *Bolam* should not apply where the giving of particular advice required no special skill. This dictum was alighted on by Ward LJ in the following case.

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[26] *Turner v Garland & Christopher* (1853) A. Hudson, *Building and Engineering Contracts*, 4th edn (London: Sweet & Maxwell, 1914), Vol.2, p.1, per Erie J.

[27] (1984) 2 Con. L.R. 43, 74.

[28] See, e.g. the passage from Bingham LJ's judgment in *Eckersley v Binney & Partners* (1988) 18 Con. L.R. 1, 80, quoted above.

[29] [1957] 2 All E.R. 118, 121.

[30] (1987) 37 B.L.R. 92, CA, 103 per Stephen Brown LJ (with whom Neill and Gibson LJJ agreed). Whether it was actually applied in that case is a different matter: see Sedley LJ's suggestion in *JD Williams & Co Ltd v Michael Hyde & Associates Ltd* [2001] B.L.R. 99, 111, col.2 that it was not.

[31] [1988] 1 Q.B. 481.

ILLUSTRATION

The claimant Employer wished to carry out conversion works on buildings for use as bulk storage warehouses for clothing. It engaged the defendant Architect to provide all architectural services necessary for the project. A heating system was required. The provider's quotation contained a disclaimer to the effect that it would not be liable for any discoloration effect on materials resulting from the heating system. The Architects noted the disclaimer and explored it in a meeting with the provider, where they were told that the system in question had been used in similar installations elsewhere without there being a discoloration problem; the Architects repeated this to the Employer and checked that this was in line with what the claimant had been told by the provider. The system was installed and caused discoloration of the Employer's clothing. The trial judge heard evidence from two architectural experts. The Employer's expert's evidence was that the Architects ought to have enquired further; the Architects' expert evidence was that the Architects had done enough by drawing the disclaimer to the Employer's attention. The trial judge held that he was not prohibited from deciding whether the Architects had been negligent or not, notwithstanding the fact that the two experts had given evidence that they would have approached the matter in question in a different way. He reached that conclusion because he held that the issue whether the Architects had been negligent did not of itself require any particular expertise (in the field of architectural practice). Held, by Ward LJ (with whom Nourse LJ agreed), quoting the dictum of Lloyd LJ in *Gold v Haringey Health Authority*, that the judge was entitled to conclude that the exercise of judgment involved in deciding whether further investigation of the risk of discoloration was required or not did not of itself require any special architectural skills. Sedley LJ (with whom Nourse LJ also agreed) approached the matter slightly differently. He held that there were two applications of a single principle (that professional negligence meant falling below a proper standard of competence): one application involved the responsible body test in *Bolam*; the other involved the court arriving (commonly with the help of evidence from the particular profession) at its own judgment of what the standard was (a "single forensically determined standard"). He declined to draw a bright line between the two applications but suggested that the responsible body test in *Bolam* was typically appropriate where the neglect was said to lie in a conscious choice of available courses made by a trained professional, and typically inappropriate where the neglect was said to lie in an oversight: *JD Williams & Co Ltd v Michael Hyde & Associates Ltd* (2001).[32]

Sedley LJ applied his reasoning on this last issue in the subsequent case of *Adams v Rhymney Valley DC*.[33] He thought that the responsible body test in *Bolam* should not apply where, on the facts, the defendant had not purported to exercise the relevant skill (in that case of design) and thus had not deliberated which course of action to take (where there were available two non-negligent courses of action). It was therefore his view that the defendant in that case, who had not so deliberated, had been negligent (the negligence lying, at least in part, in the very fact that it had not undertaken that deliberation), even though it had adopted a course of action which a reasonable (or responsible) body of practitioners in that field would have adopted. This approach was rejected by the majority in that case. Sir Christopher Staughton said as follows[34]:

> "The key question is whether the *Bolam* test still applies, although the particular defendant did not, in fact, have the qualifications of a professional in the relevant field of activity, and although he did not go through the process of reasoning that a qualified professional would consider before making a choice. I know of no authority that the benefit of the *Bolam* test should be refused in either of those cases. Nor do I think that it should be refused … Nor can it be a requirement of the *Bolam* test that

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[32] [2001] B.L.R. 99.

[33] [2000] 3 E.G.L.R. 25.

[34] [2000] 3 E.G.L.R. 25, 29.

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the defendant should have considered, and reflected upon, the alternative courses available and made a conscious choice between them. Seeing that, upon the hypothesis which is inherent in the problem, a respectable body of professionals has been, and is, in favour of each course, I do not see that the defendant is required to go through the same thought process in order to deserve the support of those who favour the course that he chooses."

On analysis, it may be doubted whether the difference in approach between the majority and minority in this case actually has anything to do with the responsible body test in *Bolam*. One can test the point by thinking of a case where, once one had weighed up the various considerations and deliberated on the point, there was in fact only one non-negligent course of action (or, to put the point in a less conclusory way, one course of action which any responsible body of practitioners in the field would have adopted).[35] Suppose, however, that the professional in question had alighted on that course of action without undertaking any of the necessary weighing up or deliberation (which, let it be supposed, no ordinarily competent professional in their field would have done). On Sedley LJ's analysis, the professional would have acted negligently. On the approach of the majority, there is no liability. This is because the focus of Sedley LJ's analysis is on the thought processes leading to the decision; while the focus of the majority's analysis is on the decision itself. All that said, it is only in a case where there are two differing opinions held by responsible bodies that this difference in analysis has any practical difference. In the example just given, even though Sedley LJ's analysis would lead to the conclusion that there had been a breach of the duty of care, such breach would not have caused any loss (since, if the professional had carried out the reasoning process correctly, the chosen course of action would not have changed[36]). Where, however, there are two differing courses of action open to the professional, then on Sedley LJ's analysis, breach having been established, it becomes a question of causation to determine which of the two courses of action the professional would have adopted.

2-015 It is suggested that there is in fact no bright line between the differing approaches in *Adams v Rhymney Valley*.[37] There is some force in the observations made by the majority that an experienced professional may choose a method borne of experience rather than going afresh through the reasoning process. On the other hand, it would be odd to conclude that, to give an extreme example, a professional who chose a particular course of action based on the toss of a coin had not been negligent (even if the course of action in question was itself not negligent). *Rhymney Valley* has however been cited for precisely this proposition: if the advice is advice that could have been given by someone in the defendant's position consistently with skill and care, the defendant cannot be in breach of duty simply because of the process by which the defendant came to give the advice: "Negligence in these circumstances depends essentially upon what advice was in fact given, not upon the processes whereby it came to be given."[38]

Ward LJ's judgment in *JD Williams & Co Ltd v Michael Hyde & Associates Ltd*[39] also contains what he describes as two further qualifications to the responsible body

[35] As appears below, what follows is stated deliberately simplistically.

[36] In *Platform Funding Ltd v Anderson & Associates Ltd* [2012] EWHC 1853, the valuation was poorly carried out, although a competent valuation would still not have produced a satisfactory result, and it was held that there was no liability.

[37] [2000] 3 E.G.L.R. 25.

[38] *Camerata Property Inc v Credit Suisee Securities (Europe) Ltd* [2011] EWHC 479 (Comm), [199].

[39] [2001] B.L.R. 99.

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test in *Bolam* (although as the commentary in the B.L.R. (Building Law Reports) observes, they may perhaps be better described as instances in which the conditions for applying that test are not made out).[40] The first is taken from the judgment of Lord Browne-Wilkinson in *Bolitho v City and Hackney Health Authority*[41]:

"if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible."

The second is where the expert evidence is not evidence of a practice accepted as proper by a responsible body of professionals acting in the particular field. In this respect, Ward LJ referred to the judgment of Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp*,[42] where he distinguished between such evidence and evidence:

"which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendant"

which he thought was of "little assistance to the court".

The subject of delegation of design responsibilities to sub-contractors and specialist suppliers is not an easy one, and is dealt with below, in sub-section (2).[43] Where, however, a professional (as contemplated by some professional institutions' conditions of engagement) recommends to the client the appointment of another consultant to deal with a particular part of the work, and the client does employ such a consultant, the position is much more straightforward and has been very well stated in the English Court of Appeal by Slade LJ:

"where a particular part of the work involved in a building contract involves specialist knowledge or skill beyond that which an architect of ordinary competence may reasonably be expected to possess, the architect is at liberty to recommend to his client that a reputable independent consultant, who appears to have the relevant specialist knowledge or skill, shall be appointed by the client to perform this task. If following such a recommendation a consultant with these qualifications is appointed, the architect will normally carry no legal responsibility for the work to be done by the expert which is beyond the capability of an architect of ordinary competence; in relation to the work allotted to the expert, the architect's legal responsibility will normally be confined to directing and co-ordinating the expert's work in the whole. However, this is subject to one important qualification. If any danger or problem arises in connection with the work allotted to the expert, of which an architect of ordinary competence reasonably ought to be aware and reasonably could be expected to warn the client, despite the employment of the expert, and despite what the expert says or does about it, it is in our judgment the duty of the architect to warn the client. In such a contingency he is not entitled to rely blindly on the expert, with no mind of his own, on matters which must or should have been apparent to him."[44]

(b) Standards other than reasonable skill and care

2-016 It is, of course, possible for the Employer and the Construction Professional to contract on terms which expressly impose on the Construction Professional a duty

[40] [2001] B.L.R. 99, 101, col.1.

[41] [1998] A.C. 232, 243B–C.

[42] [1979] Ch 384, 402.

[43] See in particular the cases of *Moresk Cleaners v Hicks* [1966] 2 Lloyd's Rep. 338; *Merton LBC v Lowe* (1981) 18 B.L.R. 130, CA; and *George Hawkins v Chrysler (UK) Ltd* (1986) 38 B.L.R. 36, CA.

[44] Investors in *Industry Commercial Properties Ltd v South Bedfordshire DC* [1986] 1 All E.R. 787, 807–808.

which is more onerous than the obligation to exercise reasonable skill and care. In *Rolls-Royce Power Engineering Plc v Ricardo Consulting Engineers Ltd*,[45] HH Judge Seymour QC considered (in a preliminary issues hearing) a contract for the design of a diesel aero engine. Clause 4.1 of that contract provided, inter alia, that in the absence of a specific reference to specification, the goods and the work must be new and of first class quality. The judge held that an obligation to provide services of first class quality was conceptually different from an obligation to use reasonable skill and care in the provision of those services, and set a standard which, in theory (if not necessarily in practice[46]), was higher than merely undertaking the provision of the services with reasonable skill and care.[47]

Certain terms which do not identify the standard being imposed may also be construed as imposing an absolute obligation, such as the obligation to value the house which is in fact the one contemplated as security for the loan by the lender instructing the surveying, rather than the wrong house.[48] An express term as to time may be intended only to require reasonable skill and care to meet the date, although it may equally be an unqualified promise to meet that date, or be qualified only to the extent that the Employer caused the delay, or by reference to certain defined risk events and no others. Similarly, where a professional firm acts as agent or as fiduciary for its client, which some Construction Professionals may, duties of loyalty may arise which go beyond those of skill and care.

What is more difficult is to determine whether the Construction Professional owes any more onerous duty by reason of an implied term (rather than an express term) in the contract with the Employer. This is considered in more detail below, in the context of the Construction Professional's design duties. The discussion of the Contractor's obligations under implied terms in Ch.3 is also relevant.

(4) Measure of Damages

2-017 The general principles relating to foreseeability, remoteness and proof of damage, in contract and tort, will govern the quantum of any damages claim against a Construction Professional.

In tort, the distinction between physical damage and economic loss is critical, and operates to restrict the availability of any claim in negligence, as discussed in Ch.1. In general, Construction Professionals will be liable in tort for economic loss only to a very restricted class of persons, but nevertheless the most likely consequences of a breach of duty will normally include a liability (albeit usually a liability to persons to whom the professional owes an overlapping contractual duty) for some form of economic loss—i.e. unsatisfactory features or excess expenditure in the course of the project the professional contracted to design or whose construction the professional contracted to procure, cost, value or manage.

Such economic losses arise against a background of complex facts. Thus, for example, projects are long-term and inflexible and cannot be sold on or liquidated for cash. In most circumstances Employers cannot replace one project which has

[45] [2003] EWHC 2871 (TCC); (2003) 98 Con. L.R. 169. See also, *ConocoPhillips Petroleum Company UK Ltd v Snamprogetti Ltd* [2003] EWHC 223 (TCC), cited by HH Judge Seymour QC.

[46] He reserved the practical effects of his conclusion on the preliminary issue for consideration on another occasion.

[47] See (2003) 98 Con. L.R. 169, [84] and [85] at 213–214.

[48] As in *Platform Funding Ltd v Bank of Scotland Plc* [2009] Q.B. 426, CA, illustrated below at para.2–072.

become uneconomic with another exactly the same, as they could with a grain purchase or an item of manufactured goods. When claimants become aware of problems, they may be able to remedy them with remedial work at a convenient time, but if not, or if they cannot afford the remedial work and must sell out of the project, or the remedial work has delay or other consequences for their business, the claimants will have to take steps to mitigate their loss which change the nature of the loss. Furthermore, the factors which affect the claimants are likely to include not only the direct consequences of the defendants' breach but also a number of matters which are not the fault of the defendants at all.

2-018 In those circumstances the traditional stance of the courts is to apply two main principles to the complex facts which arise in damages claims:

(1) First, that in both contract and tort the object of the award is to place the claimants in the position they would have been but for the breach, subject to the rules of remoteness and causation.[49]

(2) Secondly, that if a claimant faced with a loss became aware of some reasonable step to reduce the loss (a step taken "in mitigation"), they had a duty to take that step if it was clearly necessary as well as an option to take it if it was reasonable. Also, (if they took the step) the cost of that reasonable step was recoverable as part of the damages, both when it successfully reduced the loss, and when (for whatever reason) it failed to do so but still could not be criticised with hindsight as so unreasonable that it broke any chain of causation between the original breach and the losses and costs involved. In relation to mitigation, the conduct of the claimant would be treated generously and would not be criticised, and the costs would be awarded, unless it could be shown to be positively unreasonable.[50]

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Thus once duty and breach were established, the exercise in most damages claims is to trace the history of the losses which occurred thereafter, by reference to the general principles of causation in law, and where the claimants have taken steps to try to mitigate the loss (as very frequently happens in claims arising out of complex projects), to investigate whether the defendants could achieve the generally onerous task of demonstrating that such steps were so unreasonable that the defendants should not bear any of the expenses or losses which occurred as a result of them. In that enquiry, the object is to compensate the claimants for the breach, and/or for any steps taken in mitigation.

These two principles are applied by the courts in both contract and tort and to cases involving both Construction Professionals and Contractors. The important questions of whether the cost of cure is recoverable, and whether the impecuniosity of the claimants is relevant, which might be characterised as particular examples of these two principles of compensation and reasonable mitigation, are discussed in Ch.7.

2-019 However, in relation to Construction Professionals it is necessary to discuss damages specifically for two reasons. First, the various functions performed by Construction Professionals give rise to slightly different types of loss, and therefore in the discussion of the various duties of Construction Professionals in the following Section 2.4, "Duties in Detail", some specific cases on damages will be referred

[49] *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25, 39; *Robinson v Harman* (1848) 1 Exch. 850, 855.

[50] *Banco de Portugal v Waterlow* [1932] A.C. 425, 506.

CHAPTER 5

PRICE AND VARIATIONS

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SECTION 5.1: PRICE

(a) Classification of types of building contracts for the purposes of payment

5-001 Building contracts, of whatever degree of complexity, need to provide for the amount that the Contractor is entitled to be paid. The Contractor's remuneration under the contract will usually be identified as the Contract Price, and the principal focus of this chapter is on the principles relevant to the ascertainment of that price and the manner of payment. Building contracts are likely also to regulate the circumstances in which the Contractor becomes entitled to be paid, the intervals at which payment will be made, in an international contract—the currency of the payment, and what deductions from the Contract Price may be allowable. Where the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) applies, aspects of the Contractor's entitlement to be paid will also be regulated by statute. The application of the Act to payment and other aspects relating to a Contractor's entitlement to be paid are dealt with elsewhere in this work.

For the purposes of this chapter, construction contracts can be divided into the following:

(1) lump sum fixed price contracts;
(2) measure and value contracts;
(3) cost reimbursable contracts; and
(4) contracts where no price is stipulated.

In order to understand the significance of the difference between these types of contract, some historical perspective is necessary. Moreover, the classifications are not mutually exclusive. So, for example, a lump sum contract may contain provision for the valuation of extra works against remeasurement, or at a reasonable price, depending on the valuation rules.

(b) Lump sum contracts

5-002 Traditionally the first method of contracting was the most prevalent. In these lump sum contracts the role of a bill of quantities, if prepared, was as a guide to

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tendering Contractors to assist them in arriving at their lump sum tenders from the Employer's design drawings. This placed the risk of inaccuracy in the bills on the Contractor, and was obviously inefficient, since a number of tendering Contractors had to duplicate the effort of providing bills of quantities. The practice therefore grew up of the Employer employing a Quantity Surveyor to prepare a bill of quantities for tendering purposes. A question which gave rise to difficulty, illustrated in the cases below, is whether a variation in the quantity of work which was required to be carried out when compared with the quantity summation in the bills, gave the Contractor an entitlement to be paid additionally, or an entitlement to the Employer to adjust the prices so as to reflect the actual quantities employed in the completion of the works. The answer given by the court depended on whether the bill was incorporated as a contract document, as the cases below illustrate.

There are two concepts which are often referred to which reflect the difference in treatment of price between a lump sum contract, where the Contractor undertakes to carry out defined work for a fixed lump sum, and contracts where the contract price is arrived at by remeasurement either during or at the end of the project, to establish the price for the work in fact undertaken.

(1) Building contracts are entire in the sense that completion of the work or defined parts of the work is a condition of the Contractor's entitlement to be paid.
(2) The contract price is inclusive of all works incidentally necessary to achieve completion of the works.

The consequences of a contract being entire, in the sense explained above, are potentially severe for the Contractor. In *Appleby v Myers*[1] the work was destroyed by fire before any sections of work had been completed, and the Contractor was entitled to be paid nothing since he had completed no part of the contracted work.[2] The potential severity of the doctrine of entire contracts is mitigated in a number of ways,[3] the most important of which are, first, that the courts would only require substantial performance of the work before the entitlement to be paid the contract price arose.[4] Secondly, most construction contracts make provision expressly for interim or stage payments as the work proceeds. If there is no express provision for payment of instalments of the contract price, the courts may be prepared to imply them in a contract of any substance.

5-003

The second concept was referred to in previous editions as the "inclusive price principle" and that terminology will be retained in this chapter. Since the lump sum price will cover the work as described, all work necessary to complete the work is described in the contract documents.[5] However, the principle derived from nineteenth century contracting practices has limited application to modern standard

[1] (1867) L.R. 2 C.P. 651.
[2] The result in *Appleby v Myers* would now be differently decided as a result of the Law Reform (Frustrated Contracts) Act 1943, but the principle that entire completion is a pre-condition to payment remains unaffected.
[3] Discussed above in Ch.3.
[4] *Hoenig v Isaacs* [1952] 2 All E.R. 176. Substantial completion connotes a degree of completion less exacting than practical completion and the court is likely to be influenced by the ability of the Employer to make use of the work contracted for—e.g. *Bolton v Mahadeva* [1972] 1 W.L.R. 1009. There is also a distinction between work that is incomplete and work which is complete but defective. In the latter case the courts are more likely to conclude that substantial completion has been achieved as the building Owner has their remedy in damages, see Ch.7, below.
[5] An extreme example of the principle is provided by the facts of *Sharpe v San Paulo Railway* (1873)

terms, which make elaborate provision for the identification and valuation of varied and extra work, as discussed below.

Another broad classification of construction contracts is to divide them between those where the extent and design of the work is not sufficiently known at the time of the contract (where, in the absence of a cost-reimbursable approach, some form of "measure and value" or "schedule" contract, employing either a schedule of rates or a relatively primitive or approximate bill of quantities, is likely to be used) or, on the other hand, those contracts where the work is sufficiently pre-planned at the time of contracting to enable either a lump sum contract, or a modern English-style measured contract with fully detailed bills of quantities or schedules of rates, to be used.

Both types of contract in this latter category are, however, "lump sum" contracts in the strict legal sense for the purpose of the rules as to entire and substantial performance; that is, they are contracts to carry out and complete defined work for a price ascertained or to be ascertained. Both types will be subject to the "inclusive price principle", which requires prices to be inclusive of any undescribed work necessary to bring the described work to satisfactory completion, in the absence of provision to the contrary.

5-004

This chapter will also discuss the various adjustments to the contract price commonly required by construction contracts. These will include variation in the nature or scope of the work; fluctuations ("rise and fall" or "variation of price") clauses; "changed conditions" or "Clause 12" clauses; the increasingly complicated provisions in the English standard forms with regard to withholding of retention; and other matters directly affecting price, such as contra items and bonus and deduction provisions. Clauses regulating Contractors' claims for loss and expense or increased cost are addressed in Ch.6.

For lump sum fixed price contracts, it is therefore important to understand the significance of the bill of quantities in the ascertainment of the contract price. A bill of quantities or schedule of rates may be included in the contract solely for the purposes of establishing the valuation of varied work, whether by omission or addition to the contractual scope of work. Alternatively, the scope of some part of the work may be defined by the quantities in the bill, so that the final contract value can only be finally calculated after the work has been undertaken and remeasured. The status of the estimate of quantities contained in the bill and the method by which the bill has been prepared and the costings of work described (as provided by the various standard methods of measurement) therefore assume considerable importance in any discussion of the amount to which the Contractor is entitled. Further, the incorporation of a description of works prepared according to one of the various standard methods assumes importance when considering the inclusive price principle. In a simple lump sum contract, the contract price will be taken to include all work incidentally necessary to achieve the contractual object, however difficult and costly that might prove to be.[6] Whilst the inclusive price principle still has application in lump sum contracts where the work is only generally defined or where the Contractor is responsible for design—as generally with temporary work—the rigour of the application of the rule is much attenuated where bills of

L.R. 8 Ch. App. 597.
[6] e.g. *Tharsis Sulphur & Copper Co v M'Elroy & Sons* (1878) 3 App. Cas. 1040; *Bottoms v York Corp* (1892) A. Hudson, *Building and Engineering Contracts*, 4th edn (London: Sweet & Maxwell, 1914), Vol.2, p.208; and *Thorn v London CC* (1876) 1 App. Cas. 120.

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quantities are used, particularly if the description of the item in the bills is contractually required to be prepared in accordance with the relevant standard method of measurement.

Lump sum fixed price contracts make provision for the adjustment of the contract price in defined circumstances. Principally, these are varied work, fluctuations and claims for direct loss and expense. The rates in the bill of quantities or schedule of rates, if incorporated and to the extent applicable, will be used to value the varied work. The adjustments to the contract price for these items will then be added to or deducted from the contract sum.

5-005 Remeasurement contracts, of which the most prominent examples are the current editions of the ICE Conditions of Contract and FIDIC Conditions of Contract, also make provision for variations to be valued in accordance with the valuation rules to be applied. However, there is a distinction between an adjustment to the rate to reflect varied work and the adjustment allowed[7] to result in an increase or decrease in quantities above the given percentage.

In 2005 the Joint Contracts Tribunal Limited (JCT) re-launched its entire suite of contracts, which were further revised in 2011 and included the JCT Standard Building Contract with Quantities (known as SBC/Q). Payment is dealt with at s.4 of the JCT Contract, which provides that adjustments should only be made in accordance with the relevant conditions of contract relating to payment.[8] Any error, whether of arithmetic or otherwise, of the computation of the contract sum should be deemed to have been accepted by the parties. This form is a hybrid, part lump sum and part remeasurable. The extent to which the bills of quantities are remeasurable is provided by the valuation rules to be found in the variation section of SBC/Q—s.5. If there are approximate quantities in the contract bills (or the Employer's requirements if a JCT Contract with design) then the quantities are remeasurable under the valuation rules in Cl.5.6.1, where the approximate quantities are not a reasonably accurate forecast of the quantity of work required. The rate will then be adjustable to make fair allowance for the difference in quantity.[9] Under this form of contract the bills are treated as though they have been prepared in accordance with the standard method of measurement unless the bills provide otherwise. As with the previous forms of contract, any error of description or other error in the bills will not "vitiate" the contract but will be treated as a departure, which is to be valued in accordance with the valuation rules for variations.

Under ICE (7th edn) a distinction is drawn in Cl.51 between variations to the works, which are required to be ordered by the Engineer in writing, and changes in the quantities, which are simply valued on remeasurement.[10]

5-006 This tension between the inclusivity of the price inherent in a lump sum contract and the use of bills of quantity to define the payment to which the Contractor is entitled has given rise to difficulty, as explained below. Where the scope of work is not fully defined at the time that the contract is entered into, this difficulty is exacerbated. Further, application of the principle of inclusivity made it difficult to

7 For example by Cl.52.2 of the FIDIC Conditions, and see below for further discussion of this difference.
8 Cl.4.2.
9 Cl.5.6.1.5.
10 Cl.51(5) provides expressly that the Engineer is not required to issue any instruction in relation to changes in quantities. There is no provision for amending a rate which is incorrect on remeasurement unless the work has been varied or Cl.56(2) applied so that the rate has ceased to apply: *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2000] B.L.R. 247.

assess the extent to which the risk of an incomplete design had been transferred to the Contractor, and increased the uncertainties inherent in the contract price. As explained below, and in the previous editor's article "How Much Measurement",[11] the residual risk that the Contractor bears, even under a remeasurement contract, led to an adversarial culture between Contractor and Employer, which gave impetus to the evolution of different contractual models, and culminated in the New Engineering Contract (NEC) suite of contracts. Before the NEC Forms were produced, there had been a movement towards design and build contracting which allowed an incomplete design to be handed over to the Contractor for development after the contract had been concluded. This transfer was often accompanied by a novation of the consultants' contracts of engagement from the Employer to the Contractor.[12] Additional payments for variations only arose if the Employer varied the requirements (the Employer's Requirements) rather than the more wide-ranging circumstances envisaged by the JCT Standard Form Contract and ICE/FIDIC Standard Form Contracts. Major Contractors also promoted the virtues of Contractor involvement in the management of the contract works through various forms of management contracts, which allowed for the Contractor's expertise to be applied to limiting the overall cost of the project. Whilst the FIDIC Standard Form Contract remains the template for international contracting,[13] the NEC Form is currently the form of choice for major procurement contracts in the UK. Where the reimbursable method is used for arriving at the contract price, the Contractor's principal risk areas are represented by:

(1) target cost and bonus (pain share/gain share) if used;
(2) the disallowance of elements of cost which are "improperly" incurred; and
(3) where used, liquidated damages for late completion.

Whether a lump sum contract is an entire contract will depend both on the nature of the work undertaken and the provisions for stage payments. If the Contractor's performance is divided into distinct parts of work then the court may conclude that payment is due on completion of that part rather than the entire work. This applies also to the case where professional services are provided. In *Smales v Lea*[14] the Court of Appeal observed that it was relatively unusual in modern construction contracts and contracts of retainer for professional services for entire performance to be a pre-condition of receiving payment; in that case it was held that the professional services and the obligation to perform them were divisible in the sense explained above. That this is not always the case where a party contracts to produce a result, is exemplified by *P.C. Harrington Contractors Ltd v Systech International Limited*[15] when the Court of Appeal held that the bargained for performance was an enforceable decision and since the decision published by the adjudicator was not enforceable there was no entitlement to any payment.[16] The decision was based on a failure to complete all of his obligations.[17] It is also suggested that the decision is based on the fact that the adjudicator's obligation was entire, despite the fact that there was provision for interim payment under the Scheme for Construction

11 (1987) 3 Const. L.J. 3.
12 See Ch.7, below.
13 Necessarily where the finance is provided by the World Bank.
14 [2011] EWCA Civ 1325, [43]
15 [2012] EWCA 1371 [29] [40]; [2013] B.L.R. 1.
16 [32] per Dyson MR; [45] per Davis LJ.
17 [2013] BLR 1. Illustrated in Ch.11 below.

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Contracts, rather than a total failure of consideration. Indeed Davis LJ accepted that the position would be the same and the adjudicator would be entitled to no fee, if he died or was incapacitated before giving his decision.[18]

(c) Measurement contracts

5-007 Contracts where the ultimate price is to be determined by the "as built" quantities of work finally carried out, and which are to be priced in accordance with a list or schedule or bill or agreed prices for different items or units of work (that is, measured contracts) have in modern times developed degrees of progressive sophistication in the building industry, permitting a steady increase in potential areas of claim for additional payment on remeasurement.

By contrast, it was always clear that many civil engineering projects contained substantial elements where the extent, location or quantities of at least some parts of the work must inevitably be provisional and unavoidably not capable of precise calculation at the time of contract, although the work processes might be relatively few in number and likely to be repetitive in character. Since early times, therefore, it was found to be commercially convenient to price certain types of civil engineering contract on a "measure and value" basis, as it was first called in nineteenth-century judgments. In particular, road, railway, earth-moving, drainage or pipe-laying contracts all fell into this category. Measured contracts were, however, rarely if ever used for building projects, because of their much greater complication of detail and, if normally pre-planned, their much lesser degree of uncertainty as to quantities, which would usually be limited to the relatively small proportion by value of "civil engineering" excavation and foundation work below ground level.

Typical lists or "schedules" or "schedules of rates and prices" in these civil engineering contracts often very sensibly employed relatively simplistic pricing units, quite often of a large and composite character, even though there might be a very detailed contract specification (as, for example, large composite lineal rates for closely-specified road or rail works). Simpler examples of these contracts might not have a "preliminary" or "preliminaries" section in the schedule or bills, so that, if these were not present, any relevant "site overheads" would, on the inclusive price principle, be regarded as included in whatever unit prices for construction were to be found in the schedules. On the other hand, the contracts might be more sophisticated, with more numerous sub-divisions of prices and units of construction work and a separate "preliminaries" section. These more sophisticated measurement contracts might or might not go one step further, and proceed to calculate estimates of the likely final quantities which would be inserted opposite the construction items. Again, these might or might not be carried across and grossed-up into priced totals, as in the case of a full modern bills of quantities contract. But in all cases, the essential contract intention would be one of "measure and value" of the final "as built" quantities at the quoted prices (independently of any separate valuation of any variations which might be ordered) as the ultimate determinant of the final contract price, although this was often not clearly or explicitly expressed, and might require interpretation of the contract as a whole. In such a contract, it may not be determinative that the "price list" document is nominally described as a "schedule of rates" or as a "bill of quantities", or that the

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[18] Consistently with *Cutter v Powell* (1795) 6 TR 320.

contract describes itself by reference to one or other of those terms.[19] Thus some self-styled "lump sum" contracts may show an intention for a partial remeasurement of some items of work,[20] or even of the work as a whole.[21] It is the intention to be derived from the contract as a whole rather than the precise terminology which will be paramount.

5-008 The most sophisticated category of measurement contract is the modern English type, incorporating bills of quantities priced and grossed-up to a total contract sum in association with an incorporated standard method of measurement. The incorporation and contractual application of both these documents has now come to be expressed in terms which are effectively unique in England (or to those Commonwealth countries such as Hong Kong, Malaysia or Singapore, where the English terminology has been relatively closely followed, no doubt partly by reason of their association with the English quantity surveying and other professional institutions). This type of contract finally emerged between the First and Second World Wars in the English building industry and not, as might have been supposed, in the civil engineering industry.

While the legal effect (re-calculation of the final price on the basis of the "as built" quantities) is basically identical in all schedule or measurement contracts, it may be noted that the practical background which explained the earlier use of measurement contracts in civil engineering cases is almost entirely absent in the building industry, since English measurement contracts are now advocated for use in building cases where the precise extent of the work is known in advance and detailed drawings and specifications of the work to be done form part of the contract, so that truly provisional work will only be necessary either because of inadequate pre-planning or in excavation for foundations (there are in any case other well-known techniques for dealing with genuinely provisional work). This is so because the great majority of building work by value is in the superstructure of the building, which involves no inherent or contingent elements of uncertainty or unpredictability as to quantities, such as may be unavoidably involved in civil engineering work (where, for example, the true but as yet unascertained levels of ground surfaces may affect the final excavation quantities, or the inevitably unpredictable proportion of suitable or unsuitable material arising from excavations may have a major impact on the quantities for disposal off-site, or for importation onto site, unless there is to be a quite impractical degree of pre-contract investigation expenditure). As a result, in building cases the quantities can be and are meticulously and professionally calculated and inserted into the contract on behalf of the Employer for checking by the Contractor as in the Standard Form JCT Contract that uses bills of quantity.

It should be appreciated that all measured contracts, and particularly those with bills of quantities, are in any event vulnerable to price manipulation with a view to maximisation of profit. Thus, in 1982, in a percipient judgment showing an unusual degree of understanding of the opportunities for price manipulation offered by these contracts, the Full Court of Victoria said of an Employer's "unbalanced bid" protective provision:

> "The need for some contractual provision, either requiring the builder to act reasonably in pricing

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[19] See *Arcos Industries v Electricity Commission of New South Wales* [1973] 2 N.S.W.L.R. 186.

[20] As in JCT 2005. See *Commissioner of Main Roads v Reed* (1974) 131 C.L.R. 378; and see also the Malaysian JKR (PWD) government forms.

[21] See *Sist Constructions v State Electricity Commission of Victoria* [1982] V.R. 597.

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the bill or empowering the person administering the contract to reject the rates in the price bill, arises from the notorious practice of those who tender for building and engineering contracts of marking what has been described as an unbalanced bid, that is to say, of pricing the bid in a way in which, without affecting the amount of the tender, is calculated to enure to their financial advantage. A tenderer may put down low rates of items where he believes that the 'as built' quantities are likely to be less than the billed quantities, and high rates for items where he believes the 'as built' quantities will exceed the quantities in the bill. He may also increase his rates for early work and reduce his rates for later work in order to give him a substantial cash flow at an early stage. The practice is also known as 'loading' the rates. It is referred to in many of the textbooks."[22]

For this reason some contracts contain provisions designed to enable an Employer's agent, who, in the absence of the essential assistance of a contractually compulsory make-up of the Contractor's prices, has nevertheless succeeded in detecting such "unbalanced" prices, to have them corrected. In one case in Australia, a Contractor even put forward an interpretation of such a provision to support his claim for higher prices on remeasurement.

ILLUSTRATION

Clause 1.4.1 of the specification of a contract for roads and structures in a power station stated:

"The contract shall be a Lump Sum Contract based on a Bill of Quantities with a Schedule of Rates for some additional items detailed in the Schedule."

By Cl.1.7.1, the Contractor was required to price and gross-up a bill of quantities showing the full contract price. By Cl.1.7.2 the bills were guaranteed to the extent that if the quantity of any item in the bills was varied, the difference in the contract price due to such variation was to be calculated at the price rates in the bills (which also provided that the quantities were provisional and would be adjusted before completion). By Cl.1.7.3, if the Engineer was not satisfied with the rate in respect of any item "having regard to current industry prices", he could fix a rate for such an item which was to be used for varying the contract price, and by Cl.1.7.4, if the Engineer issued a "Re-measured Bill of Quantities" the price rates in the contract bills were to be applied to "the corresponding item in the Re-measured Bill to obtain the value of the Re-measured Work". However, where the re-measured bill did not have a "corresponding item" in the contract bill, the Contractor was to submit a price applicable at the date of tender for that item for approval by the Engineer. In due course the Engineer issued his "Re-measured Bill" showing some unchanged quantities, but substantially changed quantities for excavation of unsuitable material and for some drainage items, both of which had been described and itemised in the contract bills and applied the bill prices to the "as built" quantities. The Contractor contended that where the quantities in the remeasured bill differed, to whatever extent, from those in the contract bills, there would be no "corresponding item" in the remeasured bill, and that he was accordingly entitled to put forward different higher prices for approval by the Engineer, "having regard to current prices in the industry" at the date of the remeasurement, by virtue of Cl.1.7.3. Held, by the Full Court of the Victorian Supreme Court, upholding King J, that Cl.1.7.3 was not (distinguishing expressly the Engineer's power to determine any increase or decrease in rates or prices where quantities differed in Cl.56(2) of the post-1973 English ICE conditions) a provision entitling the Contractor to claim different prices in that event, which would be contrary to Cl.1.7.2, but was one entitling the Engineer to reject the Contractor's rates when submitted in his priced bill, and arose from the notorious practice of tenderers in construction contracts to submit unbalanced bids. The difference between the "as built" quantities of the relevant items in the remeasured bill and those identically described, although with different quantities, in

[22] Per Brooking J's judgment in *Sist Constructions v State Electricity Commission of Victoria* [1982] V.R. 597, 606.

the contract bill did not prevent them from being "corresponding items" for the purpose of applying the quoted bill prices in the remeasured bill: *Sist Constructions v State Commission on Electricity* (1982).[23]

5-009 The above case is, as it happens, an excellent example of a self-styled "lump sum" terminology being used for what was, in all essential respects, a full measured contract. The wording of the *Sist* Contract also serves to emphasise that there is no difference in law between the "measurement" and "remeasurement" expressions. Some Quantity Surveyors in England, having in mind that in practice they will not usually have any reason to remeasure (that is, re-calculate) the final "as built" quantities (at least in regard to the majority of items where the quantities are capable of precise "taking off" from the drawings) unless a variation has been ordered, appear to think that what they call a "full remeasurement" (usually carried out because the variations have been so numerous that it is more convenient to start new measurement de novo from the final construction drawings rather than apply the variation adjustments to the quantities taken from the original contract drawings) has some special legal consequence or significance. This is not so, since the essence of a measured contract is that either side can in the last resort require remeasurement wherever they suspect that an adjustment of the contract sum in their favour is likely to result from an inaccuracy, however small, in the estimated quantities.

Where the preliminary items are priced in the rates, then any adjustment to the quantities will automatically include an element for preliminaries. Where, as commonly happens, the preliminaries are priced as lump sums, there may be a question as to the extent to which it would be appropriate to vary those preliminary items as a consequence of any adjustment to quantities or varied work. This will naturally depend on whether the preliminaries are time-related (such as insurances) or volume-related (such as fuel or other consumables) and generally, it is suggested, there is no provision in the ICE/FIDIC Contract for adjusting fixed element and preliminary costs as a consequence only of an increase or decrease in the quantity of work to be executed.

The historical evolution of bills of quantities in the English building industry has already been shortly stated in this book in the context of the duties of Quantity Surveyors. At first, the successful tenderer paid for the preparation of the bills, and it later became the practice to add an item at the end of the bills providing for the Quantity Surveyor's fee for their preparation, so that the payment was effectively made by the Employer to the builder for onward transmission to the Quantity Surveyor (with resulting problems on the insolvency of the builder). Eventually, Employers began to employ Quantity Surveyors directly to prepare the bills, but the documents remained a guide only, and there was no warranty as to their accuracy by the Employer. The arrangement had, of course, the effect of reducing the immediate cost of tendering to the Contractors as a whole by avoiding duplication of the task of "taking off" quantities from the drawings, thereby reducing the cost to a Contractor of an abortive tender.

5-010 While bills fulfilled this function, the Contractor took the risk of them being inaccurate, and the fact that the Contractor might have to carry out greater quantities of work than those billed in order to complete the Contract would not entitle it to make any claim against the Employer. Very often the bills in these earlier contracts

[23] [1982] V.R. 597.

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were not mentioned at all in the contract conditions or, if they were, only in terms which were construed as denying them any legal effect. In such cases the courts frequently referred to the bills as "not forming part of the contract".

Later, however, contracts did begin to refer to the bills, although still only in terms which showed that the rates and prices in the bills were to be used for valuing variations. Finally, the intention to remeasure, whether variations were ordered or not, began to emerge from a background of obscure draftsmanship and terminology. Thus, the courts might describe the bills as "forming part" of the contract, or the contract as being "for measure and value", and occasionally as "schedule of rates" contracts to distinguish them from "lump sum" contracts. At the present day, of course, the usual understanding of a contract which incorporates full bills of quantities is likely to be that, in the absence of indications to the contrary, remeasurement is intended. As will be seen, the courts were (perhaps not unsurprisingly in view of the unsuitability for remeasurement of a normally pre-planned building project), very slow and uncertain in recognising the remeasurement intention, even in some of the engineering cases.[24]

ILLUSTRATIONS

(1) The plaintiff, a builder, signed a tender to build a house for the defendant according to a specification and plans for £1,985, the tender being based on quantities calculated by the defendant's Surveyor. The plaintiff completed the work and claimed the sum of £1,985 "as per contract", and also claimed a further sum of £142 for work or materials in excess of the quantities calculated by the defendant's Surveyor. Held, by Hill J, that the plaintiff had adopted the contract and claimed payment under it, and could not therefore at the same time ignore it and recover the further sum of £142: *Coker v Young* (1860).[25]

(2) A builder contracted to build a church for £1,988. Owing to errors in the plans and bills of quantities, the work cost him £3,600, including extras, which, however, had not been ordered in writing as provided by the contract. In an action for the extra cost of the work, the builder contended that the errors in the quantities and plans amounted to a fraud on him. Held, by Blackburn J, that since there was no evidence of fraud to go to the jury or of waiver of the condition that extras should be ordered in writing, the claim must fail: *Sherren v Harrison* (1860).[26]

(3) The plaintiff, the defendant, and one P, an Architect, entered into a contract whereby the plaintiff agreed to build a house for the defendant in accordance with drawings, a specification and conditions of contract, to the satisfaction of P, in consideration of the sum of £440. P agreed to inspect and superintend the works, to furnish detail drawings and to certify the payment of advances and completion of the work. P had prepared quantities which did not form part of the contract but which he supplied to the plaintiff and which he assured the plaintiff were correct. The plaintiff paid P for the quantities and included the sum paid in his tender. The quantities proved to be inaccurate and in the event had to be exceeded. The plaintiff sued for goods sold and delivered, work done and materials supplied, and for damages for breach of a guarantee that the quantities were accurate. Held, by the Court of Exchequer Chamber, that there was no evidence that P had authority to contract or that any guarantee was given by the defendant, and the plaintiff could not recover: *Scrivener v Pask* (1866).[27]

(4) The plaintiff tendered to the defendant to build a mansion shown on rough drawings for £13,690. The defendant's Architect had orally given rough quantities to the plaintiff. Subsequently a specification and working drawings were prepared and the plaintiff incautiously agreed to complete the mansion house in accordance with the specification and working drawings for the same sum of £13,690. The quantities of work described in the specification and shown on these working drawings were considerably in excess of those in the Architect's rough drawings and rough quantities. The contract contained a power enabling the Architect to order alterations or omissions and provided that if any difference of cost should be caused by such alterations, a formal order signed by the Architect should be sent to the plaintiff and that the plaintiff should not claim any extra except on these conditions. The Architect had agreed with the defendant that the total cost of the mansion should not exceed £15,000, but the plaintiff did not know this. Extra works were done under the direction of the Architect, and the cost of the works exceeded £15,000. The Architect refused to certify extra for the work done in excess of the quantities given by him or for the extra work ordered by him. Held, by Lord Romilly MR, that the plaintiff was bound by the contract he had entered into and could only recover extra for the extra work ordered and not for the excess due to the inadequate quantities: *Kimberley v Dick* (1871).[28]

(5) J contracted to construct a railway for a lump sum. On the profile plan it was stated that the best information in possession of the Engineer would be found in the schedules "but contractors must understand that these quantities are not guaranteed", and in the "bill of works" it was stated:

> "the quantities herein given as ascertained from the best data obtained are, as far as is known, approximately accurate, but at the same time they are not warranted as accurate and no claim of any kind will be allowed, though they may prove inaccurate."

Held, by the Supreme Court of Canada, that there was no guarantee, express or implied, as to the quantities, nor any misrepresentation respecting them: *Jones v The Queen* (1877).[29]

(6) A builder, by an offer appended to a schedule, offered to do the mason's work of a proposed tenement "agreeably to plans thereof now shown, and to the extent of this schedule, for the sum of £286 10s. 8;d". The schedule gave the estimated quantities of work required, and the builder inserted the rate at which he proposed to do each item. There was a stipulation that the work was to "be measured when finished, and charged at schedule rates". In calculating the price the builder had made an under-calculation of £30. Held, by the Court of Session, that the contract was on a schedule of rates, and not a contract for a lump sum, and that the builder was entitled to be paid for the work as measured and at his rates: *Jamieson v McInnes* (1887).[30]

(7) An estimate for the delivery, fixing and cleaning down of stone-work for "the lump sum of £3,096" contained the words:

> "The bill of quantities to form part of the contract, and all variations to be priced at the rates stated in the bill, and added to or deducted from the lump sum, as the case may be."

There were differences from the quantities in the bill, and the Employer contended that he was entitled to measure up the whole of the work and adjust the contract sum. Held, by the Queen's Bench Divisional Court that while measure and value contracts were well-known, there were no words requiring this, and it would give no effect to the lump sum wording if more than the variations was remeasured: *London Steam Stone Saw Mills v Lorden* (1900).[31]

(8) At the request of the Employer, his Architect prepared plans and a bill of quantities and invited tenders on them. A contract was entered into by which the builders agreed to execute "the whole of the works required in accordance with the plans and specifica-

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[24] In addition to the cases illustrated, see *Nuttall and the Lynton and Barnstaple Railway Co, Re*, (1899) 82 L.T. 17, A. Hudson, *Building and Engineering Contracts*, 4th edn (London: Sweet & Maxwell, 1914), Vol.2, p.279.

[25] (1860) 2 F. & F. 98.

[26] (1860) A. Hudson, *Building and Engineering Contracts*, 4th edn (London: Sweet & Maxwell, 1914), Vol.2, p.5.

[27] (1866) L.R. 1 C.P. 715.

[28] [1871] L.R. 13 Eq. 1.

[29] [1877] 7 Can. S.C.Rep. 570.

[30] [1887] 15 R. (Ct. of Sess.) 17.

[31] (1900) A. Hudson, *Building and Engineering Contracts*, 4th edn (London: Sweet & Maxwell, 1914), Vol.2, p.301, DC. See per Lord Alverstone LCJ, 304.

tion for the erection of the new works" for a lump sum. The specification was, in fact, a bill of quantities with rather fuller descriptions than usual. The quantities turned out to be incorrect and less than they should have been. There was some evidence of a custom in the building trade that a builder was entitled to rely on the bill of quantities on which he tendered. Held, by the Court of Appeal, that the quantities in the margin of the specification were merely an estimate and no part of the contract at all. They did not amount to a warranty by the Employer and, therefore, the builders were not entitled to anything beyond the lump sum agreed. Held, also, that the custom contradicted the contract and could not be maintained: *Ford & Co and Bemrose & Sons, Re* (1902).[32]

(9) A Contractor undertook to complete certain works for a sum of £17,000 "according to the plans, invitation to tender, specification and bills of quantities". Other clauses provided that the Contractors should supply everything requisite for the execution of the works included in the contract according to the true intent of the drawings, specification and quantities, whether or not particularly described in the specification and shown on the drawings, and for measurement of alterations and additions and valuation of them according to the prices on the bills. There was no express provision for measurement of the works as a whole. Held, by Channell J, that if the quantities in the bills were less than those required by the drawings, the Contractor was entitled to be paid an appropriate addition to the contract sum, since the quantities were introduced with the contract as a part of the description of the contract work, and if the Contractor was required to do more, it was an extra: *Patman and Fotheringham Ltd v Pilditch* (1904).[33]

The case of *Patman and Fotheringham Ltd v Pilditch*, illustrated above, represented a final recognition by the courts that, even where the language used might not be entirely clear, the parties' contractual intention might be that the bill of quantities was a contractual document which should be used for the purpose of re-calculation of the entire contract price as well as for valuing variations. It should be appreciated that if bills which have been incorporated into a contract are only intended for the valuation of such variations as may be ordered, there is strictly no need for any quantities to be inserted into the bills at all—merely a sufficient number of rates or prices for the particular work processes likely to be involved in any varied work called for, although it can be retorted, on the other hand, that the (grossed-up) quantities were also fulfilling their original function as a guide to tenderers in arriving at their lump sum bids. Channell J was clearly influenced in his judgment in the *Patman* case by the fact that, as the bills were clearly identified and referred to in and for the purposes of the variations clause of the contract, there was no need to have the further separate undertaking to complete the work "according to the plans, invitation to tender, specification and bills of quantities" unless the bills were to have some additional legal effect beyond the valuation of variations. The case was therefore an important watershed in the interpretation of doubtfully drafted provisions incorporating bills, despite the failure of the official law reports to report it.

(i) *Standard method of measurement and the omitted item claim*

5-011 It is obvious that detailed documents which are designed to effect precise remeasurement in the light of "as built" quantities will fail in their intention unless there is agreement as to the exact technical manner in which the quantities

[32] (1902) 18 T.L.R. 443; (1902) A. Hudson, *Building and Engineering Contracts*, 4th edn (London: Sweet & Maxwell, 1914), Vol.2, p.324.

[33] (1904) A. Hudson, *Building and Engineering Contracts*, 4th edn (London: Sweet & Maxwell, 1914), Vol.2, p.368.

themselves are to be measured—there are, for example, at least four radically different ways of arriving at a cubic content of excavation, and the same may well apply to many types of lineal unit as well. It should be borne in mind that, in deciding upon a method of arriving at the quantities for particular parts of the work, the administrative convenience and economy of a perhaps arbitrary technique, in spite of its lesser accuracy, will often fully justify its adoption for the purposes of contractual measurement and pricing.

A code or set of rules identifying the precise techniques to be used for remeasurement is, therefore, to be expected; and this is a full justification for the preparation and publication of standard methods of measuring building or civil engineering construction work, and for their express incorporation by reference into measurement contracts in the appropriate industry. This has the consequence that those preparing contract documents need to be careful that the preambles and description of items do indeed conform to the relevant method or otherwise make clear what is included in the rate for an item of work, otherwise the Contractor has scope for arguing that it is entitled to be paid additionally for any work inadvertently "omitted" from the bill items even where this would naturally have been priced for by the Contractor in the rate.[34]

ILLUSTRATIONS

(1) Clause 11 of the 1931 RIBA standard form provided that the bills "unless otherwise stated" should be deemed to have been prepared in accordance with the standard method of measurement. The latter provided as follows:

> "Where practicable the nature of the soil shall be described and attention shall be drawn to existing boreholes. Excavation in rock shall be given separately."

By bill no.1 the Contractor was referred to the site to satisfy himself as to local conditions and the full nature and extent of the operation and execution of the contract generally, and no claim on the ground of want of knowledge in such respect was to be entertained. The bills referred the Contractor to two boreholes, although in fact five had been dug. In two of the five there was evidence of rock, although the Contractors only inspected two (which of the five was not known). The bills further stated: "Include for removing any natural stone or rock that may be encountered in the excavation." The Arbitrator held this latter clause could not be fairly read to indicate blasting and lifting of rock below the surface.[35] There was evidence of rock on other parts of the site and the Architect was aware of the fact, but the plans and bills made no mention of it. On a case stated, the Employer's main argument was that Cl.11 of the RIBA Standard Form had not as a fact been incorporated into the contract between the parties. Held, by Lewis J, that on the facts it had been incorporated and counsel for the Employer having conceded (in the court's opinion rightly) that, if it was, the Contractor was entitled to the extra cost of excavating rock, the Contractor's claim must succeed: *C Bryant & Son Ltd v Birmingham Hospital Saturday Fund* (1938).[36]

(2) By Cl.12(1) of the ICE Conditions of Contract the rates and prices in the bill of quantities were to cover all the Contractor's obligations under the contract and all matters and things necessary for the proper completion and maintenance of the works. Similar provisions were to be found in the bills of quantities themselves, and in the standard method of measurement (itself incorporated by Cl.57 of the Conditions). The bills

[34] The previous editor considered that the tendency towards elaboration and complication in the Standard Method was to be deprecated as offending against the "inclusive price principle": see I.N. Duncan Wallace, *Hudson's Building and Engineering Contracts*, 11th edn (London: Sweet & Maxwell, 1994), paras 8.25–8.39 and articles there referred to.

[35] This finding was not in dispute but seems highly questionable.

[36] [1938] 1 All E.R. 503.

stated that the price or rate set down against each item was to be considered as the full inclusive price or rate of the finished work, and also to cover the cost of every description of timbering works executed or used in connection therewith, except those in respect of which specific provision was made by way of separate items. By Cl.16 of the bills the measurement of excavation in pit or trench for a structure was, unless otherwise stated, to be the net plan area of the permanent work multiplied by the depth to the authorised bottom, and:

> "any additional excavation which may be required for working space etc. may be paid for under separate items, the measurement being the sum of the area of the side of the excavation."

Excavation for the main part of the project was billed at ordinary cubic yard rates, but no additional square yard items for working space were included, although two specific items for such additional excavation were included in a part of the bills relating to subsidiary parts of the project. The Engineer approved a programme showing an intention to carry out additional working space excavation in the main part of the work. The Contractor contended that he should be paid a reasonable extra rate for working space whenever it was reasonable in all the circumstances to excavate outside the planned area. Held, by the House of Lords (Lords Hodson and Guest dissenting), overruling a unanimous Court of Appeal, that on its true construction Cl.16 was a promise to pay for whatever working space might be necessary, whether or not described as a special item in the bills: *A.E. Farr Ltd v Ministry of Transport* (1965).[37]

[Note: Apart from the remarkable conflict of judicial opinion, with only three out of the eight appellate judges supporting the final decision, it is important to note that this case understandably did not involve any argument based on incorporation of the standard method, the wording of Cl.40 of which at that time only provided that: "It may be necessary to provide a separate item." for working space. The case, however, illustrates the obscurities which can arise from carelessly drafted bills.]

(3) A FIDIC-style tunnelling contract anticipated that, depending on the degree of severity of ground conditions encountered, either no lining at all, or one of five different progressively more expensive types of tunnel lining, would be required for the various sections of the project. Estimated quantities for the unlined sections and the different types of lined sections were given in the bills for pricing. The precise location and extent of the different types of lining was not indicated in the drawings or the bills or elsewhere in the contract, but was to be the subject of day-to-day site instructions given by the Engineer after inspecting the ground conditions. The Employers expressly warned all tendering Contractors that the phasing and construction of all tunnelling work was dependent upon ground conditions, and that time-related costs were a significant factor determined by the ground conditions. In the event, ground conditions were in general worse than had been expected, so that there was a decrease in the unlined length of tunnel and of lengths using the lighter linings and a substantial increase in the higher-priced lengths using the heavier linings, and a substantial extension of time was granted. The Contractor claimed entirely new rates and prices under the terms of the usual FIDIC/ICE variations clause, while the government claimed that he was limited to the higher prices he had quoted for the heavier linings and relied on the warnings conveyed to tenderers in the contract documentation. The contract contained very brief measurement provisions identical to those in Cll.55 and 56 of the pre-1973 ICE Conditions, and Cl.3 of the preamble to the bills provided additionally that:

> "All the work done and materials supplied by the Contractor will be measured and paid for at the rates quoted in the Bill of Quantities."

However, the definitions clause contained two untypical definitions of what were called "Additional Works" and "Extra Works" respectively, and also made an untypical reference to adjustment of the "Final Contract Sum". Held, by the Privy Council,

[37] (1965) 5 B.L.R. 94. See also the cases of *Crosby & Sons Ltd v Portland UDC* (1967) 5 B.L.R. 121; and *Holland Dredging (UK) Ltd v Dredging Construction Ltd* (1987) 37 B.L.R. 1.

that since these latter definitions appeared to be applicable to differences arising on measurement as well as to variations, and since they contained references to "adjustment of the Contract Sum" which also were to be found in the variation clause of the contract, that clause was the only one available for the purpose of remeasurement, so that in principle the Contractor was entitled to new prices: *Mitsui Construction Co Ltd v Att Gen of Hong Kong* (1986).[38]

In view of the prevalence of these provisions in England, it is useful to appreciate that these various expressly permitted departures from the contract prices on measurement are a virtually unique feature of the English domestic forms, or of some directly influenced forms overseas, such as in Hong Kong. Many public Employers in the Commonwealth have, however, maintained a radically opposed attitude to the principles to be used on remeasurement, which they have expressed with notable drafting skill and clarity. The following provision may be regarded as typical of a number of public civil engineering contracts in Australia, for example:

> "The Contractor shall not be entitled to any allowance above the unit prices set out in the Schedule of Rates by reason of any amount or none of the work being required under such items, and all work for which items are included in the Schedule of Rates shall be done at the unit price therefor in the Schedule of Rates regardless of its difficulty."[39]

It will be noted that this admirably simple draftsmanship also addresses questions of necessary contingent expenditure and temporary works or other difficulties.

(ii) Mistakes of Contractor in the bills

5-012 It has been seen that the standard form measurement provisions have frequently made use of the drafting device of "correction of errors" in order to bring about the process of remeasurement.[40] These, of course, will be "errors", (usually in the estimates of the quantities) made by the Employer or their advisers in the original bills, not of the Contractor.

Mistakes and errors by the Contractor in pricing the bills are often arithmetical, and can, given the bills' complexity in even moderately-sized projects, arise very easily. An obvious first consideration in deciding whether a contract should make any provision for this is that Contractors will have obtained the contract through the attraction of their overall quoted price, and should not thereafter be permitted to steal a march on their competitors by asserting their own errors as a justification for increasing their price. In the US and Canada, particularly in public contracts where complicated tendering procedures have been developed in order to meet the problem, the assertion of pricing errors by Contractors, often within hours of their tenders being accepted, with the object of avoiding the contract or obtaining a higher price, had shown signs of becoming a well-practised art, supported by highly ingenious arguments based on the law of mistake, fortunately successfully resisted

[38] (1986) 33 B.L.R. 1. Contrast the *Grinaker* case illustrated below, para.5-022.

[39] See Cl.G26 of the contract in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 56 A.L.J.R. 459, 489.

[40] See Cll.12(2) and 2.2.2.2 of the pre- and post-1980 JCT Standard Form Contracts, Cl.2.14 of the 2005 and 2011 JCT contracts, and see also Cl.55(2) of the ICE 7th edn.

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by the Canadian courts.[41] The English standard terms do not allow adjustments for Contractors' errors in pricing the bills.

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(1) Contractors through an oversight omitted to price a substantial portion of one of the bills of quantities, and consequently tendered a contract sum which was too low. There were rates in other parts of the bills for similar work by which the work could have been measured and valued. Held, by Vaisey J that the Contractors could recover nothing for the work in question under the RIBA provision for rectification of errors in the bills, there being no error or omission in the bills (only in the Contractor's pricing of them): *M.J. Gleeson (Contractors) Ltd v Sleaford UDC* (1953).[42]

(2) A contract contained an item for temporary sheet piling for civil engineering work. That price was arrived at by an erroneous calculation which could be demonstrated. Sheet piling was subsequently altered to different areas of the site. Since the error in calculation worked in the Contractor's favour, valuing the additional work on the basis of the derived rate from the contract work would give the Contractor a significant windfall. It was accepted by the Employer that where work was of a similar character and executed under similar conditions, there was no basis in the valuation rules contained in Cl.52(1)(a) of the 6th edn of the ICE Conditions of Contract for altering the rate. The question arose under the provisions of Cl.52(1)(b), described as Valuation Rule 2. It had been found by the Arbitrator that the work was not of a similar character in the additional areas as the work contracted for. Held, by a majority of the Court of Appeal, that the erroneous rate remained the basis for calculating the value of the additional work and did not become unreasonable because the rate was mistakenly high. The valuation could only take account of the respects in which the varied work differed from the work covered by the rate, not the unreasonableness of the rate itself. The issue was accordingly remitted to the Arbitrator for him to re-consider his award. Clause 56(2) did not apply because the error was an error in the rate not in the description of work to be undertaken. Clause 52(2) of the ICE 6th edn also had no application because the amount of extra work was not such as to make the rate inapplicable: *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* (2000).[43]

[Note: the conclusion of the Court of Appeal in relation to Cl.52(1)(b) may be questioned. Whilst the inflated rate for the work contracted for cannot be adjusted, it seems less clear why it should be reasonable to apply such a miscalculation to varied work which is not of a similar character. This is on the simple ground that it is not reasonable to apply a rate which obviously over-compensates the Contractor for the work done and would lend encouragement to the sort of rate manipulation where the Contractor is encouraged effectively to gamble on the necessity for additional work where the applicable rates have been deliberately inflated.]

On the other hand, contracts using the quite different remeasurement wording of Cl.56 of the pre-1973 ICE 4th edn and the international FIDIC remeasurement provisions may well, in the absence of such express wording, result in a mistake of the Contractor being corrected on remeasurement. A distinction needs to be drawn between the insertion of an inappropriate rate (which is not subject to adjustment unless the work is varied) and the failure to insert any rate at all. The latter is likely to be correctable on a remeasurement on the basis that the contract contains no rate or price for the item.[44] Further the FIDIC and ICE Conditions contain provisions allowing for adjustment of a rate when a substantial increase or

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[41] See *The Queen v Ron Engineering* (1981) 119 D.L.R. (3d) 267; *City of Calgary v Northern Construction* [1986] 2 W.W.R. 426.

[42] (1953), Unreported. Compare the *Ron Engineering* and *City of Calgary* cases above.

[43] [2000] B.L.R. 247.

[44] See, e.g. Cl.12.3(b)(ii) of the FIDIC Red Book Conditions, cf. Cl.55(2) of the ICE 7th edn, which

decrease in the quantity of work makes the original rate inapplicable. This may commonly arise where the work involves a constituent element which does not change with the quantity of work so that the cost of carrying out additional quantities of work does not vary proportionately with the extra work.

ILLUSTRATION

Contractors priced an item in the Bill of Quantities by including in the rate a significant element of costs on costs, contingency and risk which did not relate directly to the work in question but had been transferred to that item from the preliminary section of the tender when submitting their final price. The Contractors' motive in transferring the costs and risk items was to avail themselves of a "pricing opportunity" because they appreciated that the relevant quantities had been significantly underestimated. The make-up of the rate as finally tendered therefore included a significant fixed element that was unrelated to the quantity of work actually undertaken. The Contract, which was in substantially the same terms as the FIDIC and ICE Conditions provided both that "there shall be no rectification of any error, … or wrong estimate .. in any rate inserted by the contractor in the Bills of Quantities" and that "Should the actual quantity of work executed in respect of any item be substantially greater or less than that stated in the Bills of Quantities … and if in the opinion of the Engineer such increase or decrease of itself shall render the rate for such item unreasonable or inapplicable, the Engineer shall determine an appropriate increase or decrease in the rate for the item using the Bills of Quantities rate as the basis for such determination". The Employer argued that since the rate included a fixed element of cost which was unaffected by the increase in the quantities of work, the rate was unreasonable or inapplicable if applied to the increased quantity of work and so re-rating was necessary. The Contractors argued that the work activity had not changed and the increase in quantity had not made the rate unreasonable since it was unreasonably high because of the inclusion of extraneous costs unrelated to the work activity. Held, by Hong Kong Court of Appeal, the increase in quantities had rendered the rate unreasonable because if the original rate was applied the Contractor would recover an element of fixed cost that had not increased proportionately with the volume of work undertaken: *Maeda Hitachi Yokogawa Hsin Chong Joint Venture v The Government of Hong Kong Special Region* (2012).[45]

5-013 The cases illustrated above can be seen as establishing the general principles stated below when Bills of Quantity have been incorporated into the contract for the purposes of valuing additional work, bearing in mind that the terms of any particular contract[46] and the particular factual background will govern the result in particular cases:

(1) Standard Form Contracts do not generally allow Contractors relief from pricing errors made in Bills of Quantities.
(2) Where the additional quantity of work is similar to that described in the Bills of Quantities then the Bill rate will apply.
(3) Where no rate is provided then an analogous rate will be used (if it exists) to value the work or a new rate (usually referred to as a "Star rate") will be established.
(4) Where the quantities have increased significantly and the effect of that increase is to render the original rate unreasonable, typically where the cost of executing the work covered by the rate includes a significant element of fixed cost, then it is appropriate to adjust the rate in question.

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distinguishes between uncorrectable and correctable mistakes.

[45] (2012) CACV 230/2011.

[46] See below at para.5-050 where the JCT rules for valuation are explained.

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(5) Where the additional quantity of work changes the character of the work undertaken then a new rate will be fixed.

The 1980 Singapore SIA Contracts introduced a limited protection (for both parties) substituting a reasonable rate or price in the case of any "obvious accidental error" in the Contractor's rates or prices. However, the principle of avoiding any change in the tendered contract sum or contract price was maintained by applying the corrected rate or price only to any differences arising from the "as built" quantities, or from a variation, as opposed to the originally billed quantities, which remain uncorrected.[47]

(d) Cost reimbursable contracts

5-014 The essence of a cost reimbursable contract is that the Contractor's entitlement to payment depends upon the cost actually incurred by the Contractor in executing the work plus some uplift (usually described as a fee) for the Contractor's own effort in bringing the works to conclusion. Yet in order to reintroduce some risk on the Contractor if the anticipated or estimated contract value is exceeded, cost reimbursable contracts provide for the Contractor only to recover costs which are properly incurred in the execution of the work, or by disallowing costs not properly incurred. A contract in wide use is the New Engineering Contract, which, as NEC 3, contains an Option E form of cost reimbursable contract. This Option E at Cl.11 provides a description of categories of disallowed cost, which are described as items which the project managers decide should not be admitted as part of the defined cost. A cost reimbursable contract is clearly neither a lump sum contract nor a remeasurement contract and the concept of a defined contract price has little application, since the final contract amount will be dictated by the cost incurred by the Contractor plus its fee. The method by which the New Engineering Contract seeks to constrain overrun costs, apart from disallowing costs not properly incurred, is by using a target contract either with an activity schedule or with a bill of quantities (Options C and D). These options essentially use a lump sum for "activities", in the case of Option C, and a bill of quantities, in the case of Option D, to derive a notional target price, which is then compared with the actual cost of the work in order to work out the amount of the over- or under-spend. The amount of variance between target price and actual cost as allowed under the contract is then apportioned between the parties as an incentive for the Contractor to achieve the contractual objective at a cost less than the target and a penalty if they fail to do so. The advantages of cost reimbursable contracts are perceived to be that they represent a simplified contracting model which eliminates the need for sophisticated rules for price adjustment and the payment of claims.[48] The use of a cost reimbursable model also allows for the parties to contract on a "good faith" basis with extensive mutual obligations of co-operation.[49]

Secondly, since the pricing risk is largely eliminated because the Contractor is paid the actual cost of the work, subject to disallowance for costs improperly incurred, it avoids the adversarial claims-driven culture which was perceived to permeate much of the relationship between Employers and Contractors under the

[47] See Cl.12(4)(g), 13(1)(d) and (2) of that form of contract.

[48] Although the NEC Contract Option E still retains the compensation events core clause for what are essentially variations in the work which are necessary to regulate the time for completion and adjustments of target price.

[49] As in that used for the Heathrow Terminal 5 procurement.

traditional standard forms.[50] This may encourage a more co-operative attitude between the parties, where the Contractor's expertise is used to reduce costs in achieving the contractual objective. The relative popularity of the NEC projects, at least for major procurement work, and the paucity of any authority as to the resolution of disputes arising from NEC Contracts, would tend to suggest that this cultural change has been realised, at least to some extent.

(e) Contracts where no price is stipulated

5-015 Contractual liability to pay a reasonable price for construction work can come about in a number of ways. Thus, if a request to carry out work and an intention to pay for it can be inferred from the circumstances between the parties, silence as to price will not necessarily prevent a contract coming into being, provided that the contract is otherwise sufficiently certain, and a term for payment of a reasonable price will be implied. Obviously, this will be more likely to be the case if the contract is a relatively small one, or in cases where the work has been carried out rather than where a still executory contract is being alleged.[51]

A contractual entitlement to be paid a reasonable price is frequently but incorrectly referred to, by lawyers as well as the industry, as an entitlement to be paid a quantum meruit. However, true quantum meruit is strictly applicable only where the basis of liability is not founded on a consensual, express or implied agreement between the parties, but on the concept of unjust enrichment (that is, because, in the particular circumstances, it will be regarded as unconscionable to allow the defendant to retain the benefit of the plaintiff's work without payment).[52] This concept of a restitutionary remedy of quantum meruit is particularly necessary in the case of construction contracts where, once carried out, work and materials become the property of the Employer on fixing to their land, so that no question of re-delivery or return of the benefit received, other than by payment, is practicable.[53] Where it is not possible to find that the parties have agreed essential terms so no contract exists, liability to pay a reasonable price may arise in restitution.[54] The courts have not always been careful to distinguish between contractual entitlement to be paid a reasonable sum under an implied term of a contract and an entitlement to a restitutionary remedy—referring to both as an entitlement to quantum meruit in quasi-contract.[55] Further, the basis on which a reasonable sum is to be calculated may differ, as the value of benefit conferred on the defendant may be relevant in calculating the amount of restitution but is likely to be irrelevant to a contractual claim, where the cost to the Contractor of carrying out the work will be more important.

[50] The Latham Report "Building the Team".

[51] In *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] 1 W.L.R. 753 the Supreme Court found a contract where the parties had agreed essential terms (as the court found) whilst still apparently negotiating "subject to contract". In reaching this conclusion the Supreme Court was significantly influenced by the fact that the work had been completed.

[52] *Benedetti v Sawiris* (2013) UKSC 50 [128].

[53] This may also serve to mitigate the effect of the doctrine of an entire contract as applied to a construction contract. If an Employer takes the benefit of the Contractor's work then they may be obliged to account for that benefit in restitution even if the Contractor has no entitlement to be paid for it under the contract. See above.

[54] See above, Ch.1.

[55] Quasi-contract has its origin in the (now discarded) fictional foundation of the entitlement to a quantum meruit being an implied promise to pay—e.g. *Molloy v Liebe* (1910) 102 L.T. 616; and S.J. Stoljar, *Law of Quasi-Contracts*, 2nd edn (Sydney: Law Book Co, 1989), pp.239–245.

Particular examples of liability in quantum meruit in the context of construction contracts include cases:

(i) where the Contractor has successfully rescinded the contract following a repudiation by the Employer[56];
(ii) where a contract has been frustrated at common law: the remedy may be governed by statute, in England by the Law Reform (Frustrated Contracts) Act 1943;
(iii) where work has been carried out under a void (but not an illegal) contract[57];
(iv) where work has been carried out under a contract unenforceable by statute, thus preventing any new contract being implied[58];
(v) where the Employer has refused necessary instructions in writing while wrongly but bona fide insisting on disputed work being carried out as part of the original contract obligation[59];
(vi) where work is done in expectation of agreement which is never reached[60]; and
(vii) where preparatory work, not usually charged for in the expectation of a contract, is made use of by an Owner.[61]

5-016 Another situation in which an entitlement to be paid a reasonable price may arise is where work is started while the parties are still in negotiation for the execution of a formal contract, typically under a letter of intent. If, as not infrequently occurs, the works proceed without a contract being finally agreed, the following questions will arise:

(1) To what extent is payment for the works governed by the terms of the letter of intent (if any)?
(2) If the parties have agreed a contract price but are unable to agree on other essential terms, to what extent does the negotiated price govern the sums that the Contractor is entitled to be paid as a reasonable price?

The answer to the first question will depend upon the terms of the letter of intent and whether or not it is, as a matter of construction, intended to govern the parties' relationship if, as usually occurs, the amount payable under the letter of intent is limited. As a matter of analysis, a letter of intent may be a type of unilateral contract, which obliges the offeror to pay if the terms of the standing offer are accepted by performance or past performance by the offeree.[62] The terms of the offer contained in the letter of intent can be accepted before any performance by the

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[56] *Planché v Colburn* (1831) 8 Bing. 14; *Lodder v Slowey* [1904] A.C. 442; *Morrison-Knudsen Co Inc v British Columbia Hydro and Power Authority* (1978) 85 D.L.R. (3d) 186.

[57] See, e.g. *Lawford v Billericay Rural DC* [1903] 1 K.B. 772 (absence of seal). The fact that there has been some illegality in the manner in which the contracts were performed will not preclude recovery of a contractual quantum meruit: *A.L. Barnes Ltd v Time Talk (UK) Ltd* [2003] B.L.R. 331; cf. *Taylor v Bhail* [1996] C.L.C. 377.

[58] *Scott v Pattison* [1923] 2 K.B. 723; *James v Kent (Thomas) & Co* [1951] 1 K.B. 551; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 C.L.R. 221.

[59] *Molloy v Liebe* (1910) 102 L.T. 616; *Brodie v Cardiff Corp* [1919] A.C 337, illustrated at para.5–044.

[60] *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All E.R. 504, illustrated above, Ch.1, cf. *Regalian Properties Plc v London Docklands Development Corp* (1995) 1 W.L.R. 212.

[61] *William Lacey (Hounslow) v Davis* [1957] 1 W.L.R. 932; *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 N.S.W.L.R. 880.

[62] This may be the arrangement that Goff LJ was describing as an "if" contract in *British Steel v Cleveland Bridge* [1984] 1 All E.R. 504, although the decision is that the entitlement to be paid was restitutionary in nature. A classic example of a unilateral contract being provided by the facts of *Rogers v Snow* (1573) Dalison 94.

Contractor under the letter. However, performance itself may constitute acceptance of the terms of the letter of intent.[63] In these cases the analysis is contractual. The Contractor as offeree is entitled to be paid in accordance with the terms of the letter, and if the offer is subject to some limit in amount, the Contractor will not be entitled to further remuneration under the letter of intent. It also follows that once the offer has been accepted and becomes mutual, the Contractor is bound to proceed in accordance with any relevant terms of the letter of intent. As to the second question, it is often thought by Contractors that there is some benefit to them in establishing payment on the basis of a reasonable price, particularly where the Contractor's tender has been submitted in competition, and the profit element is small or non-existent. It is suggested that in a situation of failed negotiation, so long as the quoted rates were not abnormally low and therefore in a commercial sense objectively reasonable, they should be taken as the basis for a calculation of a reasonable price.[64] The assessment of a reasonable sum will, however, also be affected by the standard to which the work is carried out and other relevant circumstances. If, for example, the Contractor is claiming on a cost plus basis, then some allowance will need to be made for the Contractor's need to carry out remedial work.[65] If, on the other hand, the claim arises under a contract which is silent as to price, so that the courts imply a term that the Contractor is entitled to reasonable remuneration, then the calculation will be on the basis of prices prevailing in the market at the time that the work is undertaken. Although the cost to the Contractor of undertaking the work may be an indication of a reasonable price, it will not in any sense be determinative whether the claim arises strictly in restitution, or under a simple contract.[66]

As noted above, the court approaches a restitutionary claim for unjust enrichment and a claim for a reasonable sum under a contract on a different basis. In the case of a restitutionary claim it is the benefit to the defendants valued at the time the benefit is conferred at market rates, (where a market exists), which will be taken as representing the amount by which the defendant has been unjustly enriched at the expense of the claimant.[67] A reasonable sum under a contract will be assessed having regard to all the circumstances in which the services are provided.[68] In the case of a restitutionary remedy the circumstances of the defendant will be relevant only to the extent that he can be shown to have benefitted to an extent less than predicted by the market rate, for example because he is in a particularly strong bargaining position.[69] In the case of a claim for a reasonable sum under a contract many factors may be relevant, such as the negotiations of the parties as to price, the quality of performance offered and the cost to the Contractor of providing the services as well at the market rate for the type of work undertaken and appropriate

[63] *The Eurymedon* [1975] A.C. 154, 167–168.

[64] See *ERDC Group Ltd v Brunel University* [2006] B.L.R. 255, a case in unjust enrichment.

[65] *Serck Controls Ltd v Drake & Scull Engineering Ltd* (2000) 73 Con. L.R. 100; cf. *Crown House Engineering Ltd v Amec Projects Ltd* (1989) 48 B.L.R. 32.

[66] See also the discussion in Ch.8 below as to the situation that arises after an Employer's repudiation and a claim by the Contractor to be paid damages on the basis of the sums that the Contractor has expended in completing the work before the contract was terminated.

[67] e.g. *Benedetti v Sawiris* [2013] UKSC 50 per Lord Reid, [22]. Illustrated at para.1-088 above.

[68] *Energy Venture Partners Limited v Malibu Oil and Gas Limited* [2013] EWHC 2118, [283].

[69] *Benedetti v Sawiris* (above) as subjective devaluation; cf. *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34 [2008] A.C. 561 where the Government was able to borrow at less than the prevailing rate.

margin for profit. In some cases, even where estimated prices have been discussed between the parties the court will fall back on the cost incurred by the Contractor as the only realistic basis on which to arrive at a reasonable price.[70]

SECTION 5.2: VARIATIONS

(a) Generally

5-017 The word "variation" can be used in a number of different senses. Thus it is frequently used by lawyers for an agreed alteration or modification by the parties of the terms of a pre-existing contract between them. Even in construction contracts it may occasionally be used by the draftsman for an agreed alteration or extension of the contract completion date; or for compensatory provisions which may alter the contract price, such as fluctuations or "variation of price" clauses, or "changed conditions" (US) or "Clause 12" (UK) clauses; or even, and in the present context highly misleadingly, for the adjustments of an initial quoted contract price in the light of the "as built" quantities resulting from the remeasurement provisions in unit price or "bill of quantities" or "schedule" or other similar remeasurement contracts.

In this section, however, the term is used in the narrow sense of an alteration in the previously described work and materials to be provided by the Contractor (that is, as shown on the drawings and described in the specifications, or to be implied as the indispensably or contingently necessary work included in the Contractor's obligation to complete such expressly described work under the "inclusive price principle").

Unlike some commonly used expressions such as "extras" or "extra work" or "additional work", the term "variations" as used in this chapter will also include reduced or omitted work ("omissions"), or altered or different work (the latter on analysis will usually involve a combination of an omission of the relevant part of the original work followed by the addition of new and different work in its place).

5-018 Variations in this sense are usually described as "changes" in US terminology, and in many modern UK and Commonwealth contracts. However, there is also a tendency to use a "changes" clause for many other matters which also involve a modification of the contract price or obligations, such as extension of time decisions or unfavourable or changed physical conditions clauses, or fluctuations "rise and fall" financial provisions, none of which usually involve any change in the permanent work. The NEC Contracts use a broad category entitled "compensation events", which includes variations, acts of prevention, breaches of contract, and other matters.

The term "variation" as normally used in the present chapter denotes an alteration which has been duly authorised or instructed by the Owner or the Owner's consultant, and for the cost of which the Owner will prima facie be responsible to the Contractor. Unauthorised alterations or variations of the physical work, whether voluntary or involuntary on the part of the Contractor, far from entitling them to extra payment, will usually be a breach of contract, for which damages are in principle recoverable.[71] On the other hand, alterations in the permanent work which may be unavoidable in order for the Contractor to discharge its completion or other contractual obligations in regard to the originally described work, while techni-

[70] And in *Sykes v Packham (t/a Bathroom Specialist)* [2011] EWCA 608.
[71] See the old case of *R. v Peto* (1826) 1 Y. & J. Ex.37.

cally a breach of contract, may nevertheless constitute substantial performance, with only nominal damages recoverable in the absence of proof of damage,[72] but will not constitute variations as here defined.

In many contracts it may be a question whether the contractual variation power extends to temporary works or methods of working, particularly if undescribed, as opposed to the final permanent work in place.

5-019 The power to vary work is inserted into nearly all construction contracts at the present day for two principal reasons. In the first place, it is better if the Employer can require a variation of the work, unilaterally and as of right, as opposed to relying on the willingness of the Contractor to agree to the variation, which would otherwise enable the Contractor to exert unacceptable pricing or other pressures on the Employer in return for the Contractor's agreement to carry out the variation. In the second place, a consultant of the Employer has no implied authority to contract on behalf of the Employer.[73] In the absence of such a provision, therefore, Contractors will not be able to recover payment for any additional or varied work which they have done on the consultant's instructions, unless they can show a separate contract with the Employer that they should do it and be paid for it (as, for example, where the Employer knows of the instruction and does not countermand it, provided that it is realised or ought to be realised by the Employer that a change of price is intended or probable as a consequence of the instruction).[74] With such a provision Contractors, provided they comply with any requirements of form, are protected from any denial by the Employer of the consultant's authority to order the variation. A third and subsidiary reason for variation clauses is that they enable the parties to agree in advance on the basis for valuing and pricing the varied work.

In concise form, the general principles entitling a Contractor to receive payment for a change or variation have been admirably summarised in a leading case in the US, in terms which are applicable equally in England and the Commonwealth, as being:

(1) that the work should be outside the narrower "agreed scope" of the contract, that is, outside the Contractor's express or implied obligations in regard to the work described in the original contract;
(2) that it should have been ordered by or on behalf of the Employer;
(3) that the Employer should, either by words or conduct, have agreed to pay for it;
(4) that any extra work has not been furnished voluntarily by the Contractor;
(5) that the work should not have been rendered necessary by the fault of the Contractor; and
(6) where applicable, that any failure of the Contractor to comply with contract requirements as to procedure or form should have been waived by the Employer.[75]

(b) Lump sum contracts

5-020 The first question to be decided in considering any claim for a variation based on a consultant's or Employer's instruction is whether or not the work comprised

[72] See, for a particularly clear statement of this position, the judgment of Cardozo J in *Jacob & Young Inc v Kent* 129 N.E. 889 (1921) (different pipe of equal value substituted for unobtainable pipe).
[73] See, e.g. the case of *Ashwell and Nesbit v Allen* (1912) A. Hudson, *Building and Engineering*

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in the instruction is in fact a variation, that is to say, whether, as defined above, it differs from the work which the Contractor is already obliged to carry out for the contract price. This will not simply involve an examination of the work now instructed in the light of the earlier descriptions in the contract drawings and specifications. Thus it has already been seen that the Contractor's basic completion obligation in a priced contract may well include other ancillary work or processes which, although not expressly described in the documents, are "indispensably" or unavoidably necessary under the "inclusive price principle" for the proper completion of the work which has been described. While usually not presenting a serious problem of interpretation in sophisticated contracts, quite difficult problems of interpretation can easily arise in less formally concluded contracts.

Additionally, it has been seen that the inclusive price principle and the absolute nature of the Contractor's completion obligation may require contingently necessary, although undescribed, work, often in the areas of temporary works and methods of working, to be carried out within the overall contract price. Ultimately, whether work described in contract documents such as a specification or bills includes ancillary work is a question of contractual interpretation.

Instructions which do no more than insist upon the full discharge of all the Contractor's actual or potential completion obligations in these various situations will not, therefore, constitute a variation or change, as a matter of interpretation of those terms as used in a variation or changes clause, even though, in some cases, altered or additional undescribed work may be involved. A further reason for denying liability will be because, on general principles, there will be no consideration present for any promise by the Employer to pay extra for work, even though undescribed in the original contract, which the Contractor is already bound to carry out as included in his price[76] (although in some situations, not applicable to the present discussion, other forms of consideration can sometimes be found[77]). The only case, rare at the present day, in which an Employer might theoretically be liable to the Contractor in such a situation, it is submitted, will be if the Architect's decision or certificate has been made permanently binding on the Employer as to what will constitute "extras" or varied work.[78]

5-021 The foregoing principles apply with equal force to all types of priced contract, whether lump sum or measured. In the latter (measured contract) case, differences in "as built" quantities from the estimates in the original contract documents may lead to upward or downward adjustments of the contract price. However, these remeasurement provisions are designed only to apply to differences from the original contract quantities resulting from errors in taking off the quantities from

Contracts, 4th edn (London: Sweet & Maxwell, 1914), Vol.2, p.462.

74 See, e.g. *Chittick and Taylor, Re* (1954) 12 W.W.R. 653, Canada, referred to below.

75 See *Watson Lumber Co v Guennewig* 226 N.E. (2d) 270 (1967) (Appellate Court of Illinois), which contains an admirable discussion of the law relating to variations generally in terms entirely consistent with English and Commonwealth law, and also of the commercial and practical background.

76 *Stilk v Myrick* (1809) 2 Camp. 317.

77 See, for example, *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, CA.

78 In *WMC Resources Ltd v Leighton Contractors Pty Ltd* [1999] WASCA 10 the Western Australia Court of Appeal held that where a variation clause involved a discretionary valuation which was sanctioned by the contract, the arbitrator subsequently appointed had no power to review that valuation— see [76], [77]. The distinction between a discretionary decision and one involving objective assessment is not an easy one and it is unlikely that this decision would be the same in other jurisdictions.

the drawings, or from the inherently provisional and unpredictable nature of the quantities estimates of the work in question. Such provisions, on analysis, are not designed to apply to changes in the quantities resulting from alterations in the work ordered by the Employer or their Architect, even if some of the traditional UK contracts (including the JCT Forms) may confusingly (and it may be added without any logical justification and against the reasonable interest of the Employer) choose to apply the variation valuation clauses expressly to regulate adjustments under the remeasurement clause.[79]

It has been seen that an Employer does not generally warrant the accuracy of the drawings or designs of their Architect.[80] The Contractor prices the work on the basis of the temporary work and preliminaries he considers necessary to achieve the design. Unless therefore the Employer has specified a particular method of working, the fact that the design proves more difficult to build is at the Contractor's risk.[81]

The inclusive price principle applies where a price is agreed for a variation or change, whether before or after the changed work has been done:

> "...where an extra price is agreed to in respect of a particular item, that person has a right to assume that the contractor has taken into account all of his costs, direct and indirect, flowing from the change in circumstances that led to the re-negotiation, and he will not later be presented with a bill for additional compensation."[82]

The corollary of the inclusive price principle is that if work is less extensive than anticipated or is omitted from the scope of a lump sum contract then in the absence of a variation provision, the "inclusive price" will not be reduced.[83]

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(c) Remeasurement contracts—bills of quantities

5-022 Differences between "as built" quantities and those stated in bills or other contractual estimates in unit price (measured) contracts frequently come about without any alteration in the work being called for by the Architect or Employer, either because of errors in taking off quantities from the drawings in the first place or because of the inherently unpredictable or provisional extent of the particular work in question. The difference between a lump sum contract and measured contract in this situation lies in the fact that, in the former case, both parties carry the risk of both of these types of difference and the price will not alter, whereas in the latter the contract sum will be adjusted, up or down, to take account of the differences. A change in quantity, although not itself a variation to the permanent work, may cause a revision to the unit rate for that work if the increase or decrease in quantity has rendered the original rate "unreasonable".[84] Since the primary intention of a remeasurement provision ought, therefore, be to remeasure only at the

79 Compare Cl.2.14.3 of the 2005 JCT Form, and Cl.55(2) of the ICE 7th edn. The JCT 2005 Form provides for valuation rules that include valuation rules for measurement, at Cl.5.6.

80 There are various different risks of this kind, which can all be allocated by express provision, including information about the site, data about the process fluid in oil and water contracts, soil conditions in civil engineering, and errors in detailed design, or the so-called Front End Engineering Design taken over by a Contractor. These are discussed in Ch.3, above. There are usually express terms governing the allocation of such risks which generally place less risk on the Contractor than the common law position expressed here.

81 See para.5–004 above.

82 Per Mahoney J in *Walter Cabott Construction Ltd v The Queen* (1974) 44 D.L.R. (3d) 82, 90.

83 See *SWI Ltd v P&I Data Services Ltd* [2007] B.L.R. 430 where the Court of Appeal refused to infer or imply a term to the effect that a variation reducing scope would lead to a reduction in the price.

84 See Cll.12(2) and 2.2.2.2 of the 1963 and 1980 JCT Standard Forms, Cl.5.6 of the 2005 JCT Standard

quoted prices in the bills or any schedule, it becomes necessary to distinguish carefully between differences in quantities due to remeasurement or contained within the lump sum intention, on the one hand, and differences due to variations or changes resulting, as defined in this chapter, from an Employer or their Architect's instructions, on the other. Due to frequent obscurities of draftsmanship, this may not always be easy. A particularly common source of discrepancies in the "as built" quantities can be anticipated in civil engineering contracts, where it is frequently not practical to give more than an approximate estimate of quantities derived from existing ground levels at the time of contracting.

ILLUSTRATIONS

(1) A contract for power-station foundations stated: "This is a Schedule of Rates contract", and that the Employer would only be liable to pay for the "as built" measured quantity of work at the rates in the schedule, whether that should be more or less than the quantities in the schedule. These quantities were stated to be approximately correct but no guarantee was given. The same clause also stated that the work would be subject to extras, additions, deductions, alterations, substitutions and omissions as provided for in Cll.10 and 11. Those clauses conferred a wide power to order variations, but placed a limit of 10 per cent of the contract price on the total value of permitted "omissions". The contract price for this latter purpose was defined as the total value of the work ascertained under the remeasurement clause, exclusive of the variations, etc. referred to in that clause. The specification stated that the levels and dimensions shown on the drawings were a general indication, and that the construction drawings and details might give substantially differing levels and dimensions. In the event, the true in situ levels were such that there were substantial reductions in the quantities of the earthworks and concrete required by the design. Held, by the Court of Appeal of New South Wales, that the word "omissions" in Cl.11 meant omissions resulting from variations ordered by the Engineer, and not simple reductions in quantities resulting from the actual levels of the ground: *Arcos Industries v Electricity Commission of New South Wales* (1973).[85]

(2) A Contractor tendered a lump sum in a highway contract, which contained no general remeasurement provision. The lump sum was the grossed-up total of various items at estimated quantities and rates and prices in a schedule required to be priced by the tendering Contractors. The Contractor priced an item for approximately 49,700 cubic yards of topsoil to be placed in the finished embankments. The specification provided:

> "If insufficient top soil to meet the requirements of the Works cannot be obtained within the right of way, the engineer may direct the contractor to obtain top soil from other approved locations."

In addition to the placing item, which was priced at 15 shillings per cubic yard by the Contractor, and grossed-up using the indicated quantities and included in the tendered lump sum price, there was a £3 rate, without any estimated quantities and with no grossed-up or provisional amount for inclusion in the price, for importing and placing topsoil from outside the site. In the event, there was only 25,000 cubic yards of topsoil available on site, and the contract requirement was also found to be greater than expected, at over 60,000 cubic yards. Held, by the High Court of Australia, that on its true construction the Contractor's overall lump sum price included for the placing of any amount of topsoil necessary for the contract requirements, if it could be taken from the site, without any alteration to the contract sum; but in the event of topsoil needing to be imported, he was entitled to be paid the £3 rate for whatever quantity needed to

Forms, and Cl.56(2) of the ICE 7th edn.

85 [1973] 2 N.S.W.L.R. 186; 12 B.L.R. 65.

be imported, and whether or not it exceeded the original total estimated quantities of topsoil: *Commissioner for Main Roads v Reed and Stuart* (1974).[86]

(3) Clause 49 of a roadworks contract in Transvaal empowered the Engineer to order variations and permitted departures from the contract rates or prices in defined circumstances, in terms identical to those in Cl.51 of the pre-1973 ICE Conditions and the 3rd edn of the FIDIC Conditions. The contract also provided elsewhere, in terms very similar to the ICE and FIDIC Conditions, that the quantities were approximate only and that the Contractor was to be paid for the actual work done at the unit rates and prices tendered. Clause 49 also provided that no order in writing should be required for increases or decreases in the quantity of any work that was not the result of a variation order under the clause but the result of the quantities exceeding or being less than those stated in the schedule of quantities. The Contractor contended that this wording (also found in the ICE and FIDIC Conditions) implied that differences in quantities were indeed a variation, so that additional payments could be obtained under the variation clause. Held, by the Appellate Division, that it was fallacious to equate a variation of the quantity of the work as envisaged in Cl.49 with an increase or decrease of quantities under the remeasurement provision, which was to be carried out at the rates and prices in the schedule of quantities: *Grinaker Construction Ltd v Transvaal Provincial Administration* (1978).[87]

The two Australian cases are right, it is submitted. Donaldson J, in an unsatisfactory and, it would seem, shortly argued case in 1967,[88] took a contrary view of the then ICE Cll.51 and 52. However, that was a case where no item existed in the bills for the work in question, and the case has been doubted on this as well as on other grounds. The South African *Grinaker* contract differed very slightly from the ICE and FIDIC conditions in that its remeasurement provision did make an express reference to the contract rates and prices, whereas the ICE and FIDIC Conditions refer only to a valuation "in accordance with the contract" without any such reference to the prices. It is submitted that *Grinaker's Case* is also right and to be preferred to that of Donaldson J, and that the decision would have been the same even had the remeasurement provision been identical to the ICE and FIDIC wording.[89]

The same distinction between quantities arising from "as built" differences and quantities arising from variations may need to be made in interpreting provisions not uncommonly found in contracts imposing a percentage limit restriction on the amount of variations,[90] and when the difference in quantities must exceed a given percentage before the re-rating provision can have application.[91]

Whether items of work which are not expressly mentioned in the contract documents should be regarded as included in the contract price, as being either indispensably or contingently necessary to carry out the described work, has been discussed above.

86 [1974] 48 A.L.J.R. 641.

87 [1978] 1 S.A.L.R. 78; 20 B.L.R. 30.

88 *Crosby Ltd v Portland UDC* (1967) 5 B.L.R. 121.

89 Contrast the difficult Privy Council decision of *Mitsui Construction v Att Gen of Hong Kong* (1986) 33 B.L.R. 1, arrived at on different express wording, doubting the relevance of *Grinaker* to the issue in that case, and itself doubted and criticised by I.N. Duncan Wallace in, "How Much Measurement?" (1987) 3 Const. L.J. 3.

90 See *Ministry of Public Works v J.M. Construction Ltd* [1983] 3 S.A. 58 (AD); and *LTA Construction Ltd v Ministry of Public Works & Land Affairs* [1994] 1 S.A. 153 (AD).

91 e.g. FIDIC Red Book requires the quantity to have changed by more than 10% and to satisfy the other requirements of Cl.12.3(a), cf. the Silver Book, which retains the fixed price lump sum concept in relation to variations (Cl.13).

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CHAPTER 9

ASSIGNMENTS, SUB-CONTRACTS AND TRADE CONTRACTS

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SECTION 9.1: ASSIGNMENT

(1) Introduction

9-001 The first part of this chapter is concerned with the transfer of rights and obligations in the context of construction contracts, principally by assignment and novation. The essential difference between assignment and novation is that one contracting party can effect an assignment without the agreement of the other contracting party, whereas novation requires an agreement between the original contracting parties and the substitute Contractor. Novation is therefore a matter of contract and the usual rules as to formation of contracts apply. The second part of the chapter deals with vicarious performance and sub-contracts.

Not all contractual or tortious rights are assignable. The expression "chose in action" is used to describe a right which is assignable. Originally the expression chose in action was synonymous with a cause of action but since not all causes of action are assignable as a chose, the terminology is not always useful. Choses in action may either be legal choses in action (that is rights of action which were recognised in law before the Judicature Act 1873), or equitable choses in action (which were only enforceable in equity). The distinction remains of some significance because it is only debts or other legal things in action which are assignable by the statutory mechanism under s.136(1) of the Law of Property Act 1925. Where the legal chose is assignable, the right vests absolutely in the assignee once notice in writing has

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been given to the person liable to the assignor. If notice is not given, the assigned right will still be enforceable, but if the assignment is of the legal chose, both assignor and assignee must be party to any proceedings to enforce that right.[1] This may be either because there is a separation between the legal interest which remains in the assignor, and the beneficial interest which passes to the assignee, or because the assignee is given a right to sue in the assignor's name (essentially a power of attorney). For an equitable assignment of an equitable chose, both assignor and assignee must be parties to any proceedings if a claim for damages is asserted.[2] If an assignment is ineffective to transfer rights to the assignee, for example because of a contractual prohibition against assignment, the assignee may nonetheless acquire rights over the chose to be transferred as between the assignor and assignee,[3] whereby the assignor holds the benefit of the right assigned on trust for the assignee or as a personal contract.

Novation, on the other hand, normally involves a new contract by which all relevant parties agree that the performance of the original contracting party can be substituted by a new contracting party. Novation avoids the difficulties and complexities of assignment, since the parties are agreed that a novation can occur. Thus for example, since the parties have agreed to substituted performance, the burden as well as the benefit of a contract will be transferred. It is therefore usual and helpful to distinguish between a novation of the contract and an assignment of a right (or chose) under the contract.[4] Assignment is important for the obvious reason that by the time the substitution is required or desired by one party, the other party to the original contract may not consent to a novation.

9-002 Both assignment and novation are of considerable practical importance in the context of construction contracts. Assignment, because it is a means by which a transfer of rights can be made from a developer to a purchaser of a development which may have originally been speculative. Novation, because it is a means by which the obligations of a consultant can be transferred from the Employer to the Contractor where the contract is for design and build.

In a construction contract, speaking generally, the liability of the Contractor is to do work and supply materials, and of the Employer (or the Main Contractor in a sub-contract) to make due payment for them. The correlative rights of the parties are, on the part of the Contractor, to receive payment, and, on the part of the Employer or Main Contractor, to have the work done in accordance with the contract. The difficulties which arise in the law of assignment in the case of construction contracts are partly due to the fact that the rules governing assignment have evolved from comparatively simple contracts, such as money debts and contracts of sale. The convenient dichotomy of benefit and burden and rights and liabilities is not so easy to identify in the case of more complicated contracts, involving a complex interrelationship of rights and liabilities.

An important starting point is that it is only the benefit of a contract which is assignable and not the contract itself. The burden of the contract is not assignable. Lord Browne-Wilkinson stated this principle succinctly in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*[5]:

> "It is trite law that it is, in any event, impossible to assign 'the contract' as a whole, i.e. including both burden and benefit. The burden of a contract can never be assigned without the agreement of the other party to the contract, which event will give rise to a novation."

9-003 It is fundamental that English law, as indeed most legal systems, does not recognise or permit the assignment of contractual liabilities so as to extinguish the liability of the assignor without the agreement of the other contracting party. Thus in *Tolhurst v Associated Portland Cement Manufacturers*[6] Collins MR said:

> "It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor onto those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to somebody else; this can only be brought about by the consent of all three, and involves the release of the original debtor."[7]

So, in construction contracts the Employer will be unable to divest itself of the liability to pay for the work, or the Contractor of its responsibility for duly completing it, in the absence of a novation, or where by some act or conduct the other party acquiesces in the new arrangement.[8]

In *Young v Kitchin*,[9] a builder validly assigned his right to payment under the contract, and his assignee sued upon the contract. The building Owner was permitted to set off damages due to delay by the builder to the extent of the assignee's claim as an equitable set-off (or defence), but not to recover any excess, for which the builder-assignor remained liable.

In the past, assignment problems likely to arise in connection with construction projects were relatively simple; the great majority being concerned with assignment of rights to receive payment by the Contractor, and a very small minority with the Employer's right to have the contract performed, as, for example, where a developer might sell a project with the benefit of any previously concluded building contracts to another developer. For a time, the increasingly widespread prevalence of defective work in newly completed buildings[10] rarely raised assignment problems, since the emergence of the *Anns'* liability in tort had meant that later Owners or occupiers could proceed directly in tort against any of the parties concerned with the original construction of the building, including the developer, or their professional consultant, as well as Main Contractors and Sub-contractors, without any need to use assigned rights for the purpose.

9-004 However, with the abolition of the *Anns'* liability effected by the House of Lords' decision in the *D & F Estates* and *Murphy v Brentwood DC* cases,[11] the advisers of later Owners and occupiers of new buildings discovering defects have, failing a remedy under the Defective Premises Act 1972, been obliged to re-direct their attention to the remedies available by way of assignment at the time of purchase of

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1 *Cator v Croydon Canal Co* (1843) 4 Y.&C.X. 593.

2 This statement is not uncontroversial, and may depend upon whether the matter is viewed as a matter of procedure: *Central Insurance Co Ltd v Seacalf Shipping Corp* [1983] 2 Lloyd's Rep. 25 per Oliver LJ at 32; *William Brandt Sons & Co v Dunlop Rubber Co Ltd* [1905] A.C. 454; *Raiffeisen Zentral Bank Österreich AG v Five Star Trading LLC* [2001] Q.B. 825, 50.

3 e.g. *Don King Productions Inc v Warren* [1998] 2 All E.R. 608; cf. *Barbados Trust Co Ltd v Bank of Zambia* [2007] 1 Lloyd's Rep. 495.

4 There is a separate situation in which the contract allows the transfer of rights to a specified third party without the consent of the other contracting party. In this case there is no novation, since the agreement of the other party is not required, nor strictly is there an assignment.

5 [1994] 1 A.C. 85 at 103; (1993) 63 B.L.R. 1.

6 [1903] 2 K.B. 660.

7 [1903] 2 K.B. 660, 668.

8 See, e.g. *Jaegers, etc. Ltd v Walker* (1897) 77 L.T. 180.

9 (1878) 3 Ex.D. 127.

10 As to which, see I.N. Duncan Wallace, "Defective Work: the New Flavours" (1990) 6 Const. L.J. 87.

11 [1989] A.C. 177; [1991] A.C. 398; (1990) 50 B.L.R. 1.

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Ltd[18] the House of Lords declined to adopt this "broad" ground of recovery by a bare majority. However, the court had already established a "narrow" ground based on *Dunlop v Lambert*,[19] where the transfer of property was foreseen, and recovery by a third party was presumed to be the intention of the contract.[20]

Thirdly, further inroads to the general principle that the assignee stands in the assignor's shoes, and therefore can recover no more than the assignor's loss, have been made by the decision of the Court of Appeal in *Technotrade Ltd v Larkstore Ltd*.[21] The Court of Appeal could not adopt the broad ground of recovery, since it had not been accepted in *Panatown*, and so proceeded by accepting that the assignee stood in the shoes of the assignor and therefore could recover no more than the assignor could have recovered. The Court of Appeal further observed that the assignment was a transfer of a right of action not of a right to recover specific loss. Since, on the court's analysis, the assignor would have been entitled to recover substantial damages had it remained in occupation of the premises after the assignment, the assignee could recover on the basis that in that event the assignor would have suffered loss in the amount corresponding to the expenditure of the assignee in remedying the relevant defects. In arriving at this conclusion, Mummery LJ relied on a passage in the judgment of Staughton LJ in *Linden Gardens Trust v Lenesta Sludge Disposals*[22]:

> "...In a case such as the present one must elucidate the proposition slightly: the assignee can recover no more damages than the assignor could have recovered if there had been no assignment, and if the building had not been transferred to the assignee."

9-007 The actual amount of loss did not arise for decision in *Technotrade*.

ILLUSTRATION

A site investigation was carried out by Technotrade for the Owner of land—Starglade. The site investigation was inadequate. Subsequently while works were being carried on the site a landslip occurred causing significant damage. Extensive works had to be undertaken by Larkstore, who had acquired the site by the date of the landslip. Proceedings were started thereafter. After proceedings had been started an assignment of Starglade's rights under the site investigation contract was made to Larkstore. Held, by the Court of Appeal, that Starglade would have been entitled to recover substantial damages as a result of the landslip if it had remained the Owner of the land at the time that the landslip occurred. Accordingly at the date of the assignment it had a right to substantial damages which was capable of being transferred to Larkstore. The justification for holding that Technotrade was liable for the loss in fact suffered by Larkstore was that a similar loss would have been suffered by Starglade had it remained the Owner of the site throughout the relevant period: *Technotrade v Larkstore* (2006).[23]

[Note: The striking feature of this case is that the damage resultant from the landslip occurred at a time when Larkstore was the Owner of the site, but before Larkstore had acquired any right to sue for the benefit of the site investigation contract.]

In *Technotrade*, Rix LJ emphasised the theme of the previous authorities as follows:

[18] [2001] 1 A.C. 518; [2000] B.L.R. 331.
[19] (1839) 6 C.L. & F.
[20] See also, I.N. Duncan Wallace, "Still No Answer: Third Party Damage and the Legal Black Hole" (2001) 18 I.C.L.R. 113.
[21] [2006] B.L.R. 345.
[22] (1992) 57 B.L.R. 57, 81.
[23] [2006] B.L.R. 345.

> "the maxim that where there is a right there is a remedy; but it could also be said that the courts are anxious to see, if possible, that where a real loss has been caused by a real breach of contract, then there should if at all possible be a real remedy which directs recovery from the defendant towards the party which has suffered the loss."[24]

An assignment may also be of a part only of the rights or sum due under the contract, which will not qualify as a statutory assignment.[25] Further, an assignment may relate only to a future contractual right, for example, a Contractor may assign rights under any contracts to be undertaken by them in the future, which, however expressed, can only operate as an agreement to assign. On the other hand, an assignment of rights not yet accrued under an existing contract is valid, including the right to damages for a breach not yet committed at the time of the assignment.[26]

(b) Legal assignments under s.136 Law of Property Act 1925

9-008 The Law of Property Act 1925 s.136(1) (which replaced s.25(6) of the Judicature Act 1873) provides for a statutory form of assignment in very specific terms. It provides that an "absolute assignment" by writing under the hand of the assignor of any debt or "other thing in action" of which express notice in writing has been given to the debtor or trustee is effective in law to pass the legal right to the assignee. This allows the assignee to sue the debtor in its own name without needing to join the assignor as a party to the action. For there to be an "absolute assignment" it is necessary that the assignor retains no interest in the subject matter of the assignment. Thus an attempt to assign part only of the assignor's rights will fail.

Attempted assignments often fail to fulfil the requirement that the assignment is absolute. One obvious way in which it is not absolute is when the right or fund in question is never actually transferred, but the chargee is given a right to payment out of that right or fund. These are not considered to be absolute assignments within the meaning of the Law of Property Act 1925.

ILLUSTRATIONS

(1) T was a creditor of the defendants for work done and plant and materials supplied to an amount which was, subsequent to the assignment but previous to the action, ascertained under an award as £31,109. By an indenture between G and T, reciting the contract with the defendants, a previous advance by G to T, an agreement to advance £5,000 more, and a still further sum not exceeding £10,000, T, after covenanting to repay with interest such advances, assigned to G all sums of money due, or to become due to him, T, from the defendants, subject to a proviso for redemption on repayment of all moneys due. Held, by the Queen's Bench Division, that G was held entitled to sue the defendants on this assignment in its own name as "an absolute assignment (not purporting to be by way of charge only)" under s.25(6) of the Judicature Act 1873: *Tancred v Delagoa Bay etc. Railway* (1889).[27]

(2) A firm of builders delivered a document to the plaintiffs as follows:

> "In consideration of money advanced from time to time we hereby charge the sum of £1,086,

[24] *Technotrade v Larkstore* [2006] B.L.R. 345, 83 per Rix LJ. See also *Pegasus v Ernst and Young*, applying *Linden Gardens* and *Technotrade*, [2012] EWHC 738 (Ch); [2012] S.T.I. 1387.
[25] *Williams v Atlantic Assurances* [1933] 1 K.B. 81.
[26] See per Staughton LJ in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1992) 57 B.L.R. 57, 93, CA. See also, I.N. Duncan Wallace, "Assignment of Rights to Sue for Breach of Construction Contracts" [1993] 109 L.Q.R. 82, 90–91, Staughton J's dictum was not dissented from on this point in the House of Lords.
[27] (1889) 23 Q.B.D. 239.

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which will become due to us from … Robertson on the completion of the above buildings as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you."

The plaintiffs gave notice to Robertson and sued for the sums due. Held, by the Court of Appeal, after considering *Tancred v Delagoa Bay etc. Railway*,[28] that while an assignment under a mortgage with an express proviso for reassignment on redemption was an absolute assignment, as the mortgagor-assignor would have to give notice on the reassignment to the original debtor and the latter would know with certainty in whom the legal right was vested, and while that principle ought not to be confined to cases where there was an express provision for reassignment, the present assignment was nevertheless conditional because of the use of the words "until the money … be repaid", which limited the assurance to Robertson, and consequently the plaintiffs, having sued alone, could not succeed: *Durham Brothers v Robertson* (1898).[29]

(3) A building Contractor, in consideration of an overdraft from his bankers, executed an instrument by way of continuing security to them for all money due or falling due or to become due under his building contracts, and empowering them to settle all accounts in connection with the works and to give receipts for the moneys assigned, and to sue for and take any steps necessary to enforce payment. Notice in writing was given to the building Owners. Held, by the Court of Appeal, and following the reasoning in *Durham Brothers v Robertson*,[30] that the principle relating to mortgages was not confined to cases where there was an express proviso for reassignment, and the assignment was absolute: *Hughes v Pump House Hotel Co* (1902).[31]

One substantial reason for the distinction between absolute assignments and charges is that in the case of a charge, if the assignee sued the debtor the court could not decide who the debtor should finally pay without reviewing the position as between the assignee and assignor, and this could not be done without having both before the court. Absolute assignment leaves no doubt as to the assignee's right to seek redress from the debtor. So, where an assignment of a debt to a bank was held to be by way of a charge because it was expressed to be made as a security for a loan to the bank and operable only on the assignor's failure to perform the obligations under the original contract, which had given rise to the debt under the loan agreement with the bank, the right assigned could not be enforced as a s.136 assignment.

9-009 A similar result has arisen in respect of other conditional assignments which cannot be said to be "absolute" for the purposes of the Act. In *Herkules Piling v Tilbury Construction*[32] it was held that an assignment subject to a condition, whether a condition precedent or condition subsequent, was not to be viewed as an absolute assignment.

The effect of s.136 is also procedural, and means that, as from the date of receipt of the notice,[33] an assignee under a valid assignment may sue upon the contract in its own name, without joining the assignor in the proceedings, and may give a good discharge for the contractual obligation involved without the consent of the debtor. No consideration is necessary to support such an assignment.[34] However, the notice must be accurate in all substantial respects, so that if, for instance, it mis-states the

[28] (1889) 23 Q.B.D. 239, see above.
[29] [1898] 1 Q.B. 765.
[30] [1898] 1 Q.B. 765, see above.
[31] [1902] 2 K.B. 190.
[32] (1992) 81 B.L.R. 107.
[33] *Holt v Heatherfield Trust Ltd* [1942] 2 K.B. 1.
[34] *Westerton, Re* [1919] 2 Ch 104.

date of the assignment, it will be invalid as a statutory assignment,[35] although it may be valid as an equitable assignment.

In construction contracts, a Contractor requiring working capital or which finds itself in financial difficulties may assign all moneys due or to become due under a contract to a bank, factor or creditor. An assignment of the retention moneys alone is also not uncommon in practice. An assignment of this latter kind was held to qualify as a valid statutory assignment in *G & T Earle Ltd v Hemsworth Rural DC*,[36] by the Court of Appeal affirming Wright J, and a number of earlier cases to the same effect.

(c) Equitable assignments

9-010 Even if an assignment cannot take effect as a statutory assignment, either because it is not in writing, or because notice is not given, or because it is conditional, or by way of charge only, or of part only of the debt, it may nevertheless be a valid equitable assignment. An equitable assignment may be perfectly effective despite its being by word of mouth only, and equally need not be supported by consideration,[37] although the completed transfer of the right in question must be plainly shown. There must have been some action or statement evincing a positive intention to assign, so that the mere inclusion of an assignable direct warranty by a designer in favour of a developer vendor in a bundle of documents sent by the vendor's liquidator to a purchaser of property in circumstances indicating a need for its assignment to the purchaser, was held ineffective.[38]

Nor need notice to the debtor be given, although this is highly desirable from the assignee's point of view, since by doing so priority against any other assignee will be obtained, and any subsequent equities by the debtor contractee against the debt will be avoided, as also the risk of the debtor's obligation being discharged by payment to the assignor.

While an absolute assignee of any equitable right can also sue in its own name, this is not the case if the right is a legal one,[39] and as an ordinary rule, equity will require the assignor to be joined. In *Three Rivers DC v Bank of England*,[40] Waite and Peter Gibson LJJ recognised this as a general principle, although that case was concerned with the question of whether an assignor must add the assignee as a claimant.[41] Peter Gibson LJ held that save in "special circumstances" the court will require the equitable assignee of a legal chose in action to join the assignor "as a procedural requirement so that the assignor might be bound and the debtor protected."[42]

9-011 The question of whether or not both the assignor and the assignee must be par-

[35] *W.F. Harrison & Co Ltd v Burke* [1956] 1 W.L.R. 419 (or if the amount of the debt is wrongly stated, per Denning LJ).
[36] (1928) 44 T.L.R. 758.
[37] *Holt v Heatherfield Trust Ltd* [1942] 2 K.B. 1.
[38] *Allied Carpets Group Plc v WMP (a Firm)* [2002] B.L.R. 433 (HH Judge Bowsher QC). See also, *Swiss Bank Corp v Lloyds Bank* [1982] A.C. 584, 613; and *Kijowski v New Capital Properties* (1990) 15 Con. L.R. 1, in which it was held that there had been no intention to assign and see *Burridge v MPH Soccer Management Ltd* [2011] EWCA Civ 835 (equitable assignment of debt inferred solely from instruction by assignor to pay the debt into the account of the assignee).
[39] See, e.g. an ordinary contractual right.
[40] [1996] Q.B. 292 CA.
[41] See [1996] Q.B. 292, 304B–H per Waite LJ.
[42] [1996] Q.B. 292, 313F–G per Peter Gibson LJ.

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ties to a claim based on an equitable assignment remains open as is shown by the contrasting cases of *Bexhill UK Ltd v Razzaq*[43] and *Cluttons LLP v Regis Group Ltd*.[44] In the former case the assignor was required to be a party whereas in *Cluttons* they were not.

In *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC*,[45] Mance LJ stated the position in the authorities regarding equitable assignment of a legal chose in action thus:

> "There is a rule of practice that the assignor should be joined but that rule will not be insisted upon where there is no need, in particular if there is no risk of a separate claim by the assignor ...The case for joinder will obviously be strongest if there is an issue between assignor and assignee regarding the existence of an assignment or the equitable assignee has acquired only part of a chose in action ...."

The current position in the authorities means that although the rule is not absolute, a cautious assignee of a legal chose in action under an equitable assignment would always add the assignor.

The necessity for joinder in cases of non-statutory assignment is due to the fact that both the court and the debtor will need to know the exact current state of accounts or of mutual obligations as between assignor and assignee and give good discharge for any judgment.[46] For the same reason, an assignor under an equitable or non-statutory assignment may not sue alone, at any rate once notice of the assignment has been given.[47]

ILLUSTRATION

Plastering Sub-contractors claimed that £1,808 was due to them by the Main Contractors. The Sub-contractors had entered into an arrangement with their own suppliers and with the Main Contractors whereby the latter were given an irrevocable authority to pay £1,558 to the suppliers as a good and sufficient discharge of the money due for the plastering work to the extent of the sum so paid. Held, by the Court of Appeal, that the arrangement amounted to an assignment to the suppliers by way of charge of part of the alleged debt due to the plastering Sub-contractors, who could not sue for the work done without joining the suppliers: *Walter & Sullivan Ltd v J. Murphy & Sons Ltd* (1955).[48]

See *Kapoor v National Westminster Bank Plc*[49] at [30]–[43] for a useful summary of the current approach.

(d) Assignment of rights under personal contracts

9-012 Rights which are personal in nature are not assignable. Whether the rights are personal is a matter of the presumed intention of the parties to the contract and therefore a question of construction. The characteristic of a personal right is if the performance by the other party is an important matter because of the personal

[43] [2012] EWCA Civ 1376.
[44] [2012] EWCA Civ 965.
[45] [2001] Q.B. 825; [2001] 2 W.L.R. 1344, 60.
[46] See the *Durham Brothers* case, above, para.9-009.
[47] See, e.g. *Steel Wing Co Ltd, Re* [1921] 1 Ch 349 (assignment of part of the debt). Compare *Cottage Club Estates Ltd v Woodside Estates Co (Amersham) Ltd* [1928] 2 K.B. 463, discussed in another context below.
[48] [1955] 2 Q.B. 584.
[49] [2011] EWCA Civ 1083.

requirements or special skill of one party then the contract is likely to be a personal one.

By the nature of construction contracts, it is not obvious that an assignment of the parties' rights, whether of the Contractor to receive the price or of the Employer to have the work done according to the contract, can prejudice the other party to the Contract. In *Charlotte Thirty Ltd* and *Bison Ltd v Croker Ltd*,[50] HH Judge Malcolm Potter QC accepted this as a general rule[51] and saw it as supported by the line of authorities before and after *Tolhurst v Associated Portland Cement Manufacturers*.[52]

However, any general statement that building contracts do not give rise to personal rights and obligations is too broad. An assignment by an Employer under a construction contract where the work is not very clearly defined, or to a large extent provisional, and where wide powers to order variations are available, might prejudice the Contractor, depending upon the requirements or standing of the proposed assignee.[53] Moreover, some Employers or their construction professionals may well be regarded as more strict in their administration of their contracts and in the enforcement of remedies than others, but it would seem that arguments that the Employer's rôle in a construction contract is for that reason personal, and so preventing assignment of the benefit of the contract without consent, have not been generally accepted by the courts.[54]

9-013 In *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd*[55] such considerations influenced the House of Lords in upholding an express prohibition on assignments, saying construction contracts were "pregnant with disputes" so a Contractor has interest in dealing only "with the particular employer with whom he has chosen to enter into a contract".[56]

ILLUSTRATIONS

(1) Owners of chalk pits contracted to supply all the chalk requirements for 50 years of a company operating a cement works. The cement manufacturers assigned their whole undertaking, including the benefit of their various contracts. Held, by the House of Lords, that the chalk pit Owners were bound to continue to supply the requirements of the works for the new company: *Tolhurst v Associated Portland Cement* (1903).[57]

(2) A provision merchant agreed to supply a cake manufacturer with all the eggs he should require for his business for one year, the manufacturer undertaking not to purchase eggs elsewhere during that period provided the merchant was able to supply them. During the year the manufacturer transferred his business to a bakery company with branches all over the country, whereas the manufacturer had only three places of business. Held, by the Court of Appeal, distinguishing *Tolhurst's* case, above, on the ground that the contract there was to supply the needs of a particular place (the cement works), that the contract was personal and could not be assigned: *Kemp v Baerselman* (1906).[58]

Cases on this subject, depending on their facts and surrounding circumstances,

[50] [1990] Con. L.R. 46
[51] 24 Con. L.R. 46, 56.
[52] [1903] A.C. 414. See also, *Shayler v Woolf* [1946] Ch 320.
[53] See the rather similar position of a vendor undertaking pre-completion building works in *Southway Group Ltd v Wolff* (1991) 57 B.L.R. 33.
[54] See Staughton LJ's dicta to this effect in *Linden Gardens* (1992) 57 B.L.R. 57, 93.
[55] (1993) 63 B.L.R. 1.
[56] See *Linden Gardens* (above) at 105. However, the matter was in the event subject to an express provision which prohibited assignment for either party without written consent of the other.
[57] [1903] A.C. 414.
[58] [1906] 2 K.B. 604.

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are likely to be found falling on each side of a difficult borderline. In addition to the illustrations above, see the illustrations in the section on Vicarious Performance of Contractual Liabilities[59] below, some of which in fact concern assignment. It is submitted that although rights such as a warranty that a completed building is free from defects, or a debt, are plainly assignable, it is necessary to consider with care whether the benefit of a building contract which has not been fully executed will be personal and incapable of assignment or vicarious performance, by reference in particular to whether the contract involves particular skills, individual characteristics of the parties, extensive co-operation, trust, or ill-defined obligations which only the original parties understand.

It is because of these uncertainties that construction contracts frequently contain express prohibitions against assignment.

9-014 Even in personal contracts such as between Employers and their professional consultants it is not unknown for the parties to agree that one party may assign the benefit of the contract whilst the other cannot. So if the Employer has specially selected an architectural firm for their iconic style of design and no other Architect could perform that service, an express non-assignment clause is often included or implied; however, the Employer may well assign the contract to a third party purchaser whose only obligation is to pay the Architect's fees.

When a purported assignment fails due to the personal nature of the contractual relationship this does not prevent there being an agreement between the assignor and assignee.[60]

(e) Notice

9-015 As already stated, notice of an assignment to the debtor or party liable is procedurally essential for a statutory assignment, and while not essential in the case of equitable assignments, is highly desirable from the point of view of the assignee.

First, provided the assignment is in writing and not conditional, or by way of charge only, or of part of the debt only (for this purpose retention moneys can be treated as a single debt, separate from any remaining balances due) the fact of notice will enable it to rank as a statutory assignment, and hence enable the assignee of such a legal right or debt to sue in its own name, in the same way as an absolute assignee of an equitable right or debt, without the expense of joining the assignor in the proceedings.

Secondly, in the case of assignment of a debt to the Contractor, Employers who disregard the notice and pay the Contractor and not the assignee will do so at their peril, and will be liable to pay twice over.[61]

9-016 Thirdly, the assignee will thereby gain priority over any other assignees there may be who have not already given notice.[62]

Fourthly, the assignee may avoid the creation of any later new equities against the debt (as, for example, by an Employer making further voluntary advances, as opposed to equities subsequently arising under the contract itself). Even if no notice is given, however, an assignee for value takes priority over a subsequent garnishee,

[59] See Section 9.1, sub-section (9).
[60] *Don King Productions v Warren* [2000] Ch 291; cf. *Milroy v Lord* (1862) 44 De G.F. & G. 264.
[61] *Brice v Bannister* (1878) 3 Q.B.D. 569, illustrated below at para.9-035.
[62] *Ward v Buncombe* [1893] A.C. 369.

since the latter can only take under their order what could properly and without violation of the rights of others be dealt with by the judgment debtor.[63]

An additional reason may be that, under the express terms of many prohibition clauses, a valid permitted assignment whether by Employer or Contractor requires the consent of the other party to be effective. Even where, as often the case with leases, there may be a still further proviso prohibiting unreasonable withholding of consent (see further the discussion below on prohibitions against assignment) and there is self-evidently no reasonable ground for objection, consent must nevertheless be requested and refused if the assignment is to be valid.[64] As to when it is reasonable to refuse consent, see *Lymington Marina Ltd v MacNamara*[65] and *JML Direct Ltd v Freesat UK Ltd*.[66]

9-017 Only the statutory notice needs to be in writing (except in the case of equitable interests in land or personalty, where writing is required under s.137(3) of the Law of Property Act 1925, but this is not likely to arise in building contracts).

No particular form is required, but the notice must be clear and unambiguous. The fact of assignment should be stated, and the debtor informed that the assignee is by virtue of the assignment entitled to payment or performance of the obligation in question. A mere indication that payment may be made to a third party as agent for the creditor is insufficient.[67]

(f) Assignee takes subject to equities

9-018 Assignees, whether under statutory or equitable assignments, take subject to all defences available against the assignor, including equitable set-offs (that is, cross-claims for damages arising out of the same contract or transaction which rank as a defence up to but not exceeding the value of the right assigned. The excess thereafter represents a true counterclaim and not a set-off and is maintainable only against the assignee.)

ILLUSTRATION

A builder assigned to the plaintiff money due from the defendant building Owner on completion of the building. Held, by Cleasby B, that the defendant might set off any damages caused by delay of the builder to the extent of the claim, but might not recover damages in excess of the claim against the assignee: *Young v Kitchin* (1878).[68]

(3) Assignment of Contractual Liabilities, or the Burden of the Contract

9-019 It is fundamental that although the benefit of a contract can be assigned, a contracting party can never assign its *liabilities* to be discharged by another. That

[63] *Pickering v Ilfracombe Railway* (1868) L.R. 3 C.P. 235; *Badely v Consolidated Bank* (1888) 38 Ch D. 238; *Davis v Freethy* (1890) 24 Q.B.D. 519; *Evans Coleman & Co v Nelson Construction* (1958) 16 D.L.R. (2d) 123.
[64] See per Millett LJ in *Hendry v Chartsearch* [2000] 2 T.C.L.R. 115 CA, cited with other early authorities by J.A. Tackaberry QC in "Assignment of the Right to Arbitration" (2001) 17 Const. L.J. 287, 288. Further, as to when it is reasonable to refuse consent, see *Lymington Marina Ltd v MacNamara* [2007] EWCA Civ 151 and *JML Direct Ltd v Freesat UK Ltd* [2009] EWHC 616 (Ch).
[65] [2007] EWCA Civ 151.
[66] [2009] EWHC 616 (Ch).
[67] See *Percival v Dunn* (1885) 29 Ch D. 128, below at para.9-037.
[68] [1878] 3 Ex.D. 127.

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can only be done by agreement, i.e. by novation, which is the transfer by agreement of both the rights and liabilities under a contract undertaken by both the original contracting parties and the third party. The phraseology that is traditionally used is that of benefit and burden: the benefit of the contract can be assigned, but not the burden of the contract.[69]

There are, however, two rarely used exceptions to this general rule against assignment of burdens.

(a) Conditional benefit

9-020 It is permissible to assign the benefit of a contract and attach conditions that run with the enjoyment of that benefit such that the burden of a contract will have to be accounted for in order that the benefits can be received. In *Schiffahrtsgesellschaft Detlef Von Appen v Voest Alpine Intertrading GmbH*[70] it was held that the right to extract minerals was to be subject to the duty to pay compensation if due to the extraction the land suffered from subsidence giving rise to compensation due from the assignee of that mining right. More generally and without prior conditional agreement the rule that an assignment is subject to equities, including equitable set-off, will make contractual liabilities highly relevant. Thus it is well recognised that if a Contractor assigns monies to a bank that are due from the Employer, then whilst the bank is under no liability to the Employer and no such liability has been assigned, nevertheless if the builder breaches the construction contract then the Employer can reduce the bank's claim when calling on the debt by reference to the poor performance, allowing an abatement.[71]

(b) Pure benefit

9-021 In *Tito v Waddell*[72] Megarry VC developed a new concept distinguished from conditional burdens and described as the "pure principle of benefit and burden".[73] This pure principle is regarded as a further limited exception to the general rule, which has the restrictions applied that the condition giving rise to the burden must be relevant to the exercise of the right and that there must have been a clear intention of the parties to allow this assignment, i.e. it cannot be exercised unilaterally by one party to the contract as in usual assignments. The first test of the exception was *Rhone v Stephens*[74] in which the owner of a house agreed to keep the roof of the house and adjoining property in repair. Both the house and adjoining cottage were then sold and the assignee attempted to argue that this was a pure benefit case. This argument was rejected because the condition giving rise to the need to repair was not relevant to the exercise of that right. Hence the purchaser of the cottage could not require the purchaser of the house to continue to repair the roof of the cottage; it was not a condition of the right to occupy the house that the roof had to be repaired nor was it relevant to occupation.

[69] The traditional language is still used, e.g. *Linden Gardens* (above) [1994] 1 A.C. 86, 103: "the burden of a contract can never be assigned without the consent of the other party to the contract."
[70] [1997] 2 Lloyd's Rep. 279.
[71] See *Young v Kitchin* (see para.9-018, above); and *The Trident Beauty* [1994] 1 W.L.R. 161, 165.
[72] [1977] Ch 106.
[73] [1977] Ch 106, 302.
[74] [1994] 2 A.C. 310, 322.

(4) Unassignable Contractual Rights and Remedies, and the Damages Recoverable on Assignment

9-022 Certain rights are by reason of their nature not permitted to be assigned. Apart from some perhaps doubtful extensions of the previously discussed category of rights under "personal" contracts, under which contractual rights of seizure or forfeiture, or under an arbitration clause, have been held not to pass upon an assignment of the benefit of the contract, the principal exception to assignability will be found where what is assigned is a "bare" right to sue for damages of breach of contract.[75] The exceptions to this rule are closely linked to the question of how an assignee's rights are enforced, and the extent to which they can recover substantial damages in litigation, and that question is examined here.

(a) Bare right of litigation

9-023 The common law prohibited the buying and selling of rights to litigate, and the rules of champerty and of the ancient tort of maintenance still exist, although as set out below, substantial inroads have been made. An assignment of a bare right of litigation which is unattached to a lawful transfer of other property to the assignee (such as the assignment of a dilapidations claim upon the transfer of a lease,[76] or a ship-builder's assignment on delivery of a ship to a ship-owner of a right of damages against a Sub-contractor[77]) offends against the principles of the tort of maintenance, and is unassignable as being a mere "trafficking in litigation", unless the assignee can show what has been described by the House of Lords in *Trendtex Trading v Credit Suisse* as "a genuine and substantial commercial interest in taking the assignment and enforcing it for his own benefit".[78]

The "genuine commercial interest" test in *Trendtex* has severely limited the reach of the common law prohibition on maintenance and champerty.[79] Subsequent authorities have continued this trend. The common law rule that no one can interfere in or profit from litigation, which was embodied in the doctrines of maintenance and champerty, is now only important where the commercial interest does not exist. In *Trendtex Trading v Credit Suisse*, Lord Wilberforce stated that an assignment of a bare cause of action which involved the likelihood of a profit being made (beyond the genuine commercial interest) "would savour of champerty".[80]

However, some profit beyond the commercial interest will not render the whole transaction void. In *Browntown v Edward Moore Incubon Ltd*[81] the Court of Appeal held that a defendant who had settled with the plaintiff had a genuine commercial interest in taking an assignment of the plaintiff's claim against the other defendant who was denying liability. This was not limited to cases where the assignee would recover no more than their commercial interest; a profit on the transac-

[75] *Prosser v Edmonds* (1835) 1 Y. & C. (Exch.) 48; *Gregg v Bromley* [1912] 2 K.B. 474.
[76] See *Ellis v Torrington* [1920] 1 K.B. 399.
[77] *Constant v Kincaid* (1902) 4 F. (Ct. of Ses.) 901.
[78] *Trendtex Trading Corp v Credit Suisse* [1982] A.C. 679, 703F.
[79] In *Cant, In the matter of Novaline Pty Ltd (In Liq)* [2011] F.C.A. 898, the Federal Court of Australia deemed the interest of a former director and creditor of a defunct company in the overall pool of assets available for distribution to creditors a genuine commercial interest allowing him to take an assignment of a bare right to litigate from the company's liquidators.
[80] *Trendtex* [1982] A.C. 679, 694G, per Lord Wilberforce.
[81] [1985] 3 All E.R. 499. See also *Eurocall Ltd v Energis Communications Ltd* [2010] EWHC 1730 (QB).

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tion did not automatically render the transaction void. The prospect of excessive profit may properly be taken into account in deciding whether the commercial interest was genuine.[82] Moreover, assignments by insolvency trustees or liquidators (there often being few other assets to fund litigation on behalf of the creditors) have traditionally been upheld and treated as a privileged class of transaction on a pragmatic basis,[83] even if made in return for a share of the proceeds. Thus in *Stein v Blake*[84] an assignment by a trustee to a legally-aided plaintiff after he had become bankrupt but before trial in return for a substantial share of the proceeds was upheld, enabling the proceedings to continue with renewed legal aid on joinder of the trustee.[85]

Again, though an assignment to an individual was previously invalidated on policy grounds by the Court of Appeal where its principal object had been to obtain legal aid not otherwise available to a company,[86] that case was expressly overruled by the House of Lords in the combined *Norglen Ltd v Reeds Rains Prudential Ltd* and *Circuit Systems Ltd v Zuken-Redac (UK) Ltd* cases,[87] in terms expressed by Lord Hoffmann which were wide enough not only to reject maintenance or champerty challenges but also objections by defendants to assignments in insolvency cases where the principal objective was to gain procedural or tax advantages for the bankrupt estate, such as obtaining legal aid (*Circuit Systems*) or avoiding a security for costs order against a plaintiff insolvent company (*Norglen*).

Illustration

A Contractor had a claim against the Bahamian government and the government-owned national airline carrier Bahamasair for delay and disruption caused to CAASL's development of a site for the government. This claim was for a six-figure sum. After proceedings had been commenced, the Contractor sold the business to a third party, but did not sell or assign the benefit of the claim. Subsequently, the Contractor assigned its entire interest in the litigation for $10 to Aerostar, a limited company formed by its sole shareholder. At first instance and on appeal, the assignment was held to be void as assignment of a bare right to litigate. The Privy Council allowed the Contractor's appeal. Baroness Hale, who delivered the Privy Council judgment, stated that:

> "In order to decide whether the particular transaction is permissible, it is essential to look at the transaction as a whole and to ask whether there is anything in it which is contrary to public policy."

Given that Aerostar owned all the shares in the original Contractor the assignment was a "perfectly sensible business arrangement.": *Massai Aviation Services Ltd v Att Gen for Bahamas* (2007).[88]

[82] [1985] 3 All E.R. 499, 508–509 per LLoyd LJ. See also the Privy Council decision in *Massai Aviation Services Ltd v Att Gen for the Bahamas* [2007] UKPC 12. Baroness Hale's speech sets out the authorities subsequent to *Trendtex* and the common law position on assignment of bare rights to litigate. For a first instance case where these earlier decisions were applied see *Tinseltime Ltd v Roberts* [2011] EWHC 1199 (TCC); [2011] B.L.R. 515.

[83] See per Lord Hoffmann in *Circuit Systems Ltd v Zuken-Redac (UK) Ltd* (1997) 87 B.L.R. 1 at 14C.

[84] [1996] 1 A.C. 243.

[85] See also, *Grovewood Holdings Plc v James Capel* [1995] 2 Ch 80.

[86] *Advance Technology Structures Ltd v Cray Valley Products Ltd* (1993) 63 B.L.R. 51.

[87] (1997) 87 B.L.R. 1; [1999] 2 A.C. 1.

[88] [2007] UKPC 12. See by contrast the decision of Judge Alison McKenna in *Skywell (UK) Ltd v Revenue & Customs Commissioners* concluding that the assignment of a bare right to litigate, intended to protect an independent interest previously acquired, was champertous and unenforceable [2012] UKFTT 611 (TC).

(b) As a compromise of litigation

9-024 It not infrequently occurs that, in the course of multi-partite litigation, one party may compromise a claim against it by another party on the basis of assigning to that party its own rights against yet another party to the litigation.[89] Such assignments have been upheld in appropriate circumstances, notwithstanding objections that they were void as assignments of a bare right to sue: see, for example, the New Zealand case of *Fris Co Ltd v Kingston Partners Ltd*[90] where the claimant Employer, following the Contractor's liquidation, entered into a compromise agreement with the Contractor's liquidators pursuant to which the Employer waived its claims against the Contractor in return for an assignment of the Contractor's claims against the Sub-contractor. Faire J held, obiter,[91]:

> "The assignment in this case is clearly designed to avoid unnecessary and prolonged steps in a series of litigation designed to recover from the ultimate alleged wrongdoer damages suffered by the plaintiff. I certainly therefore conclude (for the purposes of a strike out application) that the plaintiff has a genuine commercial interest in taking the assignment so that it has the possibility of recovering for its own benefit damage which it sustained in the first place, and which it would claim against [the Contractor] who, in turn, would claim against the [Sub-contractor]."

Illustration

Owners of a hospital, where certain stacks had collapsed, sued variously in contract or tort the Main Contractors, the Sub-contractor suppliers of certain concrete rings used in constructing the stacks, and the Architects, Structural Engineers and Heating Engineers. All parties, except the Heating Engineers, agreed to contribute and meet the Employers' claim in an agreed sum. The Structural Engineers then agreed with the Employers and the remaining defendants that they would meet the Heating Engineers' proposed share of the total sum in return for an assignment of the Employers' claims and of the other defendants' various third party claims against the Heating Engineers, together with arrangements for reducing contributions if sums were recovered in their names from the Heating Engineers. No notice was given of the assignments, and the Heating Engineers objected to them as being void for maintenance and champerty. Held, by HH Judge Newey QC, that in the absence of notice the assignment took effect as an equitable assignment of the various claims; and that the Structural Engineers had a genuine commercial interest in the assignments and in enforcing the claims, so that they were valid and effective, notwithstanding a theoretical possibility of profit from the agreement: *South East Thames Regional Health Authority v Y.J. Lovell* (1985).[92]

(c) Where property of third party is damaged

9-025 Building or plant constructed under a building or engineering contract is very commonly sold on before completion, and the Employer is not necessarily the Owner of the real property interest. Such arrangements often involve the assignments of rights under the building or engineering contract, or under collateral warranties can fall foul of the technicalities of the law of assignment. The circumstances in which an assignee can litigate and recover its losses are therefore of great importance.

[89] The Court of Appeal decision in *Kazeminy v Siddiqi* [2012] EWCA Civ 416 underlines the importance of considering assignee claims when drafting and agreeing settlement agreements.

[90] [2011] NZHC 514 (24 May 2011).

[91] At [68].

[92] [1985] 32 B.L.R. 127. See also, *Constant v Kincaid* (1902) 4 Ct. of Sess. 901; *Hydrocarbons Great Britain Ltd v Cammell Laird Shipbuilders Ltd* (1991) 53 B.L.R. 84, both illustrated below.

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Not only will an assignment, for example, of a right to damages for breach of contract or for negligence in tort, be effective if made as an incident of a transfer of property, but it now seems established that such an assignment will be effective notwithstanding that, at the date of the assignment, there was no cause of action then known to the assignor, or indeed that, at the date of the assignment, no breach of contract or other cause of action had as yet even occurred.[93]

This is the result of the seminal line of cases commencing with the *St Martin's* decision in the House of Lords, followed by *Darlington BC v Wiltshier Southern Ltd* in the Court of Appeal, and culminating in the House of Lords in 2000 in *Alfred McAlpine Construction Ltd v Panatown* (illustrated, below[94]).

9-026 The *Linden Gardens* and *St Martin's* cases involved assignors under a failed, because expressly prohibited, assignment. They do not, on analysis, really depend on the law of assignment but are concerned solely with the question of whether the doctrine of privity of contract excludes enforcement of a right to damages by third party beneficiaries in situations where assignment is absent.[95]

ILLUSTRATION

In two linked cases there were express prohibitions against "assignment of the contract" by the Employers in all the relevant building contracts. These were held to be effective to prevent the assignees from suing or recovering in both cases. Since the assignors were no longer a party in the *Linden Gardens* action, but only the assignees had brought proceedings, it was held that the Contractors in that case had a complete defence. However, in the *St Martin's* case, although the assignor company was not liable to the assignee company for the cost of repairs, on the true construction of the assignment agreement, so that that basis for recovery by the assignor company in the Court of Appeal could not be supported, nevertheless the assignor could recover. The assignor company in the *St Martin's* case could recover the cost of repair which the assignee company had incurred on their behalf, since it was in the contemplation of the building contract as part of a building development project that ownership of the building would pass from the original developers to other parties, on whose behalf the assignor company would need to sue: *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*; *St Martin's Property Corp v Sir Robert McAlpine & Sons* (1993).[96]

The practical effect of the *Linden Gardens* case seems to be as set out below. In the absence of express prohibitions on assignment in a developer's contracts with its Contractor or Architect, an assignment of the developer's contractual rights against them will be effective to enable the assignee to sue for cost of repair of defects or other damages, notwithstanding that at the time of the assignment no existing breach of contract has yet been discovered or even, as in the *St Martin's* case, that no breach has as yet been committed. (Staughton LJ suggested in the Court of Appeal that in such a case the assignor might have to be joined, however.)[97] In the *Linden Gardens* case itself there was an express prohibition, so the assignees themselves could not sue.

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[93] As explained above and illustrated in *Technotrade*, the rationale being that it is the right to enforce the contract not the right to recover damages that is the essential chose, and the right does not depend on the date the damage was suffered.

[94] See para.9-027.

[95] See the articles of I.N. Duncan Wallace, "Defects and Third Parties: No Peace for the Wicked?" (1999) 15 Const. L.J. 245 CA; and "Still No Answer: Third Party Damage and the Legal Black Hole" (2001) 18 I.C.L.R. 113 HL.

[96] (1992) 57 B.L.R. 57, CA; [1994] 1 A.C. 85, HL.

[97] See 57 B.L.R. 57 at 93. See, however, now *Darlington BC v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68; (1994) 69 B.L.R. 1.

Where the assignee itself cannot sue for any reason, such as a prohibition against assignment, the assignor can sue on the assignee's behalf, accounting to it for the proceeds of the action, if it is the assignee and not the assignor who has suffered the loss. This may, however, be limited to cases where it is in the contemplation of the original contracts, such as those in a development project, that the original contracting party will be passing the property on to other owners or lessees. The speeches in the House of Lords, however, expressly leave open the question whether this is an unduly narrow restriction, and that the rule may also apply to all contracts of services carried out on property, such as construction contracts, as an objective measure of damage where work is defective, whether or not transfer of the property to other persons is contemplated by the original contract.

9-027 Nevertheless, this case raises a number of difficult and unresolved questions where property has been transferred and assignment has taken place but, on the particular facts, the loss has not been suffered by the party able to sue under the rules relating to assignment of contracts. Very importantly also, the available remedies to an assignee unable to sue for any reason, and whose assignor is unwilling to proceed on the assignee's behalf, seem uncertain.[98] In the *Darlington* case Dillon LJ held that the assignor there was also a constructive trustee of the benefit of the right to enforce the building contract. In the *Linden Gardens* case itself, Lord Griffiths held that St Martin's could recover on the broad ground that in contracts for work and materials, recovery of substantial damages should not depend on the claimant having a proprietary interest in the subject matter of the claim, because it was so frequent for work to be ordered on behalf of the real property Owner, but by a party who was not in fact the real property Owner. However, the majority were content to decide the case on the basis of a narrow exception derived from contracts for the carriage of goods, which does not apply to all contracts to work and materials, but only to contracts where the parties can be held to have intended that the contracting party can obtain a remedy for the true Owner of the goods, because no other remedy is available.

The validity of the broad ground is still not established.

ILLUSTRATION

Contractors M contracted with P to design and build an office building and car park for £10m on land in fact owned by another company in P's group (Unex). At the time of the contract, M (together with various consultants on the project) had given Unex a warranty by deed of *due care* in discharging their contractual obligations to P, and additionally undertook with Unex to give *unqualified* warranties of *Contract compliance* to any future lessees of Unex. Prior to completion or any subsequent leases a major dispute developed over the state of the building, with P alleging that it was so defective that it would require demolition. It was not alleged that P had contracted as agents for Unex, or that they would be liable to Unex for the defects. Held, by the Court of Appeal, overruling the trial judge, that M were liable to P on the narrow ground of exception, which had been applied to construction contracts by the *St Martin's* case. But held, by the House of Lords, allowing M's appeal (Lords Goff of Chieveley and Millett dissenting) that the deed entered into between M and Unex was sufficient to displace both the narrow and broad grounds of liability: *Alfred McAlpine Construction Ltd v Panatown Ltd* (2001).[99]

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[98] See I.N. Duncan Wallace, "Assignment of Rights to Sue: Half a Loaf" (1994) 110 L.Q.R. 42.

[99] [2001] 1 A.C. 518; [2000] B.L.R. 331.

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(d) Damages recoverable on assignment

9-028 When assignments of a right to sue for damages are permitted, defendants have tried to argue that no loss has occurred. They contend either that in the particular circumstances the assignor has suffered only nominal damage, so that the assignee can be in no better position, or conversely that in the circumstances, while the assignor may have suffered damage, the assignee has not. In other words, they contend that the accident of transfer and assignment create, in Lord Keith of Kinkel's phrase, a "legal black hole"[100] into which the right to damages disappears, leaving the contract-breaker defendant with an uncovenanted immunity.

In *Dawson v GN & City Railway*[101] the Owner of land had a statutory claim against a railway company in respect of the damage caused to the land by reason of the railway operations. The land was sold and the new purchaser assigned the statutory claim with the title deeds. The railway company's liability to the assignee new purchaser was held to be limited to the measure of loss suffered by the original landowner assignor—the additional loss wholly suffered by the new purchaser was irrecoverable. This decision is entirely in line with the general proposition that an assignee cannot recover more than the assignor. However, an attempt to extend this somewhat obvious and general principle was made in *Technotrade Ltd v Larkstore Ltd*.[102] The defendant soil mechanics expert produced a soil inspection report for the assignor for use in a pending development of the site. The Owner assignor sold on to the new purchaser of the land who as assignee developed the site, which subsequently suffered from landslip. In order to seek redress from the soil mechanic defendant the new purchaser arranged to have the soil report assigned to him and proceeded to sue for negligent inspection. The defendant argued that the assignee was unable to prove any loss because the original site Owner had sold for full value and thus suffered no loss. The Court of Appeal rejected this argument as contrary to legal principle and good sense and noted:

> "that where a real loss had been caused by a real breach of contract, then there should if at all possible be a real remedy which directs recovery from the defendant towards the party which has suffered loss."[103]

The correct test to apply therefore seems to be that the assignee should only recover to the same extent that the assignor could have done on the assumption that there had been no assignment, i.e. the landowner had not sold the development site on to the purchaser. From that point of view the landowner could have successfully sued the soil mechanic for a negligent soil report. This principle entirely accords with the approach taken in *Linden Gardens* (above) in the Court of Appeal by Staughton LJ, who noted that:

> "the assignee can recover no more than the assignor could have recovered if there had been no assignment and if the building has not been transferred to the assignee."[104]

9-029 *Technotrade Ltd v Larkstore Ltd*[105] is a strong case against any "black hole" defence, since the black hole was avoided even though the damage occurred after

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[100] Per Lord Keith of Kinkel in the *GUS Property Management* case, illustrated at para.9-029, below.
[101] [1905] 1 K.B. 260.
[102] Illustrated above at para.9-007.
[103] At [83].
[104] At 80–81.
[105] [2006] B.L.R. 345.

property had changed hands from assignor to assignee, i.e. by the time the damage occurred, the assignor was no longer in a position to suffer directly from the damage. The principle that the assignee can recover no more than the assignor is preserved to some extent, but with the important modification that one effectively ignores the sale of the property.

The overall impression created by the *Linden Gardens* judgments and speeches seems to be that considerations of principle had, perhaps understandably, become secondary to an overriding policy objective, namely to ensure by one means or another that no uncovenanted immunity of contract-breakers causing damage should result from the accident of a transfer of property by an assignor.[106]

ILLUSTRATIONS

(1) Ship-builders of two steam tugs sub-contracted the manufacture of the engines and boilers. The vessels were delivered to the Owners and full payment made both by the ship-owners and the ship-builders, but the engines were later found to be defective, and had to be replaced at a time when the ship-builders were in bankruptcy. The ship-owners thereupon negotiated a settlement with the trustee whereby, in return for an assignment to them of the ship-builder's right of action against the engine-makers, the trustee would be relieved of all further claims by the ship-owners. When sued by the ship-owners as assignees, the engine-makers contended that, since the assignor ship-builders had paid nothing to the ship-owners and had been released from all liability, the assignors had suffered no damage at all; or alternatively that the damages should be limited to the four shillings in the pound which the ship-owners would have recovered from the ship-builders' trustee in the bankruptcy. Held, by the Court of Session, that but for the assignment the trustee would have been able to claim in full. Instead he had received, in return for the assignment, a full discharge from the ship-owners, who as assignees were accordingly entitled to recover in full: *Constant v Kincaid* (1902).[107]

(2) The walls of a concrete reservoir collapsed during construction, due to the Contractor's disregard of orders given by the Resident Engineer as to the sequence of back-filling behind the walls. When the Contractors refused to repair at their own cost and complete, the Owners terminated the contract and made a claim for damages against the Contractor. The latter's sureties then settled the Owner's claim in full for a sum in excess of the amount of their bond, being recouped for this in full by the Contractors under their indemnity obligation to the sureties, as part of an overall arrangement whereby the Owners agreed to transfer the benefit of their contract of employment of their Engineers and permit the sureties to use the Owners' name in proceedings against them. The Engineers, when sued for negligence in the name of the Owners for failing to ensure that their orders had been carried out by the Contractor, contended that the Owners, having been reimbursed in full, had suffered no loss. Held, by the Supreme Court of Canada (Cartwright CJC and Spence J dissenting), that the sureties, using the name of the Owners, were entitled to recover the cost of repairing and completing the reservoir, since the Owners would be bound to hand over the proceeds of the action to the sureties if successful, and as a result there would not be double recovery: *City of Prince Albert v McLellan* (1969).[108]

[Note: It is difficult to approve of the majority reasoning in this case. As pointed out by Cartwright CJC, the surety had not himself paid the Owners under the bond, but simply used the Contractor's money to pay the claim in full, so that no question of subrogation arose. Moreover, there is no reason apparent in the report of the case why

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[106] Any difficulty of these "no loss" arguments arising from the respective Court of Appeal and House of Lords' judgments in the *Linden Gardens* case was discussed and discounted by I.N. Duncan Wallace (see "Assignment of Rights to Sue for Breach of Construction Contracts" (1993) 109 L.Q.R. 82; and "Assignment of Rights to Sue: Half a Loaf" (1994) 110 L.Q.R. 42).
[107] (1902) 4 Ct. of Sess. 901.
[108] (1969) 3 D.L.R. (3d) 385.

the Owner would be obliged to hand back the surety's payment if the action failed, as the majority judgments in the case apparently thought.]

(3) In 1970 and 1971 a building, then owned by the assignor company, was damaged by building operations on an adjoining property. In 1975, ownership of the building was transferred by the assignors under company policy to a second company in the same group at book value, and in 1976 the first company assigned all its claims arising out of the adjoining building operations to the second company, which carried out the necessary repairs and, as assignees, sued the defendants in tort for the reduced value of the building or, alternatively, for its cost of repair. The defendants argued that the assignors could have pursued their claim at the date of the assignment; that the only relevant loss for which the plaintiffs could sue was that of the assignors; and that since it was the assignees who had incurred the costs, while the assignors had transferred the building at book value without any deduction for the damage, the assignors had suffered no loss and so there was no claim to assign. Held, by the House of Lords, reversing the Scottish First Division, that while a sale of the land at a price reflecting its damaged state might, in such a case, be the best evidence of the loss suffered by an assignor, this particular transaction was effected under company policy at book cost regardless of the state of the building, and should therefore be disregarded in considering the assignor's damage, in the same way as if the building had been the subject of a later gift by the assignor. The cost of repair by the assignees was relevant in assessing the damage which the assignors would have suffered if they had continued to own the building. Whether the cost of repair rather than diminution of value was the appropriate measure of damage could await evidence, but it had been wrong to treat the price of the transfer as showing that there had been no damage suffered by the assignors: *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* (1982).[109]

(4) Main Contractors C for the construction of an off-shore accommodation vessel sub-contracted the design and supply of a number of hydraulic jacking units to A, who sub-sub-contracted the manufacture and supply of 24 hydraulic cylinders to RB, who in turn sub-sub-sub-contracted the supply of 48 parts for these cylinders, called cast steel clevises, to BC. RB were financially in some difficulties, and the party likely to be ultimately responsible for later discovered defects in the work were the clevis suppliers BC. The Employers brought an action against C, which was settled; and C brought proceedings against his Sub-contractor A. In these circumstances A entered into an agreement with his Sub-sub-contractor RB under which, in the event of A being held liable to C, RB admitted liability to A and assigned its own right of action against BC to A, but on terms that RB's liability to A should be limited to whatever sum of money might be recovered by A when proceeding in RB's name against BC. Shortly after this, A settled C's claim against him for £5,000,000. In proceedings by A in RB's name against BC to recover the £5,000,000, the latter took the preliminary point that, as a result of RB's agreement with A, the possibility of RB incurring any loss at all had now been effectively removed, so that A as assignee of RB's cause of action could recover no more than nominal damages. Held, by the Court of Appeal, that the effect of the agreement between A and RB was not to extinguish RB's liability to A, but merely to limit it to such amount as might be recovered in the action against BC, so that BC were in principle liable to indemnify RB in full in respect of A's liability to C: *Hydrocarbons Great Britain Ltd v Cammell Laird Shipbuilders Ltd* (1991).[110]

A number of other authorities in England where a benefit, having the effect of reducing or eliminating the plaintiff's loss, and deriving from some other incidental source, has been disregarded when computing a plaintiff's damages for breach of contract or in tort are discussed by Staughton LJ in the *Linden Gardens* case.[111]

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[109] 1982 S.L.T. 533. See this case discussed by Staughton LJ in the *Linden Gardens* case in the Court of Appeal, 57 B.L.R. 57, 89–90.

[110] (1991) 53 B.L.R. 84.

[111] (1992) 57 B.L.R. 57, 84–91. This difficult and rarely discussed subject has also been the subject of

(e) Rights of seizure and forfeiture

9-030 Certain individual rights under a contract otherwise assignable may also be so personal in nature as not to pass upon an assignment of the benefit of the contract. Thus in hire-purchase agreements, the right of the Owner to enter and seize in default of payment has been held to be a right personal to the original Owner, and hence not to pass on an assignment of the benefit of the agreement.[112] It is submitted, however, that, despite any apparent similarity an Employer's rights of determination and re-entry onto its own land when faced with a recalcitrant Contractor under the provisions of a construction contract (which are usually conditioned on breach or other conduct of the Contractor requiring to be objectively assessed, and often further subject to a construction professional's certification), and conversely a Contractor's right to determine for non-payment and to seize and use goods and materials on site, as in the Standard Form Contract, can easily be distinguished from the personal nature of a hire-purchase Owner's right to enter another person's dwelling-house and seize their chattels. It would be impractical, it is submitted, so to emasculate the Employer's control of a construction project upon an otherwise acceptable transfer of property, for example, upon the transfer of a development during construction with an assignment of the benefit of the current construction contract. This view of the nature of the forfeiture power in a construction contract receives support, it is submitted, from the cases where injunctions have been refused against construction Employers restraining them from wrongful re-entry and expulsion of the Contractor from the site. Moreover, it has been seen that the law will not generally take account of the possibility that one person may be relatively more or less indulgent than another in the enforcement of contractual rights and remedies when deciding whether a contract is of such a personal nature that it cannot be assigned or vicariously performed.

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(f) Arbitration clauses

9-031 In *Cottage Estates Ltd v Woodside Estates Ltd*,[113] Wright J expressed the view that arbitration agreements were not assignable; in that case a builder assignor of moneys due under a building contract had obtained an award from an Arbitrator, but on case stated the award was set aside on the ground that the assignee had not been joined. However, Wright J's view was openly disapproved by the Court of Appeal in 1946 in *Shayler v Woolf*,[114] and distinguished, and not followed by Bingham J in 1984, when he held that under s.1 of the Arbitration Act 1975 charterers, but for having taken a step in the action, would have been entitled to a stay for arbitration of an action for demurrage brought by the assignee.[115]

It is submitted that Wright J's reasoning cannot really be upheld on principle. An assignment confers a right to sue. The contract may have provided that the forum

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an article by Professor J.G. Fleming, "The Collateral Source Rule and Contract Damages" (1983) 71 *California Law Review* 56. See also, I.N. Duncan Wallace, "Assignment of Rights to Sue for Breach of Construction Contracts" (1993) 109 L.Q.R. 82, 89.

[112] *Ex p. Rawlings, re Davis* (1888) 22 Q.B.D. 193; applying *Brown v Metropolitan Counties Life Assurance Society* (1859) 28 L.J.Q.B. 236.

[113] [1928] 2 K.B. 453.

[114] *Shayler v Woolf* [1946] Ch 320, 323.

[115] *Rumput (Panama) SA v Islamic Republic of Iran Shipping Lines, The Leage* [1984] 2 Lloyd's Rep. 259. See also, *Montedipe SpA v JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep. 11, per Hobhouse J.