



SBC/**G** 2016

Standard Building Contract
Guide 2016

An abstract graphic design featuring a series of overlapping rectangles in various shades of blue, ranging from a deep navy to a bright cerulean. The rectangles are arranged in a way that creates a sense of depth and movement, with some appearing to be in front of others. The pattern is set against a solid yellow background.

2016

STANDARD BUILDING CONTRACT

Standard Building Contract Guide (SBC/G)

This Guide is intended to provide a general introduction to the contract and is not a substitute for professional advice.

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Contents

| | |
|---|---------------|
| Introduction | <i>Page 1</i> |
| General | |
| 2016 edition changes | |
| Format and Risk Allocation | |
| Content of the Guide | |
| Agreement | 3 |
| Recitals | 3 |
| Articles | 3 |
| Contract Particulars | 3 |
| Attestation | 4 |
| Conditions | 5 |
| Section 1 – Definitions and Interpretation | 5 |
| Definitions (clause 1.1) | |
| Interpretation (clauses 1.2 to 1.12) | |
| Section 2 – Carrying out the Works | 5 |
| Contractor's Obligations (clauses 2.1 to 2.3 and Supplemental Provisions 1, 4 and 5) | |
| Possession (clauses 2.4 to 2.7) | |
| Supply of Documents, Setting Out etc. (clauses 2.8 to 2.12 and Schedule 1 (Design Submission Procedure) and Supplemental Provision 7) | |
| Errors, Discrepancies and Divergences (clauses 2.13 to 2.18) | |
| Contractor's Design Work and Liability (clauses 2.19 and 2.20 and Supplemental Provision 3) | |
| Fees, Royalties and Patent Rights (clauses 2.21 to 2.23) | |
| Unfixed Materials and Goods (clauses 2.24 and 2.25) | |
| Adjustment of Completion Date (clauses 2.26 to 2.29 and Schedule 2) | |
| Practical Completion, Lateness and Liquidated Damages (clauses 2.30 to 2.32) | |
| Partial Possession by Employer (clauses 2.33 to 2.37) | |
| Defects (clauses 2.38 and 2.39) | |
| Contractor's Design Documents (clauses 2.40 and 2.41) | |
| Section 3 – Control of the Works | 9 |
| Access and Representatives (clauses 3.1 to 3.6) | |
| Sub-Contracting (clauses 3.7 to 3.9 and Supplemental Provisions 8 and 9) | |
| Architect/Contract Administrator's Instructions (clauses 3.10 to 3.22 and Schedule 4) | |
| CDM Regulations (clause 3.23 and Supplemental Provision 2) | |
| Section 4 – Payment (and Schedule 6 – Forms of Bonds) | 11 |
| Contract Sum and Adjustments (clauses 4.1 to 4.4) | |
| Taxes (clauses 4.5 and 4.6) | |
| Payments, Certificates and Notices – general provisions (clauses 4.7 to 4.13) | |
| Interim Payments – calculation of sums due (clauses 4.14 to 4.15) | |
| Listed Items (clause 4.16) | |
| Retention (clauses 4.17 to 4.19) | |
| Loss and Expense (clauses 4.20 to 4.24) | |
| Final Adjustment and Final Payment (clauses 4.25 and 4.26) | |

| | |
|---|-----------|
| Section 5 – Variations | 13 |
| General (clauses 5.1 to 5.5 and Schedule 2) | |
| The Valuation Rules (clauses 5.6 to 5.10) | |
| Section 6 – Injury, Damage and Insurance (and Schedule 3 – Insurance Options) | 14 |
| Personal Injury and Property Damage – indemnity and insurance (clauses 6.1 to 6.5) | |
| Insurance of the Works and Existing Structures (clauses 6.7 to 6.14 and Schedule 3) | |
| CDP Professional Indemnity Insurance (clauses 6.15 and 6.16) | |
| Joint Fire Code (clauses 6.17 to 6.20) | |
| Section 7 – Assignment, Performance Bonds and Guarantees, Third Party Rights and Collateral Warranties (and Schedule 5 – Third Party Rights) | 17 |
| Section 8 – Termination | 18 |
| General (clauses 8.1 to 8.3) | |
| Termination by Employer (clauses 8.4 to 8.8) | |
| Termination by Contractor (clauses 8.9 and 8.10) | |
| Termination by either Party and regulations 73(1)(a) and 73(1)(c) of the PC Regulations (clause 8.11) | |
| Consequences of Termination under clauses 8.9 to 8.11, etc. (clause 8.12) | |
| Section 9 – Settlement of Disputes | 20 |
| General (and Supplemental Provision 6) | |
| Mediation (clause 9.1) and ADR | |
| Adjudication (clause 9.2) | |
| Arbitration (clauses 9.3 to 9.8) and litigation (Article 9) | |
| Appendix A – Model Form for the Rights Particulars | 22 |
| Appendix B – Related Publications | 25 |

Introduction

General

- 1 This edition of the Guide to the Standard Building Contract has been issued in conjunction with the 2016 edition of the Contract (SBC 2016).
- 2 The Standard Building Contract continues to be published in three versions: With Quantities (Q), Without Quantities (XQ) and With Approximate Quantities (AQ). Each continues to include the provisions designed to meet the needs of both private and public sectors.
- 3 The Contract is primarily appropriate for larger works where most of the works have already been designed and/or detailed by or on behalf of the Employer, where detailed contract provisions are required and where the Employer is to provide the Contractor both with drawings and with either bills of quantities (Q and AQ) or a specification or work schedules (XQ) to define the required quantity and quality of the work.
- 4 Each version requires the appointment of an Architect/Contract Administrator and Quantity Surveyor to administer the contract; each allows both for Contractor's design of discrete part(s) of the works (the Contractor's Designed Portion) and for the works to be carried out in sections.

2016 edition changes

- 5 The principal changes in the 2016 edition of SBC are:
 - the incorporation, with minor changes, of the provisions of the JCT Public Sector Supplement 2011 relating to Fair Payment, Transparency and Building Information Modelling;
 - adjustments to reflect the Construction (Design and Management) Regulations 2015 ('the 2015 CDM Regulations');
 - the inclusion of provisions to reflect relevant aspects of the Public Contracts Regulations 2015 ('PC Regulations');
 - incorporation of the provisions of the JCT 2012 Named Specialist Update;
 - an extension of (Works) Insurance Option C to allow alternative solutions to the problems for tenants and domestic homeowners of obtaining Existing Structures cover for Contractors, accompanied by consolidation within the main text of the previous general provisions of Insurance Options A, B and C relating to evidence of insurance, insurance claims and reinstatement work;
 - revisions and simplification of the section 4 payment provisions, including introduction of a procedure for prompt assessment of Loss and Expense claims, the establishment for Fair Payment purposes of Interim Valuation Dates that are also to apply at sub-contract and sub-subcontract levels, further flexibility in relation to Fluctuations Provisions and consolidation in a single sub-section of the notice requirements of the Housing Grants, Construction and Regeneration Act 1996, as amended ('the Construction Act');
 - inclusion of provisions for the grant of Performance Bonds and Parent Company Guarantees;
 - extension of the optional provisions for Collateral Warranties from sub-contractors to include Third Party Rights from them;
 - minor updating and clarification of the JCT IPR provisions.
- 6 Together with minor consequential amendments and in common with other JCT contracts SBC 2016 also:
 - introduces minor updates in terminology: the Articles remain in their existing format but reference to them has been dropped from the Agreement heading; 'Measurement Rules' (the RICS New Measurement Rules, unless otherwise stated) now supersede the Standard Method of Measurement; and 'Site Manager' supersedes 'Person in charge';
 - includes an updating of the wording of clause 1.9 (Effect of Final Certificate), as part of a review that, in the case of certain other contracts and sub-contracts, was already reflected in their 2011 editions;

- includes a new clause 1.11 (Consents and approvals); this eliminates the need for multiple iterations of the requirement that particular consents or approvals are not to be unreasonably delayed or withheld. (Clauses where the giving of consent is entirely discretionary remain limited to Employer's consents to allow errors in setting out, defective work and work not in accordance with the Contract to remain and the consent of either party to an assignment of rights by the other.)

Format and Risk Allocation

- 7 In this edition the sectional division and overall format of SBC remains unchanged apart from the Contract Particulars where Part 2 has now been deleted.
- 8 It seems that most users have now developed their own forms setting out their detailed Third Party Rights and Collateral Warranty requirements; the additional provisions for Third Party Rights from Subcontractors would not readily fit into the existing JCT Contract Particulars format and separate documents therefore appear preferable. Assistance with their preparation, if required, is available from the Model Forms for the Rights Particulars on the JCT website www.jctltd.co.uk. A copy of the Model Form for use with all versions of SBC 2016 is appended to this Guide.
- 9 Within existing sections it will be seen that in section 4 there is change in the order of several clauses which in certain cases are now grouped for ease of reference into new, shorter sub-sections.
- 10 Other than that and clarificatory changes in clause headings, the only alterations in clause order are a change at the end of section 1 consequent on insertion of the new clause 1.11; changes at the end of section 6 consequent on inclusion at clauses 6.12 to 6.14 of the ancillary provisions from the three (Works) Insurance Options; and the changes of numbering in section 7 for three general clauses relating to Third Party Rights and Collateral Warranties that result from insertion of the Performance Bond and Parent Company Guarantee provisions.
- 11 It is not believed that any of the 2016 edition amendments or changes in format will in practice materially affect risk allocation.

Content of the Guide

- 12 This Guide reviews the provisions of SBC 2016 sequentially, starting with the Agreement, followed by the Conditions. The Schedules, including the Supplemental Provisions (Schedule 8), are discussed in the context of the Conditions to which they most closely relate. That commentary is followed by:

Appendix A – Model Form for the Rights Particulars (for use with all versions of SBC 2016)

Appendix B – Related JCT Publications
- 13 Appendix B lists the other JCT documents that either form part of the SBC 2016 suite or can otherwise readily be used in conjunction with the Contract.
- 14 Users wishing to have full tracked change details in hard copy form of the amendments made in SBC 2016 should purchase a copy of whichever of the Q, AQ or XQ versions of SBC 2016 Tracked they require.

Agreement

- 15 The Agreement comprises the Recitals, Articles and Contract Particulars, followed by the Attestation clauses. The Contract Particulars set out the particulars required for both the Articles and the Conditions.

Recitals

- 16 The Recitals require insertion of a brief description of the Works, identifiers of the Contract Drawings or of their listing and a brief description of the Contractor's Designed Portion (if applicable).
- 17 Deletions should be made if a priced Activity Schedule (Q and XQ versions only) or an Information Release Schedule is not provided and where the Works are not divided into Sections.
- 18 JCT would stress the need for proper identification of Contract Drawings and, for any Contractor's Designed Portion, the respective documents that comprise the Employer's Requirements and Contractor's Proposals, together with the need to check for consistency between them before execution. That identifiers are not always changed to reflect a change reinforces the desirability of initialling or signing all Contract Documents for identification purposes.

Articles

- 19 Subject to minor adaptation of Article 5 to deal with appointment of the Principal Designer that is now generally required by the 2015 CDM Regulations, the Articles remain substantially the same as those in previous editions, with Articles 1 and 2 summarising the primary obligations under the Contract, Articles 3 to 6 dealing with relevant contractual and statutory appointments and Articles 7 to 9 with dispute resolution. (Reference in Article 6 to the Site Waste Management Plans Regulations 2008 has been deleted following their repeal.)
- 20 In terms of Article 7 (Adjudication) and clause 9.2 of the Conditions, care needs to be taken when SBC 2016 is used for a contract to be let by a residential occupier within the meaning of section 106 of the Construction Act (i.e. a contract which principally relates to operations on a dwelling which one or more of the parties to the contract occupies, or intends to occupy, as his or her residence). Part 2 of that Act does not apply to contracts with residential occupiers and, in those cases, the Architect/Contract Administrator should consider with clients whether those provisions and/or any of the Act's notice provisions should be disapplied.
- 21 Article 8 (Arbitration) applies only if the Contract Particulars specifically state that that Article and clauses 9.3 to 9.8 apply. If they do not apply final resolution of disputes will, absent any subsequent agreement to arbitrate be a matter for the courts.

Contract Particulars

- 22 The Contract Particulars have been simplified by the deletion of Part 2 of the Particulars for the reasons given in the Introduction; that part is replaced by simple identification of the Rights Particulars document in the entry for clause 7.4.
- 23 In relation to the Eighth Recital entries for Supplemental Provisions, it will be noted that the Named Specialist provision does not apply unless one of the positive options is selected and the other entries deleted.
- 24 There is a new entry against clause 1.1 for identification of any BIM Protocol applicable and, with the deletion of the Fluctuations sub-section of section 4, a wider entry for choice of provision (or non-applicability) is now set out against the reference to clauses 4.3 and 4.14.
- 25 There is an additional entry for clause 6.7 and Schedule 3 in relation to Insurance Option C to allow the substitution of paragraph C.1 by alternative Existing Structures insurance arrangements (a 'C.1 Replacement Schedule'), which are further discussed below in the context of section 6.
- 26 For section 7, in addition to the Rights Particulars entry mentioned above, there are new entries relating to performance bond and parent company guarantee requirements (clauses 7.3.1 and 7.3.2).

Attestation

General

- 27** The attestation provisions remain in the standard JCT layout introduced in 2008, with separate forms for execution under hand and execution as a deed. Different attestation provisions are still required under the law of Scotland (for which the Scottish Building Contract Committee Limited issues Scottish contract forms); other attestation clauses may also be needed in the case of certain housing associations, partnerships and possibly, as discussed below, foreign companies.

Execution under hand or as a deed

- 28** The primary factor governing the decision to execute the Contract under hand or as a deed is whether the limitation period for instituting proceedings in contract is to be 6 years, as in the case of execution under hand, or 12 years, where the Contract is executed as a deed. The mode of execution of the Contract will also determine the mode of execution of collateral warranties (clause 7.6) and (for both third party rights and collateral warranties) the limitation period that applies to them.

Foreign companies

- 29** It appears that there is a continuing increase in the number of foreign companies involved in development and construction that now themselves directly carry on business in the UK, rather than operating here through UK subsidiaries.
- 30** Under existing Companies legislation (the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 (SI2009/1917)), a foreign company can execute deeds either:
- by affixing its common seal or any manner of execution permitted under the laws of its place of incorporation; or
 - by expressing the document to be executed by the company under the signature of persons authorised to sign on its behalf in accordance with its domestic law.

Many foreign companies do not have a seal and the authority of relevant signatories needs to be checked. If there is any doubt, professional advice should be obtained.

- 31** To avoid complications in the service of claims or notices outside the jurisdiction, consideration should also be given to inserting an obligation on the foreign company for the duration of the Contract to maintain an agent for service within England and Wales or within Scotland or Northern Ireland, as appropriate.

Conditions

Section 1 – Definitions and Interpretation

Definitions (clause 1.1)

- 32 Principally as a result of the contractual and legislative changes outlined in the Introduction, clause 1.1 contains a significant number of changes from SBC 2011; these are shown in the tracked change versions of SBC 2016 but most are straightforward and self-explanatory. The extension of traditional references to Local Authorities to include other public authorities reflects the very substantial and significant take up of the JCT Public Sector Supplement by other public authorities and their advisers.

Interpretation (clauses 1.2 to 1.12)

- 33 This sub-section of SBC 2016 contains four straightforward changes:
- the first two, in clause 1.3 and the new clause 1.4.6, both relate to BIM, i.e.:
 - first, in terms of clause 1.3 and precedence of documents, an agreed BIM Protocol is a Contract Document but some model protocols claim in the case of conflict to override the Agreement and other Contract Documents; JCT considers that its contracts give sufficient latitude to BIM Protocols so that a conflict should not arise; in any event, it also considers that unqualified overriding provisions of this type are not appropriate in such protocols;
 - secondly, with a view to avoiding any ‘form over substance’ argument, clause 1.4.6 reflects the fact that, under BIM, designs and information supplied to or by the Contractor may not take the same name or form as their hardcopy equivalent, albeit they clearly serve the same function, whether that be a design, a specification, work schedule or the like;
 - the third consists in the amendments to clause 1.9 (Effect of Final Certificate) referred to in the Introduction which are simply aimed at brevity and clarity;
 - the fourth change is insertion of the new clause 1.11, also referred to in the Introduction.
- 34 In terms of clause 1.9, a corollary of the strict Construction Act time limits for issue of Architect/Contract Administrator’s payment certificates is that if the Final Certificate is to have its intended effects, it must be issued on time, i.e. within the two month period specified in clause 4.26.1.

Section 2 – Carrying out the Works

- 35 Section 2 remains substantially in its existing form, dealing sequentially with various aspects of the construction process, starting with the Contractor’s basic obligations with respect to the carrying out and completion of the Works. Minor simplifications and consequential changes apart, the only changes in the section are the minor revisions of the IPR provisions in clauses 2.22, 2.23 and 2.41 and the Relevant Event in clause 2.29.12 together with the insertion of further Relevant Events at clauses 2.29.2.3 and 2.29.13 (reasonable objections to, and insolvency of, Named Specialists).

Contractor’s Obligations (clauses 2.1 to 2.3 and Supplemental Provisions 1, 4 and 5)

- 36 Clause 2.1 expands on the Contractor’s principal obligation under Article 1. It requires that the Works be carried out in a proper and workmanlike manner and in compliance not only with the Contract Documents but also with the CDM Construction Phase Plan and Statutory Requirements, e.g. planning consent conditions, local bye-laws and health and safety legislation generally. The Contractor is also required to give all relevant statutory notices, e.g. those under building regulations, those to the local authority in relation to the operation of the site and any that are required in relation to health and safety matters, including incident reports.
- 37 Clause 2.2 sets out further obligations in respect of the design of the Contractor’s Designed Portion, i.e. to complete the design in a manner consistent not only with the Employer’s Requirements and Contractor’s Proposals, but also (so far as relevant) with the Contract Drawings and Contract Bills (Q and AQ versions) or Specification/Work Schedules (XQ version) and with Architect/Contract Administrator’s instructions on integration into the overall design of the Works. Clause 2.3 then makes provision with regard to materials, goods and workmanship.

- 38 Unless disapplied, Supplemental Provision 1 in Schedule 8 makes certain provisions for collaborative working; Supplemental Provision 4 encourages Contractor's suggestions for improving environmental performance and makes further provision for the supply of environmental impact information in relation to materials and goods selected by the Contractor; Supplemental Provision 5 covers KPIs and their monitoring.

Possession (clauses 2.4 to 2.7)

- 39 The sub-section covers the transfer to the Contractor of possession and, in effect, control of the site for the period up to practical completion. That is subject to:
- the Employer's possible option to defer giving possession for a specified period not exceeding 6 weeks (the Contractor being entitled to recover any loss and/or expense arising from a deferral);
 - the Contractor's obligation not unreasonably to refuse the Employer a right to use or occupy the site or part of it for storage or any other purposes prior to practical completion, if the Works and other relevant insurers consent; and
 - the Contractor's obligations to allow the Employer or other contractors on the latter's behalf to carry out other work on site where the requirement has been sufficiently described in the Contract Documents, and not unreasonably to withhold or delay his consent to such work being carried out even where sufficient information has not been given to him in advance.

(Employer's use or occupation for storage or other purposes under clause 2.6 should be distinguished from partial possession being retaken by the Employer under clause 2.33; the latter is treated as practical completion of the part repossessed and has consequences in terms of defect rectification, insurance and liquidated damages.)^[1]

Supply of Documents, Setting Out etc. (clauses 2.8 to 2.12 and Schedule 1 (Design Submission Procedure) and Supplemental Provision 7)

- 40 At clause 2.8 this sub-section covers the Contract Documents, access to them and confidentiality. Supplemental Provision 7, where it applies, contains provisions relevant to the Freedom of Information Act 2000 and transparency. Clause 2.9 provides for the supply of further construction information, including Contractor's Design Documents, levels and setting out dimensions, and the Contractor's master programme. The Architect/Contract Administrator is responsible for supplying information from the Employer's side in accordance with the Information Release Schedule and is also required under clause 2.12 to issue timely instructions to enable the progress of the Works to be maintained.
- 41 The Contractor is to supply his design documents as and when necessary and in accordance with the Design Submission Procedure (which may be that specified by the BIM Protocol or, in the absence of such a protocol, the procedure set out in Schedule 1). The latter may also be subject to any amendments of it, or other procedure substituted for it, by the Contract Documents. It is extremely important that the Contractor should not undertake work to which his particular designs relate until he has complied fully with the applicable procedure. If he fails to do so, he risks not being paid for the work in question (see paragraph 6 of Schedule 1).
- 42 Clause 2.9.1 includes the option of requiring critical path information in the Contractor's master programme (exercisable through the appropriate Contract Particulars entry). If that information is required, it extends also to the updates of the Contractor's programme that are required after any decision on the Completion Date or any Pre-agreed Adjustment of it. Insofar as they merely supplement the Articles and Conditions, other information requirements relating to the programme may be included in the Contract Documents; those requirements are a common feature of Preliminaries.
- 43 Under clause 2.10 (Levels and setting out of the Works), the Architect/Contract Administrator has power to make an appropriate adjustment of the Contract Sum for errors by the Contractor that are not required to be amended, but acceptance of the defect specifically requires Employer's consent. (A similar arrangement applies also to other defects in the context of clauses 2.38 and 3.18.2.)

Errors, Discrepancies and Divergences (clauses 2.13 to 2.18)

- 44 The sub-section deals in detail with the requirements for notification of errors, discrepancies and divergences discovered in Contract Documents and instructions, either in or between themselves or in relation to the Statutory Requirements; it also deals with the cost of remedial action. Again the Architect/Contract Administrator is required to give prompt instructions.

[1] The distinction between 'use and occupation' on the one hand and 'partial possession' on the other may not always be obvious. For a clear and helpful analysis, users are referred to the judgment in the case of *Impresa Castelli SpA v Cola Holdings Ltd* [2002] EWHC 1363 (TCC), 87 Con LR 123.

- 45 Subject to two exceptions, the general principle on cost is simple; it is borne by the Party responsible for the document in question. If any Contract Bills contain undisclosed departures from the Measurement Rules, or if there is a Contractor's Designed Portion and there are inadequacies in the Employer's Requirements (or any designs contained in them) that are not dealt with in the Contractor's Proposals, the Employer is responsible for the cost of the necessary Variation; the Contractor is responsible for errors, discrepancies and divergences in the Contractor's Proposals, in his CDP Analysis and in any other design work he carries out.
- 46 The two exceptions arise in relation to divergences from the Statutory Requirements. The first, under clause 2.17, is that the Contractor is responsible for checking that the Employer's Requirements and any instructions relating to the Contractor's Designed Portion conform to the Statutory Requirements in the same way that his own design documents must. However, by the further exception, the Employer assumes the risk of any divergences between the Statutory Requirements and any documents relating to the Contractor's Designed Portion, whether they are Contractor's documents or Employer's documents, if (but only if) the divergence arises from a change in Statutory Requirements after the Base Date and that change necessitates an alteration in the Contractor's Designed Portion.

Contractor's Design Work and Liability (clauses 2.19 and 2.20 and Supplemental Provision 3)

- 47 This sub-section follows on from clause 2.2 and deals with the Contractor's liability in respect of his design work. Under JCT contracts, this is intended to be the same as that of any independent architect or other professional designer directly employed by the Employer and claiming to be competent to undertake work of the relevant type. There is, under clause 2.19.3, an optional provision for an overall cap on liability for loss of use, loss of profits and other consequential loss arising from any inadequacy in the Contractor's design work: this does not limit or affect liability for direct loss, including the cost of remedial work or, where the consequences of the inadequacy are irremediable, the resultant diminution in value of the Works.
- 48 Unless disapplied, Supplemental Provision 3 (Cost savings and value improvements) applies whether or not there is a Contractor's Designed Portion. It is of course generally in the pre-construction period, rather than the construction phase covered by SBC 2016, that the Contractor is able to make his most useful contribution to value engineering exercises and it is to cover that period that JCT has produced its two Pre-Construction Services Agreements (PCSA and PCSA/SP). However, opportunities can arise later, often in the context of proposed variations, and it is not unreasonable that Contractors whose ideas make for material savings or improvements should receive a fair share of the benefits. A basic safeguard for Contractors' ideas can be built in as a condition of disclosure but it has to be recognised that there are considerable problems in assessing those benefits and that lengthy periods frequently have to elapse before they can properly be assessed. This makes positive formulation of benefit-sharing arrangements difficult. When making suggestions, Contractors should take care to avoid accidental assumption of design liabilities, particularly in areas where they otherwise have no design role.

Fees, Royalties and Patent Rights (clauses 2.21 to 2.23)

- 49 Statutory fees, e.g. building regulation notification and inspection fees, are under clause 2.21 to be paid by the Contractor. In the Q and XQ versions, they are his liability where they relate solely to the Contractor's Designed Portion; if they relate to the Works generally, they are to be reimbursed to him by the Employer, unless as a term of the tender they are included in the Contract Sum. Under AQ, they are in any event to be included in the Ascertained Final Sum and reimbursed.
- 50 In terms of patents, the wording of clauses 2.22 and 2.23 has been clarified and the latter now contains an additional notification provision. The principles, however, remain the same. In the case of the Works as originally designed or specified, any patent-related royalties or other payments to third parties are deemed to be included in the Contract Sum; it is only where supply or use is required by a subsequent instruction that the Contractor has right to reimbursement. Such cases are rare; if there is any question as to whether a requirement may involve use or infringement of third party patent rights, the matter should be raised with the Employer and the Architect/Contract Administrator before entry into the Contract or implementation of the instruction, as the case may be. The provision does not extend to copyright or design right infringement, which remains governed by general law.

Unfixed Materials and Goods (clauses 2.24 and 2.25)

- 51 The sub-section concerns the transfer to the Employer of property in Site Materials and Listed Items on payment to the Contractor, with a concomitant restriction on removal from site. This in practice is a matter which in a majority of cases involves sub-contractors, so that the flow-down of these conditions required by clause 3.9.2 is generally essential in cases of sub-contracts for work and materials. For Listed Items, the pre-conditions of payment are set out in clause 4.16.

Adjustment of Completion Date (clauses 2.26 to 2.29 and Schedule 2)

- 52 The sub-section sets out the provisions governing extensions of time in all cases other than those where there is a Pre-agreed Adjustment, i.e. agreement on an extension of time or for acceleration under the Schedule 2 Quotation procedure. In clause 2.29, SBC 2016 includes the minor amendments and extension to the list of Relevant Events mentioned above in the introductory comments on section 2.

- 53 Following the clause 2.26 definitions, clause 2.27.1 sets out the Contractor's obligation to notify; it should be noted that the obligation arises not merely when progress *is* being delayed but when it becomes reasonably apparent that it *is likely to be* delayed, and also that it arises in relation to *any* cause of delay or likely delay. The obligation is not restricted merely to Relevant Events that entitle the Contractor to an extension (i.e. those listed in clause 2.29) nor, where that likelihood exists, is it limited to events that have already occurred.
- 54 The obligation is to notify all the material circumstances, including the expected effects (clause 2.27.2), and thereafter to update the information given, as well as supplying any further information reasonably required (clause 2.27.3). The Contractor must also use best endeavours to prevent delay (or further delay) and, if that nevertheless occurs, to do everything reasonably required to proceed (clauses 2.28.6.1 and 2.28.6.2).
- 55 On being notified, the Architect/Contract Administrator has power and, where appropriate, a duty to grant extensions under clause 2.28.1, though it is only to grant such extension as he considers fair and reasonable. The Architect/Contract Administrator should reach a decision as soon as reasonably practicable (clause 2.28.2). Where there has been a Relevant Omission, as defined in clause 2.26.3, he also has power under clause 2.28.4 to fix an earlier Completion Date. However he can exercise the latter power only where there has already been an extension of the original Completion Date, either through an earlier decision or by a Pre-agreed Adjustment, and he cannot do so in such a way as to affect the length of any Pre-agreed Adjustment unless the omission is from the work that formed the subject of that adjustment (clause 2.28.6.4). In no circumstances may the date fixed by such a decision be earlier than the Date for Completion given in the Contract Particulars.
- 56 In addition, immediately following practical completion, the Architect/Contract Administrator under clause 2.28.5 has not merely the power (as from the Completion Date) but also a duty to review the overall position with respect to extensions of time. In that review he may look at all the circumstances, including Relevant Events that may not have been specifically notified under clause 2.27.1 and has power to do what he considers fair and reasonable, either by fixing a later or (for Relevant Omissions) an earlier Completion Date or by confirming the existing date.
- 57 The provision for overall review appears frequently to be overlooked. It provides an opportunity for proper reflection and assessment and is, in the JCT's view, essential. Without such a review, decisions made in the course of the Works – sometimes made in a short space of time and without a full knowledge of either the facts or the effects of the various possible causes of delay – inevitably risk giving rise to precisely the expensive and wasteful disputes that the Contract seeks to avoid.

Practical Completion, Lateness and Liquidated Damages (clauses 2.30 to 2.32)

- 58 The sub-section requires the Architect/Contract Administrator to issue a Practical Completion Certificate or Section Completion Certificate as soon as the Works or Section achieve practical completion and the Contractor has fulfilled his obligations both as to as-built drawings and health and safety file matters (clause 2.30). Where there are Sections, good practice dictates issue of the Practical Completion Certificate for the Works at the same time as the last Section Completion Certificate, but there is no reason why these should not form a single document.
- 59 The sub-section also requires the issue of a Non-Completion Certificate if the Contractor fails to achieve practical completion by the relevant Completion Date (clause 2.31). In the event of such failure, liquidated damages will become payable or deductible on notice from the Employer in accordance with clause 2.32.2 provided that a subsisting Non-Completion Certificate has been issued and provided that the Employer himself has notified the Contractor in advance that he may require payment or make a withholding or deduction of such damages (clause 2.32.1).
- 60 Grant of an extension of time requires cancellation of a Non-Completion Certificate and, within a reasonable time, repayment of any liquidated damages insofar as they relate to the period of the extension; it also requires the issue of a further certificate in respect of any residual period of default. Users should note the time limits for service both of the warning notification (clause 2.32.1.2) and of the notice of the claim itself (clause 2.32.1, hanging paragraph); they should also note that, where the Employer intends to withhold or deduct all or any of the liquidated damages payable, he must also satisfy the Pay Less Notice requirements of clause 4.11.5, in order to comply with section 111(3) of the Construction Act.

Partial Possession by Employer (clauses 2.33 to 2.37)

- 61 As indicated above, there is provision at clauses 2.6 and 2.7 whereby the Contractor may during the progress of the Works be obliged to accommodate use and occupation of parts of the site by the Employer for storage or other purposes and work by others that falls outside the Contract. Clause 2.6 contains a pre-condition as to insurance, but the clauses otherwise have no effect on the operation of other terms of the Contract.
- 62 Clause 2.33, on the other hand, is concerned with outright repossession of part(s) of the site in advance of practical completion, which has the consequences set out in clauses 2.34 to 2.37, i.e. deemed practical completion of the

relevant parts, commencement of the Rectification Period in respect of them, followed by a separate Certificate of Making Good, responsibility for insurance of the part(s) in question immediately passing to the Employer and a reduction (pro rata to value) in the rate of liquidated damages.^[2]

- 63 The clause 2.33 right can be of benefit to Employers in relation to discrete areas of the site, where use and occupation will not impede the Contractor in managing the site and his completion of the Works as a whole, but it should not be invoked without proper liaison and due consideration of its possible effects.

Defects (clauses 2.38 and 2.39)

- 64 Clauses 3.17 to 3.19 set out the Architect/Contract Administrator's powers with regard to actual and suspected defects arising during the progress of the Works. This sub-section gives him power to specify and require remedial action in respect of defects that become apparent in the Rectification Period exercisable through an overall Schedule of Defects (clause 2.38.1) and/or by interim instructions in respect of individual defects (clause 2.38.2). The schedule or notice in each case must be given or delivered not later than 14 days after the expiry of the Rectification Period. A Schedule of Defects should be comprehensive since, in the interests of a properly managed rectification programme, the clause 2.38.2 power in respect of individual defects ceases when that schedule is served.
- 65 As under clauses 2.10 (Setting out) and 3.18.2 (Work not in accordance with the Contract), if the Employer agrees to defective work being allowed to remain, the Architect/Contract Administrator has power under clause 2.38 to make an appropriate adjustment to the Contract Sum. Clause 2.39 then sets out his obligation to issue the Certificate of Making Good. It is issue of the Certificate of Making Good that permits the final release of Retention (see clause 4.19.2). It also normally starts the Final Certificate timetable under clause 4.26.1.

Contractor's Design Documents (clauses 2.40 and 2.41)

- 66 The sub-section deals first with the supply of as-built drawings which, as noted in the context of clause 2.30, is a pre-condition to issue of the Practical Completion Certificate or a Section Completion Certificate in cases where there is a Contractor's Designed Portion. The sub-section then sets out the terms and conditions of the Employer's licence to use Contractor's Design Documents. The licence is in substantially the same terms as that granted to Purchasers, Tenants and Funder under Schedule 5 or by the relevant collateral warranty; it is however conditional on the Contractor having been paid in full.

Section 3 – Control of the Works

- 67 The section deals with most of the principal control issues other than the performance-related matters dealt with in section 2 and payment-related matters dealt with in section 4. It consists of four sub-sections, namely Access and Representatives; Sub-Contracting; Architect/Contract Administrator's Instructions; and CDM Regulations.

Access and Representatives (clauses 3.1 to 3.6)

- 68 For work inspection purposes, clause 3.1 requires reasonable access for the Architect/Contract Administrator and his nominees to the Works and the Contractor's premises and, so far as practicable, those of sub-contractors (a point reflected in clause 3.9.2).
- 69 In terms of representatives (clauses 3.2 to 3.4), the Contractor is obliged to maintain competent management on site, now in the form of a Site Manager or deputy, both deemed the Contractor's agent there for receiving instructions and directions. The Employer has power to appoint a representative and/or a clerk of works. Unless the Contractor is notified otherwise, an Employer's representative is deemed to have full power in respect of the functions that the Conditions ascribe to the Employer; on the other hand, the effectiveness of clerk of works directions are dependent on the Architect/Contract Administrator's confirmatory instruction being issued within 2 Business Days.
- 70 As the footnote to clause 3.3 indicates, JCT considers that the Architect/Contract Administrator and the Quantity Surveyor should not be appointed as Employer's representative given the potential for conflict between that role and their obligation to act in a fair and professional manner in administering the Contract.
- 71 If it becomes necessary to appoint a replacement Architect/Contract Administrator or Quantity Surveyor, clause 3.5.1 requires the appointment to be made speedily, within 21 days, and, except in Local or Public Authority cases where an authority official is appointed, the Contractor has a right of reasonable objection to the replacement.

[2] For an analysis of the distinctions between clauses 2.6 and 2.33, see the TCC judgment referred to in the footnote to the section above on Possession (clauses 2.4 to 2.7).

- 72 Clause 3.5.2 reinforces the point that a replacement Architect/Contract Administrator is bound by the acts of his predecessor and that any reversal or change in them requires due observance of contractual procedures. On the other hand, as clause 3.6 indicates, neither inspection by the Architect/Contract Administrator or clerk of works nor (subject to clause 1.9) the issue of any certificate affects or limits the Contractor's obligation to carry out and complete the Works.

Sub-Contracting (clauses 3.7 to 3.9 and Supplemental Provisions 8 and 9)

- 73 Sub-contracting by the Contractor requires Architect/Contract Administrator's consent in the case of work and Employer's consent where it concerns design of the Contractor's Designed Portion (clause 3.7), though in neither case is it to be unreasonably delayed or withheld.
- 74 Clause 3.8 continues to offer the Employer a degree of control over the selection of specialists by providing for the Contractor to select from an (adjustable) list of three or more approved sub-contractors for individual work packages identified in the Contract Bills or (in the XQ version) the Specification or Work Schedules.
- 75 In addition to that, SBC 2016 incorporates as an optional Supplemental Provision the power for the Employer to name individual specialists for work outside the Contractor's Designed Portion either pre-contract in respect of work identified in the Contract Particulars and/or, dependent on the Contract Particulars entry selected, post-contract, provided in the latter case that the work is identified as the subject of a Provisional Sum.
- 76 In the case of post-naming and where the Employer seeks to name a replacement specialist, the Contractor has a right of reasonable objection: in these cases and also if a Named Specialist becomes insolvent, the Contractor also has a right both to an extension of time and to loss and expense. The latter rights do not however extend to termination of a solvent named specialist's employment for default – and it will be noted that in such a case the Contractor is required to give the Employer not less than 14 days prior notice of the proposed termination.
- 77 With regard to Named Specialists and also any lists of approved sub-contractors, periodic review may be necessary. It is always possible that by the time that a sub-contract is due to be entered into the pre-named, pre-agreed or listed specialist may have other priorities, may have undergone an unwelcome change of control, may have lost key personnel or capabilities and/or be materially less secure in financial terms.
- 78 Clause 3.9 sets out the minimum conditions required of all sub-contracts, namely automatic termination of the sub-contractor's employment upon termination of the Contractor's employment and sub-contract provisions that are compatible with the main contract with respect to vesting and control of Site Materials, access to workshops, CDM Regulations, interest on late payments, sub-contractors' third party rights and collateral warranty obligations and any applicable BIM Protocol.
- 79 Supplemental Provision 8, which will only apply where the Employer is a Local or Public Authority and the Contract is subject to the PC Regulations, includes provisions to reflect the sub-contracting regulation, regulation 71, of those regulations. Under regulation 71, there is an obligation on the contracting authority to require the main contractor to provide basic information on his sub-contractors and to update this information. Also, the contracting authority can insist on the removal of a sub-contractor where there are grounds for exclusion of that sub-contractor under regulation 57. Paragraphs 8.2 and 8.3 of Supplemental Provision 8 provide specific contractual powers to the Employer and impose obligations on the Contractor to reflect relevant aspects of regulation 71. There is also at paragraph 8.1 a specific provision dealing with the prompt payment provisions of regulation 113 to allow for these to be passed down the supply chain. (Reference should always be made to the wording of the regulations themselves and if there is any doubt as to the applicability of the PC Regulations generally or any specific provision, professional advice should be taken.)
- 80 Users are reminded that as the PC Regulations bed down they may be the subject of future guidance from the government and matters as to their interpretation addressed in litigation or other proceedings.

Architect/Contract Administrator's Instructions (clauses 3.10 to 3.22 and Schedule 4)

- 81 The sub-section commences with the general requirement that the Contractor should forthwith comply with all instructions (clause 3.10). In clause 3.11 it outlines the consequences of failure to do so in terms of liability for the Employer's additional costs. It then sets out in clauses 3.12 and 3.13 the procedures to be followed if the Architect/Contract Administrator gives oral instructions or if there in the Contractor's view is doubt as to the Architect/Contract Administrator's power to issue particular instructions.
- 82 The only four express exceptions to the requirement for immediate compliance are those in clauses 3.10.1 and 3.10.3 to 3.10.5. The first of those applies where the instructions relate to a Variation within clause 5.1.2 (i.e. one that relates to site access, imposes any limitation on working space or hours or affects the order of working) and operates if the Contractor makes reasonable written objection to compliance. The second relates to instructions that have an injurious practical effect on the design of the Contractor's Designed Portion and, again, notice is required, though subsequent confirmation of the instruction by the Architect/Contract Administrator requires

immediate compliance by the Contractor. The two further exceptions added by SBC 2016 are where further instructions are needed in relation either to patent use or Named Specialists.

- 83 The sub-section then lists the Architect/Contract Administrator's powers and duties in relation to specific types of instruction. Provision for certain types of instruction, including a duty to issue those necessary to enable the Contractor to carry out and complete the Works or to resolve discrepancies and divergences and those relating to defects have already been made in section 2 (see, e.g., clauses 2.12.1, 2.15, 2.17.2 and 2.38).
- 84 Those contained in section 3 relate to the other key instructions, i.e. the power to instruct Variations and postponement, the duty to give instructions on Provisional Sums; and powers in relation to opening up and testing, non-compliant work or workmanship and finds of antiquities. There is also a power to exclude persons from the site. Where work, materials or goods are not in accordance with the Contract, the Architect/Contract Administrator, if he wishes to issue instructions under clause 3.17 for opening up and testing to establish whether there is more extensive non-compliance, is required by clause 3.18.4 to have regard to the Code of Practice set out in Schedule 4.
- 85 In relation to executed work comprising materials, goods or workmanship that are required to be to the Architect/Contract Administrator's satisfaction, it will be noted that under clause 3.20 he is under a duty to give reasons for any dissatisfaction within a reasonable time.

CDM Regulations (clause 3.23 and Supplemental Provision 2)

- 86 The CDM provisions in SBC 2016 have been consolidated into a single clause. This continues to provide specific contractual cross-undertakings by the Parties to comply with their respective duties under the Regulations since failure to observe those duties may constitute grounds for termination. Clause 3.23 also provides for the supply of necessary information to the Principal Designer and Principal Contractor at no cost to the Employer.
- 87 General Health and Safety matters, which insofar as they are Statutory Requirements are in any event covered by the Contractor's obligations under clause 2.1, are augmented by Supplemental Provision 2, unless the latter is disapplied.

Section 4 – Payment (and Schedule 6 – Forms of Bonds)

- 88 As part of the 2016 revisions and simplification of JCT payment provisions referred to in the Introduction and to assist navigation of the topics covered, the section has been rearranged into eight, generally shorter sub-sections – Contract Sum and Adjustments (in the AQ version, 'Price and Adjustments'); Taxes; Payments, Certificates and Notices – general provisions; Interim Payments – calculation of sums due; Listed Items; Retention; Loss and Expense; and Final Adjustment and Final Payment (in the AQ version, Final Computation and Final Payment).
- 89 The forms of the three bonds referred to in the section (the Advance Payment, Off-site Materials and Goods (Listed Items), and Retention bonds) are set out in Schedule 6. Employer's approval of the proposed surety for each bond required should wherever practicable be obtained before the Contract is executed.

Contract Sum and Adjustments (clauses 4.1 to 4.4)

- 90 This sub-section deals with the basic principles of adjustments to the Contract Sum or, in the AQ version (which is based on complete re-measurement) the calculation of the Ascertained Final Sum.
- 91 Clause 4.1 defines the quality and quantity of work included in the Contract Sum or, in the AQ version, that included in the Tender Price; in the XQ version the clause has been slightly simplified. Clause 4.2 limits adjustment to the express provisions of the Conditions and, in the Q and XQ versions, expressly states that any error in the computation of the Contract Sum is accepted by the Parties. There is no contractual provision or mechanism for correcting erroneous rates or unit prices in the Contract Bills or other Priced Document and, save in cases under clause 5.3.3, those rates and prices will continue to form the basis for any valuation of work of a similar character under the Valuation Rules.
- 92 Clause 4.3 in each case continues for convenience but in abbreviated form to list the various adjustments that are provided for in the Conditions, with clause 4.4 then providing for the amount of each adjustment, when ascertained, to be reflected in the next Interim Certificate. The Final Adjustment procedure is now dealt with in the final sub-section in conjunction with the Final Certificate.

Taxes (clauses 4.5 and 4.6)

- 93 The new sub-section consists solely of the standard JCT VAT and CIS provisions, without material amendment.

Payments, Certificates and Notices – general provisions (clauses 4.7 to 4.13)

- 94 The optional advance payment provisions (clause 4.7) remain substantially unchanged.
- 95 Clause 4.8 defines the due dates for interim payments. As referred to in the Introduction, these provisions have been modified in SBC 2016 and now include the establishment of Interim Valuation Dates that are also to apply at JCT sub-contract and sub-subcontract levels.
- 96 Under revised clause 4.8, for the period up to the due date for the final payment, the monthly due dates for interim payments are in each case the date 7 days after the relevant Interim Valuation Date specified in the Contract Particulars. The first Interim Valuation Date must be specified in the entry in the Contract Particulars against clause 4.8. As stated in the footnote corresponding with that entry, JCT recommends the first Interim Valuation Date should not be more than one month after the Date of Possession. Subsequent Interim Valuation Dates are the same date in each month.
- 97 It is to be noted the monthly cycle of due dates applicable to payments up to practical completion now continues to apply after practical completion, up to the due date for the Final Payment. This replaces the two month cycle that from 2009 applied post-practical completion under previous editions.
- 98 As previously, the due date provisions are followed at clause 4.9 by the requirement for the issue of interim certificates within 5 days of the due date and then by the general provision governing Contractor's payment applications (and, in default of a payment certificate, their role as a payment notice) (clause 4.10). The provisions regarding final dates for payment (14 days from due date), Payment and Payless Notices, amounts to be paid and default interest are set out in clause 4.11 and detailed provisions regarding Pay Less Notices in clause 4.12, with the Contractor's (statutory) right of suspension forming clause 4.13. As the text of each indicates, clauses 4.10 to 4.12 all apply with respect to the final payment as well as to interim payments.
- 99 A point that Employers (and, in relation to sub-contracts, Contractors) should bear in mind is that under the Contract Particulars Interim Valuation Dates in certain months will be altered to the nearest Business Day in the month. That alteration will directly affect the due date and, inter alia, the 5 day period for issue of the payment certificate, the last day for giving a Pay Less Notice and the Final Payment date. With the status given to Contractor's payment applications by the 2009 amendments of the Construction Act and in view of certain recent TCC cases involving failure to give notices, JCT would stress the need for less experienced users to list (and make appropriate diary entries) for those months where they need to be alert to the point.

Interim Payments – calculation of sums due (clauses 4.14 and 4.15)

- 100 Clause 4.14 sets out the Gross Valuation rules, the basis for calculating amounts that have fallen due under the Contract prior to making the clause 4.15 deductions. The rules make a simple division for the purposes of clause 4.19 as between items that are subject to Retention, i.e. work, materials and goods, and the additional amounts that are not subject to Retention; they then net off any specific deductions provided for in section 2, 3 or 6 ascertained or fixed by the Architect/Contract Administrator and any sum allowable under any applicable Fluctuations Provision that is not set against the value of work, materials or goods.
- 101 Under clause 4.15 the amount due as an interim payment is then the Gross Valuation less the aggregate of the Retention, the cumulative amount of any advance payment that has by then become due for repayment, amounts shown as due in previous certificates and (if relevant) any sum paid by the Employer in response to a Contractor's application in the absence of a certificate. (The time limit for certificates is tight and the deadline may innocently be missed on occasion; the last of those deductions enables the certification process to resume and catch up, avoiding the need for an Employer who has duly paid to agree with the Contractor to validate an out-of-time certificate or otherwise being forced to give Pay Less Notices for every subsequent interim payment.)

Listed Items (clause 4.16)

- 102 For ease of reference the conditions precedent to inclusion of Listed Items in a Gross Valuation now form their own separate sub-section. The text has been further simplified but the pre-conditions remain substantially unaltered.

Retention (clauses 4.17 to 4.19)

- 103 Clause 4.17 sets out the fiduciary basis of retentions, coupled with the accounting requirements and the Contractor's option (other than in Local or Public Authority cases) of requiring a separate bank account for any retention made.
- 104 Clause 4.18 sets out the terms governing the alternative option of a Retention Bond, where selected by the relevant entry in the Contract Particulars.

- 105 Clause 4.19 specifies the default percentage retention rates. Application of the rules in that clause should result in the release of one half of the Retention under the interim certificate issued on or immediately following practical completion and of the remaining half under the next certificate issued after the Certificate of Making Good.

Loss and Expense (clauses 4.20 to 4.24)

- 106 Clause 4.20 expressly entitles the Contractor by written application to claim loss and expense that he incurs either as a result of any deferment of possession under clause 2.5 or (subject to any express exclusion in the Conditions) because regular progress of the Works or any part of them has been or is likely to be materially affected by a Relevant Matter. The clause itself has been slightly recast in order to fit in with the new procedure for dealing with claims set out in clause 4.21.
- 107 With a view to timely and orderly settlement of such claims, clause 4.21 provides for prompt initial notification of claims – or the likelihood of claims – in the same way as before. It then provides for monthly updates from the Contractor for as long as is necessary for final ascertainment. The Architect/Contract Administrator or Quantity Surveyor for his part is to notify the Contractor of his initial ascertainment within 28 days of receiving the required information, with further notifications being made within 14 days of each subsequent update, in each case identifying any points on which that ascertainment differs from the Contractor's assessment.
- 108 The Relevant Matters are listed in clause 4.22. They include Variations, other than those under the Variation Quotation procedure (where loss and expense is to be included in the quotation). They also include instructions for postponement, expenditure of provisional sums (where not for defined work), opening up or testing (except where required to be provided for, or in cases of non-compliant work, etc.), certain instructions relating to discrepancies or divergences in documents or to Named Specialists; actions and instructions relating to antiquities; material inaccuracy in any Approximate Quantities; and impediment, prevention or default on the part of the Employer or those for whom he is responsible.
- 109 Loss and expense ascertained under clause 4.21 is to be added to the Contract Sum (or, in the AQ version, to be included in the Ascertained Final Sum) but the provisions do not affect any other rights or remedies of the Contractor.

Final Adjustment and Final Payment (clauses 4.25 and 4.26)

- 110 Clause 4.25 covers the final adjustment (or in the AQ version, final computation), with the relevant statement and ascertainment to be provided to the Contractor within 3 months of the Contractor's submission of the necessary documentation; that documentation should itself be supplied within a maximum of 6 months after practical completion of the Works. Where there are Sections, the JCT recognises that there may be practical difficulties in following that procedure on the completion of each Section but, to reduce the scope for later disagreements and in the same way as with the revised Loss and Expense provisions, JCT would encourage the Parties to consider that step by step course wherever practicable.
- 111 Clause 4.26 provides for issue of the Final Certificate, the effects of which are set out in clause 1.9. However, to bring about the closure envisaged by clause 1.9, the Final Certificate must be issued on time, within the two month period specified in clause 4.26.1. With respect to the final date for payment, notices and amount to be paid, the provisions of clauses 4.10 to 4.12 apply.

Section 5 – Variations

- 112 The section (in the AQ version entitled Measurement and Valuation) is divided into two sub-sections, the first a General sub-section which includes at clause 5.1 the definition of Variations, and the second comprising the Valuation Rules. In the 2016 edition, there are minor drafting changes but none of commercial significance.

General (clauses 5.1 to 5.5 and Schedule 2)

- 113 The clause 5.1 definition of Variations comprises two parts: the first, in clause 5.1.1, consists of alteration or modification of the design, quality or quantity of the work; the second, the imposition or alteration of obligations or restrictions affecting either access or time, method or order of working. (The Contractor's clause 3.10.1 right of reasonable objection that excuses immediate compliance with instructions, arises only in relation to the second category.)
- 114 Clause 5.2, in addition to Variations, covers work which is to be treated as a Variation, work under instructions as to the expenditure of Provisional Sums and work for which there is an Approximate Quantity. In each case the value may be pre-agreed by the Employer and the Contractor. If they do not agree the value, then, unless they agree on some other method of valuing the work, it is a matter for a Valuation, i.e. valuation by the Quantity Surveyor in accordance with the Valuation Rules. The other method of determining value, short of a Valuation, is through the Variation Quotation procedure set out in Schedule 2. Clause 5.3 brings the Variation Quotation procedure into

operation if the Variation instruction requires such a quotation and if the Contractor does not by notice given within 7 days of receiving the instruction object to producing one.

- 115 If he objects but the Architect/Contract Administrator then confirms the instruction, or if the quotation is not accepted but the instruction stands, the matter reverts to the Quantity Surveyor for a Valuation. If the Contractor makes a Variation Quotation that is accepted, then, if the Architect/Contract Administrator instructs a further Variation to the work that forms the subject of that quotation, that again is a matter for the Quantity Surveyor to value, but under clause 5.3.3 (which requires valuation on a fair and reasonable basis having regard to the content of the quotation and, only to the extent consistent with that basis, in accordance with the Valuation Rules).
- 116 Clause 5.4 gives the Contractor the right to be present at any measurement for the purpose of a Valuation.

The Valuation Rules (clauses 5.6 to 5.10)

- 117 Clause 5.6 (Measurable Work) provides that where the work to be valued is of a similar character to work in the Contract Bills or (in the XQ version) the Contract Documents, is executed under similar conditions (e.g. as to site and working conditions) and does not give rise to a significant change in the original quantity, the original rates and prices apply. If on an objective view there is a significant change in conditions or in overall quantity, the rates and prices still form the basis for valuation but with a fair allowance for the change(s); if the work is not of a similar character, fair rates and prices are to be applied, a principle extended in the additional provisions at clause 5.10.1.
- 118 Clause 5.7 makes provision for valuing daywork: where using the Q and AQ versions, the Percentage Additions and any All-Inclusive Rates applicable should be set out in the Contract Bills. Where using the XQ version, there will be no bills, and the document containing that information should be identified in the Contract Particulars.
- 119 Clause 5.8 applies the clause 5.6 and other principles to variations in the Contractor's Designed Portion; these are to be valued by reference to the CDP Analysis, where appropriate, and with specific allowance for the addition or omission of design work. Clause 5.9 makes consequential provision for any resultant changes in conditions under which other work, outside the direct scope of the instruction, is executed and there is a general 'safety-net' provision at clause 5.10.1.

Section 6 – Injury, Damage and Insurance (and Schedule 3 – Insurance Options)

- 120 The section takes the form of five sub-sections: Personal Injury and Property Damage; Insurance against Personal Injury and Property Damage; Insurance of the Works and Existing Structures; CDP Professional Indemnity Insurance; and Joint Fire Code – compliance.
- 121 In terms of Works insurance, the three Insurance Options (A, B and C) are set out in Schedule 3. As indicated in the Introduction to this Guide, Insurance Option C which is generally intended to apply where there are Existing Structures has in the 2016 edition been modified in relation to Existing Structures cover (paragraph C.1) with a view to enabling alternative solutions to be adopted through a C.1 Replacement Schedule without amendments to the Conditions in those cases where the Employer is unable to arrange satisfactory cover for the Contractor in respect of those structures – notably where the Employer is a homeowner or a tenant with an insuring landlord.
- 122 The three Insurance Options have themselves been simplified by the transfer to and consolidation in section 6 of their respective provisions relating to evidence of insurance (now clause 6.12) and insurance claims and reinstatement (clause 6.13), together with the former Insurance Option C rights of termination in case of damage to Existing Structures (clause 6.14).

Personal Injury and Property Damage – indemnity and insurance (clauses 6.1 to 6.5)

- 123 Clauses 6.1 and 6.2 set out the Contractor's liability for personal injury and for injury or damage to property, coupled with his indemnity to the Employer, subject to the clause 6.3 exclusions. As part of the overall insurance scheme, clause 6.3 now excludes liability for loss or damage to the Works, executed work and Site Materials (previously excluded by clause 6.2) and, where paragraph C.1 of Insurance Option C applies, liability for damage by any of the Specified Perils to the Employer's existing structures/contents prior to practical completion. Where there is a C.1 Replacement Schedule, the Contractor's liability is subject to any exclusions or limitations set out in that Schedule. (It will be noted that clause 6.3 also deals with Sectional completion.) Those exclusions are followed in the next sub-section by the Contractor's clause 6.4 obligation to effect insurance against liability under clauses 6.1 and 6.2 (i.e. Public Liability cover) with the level of cover (other than in respect of employer's liability insurance) specified in the Contract Particulars.
- 124 If the Contract Particulars state that insurance under clause 6.5.1 may be required and the Architect/Contract Administrator requests, the Contractor is also required to take out insurance in the joint names of the Employer and the Contractor in respect of claims against the Employer as a result of damage to property due to subsidence, weakening or removal of support, vibration or the like arising out of the carrying out of the Works. Cover is to be the amount stated in the Contract Particulars and is subject to the list of exclusions set out in that clause. This

insurance is sometimes referred to as “non-negligent loss insurance”, reflecting the Employer’s strict liability in respect of damage to neighbouring properties, irrespective of whether or not there has been negligence or breach of duty on the part of either the Employer or the Contractor. Where that insurance is required, the cost is added to the Contract Sum.

Insurance of the Works and Existing Structures (clauses 6.7 to 6.14 and Schedule 3)

Insurance Options A, B and C

125 For Works insurance, it is envisaged that the Parties will effect a Joint Names Policy in the terms of Insurance Option A, B or C, as appropriate (the ‘Works Insurance Policy’), a choice that is effected by the relevant entry in the Contract Particulars for clause 6.7:

- Insurance Option A is generally intended for new buildings and requires the Contractor to take out a Joint Names Policy for All Risks Insurance for the full reinstatement value of the Works, including Site Materials, plus professional fees;
- Insurance Option B is intended for new buildings and requires the Employer to take out a Joint Names Policy for All Risks Insurance for the full reinstatement value of the Works, including Site Materials, plus professional fees;
- Insurance Option C is relevant where existing structures are involved. Unless the Parties agree to replace it with a C.1 Replacement Schedule, an option now provided for in SBC 2016, paragraph C.1 requires the Employer to take out both a Joint Names Policy for the full reinstatement cost in respect of damage to the existing structures and their contents by Specified Perils; in respect of the Works paragraph C.2 requires a Joint Names Policy for All Risks Insurance on the same basis as under Option B. (In the case of existing structures and contents, the Employer will normally have, and will for himself wish to retain, All Risks cover rather than the narrower Specified Perils cover to be afforded to the Contractor under paragraph C.1 but in some cases the Employer’s insurers appear prepared to extend full All Risks cover to the Contractor.)

Existing Structures – alternative approaches

- 126** As indicated in the Introduction, the Joint Names policy (or extension of a subsisting structure and contents policy) required by paragraph C.1 may not be readily available for refurbishment projects, extensions or alterations by tenant Employers where Existing Structures insurance is the landlord’s responsibility. It may also not be readily available to some domestic owner-occupiers looking to undertake refurbishments or extensions. Hence the introduction of the C.1 Replacement Schedule option.
- 127** At its simplest, for works whose value is well within the cover that the Contractor can obtain, in particular those on domestic properties, his risk in respect of those structures and their contents may be covered under the Public Liability cover that he is required to have under clause 6.4, provided that cover has no exclusion of liability in respect of the property in or on which the Works are to take place (sometimes referred to as a ‘care, custody or control’ exclusion).
- 128** However, in the case of projects for a tenant Employer of a building in multiple occupancy, the overall value of the structures and other tenants’ contents may be well beyond the Contractor’s Public Liability cover level. In such cases more complex insurance arrangements, involving several layers of different covers and/or risks may be necessary, e.g. Contractor’s Public Liability to respond up to (or, in certain cases, above) a certain level, special structures insurance effected by the Employer to another level and landlord’s insurance to respond above or below that, albeit for a premium to be paid by the Employer.
- 129** In certain high value cases the Employer and Landlord may agree that a level of cover below full reinstatement/replacement cost is adequate for their purposes. In any case where potential liabilities exceed any agreed level the Contractor and his insurance advisers should, as indicated by clause 6.3.3, ensure that the Contractor’s liability is limited to realistic levels by the C.1 Replacement Schedule and, since the Contractor may be exposed to third party claims, that he also obtains a suitable indemnity from the Employer in respect of any excess claims.
- 130** There is a limited exception to the principles outlined in relation to use of Insurance Options A and C. This arises where there are existing structure(s) on site but it or they substantially consist of the building shell or retained facades that have a reinstatement value substantially less than the value of the Works (generally less than one half). In such cases the Contractor’s Works insurers may be prepared to extend his Option A All Risks cover to include such structures at lesser overall cost than that of effecting Option C insurances.
- 131** **At all events, where there are Existing Structures, it is vital that any prospective Employer who is not familiar with Insurance Option C – in particular any Employer who is a tenant or domestic homeowner – and/or an appropriate member of the Employer’s professional team, should consult specialist construction insurance advisers prior to the tender stage. Any Employer who is a tenant should also consult his**

insuring landlord prior to that stage. Thereafter, prior to entering into the contract, they should also consult the prospective contractor and his insurance advisers.

Relevant Definitions

- 132 The term 'Joint Names Policy' and other relevant insurance-related terms are defined in clause 6.8. The policy (or policies) are required to include the Employer and the Contractor as composite insured and to provide that the insurer has no right of recourse against either of them, irrespective of which Party claims under the policy or may otherwise have been liable for the loss or damage. By clause 6.9, the Joint Names Policy for the Works is also required either to recognise each sub-contractor as an insured or to include a waiver of rights of subrogation against him in respect of loss or damage caused by a Specified Peril.
- 133 'All Risks Insurance' is wider than 'Specified Perils' cover, since the Specified Perils do not include impact, subsidence, vandalism or theft, but it has a meaning somewhat narrower than the phrase "all risks" might otherwise imply. Briefly, the policy is to cover physical loss or damage to work executed or Site Materials (but not the Contractor's plant and equipment), and it will usually exclude loss or damage of the types listed, e.g. caused by wear and tear/deterioration, defects in design or workmanship, war or Excepted Risks and also certain inventory losses. It also requires the "buy back" of Terrorism Cover, which is discussed in the following paragraphs.

Terrorism and Terrorism Cover

- 134 Users generally will be aware that the Works insurance requirements of JCT contracts have not historically excluded loss or damage resulting from acts of terrorism from the requirements for Joint Names All Risks insurance of the Works. However, insurers' standard terms for such insurance have for many years limited that cover to a very small retained level (generally £100,000), thereby requiring a buyback of terrorism cover. To try to avoid the possible shortcomings in cover bought-back under the Pool Re scheme that indirectly resulted from a change in 2000 to the statutory definition of terrorism, JCT issued its 2009 Terrorism Cover Update, subsequently incorporated in the 2011 editions of relevant JCT contracts. This allows a choice between Pool Re and other insurance market types of Terrorism Cover, but more importantly, by clause 6.10 limits liability on the part of the party responsible for the Works Insurance policy to risks within the Terrorism Cover chosen. That limitation is reinforced in the context of clause 6.6 by clause 6.8 with its extension to the definition of Excepted Risks and by an exclusion in the definition of All Risks Insurance.
- 135 As a long-standing alternative to Pool Re, Lloyds market cover has continued to cover all types of terrorism, but does not cover chemical and biological damage, normally requires an extension for nuclear risks and cannot practically speaking be used as a supplement to Pool Re Cover. (It will be noted that in the case of residential property, i.e. houses, blocks of flats and other dwellings insured in the name of a private individual, Pool Re itself also continues to exclude nuclear, chemical and biological risks.). In all cases Pool Re Cover requires annual renewal: Lloyds market cover may be available for the duration of the project.
- 136 In relation to clause 6.10 and the costs of Terrorism Cover where Insurance Option A applies, it will also be noted that there are different approaches to Pool Re Cover and open market cover. In the case of Pool Re cover, the Contractor is required to include the cost in his tendered price, subject to adjustment for changes in renewal costs (clause 6.10.2). Where cover other than Pool Re cover is required, the costs of effecting and renewing cover are both treated as an addition to the Contract Sum (clause 6.10.3). This is because the cost of effecting open market cover may not be as predictable as that of Pool Re. Clause 6.10.4 preserves a Local or Public Authority's right itself to assume the terrorism risk in the case of an increase in the Contractor's terrorism cover premium on any renewal.
- 137 Clause 6.11 in relation to non-availability or a reduction in scope or level of cover at the renewal date, gives the Employer options to terminate, accept the reductions in the scope or level of cover by insurers or, where the Contractor is responsible for Works insurance, to require the latter to switch to any alternative form of Terrorism Cover reasonably available at the renewal date.
- 138 Effecting Terrorism Cover may still be difficult in certain situations. **The JCT would again stress that as with Works insurance generally and, in certain cases, Public Liability and Professional Indemnity insurances, this cover also requires discussion and agreement between the Parties and their insurance advisers prior to entering into the Contract.**

Evidence of insurance, claims, reinstatement and other costs

- 139 Clause 6.12 consolidates the provisions relating to evidence of insurance previously set out in each of the three Works Insurance Options; it also applies to clauses 6.4, 6.5 and 6.10. It simply provides for such evidence as the other party reasonably requires (eliminating in the case of the Works Insurance Options the special provisions relating to deposit of Contractors Works Insurance Policies and evidence from local authorities); it also specifies seven days as the period after which a party requesting evidence is entitled to assume there has been a default in insuring.

- 140 Clause 6.13 in turn consolidates the three Works Insurance Option provisions relating to procedures in cases of insured loss or damage; these necessarily differ slightly, depending on which Party is responsible for effecting the Works Insurance Policy.
- 141 Clause 6.14 follows the former Insurance Option C provision relating to the rights of either party to terminate, if just and equitable, in the case of material loss of or damage to any Existing Structures.
- 142 The provisions relating to Works Insurance are designed solely to meet the cost of restoring lost and damaged work and materials, but in calculating reinstatement cost there are several factors to be borne in mind; other potential costs and losses also need to be considered.
- 143 The costs of reinstatement generally include those of removing debris. They are often covered automatically by insurers' policy terms but appear on occasion to require to be dealt with by a separate item under the All Risks policy: the Parties and their advisers should ensure that there is an appropriate level of cover for them.
- 144 If the Employer is exempt from VAT registration or if supplies made by him in the course of the business are wholly or partially exempt, the Employer should include in his calculation of the reinstatement cost not only the normal VAT-exclusive cost of reinstatement (adjusted for interim increases in those costs) and the percentage to cover professional fees, but also the amount of the VAT chargeable on the work of reinstatement, to the extent that he would not be able to recover it.
- 145 Other costs that are not generally covered automatically by the Works insurance and may require an extension of cover or separate cover include increases in costs of working as a result of the damage or reinstatement work, together with increases in the cost of the unbuilt portion through inflation.
- 146 In addition Employers may require their own separate cover for financial or consequential losses of the Employer's Delay in Completion/Advance Loss of Profits (ALOP).

CDP Professional Indemnity Insurance (clauses 6.15 and 6.16)

- 147 Where there is a Contractor's Designed Portion, the Employer may require the Contractor to effect and thereafter, provided it is available at commercially reasonable rates, maintain PI insurance of the type(s), with limit(s) of indemnity and for a period not less than that stated in the Contract Particulars. The Contract Particulars retain the option of a requirement for cover against pollution and contamination in appropriate cases.
- 148 A realistic approach needs to be taken both to the type of PI cover and the cover level(s) required. Unless otherwise specifically agreed, the terms and period agreed for the purposes of clause 6.15 will apply in relation to the Third Party Rights and each Collateral Warranty that the Contractor is required to give.

Joint Fire Code (clauses 6.17 to 6.20)

- 149 The Joint Fire Code is generally required by insurers to apply and the Parties should comply both with its requirements and the other provisions of clauses 6.18 and 6.19. Under clause 6.19 the Contractor is to ensure that any remedial measures required by the insurers to achieve compliance are carried out and, if he fails to do so, the Employer may employ others for the purpose, with an appropriate deduction being made from the Contract Sum. In respect of amendments made after the Base Date there is an option as to which Party bears the cost.

Section 7 – Assignment, Performance Bonds and Guarantees, Third Party Rights and Collateral Warranties (and Schedule 5 – Third Party Rights)

- 150 This section comprises the restrictions on, and the Employer's limited optional right of, assignment, together with the new enabling provisions relating to Parent Company Guarantees and Performance Bonds and those for Third Party Rights/Collateral Warranties, now extended to include Third Party Rights from Sub-Contractors. The terms of Third Party Rights (TPRs) from the Contractor are set out in Schedule 5; those from Sub-Contractors are set out in the Standard Building Sub-Contract Conditions (Schedule 6). The relevant forms of JCT Collateral Warranty are available as separate published documents.
- 151 The assignment provisions form clauses 7.1 and 7.2; those relating to performance guarantees and bonds are set out in clause 7.3. The remainder of the section consists of the TPR/Collateral Warranty provisions: Clauses 7.4 to 7.6 being general provisions and clauses 7(A) to (E) then dealing with TPRs from the Contractor (7A and 7B); Collateral Warranties from the Contractor (7C and 7D); and (at 7E) TPRs and Collateral Warranties from Sub-Contractors.
- 152 Clause 7.4 is relevant to the main format change in the 2016 edition, namely substitution of the former Part 2 of the Contract Particulars by Rights Particulars, a separate document to be prepared by or on behalf of the Employer setting out the requirements at each level in whatever format they consider appropriate. Model Forms for those particulars at both main contract and sub-contract level are available on the JCT website.

153 To simplify the process and provisions at each level, JCT has made certain amendments relevant to the Rights Particulars:

- at clause 7.4.3 there is for the purposes of Net Contribution clauses a standard definition of Consultants, though that can be altered by the Rights Particulars;
- within the Net Contribution clauses applicable at Main Contract level, existing paragraphs 1.3.2 in Part 1 and 1.1.2 in Part 2 of Schedule 5 together with the corresponding clauses in CWa/P&T and CWa/F have been deleted. Supplemental Provision 9 does not permit 'naming' within the Contractor's Designed Portion, so the only sub-contractors now in the relevant category would be Named Sub-Contractors under JCT Intermediate Building Contracts and the Contractor's position is in any event covered by the reference to Contractor's responsibility in the introductory words to paragraph/clause 1.3 in Part 1 and paragraph/clause 1.1 in Part 2 respectively;
- in relation to Professional Indemnity insurance, the terms of CWa/P&T and CWa/F respectively have been brought into line with TPRs under Parts 1 and 2 of Schedule 5 so that if there is a Contractor's Designed Portion and the Contract requires the Contractor to take out and maintain Professional Indemnity insurance the Purchaser, Tenant or Funder will automatically receive an undertaking from the Contractor in relation to such insurance in the same terms as those given to the Employer under the Main Contract. (In relation to Sub-Contractors however, it remains necessary for the Employer in his Rights Particulars to specify the levels of PI cover or, where appropriate, Product Liability cover that the Contractor is to require from relevant categories of sub-contractor under their respective sub-contracts.)

It may also be noted that under clause 7.4.2, the default position in relation to a failure to specify whether rights are to be granted as third party rights or by collateral warranty, is now that the decision as to mode of grant rests with the grantor Contractor or Sub-Contractor.

Rights Particulars

- 154** Aided by the further changes and Model Form for the Rights Particulars, preparation of Rights Particulars should be a relatively simple matter. As indicated by clause 7.4.1 – reflecting section 1 of the Contracts (Rights of Third Parties) Act 1999 and, as regards warranties, the common law position – the key points are certainty as to the identity of the beneficiaries and, in the case of rights from Sub-Contractors, as to which beneficiaries are entitled to rights from which sub-contractors.
- 155** In the case of sub-contractors, it is also important that those sub-contracts under which the rights are to have the longer, 12 year, limitation period should be executed as deeds.
- 156** The 1999 Act refers to identification of beneficiaries by name, as a member of a class or as answering a particular description. At the relevant stage it may not be possible to identify Purchasers, Tenants or the Funder by name but the category or description can be quite simple and general, e.g. "all first purchasers" and/or "all original/first lessees" of the building or of particular units or parts of the Works. A third party need not be in existence when the contract is entered into so there should also be no problem describing an as-yet unascertained Funder as, for example, the lead bank providing finance for the project or as the special purpose vehicle to be incorporated or established under a specified agreement.
- 157** The same approach may where appropriate be applied to identify relevant sub-contractors; it is thought that reference to sub-contractors selected for work packages that are clearly identified should generally suffice.
- 158** The only remaining points then are:
- whether or not there are any departures from the default positions in relation to the liability for other losses at either level or, in relation to Sub-Contractor Rights for the Employer, the net contribution provisions;
 - whether there are any sub-contractors for whom another form of warranty may be more appropriate (e.g. for a professional novated to or engaged by the Contractor);
 - the levels of professional indemnity (or, where appropriate, product liability) insurance (if any) that relevant categories of sub-contractor can reasonably be expected to have and to maintain. A realistic view is necessary.

Section 8 – Termination

- 159** The section comprises five sub-sections: General (defining insolvency and setting out certain ancillary provisions that apply to the section generally); Termination by Employer; Termination by Contractor; Termination by either Party (in cases of extended no-fault suspension) and regulations 73(1)(a) and 73(1)(c) of the PC Regulations; and

Consequences of Termination (for cases of termination by the Contractor, or by the Employer where the regulations (under the PC Regulations) referred to in the preceding sub-section apply, or for extended no-fault suspension).

- 160** The section includes some new termination grounds to reflect regulation 73 of the PC Regulations, which requires a contracting authority to have the right to terminate the Contract where:
- there has been a substantial modification to the Contract which would have required a new procurement procedure (regulation 73(1)(a)); or
 - at the time of Contract award one of the mandatory grounds for exclusion applied and the Contractor should have been excluded from the procurement procedure (regulation 73(1)(b)); or
 - the Contract should not have been awarded to the Contractor in view of a serious infringement of the obligations under the Treaties and the Public Contracts Directive as declared by the ECJ (regulation 73(1)(c)).
- 161** These termination rights will be implied into the Contract where the relevant regulations apply and are not expressly provided for, but the JCT has chosen to deal with them in the contract itself to provide greater legal clarity and to allow for the consequences of termination to be specified. Termination under regulation 73(1)(b) is dealt with in the same way as a Contractor default ground (clauses 8.6 and 8.7) and termination under regulations 73(1)(a) and (c) dealt with as neutral grounds for termination (clauses 8.11.3 and 8.12).
- 162** The basis of the section is that each Party may terminate the Contractor's employment either for a specified default or insolvency on the part of the other or where substantially the whole of the Works is suspended for the period stated in the Contract Particulars through a range of events outside the control of either Party. The default entry in the Contract Particulars is a period of 2 months. In addition the Employer may terminate for corruption and in the three specific situations under regulation 73 of the PC Regulations referred to above.
- 163** In each case it is the Contractor's employment under the Contract that is terminated and not the Contract itself, which remains in force to deal with the consequences of termination. Those differ, depending on the grounds for termination.
- 164** In the case of default by either Party (which, in the case of the Employer, includes certain acts and defaults of the Architect/Contract Administrator or Quantity Surveyor), there is a requirement for a warning notice of the default to be given prior to termination, giving an opportunity for the default to be remedied. If it is not remedied within 14 days of that notice, there is a 21 day period for giving notice of termination. Where, after a notice of default, a notice of termination is not given within the 21 day period but the default is repeated, the Party not in default again becomes entitled to give notice of termination within a reasonable time.
- 165** Where either Party is insolvent or the Contractor commits a corrupt act or the exclusion grounds apply to the Contractor under regulation 73(1)(b) of the PC Regulations, the other Party may terminate without a warning notice but, where termination is due to prolonged no-fault suspension of the Works, a warning notice is required.

General (clauses 8.1 to 8.3)

- 166** In clause 8.1 the very minor changes reflect the fact that the insolvency definition may now also be relevant to Named Specialists. Clauses 8.1.1 to 8.1.3 of the definition reproduce section 113 of the Construction Act; clause 8.1.4 retains two additional tests of insolvency from the SBC 2005 edition. The latter two tests are grounds for termination under clauses 8.5 and 8.10, but do not under the Act entitle retention under clause 8.7.3 of sums already due for payment. In terms of grounds for termination the ambit of the definition remains essentially the same.
- 167** Clause 8.2 makes provision with respect to notices, commencing with the long-standing requirement that notice of termination is not to be given unreasonably or vexatiously. Notice of termination takes effect on receipt; clause 8.2.3 is aimed at ensuring that there is no scope for argument on the question of receipt.
- 168** Clause 8.3.1 then provides that the operative provisions of the section do not limit the rights of the Employer or, as relevant, the Contractor under general law; there may for example be occasions where there is repudiatory breach by a Party that is not within the specified grounds for termination but which the innocent Party wishes to treat as bringing the Contract to an end.

Termination by Employer (clauses 8.4 to 8.8)

- 169** Clause 8.4 sets out the Employer's right to terminate for default, clause 8.5 his right to terminate for insolvency and in clause 8.6 the right to terminate for corruption (updated for the Bribery Act 2010) and where the PC Regulations apply the right to terminate where there are grounds for exclusion of the Contractor under regulation 73(1)(b) of those regulations. It will be noted that the grounds of termination for default in clause 8.4 are specific and that both the warning notice and notice of termination also therefore need to be specific.

- 170** In relation to the Contractor's insolvency and termination on any of the four grounds referred to, clause 8.5.3 and clause 8.7.3 respectively provide (inter alia) that, until issue of the final account under clause 8.7.4 or 8.8, no further sums become due under the Contract. (There is a similar provision in clause 8.12.1; also see clause 6.11.4.) In the case of sums that are due but unpaid where no Pay Less Notice has been given and the last date for giving such notice has passed, section 111(10) of the Construction Act essentially confirms the position as that set out in the House of Lords decision in *Melville Dundas Ltd v. George Wimpey UK Ltd* [2007] UKHL 18. That is that the sum due may be validly withheld if termination is on the grounds of insolvency and the insolvency has occurred after the period for giving a Pay Less Notice has expired, but not if the insolvency occurred before that expiry and not if the termination was on grounds other than insolvency.
- 171** If there is any doubt as to the position regarding possible termination or the notices to be given, professional advice should be taken; where any sums are due but unpaid, a Pay Less Notice should of course be given by the payer where that is still practicable.
- 172** The provisions of clause 8.7 as to the Employer's rights, Contractor's obligations and the basis of the final account (clause 8.7.4) are reasonably straightforward, the final account being based on cost to complete and direct loss or damage caused to the Employer. That is however predicated upon completion of the Works by a completion contractor. If the Employer decides not to complete the Works or fails within 6 months of the termination to make arrangements to that end, clause 8.8 provides for the final account to be prepared on the alternative basis of the value of work properly executed less direct loss or damage.

Termination by Contractor (clauses 8.9 and 8.10)

- 173** Over and above failure to pay, breach of the prohibition on assignment and breach of CDM Regulations (the latter two of which are also grounds under clause 8.4), clause 8.9 gives the Contractor the right to terminate if the Employer interferes with or obstructs the issue of any certificate and for continuous extended suspension caused by instructions for variations or postponement, lack of instructions as to inconsistencies in documents or by any other impediment, prevention or default on the part of the Employer, professional team or others for whom the Employer is contractually responsible. (Here also the default period for the suspension is 2 months, plus 14 days for a warning notice.) Clause 8.10 relates to Employer insolvency. The consequences of termination are not dissimilar to those of termination under clause 8.11 and these are dealt with together in the final sub-section (clause 8.12).
- 174** Where he has given Third Party Rights or a Collateral Warranty to a Funder, the Contractor's right to terminate will, as indicated above, be subject to either paragraph 6 in Part 2 of Schedule 5 or clause 6 of Collateral Warranty CWa/F, providing for notice to the Funder to enable the Funder to decide whether to exercise its 'step-in' rights.

Termination by either Party and regulations 73(1)(a) and 73(1)(c) of the PC Regulations (clause 8.11)

- 175** As indicated above, the bilateral right of termination under clause 8.11.1 is not entirely dissimilar to termination by the Contractor under clause 8.9 for extended suspension; it has the same default period and, entitlement to direct loss and damage apart, the same consequences. It is based on events beyond the reasonable control of either party – force majeure, negligence or default of Statutory Undertakers, damage to the Works by insured perils and Excepted Risks, civil commotion and UK Government action. (It will be noted that in clause 8.11.1.3 damage to the Works by insured perils and Excepted Risks represents a logical extension of the provision from its previous form; clause 8.11.2 retains the appropriate bar to its invocation by the Contractor in cases of Contractor's negligence.) As regards clause 8.11.3, please see the commentary above.

Consequences of Termination under clauses 8.9 to 8.11, etc. (clause 8.12)

- 176** This sub-section covers the consequences of termination under clauses 8.9 to 8.11 and also where termination arises under clause 6.11.2.2 (withdrawal of Terrorism Cover) or 6.14 (material loss of or damage to existing structures). As under clause 8.8, the final account is based on value of work properly executed and other amounts due to the Contractor under the Conditions. In addition the Contractor is entitled to direct loss and damage arising from the termination where he has terminated for Employer's default or insolvency or where the damage to the Works giving rise to an extended suspension and then to termination under clause 8.11 has been caused by negligence or default on the part of the Employer or those for whom the latter is responsible.

Section 9 – Settlement of Disputes

General (and Supplemental Provision 6)

- 177** Section 9, which remains substantially unaltered, contains provisions in relation to four external means of settling disputes:
- it refers to the possibility of resolving disputes through mediation, using a third party to assist the negotiation process;

- it gives a contractual right as well as the statutory right to refer disputes to adjudication (Article 7 and clause 9.2), with adjudication being conducted in accordance with the Scheme for Construction Contracts, subject only to the clause 9.2 provisions regarding the nomination of adjudicators and for cases of opening up and testing;
 - the Contract Particulars for Article 8 provide the option of agreeing to refer disputes to arbitration by making the appropriate entry in them; the Parties may also subsequently agree to do so; the arbitration agreement in Article 8 is subject to the three exceptions there mentioned and, under section 9, arbitration is to be conducted in accordance with the JCT 2016 edition of the Construction Industry Model Arbitration Rules (CIMAR);
 - in relation to litigation and subject to any agreement to arbitrate, Article 9 records the jurisdiction of the English Courts; selection of another jurisdiction requires an appropriate amendment.
- 178** Supplemental Provision 6 in Schedule 8, assuming it applies, also requires each Party to give the other prompt notice of potential disputes and encourages nomination by each of an employee of sufficient seniority and authority to act as its representative with a view to early settlement of any dispute.

Mediation (clause 9.1) and ADR

- 179** The JCT supports the use of mediation, ADR or ENE (Early Neutral Evaluation) in appropriate cases, but considers that it would not be appropriate to endorse particular techniques or bodies. The variety of techniques and bodies that have developed over recent years would appear to suggest that such choices are frequently better made by the Parties when the dispute has actually arisen and its nature is clear: in cases where mediation is likely to assist, possible exposure to litigation costs under the Civil Procedure Rules may be sufficient incentive for the Parties to agree such matters.

Adjudication (clause 9.2)

- 180** In the case of adjudication, the adjudicator may be named and the nominating body identified in the Contract Particulars. Where the Employer is a residential occupier (as defined by section 106 of the Act) there is no statutory requirement for the contract to contain an adjudication provision, and the Employer's advisers should consider with their client whether the adjudication provision is desirable or whether it should be deleted.
- 181** The costs of adjudication are generally less than those of litigation or arbitration, but they are not inconsiderable. If a dispute arises, and whether or not Supplemental Provision 6 applies, the Parties should consider whether to allow a reasonable period for negotiation before recourse to adjudication or other external means of resolving the dispute.

Arbitration (clauses 9.3 to 9.8) and litigation (Article 9)

- 182** A range of factors outside the scope of this Guide will determine the choice between arbitration and litigation. Litigation is the default position and will apply unless the Parties specifically make arbitration operative.
- 183** Where arbitration is agreed under the Contract and CIMAR Rules apply, Rule 2.3 in effect provides that an arbitrator cannot be named by the appointor identified in the Contract Particulars until at least 14 days after the arbitration notice is served and it is only after that period, if no agreement is reached as to who is to act as arbitrator, that either Party has the right to apply to the appointor, requesting him to name the arbitrator. The award of the arbitrator is final and binding on the Parties except in respect of any question of law arising in the course of the reference or arising out of an award, which (by clause 9.7) the Parties agree may be referred to the courts.

Appendix A – Model Form for the Rights Particulars

Standard Building Contract 2016

Standard Building Contract 2016

(all versions – SBC/Q, SBC/AQ and SBC/XQ)

Model Form for the Rights Particulars

*Note: An asterisk * indicates text that is to be deleted as appropriate.*

(A) Rights to be granted by Contractor

1 Identity of Beneficiaries

Purchasers/Tenants (P&T)
(Specify by name or category)

Funder (F)

2 Mode of grant

Rights are to be granted

- * as Third Party Rights/
- * by Collateral Warranty (CWa/P&T or CWa/F, as appropriate)

3 Applicable terms

(References below to paragraphs are to those in the relevant part of Schedule 5 of the Standard Building Contract; those to clauses are to clauses of the relevant JCT Collateral Warranty.)

(P&T) Liability for other losses

If paragraph/clause 1.1.2 is to apply for any beneficiary, state:

- the beneficiary or category of beneficiaries for whom it is to apply
- each limit on liability that is to apply, i.e.:
 - whether the limit is in respect of each breach, and/or
 - whether it is an aggregate limit on liability, either to each individual beneficiary or a category of beneficiaries

(P&T and F) Net Contribution

If for the purpose of the Net Contribution provisions the definition of Consultants in clause 7.4.3 of the Contract Conditions is to be modified, state the modifications.

(B) Rights to be granted by Sub-Contractors

1 Identity of Sub-Contractors and Beneficiaries

| Sub-Contractors by whom rights are to be granted | Beneficiaries to whom those rights are to be granted | Rights to be granted as Third Party Rights (TPRs) or by Collateral Warranty (SCWa/P&T, SCWa/F or SCWa/E, as appropriate) | Requirement for Sub-Contractor's Professional Indemnity (PI) or Product Liability (PL) insurance (where applicable) ^[3] |
|--|--|--|--|
| ----- | ----- | ----- | ----- |

2 Mode of execution

| | |
|--|--|
| For Third Party Rights, Sub-Contracts | <ul style="list-style-type: none"> * must be executed as deeds/ * may be executed under hand |
| For Collateral Warranties, Sub-Contracts and Collateral Warranties | <ul style="list-style-type: none"> * must be executed as deeds/ * may be executed under hand |

3 Applicable terms

(References below to paragraphs are to those in the relevant part of Schedule 6 to the JCT Standard Building Sub-Contract Conditions; those to clauses are to clauses of the relevant JCT Collateral Warranty.)

(P&T and E) Liability for other losses

If paragraph/clause 1.1.2 is to apply for any beneficiary, state:

- the beneficiary or category of beneficiaries for whom it is to apply
- whether liability is unlimited or, if limited, each limit on liability that is to apply, i.e.:
 - whether the limit is in respect of each breach, and/or
 - whether it is an aggregate limit on liability either to each individual beneficiary or a category of beneficiaries

[3] It should be indicated in this column whether Professional Indemnity insurance (PI) or Product Liability insurance (PL) is required from each category of sub-contractor and, if so, which type. The necessary further details as to levels of cover/indemnity required may more conveniently be set out on further sheets as appropriate (which should then be annexed to these Rights Particulars), indicating in each case whether the required level is for claims or a series of claims arising out of a single event and/or is an aggregate amount of cover for any one period of insurance. If there are additional requirements, e.g. if cover for pollution and contamination claims is required from a sub-contractor, the required cover level and/or terms should also be specified.

(P&T, F and E) Net Contribution^[4]

If in the case of Employer Rights paragraph/clause 1.3 is to apply, this must be stated, as should any variation in its terms.

Unless otherwise stated, the definition of Consultants shall be that in clause 2.26.6 of the Standard Building Sub-Contract Conditions (SBCSub/C and SBCSub/D/C).

[4] In the case of JCT third party rights or warranties from a Sub-Contractor to Purchasers/Tenants and a Funder the Net Contribution clauses apply. In the case of the JCT third party rights and warranties for the Employer the default position is that the provision does not apply unless so stated.

Appendix B – Related Publications

The 2016 editions of the following documents have been issued by the JCT for use with SBC 2016, where required:

- Standard Building Sub-Contract in the following versions:
 - Agreement (SBCSub/A) and Conditions (SBCSub/C), and
 - Agreement and Conditions with sub-contractor's design (SBCSub/D/A and SBCSub/D/C)
- Standard Building Sub-Contract Guide (SBCSub/G)
- Short Form of Sub-Contract (ShortSub)
- Sub-subcontract (SubSub)
- Partnering Charter (Non-binding)
- Framework Agreement (FA) and Framework Agreement Guide (FA/G)
- Pre-Construction Services Agreement (General Contractor) (PCSA)
Pre-Construction Services Agreement (Specialist) (PCSA/SP)
- Consultancy Agreement (Public Sector) (CA)
- Collateral Warranties
 - Contractor Collateral Warranty for a Purchaser or Tenant (CWa/P&T)
 - Contractor Collateral Warranty for a Funder (CWa/F)
 - Sub-Contractor Collateral Warranty for a Purchaser or Tenant (SCWa/P&T)
 - Sub-Contractor Collateral Warranty for a Funder (SCWa/F)
 - Sub-Contractor Collateral Warranty for Employer (SCWa/E)
- Adjudication Agreement (Adj) and Adjudication Agreement (Named Adjudicator) (Adj/N)
- JCT 2016 edition of the Construction Industry Model Arbitration Rules (CIMAR)



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