# UNDERSTANDING

## JCT STANDARD BUILDING CONTRACTS

SEVENTH EDITION

David Chappell

# Understanding JCT Standard Building Contracts

*7th edition*

David Chappell

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# Preface to the seventh edition

I have stopped being surprised by the success of this little book among architects, quantity surveyors and contractors. I am still gratified to learn that it has been adopted as a standard text for students in schools of architecture and building as well as being popular with those who are established in the industry. I will do my best to ensure that the text remains relatively simple and easy to read, and free from legalisms while remaining up to date and improved where possible. The original intention was to provide a straightforward guide to the three standard forms of contract in common use. After some hesitation, I have been persuaded that the book would become even more useful to its readers if it was enlarged to deal with the most common form of design and build contract.

My guiding principle remains the kind of book I would have wanted when I was a newly qualified architect. What I wanted then and what was not available was a short book which told me all I needed to know about the then current forms of contract and which I could read without having to look up every other word in a legal dictionary. I wanted a book which was not too superficial, which gave me a few insights and which pointed the way to further reading.

This edition has been thoroughly updated to take account of legal decisions and relevant statutes. The JCT contracts dealt with in this book are JCT 98, IFC 98, MW 98 and WCD 98, each with amendments up to number 4. In response to requests, a full table of cases has been included with the indexes.

As always, I am grateful to all those who have taken the trouble to express a view on this book and all suggestions have been carefully considered and acted upon where appropriate.

Thanks to my wife Margaret.

*Note:* The male pronoun is used in this book. This is for ease of reading (and writing) and should be taken to mean both female and male individuals.

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# List of abbreviations used in references

| | |
|---|---|
| AC | Appeal Cases |
| ALJR | Australian Law Journal Reports |
| All ER | All England Law Reports |
| BCL | Building and Construction Law |
| BLM | Building Law Monthly |
| BLR | Building Law Reports |
| Ch App | Chancery Division Appeal Cases |
| CILL | Construction Industry Law Letter |
| CLD | Construction Law Digest |
| CLJ | Commonwealth Law Journal |
| Con LR | Construction Law Reports |
| Const LJ | Construction Law Journal |
| DLR | Dominion Law Reports |
| EG, EGCS | Estates Gazette Cases |
| LGR | Local Government Reports |
| LR Ex | Law Reports, Exchequer |
| LT | Law Times Reports |
| QB | Queen's Bench Law Reports |
| QBD | Law Reports, Queen's Bench Division |
| STL | Scottish Times Law Reports |
| WLR | Weekly Law Reports |

# Introduction

This book is written as a helpful general guide to four popular forms of contract in the JCT series, namely: The Standard Form of Building Contract With Quantities, 1998 (JCT 98), The Intermediate Form of Building Contract, 1998 (IFC 98), the Agreement for Minor Building Works, 1998 (MW 98) and the Standard Form of Building Contract 1998 with Contractor's Design (WCD 98). The text refers to contracts in England and Wales and substantially to Northern Ireland. It does not apply to Scotland, which has major legal and contractual differences.

It has been thought sensible to arrange the guide under a series of topics rather than undertake a clause-by-clause interpretation, because there are dangers in looking at the clauses in isolation and taking too literal an approach. So far as possible, the way in which all the contracts deal with a particular topic is examined together. However, it should be noted that no architect is specified in WCD 98. Any instructions or directions are given by the employer or, if appointed, the employer's agent. References in this book to the architect are never intended to mean an architect employed by the contractor. Such architects are treated as being part of the contractor's team – which indeed they are. References to case law have been inserted for the benefit of those who wish to read further and to show the way in which contract provisions have been interpreted by the courts. It should be noted, however, that detailed expositions of cases have been excluded. The book tries to state the law and the position under the contracts as at the end of December 2002.

Legal language has been avoided and, where the contractual position is obscure, a suggested course of action is laid down. In the interests of clarity, the provisions have been simplified; this book, therefore, supplements but does not take the place of the original forms. More than anything, it is intended to be practical with emphasis on the contractor's interests. When in difficulty, the golden rule is to obtain expert advice.

# Contents

# 1 Contractor's obligations

## 1.1 The forms

It seems appropriate to begin by looking briefly at the standard forms under consideration. All the JCT forms of contract were substantially amended in April 1998 to take account of the Housing Grants, Construction and Regeneration Act 1996 and the Latham Report. All the forms were reprinted at the end of 1998. JCT 80, IFC 84, MW 80 and CD 81 became JCT 98, IFC 98, MW 98 and WCD 98 respectively.

JCT 98 is a very comprehensive document which is suitable for use with any size of building works. Due to its complexity, however, its use is likely to be reserved for projects which are substantial in value or complex in nature.

CD 81 (now WCD 98) was introduced to produce a basis to allow contractors to carry out the design as well as the construction. In basic structure, and in some of the wording, it was based on JCT 80 and the resemblance between JCT 98 and WCD 98 is still very strong. There lies the trap, because WCD 98 has many substantial differences to the traditional form of contract. Essentially, the scheme of the contract is that the employer, either personally or through an agent, produces a performance specification (the Employer's Requirements) which the contractor must satisfy. He demonstrates how he intends to do this by producing the Contractor's Proposals. With this type of contract, the contractor carries most of the risk so far as cost, time and finished product are concerned. No independent architect is involved and, therefore, there are no certificates of any kind. There are merely statements and notices from the employer and applications for payment from the contractor. In addition to the normal clauses, this contract contains optional supplementary clauses.

IFC 84 (now IFC 98) was introduced to fill the gap between JCT 80 (now JCT 98) and MW 80 (MW 98). Practice Note 5 (series 2) issued by the JCT suggests its use if the Works (all the work to be done) are of simple content, adequately specified or billed and without complicated specialist work. The suggested upper price limit is £375,000 (at 2001 prices) and the maximum contract period of 12 months. Price and length of contract period are not,

however, the most important factors. IFC 98 is only slightly shorter than JCT 98, but the layout is better and, although complex, it is relatively easy to read. A more user-friendly layout is being developed for JCT 98.

MW 98 is recommended for use on projects having a maximum value of £100,000 (at 2001 prices). It is not suitable for complex Works and no provision is made for bills of quantities or nominated sub-contractors. Very importantly, as far as contractors are concerned, there is only limited provision for reimbursement of loss and/or expense, although a claim can always be made using common law rights. This form is very popular and not only for minor Works. It is known for it to be used in conjunction with bills of quantities, although quite unsuitable. The reason for its popularity is no doubt because it is short and simply expressed. Its simplicity is deceptive, however, and there are pitfalls for the unwary.

The contractor may think that the suitability or otherwise of a particular form for a particular project is academic in the sense that he can do very little about it. The choice is for the employer advised by the architect. A thorough knowledge of the contents of the various forms, however, can influence the contractor's tender – if he has any sense.

Some employers use the standard forms, but with amendments to suit their own requirements and ideas. Such amendments, if substantial, may turn a standard form into the employer's 'written standard terms of business' under section 3 of the Unfair Contract Terms Act 1977 with the result referred to earlier. Amended forms of contract do have an unfortunate habit of backfiring on the party, making the amendments inconsistent or inoperative [1]. Any amendment to clause 25 of JCT 98 is likely to provide a bonus to the contractor unless great care is taken. More will be said about this later when dealing with extensions of time.

Whichever of these forms is used, the contractor undertakes to carry out the Works in accordance with the contract documents.

It should be noted that the 1998 reprints of the JCT forms are not the same as the previous issue plus JCT Amendments. For example, IFC 98 is not the same as IFC 84 plus JCT Amendments 1–12. JCT have taken the opportunity to carry out many corrections. The intermediate form is particularly affected, because Amendment 12 was issued containing errors. If tenders have been invited using IFC 84 plus Amendments and the contract has been drawn up on the basis of IFC 98, the plain fact is that the formal contract will not properly reflect the agreement. Whether that is to the advantage or disadvantage of one or other party will depend upon particular circumstances.

### *Contract documents*

It is vitally important to know which are the contract documents, because they are the only documents which spell out what the employer and the contractor have agreed to do. Letters exchanged before the contract is entered

into and the contractor's programme are not contract documents, i.e. they are not binding on the parties, unless expressly so stated. Architects may point to minutes of site meetings as evidence of what was agreed, but they cannot amend the contract documents [2]. In order to amend the terms of the contract it would be necessary for the employer (not the architect on the employer's behalf) and the contractor formally to agree the change, preferably in writing and preferably as a deed. JCT 98 defines them in clause 1.3 as the contract drawings, contract bills, articles of agreement, conditions and appendix. The last three are contained in the printed standard form. The contract drawings must be the drawings on which the contractor tendered. It is not unusual for the architect to have made revisions to the original drawings between tender and the signing of the contract. The contract drawings must be carefully scrutinised before signing and, if such revisions are present, the architect must be asked to restore them to their previous condition.

IFC 98 provides four options:

- contract drawings and specification priced by the contractor;
- contract drawings and schedules of work priced by the contractor;
- contract drawings and bills of quantities priced by the contractor;
- contract drawings and specification and the sum the contractor requires for carrying out the Works;

together with the agreement and conditions (the printed form) and, if applicable, particulars of tender of any named person in the form of tender and agreement NAM/T.

If the contractor is simply asked to state a sum required to carry out the Works – the last option – he must also supply a contract sum analysis or a schedule of rates on which the contract sum is based.

Strangely, neither the contract sum analysis nor the schedule of rates is a contract document. This may be important because one of these two documents is essential to value architects' instructions requiring a variation (clause 3.7.1). It will normally be to the contractor's advantage if the third option is used (with priced bills) because it puts the onus on the employer to ensure that the quantities are correct. All the other options provide room for dispute if there are inconsistencies.

MW 98 provides, in the first recital, for the contract documents to be any combination of contract drawings, specification and schedules together with the conditions (the printed form). The second recital provides that the contractor must price either the specification or the schedules or provide a schedule of rates. In the latter case, the schedule of rates would not be a contract document.

WCD 98, unlike the other contracts, has no definition of the contract documents. However, it is clear from clause 2.1 that the contract documents comprise the Employer's Requirements, the Contractor's Proposals and the

Contract Sum Analysis together with the articles of agreement, the conditions and the appendices (the printed form). The contents of the Employer's Requirements, the Contractor's Proposals and the Contract Sum Analysis are to be listed in appendix 3. They are frequently composed of a mixture of specifications of various kinds and drawings. The Contract Sum Analysis is sometimes as detailed as bills of quantities.

It is usual to talk about 'signing' the contract, but in fact it can be executed in either of two ways: under hand (also known as a 'simple' contract) or as a deed (also known as a 'specialty' contract). As far as building contracts are concerned, there are two important differences. A deed does not need what is called 'consideration' to make it a valid contract, but a simple contract does need consideration. For example, a builder who offered to construct a house for someone would have to receive something in exchange for there to be a valid simple contract, but if the contract was entered into as a deed, it would be binding even if the builder agreed to build the house without any reward.

The second important difference concerns the Limitation Act 1980 which operates to limit the period during which either party may bring an action to enforce their rights under the contract. In the case of a simple contract, the period is six years from the date of the breach. For practical purposes, the starting date is usually taken as practical completion [3]. In the case of a deed, the period is 12 years. It is clear, therefore, that a contractor is more exposed if he enters into a building contract in the form of a deed.

It used to be the case that a deed had to be sealed in order to be properly executed. This was usually achieved by the impression of a device on wax or a wafer and fixed to the document. In fact, it was usually sufficient if it could be shown that both parties intended the document to be sealed [4]. The Law of Property (Miscellaneous Provisions) Act 1989 and the Companies Act 1989 have abolished the necessity for sealing for individuals and companies respectively. Indeed, sealing alone is not sufficient to create a deed (except in Northern Ireland, where the Acts do not apply). All that is necessary now in order that a document be executed as a deed is that it be made clear on its face that it is a deed and, in the case of a company, that it is signed by two directors or a director and company secretary, or, in the case of an individual generally, that it is signed by the individual in the presence of a witness who must attest the signature. It is a matter on which proper advice should be sought before executing the contract.

Clause 1.11 of JCT 98, clause 1.16 of IFC 98 and clause 1.8 of WCD 98 allow the parties to enter into an agreement that communications can be exchanged electronically, i.e. by email. Security may be a factor to consider and the use of an electronic signature is sensible. The details of such an agreement are provided in annex 2 to the conditions. It should be noted, however, that there are certain notices under the contract which must be served in writing in the ordinary way. These are:

- determination of the contractor's employment;
- suspension by the contractor of the performance of his obligations;
- the final certificate or the final account and final statement under WCD 98;
- any notice given to invoke the dispute resolution procedures;
- any agreement the parties make to amend the contract or the electronic data interchange provisions.

It appears, therefore, that an interim certificate could be issued by electronic data interchange if the parties enter into the appropriate agreement.

### *Discrepancies*

It is quite usual for there to be some small, and sometimes large, discrepancies between the provisions in the printed form and in, say, the bills of quantities or specification. Priority of documents then becomes important. It is often thought that terms which are hand- or type-written must take precedence over those which are printed because the written terms must represent the clear intentions of the parties. Indeed, that is the general law: type prevails over print [5]. However, JCT 98 clause 2.2.1, IFC 98 clause 1.3, MW 98 clause 4.1 and WCD 98 clause 2.2 clearly state that nothing contained in any of the contract documents will override or modify the terms in the printed form.

This kind of provision has been upheld in the courts [6]. In practice, it means that, if a term in the contract bills or specification is in conflict with a term in the printed form, the printed term will prevail. For example, if the bills provide for an estate of houses to be completed on specific dates, in other words phased completions, and the printed form contains just one date, it is the date in the printed form which will apply and the contractor will have fulfilled his obligations as to the time for completion if he completes all the houses on that one date. If the printed form stipulates that the period for payment is 14 days, that stipulation cannot be overridden by a clause in the bills allowing 21 days. To be effective, the change must be made to the printed form itself.

All four contract forms are lump sum contracts. That is to say that, in general, the contractor takes the risk that the work may be more costly than he expects. Specific clauses, however, modify the effects.

In particular, when bills of quantities are used, JCT 98 clause 2.2.2 and IFC 98 clause 1.5 expressly provide that the bills are to be prepared in accordance with the Standard Method of Measurement (SMM) unless specifically stated otherwise in respect of particular items. Errors in the bills are to be corrected and treated as variations. The effect of this is that a contractor is entitled to price everything as though measured in accordance with SMM unless there is a note for that item. A general note to the

effect that not everything is measured in accordance with SMM would not be effective. Contractors can recover substantial amounts of money simply by paying attention to this point.

Under WCD 98, there is less scope for the contractor to claim additional costs, because he is generally taken to have allowed in his price for satisfying the Employer's Requirements.

If the contractor makes an error in pricing which is not detected before acceptance of the tender, he is stuck with it. This may seem harsh and many *ex gratia* claims are made on this basis, but if two parties contract together they are usually taken to know what they are doing. It may be possible for the contractor to obtain relief if he can show that the employer detected a substantial mistake in pricing and, knowing that the contractor would not wish to contract on those terms, purported to accept the tender [7]. In Canada, an architect has been held liable to a contractor for failure to include important information in the invitation to tender. As a result, the contractor was unable to use his preferred system and lost money [8].

It is now established that, under JCT 98, IFC 98 and MW 98, the contractor has no duty to search for discrepancies and inconsistencies between the contract documents. The architect is responsible for providing the contractor with correct information. If the contractor does not discover a discrepancy until too late, the employer must pay for any additional costs resulting [9]. In the nature of things, inconsistencies will be present. All the three forms make provision for the correction of such inconsistencies: JCT 98 in clause 2.3, IFC 98 in clause 1.4 and MW 98 in clause 4.1.

The architect may well consider that a contractor who is carrying out his obligations properly will have to examine the documents carefully and so detect discrepancies. This favourite argument does not change the legal position noted above. Of course, upon finding a discrepancy, the contractor should always ask the architect, in writing, for an instruction.

Most of the contractor's problems in this respect arise because he is anxious to proceed 'regularly and diligently' and when confronted by two drawings, or a drawing and a bill item, which do not correspond, he attempts to solve the problem himself. By so doing, the contractor loses his right to payment for any variation and probably takes responsibility for the design of that particular part of the work. If, however, the contractor does not proceed on that particular part of the work, asks the architect for instructions and notifies delay and disruption, he will be entitled to the whole of his loss, in terms of time and money as well as payment for the variation instruction when it eventually arrives.

A closely linked situation, although not strictly an inconsistency, is where the contractor is not provided with a particular detail he requires. He may think he knows what the architect intends to be done, but again he should beware of doing it without precise instructions. He should deal with it in precisely the same way as inconsistencies.