

KEATING ON CONSTRUCTION CONTRACTS

TENTH EDITION

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a commentary on JCT Forms of Contract

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a commentary on the Infrastructure Conditions of Contract

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a commentary on the FIDIC Standard Forms

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given and for further information reference must be made to one of the standard works on the law of contract.⁶

2. THE PERSONS CONCERNED IN A CONSTRUCTION CONTRACT

- 1-003 The employer and the contractor.** The employer for whose benefit the work is carried out and the contractor who must carry out the work are the principal parties to a construction contract. The employer has frequently been termed "the building owner", and the contractor the "builder"⁷ or the "building contractor". For the sake of clarity and because both the Standard Form of Building Contract⁸ and the Infrastructure Conditions of Contract (2014 edition)⁹ use the terms, the parties are generally referred to in this book as "employer" and "contractor", unless a reference to a decided case involves the use of other terms.
- 1-004 Other persons.** In addition to the parties to the contract, there are usually several other persons involved in a construction contract. These may include the architect or engineer, the quantity surveyor and other consultants. Although they are not parties to the construction contract, they may materially affect the legal relationship between the contractor and the employer. There is no requirement of the law that there shall be such persons employed in a construction contract and many smaller contracts are entered into and completed without their employment.
- 1-005 The architect.** The term is ordinarily used in this book to describe the person who is engaged by the employer to carry out the duties of an architect referred to in Ch.14.¹⁰ In the broadest sense its duties are to prepare plans and specifications and supervise the execution of the works on behalf of the employer so that they may be completed in accordance with the contract. The architect is therefore the agent of the employer and owes the employer a contractual duty of professional care. The employer and contractor ordinarily contract on the understanding that many matters may arise under the contract where the architect has to make a decision in a fair and unbiased manner.¹¹ A surveyor or some other person may carry out the duties and occupy the position of an architect in a building contract.
- 1-006 The engineer.** In an engineering contract the person who carries out the duties and occupies a position similar to that of an architect in a building contract is normally termed the engineer.¹²
- 1-007 The quantity surveyor.** The quantity surveyor is employed by or on behalf of

⁶ e.g. *Chitty on Contracts*, edited by H. Beale, 32nd edn (London: Sweet & Maxwell, 2015).

⁷ This term received judicial consideration under a now repealed statute formerly relating to bankruptcy law—see H.B.C. (7th edn, 1946), p.105. It has also been defined for the purpose of the London Building Acts 1930–1939 in s.4 of the London Building Acts (Amendment) Act 1939. See also ss.121–123 of the Building Act 1984.

⁸ Joint Contracts Tribunal Standard Form of Building Contract (2011 edn). See further Ch.20. Further references will normally be to the "Standard Form of Building Contract".

⁹ See further Ch.21.

¹⁰ See para.14–002. Thus references to "architect" do not refer to a person who, though qualified as an architect, does not practise as such but acts as, say, an expert adviser or salaried assistant to a large contractor.

¹¹ *Sutcliffe v Thackrah* [1974] A.C. 727, HL. See further, para.5–062. The architect may also owe its client a parallel professional duty in tort—see "Professional negligence" at para.7–048.

¹² See generally, para.14–010. Note that surveyors, engineers and others may not term themselves architects unless registered under the Architects Act 1997.

the employer to estimate the quantities of the proposed works and set them out in the form of bills of quantities for the purposes of tender. The quantity surveyor may also be employed to measure and value variations and to do such other works of measurement and valuation as the architect may require.¹³ In some cases, particularly small contracts, the architect may perform the tasks of the quantity surveyor. In engineering contracts, the task is generally performed by the engineer.

Consultants. In large construction contracts, consultants other than the architect and quantity surveyor or the engineer are often engaged by the employer for special purposes. There may, for instance, be a structural engineer, a mechanical and electrical engineer, an acoustics consultant or others. Their roles are often not defined in the contract but generally their functions are confined to the design and supervision of those parts of the works within their special expertise.

Project manager. In some large construction contracts, the employer may engage a project manager in addition to the architect and some or all of the consultants mentioned above. A project manager's role is organisational but its exact relationship with the architect, consultants, contractor and sub-contractors varies from one contract to another. Contractors sometimes also employ a person called the project manager.

Clerk of works. In large construction contracts, the employer may also employ a clerk of works whose functions have been described as being "the eyes and ears of the employer" on the site. Sometimes the role of the clerk of works is prescribed by the contract.

Employer's agent or representative. Where the employer chooses a contract which does not provide for an architect or engineer, the employer often appoints an agent or representative who carries out certain administrative functions and is often a qualified construction professional. The extent of the authority of the person appointed will, generally, depend on each contract.

Sub-contractors. The contractor frequently sub-contracts, or, as it is sometimes termed, sub-lets, part of the work to sub-contractors.¹⁴ The sub-contractor may be "domestic"—that is, chosen by the contractor alone—or may be "nominated"—that is, chosen by the employer and nominated under the provisions of the contract. There are also "named" and other sub-contractors whose selection and legal position may be different.

Suppliers. A supplier generally supplies goods or materials under the contract. Again, the supplier may be domestic, nominated or have some other means of selection.

Sureties. Persons known as sureties may give various guarantees. They may guarantee the performance of the works by the contractor or due payment by the

¹³ See generally para.14–149.

¹⁴ See generally para.13–044.

Proposals and also as to the extent of the contractor's liability for the design contained in the Employer's Requirements. Often the point of handover of the design is difficult to establish and the distinction between design development and changes in design is not plain.

- 1-038 Under the JCT Design and Build Contract (2011) the contractor has an equivalent design liability to the employer "as would an architect ... acting independently under a separate contract with the employer". Under the Infrastructure Conditions of Contract the contractor has to exercise reasonable skill and diligence in designing any part of the permanent works for which it is responsible.

- 1-039 **General obligations.** In so far as the contractor is performing duties of architects, engineers and surveyors, cases dealing with such duties when performed by persons as independent professionals⁵³ may be of some assistance, although care must be taken to have regard to the different subject matter. Again when considering the performance of duties similar to those carried out by a contractor in a traditional contract, some of the decided cases may help but caution is required. Apparently identical terms of contract may, because of the different subject matter, have a different meaning. An obvious example is that relating to a "defects" clause.⁵⁴ In the traditional type of contract it ordinarily excludes defects of design, while in design and build contracts it ordinarily includes them.

- 1-040 **Design obligations.** In a design and build contract there may be an implied term that the finished work will be reasonably suitable for the purpose for which the contractor knows it is required.⁵⁵ However, the nature of the design obligation will depend on the terms of the contract⁵⁶ and it is desirable to define the design obligation in an express term. Where a contractor is invited to tender to design and build and submits a design which is adopted by the employer's architect acting in the traditional sense and thereafter a formal contract is entered into whereby the contractor's obligations are limited to performing specific works described in the contract, the contractor is not liable in damages for breach of contract if the works do not fulfil the result which, to their knowledge, was sought to be achieved by the employer.⁵⁷ However, the contractor may be liable if they have expressly guaranteed the result,⁵⁸ and might in special circumstances be liable in tort.⁵⁹ Subject to the application of the Defective Premises Act 1972 for dwellings,⁶⁰ the contractor's design liability for consequential loss may be limited to a specific agreed sum.

- 1-041 **Professionals.** Contractors sometimes engage independent professionals to carry

⁵³ See Ch.14. See *MT Højgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2015] EWCA Civ 407.

⁵⁴ See para.11-028.

⁵⁵ *Greaves & Co Ltd v Baynham Meikle* [1975] 1 W.L.R. 1095 at 1098, CA; considered in *Douglas Robert Cheal v Hale Allen* (1997) 59 Con. L.R. 106.

⁵⁶ In *MT Højgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2015] EWCA Civ 407 it was held that very clear words are required to impose a "fitness for purpose" duty on a design and build contractor. If any obligations are intended to be absolute, these should be made clear and distinguished from those that are subject to reasonable care and skill. See further, "Fitness for purpose of completed works" and "Design and build" at paras 3-078 and 3-080.

⁵⁷ *Cable (1956) Ltd v Hutcherson Ltd* (1969) 43 A.L.J.R. 321 (Australia HC).

⁵⁸ *Steel Co of Canada Ltd v Willand Management Ltd* [1966] S.C.R. 746 (Canada SC); considered in *MT Højgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2015] EWCA Civ 407.

⁵⁹ See generally Ch.7 and in particular "Contractor's pre-contract information" at para.7-005.

⁶⁰ See para.16-001 for the Defective Premises Act 1972.

out design and other services to fulfil part of the contractor's obligations to the employer. Arising out of such engagement they owe the contractor a duty to carry out their work properly. The requisite standard will be at least one of reasonable skill and care.⁶¹ Where they know that the contractor is under an absolute duty to provide finished work reasonably suitable for a purpose of which they have knowledge, they are, it seems, ordinarily under such a duty themselves to the contractor in carrying out design or other services.⁶² Further, although not engaged by the employer, they might in certain circumstances owe them a duty of care in tort.⁶³

The employer may engage independent professionals to protect their interests. They owe the employer a duty of care arising out of the engagement.⁶⁴ An architect or engineer in such a position usually is, or is supposed to be, an inspector only, whether of the design, the works or both. If such architect or engineer is given authority as agent of the employer, the terms of such agency and their actions should be such as not to interfere with the duties of design, administration and supervision undertaken by the contractor towards the employer. If there is such interference, liabilities may become confused and the employer may find itself deprived of, or hindered in the enforcement of, their remedy against the contractor by the operation of doctrines of law such as variation, waiver or estoppel.⁶⁵

Employers sometimes engage a surveyor or other professional to check the contractor's valuations, to price variations and to perform some other duties comparable with those carried out by a quantity surveyor in the traditional procedure. This can usually be accommodated without great difficulty in a design and build contract and some contractors encourage it, presumably on the basis that it will help to avoid disputes over payment.

7. MANAGEMENT AND CONSTRUCTION MANAGEMENT CONTRACTS

For large construction projects, management contracts are now fairly common.⁶⁶ They are more akin to the traditional procedure than to design and build contracts. They have varying procedures but the main feature is that there is a management contractor or construction manager who generally does little or no direct construction work except organising and co-ordinating those who do. The management contractor is usually paid the prime cost of the works⁶⁷ plus a fee which may be increased by a bonus related to the amount by which the actual cost of the works is less than a target cost. The construction works are carried out by works or trade contractors who may be sub-contractors of the management contractor or in direct contract with the employer. Architects, quantity surveyors and other consultants are

⁶¹ See para.14-043.

⁶² *Greaves & Co Ltd v Baynham Meikle* [1975] 1 W.L.R. 1095, CA.

⁶³ See generally, "Negligent misstatement" at para.7-055 and in particular "Consultants" at para.7-072.

⁶⁴ See para.14-042.

⁶⁵ See Ch.12.

⁶⁶ The JCT publishes a Management Building Contract (MC) and Management Works Contract Tender & Agreement (MCWK), together with a Management Works Contract Conditions (MCWK/C) and Management Works Contract/Employer Agreement (MCWK/E).

⁶⁷ Most management contracts define "prime cost" in an elaborate schedule. The expression usually denotes the basic cost to the management contractor of carrying out the works. Their profit and overheads and sometimes their site and supervision costs may be allowed for separately or covered by the fee. Compare "P.C. or prime cost sums" at para.4-058.