MATTHEW COUSINS

Architect's Legal Pocket Book

SECOND EDITION

ROUTLEDGE

Architect's Legal Pocket Book

A little book that's big on information, the *Architect's Legal Pocket Book* is the definitive reference on legal issues for architects and architectural students. This handy pocket guide covers key legal principles which will help you to quickly understand the law and where to go for further information.

Now in a fully updated new edition, this bestselling book covers a wide range of subjects focused on the UK, including building legislation, negligence, liability, planning policy and development, listed buildings, party wall legislation and rights of light. This edition also contains greater coverage of contracts including the RIBA contracts, dispute resolution and legal issues in professional practice.

Illustrated with clear diagrams and featuring key cases, this is an invaluable source of practical information and a comprehensive guide to the current law for architects. It is a book no architect should be without.

Matthew Cousins is a practising architect and a member of the Royal Institute of British Architects.

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Architect's Legal Pocket Book

Second edition

Matthew Cousins

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To Katinka, Julian and Marianne

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Preface to the second edition

The way in which architects work is changing. There are an increased number of contracts in use, including bespoke and standard contracts and a growing use of BIM. Architects now take on a number of different roles, for example, acting as a CDM coordinator, a health and safety advisor, contract administrator, a design manager or a lead designer. As a result of these roles there is an increase of risk, responsibility and legal liabilities. The risk that an architect might take on, whether knowingly or not, are not straightforward or uniform throughout the duration of the project. Architects have to be aware of risk and their legal liabilities which form an essential part of the architect's professional duty of care.

The second edition of this book has been written to reflect the changes and updates to regulations, legislation and case law since the publication of the first edition. The second edition includes new sections on novation and inspection duties, professional consultant's certificates, certification, defects and the latest case law.

It is acknowledged that the inclusion and exclusion of legal issues for architects is subjective. This book does not attempt to give exhaustive analysis of construction law and does not claim to be a single interpretation or authority of the law. Given the limitation in size of the book, a careful balance has been sought between the range and depth of information an architect may need. I have included references for those who wish to seek further information, however, anyone seeking legal advice should contact a solicitor or barrister.

The law in the book is current as from January 2015 and generally covers the law for England and Wales.

Disclaimer

This book is intended to be informative only and is not a definitive source of legal information. In no event will the author or publisher be liable for negligence loss or damage including, without limitation, indirect or consequential loss or damage, or any loss or damages whatsoever arising from use or loss of use of, data or profits arising out of or in connection with the use of this book. If you are in any doubt you should contact a solicitor or barrister before undertaking any work.

British Standards

There are more than 30,000 current *British Standards in use today*. The following are relevant British Standards.

Accessibility

BS8300:2009+A1:2010 Design of buildings and their approaches to meet the needs of disabled people. Code of practice (relates to Approved Document M)

Basements

BS 8102:2009 Code of practice for protection of below ground structures against water from the ground

Clay bricks

BS 3921:1985 Specification for Clay Bricks

Condensation

BS 5250:2011 Code of practice for control of condensation in buildings

BS EN ISO 13788–2002 Hygrothermal performance of building components and building elements – Internal surface temperature to avoid critical surface humidity and interstitial condensation – Calculation methods

Curtain walling

BS EN 13830:2003 Curtain Walling

Demolition

BS 6187: 2000 Code of practice for demolition

Doors

BS 8214:2008 Fire door assemblies

BS 8214:1990 Non-metallic fire doors

BS 4787–1:1980 Doors. Specification for dimensional requirements

Drainage

BS 8000–14 1989 Workmanship on building sites. Code of practice for below ground drainage

BS EN 12056–1:2000 Gravity drainage systems inside buildings. General and performance requirements

BS 12056–2 2000 Gravity drainage systems inside buildings-Part 2: Sanitary pipework, layout and calculation

BS 6465–3:2006 Sanitary installations. Code of practice for the selection, installation and maintenance of sanitary and associated appliances

BS 12056–5:2000 Gravity drainage systems inside buildings. Installation and testing, instructions for operation, maintenance and use

BS EN 1433–2002 Drainage channels for vehicular and pedestrian areas – Classification, design and testing requirements, marking and evaluation of conformity

BS EN 12056–1:2000 Gravity drainage systems inside buildings. General and performance requirements

BS 8515:2009 Rainwater harvesting systems – Code of practice

BS12056–3:2000 Gravity drainage systems inside buildings – Part 3: Roof drainage, layout and calculation

BS EN752:2008 Drains and sewer systems outside buildings

Fire

BS 9999:2008 Code of practice for fire safety in the design, management and use of buildings

BS 476–10:2009 Fire Tests on building materials and structures. Guide to the principles, selection, role and application of fire testing and their outputs

BS 7974–6:2004 Application of fire safety engineering principles to fire safety design of buildings. Human factors: Life safety strategies – Occupant evacuation, behaviour and condition (sub-system 6)

BS 8214:2008 Code of practice for fire door assemblies

BS 9251:2005 Sprinkler systems for residential and domestic occupancies – Code of practice

BS 476–10:2009 Fire tests on building materials and structures

Fire doors

BS 8214:2008 Code of practice for fire door assemblies

BS EN 1634–1:2014 Fire resistance and smoke control tests for door, shutter and, openable window assemblies and elements of building hardware. Fire resistance tests for doors, shutters and openable windows which is an alternative for BS 476–22: 1987

Flooring

BS 8201–2011 Code of practice for installation of flooring of wood and wood-based panels

Floor tiling

BS EN 12004:2001 Adhesives for tiles. Definitions and specifications

BS 8204–1:2003+A1:2009 Screeds, bases and in situ floorings. Concrete bases and cementitious levelling screeds to receive floorings. Code of practice

Glazing

BS EN 356:2000 Glass in building – Security glazing – Testing and classification of resistance against manual attack

BS EN 410:2011 Glass in building – Determination of luminous and solar characteristics of glazing

BS EN 1096:2012 Glass in building – Coated glass

BS 4873:2009 Aluminium External Doors and Windows

BS EN 13830–2003 Curtain walling – Product standard

BS EN 12152–2002 Curtain walling – Air permeability – Performance requirements and classification

BS EN 12600:2002 Glass in building – Pendulum Test – Impact

BS EN13022–1:2006 Glass in building-structural sealant glazing – Glass products

BS EN13022–2:2006 Glass in building-structural sealant glazing – Glass products

BS EN14179–1:2005 Glass in buildings – HeatSoaked – Part 1

BS 6262–1:2005 CP Glazing for buildings – General methodology for selection

BS 6262–2:2005 Glazing for buildings – CP for energy light & sound

BS 6262–3:2005 Glazing for buildings – CP for fire security & wind loading

BS 6262–4:2005 CP Glazing for buildings – CP human impact

BS 6262–6:2005 CP special applications

BS 6262–7:2005 CP info provision

BS 5516–1:2004 Patent glazing etc. – CP

BS 5516–2:2004 Patent glazing etc. – CP – Sloping

BS 952–1:1995 Glass for glazing for buildings – Classification

Lead

BS 6915:2001 Design and construction of fully supported Lead Sheet Roof and Wall coverings – Code of practice

BS EN1 2588:2006 Lead and lead alloys – Rolled lead sheet for building purposes

Lintels

BS EN 845–2:2013 Specification for ancillary components for masonry. Lintels

Flexible damp proof courses and cavity trays

NA to BS EN 1996–2:2006. UK National Annex to Eurocode 6. Design of masonry structures. Design considerations, selection of materials and execution of masonry

Fixings of natural stone

BS 8298–2:2010 Code of practice for the design and installation of natural stone cladding and lining. Traditional handset external cladding

Materials for fixings

BS 8298–2:2010 Code of practice for the design and installation of natural stone cladding and lining. Traditional handset external cladding

Masonry

BS EN 771–1:2011 Specification for masonry units. Clay masonry units

BS EN 413–1:2011 Masonry cement. Composition, specifications and conformity criteria

BS EN 998–2:2010 Specification for mortar for masonry. Masonry mortar

BS EN 771–6:2011 Specification for masonry units. Natural stone masonry units

BS 5628–1: 2005 Code of practice for the use of masonry – Part 1: Structural use of unreinforced masonry

BS 5628–2:2000 Code of practice for the use of masonry – Part 2 Structural use of reinforced and prestressed masonry

BS 5628–3:2005 Code of practice for the use of masonry – Part 3 Materials and Components, design and workmanship

BS 8215:1991 Code of practice for design and installation of damp-proof courses in masonry construction

Joints

BS 8298–1:2010 Code of practice for the design and installation of natural stone cladding and lining. General

BS 8298–2:2010 Code of practice for the design and installation of natural stone cladding and lining. Traditional handset external cladding

BS 6093:2006 Design of Joints in Building Construction – Guide

Lighting

BS 8206–2:2008 Lighting for Buildings, Code of Practice for Daylighting

Plugs, socket-outlets, adaptors and connection units

BS 1363–5:2008 13 A plugs, socket-outlets, adaptors and connection units. Specification for fused conversion plugs

BS 7671:2008 incorporating amendment number 1:2011, IET Wiring Regulations 17th Edition

Performance of windows and doors

BS 6375–1:2009 Performance of windows and doors. Classification for weather tightness and guidance on selection and specification

BS 6375–2:2009 Performance of windows and doors – Part 2: Classification for operation and strength characteristics and guidance on selection and specification

BS 6375–3:2009 Performance of windows and doors. Classification for additional performance characteristics and guidance on selection and specification

BS 6375–1:2009 Window Frames

BS 6375–2:2009 Operation and strength characteristics

BS 6496:1984 Polyester powder coated

Glass to be BS EN 952:1999, and the relevant parts of BS EN 572–1:2012

Glass type and quality to BS EN 952:1999, parts 1 and 2

Hermetically sealed double glazing units to BS 5713

Wind and impact loading BS 6262–3:2005 & BS 6262–4:2005

Plasterboards, plaster, render

BS EN13914–1:2005 Design, preparation and application of external rendering and internal plastering. External rendering

BS EN13914–2:2005 Design, preparation and application of external rendering and internal plastering. Design considerations and essential principles for internal plastering

BS EN 520:2004+A1:2009 Gypsum plasterboards. Definitions, requirements and test methods

Paint

BS 6150:2006+A1:2014 Painting of buildings. Code of practice

BS EN 927–1:2013 Paints and varnishes. Coating materials and coating systems for exterior wood. Classification and selection

Production information

BS 1192:2007 Collaborative production of architectural, engineering and construction information – Code of practice

Rising damp

BS 6576:2005+A1:2012 Code of practice for diagnosis of rising damp in walls of buildings and installation of chemical damp-proof courses

Roofs

BS 5534:2003+A1:2010 Code of practice for slating and tiling (including shingles)

Stone selection

BS EN 1469:2004. Natural stone products. Slabs for cladding. Requirements

Sealants

BS EN ISO 11600:2003+A1:2011 Building construction. Jointing products. Classification and requirements for sealants

BS 6093:2006+A1:2013 Design of joints and jointing in building construction. Guide

BS 6213:2000+A1:2010 Selection of construction sealants. Guide

BS EN ISO 11600:2003 (+A1:2011) (incorporating corrigendum July 2006) Building construction – Jointing products – Classification and requirements for sealants

Stone

BS EN 1342:2012 Setts of natural stone for external paving – Requirements and test methods

BS EN 1341:2012 Slabs of natural stone for external paving – Requirements and test methods

BS 7533–6:1999 Pavements constructed with clay, natural stone or concrete pavers. Code of practice for laying natural stone, precast concrete and clay kerb units

BS EN 12058:2004 Natural stone products – Slabs for floors and stairs – Requirements

BS 8298–1:2010 Code of practice for the design and installation of natural stone cladding and lining. General

BS 8298–4:2010 Code of practice for the design and installation of natural stone cladding and lining. Rainscreen and stone on metal frame cladding systems

BS EN 12057:2004 Natural stone products – Modular tiles – Requirements

BS EN 12058:2004 Natural stone products – Slabs for floors and stairs requirements

BS 7533–1:2001 Pavements constructed with clay, natural stone or concrete pavers. Guide for the structural design of heavy duty pavements constructed of clay pavers or precast concrete paving blocks

BS 7533–2:2001 Pavements constructed with clay, natural stone or concrete pavers. Guide for the structural design of lightly trafficked pavements constructed of clay pavers or precast concrete paving blocks (AMD Corrigendum 13217)

BS 7533–3:2005 Pavements constructed with clay, natural stone or concrete pavers. Code of practice for laying precast concrete paving blocks and clay pavers for flexible pavements (+A1:2009)

BS7533–04:2006 Pavements constructed with clay, natural stone or concrete pavers. Code of practice for the construction of pavements of precast concrete flags or natural stone slabs

BS 5385–5:2009 Wall and floor tiling – Design and installation of terazzo, natural stone and agglomerated stone tile and slab flooring

Steel Framed windows

BS 6510:2010 Steel-framed windows and glazed doors. Specification

Stone

BS 5385–5:2009 Wall & floor tiling-Design & installation-Floor-Code of practice

BS 5385–4:2009 Wall & floor tiling-Design and installation of ceramic and mosaic tiling in special conditions-code of practice

BS EN ISO 10545–4:2012 Ceramic tiles. Determination of modulus of rupture and breaking strength

BS 5385–3 2007 Wall & floor tiling-Design & installation – Internal and External normal conditions – Code of practice

BS 5385–2 2006 Wall & floor tiling – Design & installation – External wall tiling – Code of practice

BS5385–1:2009 Wall & floor tiling – Design & installation – Wall tiling – Code of practice

BS 8000–11–2011 Workmanship on building sites – Ceramic and agglomerated stone

BS EN ISO 10545–2:1997 Ceramic tiles. Determination of dimensions and surface quality

Tiling

BS 8000–11.1–1989 Code of Practice for wall and floor tiling

BS EN1341:2001 Stone slabs for external paving requirements and test methods

BS 7533–13:2009-Permeable pavements clay stone and concrete pavers-des guide

BS 7533–12:2006-Clay stone and concrete pavers

BS 7533–04:2006-Clay stone and concrete pavers – Code of Practice for PCC

Timber in joinery

BS EN 942:2007 Timber in joinery. General requirements

Timber windows

BS 644:2009 Timber windows. Fully finished factory-assembled windows of various types. Specification

Trees

BS 5837:2012 Trees in relation to design, demolition and construction Recommendations

Ventilation

BS 5598–9:1989 Code of practice for ventilation principles and designing for natural ventilation

Wall ties

BS EN 845–1:2003+A1:2008 Specification for ancillary components for masonry. Ties, tension straps, hangers and brackets

Wall tiling

BS 5385–1:2009 Wall and floor tiling. Design and installation of ceramic, natural stone and mosaic wall tiling in normal internal conditions. Code of practice

BS 5385–2:2006 Wall and floor tiling. Design and installation of external ceramic and mosaic wall tiling in normal conditions. Code of practice

Weep holes

British Standards BS 8215:1991 Code of practice for design for installation of damp-proof courses in masonry construction

Windows (replacement of)

BS 8213–4:2007. Windows, doors and rooflights. Code of practice for the survey and installation of windows and external doorsets

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1
Legal framework

Any comprehension of the law applicable to construction and engineering projects requires at the very least, a rudimentary understanding of the legal framework within which the law has developed and is applied, and the nature of legal rights and remedies deriving from the various sources of law.[1]

What is law?

The law is a body of enforceable rules comprising social, political, moral and economic factors intended to maintain order and social control of society. There are different types of law including common law, equity and statute law. Common law is the part of English law developed by judges who make court decisions (case law) which are binding on lower courts and are known as precedent. Common law legal jurisdictions are widespread throughout the world in those countries formerly part of the British Empire and in those now forming the Commonwealth. The common law system is also used in the United States. Equity is the part of English law developed in the former Courts of Chancery and designed to mitigate the rigours of the common law. Since the Judicature Acts 1873–1875, the courts administer both common law and equitable principles, and where there is a conflict between the rules of law and equity, the rules of equity should prevail. Statute law is the law enacted by the legislature in the form of Acts of Parliament. The common law system is noted for its flexibility.

[1] Bailey, J., 2011, Construction Law, Volume 1, Informa, p. 5.

Common law jurisdictions are to be contrasted with civil law jurisdictions, which are codified systems often based upon the Napoleonic Code and are prevalent in continental Europe, the former French colonies in Africa and Latin America. Common law courts tend to follow an adversarial approach to litigation, whereas civil law courts usually adopt an inquisitorial system. In civil law jurisdictions less weight is given to precedent. Three basic principles underlying the British Constitution are the separation of powers, the supremacy of Parliament and the rule of law.

Construction law

Construction law is the law that applies to construction and engineering projects.[2] Construction law is applicable to a diverse range of building and infrastructure projects, including houses, schools, offices, roads, railways and harbours. Construction law is formed from construction and engineering contracts which range in complexity and size from simple agreements to complex legislation and includes procurement routes, tendering processes and applicable laws. Construction law has developed because of construction and engineering projects becoming more complex and highly specialised. Primary and secondary legislation regulates the construction and engineering works through contracts.

The legal framework

There are four principle sources of law:

1. Law that is made by Parliament and Statute Law
2. Judge-made law
3. Crown
4. Customary law

[2] Bailey, J., 2011, Construction Law, Volume 1, Informa.

Divisions of law

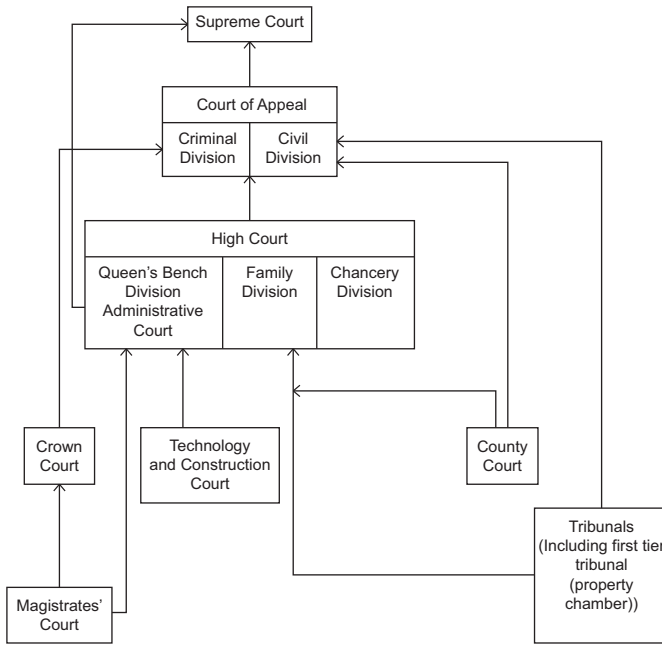

Figure 1.1 Hierarchy of courts in England and Wales

Common law

Common law is unwritten law, which is derived from judicial precedent and custom. Under common law, new laws are created through the decisions of courts, that is made by judges. Common law is governed by the doctrine of precedent in which courts of a higher or the same level must apply the same reasoning in earlier cases. Common law incorporates elements of equity if other branches of the law cannot provide an adequate remedy.

Statute law

Statute law refers to law that has been created by Parliament in the form of legislation. A statute is an Act of Parliament.

Private law

Private law is the body of law that deals with disputes and the legal relationships between individuals that are of no direct concern to the state. Private law includes the law of tort, property and trusts, family law and the law of contract.

Public law

Public law (also known as 'administrative law') is the body of law which deals with the state. It includes the exercise of powers and duties by public bodies arising under statute. It may include conflicts between the individual and the state. Public law includes the enforcement of building regulations by a local authority. See Figure 1.1.

Civil law

Civil law is related to the rights, duties and obligations of individuals to each other to do with civil matters such as family, property, contract, commerce, partnerships, insurance, copyright and the law of torts. This definition is to be contrasted with the civil law systems operating in civil law jurisdictions.

Criminal law

Criminal law is the body of law which regulates criminal acts that are deemed by statute or the common law to be public wrongs and are therefore punishable by the state in criminal proceedings. There are a number of situations where the conduct or action of an architect may result in criminal proceedings, including dishonesty and fraud. Architects and anyone

involved in financial transactions also must take action in relation to knowledge of any criminal activity.

Equity

Equity refers to the system of rules and principles developed by the former Courts of Chancery. Equity provides a measure of fairness or natural justice, that is not always available under common law. Although equity and the common law are implemented by the same courts, the two branches of the law are separate. Equity includes wide remedial principles that allow the courts to protect individuals from strict common law rules.

Legal systems in the United Kingdom

There are three distinct legal jurisdictions in the United Kingdom, and each has its own legal system:

- England and Wales
- Northern Ireland
- Scotland

English law prevails in England and Wales. The basis of the legal system in Northern Ireland is English common law, but it has its own law courts and its own statutory provisions. The Scottish legal system is entirely different from that in England and Wales and has its own courts and legal traditions which were preserved under the Act of the Union in 1707.

Who makes the law?

There are four predominant sources of the law within the English legal system:

- Parliament
- The courts
- The European Union
- The Council of Europe

Overview of the system of government in the United Kingdom

The United Kingdom is a parliamentary democracy with a constitutional monarch. The king or queen is the head of state, and the prime minister is the head of government.

The constitution

The United Kingdom is unusual compared with other countries in that it does not have a single written constitution but an unwritten one. Rather than one formal document, the British constitution is formed from various sources including case law made by judges, statute law and international treaties. There are also some unwritten sources, including parliamentary conventions and royal prerogatives. Since 1997 the United Kingdom has been engaged in a process of constitutional reform and has witnessed unprecedented constitutional changes including the following:

- Devolution to Scotland and Wales, under the Referendum (Scotland and Wales) Act 1997;
- The Scotland Act, 1998, providing for a directly elected Scottish Parliament and with a Scottish Executive responsible to it on devolved matters;
- The Government of Wales Act, 1998, providing a directly elected National Assembly in Wales;
- The Northern Ireland Act, 1998, providing for a referendum on a partnership form of government and devolution in Northern Ireland and the establishment of a directly elected Assembly in Northern Ireland;
- The Local Government Act 2000 requiring local authorities to abandon the committee system and providing for the possibility of directly elected mayors following referendums;
- The Human Rights Act, 1998, requiring government and all other public bodies to comply with the provisions of the European Convention on Human Rights;
- The Freedom of Information Act, 2000, providing for a statutory right of access to government information;

- The independence of the Bank of England from government in monetary policy (1997);
- The Constitutional Reform Act, 2005, providing for the Lord Chief Justice, rather than the Lord Chancellor, to become head of the judiciary and the establishment of a new Supreme Court whose members, unlike the Law Lords, will not be members of the House of Lords.[3]

Acts of Parliament

Acts of Parliament (also called 'statutes') contain the main laws made by Parliament acting in its legislative role. Until the statute (or act) has passed through all its stages in both houses and has received the Royal Assent it is referred to as a bill.

Courts and tribunals

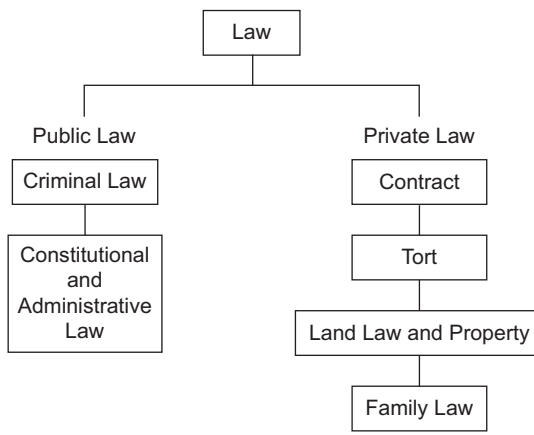

Figure 1.2 Public and private law categories

[3] Cited in Bogdanor, V., 2009, *The New British Constitution*, Hart Publishing, Oxford, pp. 4–5.

The Supreme Court

The Supreme Court of the United Kingdom was established by the Constitutional Reform Act 2005 and replaced the judicial function of the House of Lords. The appellate jurisdiction of the former House of Lords and the jurisdiction of the Judicial Committee of the Privy Council have been transferred to the Supreme Court. The Supreme Court is the final court of appeal for all United Kingdom civil cases and criminal cases in England, Wales and Northern Ireland. The Supreme Court was established to emphasise the independence of the Law Lords and increase the transparency between Parliament and the courts by achieving a separation between the Upper House of Parliament and the United Kingdom's senior judges. The Supreme Court hears appeals on arguable points of law of public importance, concentrates on cases of the greatest public and constitutional importance and maintains and develops the role of the highest court in the United Kingdom as a leader in the common law world.

For further Information, see www.supremecourt.gov.uk.

Court of Appeal

The Court of Appeal has two divisions, the Civil Division and the Criminal Division. It exercises an appellate function over all judgments and orders of the High Court and most determinations of judges of the county courts. Its decisions can be appealed with leave of the House of Lords. The Court of Appeal is the highest court within the Senior Courts, which also includes the High Court and Crown Court.

The Court of Appeal is served by 37 senior judges, termed Lord Justices of Appeal. The most senior judge is the Master of the Rolls. Usually, three judges will normally sit to hear an appeal, although for very important cases five judges may sit.

For further information, see www.justice.gov.uk.

The Privy Council

The Privy Council is the highest court of appeal for a number of Commonwealth countries, the Channel Islands and the Isle of Man. The Judicial Committee is also responsible for considering devolution issues and hears appeals from medical and veterinary disciplinary bodies and certain ecclesiastical cases.

For further information, see www.privy-council.org.uk.

The High Court

The High Court of Justice functions both as a civil court of first instance and as a criminal and civil appellate court for cases from lower courts. It consists of three divisions:

- The Queen's Bench Division, which deals with general civil cases such as personal injury, medical negligence, libel and contract disputes. The Technology and Construction Court is a sub-division of the Queen's Bench Division, part of the High Court of Justice.
- The Chancery Division, which deals with company law cases, disputes involving the sale of land, the redemption or foreclosure of mortgages, company law and bankruptcy, partnerships trusts and trustees, wills and probate.
- The Family Division, which deals with all matrimonial matters, divorce and children.

High Court judges sit in the High Court of Justice in the Rolls Building, Fetter Lane. It is possible for the High Court to sit anywhere in England or Wales. Furthermore, the judges of the Queen's Bench Division travel on circuit throughout England and Wales to hear cases.

For further information, see www.judiciary.gov.uk.

Technology and Construction Court

The Technology and Construction Court (TCC) is a specialist court that deals with technology and construction disputes, including building, engineering and information technology disputes, professional negligence claims and nuisance. A significant part of the TCC's work relates to adjudication. The TCC is based in London.

Types of claims appropriate to the TCC

- Building or other construction disputes, including claims for the enforcement of the decisions of adjudicators under the Housing Grants, Construction and Regeneration Act 1996
- Engineering disputes
- Claims by and against engineers, architects, surveyors, accountants and other specialised advisers relating to the services they provide
- Claims by and against local authorities relating to their statutory duties concerning the development of land or the construction of buildings
- Claims relating to the design, supply and installation of computers, computer software and related network systems
- Claims relating to the quality of goods sold or hired and work done, materials supplied or services rendered
- Claims between landlord and tenant for breach of a repairing covenant
- Claims between neighbours, owners and occupiers of land in trespass, nuisance and so on
- Claims relating to the environment (e.g. pollution cases)
- Claims arising out of fires
- Claims involving taking of accounts where these are complicated
- Challenges to decisions of arbitrators in construction and engineering disputes including applications for permission to appeal and appeals[4]

[4] Ministry of Justice (2010a).

For further information, see Ministry of Justice (2010a) and www.judiciary.gov.uk.

TCC judgements are accessible on the Bailii website at www.bailii.org/ew/cases/EWHC/TCC/.

The Crown Court

The Crown Court is a single court that has an unlimited jurisdiction over all criminal cases tried on indictment and also acts as a court for the hearing of appeals from magistrates' courts. Crown Courts sit in court centres across England and Wales and are designated in six circuits:

- Midland (Birmingham, Nottingham)
- North-Eastern (Leeds, Newcastle upon Tyne, Sheffield)
- Northern (Liverpool, Manchester)
- South-Eastern (London, Norwich)
- Wales and Chester (Cardiff, Swansea)
- Western (Bristol, Exeter, Winchester)[5]

For further information, see www.gov.uk.

Property Chamber (Residential Property) Division

The Property Chamber (Residential Property) provides an independent service in England for settling disputes involving private rented and leasehold property. Scotland and Wales have their own tribunal systems for hearing private rented and leasehold property disputes.

County courts

Since 2014 there is a single civil court named the county court. All county courts can deal with contract and tort cases and

[5] Ingman, T., 2006, *The English Legal Process*, Oxford University Press, Oxford, p. 30.

recovery of land actions. There are county courts throughout England and Wales.

For further information, see www.gov.uk.

Magistrates courts

Magistrates courts exercise criminal and family proceedings. These courts also have the power to make personal protection orders and exclusion orders in cases of matrimonial violence. They exercise some civil matters and have powers of recovery in relation to council tax and charges for water, gas and electricity.

For further information, see www.gov.uk.

Coroner's courts

The main function of a coroner's court is to inquire into the causes and circumstances of certain deaths and treasure.

For further information, see www.gov.uk.

Small claims track

If the value of a case is £10,000 or less, it will generally be allocated to the small claims track. Small claims are usually heard in the County Court, but some cases can be heard by the High Court. Before a claim is made to a small claims court, the court will look for evidence that the issue was first sought by arbitration or alternative dispute resolution. A small claim is a case that has been allocated by the court to the small claims track in the county court. There are three 'tracks': small, fast and multitrack. Small claims are lower value civil cases, rather than disputes of complexity or high value. Typically small claims are claims for compensation for faulty services provided, for example, by builders. They also include disputes between landlords

and tenants – for example rent arrears or compensation for not doing repairs, road traffic accident claims or wages owed.

For further information, see www.hmcourts-service.gov.uk.

Law of the European Union

European Union law is a body of treaties and court judgements which have direct effect within the member states and, where conflict occurs, takes precedence over national law. The Treaties (known as 'primary' legislation), are binding on member states and the basis for a large body of 'secondary' legislation which has a direct impact on the daily lives of citizens of the European Union. Secondary legislation consists mainly of regulations, directives and recommendations adopted by EU institutions and are implemented into UK law by way of an Act of Parliament.

The European Court of Justice

The European Court of Justice is the highest court in the European Union and the ultimate authority on European law. The court sits in Luxembourg and has a number of principal judicial responsibilities including the interpretation of European treaties establishing the European Union and ensuring the validity and the meaning of community legislation. The European Court of Justice overrules the judgements of courts of member states.

The European Court of Human Rights

The European Court of Human Rights rules on individual or state applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. These are binding for the countries concerned and have led governments to alter their legislation and administrative practice. The court is based in Strasbourg in a building designed by

Richard Rogers in 1994. The convention secures the following in particular:

- The right to life
- The right to a fair hearing
- The right to respect for private and family life
- Freedom of expression
- Freedom of thought, conscience and religion
- The protection of property.

The convention prohibits the following in particular:

- Torture and inhuman or degrading treatment
- No punishment without law
- Slavery and forced labour
- Arbitrary and unlawful detention
- Discrimination in the enjoyment of the rights and freedoms set out in the convention.[6]

For further information, see www.echr.coe.int.

The Council of Europe

The Council of Europe is the main decision-making body of the European Union (EU). The council has legislative power, which it shares with the European Parliament. The Council also concludes international agreements that have been negotiated by the commission. The EU member states take it in turns to hold the council presidency for a six-month period. Every council meeting is attended by one minister from each EU country.

For further information, see http://europa.eu.

The European Commission

The European Commission represents interests of the EU and the governments of the member states. The commission has

[6] www.echr.coe.int/echr.

wide powers to manage common policies of the EU, such as research and technology, overseas aid and regional development. It also manages the budget for these policies. The commission is answerable to the European Parliament and has responsibility for checking that member states obey EU laws.

For further information, see http://ec.europa.eu.

The European Parliament

The European Parliament is a democratically elected body that represents the interests of the citizens of the EU. The Parliament exercises political supervision over the activities of the EU and takes part in the legislative process. The European Parliament normally holds its sessions in Strasbourg and any additional sessions in Brussels.

For further information, see www.europarl.europa.eu/.

Procurement

Legislation

EU Treaty principles
EU Directives
The Government Procurement Act 2001
Public Services (Social Value) Act 2012
Public Contracts Regulations 2006
Utilities Contracts Regulations 2006

The Government Procurement Act 2001 defines "procurement" as "the process of acquiring goods, services, works or property by purchase, lease, rental or exchange." In 2012 and 2013, the public sector spent a total of £230 billion on procurement of goods and services (including capital assets);

this accounted for 34 percent of total managed expenditure.[7] Architects are directly involved in procurement when tendering for public sector work.

Procurement must adhere to EU treaty principles of non-discrimination, equal treatment, transparency, proportionality and mutual recognition.[8] The EU operates a free market to encourage greater competition and better value in public procurements.

[7] House of Commons Library, 31 January 2014, Public Procurement, Standard Note SN/EP/6029, accessed at www.parliament.uk/briefing-papers/SN06029 on 5 May 2014.
[8] House of Commons Library, 31 January 2014, Public Procurement, Standard Note SN/EP/6029, accessed at www.parliament.uk/briefing-papers/SN06029 on 5 May 2014.

2
Legislation

Legislation

Legislation is the process in which Parliament makes new laws. For a proposed bill (draft legislation) to become an Act of Parliament it must be passed by the House of Commons and the House of Lords and be given Royal Assent by the monarch. The role of the courts is to interpret the legislation, its application and enforcement in a particular case.

Primary legislation

Laws, made by Parliament, are in the form of Acts of Parliament and are referred to as 'primary legislation'. The following are the principal types of primary legislation in the United Kingdom:

- Acts of Parliament of the United Kingdom
- Acts of the Scottish Parliament
- Assembly Measures of the National Assembly for Wales
- Acts of the Northern Ireland Assembly (and other primary legislation for Northern Ireland)
- Church of England Measures
- Prerogative Instruments.

Secondary legislation

'Secondary legislation' is delegated legislation made under the authority of Parliament by government ministers and local authorities. Building regulations under the authority of Building Act 1984 are an example of secondary legislation. The main types of secondary legislation include the following:

- Statutory Instruments
- Church Instruments

- Bye-laws
- Building Regulations
- CDM Regulations 2015.

Statutory instruments
Statutory instruments are orders, rules, regulations and other subordinate legislation. Statutory instruments are enacted under the royal prerogative or the statutory authority by the Queen in council or a minister of the Crown.

Church instruments
Church instruments are made by the archbishops of Canterbury and York under authority contained in Church Measures for the purpose of bringing Church Measures.

Bye-laws
Bye-laws are rules made by a local authority, corporation or association for the regulation, administration or management of a district. They usually deal with matters of internal regulation within the area or organisation to which they relate.

Legislation governing construction projects

Building Regulations
Construction (Design and Management) Regulations 2015
Growth and Infrastructure Act 2013
The Local Democracy, Economic Development and Construction Act 2009
Climate Change Act (2008)
Construction Act 2008
Corporate Manslaughter and Corporate Homicide Act 2007
Control of Asbestos Regulations 2006
Control of Noise at Work Regulations 2005
Working at Height Regulations 2005
Regulatory Reform (Fire Safety) Order 2005
Control of Vibration at Work Regulations 2005
Sustainable and Secure Buildings Act 2004
Control of Lead at Work Regulations 2002
Control of Substances Hazardous to Health Regulations (COSHH) 2002

Management of Health & Safety at Work Regulations 1999
Provision and Use of Work Equipment Regulations 1998
Lifting Operations and Lifting Equipment Regulations 1998
Confined Spaces Regulations 1997
Party Wall etc. Act 1996
Housing Grants, Construction and Regeneration Act 1996
Health & Safety Signs and Signals Regulations 1996
Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995
Personal Protective Equipment Regulations 1992
Manual Handling Operations Regulations 1992
Electricity at Work Regulations 1989
Construction (Head Protection) Regulations 1989
Building Act 1984
Health & Safety (First Aid) Regulations 1981
Health and Safety at Work Etc. Act 1974

Legislation for an architectural practice

Professional services

Architects Act 1997
Housing Grants, Construction and Regeneration Act 1996
Arbitration Act 1996
Sale and Supply of Goods Act 1994
Town and Country Planning Act 1990
Consumer Protection Act 1987

Architectural practice

Building Regulations
British Standards
Construction (Design and Management) Regulations 2015
Localism Act 2011
Planning Act 2008
Greater London Authority Act 2007
Party Wall Act 1996
Housing and Urban Development Act 1993
Planning (Listed Buildings and Conservation Areas) Act 1990

Housing and Planning Act 1986
Building Act 1984
Highways Act 1980
Local Government, Planning and Land Act 1980
Health and Safety at Work etc. Act 1974
Historic Buildings and Ancient Monuments Act 1953

Client relationships

Competition Act 1998
Arbitration Act 1996
Housing Grants, Construction and Regeneration Act 1996
Consumer Protection Act 1987
Unfair Contract Terms Act 1977
Misrepresentation Act 1967
Copyright Designs and Patents Act 1956

Employee relationships

Employment Right Act 1996
Equality Act 2012
Sex Discrimination Act 1986
Race relations Act 1976
Health and Safety at Work etc. Act 1974
Employers' Liability (Compulsory Insurance) Act 1969

Business

Companies Act 2006
Insolvency Act 1986
Business Names Act 1985
Partnership Act 1890

Business premises

Contracts (Rights of Third Parties) Act 1999
Occupier's Liability Acts 1957 and 1984
Supply of Goods and Services Act 1982
Offices Shops and Railway Premises Unfair Contract Terms Act 1977
Trade Descriptions Acts 1968 and 1972

Responsibilities to the public

Corporate Manslaughter and Corporate Homicide Act 2007

Design standards legislation

Local Acts and Acts governing specific building types
Building Regulations
British Standards
Building Act 1984
Health and Safety at Work Etc. Act 1974
Fire Precautions Act 1971

Building regulations

Legislation

Building Regulations
Building (Approved Inspectors etc.) Regulations
Building Act 1984

Building regulations are made under powers provided in Section 1 of the Buildings Act 1984 (as amended by the Sustainable and Secure Buildings Act 2004). Building regulations contain the procedural and technical rules to almost all new building work and alteration of existing buildings and set standards for the design and construction of buildings to ensure the health, safety, welfare and convenience and safety of people inside or outside buildings. The purpose of building regulations is to secure reasonable standards of the following:

- Health and safety for persons in or about buildings (and any others who may be affected by buildings or matters connected with buildings)
- Energy conservation
- Access and facilities for people with disabilities.[1]

[1] Building Regulations Explanatory Booklet, Office of the Deputy Prime Minister, 2004.

A separate system of control applies in Scotland and Northern Ireland. The local authority has a duty to enforce the Building Regulations and responsibility to inspect building work in progress.

What is an approved document?

Approved documents are a series of documents, as approved by the Secretary of State that give technical guidance of how to meet the requirements of the Building Regulations. There are 15 approved documents. Each provides a guideline of what may be accepted as compliance with the requirements of the guidance. If the approved documents are followed, compliance is presumed but is not guaranteed. Following the approved documents requirements cannot be ignored but they are not necessarily obligatory. If a particular case is unusual the standard guidance may not apply. There are alternative ways to comply with the requirements, and this should be discussed with the building control body.

Building Regulations, the approved documents

The approved documents are published as practical guidance to the Building Regulations in England and Wales and are as follows:

Part A
Approved Document A – Structure (2004 edition incorporating 2004, 2010 and 2013 amendments)

Part B
Approved Document B (Fire safety) – Volume 1: Dwellinghouses (2006 Edition incorporating 2010 and 2013 amendments)
Approved Document B (Fire safety) – Volume 2 – Buildings other than Dwellinghouses (2006 Edition incorporating 2010 and 2013 amendments)

Part C
Approved Document C – Site preparation and resistance to contaminates and moisture (2004 edition incorporating 2010 and 2013 amendments)

Part D
Approved Document D – Toxic substances (1992 edition, incorporating 2010 amendments)

Part E
Approved Document E – Resistance to the passage of sound (2003 edition incorporating 2010 and 2013 amendments)

Part F
Approved Document F – Ventilation (2010 edition incorporating 2013 amendments)

Part G
Approved Document G – Sanitation, hot water safety and water efficiency (2010 edition incorporating 2013 amendments)

Part H
Approved Document H – drainage and waste disposal (2010 edition incorporating 2013 amendments)

Part J
Approved Document J – Combustion appliances and fuel storage systems (2010 edition incorporating 2013 amendments)

Part K
Approved Document K – Protection from falling collision and impact (2013 edition)

Part L
Approved Document L1A: Conservation of fuel and power (New dwellings) (2013 edition)
Approved Document L1B: Conservation of fuel and power (Existing dwellings) (2010 edition with 2013 amendments)
Approved Document L2A: Conservation of fuel and power (New buildings other than dwellings) (2013 edition)
Approved Document L2B: Conservation of fuel and power (Existing buildings other than dwellings) (2010 edition with 2013 amendments)

Part M
Approved Document M – Access to and Use of Buildings (2004 edition incorporating 2010 and 2013 amendments)

Part N
Approved Document N – Glazing (In 2013, Part N of Schedule 1 to the Building Regulations 2010 (as amended) and the current edition of AD N will be withdrawn, with the functional requirements and technical guidance in them subsumed into Part K and AD K respectively. However AD N (1998 edition including 2010 amendments) (archived below) will continue to apply to building work carried out in Wales from 6 April 2013.)

Part P
Approved Document P – Electrical safety – Dwellings (2013 edition)

Regulation 7
Approved Document for Regulation 7 (2013)

Scotland technical handbooks

Erratum to 2011 Technical Handbooks, 2011 edition
Domestic 0 General, 2011 edition
Domestic 1 Structure, 2011 edition
Domestic 2 Fire, 2011 edition
Domestic 3 Environment, 2011 edition
Domestic 4 Safety, 2011 edition
Domestic 5 Noise, 2011 edition
Domestic 6 Energy, 2011 edition
Non-Domestic 0 General, 2011 edition
Non-Domestic 1 Structure, 2011 edition
Non-Domestic 2 Fire, 2011 edition
Non-Domestic 3 Environment, 2011 edition
Non-Domestic 4 Safety, 2011 edition
Non-Domestic 5 Noise, 2011 edition
Non-Domestic 6 Energy, 2011 edition

Northern Ireland technical booklets

C Site preparation and resistance to moisture, 1994 edition 2
D Structure, 2009 edition
E Fire Safety, 2005 edition 3
F1 Conservation of fuel and power in dwellings, 2006 edition 4
F2 Conservation of fuel and power in buildings other than dwellings, 2006 edition 4
G1 Sound (conversions), 1994 edition 2
H Stairs, ramps, guarding and protection from impact, 2006 edition
K Ventilation, 1998 edition 2
L Heat producing appliances, combustion appliances and fuel storage systems 2006 edition
N Drainage, 1990 edition 1,2
P Unvented hot water storage systems, 1994 edition 2
R Access to and use of buildings 2006 edition

V Glazing, 2000 edition
DOE Amendments Booklet – AMD1: 1998
DFP Amendments Booklet – AMD2: 2000
DFP Amendments Booklet – AMD3: 2006
DFP Amendments Booklet – AMD4: 2008

Control of building work

Legislation
Part 3, Regulation 12, 14, Building Regulations 2010

Under Building Regulations 12 and 14, anyone who wants to carry out 'building work' or make a 'material change of use' must comply with the Building Regulations and must give a building notice or submit full plans to Building Control or use an approved inspector's Building Control Service.

Definition of building work

Legislation
Part 2, Regulation 3 of the Building Regulations 2010

'Building Work' is defined in Regulation 3 of the Building Regulations 2010 as follows:

- The erection or extension of a building;
- The provision or extension of a controlled service or fitting in or in connection with a building;
- The material alteration of a building, or a controlled service or fitting;
- Work required by regulation 6 (requirements relating to material change of use);
- The insertion of insulating material into the cavity wall of a building;
- Work involving the underpinning of a building;
- Work required by Regulation 22 (requirements relating to a change of energy status);
- Work required by Regulation 23 (requirements relating to thermal elements);

- Work required by Regulation 28 (consequential improvements to energy performance).[2]

Material change of use

Legislation

Regulation 5, Building Regulations 2010

A material change of use is where there is a change in the purposes for which or in the circumstances in which a building is used, so that after that change:

- The building is used as a dwelling, where previously it was not.
- The building contains a flat, where previously it did not.
- The building is used as an hotel or a boarding house, where previously it was not.
- The building is used as an institution, where previously it was not.
- The building is used as a public building, where previously it was not.
- The building is not a building described in classes 1 to 6 in Schedule 2, where previously it was.
- The building, which contains at least one dwelling, contains a greater or lesser number of dwellings than it did previously.
- The building contains a room for residential purposes, where previously it did not.
- The building, which contains at least one room for residential purposes, contains a greater or lesser number of such rooms than it did previously.
- The building is used as a shop, where previously it was not.[3]

Materials and workmanship

Building work shall be carried out as follows:

- With adequate and proper materials, that
- Are appropriate for the circumstances in which they are used,

[2] Part II, Regulation 3, Building Regulations 2010.
[3] Part 2, Regulation 5, Building Regulations 2010.

- Are adequately mixed or prepared, and
- Are applied, used or fixed so as adequately to perform the functions for which they are designed
- In a workmanlike manner.[4]

Buildings which are exempt from control under the Building Regulations

Buildings controlled under other legislation

- Any building in which explosives are manufactured or stored under a licence granted under the Manufacture and Storage of Explosives Regulations 2005
- Any building (other than a building containing a dwelling or a building used for office or canteen accommodation) erected on a site in respect of which a licence under the Nuclear Installations Act 1965 is for the time being in force
- A building included in the schedule of monuments maintained under section 1 of the Ancient Monuments and Archaeological Areas Act 1979[5]

Buildings not frequented by people

Any detached building into which people do not normally go, or into which people go only intermittently and then only for the purpose of inspecting or maintaining fixed plant or machinery, unless any point of such a building is less than one-and-a-half times its height from the following:

- Any point of a building into which people can or do normally go;
- The nearest point of the boundary of the curtilage of that building, whichever is the nearer.[6]

[4] Part 2, Regulation 7, Building Regulations 2010.
[5] Schedule 2, Class 1, Building Regulations 2010.
[6] Schedule 2, Class 2, Building Regulations 2010.

Greenhouses and agricultural buildings

- A greenhouse[7]
- A building used for agriculture,[8] or a building principally for the keeping of animals, provided in each case that:
  - No part of the building is used as a dwelling
  - No point of the building is less than one-and-a-half times its height from any point of a building which contains sleeping accommodation
  - The building is provided with a fire exit which is not more than 30 metres from any point in the building[9]

Temporary buildings

- A building which is not intended to remain where it is erected for more than 28 days[10]

Ancillary buildings

- A building on a site, being a building which is intended to be used only in connection with the disposal of buildings or building plots on that site
- A building on the site of construction or civil engineering works, which is intended to be used only during the course of those works and contains no sleeping accommodation
- A building, other than a building containing a dwelling or used as an office or showroom, erected for use on the site of and in connection with a mine or quarry[11]

Small detached buildings

- A detached single-storey building, having a floor area which does not exceed 30 m^2, which contains no sleeping accommodation and is a building:

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[7] This does not include a greenhouse or a building used for agriculture if the principal purpose for which they are used is retailing, packing or exhibiting.

[8] 'Agriculture' includes horticulture, fruit growing, the growing of plants for seed and fish farming.

[9] Schedule 2, Class 3, Building Regulations 2010.

[10] Schedule 2, Class 4, Building Regulations 2010.

[11] Schedule 2, Class 5, Building Regulations 2010.

  - No point of which is less than one metre from the boundary of its curtilage
  - That is constructed substantially of non-combustible material
- Any detached building designed and intended to shelter people from the effects of nuclear, chemical or conventional weapons and not used for any other purpose, if
  - Its floor area does not exceed 30m^2
  - The excavation for the building is no closer to any exposed part of another building or structure than a distance equal to the depth of the excavation plus one metre
- Any detached building, having a floor area which does not exceed 15m^2, which contains no sleeping accommodation[12]

Extensions

- The extension of a building by the addition at ground level of the following:
  - A conservatory, porch, covered yard or covered way; or
  - A carport open on at least two sides
- Where the floor area of that extension does not exceed 30m^2, provided that in the case of a conservatory or porch which is wholly or partly glazed, the glazing satisfies the requirements of Part N of Schedule 2[13]

Special jurisdictions

Government departments have distinct jurisdictions to determine their own standards for the design of certain buildings:

- Prisons
- Defence establishments
- Royal Palaces in occupation

Legal exemption

Certain geographical areas have acquired legal exemption from the Building Regulations including the following:

- The four Inns of Court: Inner Temple, The Middle Temple, Lincoln's Inn and Gray's Inn in London

[12] Schedule 2, Class 6, Building Regulations 2010.
[13] Schedule 2, Class 7, Building Regulations 2010.

- The area in South Kensington in London controlled by the Commissioners for the 1851 Exhibition.

Breach and enforcement of building regulations

Legislation

Sections 7, 35, 36 of the Building Act 1984

Under Section 36 of the Building Act 1984 Act, a local authority may serve an enforcement notice on an owner requiring them to alter or remove work which contravenes the act. If the owner does not comply with the notice, a local authority has the power to undertake the work itself and recover the costs of doing so from the owner.

Under Section 35 of the Building Act 1984, it is an offence if Building Regulations are contravened with a fine up to £5000 and up to £50 for each day the contravention continues after conviction. Failure to comply with the Building Regulations does not in itself involve any civil or criminal proceedings, but, under Section 7 of the Building Act 1984, if it is alleged that a person has contravened building regulations, a failure to comply with a document may be relied on as tending to 'establish liability', and proof of compliance with such a document may be relied on as tending to negative liability.[14]

Local authority building control

Building Control ensures the compliance of Building Regulations. There are two possible procedures for Building Control depending on the scale and type of work involved:

- Full plans application – Plans submitted for approval in advance of construction
- Building notice – Notice given of works commencing on site (this is not used for certain types of building work)

[14] Section 7, Building Act 1984.

There are two alternative systems of building control, one by local authorities and the other by a private system of certification which relies on approved inspectors operating under the Building (Approved Inspectors etc.) Regulations 2010.

Building notice application

Legislation

Section 16, Building Act 1984 and Regulations 12 and 13, Building Regulations

A 'building notice' allows certain types of building work to get started quickly. There are specific types of exclusions where the building notice cannot be used, for example, where a person intends to carry out building work in relation to a building to which the Regulatory Reform (Fire Safety) Order 2005 applies, for work which will be constructed close to or over the top of foul drains or rain-water pipes shown on a 'map of sewers' or if a new building will front onto a private street.

The notice must be signed by or on behalf of the person intending to carry out the work. Once a building notice has been submitted, building work will be inspected as the work progresses. A 'building notice' is valid for three years from the date the notice is given to the local authority, after which it will automatically lapse if the building work has not commenced.

For further information, see Office for the Deputy Prime Minister (2004b).

Full plans application

Legislation

Section 16 of the Building Act 1984 and Regulation 14, Building Regulations 2010

A 'full plans' application must contain plans and other information showing all construction details in advance of when

work is to begin on site. Regulation 14 (3) of the Building Regulations 2010 provides that full plans shall consist of a description of the proposed building work, renovation or replacement of a thermal element, change to the building's energy status or material change of use and, where required, plans, particulars and statements. If required, particulars of the precautions to be taken in building over a drain, sewer or disposal main may also need to be submitted. Building Regulation 14 (4) requires that full plans shall be accompanied by a statement as to whether the Regulatory Reform (Fire Safety) Order 2005 applies or will apply after the completion of the building work.

Once the full plans application has been submitted, the local authority checks the submitted plans and consults with any appropriate authorities. They must complete the procedure by issuing a decision within five weeks or, if agreed, a maximum of two months from the date of deposit. If the submitted plans comply with the Building Regulations, a notice will be submitted stating that the plans have been approved. If the local authority is not satisfied with the submitted plans, amendments may request amendments that provide more details. Alternatively, a conditional approval may be issued. This will either specify modifications that must be made to the plans or will specify further plans that must be provided to the local authority. If the plans are rejected, the reasons will be stated in the notice. A full plans approval notice is valid for three years from the date of deposit of the plans, after which time the local authority may send a notice to declare the approval of no effect if the building work has not commenced.

For further information, see Department for Communities and Local Government (2004).

Local authority inspection of work

A local authority will carry out inspections of building work once work is in progress and require that they receive notice

of when inspection is needed for specific points in the works, for example:

- When construction work commences;
- When excavation for foundations is complete but before the foundations have been constructed;
- When excavation for drains is complete but before the drains have been installed;
- When drainage has been installed but not yet covered up;
- When damp proof courses have been installed;
- When the building is completed.

If the completed building work complies with the Building Regulations and a local authority will issue a completion certificate on request.

For further information, see www.communities.gov.uk.

Approved private inspectors

Legislation

Building (Approved Inspectors etc.) Regulations 2010

Approved inspectors are private-sector building control professionals and consultancies that can achieve Building Regulations approval, as an alternative procedure to local authority building control. Regulation 11 of the Building (Approved Inspectors etc.) Regulations 2010 states that approved inspectors must take such steps as are reasonable, within the limits of professional skill and care, to ensure that regulations are met. There are about 60 approved inspectors in England and Wales, accounting for about 20 per cent of all building control work.[15] Approved inspectors, unlike a local authority, do not have enforcement powers.

Approved inspectors take responsibility for checking and inspecting the building work. The procedure requires the local

[15] www.approvedinspectors.org.uk.

authority to be notified by an 'initial notice' of the intended building work. Once this notice is accepted by the local authority, the responsibility for site inspection and checking is formally placed on the approved inspector. If the work is complete, the approved inspector will issue a 'final certificate' to the local authority to say that the work is complete and that the approved inspector has carried out his or her responsibilities.

For further information, see www.approvedinspectors.org.uk.

Principal legislation governing buildings

Localism Act 2011

The Localism Act was introduced in November 2011 to devolve more decision-making powers from central government into the hands of local communities. The act contains issues concerned with local public services. The main measures of the act were grouped under four main headings:

- New freedoms and flexibilities for local government
- New rights and powers for communities and individuals
- Reform to make the planning system more democratic and more effective
- Reform to ensure that decisions about housing are taken locally.[16]

Local Democracy, Economic Development and Construction Act 2009

The Local Democracy, Economic Development and Construction Act 2009 places a duty on local authorities to promote an understanding of the functions of a Local Planning Authority

[16] A Plain English Guide to the Localism Act, November 2011, Department for Communities and Local Government, p. 3.

and establishes the framework of the Local Authority Leaders' Boards that have been set up in the eight English Regions outside London. Part 8 of the act amends the Housing Grants, Construction and Regeneration Act 1996 to improve payment practices and dispute resolution in the construction industry.

Planning Act 2008

The Planning Act 2008 established the Infrastructure Planning Commission (which was abolished under the Localism Act 2011) and the Community Infrastructure Levy and introduced nationally significant infrastructure projects and reforms to the planning system.

The Equality Act 2010

In 2010 the Disability Discrimination Act 2005 was incorporated into the Equality Act which makes it unlawful to discriminate against people in respect of their disabilities in relation to employment and the provision of goods and services. The Equality Act consolidated and streamlined existing discrimination legislation.

The Equality Act 2010 provides legal rights for disabled people in the following areas:

- Employment
- Education
- Access to goods, services and facilities including larger private clubs and land based transport services
- Buying and renting land or property
- Functions of public bodies, for example the issuing of licences.

Protected characteristics of the act are:

- Age
- Disability

- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation.

For further information, see www.equalities.gov.uk.

Housing Act 2004

The Housing Act 2004 changed powers for local authorities to deal with substandard dwellings and provides a power in certain cases to licence private landlords and to take over the management of private rented accommodation. The act introduced Home Information Packs (which were are suspended in May 2010) and extended the regulation of houses in multiple occupation providing the legal framework for Tenancy Deposit Schemes.

Housing Grants, Construction and Regeneration Act 1996

The Housing Grants, Construction and Regeneration Act 1996 came into force as a result of a report drafted by Sir Michael Latham in 1994 titled 'Constructing the Team'. The aims of the act were to improve payment within the construction industry and to provide a quicker and less costly dispute resolution procedure for adjudication. The act has been amended by the Local, Democracy, Economic Development and Construction Act 2007. The act has five parts:

1. Part I provides for the payment of grants in the private housing sector.
2. Part II provides for specific provisions in construction contracts including adjudication.

3. Part III provides for the Architects' Registration Board and registration matters. This part of the act has been repealed by the Architects' Act 1997.
4. Part IV provides for grants for regeneration, development and relocation.
5. Part V provides for housing grants, energy efficiency schemes, and the dissolution of urban development corporations, housing action trusts and commissions.

Building Act 1984

The Building Act 1984 applies in England and Wales and is the primary legislation covering the application of the Building Regulations. The act consolidated most of the primary legislation relating to building which was formerly contained in many other Acts of Parliament. Under the power given in the Building Act 1984, the Secretary of State may do the following:

- Secure the health, safety, welfare and convenience of persons in or about buildings and of others who may be affected by buildings or matters connected with buildings;
- Further the conservation of fuel and power;
- Further the prevention or detection of crime;
- Prevent waste, undue consumption, misuse or contamination of water;
- Further the protection or enhancement of the environment;
- Facilitate sustainable development;
- Make regulations with respect to the design and construction of buildings, demolition of buildings, and the provision of services, fittings and equipment in or in connection with buildings.[17]

Occupiers' Liability Acts 1957 and 1984

The Occupiers' Liability Act 1957 provides that an occupier of premises owes a common duty of care to visitors who are

[17] Building Act 1984.

permitted or invited by the occupier on their premises, including those who enter under legal authority (for example a police officer). An occupier means the person who has physical control or possession of the premises and may include the landlord.[18] The Occupier's Liability Act 1984 extends the common duty of care to trespassers as well as visitors, providing that this duty is to be required when the occupier has actual knowledge that a danger exists and that a trespasser is or may be near it.

Defective Premises Act 1972

The Defective Premises Act 1972 imposes duties on all persons taking on work for or in connection with the provision of a dwelling to ensure that a dwelling is fit for habitation when it is completed and the work is carried out in a workmanlike manner with proper materials.[19] This includes dwellings which are converted. A duty is owed to anyone who acquires a legal or equitable interest in a dwelling. The act only applies to dwellings, not to other types of buildings, and claims under the act must be commenced with six years from when the dwelling is completed. The act does not apply in Scotland or Northern Ireland.

Unfair Contract Terms Act 1977

The Unfair Contract Terms Act 1977 regulates contracts by protecting consumers who enter into a legally binding agreement with a supplier. Unfair clauses are those which may try to exclude any of the following:

- Liability for negligence in the event of death or personal injury;
- Liability for breach of contract;

[18] *Wheat v E.Lacon & Co Ltd* [1966] AC 552.
[19] Section 1, Defective Premises Act 1972.

- Clauses which try to protect an individual or a supplier from legal action in the event of professional negligence (indemnity clauses);
- Product guarantees designed to protect the consumer in case of defects;
- Statutory rights with regard to Sale of Goods and Supply of Goods and Services legislation;
- Misrepresentation in the form of false or inaccurate claims.[20]

Principal legislation governing health and safety

Construction (Design and Management) Regulations 2015

The new Construction (Design and Management) (CDM) Regulations 2015 came into force on the 6 April 2015. There are nine key changes to the CDM Regulations 2007:

1. The CDM coordinator role is replaced by a 'Principal Designer'.
2. The principal designer and the principal contractor are appointed for all projects with more than one 'trade' contractor on-site.
3. 'Explicit competence' requirements removed.
4. There is structural simplification of the regulations.
5. Construction phase plan is required for all projects.
6. Duties are applicable to domestic projects.
7. Threshold for notification.
8. The current Approved Code of Practice (ACoP) will be substituted with Health and Safety Executive (HSE) and Construction Industry Training Board (CITB) Industry Guidance.
9. There are information, instruction, training and supervision requirements.

For further information, see www.hse.gov.uk.

[20] Unfair Contract Terms Act 1977.

Construction (Design and Management) Regulations 2007 (no longer current)

The CDM Regulations 2007 (no longer current) required persons involved with all construction projects to take into account health and safety matters throughout the design, planning and construction of a project. The regulations came into force on 6 April 2007 and replaced the Construction (Design and Management) Regulations 1994 (and amendments) and the Construction (Health, Safety & Welfare) Regulations 1996. The Regulations required that there was cooperation between parties involved in the design, planning and construction of a project, including the client, designer, architect, planning supervisor and principal contractor.

Health and Safety at Work Etc. Act 1974

The Health and Safety at Work Etc. Act 1974 is the primary act that governs almost all health and safety law. The act places duties on employers, self-employed people and people in control of premises to ensure, as far as reasonably practical, that premises will be safe and without risks to health at all times when used by a person at work.[21] Under the act adequate instruction, training, and supervision must be given for the purposes of safety. Under this act everyone is responsible for health and safety.

Principal legislation governing fire

The Regulatory Reform (Fire Safety) Order 2005

The Regulatory Reform (Fire Safety) Order 2005 provides legislation on fire prevention and applies to all non-domestic

[21] Section 2(1) of the Health and Safety at Work etc., Act 1974 provides that it is the duty of every employer to 'ensure, so far as is reasonably practicable, the health, safety and welfare at work of all staff'.

premises in England and Wales, including the common parts of blocks of flats and houses in multiple occupation. The law applies to the following:

- A contractor with a degree of control over any premises;
- To those persons including architects responsible for business premises;
- For an employer or self-employed with business premises;
- To those persons responsible for a part of a dwelling where that part is solely used for business purposes;
- A charity or voluntary organisation;
- Providing accommodation for paying guests.

The order requires any person who is in control of premises to take reasonable steps to reduce the risk from fire and ensure occupants can safely escape if a fire does occur. The order requires a "responsible person" to make a suitable and sufficient assessment of the risks to which relevant persons are exposed in respect of fire. Any premises in which persons are employed or to which others have access must be subject to a fire risk assessment. The principles of risk assessment to be followed are the same as those as listed in the Management of Health and Safety at Work Regulations 1999. Where there are five or more employees, the significant findings of the risk assessment must be recorded in writing. The responsible person must do the following:

- Carry out a fire risk assessment identifying any possible dangers and risks of fire;
- Consider who may be especially at risk;
- Reduce the risk of fire within the premises as far as is reasonably practicable;
- Provide general fire precautions to deal with any residual fire risk;
- Implement special measures to control the risks from flammable materials, explosive materials or other hazardous substances;
- Create an emergency plan for fire safety;

- Record significant findings in writing;
- Review and monitor fire safety arrangements.[22]

The responsible person must also prepare an emergency plan for fire safety arrangements. Any equipment and facilities provided for the use and safety of firefighters, such as firefighting lifts, must be adequately maintained.

Definition of responsible person
Section 3 of the Regulatory Reform (Fire Safety) Order 2005 Act defines a "responsible person" as follows:

(a) In relation to a workplace, the employer, if the workplace is to any extent under his control;
(b) In relation to any premises not falling within paragraph (a)
    (i) The person who has control of the premises (as occupier or otherwise) in connection with the carrying on by him of a trade, business or other undertaking (for profit or not); or
    (ii) The owner, where the person in control of the premises does not have control in connection with the carrying on by that person of a trade, business or other undertaking.[23]

Principal legislation governing energy and sustainability

Climate Change Act 2008

The Climate Change Act 2008 introduced a long-term, legally binding framework to tackle the dangers of climate change. The Act set a target to reduce greenhouse gas emissions by at least 80 per cent by 2050 (from a 1990 baseline). The Climate Change Act 2008 set powers for a carbon reduction commitment, created the Adaptation Sub-Committee as a new expert body and established that a Climate Change Risk

[22] The Regulatory Reform (Fire Safety) Order 2005.
[23] The Regulatory Reform (Fire Safety) Order 2005.

Assessment is to be conducted every five years. The act also set out the Carbon Reduction Commitment Energy Efficiency Scheme which is a mandatory climate change and energy saving scheme. The scheme started in April 2010 and is administered by the Environment Agency, the Scottish Environment Protection Agency and the chief inspector (Northern Ireland Environment Agency). This act is important for the retrofit of buildings as new buildings may be required to be retrofitted to meet energy efficiency standards.

Climate Change and Sustainable Energy Act 2006

The Climate Change and Sustainable Energy Act 2006 provides measures for tackling climate change, promoting microgeneration and the use of heat produced from renewable sources. The Act also introduced ways in which local authorities must seek to improve energy efficiency, reduce greenhouse-gas emissions and alleviate fuel poverty.

Clean Neighbourhoods and Environment Act 2005

The Clean Neighbourhoods and Environment Act 2005 provides powers and tools to tackle poor environmental quality and antisocial behaviour. In particular, the act includes sections on nuisance and abandoned vehicles, litter, graffiti, waste, noise and dogs. The act also established the Commission for Architecture and the Built Environment (CABE) on a statutory basis.

Sustainable and Secure Buildings Act 2004

The Sustainable and Secure Buildings Act 2004 furthers powers under the Building Act 1984 to improve the sustainability of buildings, including the following:

- Furthering the conservation of fuel and power;

- Facilitating sustainable development;
- Furthering the protection or enhancement of the environment;
- The prevention of waste, undue consumption, misuse or contamination of water.[24]

The act covers the design, construction and demolition of buildings and encourages the whole lifecycle to be considered. The act allows the introduction of legislation requiring regular inspection and monitoring of performance in use. Another key change is that regulations may now be introduced which impose sustainability requirements on existing buildings when they are altered, extended or where there is a change of occupancy. The act also includes the following information:

- The efficiency with which energy is used in buildings in England and Wales;
- The level of emissions from such buildings that are likely to contribute to climate change;
- The extent to which such buildings have their own facilities for generating energy;
- The extent to which materials used in constructing, or carrying out works in relation to such buildings are recycled or reused materials.[25]

The Energy Performance of Buildings Directive 2002/91/EC and the Energy Performance of Buildings (Certificates and Inspectors) (England and Wales) Regulations 2010

The Energy Performance of Buildings Directive promotes the improvement of the energy performance of buildings within the European Community. The Energy Performance of Buildings (Certificates and Inspectors) (England and Wales) Regulations implement Articles 7, 9 and 10 of the Energy Performance

[24] Sustainable and Secure Buildings Act 2004.
[25] Sustainable and Secure Buildings Act 2004.

of Buildings Directive 2002 in England and Wales. Under Section 16 of the regulations (which implements Article 7 of the directive) a Display Energy Certificate is required for buildings with a total useful floor area more than 1,000 square metres occupied by public authorities and by institutions providing public services to a large number of persons and therefore frequently visited by those persons.

Approved Document Part L – Building Regulations

The revised Approved Document Part L of the building regulations 2013 came into force on 6 April 2014. The regulations distinguish between new build and existing properties, as well as between dwellings and non-domestic buildings. Part L is divided into four parts:

- Approved Document L1A: Conservation of fuel and power (New dwellings)
- Approved Document L1B: Conservation of fuel and power (Existing dwellings)
- Approved Document L2A: Conservation of fuel and power (New buildings other than dwellings)
- Approved Document L2B: Conservation of fuel and power (Existing buildings other than dwellings)

For further information, see www.communities.gov.uk.

Principal legislation governing the environment

Air

Climate Change Agreements Regulations 2006
Environmental Protection (Control on Ozone – Depleting Substances) Regulations 2002
Climate Change Levy 2001
Clean Air Act 1993

Water

Water Act 2003
Water Environment (Water Framework Directive) (England and Wales) Regulations 2003
Control of Pollution (oil storage) (England) Regulations 2001
The Water Industry Act 1991
The Water Resources Act 1991

Pollution of Land

The Contaminated Land (England) Regulations 2006
Environmental Liability Directive 2004/35/EC
Landfill Directive (EEC/1999/31/EC)
Landfill (England and Wales Regulations) 2002
Environmental Protection Act 1990

Noise

Control of Noise at Work Regulations 2005 (the Noise Regulations)
Building Regulations Approved Document E – Resistance to the passage of sound (2010 edition)
Noise Act 1996
Environmental Protection Act 1990
Town and Country Planning Act 1990
Noise Insulation Regulations 1975–1996
Control of Pollution Act 1974
Health and Safety at Work Etc. Act 1974
Land Compensation Act 1973

Waste

Waste Electrical and Electronic Equipment Regulations 2013
Producer Responsibility Obligations (Packaging Waste) Regulations 2007
Hazardous Waste – Hazardous Waste Regulations 2005
Environmental Protection (Duty of Care) Regulations 1991
Controlled Waste (Registration of Carriers and Seizures of Vehicles) Regulations 1991

Environmental Protection Act 1990
Control of Pollution (Amendment) Act 1989

Other relevant statutes

Human Rights Act 1998
The Human Rights Act 1998 introduced the European Convention on Human Rights into law of the United Kingdom. The act provides statutory safeguards for human rights and requires public bodies to act in a way which is compatible with the convention. Complaints under the act may be made to the European Commission on Human Rights and the European Court of Human Rights in Strasbourg.

The Human Rights Act revised the statutory duties of local authorities which provide it is unlawful for a public authority to act in a way that is incompatible with any convention right. Of particular significance in planning decisions is the European Convention on Human Rights, Article 6 which safeguards the right to a fair and public hearing, Article 8 which established the right to respect for private and family life, Article 14 which prohibit discrimination and Article 1 of the First Protocol, which provides a right to the peaceful enjoyment of possessions and protection of property.

For further information, see www.justice.gov.uk.

Growth and Infrastructure Act 2013

The Growth and Infrastructure Act 2013 received Royal Assent on 25 April 2013. The act introduced a series of reforms aimed at kick starting growth. The act covers three main areas:

- Promoting growth and facilitating provision of infrastructure, and related matters
- Other infrastructure provisions
- Economic measures.

The following are the main elements of the act:

- Limits on the powers that local planning authorities have to require information with planning applications;
- Enabling the mayor of London to delegate decisions concerning planning applications of potential strategic importance;
- Enabling applications of business and commercial projects of national significance to proceed faster under the nationally significant infrastructure regime contained in the Planning Act 2008;
- Modifying special parliamentary procedure to ensure that the procedure will consider orders under the Planning Act 2008 and other acts only to the extent that these authorise compulsory acquisition of land falling into a special category;
- Clarifying the position of variations and replacements of pre–Planning Act consents under the Planning Act 2008 and associated saving provisions;
- Broadening the powers of the Secretary of State to award costs between the parties at planning appeals.

Contracts (Rights of Third Parties) Act 1999

The Contracts (Rights of Third Parties) Act 1999 reformed the principle of 'privity of contract' by allowing third parties who are not party to a contract to enforce rights under that contract. The act sets out the circumstances in which a third party is to have a right to enforce a term of the contract (Section 1), the situations in which such a term may be varied or rescinded (Section 2) and the defences available when the third party seeks to enforce the term (Section 3).

Access to Neighbouring Land Act 1992

Under this act, a court may grant an order for access to land where such access is required to enable the execution of 'basic' preservation works and where access has been refused by

a neighbour. Examples of works under Section 4 of the act include the following:

- The maintenance, repair or renewal of any part of a building or structure;
- The clearance, repair or renewal of drains, sewers, pipes or cables;
- The treatment, cutting back or felling trees and hedges in certain circumstances;
- The filling in or clearing a ditch.[26]

Standards used in the construction industry

The British Standards

British Standards are the standards produced by British Standards Institution and are standards of quality and good practice. Most construction contracts require the design to conform to British Standards and oblige contractors to use materials and goods to conform to British Standards. Courts look at liability with reference to British Standards.[27]

For further information, see www.bsigroup.co.uk.

Agrément Certificates

An Agrément Certificate is a certificate that is recognised by building control, government departments, architects, local authorities and industry insurers. Agrement Certficates are only awarded to a construction product or system that has successfully passed a comprehensive assessment involving laboratory testing on-site evaluations and inspections of production.

For further information, see www.bbacerts.co.uk/product-approval/agrement-certificates.aspx.

[26] Section 4, Access to Neighbouring Land Act 1992.
[27] See the case of *Ian McGlinn v Waltham Contractors Ltd* [2007].

Insurance-backed warranties

An Insurance Backed Guarantee is an insurance policy that is issued to the customer to underwrite a supplier's guarantee, this means that should a supplier cease trading and no longer be in a position to honour its original guarantee and should a problem occur under the terms of the original guarantee, the claim would be met by the insurers. An Insurance Backed Guarantee can help overcome problems of workmanship by a contractor and materials used by a contractor.

Quality assurance – BS EN ISO 9001

BS EN ISO 9001 was first published in 1979 as BS 5750 to improve the performance of British manufacturing, it is now applicable for any type of business. The standard sets out how to establish, document and maintain an effective quality system which can be used to demonstrate a commitment to quality and compliance to requirements.

For further information, see www.bsigroup.co.uk.

Quality assurance – BS EN 14001

BS EN 14001 is an internationally accepted standard that outlines the requirements for an effective environmental management system for a company or organization to control and improve its environmental impacts and performance.

For further information, see www.bsigroup.co.uk.

Professional Regulation

The Architects Registration Board (ARB) was established by the Architects Act 1997 and is the independent regulator of architects in the United Kingdom. Under Section 20 of the Architects Act 1997, the title 'architect' is protected, and anyone who describes themselves as an architect must be registered with the ARB. The ARB aims to protect the consumer, safeguard the reputation of architects and ensure that those practising under the title 'architect' are competent to do so. Registered persons found guilty of unacceptable professional conduct or serious professional incompetence may be disciplined.

3
Town and country planning

Legislative and policy framework for the planning system

What is planning?

The planning system in the England and Wales is, in essence, the process of regulating the use of land and buildings by statutory intervention. It is the means by which the conflicting interests involved in the management, control and regulation of land use, and social, environmental and economic development, can be reconciled. Planning control is to be contrasted with the system of real property private rights acquired by persons over the land of others, such as easements or restrictive covenants.

The modern planning system in England and Wales was established under the Town and Country Planning Act 1947, which introduced the basic system of development plans, development control and enforcement. The framework for the planning system in England and Wales derives from National Planning Policy Guidance, primary legislation, secondary legislation, local development plans and frameworks and good practice guidance.

The plan-led system

The planning system in England and Wales follows a 'plan-led' system (see Figure 3.1) which involves preparing plans that set out the framework for planning. Current planning legislation is consolidated in the Town and Country Planning Act 1990. The meaning of the term is stated in Section 54a of the Town and Country Planning Act 1990, which states that decisions made

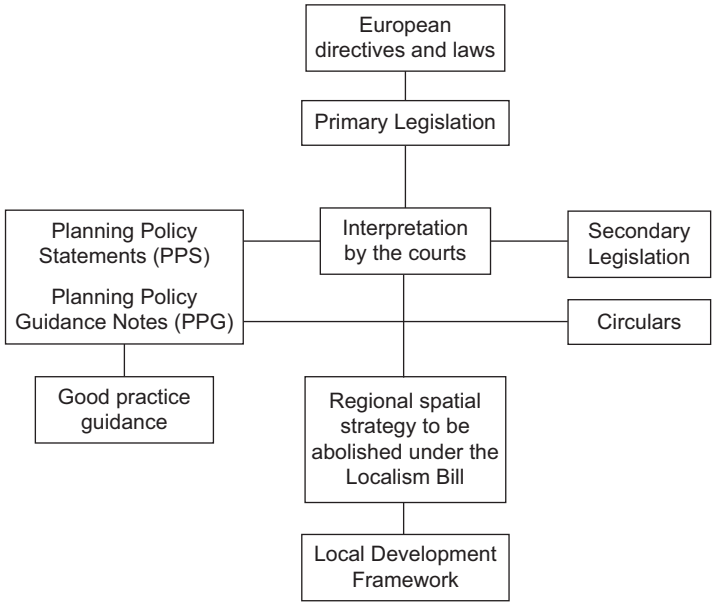

Figure 3.1 Legal and policy framework for the planning system

under any of the planning acts 'shall be made in accordance with the development plan unless material considerations indicate otherwise.' Parts of this act has been amended or replaced by the Planning and Compulsory Purchase Act 2004, which reformed the planning system in England and Wales and introduced a system of development planning based on Local Development Frameworks. The framework acts as guidance for local planning authorities and decision takers, those seeking to build and develop and communities looking to steer local development both in drawing up plans and making decisions about planning applications.

National Planning Policy Framework

The National Planning Policy Framework, published in 2012, sets out government planning policies for England and must

be taken into account where it is relevant to a planning application or planning appeal and in the preparation of local and neighbourhood plans. A development that is consistent with the National Planning Policy Framework does not remove the requirement to determine the application in accordance with the development plan unless there are other material considerations that indicate otherwise. The National Planning Policy Framework replaces planning policy guidance, withdrawn circulars and other publications. The National Planning Policy Framework does not replace European Directives. Local plans must be prepared within the context set by the framework.

For further information, see www.planningportal.gov.uk.

Structure of influence of the planning system

Figure 3.2 The key components of planning

From the top downwards, the planning system structure of influence is organised as follows:

- European Directives and laws
- National planning legislation
- Primary Acts of Parliament
- Secondary (Regulations)
- The National Planning Policy Framework
- National Planning Policy for Minerals and Waste.

These in turn influence the following:

- Local transport plans
- Local plans (Local Development Framework).

These in turn influence the following:

- Neighbourhood development plans
- Neighbourhood development orders.

Primary legislation

The planning system includes the following primary legislation:

- Growth and Infrastructure Act 2013
- Localism Act 2011
- Planning Act 2008
- Planning and Compulsory Purchase Act 2004
- Planning and Compensation Act 1991
- Town and Country Planning Act 1990
- Planning (Listed Buildings and Conservation Areas) Act 1990
- Planning (Consequential Provisions) Act 1990.

These acts are supplemented by secondary legislation.

Secondary legislation

The planning system is contained in a wide range of secondary legislation and includes the following:

- Town and Country Planning (General Permitted Development) Order 1995 (as amended)

- Planning (Listed Buildings and Conservation Areas) (Amendment) (England) Regulations 2013
- Town and Country Planning (Local Development) (England) (Amendment) Regulations 2012
- Town and Country Planning (Trees) (Amendment No 2) (England) Regulations 2012.

Administration of the planning system

The planning system in England is administered by four main tiers of decision-making (see Figure 3.3):

1. Secretary of State for Communities and local government
2. Regional planning bodies
3. County councils (for waste and minerals and transport planning)
4. District and borough councils (unitary authorities)

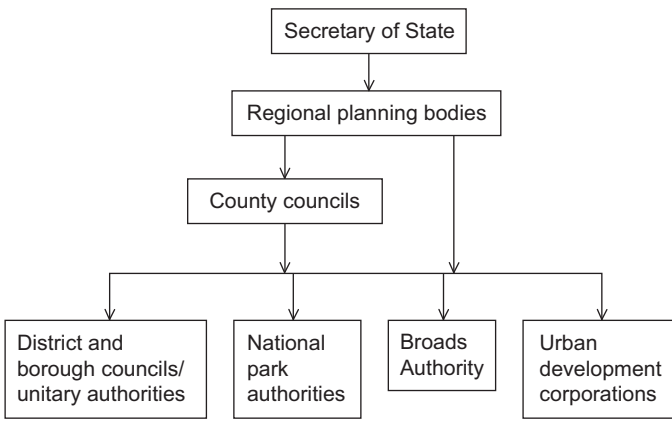

Figure 3.3 Administration of the planning system

Distribution of planning functions

National level

In England, the planning system is administered by the Department for Communities and Local Government as well as Parliament, which is responsible for making laws and setting out the framework for planning. There is a degree of overlapping of responsibility with the Department for Environment, Food and Rural Affairs (DEFRA) and with the Department for Culture, Media and Sport (DCMS) in the wider administration of planning and development matters. Nationally significant infrastructure projects are determined by the secretary of state.

Regional level

Regional Spatial Strategy

Prior to December 2010, a Regional Spatial Strategy provided the strategic planning policy framework in England and Wales and guided local issues such as environment, infrastructure, transport, housing, minerals and waste for a region, in accordance with the Planning and Compulsory Purchase Act 2004. Regional Spatial Strategies provided frameworks for determining planning applications as well as for preparing both local development documents and local transport plans. There was a Regional Spatial Strategy for each of England's regional planning bodies who were responsible for preparing and updating Regional Spatial Strategies. In May 2010 the government announced the abolition of the Regional Strategies. They were formally revoked, under section 79 (6) of the Local Democracy Economic Development and Construction Act 2009, on the 6 July 2010.

Simplified Planning Zones

Legislation

Section 82, Town and Country Planning Act 1990

A Simplified Planning Zone is an area in which a local planning authority wishes to stimulate development and encourage investment. It operates by granting a specified planning permission in the zone without the need for a formal application or the payment of planning fees. Schemes will most often be promoted

to assist with the industrial regeneration in older urban areas by stimulating investment and development activity. Simplified Planning Zones are shown in a local authority development plan.

Enterprise Zones

Legislation

Section 6, Town and Country Planning Act 1990

An Enterprise Zone is an area where the government provides grants for buildings and machinery, financial incentives and tax concessions to firms. It is most commonly located in an area of industrial decline to encourage investment and renewal. In 2011 the government announced the creation of 25 Enterprise Zones in England. Businesses in these areas will benefit from tax and planning concessions.

National Park Authorities

Legislation

Section 4A, Town and Country Planning Act 1990

National Park Authorities are statutory planning authorities, responsible for granting planning permissions for changes in buildings and land use or new buildings in a national park. There are 15 National Parks in the UK:

- **England –** Dartmoor, Exmoor, Lake District, New Forest, the Norfolk Broads, Northumberland, the North York Moors, the Peak District, the South Downs, and the Yorkshire Dales
- **Wales –** the Brecon Beacons, the Pembrokeshire Coast and Snowdonia
- **Scotland –** the Cairngorms, Loch Lomond

Local level

Local authority and local planning authority

A local authority is a local planning authority or council that has a legal duty to carry out development control, determine planning applications and prepare development plans. National Parks and the Broads Authorities are also considered to be local planning authorities. Under Section 86 of the Localism Act 2011 a local authority in England means the following:

- A district council

- A county council for an area in England for which there are no district councils
- A London borough council
- The Common Council of the City of London, or
- The Council of the Isles of Scilly.[1]

In Wales, a 'local authority' means the following:

- A county council or
- A county borough council.[2]

Local Development Frameworks

Local Development Frameworks set out the programme for preparing local development documents and comprise of the Statutory Development Plan and supplementary planning documents, a statement of community involvement, annual monitoring form, adopted proposals map and a Local Development Scheme. District councils, unitary authorities, the Broads Authority and National Park Authorities are responsible for Local Development Frameworks.

Local Development Order

Legislation

Section 61A, Town and Country Planning Act 1990

A Local Development Order is an order made by a local planning authority, through which permitted development rights additional to those granted nationally by government are granted for a specified area.

The Local Plan

Policy

National Planning Policy Framework, Paragraph 150

The Local Plan is the primary basis for deciding planning applications. Local Plans set out a vision and a framework for the future development of an area in relation to housing, the economy, community facilities and infrastructure, adapting to

[1] Section 86, Localism Act 2011.
[2] Section 86, Localism Act 2011.

climate change and securing good design. It is also a tool in guiding decisions about individual development proposals.

Neighbourhood Development Order

A Neighbourhood Development Order can be used in designated neighbourhood areas to grant planning permission for development specified in an order. They allow communities the opportunity to bring forward the type of development they wish to see in their neighbourhood areas. A Neighbourhood Development Order can grant planning permission for specific types of development in a specific neighbourhood area. A Neighbourhood Development Order can do the following:

- Apply to a specific site, sites or wider geographical area;
- Grant planning permission for a certain type or types of development;
- Grant planning permission outright or subject to conditions.

A Neighbourhood Development Order can be used to permit:

- Building operations (e.g. structural alterations, construction, demolition or other works carried out by a builder);
- Material changes of use of land and buildings; and/or
- Engineering operations.

Development

Development Plan

The Development Plan is the plan for the future development of an area and is composed of the main documents for guiding development control and for setting out decisions for development. Development Plan documents set planning policies in local authority areas and are important in decisions to grant planning permission. Planning law requires that applications for planning permission must be determined in accordance with the Development Plan, unless material considerations indicate otherwise. The Development Plan consists of the following:

- Local Plans: development plan documents adopted by local planning authorities, including any 'saved' policies from

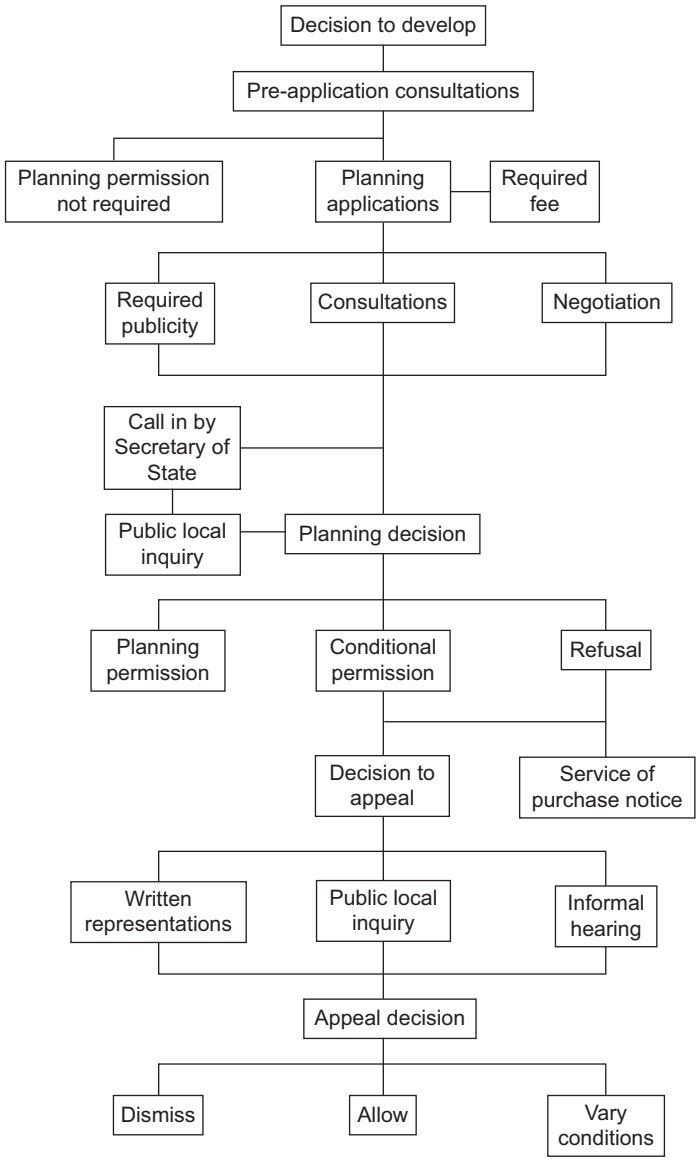

Figure: 3.4 The development control process

plans that are otherwise no longer current, and those development plan documents that deal specifically with minerals and waste;
- Neighbourhood plans: where these have been supported by the local community at referendum and subsequently made by the local planning authority;
- In London only, the London Plan: the spatial development strategy prepared by the Mayor of London;
- Any 'saved policies' from the former Regional Strategies, until such time as these are replaced by Local Plan policies.

What constitutes development?

Legislation

Section 55 (1), Town and Country Planning Act 1990

Development is defined in section 55 (1) of the Town and Country Planning Act 1990 as the 'carrying out of building operations, engineering operations, mining operations or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land.' Development is controlled by a wide range of social, economic and environmental factors. Individual planning decisions are taken within a framework set by the development plan.

For buildings the term *development* includes the following:

- Building operations (e.g. structural alterations, construction, rebuilding, most demolition)
- Material changes of use of land and buildings
- Engineering operations (e.g. groundworks)
- Mining operations
- Other operations normally undertaken by a person carrying on a business as a builder
- Subdivision of a building (including any part it) used as a dwelling house for use as two or more separate dwelling houses.

What is not development?

Legislation
Section 55 (2), Town and Country Planning Act 1990

The following operations do not involve development of land under Section 55 of the Town and Country Planning Act 1990:

- The carrying out for the maintenance, improvement or other alteration of any building of works which:
  - Affect only the interior of the building, or
  - Do not materially affect the external appearance of the building;
- The carrying out on land within the boundaries of a road by a local highway authority of any works required for the maintenance or improvement of the road;
- The carrying out by a local authority or statutory undertakers of any works for the purpose of inspecting, repairing or renewing any sewers, mains, pipes, cables or other apparatus, including the breaking open of any street or other land for that purpose;
- The use of any buildings or other land within the curtilage of a dwelling house for any purpose incidental to the enjoyment of the dwelling house;
- The use of any land for the purposes of agriculture or forestry (including afforestation) and the use for any of those purposes of any building occupied together with land so used;
- In the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class.[3]

For buildings the term *development* does not include the following:

- Interior alterations (except mezzanine floors which increase the floorspace of retail premises by more than 200 square metres).

[3] Section 55 (2) of the Town and Country Act 1990.

- Building operations which do not materially affect the external appearance of a building. The term *materially affect* has no statutory definition but is linked to the significance of the change which is made to a building's external appearance.
- A change in the primary use of land or buildings, where the before and after use falls within the same use class.

Permitted development

Legislation

The Town and Country Planning (General Permitted Development) (Amendment and Consequential Provisions) (England) Order 2014

The Town and Country Planning (General Permitted Development) (Amendment) (England) (No. 4) Order 2013

Town and Country Planning (General Permitted Development) Order (various years)

Town and Country Planning (General Permitted Development) Order 1995

The Town and Country Planning (General Permitted Development) Order 1995 as amended sets out classes of development for which a grant of planning permission is automatically given, known as 'permitted development' provided that no restrictive condition is attached or that the development is exempt from the permitted development rights.

If development falls within any one of the classes of permitted development that are spread across the 33 parts as set out in Schedule 2 to the General Development (Amendment) Order 1995 (as amended) (see Table 3.1), there is no need to make any application to a local planning authority for planning permission. Unless a development proposal is exempt under Permitted Development or falls outside the current definition of development then it is necessary to apply to the local authority for permission to carry it out. In certain circumstances the right to permitted development is restricted

Table 3.1 33 Parts of Permitted Development of the Town and Country Planning (General Permitted Development) Order 1995

Part	Class	Permitted Development
1	A	Development within the *curtilage* of a dwelling house. The enlargement or other alteration of a dwelling house
1	B	The enlargement of a dwelling house consisting of an addition or alteration to its roof
1	C	Any other addition to the roof of a dwelling-house
1	D	The erection or construction of a porch outside any external door of a dwelling-house
1	E	The provision within the curtilage of a dwelling house, of any building or enclosure, swimming or other pool required for a purpose, incidental to the enjoyment of the dwelling house, or the maintenance, improvement or other alteration of such a building or enclosure
1	F	The provision within the curtilage of a dwelling house of a hard surface for any purpose incidental to the enjoyment of the dwelling house
1	G	The erection of provision within the curtilage of a dwelling house of a container for the storage of oil for domestic heating
1	H	The installation, alteration or replacement of a satellite antenna on a dwelling house or within the curtilage of a dwelling house
2	A to C	Minor Operations
3	A to G	Changes of use
4	A to B	Temporary Building uses
5	A to B	Caravan sites
6	A to C	Agricultural buildings and operations
7	A	Forestry buildings and operations
8	A to D	Industrial and warehouse development
9	A	Repairs to unadopted streets and private ways
10	A	Repairs to Services
11	A	Development under local or private Acts or Orders
12	A to B	Development by local authorities
13	A	Development by Local Highway Authorities
14	A	Development by drainage bodies
15	A	Development by National Rivers Authority
16	A	Development by or on behalf of sewerage undertakers
17	A to J	Development by statutory undertakers

(*Continued*)

Table 3.1 (Continued)

Part	Class	Permitted Development
18	A to I	Aviation Development
19	A to C	Development ancillary to mining operations
20	A to E	Coal mining development by the Coal Authority Licensed Operators
21	A to B	Waste tipping at a mine
22	A to B	Mineral exploration
23	A to B	Removal of material from mineral-working deposits
24	A	Development by telecommunications code system operators
25	A to B	Other telecommunications development
26	A	Development by the Historic Buildings and Monuments Commission for England
27	A	Use by members of certain recreational organizations
28	A	Development at amusement parks
29	A	Driver information systems
30	A	Toll road facilities
31	A to B	Demolition of Buildings
32	A	Schools, Colleges, Universities and Hospitals
33	A	Closed circuit television cameras

such as, for example, in Areas of Outstanding Natural Beauty and National Parks. Anyone in doubt of whether permitted development applies to certain projects should contact a local planning authority.

Permitted development rights

Legislation

Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013

Town and Country Planning (General Permitted Development) Order 1995

Permitted development rights are a national grant of planning permission which allow changes of use and certain

building works to be carried out without having to make a planning application. Permitted development rights are subject to limitations and conditions to control impact and to protect local amenity. These derive from a general planning permission granted from Parliament, rather than from permission granted by the local planning authority. Permitted development rights are subject to conditions and limitations to control impact and to protect local amenity. Permitted development rights allow householders to improve and extend their homes without the need to seek a specific planning permission where that would be out of proportion with the impact of works carried out. To be certain that a proposed development is lawful and does not require an application for planning permission, it is possible to apply for a 'Lawful Development Certificate' from the local authority. Flats and maisonettes do not have the same permitted development rights as houses and other buildings.

For more information on the current permitted development rights for home extensions see the government's planning portal webpage on extensions. In some circumstances local planning authorities can suspend permitted development rights in their area with an 'article 4 direction'. As of 30 May 2013, the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013 introduced a number of changes, including increases to the size limits for single-storey rear extensions and the associated neighbour consultation scheme.

For further information, see www.planningportal.gov.uk.

Exclusions which apply to permitted development rights

A range of exclusions apply to permitted development rights in England. For instance, there are protected areas known as article 1(5) land, these cover the following:

- Conservation areas
- Areas of Outstanding Natural Beauty

- National Parks
- The Broads
- World Heritage Sites.

Withdrawal of permitted development rights (Article 4 Direction)

A local planning authority has the power to remove permitted development rights by issuing an Article 4 Direction. Article 4 Directions are normally made when the character of an area of acknowledged importance is threatened, for example in a conservation area or other sensitive areas and require the approval of the Secretary of State. Article 4 Directions must be made in accordance with government guidance given in the National Planning Policy Framework, which directs that there must be a clear justification for removing national permitted development rights.

Use Classes

Use Classes for England are set out in the Town and Country Planning (Use Classes) Order 1987 (as amended) (see Table 3.2). A Use Class is a grouping together of similar land uses. Changes of use within the same Use Class do not normally require planning permission and may constitute permitted development. In many cases involving similar types of use (as stated in Table 3.2), a change of use of a building or land does not need planning permission. Note that local planning authorities determine Use Classes depending on the individual circumstances of each case. Since 6 April 2014 there were additional changes of use for permitted development. For example, there is a new class IA that allows change of use and some associated physical works from a small shop or provider of professional/financial services (A1 and A2 uses) to residential use (C3). This involves a 'prior approval' process and the local planning authority can consider impacts of the proposed change. Up to 150 m^2 of retail space will be able to change to residential use.

Table 3.2 Use Classes from the Use Classes Order 2013

Use Classes Order 2013	Use/Description of Development	Permitted Change
A1 Shops	The retail sale of goods to the public: Shops, Post Offices, Travel Agencies and Ticket Agencies, Hairdressers, Funeral Directors and Undertakers, Domestic Hire Shops, Dry Cleaners, Internet Cafés, Sandwich Bars (where sandwiches or other cold food are to be consumed off the premises).	Mixed use of A1 and single flat or A2, A3 or B1 up to 150 m^2 (for up to 2 yrs) Note – from retail to residential also permitted as of 6 April 2014
A2 Financial & Professional Services	Financial Services: Banks, Building Societies & Bureau de Change. Professional Services (other than Health or Medical Services): Estate Agents and Employment Agencies. Other services which it is appropriate to provide in a shopping area: Betting Shops (where the services are provided principally to visiting members of the public).	A1 (where there is a ground floor display window) or Mixed use of A2 and single flat or A1, A3 or B1 (for up to 2yrs)
A3 Restaurants & Cafes	Restaurants and Cafés (i.e. places where the primary purpose is the sale and consumption of food and light refreshment on the premises). This excludes Internet Cafés, which are now A1.	A1 or A2 or B1 up to 150 m^2 (for up to 2 years)
A4 Drinking Establishments	Public House, Wine Bar or other Drinking Establishments (i.e. premises where the primary purpose is the sale and consumption of alcoholic drinks on the premises).	A1, A2 or A3 up to 150 m^2 (for up to 2 years)
A5 Hot Food Takeaway	Takeaways (i.e. premises where the primary purpose is the sale of hot food to takeaway).	A1, A2 or A3 up to 150 m^2 (for up to 2 years)
B1 Business	(a) Offices other than in a use within Class A2 (b) Research and Development – laboratories, studios (c) Light industry	C3 (B1a only) B8 (where no more than 500sqm) up to 150 m^2 or A1, A2 or A3 (for up to 2 years)

(*Continued*)

Table 3.2 (Continued)

Use Classes Order 2013	Use/Description of Development	Permitted Change
B2 General Industrial	General Industry: use for the carrying out of an industrial process other than one falling in class B1.	B1 or B8 (B8 limited to 500 m^2)
B8 Storage or Distribution	Storage or Distribution Centres – Wholesale Warehouses, Distribution Centres & Repositories	B1 (where no more than 500 m^2)
C1 Hotels	Hotels, boarding houses and guest houses. Development falls within this class if no 'significant element of care is provided'	D1. No permitted change
C2 Residential Institutions	Hospitals, nursing homes, residential education and training centres. Use for the provision of residential accommodation and care to people on need of care	D1. Permitted change to state-funded school (and back to previous lawful use)
C2a Secure Residential Institutions	Use for provision of secure residential accommodation, including use as a prison, young offenders' institution, detention centre, secure training centre, custody centre, short term holding centre, secure hospital, secure local authority accommodation or use as a military barracks	D1. Permitted change to state-funded school (and back to previous lawful use)
C3 Dwelling houses	Use as a dwelling house (whether or not as a sole or main residence) by a) a single person or by people to be regarded as forming a single household b) not more than six residents living together as a single household where care is provided for residents; or c) not more than six residents living together as a single household where no care is provided for residents (other than use within C4	C4

(*Continued*)

Table 3.2 (Continued)

Use Classes Order 2013	Use/Description of Development	Permitted Change
C4 Houses in Multiple Occupation	Use as a dwelling house by not more than six residents as a 'house in multiple occupation.'	C3
D1 Non-Residential Institutions	Medical and health services – clinics and health centres, crèches, day nurseries, day centres and consulting rooms (not attached to the consultant's or doctor's house), museums, public libraries, art galleries, exhibition halls, non-residential education and training centres, places of worship, religious instruction and church halls	Temporary permitted change (up to 2 years) for up to 150 m^2 to A1, A2, A3, B1 (interchangeable with notification)
D2 Assembly & Leisure	Cinemas, dance and concert halls, sports halls, swimming baths, skating rinks, gymnasiums, bingo halls, other indoor and outdoor sports and leisure uses (not involving motorised vehicles or firearms)	D1 Permitted change to state-funded school (and back to previous lawful/use) Temporary permitted change (up to 2 years) to A1, A2, A3, B1 (interchangeable with notification)
Sui Generis	Includes retail warehouse clubs, amusement arcades, launderettes, petrol filling stations, taxi businesses, car/vehicle hire businesses and the selling and displaying of motor vehicles, nightclubs, theatres, hostels, builders yards, garden centres	No permitted Change except casino to D2
	Casinos – following declassification, planning permission is needed for any premise, including D2 premises, to undergo a material change of use to a casino	D2

Sui generis

Some uses fall outside the defined use of permitted development classes and are referred to as 'sui generis', which literally means 'of its own kind'. Sui generis uses do not enjoy any permitted development rights and planning permission is needed for these premises. This applies to the following types of buildings: amusement arcades, casinos, hostels, houses in multiple occupation, theatres, laundrettes, nightclubs, petrol filling stations, car showrooms, retail warehouse clubs and theatres.

Planning permission

Legislation

Town and Country Planning (General Development, Procedure) Order 1995
Planning and Compulsory Purchase Act 2004
Town and Country Planning Act 1990 Sections 58, 59 and 60
Planning Compensation Act 1991
Supreme Court Act 1981 (as amended) and the Civil Procedure Rules 1998 (as amended)

Definition of planning permission

Planning permission is the permission required to be allowed to build on land, or change the use of land or buildings. A formal planning application is required to be made if the proposed development does not fall within any of the classes of permitted development. Where permitted development rights have been removed either by the imposition of an Article 4 Direction or the removal of rights under the terms of a previous planning permission, it is also necessary to apply for planning permission. Applications for planning permission must be decided in accordance with a development plan unless

'material considerations' indicate otherwise. Planning permission is only needed if the work being carried out meets the statutory definition of 'development' which is set out in Section 55 of the Town and Country Planning Act 1990.

Types of planning application

The three principal types of planning application are as follows:

- Full
- Outline
- Reserved Matters.

The following consents can be applied for online:

- Householder planning consent
- Full planning consent
- Outline planning consent
- Planning permission for relevant demolition in a conservation area
- Reserved matters
- Listed building consent
- Advertisement consent
- Lawful Development Certificate (LDC)
- Prior notification
- Removal/variation of conditions
- Approval of conditions
- Consent under Tree Preservation Orders
- Notification of proposed works to trees in conservation areas
- Application for non-material amendments.

Full planning permission
Legislation
Section 62, Town and Country Planning Act 1990

Full planning permission is the most common form of planning application and refers to an application for full permission with all the relevant details of the proposal including detailed plans, elevations, sections and site layout drawings. Full applications are required for proposals to change the use of buildings or

land, for renewal of temporary permissions and for removal or change of conditions. Full applications are required to support applications for developments within conservation areas and for listed buildings. All reserved matters are decided at this time and conditions may be imposed.

Outline applications

Legislation

Section 92, Town and Country Planning Act 1990

An outline application seeks to establish an agreement 'in principle' but not the detail to certain fundamental aspects of a development proposal. An outline application can be a useful way of testing the position of the local planning authority towards a proposed development and whether planning permission for a development may be granted. Circular 01/06: *Guidance on Changes to the Development Control System* sets out the scope of information to be submitted with an outline application which includes the following:

- The use or uses proposed for the development and any distinct development zones within the site;
- The amount of development proposed for each use;
- An indicative layout with separate development zones within the site identified;
- An indication of the upper and lower limits for height, width and length for each building within the site;
- An area or areas where the access point or points to the site are to be located.[4]

Outline applications cannot normally be submitted for proposals involving a change of use of land or buildings or for developments that do not involve the erection of buildings. Outline applications are also not possible for developments within conservation areas or involving listed buildings or complex schemes subject to the Environmental Assessment Regulations.

[4] Office of the Deputy Prime Minister (2006), available from: www.parliament.uk (accessed 15 June 2010).

Reserved matters applications

Legislation

Article 21 Town & Country Planning (General Development Procedure) Order 1995

A reserved matters application sets out the outstanding details following an outline planning application and contains the information excluded from the initial outline planning application. Once reserved matters have been approved, the application has full planning permission. Reserved matters include details relating to the following:

- Scale
- Layout
- External appearance
- Means of access
- Landscaping.[5]

Reserved matters must be applied for within the time specified in the outline permission.

Applications to vary conditions

Legislation

Section 73, the Town and Country Planning Act 1990

A planning application can be made to modify or discharge a condition imposed on an existing planning permission. This does not apply if the previous planning permission was granted subject to a condition and the time limit of the development has expired without the development having been begun.

Applying for planning permission

Pre-application consultations

Pre-application consultations are an important method of discussing the constraints and objectives of a planning application before it is submitted and to avoid the possibility that planning applications are deemed to be invalid. Local authorities encourage pre-application consultations and

[5] www.planningportal.gov.uk.

should be undertaken with all buildings with the exception of very minor (i.e. small household) planning applications. A local planning authority Local Validation List can facilitate the validation of the application when submitted at the pre-application stage. Clause 102 of the Localism Act 2011 has amended the Town and County Planning Act 1990 (adding Section 61W) requiring that any person who intends to apply for planning permission should first consult the local community and any specified persons, so that they may collaborate or comment.

For further information, see Department for Communities and Local Government (2009b) and Department for Communities and Local Government (2010c)

Standard Planning Application Form

All planning applications are required by the local planning authority to be submitted on a standard form: the Standard Planning Application Form (1APP). This is to ensure consistency in the information supplied by applicants and encourage applicants to lodge their submissions in electronic form on the government's online planning service (www.planningportal.gov.uk). Applications can also be made in paper format to the relevant local planning authority. The Standard Application Form can be used for most types of applications for planning permission including the following:

- Householder consents
- Outline and full planning permission and approval of reserved matters
- Listed building consent
- Conservation area consent
- Advertisement consent
- Lawful Development Certificates
- Applications for Prior Approval under the Town and Country Planning (General Permitted Development) Order 1995
- Removal or variation of conditions
- Consent under Tree Preservation Orders and Notification of proposed works to trees in conservation areas

- Extensions to the time limits for implementing existing planning permissions
- Non-material amendments to existing planning permissions.[6]

All planning applications must be accompanied by a certificate which confirms either of the following:

- Certificate A: That the applicant is the legal owner of the application site;
- Certificate B: That the applicant is not the legal owner and that notice has been served on all persons who had a legal interest in the application site 21 days prior to the date of the application;
- Certificate C: If the applicant is not the legal owner, and Certificate A or B cannot be served, then the applicant must confirm that notice has been served on those persons who are known to have a legal interest and that steps have been taken to identify other legal owners whose details are unknown;
- Certificate D: That the applicant confirms that all reasonable steps have been pursued to determine the names and addresses of those having a legal interest in the land, but no information has been forthcoming.

Application types not covered by the Standard Application Form (1APP)

The Standard Application Form is not to be used for applications for mining operations or the use of land for mineral-working deposits and applications of the Planning (Hazardous Substances) Act 1990 for Hazardous Substance consent. Such applications should therefore be made on a form provided by the local planning authority.

Determination Period

The determination period for planning applications is as follows:

- 8 weeks for minor applications

[6] Department for Communities and Local Government (2010c), p. 6.

- 13 weeks for major applications
- 16 weeks for applications subject to an environmental impact assessment.

A local planning authority may request to extend this determination period if the development is large or complex.

Fees

Almost all planning applications are subject to a fee payable on submission to the local planning authority, with the following exemptions:

- Applications for conservation area or listed building consent;
- Some categories of development are also exempt from fees for example playing fields for sports clubs;
- Applications following refusal, withdrawal or non-determination of a previous application on the same site, for the same development and by the same applicant;
- Applications required because of the existence of an Article 4 direction or as a result of a condition which has removed permitted development rights;
- Applications for development proposals for alteration or extension of an existing dwelling for disabled persons or which provide a means of access for disabled persons to a building which is open to the public.[7]

The fees vary according to the scale, type of application and the development proposed.

For further information, see www.planningportal.gov.uk.

Power to decline planning applications

A local planning authority have the power to decline a planning application if it is similar or the same as an application that has been refused and called in by the Secretary of State or that

[7] www.planningportal.gov.uk.

has been dismissed on appeal within the previous two years. There is no right of appeal against a decision of a local planning authority to decline a planning application other than to seek a judicial review of the local planning authority's decision.

Retrospective planning permission

Clause 103 of the Localism Act 2011 inserted the new Section 70C into the Town and Country Planning Act 1990. This provides that a local planning authority may decline to determine a retrospective planning application if an enforcement notice has been issued in relation to any part of the development.

Grant of planning permission

Determination of applications

Once representations have been received from those consulted, the planning application is assessed against the relevant planning policies and legislation. Unless material considerations indicate otherwise, local planning authorities must determine planning applications in accordance with a statutory Development Plan. Under Section 70 of the Town and Country Planning Act 1990, a local planning authority may grant the application, may refuse it or may grant it subject to conditions.

Planning conditions

Legislation

Section 70 (1) (a), Town and Country Planning Act 1990

It is important that conditions of a planning permission are fully discharged before development begins to avoid what is termed a 'conditions precedent' in which development is deemed to be unlawful; see *Henry Boot Homes Ltd v Bassetlaw District Council*.[8] It may, however, be deemed that only those conditions of a fundamental importance will give rise

[8] [2002] EWCA Civ 983.

that a development is unlawful and that planning permission has not been validly implemented; see *R (Hart Aggregates Ltd) v Hartlepool Borough Council*.[9]

Implementation of planning permission

Legislation

Section 56 (1) (2) and (4), Town and Country Planning Act 1990

A planning permission will be implemented by the commencement of development. Development will be commenced when a material operation occurs. A material operation comprises the following:

- Any work of demolition of a building;
- Any work of construction in the course of erection of a building;
- The digging of a trench which is to contain the foundations, or part of the foundations, of a building;
- The laying of any underground main or pipe to the foundations, or part of the foundations, of a building;
- Any operation in the course of laying out or constructing a road or part of a road; or any change in the use of any land, where that change constitutes 'material development'.[10]

Material considerations

A material consideration is a matter that should be taken into account in deciding a planning application or on an appeal against a planning decision. There is no statutory definition of what constitutes a material consideration; however, Cooke J gave a well-applied interpretation in *Stringer v Minister of Housing and Local Government*:[11]

> any consideration which related to the use and development of land was capable of being a planning consideration and that whether a particular consideration falling within this broad class was material in any given case will depend on the circumstances.[12]

[9] [2005] EWHC 840 (Admin).
[10] Section 56 (4), Town and Country Planning Act 1990.
[11] [1971] JPL 114; 1 All ER 65.
[12] Ibid.

Material considerations must be related to the development and use of land in the public interest. The considerations must also fairly and reasonably relate to the application concerned. Local planning policies are material considerations.

Non-material amendments
Legislation

Section 96A, Town and Country Planning Act 1990

A 'non-material amendment' also known as a minor material amendment removes the need for an entirely new planning application to be submitted where there is only a very small change to a planning application. Such an application, if approved, would form an amendment to the original planning permission and would be subject to the conditions and time limit of the original permission. Since 1 October 2010, it is possible to apply to make non-material amendments to existing planning permissions under Section 96A of the Town and Country Planning Act 1990 (introduced by Section 190 of the Planning Act 2008). There is no statutory definition of 'non-material'; it is the responsibility of the local planning authority to determine a definition. In the case of amendments to permission for alterations or extensions to a residential property, a local planning authority may use the following criteria to assist in guiding its decision as to whether applications for 'non-material amendments' might be acceptable:

- The proposal is for a very small change to the development already granted planning permission;
- The proposed amendment does not alter the development significantly from what was described on the planning permission and does not conflict with any conditions of the permission;
- No adopted planning policy is breached;
- The proposed amendment does not conflict with an objection to the original planning permission raised by a consultee or any other interested third party (in particular a neighbour of the proposed development site);
- The proposed amendment would not move any external wall outwards more than the thickness of a wall;

- The proposal would not increase the height of any roof;
- No windows are introduced that could potentially permit overlooking of other properties.[13]

For further information, see Department for Communities and Local Government (2009), available online: www.communities.gov.uk.

Neighbourhood planning
Legislation

Localism Act 2011

The Localism Act 2011 provided for a new neighbourhood planning regime to allow parish councils and groups of people to formulate Neighbourhood Development Plans and Orders, which can guide and shape development in a particular area. These plans and orders must have regard to national policies and conform to local strategic policies. The draft plans and orders must pass an independent check, and they must then be put to a local referendum. If the majority of those who vote are in favour the local planning authority must adopt the plan, unless it conflicts with the European Convention on Human Rights or EU policy.

The aim of neighbourhood planning is to give communities direct power to develop a shared vision for their neighbourhood and shape the development and growth of their local area. The intention is that communities have a say on what new buildings should look like and what infrastructure should be provided and grant planning permission for the new buildings they want to see go ahead. Neighbourhood planning is not a legal requirement but a right which communities in England can choose to use. A neighbourhood plan attains the same legal status as the Local Plan once it has been agreed at a referendum and is made (brought into legal force) by the local planning authority. This is often the most challenging part of agree a neighbourhood plan: defining and agreeing on who the 'community' actually is in the first place. It then becomes

[13] www.southbucks.gov.uk.

part of the statutory development plan. Applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise (see section 38(6) of the Planning and Compulsory Purchase Act 2004).

For further information, see the National Planning Policy Framework, Paragraph 16.

Planning obligations

Section 106 Agreement

Legislation

Section 106, Town and Country Planning Act 1990
Regulation 122 and 123 of the Community Infrastructure Levy Regulations 2010

A Section 106 Agreement is a legally binding agreement with a local planning authority in which planning gain is offered for planning permission. These agreements are a way of delivering developments which support the provision of services and infrastructure, such as highways, recreational facilities, education, health and affordable housing.

The legal tests for when a planning authority can use or require a Section 106 Agreement are set out in regulation 122 and 123 of the Community Infrastructure Levy Regulations 2010 as amended.

The following are the tests:

1. That it is necessary to make the development acceptable in planning terms;
2. That it is directly related to the development; and
3. That it is fairly and reasonably related in scale and kind to the development.

Under the Planning Act s106 (A) a person bound by the obligation can seek to have the obligation modified or discharged after five years. The use of a Section 106 Agreement as a means of

securing planning gain has been scaled back with planning obligations which are commonly being sought through the use of the Community Infrastructure Levy, where a local authority has an agreed charging schedule in place; see the later discussion).

Environmental Impact Assessments

Legislation

Town and Country Planning (Environmental Impact Assessment) (England and Wales) (Amendment) Regulations 2011

Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999

European Directive (85/337/EEC as amended by 97/11/EC)

Section 71A, Town and Country Planning Act 1990

The Environmental Impact Assessment (EIA) is a process for identifying the environmental impact of certain types of proposed development. It attempts to ensure that the environmental, economic or social effects of a proposed development are fully considered. The assessment should be submitted with the planning application and should include the following:

- A description of the physical characteristics of the development and its land-use requirements during the construction and operational phases;
- A description of the main characteristics of the production process or other aspects of the development (e.g. nature and quantity of the materials used);
- An estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat radiation, etc.) resulting from the construction and operation of the proposed development;
- The full, detailed description of the development necessary to ensure that its likely significant impacts can be properly assessed.[14]

[14] Royal Town Planning Institute (2001).

The EIA applies to most types of development and the Regulations are divided into two schedules: Schedule 1 and Schedule 2. For Schedule 1 projects an EIA must always be carried out. For Schedule 2 projects, an EIA must be carried out if the development is likely to have a significant impact on the environment by virtue of its nature, size or location.

The aim of an EIA is to protect the environment by ensuring that a local planning authority when deciding whether to grant planning permission for a project, which is likely to have significant effects on the environment, does so in the full knowledge of the likely significant effects, and takes this into account in the decision making process. The regulations set out a procedure for identifying those projects which should be subject to an EIA and for assessing, consulting and coming to a decision on those projects which are likely to have significant environmental effects. The aim of an EIA is also to ensure that the public are given early and effective opportunities to participate in the decision-making procedures.

The Town and Country Planning (Environmental Impact Assessment) (England and Wales) (Amendment) Regulations 2011 integrate Environmental Impact Assessment procedures and should only apply to those projects which are likely to have significant effects on the environment. Local planning authorities and developers should carefully consider if a project should be subject to an EIA. If required, they should limit the scope of assessment to those aspects of the environment that are likely to be significantly affected.

For further information, see Department for Communities and Local Government (2010f).

Community infrastructure levy

Legislation

Community Infrastructure Levy (Amendment) Regulations 2013

Part 11 of the Planning Act 2008

The Community Infrastructure Levy is a planning charge that allows local authorities in England and Wales to raise funds from developers undertaking new developments. This is to allocate the money to support development to fund and deliver a wide range of infrastructure projects including affordable housing, transport schemes, flood defences, schools, hospitals, parks, green spaces and leisure centres. The levy applies to most new buildings that involve an increase in floor space and charges are based on the size and type of the new development. The levy is normally collected by a local authority that grants planning permission. The Community Infrastructure Levy is generally supposed to replace S106 agreements. It is only charged where a schedule of charges (a 'Charging Schedule') has been agreed through independent examination (like any other Development Plan Document). The Community Infrastructure Levy does not usually apply to smaller developments, for example household planning applications.

The community infrastructure levy does the following:

- Gives local authorities the freedom to set their own priorities for what the money should be spent on;
- Gives local authorities a predictable funding stream that allows them to plan ahead more effectively;
- Makes the system more transparent as local authorities have to report what they have spent the levy on each year.

For further information, see Department for Communities and Local Government, 2010e, *The Community Infrastructure Levy, An Overview,* Department for Communities and Local Government, London.

Design and access statement

The Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013
Article 4C of the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2008

Planning and Compulsory Purchase Act 2004 Act (Section 42) (substituted new sections 62 and 327A of the Town and Country Planning Act 1990 and amended section 10 of the Listed Buildings Act)

A Design and Access Statement is a short report accompanying and supporting a planning application that explains the process which leads to a development proposal. A Design and Access Statement will only need to be submitted with major planning applications (full and outline), developments in a Conservation Area for one or more dwellings, or 100 square metres of building floor space, listed building consent applications or a World Heritage Site (full and outline).

For further information, see www.planningportal.gov.uk.

Unauthorised development

Enforcing planning control

Legislation/policy

Planning and Compulsory Purchase Act 2004
Planning and Compensation Act 1991
Town and Country Planning (Enforcement Notices and Appeals) Regulations 1991
Town and Country Planning Act 1990

Local planning authorities have powers to take enforcement action if development has been carried out without planning permission. If a local planning authority decides to take enforcement action they may initially request a retrospective planning application to be submitted. Enforcement action, in general, may only be taken within 4 years after the initial breach for conversion to a single dwelling or building operations or 10 years for changes of use or breach of conditions. Failure to comply with enforcement notices is a criminal offence (see the 4-year rule and the 10-year rule, discussed later).

Planning Contravention Notices

Legislation

Sections 171C and 171D, Town and Country Planning Act 1990

A Planning Contravention Notice is a notice which can be served by a local planning authority if there has been unauthorised development or unlawful contravention of planning. If a breach of planning control has occurred, the local planning authority has the power to obtain information about the use, operations and the nature of any interests in the land from any owner or occupier of the land or anyone who is carrying out operations on the land (Section 171 C (2) of the Town and Country Planning Act 1990). A Planning Contravention Notice may only be served when it appears to a local planning authority that a breach of planning control may have occurred.[15] The notice must contain the following details:

- The land to which it refers
- The alleged breach
- What is required
- Time for compliance
- A warning regarding non-compliance and false information;
- Additional information regarding further action and compensation in respect of a Stop Notice.[16]

A Planning Contravention Notice may include a warning to stop the development, an invitation to make a retrospective application, may state the remedial works required to address the breach of planning. It is illegal to provide incorrect information or to ignore a Planning Contravention Notice. A Planning Contravention Notice must be complied within 21 days of the day the notice is served (Section 171D). The maximum penalty on conviction is £1,000 for ignorance of a notice or £5,000 for false or misleading statements as provided by the Criminal Justice Act 1991.

For further information, see www.planningportal.gov.uk.

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[15] *R v Teignbridge District Council ex parte Teignmouth Quay Co Ltd* [1995] JPL 828.
[16] Durrant (2000), p. 12.

Enforcement Notices

Legislation

Section 172–182, Town and Country Planning Act 1990

An Enforcement Notice is a notice that local planning authorities can issue where development has taken place without planning permission or in breach of a planning condition. Normally, the effect of the notice is to stop development with a specified period or remove the development. The notice must contain details of the breach and the section breached.[17] The Notice must also specify the following:

- The steps to be taken
- The date the notice takes effect
- The time for compliance
- The reason for issuing the notice.

On conviction, an Enforcement Notice carries a fine of up to £20,000 or an unlimited fine on indictment. Under Section 174(1) Town and Country Planning Act 1990 anyone who has been served with an Enforcement Notice and has an interest in the property concerned has the right to appeal. The appeal must be made before a notice is effective at least 28 days after it has been served. An appeal is made to the Planning Inspectorate and an independent inspector is usually appointed to decide the case. An appeal can be decided by a public inquiry, written representations or an informal hearing. An appeal can be made on the following grounds:

- Planning Permission should be granted for the development or change of use;
- The development does not require planning permission;

[17] Town and Country Planning Act 1990, Section 171A (1) defines a breach as either

(a) Carrying out development without the required planning permission; or
(b) Failing to comply with any condition or limitation subject to which planning permission has been granted.

- No breach of planning control has taken place;
- Sufficient time has passed since the development took place so that enforcement action cannot be taken;
- The notice has not been correctly served;
- The notice asks for an unreasonable amount of work to put things right;
- The period of compliance stated in the notice is too short.[18]

For further information, see www.planningportal.gov.uk.

Stop Notices

Legislation

Sections 183–187, Town and Country Planning Act 1990

A Stop Notice allows a local planning authority to impose a ban, almost immediately, on activities that are being carried on in breach of planning control. Stop Notices are served at the same time with an Enforcement Notice. If a notice is properly served it usually requires the development to stop within three days of the notice being served. The Stop Notice can only be served prior to the Enforcement Notice taking effect and does not apply to developments involving listed buildings, conservation areas, hazardous substances or the protection of trees. Once the notice comes into operation it is an offence to continue any activity on the development. It is also an offence to fail to comply with a Stop Notice. There are certain activities which cannot be prohibited under a Stop Notice:

- The use of a building as a dwelling-house
- The carrying out of any activity which is not 'operational development' or the depositing of refuse or waste material, if the activity has been carried out for more than four years at the time the notice is served.[19]

[18] 174(2), Town and Country Planning 1990 Act.
[19] Section 183, Town and Country Planning Act 1990.

A person who contravenes a stop notice after a site notice has been displayed, or the stop notice has been served on them, is guilty of an offence (Section 187(1) of the Town and Country Planning Act 1990).There is a maximum fine of £20,000 on conviction or an unlimited fine on indictment. There is no right of appeal against a Stop Notice, but its validity can be challenged at the High Court by judicial review.

Temporary Stop Notice

Legislation

Town and Country Planning (Temporary Stop Notice) (England) Regulations 2005

Part 4, Planning and Compulsory Purchase Act 2004 (which inserted sections 171E to 171H to the Town and Country Planning Act 1990)

A Temporary Stop Notice gives local authorities power to take early action at the beginning of an unauthorised development. It can be issued without an accompanying Enforcement Notice and will take effect immediately. This differs from the powers of a Stop Notice as the Temporary Stop Notice does not have to wait for an enforcement notice to be issued.

The Temporary Stop Notice may be served on any person who appears to be carrying out the prohibited activity, anyone who seems to be an occupier of the land to which the notice relates or anybody who appears to have an interest in the land. The Temporary Stop Notice must also specify the matters alleged to constitute the breach of control, the steps required to restore the position or to bring the land to a condition satisfactory to the planning authority and the date on which the notice is to take effect.[20] There is no right of appeal against a Temporary Stop Notice, and the only opportunity to challenge a Notice

[20] Section 183, Town and Country Planning Act 1990.

is by making representations directly to the local planning authority. A Temporary Stop Notice will expire in 28 days or any shorter period that the local planning authority may stipulate. On conviction the maximum fine is £20,000.

For further information, see www.planningportal.gov.uk.

Breach of Condition Notice

Legislation

Section 187A of the Town and Country Planning Act 1990

A Breach of Condition Notice is issued by a local planning authority when someone has not complied with the conditions of a planning application. The notice provides a fast-track enforcement option, which avoids the delay of an enforcement appeal and normally applies to breaches that are detrimental to local amenities, to public safety or likely to cause serious environmental harm. A period of 28 days must be given to comply with the requirements of the Notice. It is an offence to refuse to comply with a breach of condition notice with a maximum fine of £1,000. There is no right of appeal against a Breach of Condition Notice; however, the validity of the Notice may be challenged by judicial review. A Breach of Condition Notice is governed by the 4-year rule and the 10-year rule.

A Breach of Conditions Notice requires its recipient to secure compliance with the terms of a planning condition or conditions, specified by the local planning authority. Any recipient of a breach of condition notice will be in breach of the notice if, after the compliance period, any condition specified in it has not been complied with, and the steps specified have not been taken or the activities specified have not ceased. A breach of condition notice is mainly intended as an alternative to an enforcement notice for remedying a breach of condition – but it may also be served in addition to an enforcement notice, perhaps as an alternative to a stop notice, where the local planning authority consider it expedient to stop the breach

quickly and before any appeal against the enforcement notice is determined.

There is no right of appeal to the Secretary of State against a breach of condition notice. The validity of a Breach of Condition Notice and the propriety of the local planning authority's decision to serve a Breach of Condition Notice, may be challenged by application to the High Court for judicial review.

Immunity for planning enforcement

Legislation

Section 171B, Town and Country Planning Act 1990

Under Section 171B, Town and Country Planning Act 1990 a breach of planning control becomes immune from enforcement action if no action has been taken within the time limits set which are the following:

- Operational development – 4 years
- Change of use of any building to use as a single dwelling house – 4 years
- Any other breach of planning control (most commonly unauthorised material change of use or breach of condition) – 10 years.[21]

After that, the breach of planning control is immune from enforcement, becomes lawful, and a Certificate of Lawfulness of Existing Use or Development may be obtained. The system of enforcement is underpinned by discretionary principles.[22]

The 4-year rule

If a development which has breached planning control has not been challenged for four years or more the development is allowed to remain and enforcement action cannot be taken. The

[21] Section 171B, Town and Country Planning Act 1990.

[22] *Sage v. Secretary of State for the Environment, Transport and the Regions and others* [2003] UKHL 22.

use of that building, however, is not permitted. This applies to all breaches of planning control consisting in the carrying out without planning permission of all forms of 'operational development', namely the carrying out of building, engineering, mining or other operations in, on, over or under land. This includes the change of use of any building to use as a single dwelling house.

The 10-year rule

A 10-year time limit applies to non-compliance with planning control involving any material change in the use of land (other than a change to use as a single dwelling house) and to any breach of condition or limitation. If after ten years the breach has not been challenged the breach of planning control is immune from enforcement, becomes lawful, and a Certificate of Lawfulness of Existing Use or Development may be obtained.

Lawful development certificate

Legislation

Sections 191 and 192, Town and Country Planning Act 1990

A Certificate of Lawfulness of Existing Use or Development is a certificate issued by a local planning authority, which conclusively establishes that a use or development of land is lawful and as a result immune from enforcement action. Once a lawful development certificate is granted, the certificate remains valid for the use or development described in it provided there is no subsequent material change in the circumstances

Challenging planning decisions

Planning appeals

Legislation

The Town and Country Planning (Determination of Appeal Procedure) (Prescribed Period) (England) Regulations 2009

The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009
Planning Act 2008
The Town and Country Planning (Hearings Procedure) (England) Rules 2000
The Town and Country Planning (Inquiries Procedure) (England) Rules 2000
The Town and Country Planning (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000
Planning and Compulsory Purchase Act 2004
The Town and Country Planning (General Development Procedure) Order 1995
Town and Country Planning Act 1990
Planning (Listed Buildings and Conservation Areas) Act 1990

Rights of appeal

Legislation

Section 78, Town and Country Planning Act 1990
Section 319A, Town and Country Planning Act 1990 (inserted by section 196, Planning Act 2008)

If a planning application, whether outline or full, is turned down by a local planning authority there is a right of appeal to the Secretary of State.[23] Rights of appeal exist against the following:

- A refusal of planning permission;
- Any condition imposed on a planning permission; or
- The failure of the local planning authority to determine the application within the statutory time period.

On an appeal under Section 78, Town and Country Planning Act 1990 the Secretary of State may do the following:

- Allow or dismiss the appeal; or

[23] The Planning Inspectorate exercises the powers of the Secretary of State when administering appeals.

- Reverse or vary any part of the decision of the local planning authority (whether the appeal relates to that part of it or not), and may deal with the application as if it had been made to him in the first instance.[24]

On rare occasions a planning application can also be 'called in' or the decision on appeal will be 'recovered' for the Secretary of State to make a decision based on an inspector's report. Only the person who made the application for planning permission can appeal. The right to challenge planning appeal decisions can only be made in respect to decisions of misinterpretations of law or because procedures were not properly followed, resulting in unfair treatment. There is no third-party right of appeal for other people who disagree with the local council's decision.

Period for challenging a planning appeal decision

Legislation

Section 106B Town and Country Planning Act 1990

For householder applications,[25] the time limit to appeal is 12 weeks from the date of the notice of the decision or determination giving rise to an appeal. In other cases, appeals should be submitted to the Planning Inspectorate within six months of the date of the local planning authority's decision notice giving rise to the appeal.

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[24] Section 78, Town and Country Planning Act 1990.

[25] 'Householder application' means:

(a) an application for planning permission for development of an existing dwelling house, or development within the curtilage of such a dwelling house for any purpose incidental to the enjoyment of the dwelling house, or

(b) an application for any consent, agreement or approval required by or under a planning permission, development order or local development order in relation to such development, but does not include:
  (i) an application for change of use,
  (ii) an application to change the number of dwellings in a building.

This definition is within the Town and Country Planning (General Development Procedure) Order 1995 (as amended) and the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009.

Where the local planning authority has failed to make a decision, an appeal against non-determination can be submitted up to six months after the expiry of the period the local planning authority had for dealing with the application.[26]

Administration of appeals

The appeals process is administered by the Planning Inspectorate which is an independent government agency set up for planning appeals and an executive agency of the Department for Communities and Local Government. Appeals are determined by the following:

- Independent planning inspectors (transferred appeals) or in some cases
- By the Secretary of State (recovered appeals).

Methods of appeal

Section 319A of the Town and Country Planning Act 1990 (inserted by section 196 of the Planning Act 2008) gives the Secretary of State the power to determine the procedure for dealing with various appeals and applications. Appeals can be processed in three ways:

- Written representations
- Informal hearing
- Public local inquiry.

Written representations

Legislation

The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009
Section 78, Town and Country Planning Act 1990

[26] Planning Inspectorate, April 2010, *Planning Procedure, Planning Appeals and called-in Planning Applications*, PINS01/2009, Planning Inspectorate, London, p7.

Most planning appeals are decided by the written representations method. With this method of appeal, a planning inspector considers written evidence from the applicant and the local planning authority, both of whom also have an opportunity to comment on each other's respective written submissions. There are two procedures for written representations, the Householder Appeals Service and the Standard Written Representations Procedure. An appeal decision can only be challenged on legal grounds in the High Court. To be successful and to overturn an appeal, the following has to be shown:

- A planning inspector has gone beyond his or her powers;
- A local planning authority did not follow the proper procedures and so damaged the interests of the party.

If the challenge is successful, the High Court will overturn the original decision and return the case to the local planning authority. This does not necessarily mean that the original decision will be reversed.

For further information, see Planning Inspectorate (2010).

Hearings

Legislation

The Town and Country Planning (Hearings and Inquiries Procedure) (England) Amendment Rules 2013

The Town and Country Planning (Hearings Procedure) (England) Rules 2000

The Town and Country Planning (Hearings and Inquiries Procedures) (England) (Amendment) Rules 2009

The hearing procedure involves an open discussion led by an inspector. Hearings are usually held in local planning authority offices, village halls or community centres and normally last about half a day. They are open to members of the public. Hearings are not suitable for all appeals, especially those which are complicated or controversial.

For further information, see Planning Inspectorate, 2010, *Planning Procedure, Planning Appeals and Called-in Planning Applications*, PINS01/2009, Planning Inspectorate, London.

Public inquiry for planning appeals

Legislation

The Town and Country Planning (Inquiries Procedure) (England) Rules 2000
The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure)
(England) Rules 2000 as amended by The Town and Country Planning (Hearings and Inquiries Procedures) (England) (Amendment) Rules 2009

Planning appeals by inquiry are the most formal of the three planning appeal processes and allow both verbal and written presentation of evidence, which is then often subject to examination and cross examination at the inquiry. Inquiries are usually held in the offices of local planning authorities, village halls or community centres. An inquiry usually involves larger or more complicated appeals and may last for several days, or even weeks. The site may be inspected before, during or after the inquiry.

For further information, see Planning Inspectorate (2010).

Judicial review

Legislation

The Civil Procedure (Amendment No. 4) Rules 2013
Section 288, Town and Country Planning Act 1990
Civil Procedure Rules, Part 54

Judicial review is the legal process by which one can challenge the lawfulness of a planning application decision by a public authority and the lawfulness of decisions made by government

departments and ministers and other public bodies. Judicial review is exercised by High Court judges under the Civil Procedure Rules, Part 54 and applies to the following:

- Decisions by public authorities, including local planning authorities, planning inspectors, the Secretary of State and statutory agencies such as the Environment Agency, English Heritage and Natural England;
- Decisions by domestic tribunals and certain courts, for example a Magistrates Court;
- Decisions by Parliament if contradictory to European Union Law or Convention, for example the European Convention on Human Rights;
- The legality of subordinate regulations and rules, which includes statutory instruments.

Judicial review can only be used in situations where there is no other right of appeal, or such rights have been exhausted, and where it is believed an authority has acted unlawfully. Section 288 of the Town and Country Planning Act 1990 applies where an aggrieved person wishes to obtain an order quashing the decision of a Planning Inspector or the Secretary of State on an appeal in relation to a Planning Permission application. Applications for judicial review must be made within six weeks of the date of the planning application decision.

For further information, see www.parliament.uk.

Listed buildings

Legislation/policy

The Planning (Local Listed Building Consent Orders) (Procedure) Regulations 2014

Planning (Applications for Planning Permission, Listed Buildings and Conservation Area) (Amendment) (England) Regulations 2006

General Permitted Development Order 1995

Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990
Town and Country Planning Act 1990
Planning (Listed Buildings and Conservation Area) Regulations 1990

Grades of listed buildings

Grade I: Buildings of exceptional interest (approximately 2 per cent of listed buildings)
Grade II*: Important buildings of more than specialist interest (approximately 4 per cent of listed buildings)
Grade II: Buildings of special interest (approximately 94 per cent of listed buildings)

Note: Many local authorities also have local listings where a building is recognised for having local importance or contributing to the historical realm but not deemed worthy of listing by English Heritage.

What is a listed building?

Legislation

Section 1, Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990

A listed building is a building of 'special architectural or historic interest'[27] which is included on the statutory List of Buildings of Special Architectural or Historic Interest. The list is drawn up by English Heritage and approved by the Secretary of State for the Department of Culture, Media and Sport. A listed building may not be demolished, extended or altered without special permission from a local planning authority. It

[27] Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990.

is a criminal offence to carry out works to a listed building with a fine of up to £20,000, up to two years' imprisonment or both.[28]

There are approximately 370,000 list entries of listed buildings in England and 30,000 listed buildings in Wales. The list of individual entries can be obtained at local council planning departments, county council offices and most local reference libraries. A complete set of lists for the whole country is available for inspection at the National Monuments Record in Swindon and photographs of many buildings and list entries can be viewed at the Images of England website.[29]

Enterprise and Regulatory Reform Act 2013

The Enterprise and Regulatory Reform Act 2013 introduced a number of significant and wide ranging reforms on listed buildings including heritage protection reforms. The changes are as follows:

- Conservation area consent has been replaced with planning permission. Consideration of proposals to demolish buildings in conservation areas will be dealt with as part of the application for planning consent.
- A certificate of immunity from listing may be applied for at any time. 'Certificates of immunity' from listing can now be applied for at any time and not only when a planning application is submitted, or planning permission is granted. The certificates are a guarantee that a building will not be listed for a period of five years following the date of the certificate and mean that the local planning authority cannot serve a building preservation notice within that timescale. This is helpful because it means that a pre-emptive application

[28] Section 9, Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990.
[29] www.imagesofengland.org.uk.

can be made for immunity before a planning application is worked up and before the professional fees and application fees are paid for a planning application.

- It is a criminal offence to fail to obtain planning permission for the demolition of buildings in a conservation area, or not to comply with any planning condition attached to such a planning permission. Unlike the usual sanctions for development without planning permission or in breach of condition, there is no time limit on when enforcement action can be taken for the breach of these requirements.
- Statutory guidance for owners and local planning authorities to enter into Heritage Partnership Agreements. These may be entered into between local authorities and owners setting out works for which listed building consent is granted (excluding demolition). Thus, owners of large listed buildings will now be able to agree a management framework with the local planning authority so that future alterations will not need repeated applications for consent.
- Local or national Listed Building Consent Orders may be set up by a local planning authority or the Secretary of State, respectively, under which works of the type described in the Order (excluding demolition) will not need listed building consent.
- A certificate of lawful proposed works has been introduced (valid for 10 years) that confirms that the works described in it do not affect the character of the listed building and do not therefore require consent.

Definition of a listed building

Legislation

Section 1 (5), Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990

A listed building is a building which is included in the statutory list and is 'any object or structure fixed to the building 'any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and

has done so since before the lst July 1948'.[30] Listed buildings can also apply to structures if they are of special architectural merit or historic importance such as fences, walls, gates, telephone boxes, railings, gates, garages, outhouses, stables and statutes.

Applications for listing

Legislation

Section 10, Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990

English Heritage will recommend to the Secretary of State the inclusion of a listed building on the statutory list. When the assessment is complete the recommendation for listing will be forwarded to the Department for Culture, Media and Sport which will notify the appropriate local planning authority. That authority must then notify the owner and occupier of the building.

If a building is not deemed to have sufficient historical or architectural importance, a building can also be included on a local list. A local list does not have legal protection for buildings; however, it demonstrates desire by a local planning authority to protect a building. A local list is similar to the statutory list and is prepared by a local planning authority.

Statutory criteria for listing buildings

The following are the main statutory criteria that the Department for Culture, Media and Sports uses to determine which buildings to include on the statutory list:

- Architectural Interest: Buildings of importance because of their design, decoration and craftsmanship. Special interest may also apply to nationally important examples of particular building techniques or types and significant plan forms.

[30] Section 1 (5), Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990.

- Historic Interest: Buildings which illustrate an aspect of the nation's social, economic, cultural or military history and/or have close historical associations with nationally important people.
- Historic Association: Buildings that demonstrate close historical association with nationally important people or events.
- Group Value: Buildings that form part of an architectural ensemble, such as squares, terraces or model villages.[31]

Principles of age and rarity for listing buildings

- All buildings before 1700 that contain a significant proportion of their original fabric are listed.
- Most buildings from 1700 to 1840 are listed, although selection is necessary.
- After 1840 a progressively greater selection of listed buildings is necessary because of the increased number of buildings erected and the much larger numbers of buildings that have survived.
- Between 1914 and 1939 selected buildings of high-quality or historic interest are listed.
- Buildings of less than 30 years old are normally listed only if they are of outstanding quality and under threat.
- Buildings less than 10 years old are not listed.[32]

Repair Notice

Legislation

Section 48, Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990

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[31] www.planningportal.gov.uk/uploads/1app/guidance/guidance_note-listed_building_consent.pdf. Online. Available HTTP: <www.planningportal.gov.uk> (accessed 10 June 2010).

[32] www.planningportal.gov.uk/uploads/1app/guidance/guidance_note-listed_building_consent.pdf (accessed 10 June 2010).

A local authority can take action if a listed building is not maintained or preserved and can compulsory purchase a listed building which is deemed not to be preserved at least two months after a Repairs Notice has been served on the owner of the building.

For further information, see Office of the Deputy Prime Minister (2005d).

Listed building consent

Legislation

Sections 10–16, Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990

Planning (Listed Buildings and Conservation Areas) Regulations 1990

Sections 7, 8 and 9, Town and Country Planning Act 1990

Listed building consent is required for the demolition or partial demolition, or the alteration or extension of a listed building in a way which will affect 'its character as a building of architectural or special interest'.[33] Listed building consent is separate from any planning permission that is required for a proposed development. The application for listed building consent should be made to the local planning authority and it may be granted with conditions or without conditions. It is an offence to demolish, alter or extend a listed building without listed building consent and the penalty can be a fine of unlimited amount, up to 12 months' imprisonment or both.

Applying for listed building consent

Legislation

Section 10, Planning (Listed Buildings and Conservation Areas) Regulations 1990

[33] Town and Country Planning Act 1990.

An application form is required to be completed to apply for listed building consent separate from planning permission application. The application for listed building consent is made to a local planning authority and takes eight weeks to process. To apply for listed building consent one can download a listed building consent application form via the planning portal website or by the relevant website of the local authority. The local planning authority must pay 'special regard' for preserving the building or its setting and any features of special or architectural or historic interest.

For further information, see www.planningportal.gov.uk.

Granting of listed building consent
Legislation

Section 17, Planning (Listed Buildings and Conservation Areas) Regulations 1990

Listed building consent will not be valid unless all the conditions on the decision notice are complied with and the works are executed in accordance with the approved plans. It is a criminal offence to fail to comply with any condition attached to the consent.

For further information, see www.planningportal.gov.uk.

Appeals for listed building consent
Legislation

Section 20, Planning (Listed Buildings and Conservation Areas) Regulations 1990

If consent is refused, or granted subject to conditions, which are considered unacceptable, there is a right of appeal to the Secretary of State. Appeals must be made within six months of the date of decision. Once a building has been listed there is no right of appeal by the owners against the listing; however, there is a right of appeal against a decision of listed building consent to the Department of Culture, Media and Sport within 28 days of receiving the notification.

For further information, see www.planningportal.gov.uk.

Limit of duration of listed building consent

Legislation

Section 18, Planning (Listed Buildings and Conservation Areas) Act 1990

Listed building consent is subject to the following limits of duration:

- Five years beginning with the date on which the consent is granted; or
- A period of time that the authority deems appropriate having regard to any material considerations.[34]

Outline listed building consent

It is not possible to make an application for 'outline' listed building consent. Any application must give sufficient detail including a plan and other drawings necessary, to allow the impact of the works on the building to be properly assessed.

Penalties of non-compliance of a listed building

Legislation

Section 9, Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990

It is a criminal offence to carry out unauthorised works to a listed building including demolition, alteration or extension in a manner which would affect its character as a building of special architectural or historic interest, for which listed building consent has not been granted. There is no right of appeal against action pursued against unauthorised works to a listed building. A person who is guilty of an offence on conviction may be liable to imprisonment not exceeding two years, a maximum fine of £20,000 or both.[35]

A Listed Building Enforcement Notice

Legislation

Section 38–46, Planning (Listed Buildings and Conservation Areas) Act 1990

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[34] Section 18, Planning (Listed Buildings and Conservation Areas) Act 1990.

[35] Section 9, Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990.

A Listed Building Enforcement Notice is issued by a local planning authority when demolition or works for alteration or extension have been carried out to a listed building, without consent, the works affect its character as a building of special architectural or historic interest and there is failure to comply with any condition attached to a listed building consent. The following are effects of a Listed Building Enforcement Notice:

- Restore the building to its former state; or
- To alleviate the effect of the works which were carried out without listed building consent; or
- To bring the building to the state in which it would have been if the terms and conditions of any listed building consent which has been granted for the works had been complied with.[36]

If any of the steps specified in the Listed Building Enforcement Notice have not been taken within the compliance period, the Local planning authority may do the following:

- Enter the land and take those steps, and
- Recover from the person who is then the owner of the land any expenses reasonably incurred by them.[37]

A person who is guilty of an offence for not complying with the Notice on conviction may be liable to a maximum fine of £20,000.

Grounds of appeal against a Listed Building Enforcement Notice

Legislation

Section 39, Planning (Listed Buildings and Conservation Areas) Act 1990

An appeal may be made for a Listed Building Enforcement Notice to the Secretary of State on any of the following grounds:

- That the building is not of special architectural or historic interest;

[36] Section 38 (2), Planning (Listed Buildings and Conservation Areas) Act 1990.
[37] Section 42 (1), Planning (Listed Buildings and Conservation Areas) Act 1990.

- That the matters alleged to constitute a contravention do not constitute such a contravention;
- That the works to the building were urgently necessary in the interests of safety or health or for the preservation of the building;
- That listed building consent ought to be granted for the works, or that any relevant condition of such consent which has been granted ought to be discharged, or different conditions substituted;
- That copies of the notice were not served;
- That the period specified in the notice as the period within which any step required by the notice is to be taken falls short of what should reasonably be allowed;
- That the steps required by the notice for the purpose of restoring the character of the building to its former state would not serve that purpose;
- That the steps required exceed what is necessary to alleviate the effect of the works executed to the building;
- That steps required exceed what is necessary to bring the building to the state in which it would have been if the terms and conditions of the listed building consent had been complied with.[38]

For further information, see Department for Communities and Local Government (2006b).

Building Preservation Notice

Legislation

Section 3, Planning (Listed Buildings and Conservation Areas) Act 1990

A Building Preservation Notice is a notice and form of temporary listing which may be served by district planning authorities and national park authorities (and English Heritage for buildings in London) on an unlisted building of special architectural

[38] Section 39, Planning (Listed Buildings and Conservation Areas) Act 1990.

or historical interest which is in danger of demolition or alteration. A Building Preservation Notice gives temporary protection for a period of six months.

If at the end of the six months the listing is not made by the Secretary of State the notice will automatically cease and the local planning authority are restricted not to serve an additional building preservation notice for the following 12 months. It is, however, possible to renew the notice which allows time for consideration of whether the building should be listed. It is a criminal offence to proceed with works if a building preservation notice has been served.

For further information, see Department for Communities and Local Government (2007b).

Conservation areas

Legislation/policy

Enterprise and Regulatory Reform Act 2013
Planning (Applications for Planning Permission, Listed Buildings and Conservation Area) (Amendment) (England) Regulations 2012
Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990
Planning (Listed Buildings and Conservation Area) Regulations 1990
Civic Amenities Act 1967

Conservation areas are areas of special architectural or historic interest. There are more than 9,000 designated conservation areas in England and Wales. To find a conservation area, refer to the local planning authority's Local Development Framework which contains an Adopted Proposals Map showing conservation areas or discuss the matter with a conservation officer of a local planning authority.

Since the Enterprise and Regulatory Reform Act 2013 came into force, conservation area consent has been replaced

with planning permission. The need to obtain the consent of the local planning authority will therefore remain, but it will no longer be necessary to make two separate applications (one for planning permission and one for conservation area consent) for a scheme involving the demolition and replacement of a building in a conservation area.

Scheduled ancient monuments

Legislation/policy

Ancient Monuments and Archaeological Areas Act 1979
Ancient Monuments (Applications for Scheduled Monument Consent) Regulations 1981

Scheduled ancient monuments are nationally important sites given legal protection by being placed on a schedule of ancient monuments of 'national importance' and are compiled and reviewed by English Heritage. Ancient monuments can include almost any structure, building or site of archaeological interest. There are more than 200 'classes' of monuments on the schedule, including prehistoric standing stones and burial mounds. It is against the law to do the following:

- Damage a scheduled monument by carrying out works without consent;
- Cause reckless or deliberate damage;
- Use a metal detector or remove an object found with one without a licence from English Heritage.[39]

Conviction for these offences can lead to a fine. If a scheduled ancient monument is on the schedule it does not automatically mean that the monument will be preserved. Permission must be granted for any works that may affect a scheduled monument in the form of scheduled monument consent which are

[39] www.english-heritage.org.uk.

dealt with by the Department of Culture, Media and Sport in consultation with English Heritage.

For further information, see www.english-heritage.org.uk and www.dcms.gov.uk.

Tree Preservation Orders

Legislation

Part 6 of the Localism Act 2011
Town and Country Planning (Tree Preservation) (England) Regulations 2012
Planning Act 2008
Planning and Compensation Act 2004
Town and Country Planning (Trees) Regulations 1999
The Planning and Compensation Act 1991
Town and Country Planning Act 1990

The Forestry Act 1967

A Tree Preservation Order is an order made by a local planning authority in respect of trees or woodlands. A Tree Preservation Order prohibits the cutting down, uprooting, topping, lopping, willful destruction or damage of trees without consent from a local planning authority. Tree Preservation Orders can be placed on any tree, including single trees and trees on private land, groups of trees or woodlands but not hedges, bushes or shrubs. Tree Preservation Orders are made and managed locally by a relevant local planning authority. Anyone wishing to undertake work to a tree should make suitable enquiries as to the legal status of the tree and any protection of it, before undertaking any work, in order to protect themselves and others from possible prosecutions or enforcement action.

The Town and Country Planning (Tree Preservation) (England) Regulations 2012 consolidated existing legislation that deals

with procedural matters for making and administering tree preservation orders in one new set of regulations. The aim is a simpler system for authorities to administer and is easier for tree owners and others to use.

Tree Preservation Order types

There are four types of Tree Preservation Orders:

- Individual: applied to an individual tree
- Group: applied to a group of individual trees which, together, make up a feature of amenity value, but which separately might not
- Area: Covers all trees in a defined area at the time the Order was made
- Woodland: Covers all trees within a woodland area regardless of how old they are.[40]

Application process of a Tree Preservation Order

Local planning authorities have the power to make a Tree Preservation Order if a tree appears to be 'expedient in the interests of amenity to make provision for the preservation of trees or woodlands in their area'[41] A Tree Preservation Order must define the number, species and position of the trees, groups or woodlands to which it relates. The application process has a determination target of eight weeks. A right of appeal exists against a refusal issued by a local planning authority of their failure to determine the application within the determination target. Appeals are subject to a fast-track procedure and based on the written representations method. Appeals should be submitted within 28 days of the date of the decision.

[40] The Department for Communities and Local Government (2008a).
[41] Section 198(1), Town and Country Planning Act 1990.

For further information, see the Department for Communities and Local Government (2008a).

Planning permission and Tree Preservation Orders

Where full planning consent has been granted for a development, which requires the removal of a protected tree, the consent overrides the need to make a separate application for a Tree Preservation Order. Full planning consent is limited to those trees which are immediately required to be removed to permit the development to take place. Outline planning consents, or works carried out under permitted development rights, do not allow for work to a protected tree. It should also be noted that a local authority may refuse to grant planning permission if a development proposal would compromise the health of a tree or trees on land to or next to land to which a planning application relates. In some cases this may trigger a more formal attempt to protect the tree through issuing a Tree Preservation Order.

Exemptions to a Tree Preservation Order

The following are exempt from and cannot be protected by a Tree Preservation Order:

- Works approved by the Forestry Commission under a felling licence or other approved scheme
- Felling or working on a dead, dying or dangerous tree
- Where there is an obligation under an Act of Parliament
- Works at the request of certain agencies or organisations
- Works where there is a direct need to work on the tree to allow development for which detailed planning permission has been obtained
- Works to fruit trees cultivated in the course of a fruit production business, as long as the work is in the interests

of that business. Fruit trees are not automatically exempt unless they are actively being used for a business
- Works to prevent or control a nuisance.[42]

Penalties for not complying with a Tree Preservation Order

Legislation

Section 210, Town and Country Planning Act 1990

Anyone who, in contravention of a Tree Preservation Order cuts down, uproots or willfully destroys a tree, or tops, lops or willfully damages a tree in a way that is likely to destroy it is guilty of an offence. Anyone found guilty of this offence is liable, if convicted in the Magistrates' Court, to a fine of up to £20,000.

For further information, see The Department for Communities and Local Government, 2008, *Protected Trees: a Guide to Tree Preservation Procedures,* Communities and Local Government, London, and Office for the Deputy Prime Minister, 2000, *Protected Trees: a Guide to Tree Preservation Procedures*, Office for the Deputy Prime Minister, London.

High hedges and hedgerows

High hedges legislation/policy

High Hedges Regulations 2005
Anti-social Behaviour Act 2003
Office of the Deputy Prime Minister, *Over the Garden Hedge*, 2005

[42] The Department for Communities and Local Government, 2008, *Protected Trees: A Guide to Tree Preservation Procedures*, Communities and Local Government, pp34–39.

Under Section 66 of the Anti-social Behaviour Act 2003, a high hedge is defined as a line of two or more evergreen or semi-evergreen trees or shrubs, which are more than 2 metres in height. Individual trees or shrubs, groups of trees, deciduous trees or woodlands are not defined as high hedges. Part 8 of the Anti-social Behaviour Act 2003 empowers local authorities to deal with complaints about high hedges. Hedges are not subject to planning control, and there is a chance to appeal against a high-hedge decision.

Further Information: Planning Inspectorate, 2010, *Appeals under Section 71 of the Anti-social Behaviour Act 2003, A Guide for Appellants (High Hedges)*, Planning Inspectorate, London.

Hedgerows legislation

The Environment Act 1995
Countryside Act 1981
Conservation (Natural Habitats etc. Regulations 1994)
The Hedgerows Regulations 1997
Planning Policy Statement 7 (England)
Technical Advice Note (Wales) 5 (Wales)

A hedgerow is '[a]ny boundary line of trees or shrubs over 20m long and less than 5m wide between major woody stems at the base'.[43] The Hedgerows Regulations 1997 protect 'important hedgerows' from being removed (uprooted or destroyed). Hedgerows are protected if they meet the following criteria:

- Are 20 metres or more in length
- Meet another hedgerow at each end
- Are at least 30 years old.

Countryside hedgerows have protection under the Hedgerow Regulations 1997 which prohibit the removal of most countryside hedgerows without first submitting a Hedgerow Removal

[43] Department for Environment, Food and Rural Affairs, *Hedgerow Survey Handbook, A Standard Procedure for Local Surveys in the UK,* 2nd Edition, pp10–11.

Notice to the local planning authority. The legislation applies to most countryside hedgerows in England and Wales and covers hedgerows on, or adjoining, land used for agriculture or forestry, the breeding or keeping of horses, ponies or donkeys, common land or village greens or local nature reserves. The legislation does not apply to garden hedges.

Some hedgerows may be protected because they are part of a legally designated (protected) site of nature conservation importance such as a Site of Special Scientific Interest (Wildlife and Countryside Act, 1981), or Special Area of Conservation (SAC; Habitats Directive, 1992). Hedgerows may also be protected as part of a Scheduled Ancient Monument (Ancient Monuments and Archaeological Areas Act, 1979). In addition, a hedgerow may be indirectly protected where it forms a habitat for a legally protected species under the Wildlife and Countryside Act 1981, or the Conservation (Natural Habitats etc.) Regulations 1994. Hedgerows should be at least 30 years old and meet any of the following criteria in order to be deemed important:

1. Marks a pre-1850 parish or township boundary;
2. Incorporates an archaeological feature;
3. Is part of, or associated with, an archaeological site;
4. Marks the boundary of, or is associated with, a pre-1600 estate or manor;
5. Forms an integral part of a pre-Parliamentary enclosure field system;
6. Contains certain categories of species of birds, animals or plants listed in the Wildlife and Countryside Act or Joint Nature Conservation Committee publications;
7. Within an average 30 m length, includes:
   - At least 7 woody species;
   - At least 6 woody species and has at least 3 associated features;
   - At least 6 woody species, including a black poplar tree, or large leaved lime, or small leaved lime, or wild service tree; or

- At least 5 woody species and has at least 4 associated features;
- The list of 56 woody species comprises mainly shrubs and trees. It generally excludes climbers (such as clematis, honeysuckle and bramble) but includes wild roses;

8. Runs alongside a bridleway, footpath, road used as a public path, or a byway open to all traffic and includes at least 4 woody species, on average in a 30m length and has at least 2 of the associated features listed.[44]

If a local planning authority refuses planning permission to remove a hedgerow an appeal can be made to the Secretary of State in writing within 28 days of being given the authority's decision. It is a criminal offence to deliberately remove a hedgerow without permission and subject to a fine by a magistrates' court of up to £5,000. If tried in the crown court, the fine is unlimited. The hedgerow regulations do not apply to garden hedges, even if land on the other side of the hedge meets the preceding criteria.

For further information, see www.planningportal.gov.uk; Department for Environment, Food and Rural Affairs (2007); and Department of Environment, Food and Rural Affairs (1997).

Protected species and habitats

Legislation/policy

Conservation of Habitats and Species (Amendment) Regulations 2010
Conservation of Habitats and Species Regulations 2010
Directive 2009/147/EC on the conservation of wild birds
Countryside and Rights of Way Act 2000
Badgers Act, Wild Mammals (Protection) Act 1996
EU Council Directive 92/43/EEC (1992) on the Conservation of Natural Habitats and of Wild Fauna and Flora

[44] Schedule 1, Part II, the Hedgerows Regulations 1997.

Protection of Badgers Act 1992
Wildlife and Countryside Act 1981 (as amended)
Hedgerow Regulations 1997
The Environment Act 1995
Environmental Protection Act 1990

Certain species and habitats, in the United Kingdom, are legally protected including bats, badgers, water voles and dormice, reptiles and amphibians.[45] Legislation prohibits intentional killing, injuring or taking of any of these species and also prohibits damage to, destruction of, or obstruction of access to any structure or place for shelter or protection. The disturbance of a species and habitats or the damage or destruction of its roost are criminal offences punishable by fines of up to £5,000 (£5,000 per bat if more than one is affected). There are more than 600 species protected by law in the United Kingdom, but not all protected species are protected equally. It is an offence to do the following:

- Deliberately capture, injure or kill any wild animal of a European protected species;
- Deliberately disturb animals of any such species in such a way as to be likely significantly to affect the ability of any significant group of animals of that species to survive, breed, or rear or nurture their young;
- Deliberately take or destroy the eggs of such an animal;
- Damage or destroy a breeding site or resting place of such an animal.[46]

The *Conservation of Habitats and Species Regulations 2010* place nature conservation in the planning system and provide offences which could inadvertently be committed by architects, for example whilst engaged in restoration projects. If a protected species or habitats are found (e.g. badgers, bats

[45] The list also includes great crested newts, adders and slow worms, birds, plants and invertebrates wild birds, invertebrates, protected plants, ancient woodland and veteran trees, freshwater fish, natterjack toads and white-clawed crayfish.
[46] Conservation of Habitats and Species Regulations 2010.

and great crested newts) in or outside a building or on a development, it may be necessary to obtain a licence from Natural England before any development works proceed.[47] The species protection provisions of the Habitats Directive, which is implemented by the Conservation of Habitats and Species Regulations 2010, contain three 'derogation tests' which must be applied by Natural England when deciding whether to grant a licence to a person carrying out an activity which would harm a European Protected Species. The following are the three tests:

- The activity to be licensed must be for imperative reasons of overriding public interest or for public health and safety.
- There must be no satisfactory alternative.
- Favourable conservation status of the species must be maintained.[48]

Prior to detailed design for development it is necessary to ascertain if the site contains habitats of endangered or protected animal or plant species. A survey to establish any animal or plant species may be a condition of obtaining planning approvals in accordance with the requirements of the National Planning Policy Framework legislation. Habitats and species may also require protection from damage during clearance, site preparation and construction activities.

Bats

Legislation

Wildlife and Countryside Act 1981 (as amended)
Conservation of Habitats and Species Regulations 2010
Natural Environment and Rural Communities Act, 2006
Countryside and Rights of Way Act, 2000

[47] *Woolley VS Cheshire East Borough Council and Millennium Estates Ltd* [2009] EWHC 1227 (Admin).
[48] Conservation of Habitats and Species Regulations 2010.

Bats are legally protected by the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010. Bats are not allowed to be removed or disturbed, and as a result it is necessary to know whether bats are (or are likely to be) present on a building or site proposed for development An architect, a property owner or a contractor will commit a criminal offence if they do the following:

- Intentionally or recklessly disturb a bat in its roost or deliberately disturb a group of bats;
- Damage or destroy a bat roosting place (even if bats are not occupying the roost at the time);
- Intentionally or recklessly obstruct access to a bat roost.

If bats are discovered before any project has commenced, the statutory nature conservation organisations such as Natural England should be notified; see *Woolley v Cheshire East Borough Council.*[49] The local planning authority should also be contacted to find out whether a bat survey has been carried out as part of the planning application. The planning authority are obliged by the Natural Environment and Rural Communities Act 2006 to make sure that they have all the information on the presence of protected species on site before they make a decision on planning permission.

[49] [2009] EWHC 1227 (Admin).

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4
Land law

General principles of land law

Key legislation

Access to Neighbouring Land Act 1992
Charging Orders Act 1979
Land Charges Act 1972
Land Registration Act 2002
Landlord and Tenant (Covenants) Act 1995
Law of Property Act 1925
Local Land Charges Act 1975
Trusts of Land and Appointment of Trustees Act 1996

What is land law?

Land law is concerned with rights, duties and obligations in relation to land. Land law directly affects the practice of an architect because of its impact on the spaces, rights and obligations in, around, over and below buildings.

What is 'land'?

Land is three-dimensional. It includes soil, buildings, fixtures and rights in, under and over land. There is a presumption that an owner owns everything on, above and below the land. This is encapsulated in the Latin maxim – *cujus est solum, ejus est usque ad coelum et ad inferos* (the person who owns the land owns everything extending to the heavens and to the depths of the earth). This principle is well illustrated in cases dealing with trespass to airspace. In *Anchor Brewhouse Developments Ltd v Berkley House (Dockland Developments) Ltd*[1] the boom

[1] [1987] 38 BLR.

of a construction crane that oversailed a site was held to be a trespass. The right to airspace, however, extends only to such height as is necessary for the ordinary use and enjoyment of the land and structures upon it. In the case of *Bernstein of Leigh (Baron) v Skyviews and General Ltd*[2] it was held that an aircraft taking photographs was not a trespassing.

All interests in land are classified as real property (or 'realty') and are to be distinguished from personal property (or 'personalty'). Generally, all interests in land are classified as real property, except for leasehold interests (sometimes confusingly referred to as 'chattels real') which are classified as personalty. There is a subclassification of real property into corporeal and incorporeal hereditaments. Corporeal hereditaments are the physical matter over which ownership is exercised. They are lands, buildings, minerals, trees and other things which are fixed to the land. Incorporeal hereditaments are rights, not physical things, the most important of which for present purposes are easements and profits. A 'hereditament' is a property which descended to the heir on intestacy before 1926, that is realty as opposed to personalty.

Section 205 (1) (ix) of the Law of Property Act 1925 defines land as including

> . . . land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether division is horizontal, vertical or made in any way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege or any benefit in, over, or derived from land. . . .

Personal rights and proprietary (property) rights

The distinctions between property rights and personal rights, between corporeal and incorporeal hereditaments and between

[2][1978] QB 479.

legal and equitable interests in land are fundamental to understanding land law. Land law is concerned with ownership of land and property rights held in, over and under it. Proprietary rights are rights which have an impact on the use and enjoyment of the land. Examples of these rights are freehold and leasehold interests, and mortgages and charges held over land.

'Personal' rights to use land of other persons are called licences. 'Licences' are not property rights but instead entitle people to use someone else's land, for example to attend a lecture, to deliver a letter or to view a film on a non-exclusive basis.

Equity

Interests in land can be classified as being either legal or equitable. A legal interest is enforceable against any person. However, an equitable interest (or 'beneficial interest') is only enforceable against certain persons and is not enforceable against a legitimate purchaser of the land who has no notice of such interest.

The concept of land registration

In England and Wales, the title to land is either registered or unregistered. Today the majority of land is 'registered land' whereby title to land is registered at HM Land Registry by being recorded on the register. This provides a statement of the title as it stands at any given time. However, some land remains 'unregistered land', being land where the title is still deduced historically. The title to registered estates and interests in land is guaranteed by the state, and therefore, anyone who suffers a loss because of an error or an omission in the register will normally be paid an indemnity by HM Land Registry. The indemnity will not be paid, however, if the person in question has caused or substantially contributed to the loss he or she has suffered. If the land is registered, and the address is known, it is possible to do an online search of the land register,

which will reveal the existence of any mortgage, the name of the owner(s) and other interests affecting the land.

The Land Registry

HM Land Registry is a government department which has the responsibility for the administration of the land registration system in England and Wales. It is also a 'Trading Fund'. The Chief Land Registrar is responsible for the whole system of registration and is appointed by the Lord Chancellor. He is also the chief executive. The main function of the Land Registry is to keep a register title to land in England and Wales and to record dealings with registered land, on behalf of the Crown. The Land Registry also has responsibility for the functions of the Land Charges Department and the Agricultural Credits Department.

For further information, see www.landregistry.gov.uk.

Land Registration Act 2002

The land registration system in England and Wales has a long legislative history and was originally established in the nineteenth century. It was later subject of wide-ranging legislative changes introduced by the Land Registration Act 1925. On 13 October 2003, the Land Registration Act 2002 came into force, replacing all earlier legislation on land registration. The Land Registration Act 2002 has made substantial changes to land registration the purpose of which was to simplify the conveyancing process and to introduce electronic and paper-free conveyancing. Its stated purpose is to create a register which is a complete and accurate reflection of the state of the title at any given time. The main changes brought about by the act are as follows:

- The development of an electronic conveyancing system in order to create a framework within which title to and interests in registered land can be created and transferred. This has not as yet been fully implemented.

- The streamlining of conveyancing transactions.
- The increase of the range of interests that can or must be registered.
- The decrease in the number of interests that can exist off the register.
- The creation of better protection for registered owners against claims for adverse possession.
- The replacement of documents with an electronic database accessed on the Internet.

The land registration system in England and Wales is to be contrasted with the 'Torrens system' introduced into South Australia in the mid-nineteenth century and subsequently followed in other countries. The system as it developed in this country aimed to simplify the rules of conveyancing instead of making substantive changes to the rules of law. There is less significance in the distinction since the Land Registration Act 2002.

Registered land

Legislation
Land Registration Act 2002

Registered title

The register of title is itself proof of title to the land and of all the incumbrances, such as third-party rights, affecting that registered title, other than overriding interests. The legal title to the land does not pass until the transfer is registered. The registered proprietor does not possess a physical document of title – the register itself is conclusive as to the state of the title. The register of title is an open public document which can be inspected by anybody and can be accessed online on payment of a fee.

The Land Registration Act 2002 provides for first registration of an unregistered legal estate in land and for registration on dispositions of the registered estate in land known as 'registrable dispositions'. First registration can be either voluntary or compulsory. The register is now kept in computerised form

and is available for inspection at www.landregistry.gov.uk on the payment of a fee, although it is still necessary to apply to the Land Registry for an 'official copy' of the register if one is needed.

Classes of title

The applicant for registration is entitled to be registered to one of four classes of title by the Land Registry. The first three classes of these apply to both freehold and leasehold title and the fourth to leasehold titles only.

Absolute

In the case of freehold land, a person may be registered with absolute title if he or she has a good holding or marketable title. This means a title which the registrar considers to be such as a willing buyer could properly be advised by a competent professional adviser to accept. On registration the estate is vested in the proprietor together with all interests subsisting for the benefit of the estate and subject to the entries in the register. Registration is also subject to any overriding interests that override first registration, such as a legal easement or profit a prendre, a local land charge or a franchise, together with any interest acquired under the Limitation Act 1980 of which the proprietor has notice. In the case of leasehold property, the registered estate is subject to implied and express covenants, obligations and liabilities incident to the estate.

Qualified

A qualified freehold title is rare. It has the same effect as registration with absolute freehold title, except that the title is subject to some defect or right that is specified in the register. Examples

of this arise where the applicant has deduced a root of title that is less than 15 years old, or at some point a disposition of the land has been made in breach of trust. A qualified leasehold title has the same effect as a registration with either absolute or good leasehold title, except for the specified defect in title.

Possessory

The registrar may register a person with possessory title where two conditions are satisfied. First, the person must be in actual occupation of the land or in receipt of rents and profits. Second, there must be no other title with which the person could be registered. Registration with a possessory title has the same effect as a registration with absolute title, except that it does not affect the enforcement of any estate, right or interest that is adverse to, or in derogation of, the proprietor's title if that estate, right or interest subsisted at the date of first registration or was then capable of arising. This could arise, for instance, when someone had been wrongly registered with a possessory freehold title when he or she should have been registered with possessory leasehold title.

Leasehold

A person may be registered with a good leasehold title if he has a good holding title. This means one which the registrar considers to be such as a willing buyer could properly be advised by a competent professional adviser to accept. It has the same effect as registration with an absolute title except that it does not affect the enforcement of any estate, right or interest that is adverse to, or in derogation of, the title of the lessor to grant the lease.

Unregistered interests which override first registration

Legislation

Schedules 1 and 3 to the Land Registration Act 2002

Rights in land, such as easements and restrictive covenants, must be entered on the register as registered protected interests in order to bind the purchaser. However, there are categories of rights which automatically bind the new owner on first registration as the case may be the disposition of a registered estate without being entered on a register. These rights are termed 'unregistered interests which override' (Schedules 1 and 3 LRA 2002).[3] The most important overriding interests are as follows:

- Leases granted for 7 years or less which are not required to be registered;
- Interests of persons in actual occupation;
- Certain legal easements and profits a prendre such as:
  - Customary and public rights;
  - Certain mineral rights;
  - Local land charges;
- Franchises seigniorial and manorial rights;
- Rights in respect of embankments and sea walls.

For further information, see www.landregistry.gov.uk.

Unregistered land

Legislation

Land Registration Act 2002
Law of Property Act 1925

Unregistered conveyancing applies where title has not yet been registered at HM Land Registry or cannot be registered.

[3] On 13 October 2013 the following overriding interests lost their overriding status unless an application for a caution is lodged or an application for an entry in the register of a notice was made before the end of the period of 10 years from 13 October 2003:

- A franchise
- A manorial right
- A right to rent that was reserved to the Crown on the granting of any freehold estate (whether or not the right is still vested in the Crown)
- A non-statutory right in respect of an embankment or sea or river wall
- A right to payment in lieu of title ('corn rent')

Title to unregistered land is deduced by producing to the prospective purchaser the records of past transactions relating to the land in question, for example previous sale transaction, mortgages and grants of probate. The purpose of the deduction of good title is to demonstrate to the purchaser that the vendor owns the land and that in entering a contract for sale can make good title to the whole of the legal and beneficial interest in the fee simple free from encumbrances. He or she also provides the purchaser with the opportunity to investigate the title and see whether, for example, there are any beneficial interests by which he or she would be bound if he made no such inquiries. The period for deduction of title is at least 15 years unless agreed otherwise. The title must start from a document referred to as a 'good root of title', which means a document which contains nothing which will throw any doubt on the title being deduced. Such a document needs to identify the land sufficiently, and indicates the whole of the legal and beneficial interest to be sold. Usually only a document which is more than 15 years old will suffice. An example of such a document is a conveyance on sale or a legal mortgage.

In unregistered conveyancing, the doctrine of notice is of relevance. It is a fundamental rule that a purchaser for value of a legal estate without notice has an absolute defence against the claims of any prior equitable owner or incumbrancer. Notice can be actual or constructive. In the case of registered land this doctrine virtually plays no part.

For further information, www.lawcom.gov.uk.

Licences

Legislation

Housing Act 1988
Land Registration Act 2002
Leasehold Reform, Housing and Urban Development Act 1993
Rent Act 1977

Key cases

Gillett v Holt[4]
Gray v Taylor[5]
Jennings v Rice[6]
Ives v High[7]
Street v Mountford[8]
Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd[9]
Winter Garden Theatre (London) Ltd v Millennium Productions Ltd[10]

A licence is a personal, non-exclusive right to enter and use another's land with that person's permission. It is the description given to those rights to use land that are not full proprietary rights and that therefore can never constitute property rights or bind successors in title. Such rights include a contractor in possession of a construction site, storing goods on a neighbour's land with his permission, an advertising hoarding on the neighbour's wall, going onto a neighbours land to play cricket and other such examples. There are several types of licences.

Bare licence

A bare licence is a licence which is not supported by any contract and includes a gratuitous permission, for example to cross a field or enter a house. Such a licence may be implied or expressly given. A bare licence can be revoked at any time.

[4][2000] 2 All ER 289.
[5][1998] 4 All ER 17.
[6][2002] WTLR 367.
[7][1967] 1 All ER 504.
[8][1985] AC 809.
[9][1982] QB 133.
[10][1948] AC 173.

Contractual licence

A contractual licence is a licence for consideration and will be made under the terms of a contract which limits the licensor's right to cancel it. An example is a ticket holder at a football match. A contractual licence, however, can be revoked depending on the terms of the contract.

Licence coupled with an interest

A licence coupled with an interest is a licence to enter the land coupled with the grant of a recognisable interest in property. An example is when a person has the right to enter land belonging to another and cut down a tree and take it away or to hunt and take away deer. A licence coupled with an interest cannot be revoked and is assignable.

Leases

Legislation

Commonhold and Leasehold Reform Act 2002, particularly ss168 and 169
Housing Act 1996
Land Registration Act 2002
Law of Property (Miscellaneous Provisions) Act 1989: s2
Leasehold Reform Act 1967
Rent Act 1977

Key Cases

A G Securities Ltd v Vaughan[11]
Antoniades v Villiers[12]

[11] [1988] 2 All ER 1058.
[12] [1988] 3 WLR 1205 (HL).

Bruton v London and Quadrant Housing Trust[13]
Kay v Lambeth LBC[14]
Prudential Assurance Co Ltd v London Residuary Body[15]
Street v Mountford[16]

A lease is a contract under which an owner of a property (lessor) grants another person (the lessee) the right to the use and occupy the property or land for an agreed period in return for a rent or sum. The lessee must have exclusive possession of the property. If possession is not exclusive it is not a lease but it may be a licence. An estate so created is referred to as a 'term of years' but is more commonly known as a 'lease' or 'leasehold interest'. A lease is for a definite period which can be a fixed term or a way of a periodic tenancy. A lease may be created as a legal lease by fulfilling the correct formalities. A lease can be terminated by expiry on effluxion of time, by notice or by forfeiture.

The essentials of lease

- The tenant must have a right to the exclusive possession of certain land.
- The lease must be for a period that is definite or is capable of definition.
- The period must be less than that held by the grantor/landlord.

Co-ownership

Legislation
Land Registration Act 2002

[13] [1999] 3 All ER 481.
[14] [2006] 2 WLR 570.
[15] [1992] 3 WLR 279.
[16] [1985] AC 809.

Law of Property (Joint Tenants) Act 1964
Trusts of Land and Appointment of Trustees Act 1996

Key cases

Abbey National Building Society v Cann[17]
Abbey National Bank PLC v Stringer[18]
City of London Building Society v Flegg[19]
Lloyds Bank v Rosset[20]
Oxley v Hiscock[21]
Stack v Dowden[22]
Williams & Glyn's Bank Ltd v Boland[23]

Co-ownership is where a person is entitled to hold and enjoy the same land concurrently with two or more persons for the same interest at the same time. There are two types of co-ownership today: the joint tenancy and the tenancy in common. Where there is co-ownership of land the legal estate is held on a trust of land governed by the Trusts of Land and Appointment of Trustees Act 1996. If the land is registered it will be registered in the names of the trustees of the land as the registered proprietors of the legal estate for and on behalf of the beneficiaries of the trust. Tenancies in common can only exist in equity.

Sole ownership

Sole ownership is where a person is entitled to hold land in his or her own right without any other person being joined with him or her. He or she is said to hold the land in severalty (i.e. land held by an individual not joined with others).

[17] [1991] 1 AC 56.
[18] [2006] EWCA Civ 338.
[19] [1988] AC 54.
[20] (1990) 1 All ER 1111.
[21] (2004) 2 All ER 703.
[22] [2007] UKHL 17.
[23] [1981] AC 487.

Successive co-ownership

Successive co-ownership is where an original owner known as the settlor enables a succession of persons to hold the land for their respective lives in turn. It is now mainly of historic interest.

Joint tenancy

A joint tenancy can only exist if there are four unities present between the co-owners. These are the unities of possession, interest, title and time. The defining feature of a joint tenancy is that on the death of a joint tenant his interest in the land passes automatically to the surviving joint tenants. This is known as the right of survivorship (or *jus accrescendi*). The following are the four unities:

- Unity of Possession: All co-owners must be equally entitled to possession of the whole land.
- Unity of Interest: Interests must be the same in extent, nature and duration.
- Unity of Time: Interests must all be vested at the same time.
- Unity of Title: The title must be acquired under the same act or document.

Tenancy in common

Tenants in common hold the land in undivided shares; that is, each has a specific share of the land. There is no right of survivorship. On the death of a tenant in common, his or her undivided share will pass according to his or her will. Only the unity of possession is necessary for a tenancy in common. Without the unity of possession there would not be co-ownership.

Trust

The following are the general classifications of trusts:

- Those imposed by statute
- Express trusts
- Implied trusts
- Resulting trusts
- Constructive trusts.

A trust imposed by statute (also known as a 'statutory trust') is that arising under a particular statute, for example when an attempt is made to convey a legal estate to a minor. An express trust is that declared by the settlor. 'Three certainties' must be present: imperative words, certainty of subject matter and certainty of objects. An implied or resulting trust arises from the presumed intention of the settler or the parties whose conduct leads to its creation. Such a trust is not imposed by law. There is no easy definition of a constructive trust. This classification is in the nature of a residual category imposed by operation of law into which trusts which do not fall into the other categories are fitted. An example arises where an existing trustee of a trust obtains an interest in the trust property for him- or herself. The trustee then holds it in a constructive trust for the beneficiaries.

Fixtures

Whether a particular item is a fixture can be important in the circumstances when a person conveys land to another and they also convey all fixtures, except those which have been expressly excluded from the sale. Fixtures are those objects which have become so fixed to the land that they are treated, in law, as part of the land itself. The general rule is summed up in the Latin phrase 'quicquid planatur solo, solo cedit' (whatever is attached to the land becomes part of it).[24] Fixtures

[24] *Minshall v Lloyd* [1837] 2 M & W 450.

are to be contrasted with fittings (chattels), which are objects which retain their character as personal property.

Therefore, if a building is erected on land and objects are permanently attached to the building, then the soil, the building and the objects affixed to it are fixtures and are therefore the property of the owner unless conveyed or granted. They are not fittings. Whether an article is a fixture or a fitting depends on two tests:

- The degree of annexation
- The purpose of annexation.

Therefore, unless an item is physically attached to the land it will on a general basis not be considered to be a fixture. If materials for construction are attached to the property or land they will become the property of the freeholder owner. Buildings are generally regarded as part of the land unless the building has been constructed in such a way as to be removable. In the case of *Elitestone Ltd v Morris*,[25] the House of Lords held that a bungalow on concrete foundation blocks was part of the land and therefore a fixture. However, in *Potton Developments Ltd v Thompson*[26] a prefabricated building was held to be a fitting (chattel).

Examples of fixtures or fittings

- Fireplaces, panelling and conservatories on brick foundations will prima facie be fixtures; see *Buckland v Butterfield*.[27]
- Objects such as statutes are free-standing and likely to be fixtures but only if they are regarded as an integral part of the architecture; see *D'Eyncourt v Gregory*[28] or *Berkley v Poulett*,[29] where a heavy statue was not regarded as part of the land because it was not fixed to the land.

[25](1977) 1 W.L.R 687.
[26](1988) N.P.C 49.
[27](1820) 2 Brod. & B.54.
[28][1866] L.R. 3 Eq. 382.
[29](1976) 241 EG 911.

- If a greenhouse or temporary shed is fixed to land it will be a fixture; see *Webb v Frank Bevis*.[30]
- Items such as a "Dutch barn" which rest on the property by their own weight are likely to be regarded as fittings; see *Wiltshear v Cottrell*.[31]
- In *Holland v Hogson*,[32] it was held *obiter* that a pile of stones without any mortar in a builder's yard lying on the ground was not a fixture, but the same pile of stones constructed as a dry-stone wall was part of the land.
- Television aerials are commonly attached to property and are likely to be fixtures.
- Fitted carpets and curtains which can easily be removed are likely to be seen as fittings; however, bathroom fittings and certain fitted kitchen items may be regarded as fixtures; see *Botham v T.S.B Bank plc.*[33] Items that are integrated into the structure of the building such as patio lights may be fixtures; see *Hamp v Bygrave.*[34]

Easements

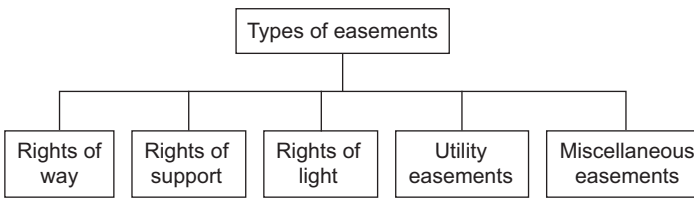

Figure 4.1 Types of easements

Legislation

Access to Neighbouring Land Act 1992
Commons Act 2006

[30] [1940] 1 All ER 240.
[31] (1853) 1 E. & B. 674.
[32] (1872) LR 7 CP 328.
[33] [1997] 73 P & CR D.1.
[34] [1982] 266 EG 720.

Land Registration Act 2002
Rights of Light Act 1959
Prescription Act 1832

Key cases

Re Ellenborough Park[35]
Hill v Tupper[36]
Mulvaney v Gough[37]
MRA Engineering Ltd v Trimester Corp[38]
P & S Platt Ltd v Crouch[39]
Phipps v Pears[40]
Saeed v Plustrade Ltd[41]
Ward v Kirkland[42]
Wheeldon v Burrows[43]
Wong v Beaumont Property Trust[44]

An easement[45] (see Figure 4.1) is a right which one landowner has over the land of another. An easement must burden one parcel of land – termed the 'servient' land (also known as the 'servient tenement') for the benefit of another parcel of land – termed the 'dominant' land (also known as the 'dominant tenement'). Thus, the dominant tenement means property benefiting from the easement, and a servient tenement means property burdened by the easement. An easement cannot exist if the same person owns and occupies both the dominant land and the servient land at the same time. One cannot have an easement over one's own land.

[35] [1956] Ch 131.
[36] (1863) 2 H & C 121.
[37] [2003] 1 WLR 360.
[38] [1988] P & CR 1.
[39] [2004] 1 P & CR 18.
[40] [1965] 1 QB 76.
[41] [2001] EWCA Civ 2011.
[42] [1967] Ch 194.
[43] (1879) 12 Ch D 31.
[44] [1965] 1 QB 173.
[45] Known in Scottish law as 'servitudes'.

Easements can have far-reaching consequences on the design of a project. The Land Registry states that at least 65 per cent of freehold titles are subject to one or more easements and that 79 per cent are subject to one or more restrictive covenants.[46] Examples of easements are rights of way, rights of light, rights of drainage, rights of support of buildings and rights to have fences maintained.

An easement can be positive, or negative. A positive easement allows a landowner to go onto or make use of some installation on his or her neighbour's land. This could be a right of way providing access (vehicular, pedestrian, or both), or a right to draw water). It could be a right to install and use a pipe or a drain. A negative easement is a right to receive something from land owned by another without obstruction or interference, for example a right of support or a right to receive light.

However, the categories of easements are not closed provided that the characteristics for their existence are fulfilled. An easement cannot be created, whether expressly, impliedly, or by prescription, unless at the time of its creation there is a person capable of creating it (a capable grantor) and a person capable of benefitting from it (a capable grantee). An easement can also arise by statute. Where both parcels of land are owned by the same person but one parcel is occupied by a tenant an easement can be granted by the owner to the tenant of that parcel.

An easement is to be distinguished from other forms of rights over land or interests in land. A landowner may grant a multitude of rights or interests over his or her land. Examples of these are leases, licences, profits a prendre, public rights and restrictive covenants. An easement permanently binds the land over which it is exercisable. When a person acquires an easement he or she becomes the owner of a legal interest in the

[46]The Law Commission Consultation Paper (2008), available from: www.lawcom.gov.uk/easements.htm (accessed on 7 July 2010).

land of another and can enforce it against all comers. It passes with the land on transfer. A lesser interest, such as a licence, is a personal contractual right which cannot be enforced against the grantor's land or any subsequent owners.

Rights of way

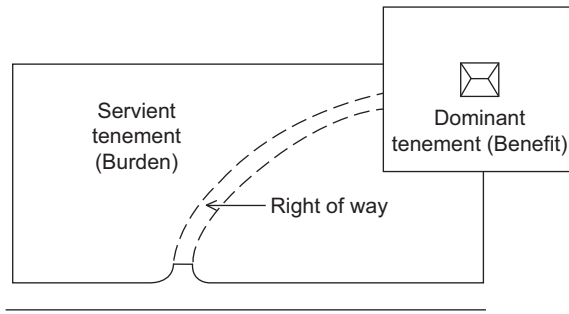

Figure 4.2 Rights of way

A right of way (see Figure 4.2) is a legal interest giving the right for one person to use or pass over land owned by another person for a defined purpose. The extent of the easement depends on the manner of its acquisition. A right of way can be for all purposes, that is for vehicular and pedestrian user at all times; limited to a particular user, that is for a pedestrian only; or to the time of day. It can also be limited to a particular type of use, for example a right to load or unload vehicles (see *London and Suburban Land and Building Co. [Holdings] Ltd v Carey*).[47]

There are common law rights safeguarding against one party, for example digging up the right of way. If one party obstructs the right of way in this fashion, then the other party has a course of action in nuisance and could seek an injunction.

[47] (1991) 62 P. & C.R.480.

Rights of support

There is no natural right of support per se. However, a right of support can exist where the owner of the dominant tenement has the right to have buildings on his or her land supported by those on the servient tenement, for example in the case where one building relies on another for support, such as semi-detached or terraced houses. It is possible for one building to acquire an easement of support against another after a period of 20 years' prescriptive use. In the case of *Dalton v Angus & Co*.[48] one of two adjoining dwelling houses was converted into a coach factory. The owners of the adjoining house then demolished their property and excavated the ground below the foundations of the adjoining coach house, which consequently brought the whole property down. It was held by the House of Lords that a right of support could be acquired by prescription. Thus, if an adjoining owner causes damage by excavation to a neighbouring land he or she is liable for that action (see *Redland Bricks Ltd v Morris*[49]). If the owner of adjoining land causes neighbouring land to subside he or she is liable for that action, and where there are successive subsidences each one is separately actionable (see *Darley Main Colliery v Mitchell*[50]).

Rights of lights

Legislation

Prescription Act 1832
Rights of Light Act 1959

[48] [1881] 6 App. Cas. 740.
[49] [1970] A.C.652.
[50] (1866) 11 App. Cas. 127.

Key cases

Midtown Ltd v City of London Real Property Company Ltd[51]
Regan v Paul Properties Ltd & Ors[52]
Shelfer v City of London Electric Lighting Company[53]
Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd[54]
City Inn (Jersey) Ltd v Ten Trinity Square Ltd[55]

A right to light is an easement whereby a building has the right to receive sufficient natural light through defined apertures, to allow a building to be used for its ordinary purpose, for example through glazed doors, windows and skylights. It may be expressly created by deed, implied by law or acquired by prescription. Where a right to light exists English law provides building owners with an entitlement to 'sufficient light according to the ordinary notions of mankind' (*Colls v Home & Colonial Stores Ltd.*).[56] The test for what is sufficient light is uncertain; however, a court will regard all relevant circumstances and facts in each case.

Prior to commencing a development, it is important to ascertain that no neighbouring buildings have acquired a right to light that may be obstructed and that the development proposal do not leave neighbouring buildings with inadequate light. To establish an easement of light, there must be actual enjoyment of the right without interruption for 20 years. A right to light is usually acquired under the Prescription Act 1832. Under this act a right to light arises once light has been enjoyed through defined apertures of a building for an uninterrupted period of 20 years. One of the most common disputes arises where an extension to the rear of a residential property blocks the light to a window on the side of a neighbouring building. Under the Rights of Light Act 1959 it is possible to issue a Light Obstruction Notice to the

[51] [2005] EWHC 33 (Ch).
[52] [2006] EWCA Civ 1391.
[53] [1895] 1 Ch 287.
[54] [2007] EWHC 212 (Ch).
[55] [2008] EWCA Civ 156.
[56] [1904] AC 179.

owners of neighbouring buildings where the period of prescription has expired or prevent a right of light from being acquired.

For further information see Anstey (2006), Royal Institution of Chartered Surveyors (2010) and Francis and Bickford-Smith (2007).

Utility easements

There are a number of types of utility easements:

- A storm water easement to carry rainwater to a river, a pond or a watercourse;
- A sanitary sewer easement to carry used water to a sewage treatment plant;
- An electrical power line easement;
- A telephone line easement;
- A fuel gas pipe easement.

Miscellaneous easements

There are a number of miscellaneous easements:

- To fix a signboard above a neighbouring house; see *Moody v Steggles.*[57]
- To use a wall to support a creeper plant; see *Simpson v Weber*.[58]
- To park a car provided that it is appurtenant to a dominant tenement and the right is not so excessive so as to exclude the servient owner without any use of the parking area; see the Scottish case of *Moncreiff v Jamieson*,[59] and see *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd*[60] and *Saeed v Plustrade Ltd.*[61]

[57] (1879) 12 Chd.261.
[58] (1925) 133 L.T. 46.
[59] [2007] 1 WLR 2620.
[60] [1993] 4 All ER 157 (CA).
[61] [2001] EWCA Civ 2011.

- To use a letter box; see *Goldberg v Edwards.*[62]
- To use a lavatory in common between a lessor and lessee and others; see *Miller v Emcer Products*.[63]
- To use the land of another to store goods; see *Att-Gen of Southern Nigeria v John Holt and Company (Liverpool) Ltd.*[64]
- To keep chicken coops on a common; *see Smith v Gates*.[65]

Identifying an easement: the four essential characteristics of an easement

For an easement to exist it must possess four separate characteristics, or elements, as identified in *Re Ellenborough Park*:[66] All four characteristics must be present if a right is to be an easement.

1. There must be a dominant tenement (benefit) and a servient tenement (burden)

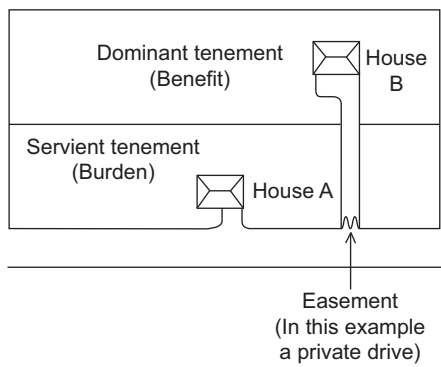

Figure 4.3 An example of dominant and servient tenements

[62] [1950] Ch. 247.
[63] [1956] Ch. 304.
[64] [1915] AC 599.
[65] [1952] CPL 814.
[66] [1956] Ch. 131.

This requirement means that every easement is, in principle, linked with two parcels of land, its benefit being attached to a 'dominant tenement' and its burden being asserted against a 'servient tenement'; that is, there must be two separate parcels of land.

2. The easement must accommodate the dominate tenement

The right claimed must be 'reasonably necessary for the better enjoyment' of the dominant tenement in that it must be connected with and facilitates the normal enjoyment of that land (see *Re Ellenborough Park* at p 170, Evershed MR). The dominant and servient properties need not be contiguous the plots of land in question must be sufficiently close to one another for an easement to be effectively created. In *Moody v Steggles*,[67] the grant of a right to fix a signboard to the adjoining property advertising the public house, which constituted the dominant tenement was held to give rise to an easement. In *Copeland v Greenhalf*,[68] leaving carts and carriages on the neighbour's verge was not objectionable on the grounds that it accommodated the wheelwright's business being conducted on the dominant land.

It is generally accepted that an easement cannot give to the dominant owner 'exclusive and unrestricted use of a piece of land' it is a question of degree of use. In *Copeland v Greenhalf*,[69] a claim made by a wheelwright to a prescriptive easement to use a strip of land belonging to the defendant failed. It being adjacent to a roadway, the wheelwright wanted to store his customers' vehicles there, which were awaiting and undergoing repair and awaiting collection following their repair. It was said by the judge that the claim amounted virtually to a claim for possession of the servient tenement.

[67] (1879) 12 Ch. D 261, 266.
[68] [1952] Ch. 488.
[69] Ibid.

3. The dominant tenement and the servient tenement must be owned or occupied by different persons

The third essential characteristic of an easement identified in *Re Ellenborough Park* is that the owners of the dominant and servient estates must be different persons. In other words, 'a man cannot have an easement over his own land'. An easement ceases to exist if the dominant and servient tenements come into the ownership and possession of the same person – there cannot be unity of ownership and possession. Not only does this mean that an easement cannot be created where the dominant and servient estates are in common ownership, but it also results in automatic extinguishment of the easement in the event of the estates coming into common ownership.

4. The easement must be capable of forming the subject matter of a grant

This means the nature and extent of the easement must be capable of exact description. Its sphere of operation must be certain and precise and cannot be vague or indeterminate.

This characteristic has three elements:

There must be a capable grantor and grantee. The servient owner must be fully able to grant an easement. A mortgage affecting the servient land may limit the grantor's power to make the grant unless the consent of the mortgagee is obtained. Likewise, the dominant owner must have the power to accept the grant of an easement.

The right must be sufficiently defined. In *Chaffe v Kingsley*[70] a claim to a right of way failed because the conveyance that 'granted' the right was not specific enough to identify the area of land affected. A general grant of a right of light is not sufficiently defined to constitute an easement, whereas a right of light through a specific

[70] [2000] 79 P & CR 404.

window can be an easement; see *Colls v Home & Colonial Stores Ltd*.[71]

The right must be within the general nature of rights capable of existing as easements. Most easements fall into one of the recognised categories of easements such as rights of way, drainage or support. Others have been added to the list, such as the right to use a neighbour's lavatory (see *Miller v Emcer Products Ltd*), or a right of storage as in the right to store coal in a shed; see *Wright v Macadam*.[72]

Extinguishment of easements

There are several means whereby extinguishment of easements may currently take place:

- By statute;
- By the exercise of statutory powers (typically, following compulsory purchase of land);
- By express release (for example, by deed executed by the owners of the dominant and servient estates);
- By implied release (that is by abandonment or by excessive use);
- Where the dominant and servient estates come into the same ownership and possession;
- On termination of the estate to which the easement is attached.

Adverse possession

Legislation

European Convention on Human Rights – Art 1, First Protocol – Protection of Property

[71] [1904] AC 179.
[72] [1949] 2 KB 488.

Land Registration Act 2002
Limitation Act 1980
Town and Country Planning Act 1990

Key cases

J A Pye (Oxford) Ltd v *Graham*[73]
Lambeth LBC v *Blackburn*[74]
Purbrick v *Hackney LBC*[75]
Pyx Granite Co Ltd v *Minister of Housing & Local Government*[76]

Within most legal systems a process exists whereby a person who has been in continuous but unlawful possession of somebody else's land for a specific period can then acquire title to that person's land. 'Adverse possession' is the phrase used for that process in England and Wales – it is also referred to as 'squatters' rights'. It is based on the consideration that if a person (or 'squatter') meets certain requirements regarding adverse possession of the land of another for more than 12 years, the courts will accept that person as the new owner. In such circumstances in so far as unregistered land is concerned 12 years is the period prescribed by Section 15(1) of the Limitation Act 1980, and the 'paper title' owner holds the land on trust for the adverse possessor.

There are policy reasons for allowing squatters to be deemed to be the true owners of land in this way. Such reasons are as follows:

- To avoid an injustice in allowing the 'paper title' owner to commence proceedings at any time for the recovery of his land against a squatter, and thus to avoid 'stale' claims;
- To protect those who have innocently encroached on the land of another from the indefinite threat of an action for recovery;

[73] [2003] 1 AC 419.
[74] [2001] 33 HLR 74.
[75] [2004] P & CR 553.
[76] [1958] 1 QB 554.

- To ensure that there is always someone in possession who is able to deal with land.

At the outset, there is the presumption that the paper title owner is in possession of land. To establish adverse possession the squatter must prove that he has both factual possession and the requisite intention to possess. The leading case on the subject is *J A Pye (Oxford) Ltd v Graham.*[77] In this case the House of Lords held that where licensees had remained in possession for more than 12 years after the expiry of their licence, they had acquired title by adverse possession as these two requirements had been made out. Once possession adverse to the true owner has been established then there is an accrual of the true owner's cause of action, and he or she has 12 years to pursue the recovery of his land. If he or she fails to do so within that period, then the adverse possessor is deemed to be the true owner and the previous owners title is extinguished. The squatter acquires an indefeasible title to the land.

In so far as registered land is concerned the position has been substantially modified following the enactment of the Land Registration Act 2002. Since 13 October 2003, adverse possession of a registered estate does not affect the title of the registered proprietor as the title itself once registered is perceived as being indefeasible and as guaranteed by the state. The register is the title. However, after 10 years of possession the adverse possessor may apply to be registered and notice is given to the registered proprietor. If the registered proprietor objects, the application will be rejected, except on very limited grounds. If the application is rejected then within two years the registered proprietor has to take steps to evict the adverse possessor or otherwise legitimise his position. If the true owner fails to do this then the squatter can reapply and his application will be successful unless he has not remained in adverse possession during that two-year period.

For further information, see Jourdan and Radley-Gardner (2011).

[77] [2003] 1 AC 419.

Restrictive covenants

Legislation

Commonhold and Leasehold Reform Act 2002
Land Registration Act 2002
Land Charges Act 1972
Town and Country Planning Act 1990

Key cases

Federated Homes v Mill Lodge Properties Ltd[78]
Whitgift Homes Ltd v Stocks[79]
Crest Nicholson v McAllister[80]
Graham v Easington District Council[81]
London County Council v Allen[82]
Martin v David Wilson Homes Ltd[83]
Jarvis Homes Ltd v Marshall[84]

Restrictive covenants are agreements entered into by owners of land which limit the use of land or activities on it. They are essentially negative in that they place restrictions on the development or use of land which are binding for successive owners, for the benefit of another piece of land, and they are enforceable by one landowner as a burden against another. A restrictive covenant may prevent or restrict the use of land for a particular purpose which would otherwise disturb neighbouring landowners. Such agreements may override any planning permission obtained and will need to be discharged or modified before the permission can be implemented. Crucially, the granting of planning permission does *not* remove or modify any existing restrictive covenants. This is an example of the competing aspects of rights over land as opposed to use of

[78] [1980] 1 WLR 594.
[79] [2001] 1 All ER D 309.
[80] [2004] EWCA Civ 410.
[81] [2008] EWCA Civ 1503.
[82] [1914] 3 KB 642.
[83] [2004] EWCA Civ 1027.
[84] [2004] EWCA Civ 839.

land imposed by planning control. So, permission to build is meaningless if a neighbour has a covenant against building which he or she refuses to release. With more development taking place on brownfield sites and more infilling of larger plots, disputes concerning restrictive covenants are likely to occur more regularly, for example on the sale of land for development.

The following are common examples of restrictive covenants:

- To restrict residential development;
- To restrict the erection of any other building or structures on the land;
- To restrict the use of the land for any business activity.

If the land concerned is registered at the Land Registry, details of these restrictions will appear on the register applicable to that particular land, or at the Land Charges Registry in the case of unregistered land. A restrictive covenant has to be registered to be enforceable. Thus, the person with the benefit of the covenant must have registered the benefit at the Land Registry or the Land Charges Registry.

For a covenant to be enforceable against subsequent owners of burdened land, the following are necessary:

- It must be restrictive.
- It must 'touch and concern the land'.
- The land benefiting from the covenant must be identifiable.

A key feature of restrictive covenants is that they bind not only the original parties but also successors in title. When a landowner is faced with the burden of a restrictive covenant there are, therefore, a number of issues to consider before a decision can be made as to whether the covenant affects the land. In particular he or she must consider the following:

- The extent of the land affected by the covenant;
- The identity of the person who has the benefit of the covenant;
- Whether the covenant has been properly protected by registration under the Land Registration Act 2002, or the Land Charges Act 1975;

- Whether the benefit of the covenant has passed to subsequent owners;
- What the true construction of the covenant is.

Advice must be sought in relation to both local authority planning and the effect of any relevant restrictive covenants. Undertaking development works in ignorance of restrictive covenants, even in accordance with planning permission, could result in the other person instigating proceedings in the courts, being entitled to enforce that restriction.

Modifying or discharging a covenant

The Upper Tribunal (Lands Chamber) has power in certain circumstances, under Section 84 of the Law of Property Act 1925, to modify or discharge restrictive covenants where the original purpose of the covenant has over time become inappropriate. An application can be made on one or more of the following grounds:

- Changes in the character of the property or of the area since the covenant was imposed render the covenant obsolete.
- The covenant impedes the reasonable use of the property.
- The modification has been agreed by those with the benefit of it.
- It will not injure the persons with the benefit of the covenant.

Party walls

Legislation

The Party Wall etc. Act 1996

Key cases

Crowley Civil Engineers v Rushmoor Borough Council[85]
Roadrunner Properties Limited v John Dean and ors[86]

[85] [2010] EWHC 2237 (TCC).
[86] [2003] EWCA Civ 1816.

Dean v George Doyle Walker[87]
Phipps v Pears[88]
Andreae v Selfridge & Co[89]

What is a party wall?

In England and Wales there often exist boundary walls dividing adjoining properties. Sometimes such a wall may be in the sole ownership of one landowner. In other cases there may be mutual rights over the wall in favour of each adjoining owner. In the latter case they are known as 'party walls' (see Figures 4.4 and 4.5). Although there is no precise definition of the term, a 'party wall' can mean the following:

a. A wall divided longitudinally into equal strips, one half of the thickness belonging to each of the neighbouring owners;
b. A wall divided longitudinally into equal strips, but each strip being the subject of a cross easement, such as an easement of support, in favour of the owner of the other strip;
c. A wall belonging in its entirety to one owner, but subject to an easement in favour of the other owner to have it maintained as a dividing wall.

The usual position (and reflecting the earlier common law presumption) is that although a party wall can no longer be owned in common, it is owned longitudinally with each party having an easement in support over the property of the other.

When does the Party Wall etc. Act 1996 apply?

- Where an owner of land wishes to build on the boundary line with an adjoining property and there is no existing party structure (Section 1);

[87] [1996] EWCA Civ 505.
[88] [1965] 1 QB 76 (CA).
[89] [1938] Ch 1.

- Where an owner wishes to carry out work to an existing party structure (Section 2–5);
- Where an owner wishes to carry out certain works of excavation near to a building or other structure of an adjoining owner (Section 6).

What is a party structure?

A 'party structure' means a party wall and also a floor partition or other structure separating buildings or parts of buildings approached solely by separate staircases or separate entrances.

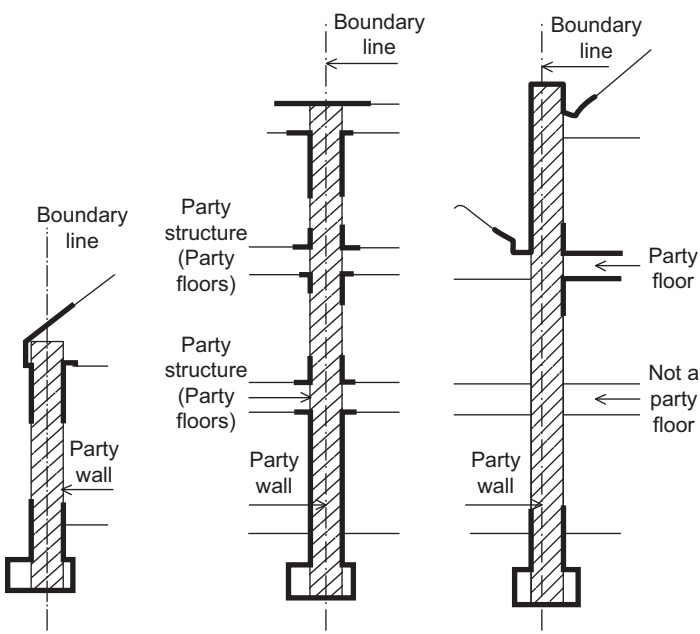

Figure 4.4 Example of a party wall – definition (a)

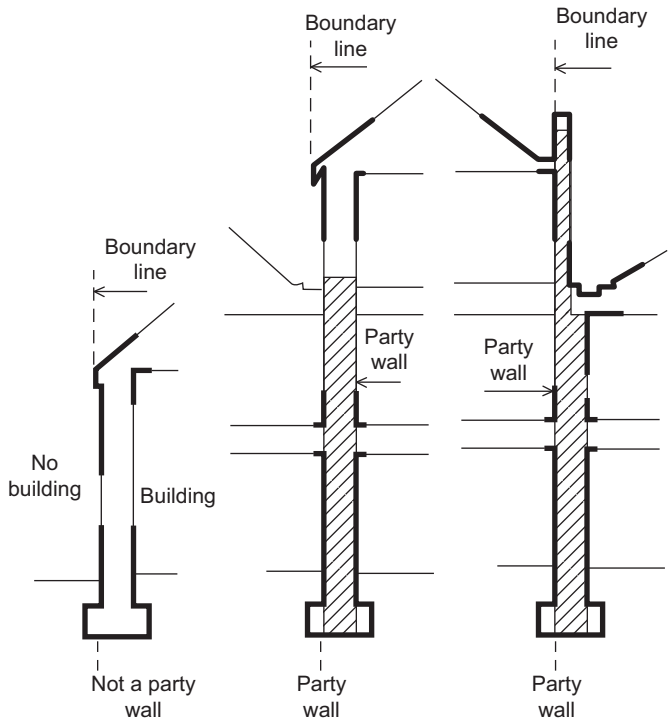

Figure 4.5 Example of a party wall – definition (b)

What is a party fence wall?

A 'party fence wall' means a wall (not being part of a building) which stands on lands of different owners and is used or constructed to be used for separating such adjoining lands. It does not include a wall constructed on the land of one owner the artificially formed support of which projects into the land of another owner.

What is the Party Wall etc. Act 1996?

In inner London and in other areas of England and Wales, since the nineteenth century some form of local party wall legislation

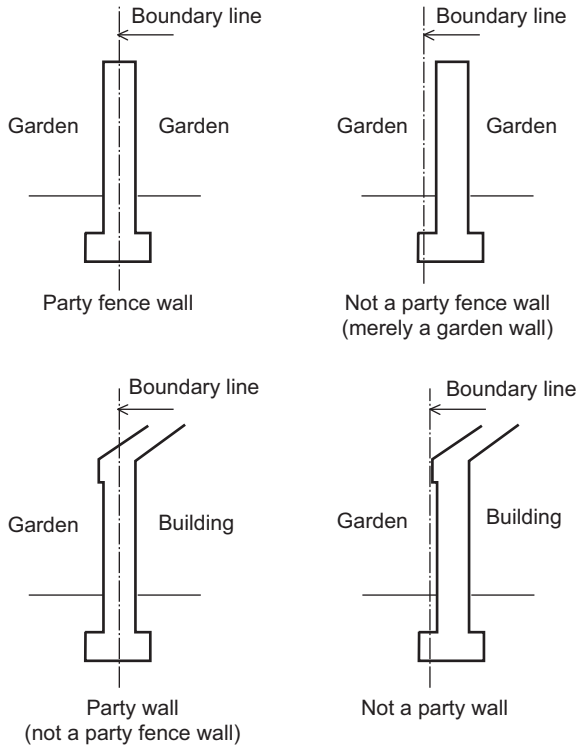

Figure 4.6 Definition of a 'party fence wall' as defined in Section 20 of the Party Wall etc. Act 1996

has existed.[90] In 1996 the Party Wall etc. Act was enacted, which came into force on 1 July 1997. This act has not repealed such local legislation, but it has extended the concept of party wall legislation nationally throughout England and Wales. The act applies throughout England and Wales with the exception of land situated in inner London and in which there is an interest belonging to the four Inns of Court.

[90] Such as the London Building Acts (Amendment) Act 1939, and various nineteenth-century Improvement Acts, for example as the Bristol Improvement Act 1847.

The act defines a party wall in terms of its function, and not in terms of its ownership. For the purposes of the act a party wall is defined to arise in the following circumstances:

- The wall forms part of a building, and the wall itself (and not just its foundations) projects beyond the boundary line into the land of an adjoining owner;
- Where the wall is constructed on the land of one owner but separates buildings belonging to different owners.

These circumstances are described in the act as the 'line of junction'. The act sets out the rights and obligations of building owners for the construction, excavation, repair and alteration of walls and structures. The act also sets out requirements in undertaking building works which affect the building or land of an adjoining owner. It further provides a framework for preventing and resolving disputes in relation to party walls, boundary walls and excavations near neighbouring buildings. The provisions of the act are directed to the following proposed building works:

- Works physically affecting the party wall between two properties;
- Works to an existing party wall, such as taking support for a new beam, inserting damp proof course, underpinning, raising, rebuilding or reducing the wall;
- Excavation and erection of a building or structure which will sit within three metres, measured horizontally from any part of an adjoining building, and extend to a lower level than the level of the bottom of the foundations of an adjoining building or structure;
- Excavation of foundations and erection of a new building or structure within a distance of six metres measured horizontally from any part of an adjoining building and where the work will cut a line drawn downwards at an angle of 45 degrees from the bottom of the neighbour's foundations.

Under the procedures set down in the act if an owner intends to demolish, cut into, thicken, raise or underpin a party wall that owner must give notice of his or her intention to do so

(referred to as a 'party structure notice'), although it is common sense that it is advisable to talk to the neighbours first. The adjoining owner can respond to a party structure notice by serving a counter-notice requiring certain specified works to be undertaken to the party wall. This counter-notice must be served within one month of the original notice, and the adjoining owner is responsible for the cost of the additional work. Each party must appoint a surveyor and enter into a formal agreement, named a Party Wall Award if the adjoining owner disagrees. If the owner on whom a party structure notice or a counter-notice has been served does not serve a notice indicating his or her consent to it with the period of 14 days, then he or she shall be deemed to have dissented to it, and a dispute shall be deemed to have arisen between the parties.

The remedy available to an adjoining owner when a building owner has commenced work to the party wall without serving the appropriate notice is to seek an injunction. However, once works are finished, there is no recourse or penalty under the act if damage is uncovered.

What are special foundations?

'Special foundations' means foundations in which an assemblage of beams or rods is employed for the purpose of distributing any load.

What is the application of the six metre and three metre notice?

Three metre notice: Any activities within three metres horizontally of a structure belonging to an adjoining owner that would involve excavation below its foundations must be notified to the adjoining owner. This applies even to works such as laying drains or inserting piles where the ground is eventually filled in.

Six metre notice: Any activities within six metres horizontally of another owner's structure that involve excavating below a line struck downwards at 45 degrees from the underside of his or her foundations in the plane of the outside face of his or her wall must also be notified.

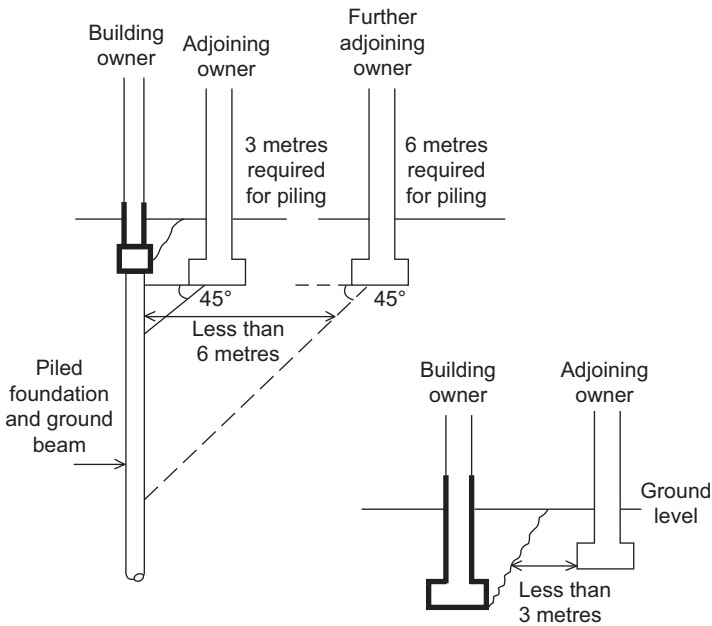

Figure 4.7 Application of the six metre and three metre notices

What is a Party Wall Award?

When a dispute arises or is deemed to have arisen between adjoining owners the two owners should agree to appoint one surveyor to act for both sides known as the 'agreed surveyor') Alternatively, each party shall appoint a surveyor. The two surveyors appointed shall then appoint a third surveyor (referred to as the 'three surveyors'). There various procedures in place in the event of difficulties arising in the appointment process.

Surveyors appointed must take into account the interests of both owners.

The surveyors (the agreed surveyor, the three surveyors, any two of them, or the third surveyor if called on to do so) then draw up and supervise a Party Wall Award. This is a statement determining what work will be undertaken and how and when it will be done. It records the conditions and requirements under which an owner must execute the proposed works. It should include drawings, a schedule of condition, (which describes in detail the state of the wall viewed from the adjoining owner's side), and other working details, together with method statements agreeing the procedure. The award will also specify who pays the construction costs and the surveyors' fees – usually the owner who initiates the work. The award is served on all relevant owners. Once the award is made it is conclusive, and each of the adjoining owners is bound by the award.

However, if the owners believe it has been made incorrectly or improperly they have 14 days in which to appeal against the award to the county court. If the building owner has commenced works and an adjoining owner wishes to appeal against an award then the adjoining owner must lodge an appeal, seek legal advice and obtain an injunction to prevent the proceeding of the works. If there is failure to pay an awarded sum, and the award has not been appealed to the county court, the sum is recoverable through the procedures of the magistrates' court.

What are the Party Wall Notices?

There are three types of notice that a building owner may serve on an adjoining owner to make them aware that he or she intends to carry out work which falls under the scope of the act.

Party Structure Notice

Party Structure Notices are covered under Section 3 of the act and cover alterations to the party wall itself and include

common works such as cutting holes to insert beams and padstones, cutting in flashings and removing chimney breasts.

The notice period is two months, and the following information must be included for the notice to be valid (although it does not have to be on a prescribed form):

- Name and address of the building owner;
- Nature and particulars of the proposed work;
- Date on which the work will begin.

Notice of Adjacent Excavation

Notices of Adjacent Excavation are concerned with works notifiable under Section 6 of the act. There are two types of excavations that are covered under Section 6:

- Excavating within three metres of your neighbour's building and to a depth lower than the bottom of their foundations;
- Excavating within six metres of your neighbour's building, if any part of that excavation intersects with a plane drawn downwards at an angle of 45 degrees from the bottom of their foundations, taken at a line level with the face of their external wall.

The notice must contain the same information as a Party Structure Notice but also plans and sections showing the proposed excavation and a block plan showing the location of the new building or structure.

With each of these types of notices the adjoining owner has 14 days to respond before they are automatically deemed to be 'in dispute' and obliged to appoint a party wall surveyor.

Line of junction notice

This is the least common of the notices and is served under Section 1 of the act and again covers two distinct tasks:

- The construction of a new wall adjacent to a boundary;
- The construction of a new wall astride a boundary.

The notice period is one month.

If the adjoining owner does not respond to a Section 1 notice relating to a neighbour's intentions to build a new wall up to the boundary, the work can commence when the notice period has expired. The building owner may place any necessary footings and foundations (with the exception of reinforced foundations known as 'special foundations') under the adjoining owner's land.

Summary of the Party Wall etc. Act 1996

Section 1: New building on line of junction

If a new wall is being built on the line of a junction a notice must be served on an adjoining owner at least one month before the wall is built:

- If the adjoining owner is not in agreement to a proposed party wall, the wall must not be built astride the boundary and the building owner must at his or her own cost build the wall on his or her land and compensate any adjoining owners for damage caused by the works.
- The parties must share the costs of the work in proportions to be agreed. If an agreement over costs is not reached surveyors must be appointed to resolve any matters under Section 10 of the act.

Section 2: Repair etc. of party wall: Rights of owner

- If a wall is in poor condition or there is a need for a stronger or higher wall a building owner has the right to demolish, underpin, repair, raise, rebuild or lower a party wall. This right also includes the insertion of damp-proof courses,

flashings, weatherings, the cutting of chases or projections overhanging the building owner's land.
- If the adjoining requires a flue or chimney stack on the party wall to remain in working condition this must be maintained.

Section 3: Party Structure Notices

- The notice must be served at least two months before the start date of the work.
- The notice will expire within 12 months if work has not started following the date of its issue.
- A builder owner must serve on the adjoining owner a 'Party Structure Notice' unless he/she has written consent from the adjoining owner to carry out work to the party wall or needs to comply with a statutory notice.
- The notice must give the proposed starting date, a description of the proposed works and the building owner's name and address.
- If the works include special foundations, the notice must be accompanied by drawings and details of the special foundations and include details of the loads they are to carry.

Section 4: Counter-notices

- A counter-notice can be served if on receipt of a Party Structure Notice served under Section 3 an adjoining owner proposes extra work to be carried out for his or her own benefit or to require modifications to the building owner's proposed special foundations.
- The adjoining owner must serve the counter-notice giving the specification of the required work together with relevant drawings and details within one month from the date of his or her receipt of the Party Structure Notice.

Section 5: Disputes arising under Sections 3 and 4 of the act

- If there is a dispute between owners this must be resolved by the appointment of a surveyor or surveyors under the provisions of Section 10.
- If a building owner has not served a notice indicating his or her consent to a notice or counter-notice of the proposed works within a period of 14 days he or she will be deemed to have dissented from the notice, and a dispute will be conferred to have arisen.

Section 6: Adjacent excavation and construction

- A notice must be served if the proposed works involve either temporary or permanent excavation, construction within three metres or six metres of an adjoining owner's building or structure and at depths lower than their foundations.
- A notice must be served on all adjoining owners and must state what the building owner intends to do with the foundations, building or structure.
- A notice must be served at least one month before the start of digging excavations.
- If an injury has resulted from the work caused by the building owner, they are liable for any harm done to the adjoining owner.
- Excavations must be started within 12 months from the date of the start of the notice.

Section 7: Rights

- The building owner is not entitled to cause unnecessary inconvenience to the adjoining owner or occupier.
- If any loss or damage has been caused by the work of a building owner the adjoining owner will be compensated for that damage.

- The building owner is not entitled to place special foundations on an adjoining owner's land without obtaining prior written consent.
- Adequate and necessary hoardings must be provided if a building owner opens part of an adjoining owner's land or building.
- All work must comply with statutory requirements and be in accordance with the agreed notice, drawings and details between owners or surveyors.

Section 8: Rights of entry

- If a notice has been served, a building owner, his or her agents, workmen and party wall surveyor are given the right to enter an adjoining owner's land during normal working hours for the specific purpose of carrying out work. Normal working hours are usually from 08:30 to 18:00 on weekdays and 08:30 to 13:00 on Saturdays.
- If it is entirely necessary fitted furniture and fixtures may be removed from the adjoining owner's premises to enable free access for the building owner's works. Once erected, scaffolding can remain on adjoining land for all of the time necessary to carry out the authorised work.
- The required period of notice is generally 14 days, however, in an emergency if access is not possible notice of the intention to enter can be given as soon as reasonable practical and with the support of a police officer forced entry may be possible.

Section 9: Easements

- Any party cannot interfere with an easement of light or other easement, such as an easement of support. Where a party undertakes works in the vicinity of other buildings then the significance of any easements should always be considered. Interference with an easement can result, as in this case, with a substantial liability for damages.

Section 10: Resolution of disputes

- If there is a dispute this must be resolved by the appointment of surveyors. One surveyor can be appointed as the 'agreed surveyor' who will act impartially for both parties equally or the more common option is for the parties to each individually appoint a surveyor. The two appointed surveyors then select a third surveyor to determine matters when they cannot agree between themselves.
- If one party does not appoint a surveyor within 10 days of the request to do so the other part is entitled to appoint a party wall surveyor on their behalf.
- Within 14 days of receiving the award either party has the right to appeal the award to a county court. The court can modify the award, rescind it or make orders to costs the court thinks fit.

Sections 11 and 13: Expenses and account for work carried out

- The general rule is that the building owner who wishes to carry out the work will pay them.
- Under the provisions of Section 10, party wall surveyors must resolve a dispute for expenses and account for work carried out.
- If there is failure to pay a sum owed this can be recovered under normal court procedures.
- If extra work is required regarding the building of special foundations on the adjoining owner or where the adjoining owner sustains additional costs in having to carry out repairs or work an adjoining owner is entitled to be reimbursed additional costs they are required to pay.
- If an adjoining owner makes use of a party wall built and paid for by the building owner they may be required to make a proportional payment to the building owner.
- In deciding the proportion for sharing costs may include the benefit they derive from the use of the work or the

responsibility for the repair. It can also include the detriment the works has had on the adjoining owners property or business or inconvenience caused by the work.

Section 12: Security for expenses

- The act provides for a deposited sum as security for expenses against default by either of the owners in the event that the possibility arises of either owner's financial stability being doubted or that a property might change hands during the course of the works.
- A notice must be served on the other party before the commencement of any work where a party has a requirement for security for expenses.
- Under the provisions of Section 10, party wall surveyors must resolve a dispute for security of expenses or related matters.

Further Information

- www.partywalls.org.uk (The Pyramus & Thisbe Club)
- www.communities.gov.uk
- www.opsi.gov.uk (The Party Wall etc. Act 1996)

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5
The law of tort

General principles of the law of tort

Key legislation

The Compensation Act 2006
Consumer Protection Act 1987
Latent Defects Act 1986
The Limitation Act 1980
Civil Liability (Contribution) Act 1978
Health and Safety at Work Act 1974
Civil Evidence Act 1968
Occupier's Liability Act 1957/1984
Law Reform (Contributory Negligence) Act 1945

What is tort?

The law of tort is a civil wrong. The term *tort* derives from the Norman French word for *wrong*. Tort is concerned with the infringement of a right that results in a loss which gives rise to an action of damages. Where there is no direct contractual relationship between parties tort can provide a remedy. Tort is separate from the law of contract. Tort covers a wide range of causes of action arising out of various aspects of everyday life, such as neighbour disputes, negligence, trespass and injuries to the person. An architect normally owes a contractual duty and a parallel duty in tort to the client and to third parties.[1] The following types of tort are most relevant to architects:

1. Negligence (design-related errors)

[1] *Henderson v. Merrett Syndicates* [1995] 2 AC 145 at 194.

2. Nuisance
3. Public nuisance
4. Trespass.

Limitation

The law will not allow an action to remain in perpetuity. Under the Limitation Act 1980 claims for negligence in tort in respect of physical damage to property must be commenced six years from the date when the claimant suffers damage (Section 2) or if later, three years from the date when the claimant first knows about the damage and certain material facts about it (Section 14A). Under the Limitation Act 1980 claims for negligence in tort in respect of personal injury or death must be commenced within three years from the date on which the cause of action accrued, or if later, the date of knowledge of the person injured (Section 11(4)). This is subject to Section 14B of the Limitation Act 1980 in which an action for damages for negligence shall not be brought after the expiration of 15 years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission which is alleged to constitute negligence and to which the damage in respect of which damages are claimed is alleged to be attributable.

Negligence

Negligence is a failure to take reasonable care to avoid causing injury or loss to another person. To establish an action in negligence the following must be shown:

1. That there is a duty of care to take care;
2. That there was a breach of that duty;
3. That there was damage which is recoverable.

The law of negligence is best explained by a brief account of the development of case law. The leading case of *Donoghue*

v Stephenson[2] (explained later) established the modern concept of negligence, setting out the general principle whereby one person would owe another person a duty of care. It was held that the manufacturer of goods (in this case, a bottle of fizzy ginger beer) was under a duty towards a consumer to take reasonable care that manufactured goods are free from defects likely to cause injury to health. The effect of this case was to provide individuals with a remedy against suppliers of consumer products who were not parties to a contract. This has had wide impact in later construction cases, such as the case of *Dutton v Bognor Regis UDC*,[3] and the House of Lords decision in the later case of *Anns v Merton LBC*.[4] Two subsequent cases overruled these earlier cases decision, first in *D & F Estates*[5] and then subsequently in *Murphy v Brentwood DC*,[6] which overturned the decision in *Anns v Merton LBC*.[7]

Donoghue v Stephenson

Mrs Donoghue and a friend of hers visited a café in Paisley, near Glasgow. Mrs Donoghue's friend bought her a bottle of ginger beer. The bottle was made of opaque glass. After Mrs Donoghue drank some of the contents of the bottle, the remains of a decomposed snail dropped out into the glass. Mrs Donoghue, as a result, alleged that she suffered shock and developed gastroenteritis. Mrs Donoghue brought an action against David Stevenson, who was a manufacturer of fizzy drinks in Scotland, to the effect that he was under a legal duty of care to her to keep snails out of the bottle and to inspect the bottle before they were filled.

[2] (1932) AC 562.
[3] [1972] 1 QB 373.
[4] [1978] AC 728.
[5] [1988] 2 All ER 992.
[6] [1990] 2 All ER 908.
[7] [1978] AC 728.

Mrs Donoghue did not buy the bottle of ginger beer, and as a result she could not make a claim in contract on breach of warranty. She instead brought an action against the manufacturer of the ginger beer in tort. The House of Lords held that the manufacturer owed her a duty to take care that the bottle did not contain decomposed snails that could cause her personal harm and that a manufacturer of goods owes a duty of care to the consumer. The case was best known for the *neighbour principle* as provided by Lord Atkin determining whether the defendant owes a duty of care in any situation. Lord Atkin stated,

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought to reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[8]

Dutton v Bognor Regis UDC

In *Dutton v Bognor Regis UDC*[9] the local authority approved plans and inspected work on site of a house built on a rubbish tip which subsequently developed serious cracks as a result of having been built with defective foundations. The second purchaser of the house, Mrs Dutton, had settled a claim with the builder and consequently brought a claim against the local authority. It was held that the council was liable for a duty of care for the defects. Dutton's case had far-reaching consequences and led to a series of cases where claims were only previously available in contract could be pursued in tort.

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[8] Lord Atkin in *Donoghue v Stevenson* (1932) AC 562.
[9] [1972] 1 Q.B. 373.

Anns v Merton LBC (re-establishing the duty of care)

Anns v Merton LBC[10] was the most comprehensive attempt to articulate a general principle of a requirement of duty of care in negligence. The judgement emphasised the circumstances in which a duty of care would arise. A man bought a flat but later realised that its foundation was defective. The builders had not dug deep enough for the quality of the soil, and the local planning authority had not checked up on the work of the builders. The House of Lords considered two central questions of law: whether a local authority was under any duty of care towards owners or occupiers of houses in relation to inspection during the building process and, if so, what period of limitation applied to any such claims by owners or occupiers. It was held that a local authority owed a relevant duty of care in tort to a building owner or occupier in respect of inspection of the foundations of a building. The case established the 'complex structure' theory, and Lord Wilberforce said,

> There is, in my opinion, no difficulty about this. A reasonable man in the position of the inspector must realise that if the foundations are covered in without adequate depth or strength as required by the byelaws, injury to safety or health may be suffered by owners or occupiers of the house. The duty is owed to them – not to a negligent building owner, the source of his own loss.[11]

Anns v Merton LBC[12] was followed as a precedent for a brief period in the late 1970s and early 1980s until the subsequent case of *Murphy v Brentwood*. This later case provided the courts with the ability to overturn long-established authorities which had previously rejected the existence of a duty

[10] [1978] AC 728.
[11] Lord Wilberforce in *Anns v Merton* [1978] AC 728.
[12] [1978] AC 728.

based on the principle that foreseeability of injury gave rise to a duty of care.[13]

Caparo v Dickman (the three-stage test)

The modern classic approach of the tort of negligence which redefined the 'neighbour principle' is the subsequent case of *Caparo v Dickman.*[14] An auditor of company accounts provided a statutory audit of a company. Caparo bought shares in the company and subsequently discovered that the accounts did not show the company had been making a loss and sued in negligence. The House of Lords held that shareholders were not in a relationship of sufficient proximity and that as a result, financial auditors did not owe a duty of care for misstatements to shareholders and investors.

Lord Bridge gave a three-stage test for the existence of duty of care:

1. Was it reasonably foreseeable that the defendant's actions might affect the claimant?

Where it is foreseeable that the actions of the architect affect a client, or third party, an architect may owe a duty of care to prevent damage or loss. In *Clay v A. J. Crump & Sons*,[15] an architect and demolition contractors agreed to leave a wall standing. This wall subsequently collapsed and killed two workmen and injured an employee of the main contractors. It was held that the architect and contractor were liable for agreeing with the demolition contractors to leave a wall standing as the injury was foreseeable, giving rise to a duty of care, as their failure to inspect the wall properly had been negligent. In *Haley v London Electricity Board*,[16] workmen from the Electricity Board

[13] *Junior Books v Veitchi* [1983] 1 A.C. 520.
[14] [1990] 1 All ER 568.
[15] [1964] 1 Q.B. 533.
[16] [1964] 3 All ER 185, HL.

were preparing to carry out work on underground cables; they dug a hole, and in order to give warning of the danger (before the permanent barriers arrived) they laid a long-handled hammer across the pavement. A blind man walked along the pavement on his way to work, tripped over the hammer and was injured. The House of Lords said the workmen were negligent because it was common knowledge, and therefore foreseeable, that many blind people walked unaided along pavements and the duty of care extended to them as well as to sighted people.

2. Was there a relationship of proximity between claimant and defendant?

Where there is a relationship of proximity between two parties,[17] for example where a client relies on the advice of an architect, the architect may owe a duty of care to prevent damage or loss for his client. In *Merrett v Babb*[18] a surveyor who carried out the inspection of a property was found to have owed the prospective purchasers of the house a personal duty of care in respect of a valuation report prepared for a mortgage because there was an assumption of responsibility between the parties.

3. In all the circumstances, is it fair, just and reasonable to impose a duty of care?[19]

Where it is fair, just and reasonable to impose a duty of care the architect may owe a duty of care to prevent damage or loss. However, in *Peabody Fund v Parkinson,*[20] architects designed a defective drainage system and submitted plans for approval to the London Borough of Lambeth. The drainage inspector working for the council overlooked the defective design, and the Peabody Fund later sued the architects, contractors, and Lambeth Council, alleging they owed a duty of care to

[17] As opposed to bystanders, such as third parties.
[18] [2001] 3 WLR 1.
[19] Lord Bridge in *Caparo v Dickman*, [1990] 1 All ER 658.
[20] [1984] 3 All ER 529, HL.

Peabody for substantial reconstruction work as they relied on their advice. The House of Lords were unanimous in rejecting any liability on the defendants because it was not reasonable or just to impose a duty on the contractor to pay for the loss arising from the advice of the architects.

Murphy v Brentwood District Council

A house was built on concrete raft foundations in Brentwood, Essex. The design was submitted to the defendant council for approval under Section 64 of the Public Health Act 1936. The council sought the advice of independent consulting engineers who approved the design. After 11 years, serious cracks started appearing in the internal walls of the house and wet patches appeared in the lawn. The concrete raft had subsided differentially, causing distortion and cracking. Instead of carrying out the repairs, Mr Murphy, who was unable to raise money for repairs, sold his defective house and sued for the drop in value, which he sought to recover from the local authority.

The action was brought against the local authority under the same action in *Anns v Merton LBC*[21] for failing to ensure that the builder had constructed the house in accordance to statutory bye-laws. The House of Lords, however, overruled the decision in *Anns v Merton LBC*,[22] declaring that decision wrong as it was illogical with previously recognised principles of the tort of negligence. It was held that a local authority is not, in general, liable in negligence to owners or occupiers of buildings for alleged faults in a local authority's enforcement of the Building Regulations and that, in general, a builder would not be liable in tort to successive owners of a building for any defects in the building except for any injury caused by latent defects.

[21] [1978] AC 728.
[22] Ibid.

Negligence – summary for architects

A duty of care is owed to all who are 'neighbours'. Where an architect is employed for the design of a building, an architect will owe to the employer a duty of care in tort to exercise reasonable skill and care to prevent personal injury or damage to property. The duty of care in these circumstances stems from the proximity between the parties and the assumption of responsibility for the design.[23] In order to establish liability in negligence against an architect it is necessary to prove that negligent conduct has caused actual damage, an architect has not exercised reasonable care, and that the damage is a foreseeable consequence of injury. However, if an architect does all they can which is reasonable foreseeable they may not be liable in tort.[24]

Economic loss

Economic loss refers to financial loss which results from property damage or personal injury suffered by a third party. Liability for (pure) economic loss may arise where there is an assumption of responsibility which gives rise to a special proximity between the parties, and reliance by the client.[25] There is no simple way of determining whether a duty of care exists in relation to economic loss; however, an architect generally owes a duty of care in tort to his or her client in relation to economic loss from negligent misstatement or misrepresentation where there is a relationship similar to contract or the non-contractual provision of services.[26] Following the cases of *D&F Estates v Church Commissioners for England*[27] and *Murphy v*

[23] *Hedley Byrne v Heller & Partners* [1964] AC 465 and *Henderson v Merrett* [1995] 2 AC 145.
[24] *Latimer v AEC Ltd* [1953] 2 All ER 449, HL.
[25] *Hedley Byrne v Heller & Partners* [1964] AC 465.
[26] *Galliford Try Infrastructure Ltd v Mott MacDonald Ltd* [2008] EWHC 1570 (TCC) at 190.
[27] [1989] 2 All ER 992.

Brentwood DC[28] economic loss is observed with caution to prevent liability. However, relatively recent cases show that where someone offers services or specialist advice they may be held to owe a duty of care in economic loss; for example in *Storey v Charles Church Developments*[29] it was held that a contractor owed a duty of care in tort for economic loss to the client even though there was a contract.

Negligent misstatement

Architects who provide negligent misstatements may be liable in tort. In *Hedley Byrne v Heller*[30] a negligent statement was made in response to an inquiry about the financial valuation of a company. The House of Lords held a defendant is responsible for financial misstatements if the following apply:

- There was special relationship based on assumption of responsibilities between the parties.
- The defendant knew or ought to have known the plaintiff was to rely on the statement.
- It was reasonable for the plaintiff to rely on the defendants statement.

If someone with a specialist skill, such as an architect, undertakes, irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care may arise. For example in *Nye Saunders v Bristow*,[31] an architect was found to be in breach of a duty by not advising his client as to the possible effect of inflation on his estimate for the cost of proposed works. In a case in New Zealand,[32] an architect was held liable in tort when he gave negligent assurances to a contractor that he would receive full payment from the employer for certain work when the employer failed to pay.

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[28] [1990] 2 All ER 908.
[29] (1996) 73 L.R.1.
[30] [1964] AC 465.
[31] [1987] 37 BLR 92.
[32] Day & Ost [1973] 2 NZLR 385.

Public and private nuisance

The tort of nuisance is concerned with unlawful interference with the use or enjoyment of land. There are two types of nuisance – public nuisance and private nuisance. Public nuisance is a crime where one inflicts damage, annoyance or inconvenience to endanger the life, health, property, morals or comfort of the public or to obstruct the public, such as obstructing a highway. Private nuisance is not a crime and involves the unreasonable interference with neighbouring land and physical damage to buildings or land. Lord Lloyd of Berwick in *Hunter v Canary Wharf*[33] provided a simple classification:

> Private nuisances are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land.[34]

Many private and public nuisances can be statutorily determined by a local authority issuing a notice under Section 79 and 80 of the Environmental Protection Act 1990 which sets out a number of matters that may be deemed to be statutory nuisances including noise, pollution and smoke. There are also statutes regulating conduct amounting to nuisance including the Noise and Statutory Nuisance Act 1993, the Clean Air Act 1993 and the Water Industry Act 1991.

Examples of nuisance

Examples of nuisance include overhanging branches,[35] interference with the reception of television broadcasts caused by the construction of a tower block, deposit of dust caused by

[33] *Hunter v Canary Wharf* [1997] 2 All ER 426, HL.
[34] Ibid.
[35] Lemmon v Webb [1895] AC 1, HL.

the construction of a link road,[36] land subsidence which caused a large mound to collapse onto a neighbouring property[37] and using land for an unauthorised 'acid party'.[38] An architect or any other person who unlawfully obstructs the exercise of rights enjoyed by the public at large commits a public nuisance.[39] However, an architect will not normally be liable for nuisances of which he or she was unaware. Thus, in the case of *Ilford UDC v Beal*,[40] it was held that a defendant who built a concrete wall, which cracked a sewer eight feet below, was not liable in nuisance because she had no reason to know of the sewer's existence.[41] Furthermore, if architects or contractors take reasonable steps to minimise the effect of nuisance it may not be held to be nuisance as long as building operations are reasonably carried on and all proper and reasonable steps are taken to ensure that no undue inconvenience is caused to neighbours, whether from noise, dust or other reasons.[42] Architects owe a duty of care to take reasonable care of buildings so as to prevent them from becoming dangerous, a nuisance and causing damage to the property of the plaintiffs.[43]

Lawful visitors

A lawful visitor is anyone who is present on the premises by the occupier's invitation, with the occupier's express or implied permission or in exercise of a legal right.[44] A number of public officials have a right of access to land and buildings (including houses) under certain circumstances even without the

[36] *Hunter v Canary Wharf* [1997] 2 All ER 426, HL.
[37] *Leakey v National Trust* [1980] 1 All ER 17, CA.
[38] *R v Shorrock* [1994] Q.B. 279.
[39] *R v Shamrock* [1994] Q.B. 279 CA approving statements of principle to be found in *Attorney-General v P.Y.A. Quarries Ltd* [1957] 2 Q.B. 169 and earlier authorities.
[40] [1925] 1 KB 671.
[41] Subject to the Rule in *Rylands v Fletcher*.
[42] Sir Wilfred Greene M.R. in *Andreae v. Selfridge & Co. Ltd.* [1938] Ch. 1, 5–6.
[43] *Sedleigh-Denfield v. O'Callaghan* [1940] AC 880.
[44] Occupiers' Liability Act 1957 s.2(6).

occupier's consent. Officials of the electricity, gas and water utility companies, TV licensing officers, public health officers, VAT inspectors, firemen on duty and many others have a right to enter premises without a warrant to perform certain duties. Under Section 214B of the Town and Country Planning Act 1990, anyone has the right to enter land with or without a warrant for the purpose of surveying it in connection with making or confirming a tree preservation order with respect to the land. Any invitation or permission may be limited to entry at particular times, to particular parts of the premises, or to certain purposes, the lawful visitor may become a trespasser if he or she exceeds the scope of his or her invitation.

Damage and unreasonable use to neighbouring land

Damage to neighbouring land may include a wrongful disturbance with a person's use or enjoyment of land, possibly involving the damaging escape of water, smoke, smells, fumes, gas, noise, heat, vibrations, electricity, germs, animals or vegetation. The case of *Rylands v Fletcher*[45] established a rule of nuisance based on the interference by one occupier of land with the right in, or enjoyment of land, by another occupier of land. This rule requires a 'non-natural use of land' when there has been an escape of some dangerous matter in the course of a non-natural use of land. Thus, an occupier is usually liable for the damage caused by the spread of fire started on his land where there is negligence either by the occupier or by someone on the land.[46] In contrast to this, is the case of *Transco v Stockport MBC*.[47] In this case, a multistorey block of flats was built by a local authority and was let to local residents. A water pipe burst within the block of flats with the inevitable result

[45] (1868) L.R. 3 H.L. 330.
[46] *H&N Emmanuel v Greater London Council* [1972] 2 All ER 835.
[47] [2003] 3 WLR 1467.

that a large quantity of water escaped causing an embankment to collapse. Transco undertook remedial measures and sought to recover from the council. It was held that the council was not liable for the escape of water from its land under the rule in *Rylands v Fletcher*. The escape must be of something dangerous, out of the ordinary, which did not include a burst water pipe on a council property.

Other cases deal with damage and unreasonable use to neighbouring land. In *Johnson v BJW Property Developments*,[48] it was held that the defendant was liable in negligence and nuisance caused by spread of fire to the claimant's property as a result of the negligence of an independent contractor. In *LMS International Ltd v Wallaby Investments Ltd*[49] the claimant succeeded in establishing liability under the rule in *Rylands v Fletcher*. Fire had spread from factory premises occupied by the defendant to the claimants' adjoining premises. The court held that the decision not to install a safety system was negligent and in breach of the Fire Precautions (Workplace) Regulations 1997, and there was negligence in failing to deal with the fire immediately. Also, the defendants were liable to in nuisance for failing to maintain the party wall after the fire.

[48] [2002] EWHC 1131.
[49] [2005] EWHC 2065 (TCC).

6
General principles of contract law

Key legislation

Companies Act 2006
Consumer Credit Act 2006
Contracts (Rights of Third Parties) Act 1999
Unfair Terms in Consumer Contracts Regulations 1999
Housing Grants, Construction and Regeneration Act 1996
Sale and Supply of Goods Act 1994
Supply of Goods and Services Act 1982
Limitation Act 1980
Sale of Goods Act 1979
Unfair Contract Terms Act 1977
Supply of Good (Implied Terms) Act 1973
Misrepresentation Act 1967

What is contract law?

> The law of contract provides the principal framework for the legal analysis of rights and obligations arising out of agreements for the carrying of construction or engineering work.[1]

In general terms, contract law can be described as a body of rules of agreement based on the mutual exchange of obligations. For there to be formation of a contract, different parties must reach agreement, the agreement must be supported by consideration, and there must be an intention to create legal relations. An agreement can be made by letter, fax or e-mail;

[1] Bailey, J., 2011, Construction Law, Volume 1, Informa, p. 4.

by the outcome of a period of negotiation; by the exchange of promises; or by the conduct of parties. The parties to a contract are free to agree the obligations to which they wish to be bound and once a contract is concluded, it binds the parties in law.

What is a contract?

> A contract is an agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties.[2]

A contract is a legally binding agreement which creates rights and obligations between two or more parties that can be enforced by law. A contract can be created by conduct, orally or exchange of letters but in order to reduce the risk of a dispute arising as to what was agreed, it is often preferable to have a formal written contract signed by both parties. Under Section 104 of the Housing Grants, Construction and Regeneration Act 1996, a construction contract has a statutory definition, meaning an agreement with a person for the following:

- The carrying out of construction operations;
- Arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
- Providing his own labour, or the labour of others, for the carrying out of construction operations.[3]

The definition of a construction contract may also include an agreement for the following:

- To do architectural, design or surveying work, or
- To provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape in relation to construction operations.[4]

[2] Treitel (2003), p. 1.
[3] Section 104 (1), Housing Grants, Construction and Regeneration Act 1996.
[4] Section 104 (1) (2), Housing Grants, Construction and Regeneration Act 1996.

Classification of contracts

Contracts can be divided into two main classes:

Deeds

A deed is a document that contains a promise that transfers, confirms or creates an interest or right in property. A deed must be in writing and be signed, witnessed and delivered. The distinguishing aspects of deeds which distinguish them from contracts not entered to as deeds are as follows:

- Promises made by deed do not need to be supported by consideration.
- Section 8 of the Limitation Act 1980 provides that a claim upon a contract by deed must be brought within 12 years.

Simple contracts

Contracts which are not deeds are simple contracts and can be made in writing, orally or by conduct. Section five of the Limitation Act 1980 provides that an action for breach of contract of a simple contract must be commenced within six years. Simple contracts can be in any form and are mainly used for the sale of land.

Contracts can also be classified as bilateral or unilateral contracts.

Bilateral contracts

A bilateral contract is a promise by one party in exchange for a promise made by another party. An example of this is when a buyer of a product promises to pay the price for the product and the seller promises to deliver the product.

Unilateral contracts

A unilateral contract is a promise by one party to do something in return for an act of the other party. The classic example of

a unilateral contract is where an offer is made to the whole world. In *Carlill v Carbolic Smoke Ball Company*[5] defendants advertised that they would pay anyone a sum of money that contracted influenza after using their smoke ball for a specified period. After having purchased the smoke ball and using it as directed, a claimant contracted influenza and claimed the reward. The defendants argued it was impossible to form a contract with the whole world. This argument was rejected by the court, which held that the advertisement constituted an offer to the world at large and the claimant was entitled to the reward. However, in *Roger v Snow*[6] the defendant promised to pay the claimant £100 if he would walk from London to York. It was held that it was not a unilateral contract because the claimant had not made any counter-promise to perform the stipulated act.

Formation of a contract

For a contract to come into force and be valid there are three essential requirements that need to be in place:

1. The parties must reach agreement with offer and acceptance (intention to create legal relations).
2. There must be agreement.
3. Both parties must have provided valuable consideration.

In addition to this, the terms must be certain to be capable of enforcement, the contract must comply with certain formalities (such as a contract for the purchase of a freehold of a house must be made in writing and be signed by or on behalf of the parties) and the persons who are agreeing the contract must have sufficient capacity. Architects should note that a contract can be created orally and does not necessarily have to be in writing to be enforceable.

[5] [1893] 1 Q.B. 256.
[6] [1573] Dalison 94.

Intention to create legal relations

In order to create a legally binding contract, the parties must have had an intention to create legal relations. In construction contracts and commercial agreements where work has been done and paid for, and as a result a transaction has been performed on both sides, the intention to create legal relations is, in general, presumed between the parties.[7]

Offer and acceptance

For contracts to be legally binding there must be an offer by one party which is unequivocally accepted by another. Offer and acceptance may be in writing or oral or may even be inferred from the parties' conduct. However, in *HTA Architects v Countryside Properties*,[8] when entering into negotiations to provide architectural services in connection with the Greenwich Millennium Village Project, a memorandum was sent which began 'Further to my memo of 10 November, your subsequent fax of 13 November and our discussion this afternoon, the Consortium will agree to the following revisions to the heads of terms.' The court looked at the correspondence as a whole and held that there contained no offer or acceptance specific enough to be capable of acceptance as the phrase 'heads of terms' was not specific enough to give rise to a binding contract as the parties were still negotiating.

Offer

An offer is a statement or a promise by one party of a willingness to enter into a contract which if accepted will give rise to a binding contract. An offer may be made in writing

[7] *G. Percy Trentham Ltd v Archital Luxfer* (1993) 1 Lloyd's Rep 25.
[8] [2002] EWHC 482 (TCC).

or orally (such as by telephone) or by conduct, and it can be addressed to one person, a group of persons or the world at large, such as an offer of reward.[9] If a party rejects an offer, then that offer is no longer available for acceptance without the further agreement of the other party. An offer should be contrasted with an invitation to negotiate (called an invitation to treat), which is an invitation to the other party to enter into negotiations to the other party on the terms proposed and not an offer.

Tenders

Under the Local Government Acts 1972 and 1988 local authorities must publicise formalised contracting procedures involving competitive tendering and must give reasons for their procurement decisions. Tender procedures for public contracts in the United Kingdom are regulated by the Public Contracts Regulations 2006, which implements the European Directive 2004/18. Requirements for advertising for tenders must be complied with the *Official Journal of the European Community* (*OJEC*; now recognised as the *OJEU* – the *Official Journal of the European Union*).

Architects should take due diligence before including contractor's on tender lists as failure to do so could leave an architect exposed to a claim from an employer should additional cost be incurred due to the incompetence of the contractor[10]

Inviting tenders

At common law, an invitation to tender is not an offer but an invitation to negotiate.[11] A tender can be revoked at any time before it is accepted and once accepted it forms a binding

[9] *Shey v U.S.* 1875.
[10] *Valerie Pratt v George J Hill* (1987) 38 BLR 25 CA.
[11] *Spencer v Harding* (1870) LR 5 CP 561.

contract. For certain tenders, for example for local authorities, a client is under an implied contractual obligation to give proper consideration to any tender submitted in accordance with the published conditions. In *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*,[12] a flying club applied to renew pleasure flights from a local airport and submitted a tender close to the deadline. The town clerk's staff failed to check the letter box, and by the time the tender was received it was stamped 'too late'. The flying club sued for breach of an alleged warranty that it had lost the contract because its tender had not received due consideration. It was held that there was an intention to create binding legal obligations when the tender was submitted in accordance with the terms of the invitation to tender, and as a result a contract arose.

Acceptance

An acceptance is a final and unqualified acceptance of the terms of an offer and can be made in writing or by conduct. To make a binding contract the acceptance must exactly match the offer, must be certain and unambiguous. In *Peter Lind & Co Ltd v Mersey Docks & Harbour Board*,[13] it was held there was no contract for the submission of two alternative tenders for the construction of a freight terminal because the defendants confirmed in writing 'your tender' but did not specify the actual tender.

Acceptance must be communicated

Acceptance of an offer is not effective until communicated,[14] and a valid contract will not be created until the acceptance is communicated to another party.[15] Acceptance must be received by the person making the offer, and where the means of communication are instantaneous, such as by telephone or

[12] [1990] 1 WLR 1195.
[13] [1972] 2 Lloyd's Rep 234.
[14] *Holwell Securities Ltd v Hughes* [1974] 1 WLR 155.
[15] *Entores v Miles Far East Corp* [1955] 2 All ER 493.

fax, the contract will be created where acceptance has been received. Silence does not generally amount to acceptance.[16] However, conduct can amount to acceptance.[17]

Acceptance by post (the postal rule)

The 'postal rule' is an exception to the general rule that acceptance must be communicated, which is limited to particular circumstances. Acceptance takes place upon posting of the letter of acceptance.[18] This rule applies even if the letter is delayed, destroyed or lost in the post so that it, in fact, never reaches the person accepting the offer.[19] However, the postal rule does not apply to all circumstances and will not be applied if it would produce a 'manifest inconvenience or absurdity'.[20] The rule of acceptance by e-mail may be similar to acceptance by post; however, there is no clear authority or case law to support this.[21]

Counter offer

When the terms of a contract are changed or sought to be changed it may be held that there is a counter-offer which destroys the original offer. Acceptance that attempts to vary the terms contained in an offer is not an acceptance but a rejection and a fresh offer. In *Hyde v Wrench*,[22] the defendant offered to sell his farm to the plaintiff for £1,000. Wrench offered to buy it for £950, but Hyde refused to do so. The plaintiff then wrote to the defendant and agreed to pay £1,000 for the farm, but the defendant never replied to that letter. It was held that no

[16] *Felthouse v Bindley* (1862) EWHC CP J 35.
[17] *Felthouse v Bindley* (1862) EWHC CP J 35 and *Robophone v Blank* [1966] 1 WLR 1428.
[18] *Brinkibon Ltd v. Stahag Stahl und Stahwarenhandelsgesellscahft* [1983] 2 AC 34.
[19] *Adams v Lindsell* (1818) 1 B & Ald 681 *Household Fire Insurance Co. v Grant* (1879) 4 Ex D 216.
[20] *Howell Securities Ltd v Hughes* [1974] 1 WLR 155 CA.
[21] McKendrick (2005).
[22] [1840] 3 Beav 334.

contract had been concluded for the farm because it had not been accepted. To constitute a valid agreement there must be a simple acceptance of the terms proposed.

Termination of offer (revocation)

An offer may be revoked at any time until it is accepted, and revocation will only be effective if communicated to the person accepting the offer. In *Byrne v Van Tienhoven*,[23] the defendants made an offer to the claimants by letter. The letter was received three days later and immediately accepted by telegram. Prior to this, the defendants had changed their minds regarding the offer and sent a letter revoking it. This second letter did not reach the claimants until more than a week after the offer had been accepted. It was held there was a binding contract because the acceptance took effect before the revocation.

Consideration

Consideration is a one-way promise of exchange of value in return for what is promised by another party. For a simple contract to be valid it must be supported by consideration.[24] A contract by deed does not need to be supported by consideration. The most common forms of consideration are provision of goods, performance of work and payment of money. Both parties to the contract must provide consideration; therefore, if only one party provides consideration the agreement will not be contractually binding. There are a number of established rules on consideration.

[23] [1880] 5 CPD 344.

[24] However, if a contract is made by deed, then consideration is not needed to make a valid contract.

'Consideration must be sufficient but need not be adequate'

If a party promises to do nothing more than they are already bound to do then that provides no consideration.

Consideration requires something of value to be given in return for a promise, but that something need not be an adequate return. Where consideration is recognised by the law as having some value, it is described as 'real' or 'sufficient' consideration. The courts will not investigate contracts to see if the parties have received equal value.[25]

'Consideration must not be past'

Anything which has been done in the past is not consideration.

The general rule is that past consideration is not good consideration.[26] If one party voluntarily performs an act, and the other party then makes a promise, the consideration for the promise is said to be in the past. In *Re McArdle*[27] a wife and her three grown children lived together in a house. The wife of one of the children did some decorating. Later the children promised to pay her £488, and they signed a document to this effect. It was held that the promise was unenforceable as all the work had been done before the promise was made and was therefore past consideration.

'Consideration must move from the promisee'

A consideration must be provided by the promisee, or arise out of his contractual relationship with the promisor.

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[25] *Chappell & Co Ltd v Nestle Co Ltd* [1959] 2 All ER 701.
[26] *Eastwood v Kenyon* [1840] 11 AD E 438.
[27] [1951] 1 All ER 905.

The requirement that consideration must move from the promisee is most generally satisfied where some detriment is suffered, for example where a contractor parts with money or goods or renders services in exchange for the promise. However, the requirement may equally well be satisfied where the promisee confers a benefit on the promisor without in fact suffering any detriment. An example of this is illustrated by the case of *Williams v Roffey Bros*,[28] in which the building contractors, Roffey, entered into a contract for carpentry work on the refurbishment of 27 flats with the carpentry subcontractor Williams. After the subcontractor completed the work to the roof, the first fix to all 27 flats, and had substantially completed the second fix to 9 flats the contractors realised that they had underestimated the cost of the work and that the agreed price was too low. Worried that the subcontractor would not finish on time due to a penalty clause in the contract, the contractor orally promised to pay the subcontractor more money to complete the work on time. The subbcontractor completed eight further flats, stopped work, and brought an action for damages under the contract. The contractors, Roffey, refused to pay the extra money on the grounds that while they had done what they were contractually bound to do the carpenter had provided no extra consideration. The Court of Appeal held that the promise by Williams to pay the extra money was enforceable and the carpenter subcontractor was entitled to the extra money because the building contractors had obtained practical benefits and had commercially secured their position by working on the further eight flats.

Estoppel

Estoppel is a legal principle which arises when a promise, assurance or representation of some future conduct made by one person is relied upon by another to that person's detriment.

[28] [1991] 1 Q.B. 1.

The promise, assurance or representation must be clear and unequivocal. The effect of an estoppel may suspend or stop a contract; see *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd.*[29]

Terms of a contract

A term is a promise, statement or undertaking that forms part of the contract and may be express or implied or both. Terms establish the extent of the parties' obligations by which they have agreed to be bound. Breach of a term of a contract entitles the injured party to claim damages and may result in the contract being declared invalid. There are a number of types of terms in a contract.

Express terms

Express terms are terms in a contract which are expressly agreed. Express terms may be written or may be agreed orally. Express terms are set out in documents such as within standard building contracts and in the RIBA Standard Form of Agreement.

Implied terms

A number of terms are usually implied into building contracts. For example, there is an implied term in every building contract that the contractor will do the work in a good and workmanlike manner.[30] There is an implied term that an architect will use reasonable skill and care in their professional duty. A term, however, cannot be implied where one of the parties has no knowledge of the matter to be implied.[31]

There are a number of different types of implied terms.

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[29] [1955] 1 WLR 761.
[30] *Test Valley Borough Council v Greater London Council* (1979) 13 BLR 72.
[31] *Liverpool County Council v Irwin* [1977] A.C. 239

Terms implied by statute

Terms are implied by statute into established categories of contract, for example contracts for the sale of goods and hire purchase contracts. Construction contracts are also subject to the implied terms contained in the Sale of Goods Act 1979 (amended by Sale and Supply of Goods Act 1994) and the Supply of Goods and Services Act 1982. The 1982 act implies terms into contracts for work and materials or for services. The 1994 act implies terms into all contracts for the sale of goods that the goods sold will be of satisfactory quality. Section 14 of the Sale and Supply of Goods Act 1994 states:

> 14.(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.
>
> (2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.
>
> (2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of good:
>
> (a) Fitness for all the purposes for which goods of the kind in question are commonly supplied;
> (b) Appearance and finish;
> (c) Freedom from minor defects;
> (d) Safety; and
> (e) Durability.[32]

Terms implied by custom

The terms of a contract may be implied into a contract from custom of an industry or usage of a particular locality or trade.[33]

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[32] Section 14, Sale and Supply of Goods Act 1994.

[33] *Hutton v Warren* (1836) 1 M&W 466.

If a custom is contrary to the express terms of the contract it will not be implied.[34]

Exclusion clauses

An exclusion clause is a term which excludes the liability of a party in a contract. Exclusion clauses apply most commonly in the case of supply of goods or services and can exclude or limit liability for work done or defective goods and materials. For example, a commercial goods company may seek to limit its obligations by stating in its standard terms that no terms are to be implied at law and that the standard terms form the whole agreement of the parties. For this reason, there are certain controls on the use of exclusion clauses under legislation such as the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. The 1977 act applies to contracts for the sale or supply of goods, materials, services and contracts for work and includes controls over exclusion clauses in non-consumer contracts. The 1999 regulations cover a wider range of contract types than the 1977 act and apply to contracts for consumers.

An exclusion clause can be incorporated in the contract by signature, by notice or by a course of dealing. In *Curtis v Chemical Cleaning Co*,[35] a customer took a dress to be cleaned and signed a piece of paper headed 'Receipt' after being told that it excluded any liability for damage to beads and sequins. In fact, the document actually excluded any liability 'for any damage howsoever arising'. When the dress was returned it was badly stained. It was held that the cleaners could not escape liability for damage to the material of the dress by relying on the exclusion clause because its scope had been misrepresented by the defendant's assistant. If there is no course of dealing, an exclusion clause may still become part of the contract through

[34] *Les Affreteurs Reunis S.A. v Walford* [1919] AC 801.
[35] [1951] 1 KB 805.

custom or trade usage. In *British Crane Hire v Ipswich Plant Hire*[36] a crane hire company supplied a crane to the defendants based on an oral telephone conversation, with no discussion of the conditions of hire. The crane hire company later sent a copy of their conditions but before the defendants could sign them, the crane sank in marshy ground. The conditions said that the hirer should indemnify the owner for all expenses in connection with use. The Court of Appeal held that the terms would be incorporated into the contract because there was a common understanding between the parties, who were in the same line of business, that any contract would be on these standard terms and the defendants were liable for the expense involved in recovering the crane.

Agency

Agency is a term which describes the relationship between two parties, the agent and the client. An agent is usually a person who acts for a client usually on the client's behalf when administering or performing a contract. A common example of an agency is where an architect acts as an agent to represent a client or where an architect or an engineer is appointed to carry out design work. An agent owes the principal a number of duties. These include the following:

- A duty to undertake tasks specified by the terms of the agency;
- A duty to discharge his duties with care and due diligence;
- A duty to avoid conflict of interest between the interests of the principal and his or her own.

The contract of agency can be brought to an end by the parties or through operation of law at any time by agreement. If the principal is declared bankrupt or the death of either the agent or principal the contract will be automatically terminated.

[36] [1974] QB 303.

Invalid contracts

Mistake

If a mistake is made by the parties concerning a contract it may have the effect of preventing the formation of a contract and thereby rendering the contractual invalid. There are a number of different categories of mistake. A common mistake is a mistake when both parties make the same error relating to a fundamental fact, for example if it was unknown to the parties that the subject matter of the agreement does not exist.[37] A unilateral mistake is where only one party is mistaken as to the nature of the contract and the other party is aware of the mistake, or the circumstances are such that he or she may be taken to be aware of it, the contract is void.[38] A mutual mistake is where both parties fail to understand each other and a mistake arise as to the quality of the subject matter of a contract.[39]

Duress

A contract can be declared invalid on the grounds that it has been entered into under duress. To establish duress it is necessary to show that there is a threat (such as pressure asserted by one party on the other) which is illegitimate and which induces the other party to enter into the contract.

Undue influence

Undue influence is influence that prevents someone from exercising an independent judgement. This usually occurs where there is a relationship between two people and one party seeks

[37] *Couturier v Hastie* (1856) 5 HLC 673.
[38] *Hartog v Colin & Shields* [1939] 3 All ER 566.
[39] *Solle v Butcher* [1949] 2 All ER 1107.

to take advantage of, or exploit, the other. A contract may be declared invalid if undue influence can be proved.

Misrepresentation

Legislation

Misrepresentation Act 1967

A misrepresentation is a false statement of fact made by one party to another, which induces the other party to enter the contract. An actionable misrepresentation makes the contract invalid, giving an innocent party the right to rescind the contract and/or claim damages. For a statement to be a misrepresentation it must be made before or at the time of contracting, and it must be a statement of fact, not opinion or future intention or law. The rights and remedies which arise from a misrepresentation depend on the types of misrepresentation.

Types of misrepresentation

- *Fraudulent Misrepresentation*: Fraudulent misrepresentation is a false statement made knowingly, made without having belief it is true or made recklessly.
- *Negligent Misrepresentation*: Negligent misrepresentation is a false statement made by a person who had no reasonable grounds for believing it to be true.[40]
- *Innocent Misrepresentation*: An innocent misrepresentation is when maker of the statement honestly believed that their statement was true and he had reasonable grounds for believing it to be true.[41]

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[40] Section 2(1) of the Misrepresentation Act 1967 states '[w]here a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true'.

[41] *Derry v. Peek* (1889) 14 App Cas 337, HL.

Discharge of contracts

Frustration

Frustration operates in situations where it is established that due to subsequent change in circumstances or an external event, or by an event not due to the act or default of either party from what was originally envisaged, the contract is rendered impossible to perform. Examples of frustration include where the subject matter is destroyed, such as a building in which one party is to carry out work for the other is accidentally destroyed by a fire[42] or where the subject matter has been destroyed as a result of war. A contract will not be frustrated where a change of circumstances makes it more onerous to perform but not radically different. In *Davis Contractors v Fareham Urban District Council*,[43] it was held that a building contract was frustrated in circumstances where as a result of labour shortages the work took three times longer to perform than had been agreed.

Performance of contract

Where both parties perform their obligations precisely as agreed, a contract is discharged by its complete performance.

Breach of contract

Breach of contract occurs when a contractual obligation has failed to be performed under a contract. If the breach is sufficiently serious it gives the innocent party an option to treat the party in breach as having repudiated the whole contract.

[42] *Taylor v Caldwell* (1863) 3 B & S 826.
[43] [1956] UKHL 3.

7
Types of contract

Introduction

There are more than 200 contracts available for use in the construction industry. There are number of considerations which should be taken in deciding which form of procurement to use and which risks should be allocated between the parties. The type of contract to use depends on the following:

- The nature of the project (e.g. is the building a new building or is it a refurbishment project? Are they small works or major works?);
- The objectives of the work and the preferred form of procurement;
- Design responsibility;
- The allocation of risk;
- The type of employer and their level of familiarity with construction.

There are many bodies which that have developed their own standard forms of contract. The most widely used forms of construction contract are published by the Joint Contracts Tribunal (JCT), the New Engineering Contract (NEC) and the Institution of Civil Engineers (ICE). There are also standard forms of contracts, including those produced by the Association of Consulting and Engineering (ACE) and the Royal Institute of British Architects (RIBA).

Advantages of standard forms of contract

- There is a known set of terms and conditions where the risk allocation is defined.

- Reduces procurement time as a the contract terms of standard form are known.
- Standard forms can reduce costs and save time.

Standard Form construction contracts with different procurement routes

RIBA contracts

RIBA Concise Building Contract
RIBA Domestic Building Contract

Traditional (lump sum)

JCT Standard Building Contract 2011 (the 'with Quantities' and 'without Quantities' versions)
JCT Intermediate Building Contract 2011
JCT Minor Works Building Contract 2011
NEC3 ECC Option A
ICC Minor Works Version 2011
GC/Works/1 Building & Civil Engineering Major Works with Quantities (1998)
GC/Works/1 Building & Civil Engineering Major Works without Quantities (1998)
GC/Works/2 Building & Civil Engineering Minor Works (1998)
GC/Works/3 Mechanical & Electrical Engineering Works (1998)
GC/Works/4 Building, Civil Engineering, Mechanical & Electrical Engineering Small Works (1998)
CIOB's Contract for Use with Complex Projects (2013)

Traditional ('remeasurement' or 'measure and value')

JCT Standard Building Contract 2011 ('with Approximate Quantities' version)

JCT Measured Term Contract 2011
NEC3 ECC Option B
FIDIC Red Book
FIDIC Pink Book
ICC Measurement Version 2011
ICC Minor Works Version 2011
ICC Ground Investigation Version 2011

Design and build

JCT Design and Build Contract 2011
JCT Major Project Construction Contract 2011
NEC3 ECC Options A–E
ICC Design and Construct Version 2011
GC/Works/1 Single Stage Design and Build (1998)
GC/Works/1 Two Stage Design and Build (1999)
IChemE Red Book 2013
IChemE Green Book 2013
IChemE Burgundy Book 2013
FIDIC Yellow Book
CIOB's Contract for use with Complex Projects (2013);
MF/1 (Revision 6) (2014 edition)

Construction management

JCT Construction Management Appointment 2011
NEC3 ECC Option F
GC/Works/1 Construction Management Trade Contract (1999)

Management contracting contracts

- JCT Management Building Contract 2011
- NEC3 ECC Option F

Partnering contracts

PPC2000 (2013 edition)
TPC2005
NEC3 ECC with secondary Option X12
JCT – Constructing Excellence Contract 2011

JCT Non-Binding Partnering Charter; and
ICC Partnering Addendum

Which type of contract?

There are no definitive or mandatory rules for selecting a particular contract. Under the doctrine of freedom of contract, parties are free to decide on the form of contract to be used. The choice of contract has to be considered with the complexity of the works and the contractual arrangements appropriate to the works, what the contractor has experience of and what is comfortable in committing to. There are many standard forms of construction contracts in use. It is also possible to create bespoke contracts, but care should be taken when creating bespoke contracts. It is important that all contracts are properly prepared and executed.

Procurement

Procurement is a broad term that defines the relationship between the various parties of the construction industry including architects, employers, consultants and building contractors to finance, implement, design and deliver construction and infrastructure projects. Architects often provide advice as to the appropriate type of procurement to be adopted, and as such, it is important to have a basic understanding of the different types of contracts. Architects should exercise caution as to the choice of the appropriate procurement as inappropriate procurement routes can result in additional cost and delays.[1]

The choice of procurement method depends on many interconnecting factors including the scope and nature of

[1] See *Plymouth and South West Co-operative Society Ltd v Architecture Structure and Management Ltd* [2006] EWHC 5 (TCC).

proposed work, the level of risk, the responsibility of design, the coordination of work and the price basis of a contract. Other factors which affect the choice of procurement include the management of programme, change arising during the works, type of commercial activity, management effectiveness and legal consequences. There is a wide variety of procurement methods used in the construction industry which loosely fall under three main categories: traditional, design and build and management procurement. Traditional contracts provide benefits of cost and quality but at the expense of time, design and build contracts provide benefits of cost and time but at the expense of quality, and management contracts provide benefits of time and quality but at the expense of cost.

The majority of building contracts used in the United Kingdom are standard form contracts. The 2007 Royal Institution of Chartered Surveyors' Survey reported that 98 per cent of investigated projects used a standard form of contract and approximately 80 per cent of those projects were procured by JCT contracts.[2] The range of procurement types and forms has increased in recent years. There are currently more than 40 standard forms of building contracts used in the United Kingdom today.

[2] Royal Institution of Chartered Surveyors, 2007, *A Survey of Building Contracts in Use during 2007*, Royal Institution of Chartered Surveyors, London, p. 13.

Table 7.1 Contracts for smaller projects – which contract to use

	JCT Minor Work's Contract 2011	JCT Building Contract for a Home Owner/Occupier	RIBA Domestic Building Contract 2014	RIBA Concise Building Contract 2014
Description	This is a residential and commercial contract for projects which are small and do not involve named specialists or bills of quantities. It is straightforward to follow and simple.	This is a simple contract which is straightforward to follow and designed for homeowners on domestic projects. It comes in two forms: where the home owner has appointed a consultant (HO/C) and where the home owner has not appointed a consultant (HO/B). There is also a consultant appointment document (HO/CA). The minor works is intended to cover elements against as set of Employer's Requirements and is not a full design and build contract.	This contract is for small projects between a client and a contractor and is simply laid out. It is suitable for all types of non-commercial work, such as house projects including renovations, extensions, maintenance and new buildings. The contract is not suitable if the works are for a commercial purpose	This contract is between an employer and a contractor. It is suitable for all types of simple commercial building work.
Suitable for	Small projects	Small residential projects. There are no provisions for LADs.	Small residential projects	Small commercial projects
Description of client	Private and local employers	Home owner	Residential occupier	Private and public employers
Number of pages	45 pages	11 pages	28 pages	30 pages

Structure of document	Recitals, Articles, Contract Particulars, Conditions	Part 1: Arrangement of the Works; Part 2: The Conditions	1. Agreement 2. Contract Details 3. Contract Conditions	1. Agreement 2. Contract Details 3. Contract Conditions
Simple payment mechanism	No (requires detailed payment provisions in accordance with statute for commercial contracts)	Yes	Yes	Yes
Continuing responsibility of the contractor (the agreement)	6 or 12 years (depending on how it is signed)	6 years	6 or 12 years (depending on how it is signed)	6 or 12 years (depending on how it is signed)
Is the architect to act as a contract administrator?	This contract is administered by an architect or a contract administrator.	This contract is administered by an architect or a contract administrator.	This contract is administered by an architect or contract administrator who the customer may appoint using the RIBA Domestic Project Agreement. In limited circumstances an experienced customer may act as the contract administrator.	This contract is administrated by an architect or contract administrator. The employer may appoint an architect or a contract administrator using the RIBA Concise Agreement.

(*Continued*)

Table 7.1 (Continued)

	JCT Minor Work's Contract 2011	JCT Building Contract for a Home Owner/Occupier	RIBA Domestic Building Contract 2014	RIBA Concise Building Contract 2014
Contractor design to part of the work	Yes	No	Yes (with provision for professional indemnity insurance)	Yes (with provision for professional indemnity insurance)
Liquidated damages for failure to complete	Yes	No	Yes	Yes
Completion in sections	No	No	Yes	Yes
Retention	5% up to practical completion, 2.5% until the end of the 3-/6-/12-month defects rectification period/all defects corrected.	5% until the end of the 3 month defects rectification period/all defects corrected.	n/a	Allows the parties to set out rules to govern applications for revision of time and/or extra payments
Insurance backed guarantee against contractor insolvency	No	No	Yes	No
Dispute resolution	Mediation, adjudication, arbitration, litigation	Adjudication & Litigation	Mediation, adjudication, arbitration	Mediation, adjudication, arbitration

Table 7.2 Contracts for larger projects – which contract to use JCT intermediate building contract, JCT standard building contract or NEC3?

	JCT Intermediate Building Contract 2011	JCT Standard Building Contract 2011	NEC3 Contract
Description	The JCT Intermediate Building Contract is for traditional building projects of a small to medium size, where the works are not complex and usually less than a year in length, although it may be suitable for longer contracts. The Intermediate Building Contract is published in two versions: the Intermediate Building Contract (IC) and the Intermediate Building Contract with Contractor's Design Portion (ICD). It can be used as a lump-sum or measurement contract with the possibility of interim payments and it is used with drawings, together with a bill of quantities, specifications or work schedules. It can be used by local authorities and private employers.	The Standard Building Contract is a traditional form of contract published in three versions: With Quantities, Without Quantities and With Approximate Quantities. Each version requires the appointment of an architect and quantity surveyor to administer the contract and allows for the contractor to design parts of the works (the Contractor's Designed Portion) and for the works to be carried out in sections. This differs from design and build where the contractor has design responsibility for all of the works. All Standard Building Contract versions allow for the use of provisional sums where it is impossible to specify or describe the work accurately in advance.	The NEC3 is a family of standard contracts published by the ICE, which embraces the concept of partnership and encourages architects, employers, contractors and project managers to work together collaboratively within a legal framework. The NEC3 contains a suite of documents to suit different procurement arrangements. It is used on a variety of projects and procurement initiatives and is often used by government departments such as the Highways Agency and by local authorities. The contract is administered by a project manager, who is required to act impartially when issuing certificates. Depending on the document chosen the NEC can be used as a lump sum, re-measurement or cost plus contract.
Suitable for	Where the building works are of simple content involving recognised trades. Where it is necessary to use detailed contract provisions and the employer is to provide the contractor with drawings and bills of quantities, a specification or work schedules to define adequately the quantity and quality of the work Where an architect and quantity surveyor are to administer the conditions Where the works are to be carried out in sections	For a variety of projects of different sizes including major refurbishment projects Where design work has been done by or on behalf of the employer Where the contractor is to design a part or parts of the works Where the work is being carried out in sections	Framework projects such as public sector projects, new roads, rail lines, nuclear facilities, water utilities and London 2012 Olympics.

(*Continued*)

Table 7.2 (Continued)

	JCT Intermediate Building Contract 2011	JCT Standard Building Contract 2011	NEC3 Contract
Number of pages	101	130	2352 (in a suite of contracts)
Structure of document	Agreement General Recitals Articles Sub-Contract Particulars Attestation Schedule of Information Conditions General Section 1 – Definitions and interpretation Section 2 – Carrying out the sub-contract works Section 3 – Control of the Sub-Contract Works Section 4 – Payment Section 5 – Valuation of Work and Variations Section 6 – Injury, Damage and Insurance Section 7 – Termination Section 8 – Settlement of Disputes	Articles Recitals Contract Particulars Attestation Conditions Section 1 – Definitions and interpretation Section 2 Carrying out the Works Section 3 – Control of the Works Section 4 – Payment Section 5 – Variations Section 6 – Injury, Damage and Insurance Section 7 – Assignment, Third Party Rights and Collateral Warranties Section 8 – Termination Section 9 – Settlement of Disputes	Contract Agreement Contract Data Conditions of Contract Schedule of Cost Components and Shorter Schedule of Cost Components Works Information Site Information Activity Schedule or bill of quantities
Key parties involved in the contract	- The employer - The contractor - The architect/CA - The quantity surveyor	- The employer - The contractor - The architect/CA - The quantity surveyor	- The employer - The contractor - The project manager - The supervisor

Who has responsibility for design of the works?	The employer retains the responsibility for the works. The Contractor's Design Portion (with the can be used to so that the contractor can be asked to design parts of the works.	The employer retains the responsibility for the works. The Contractor's Design Portion (with the can be used to so that the contractor can be asked to design parts of the works.	NEC3 is flexible so that the contractor can have no responsibility for design or full responsibility for the design. The Works Information should state who is responsible for the design of the works.
Retention	Clause 4.9.2	Clause 4.9.2.1 and 4.18–4.20 state that the employer may withhold retention monies. The rate of retention is specified in the Contract Particulars.	If Option X16 is selected, the employer may withhold retention monies.
Defects rectification	Clauses 2.30 and 2.31	Clause 2.38 and 2.39. The Contract Particulars specifies the length of the rectification period. When the architect/CA is of the opinion that defects, shrinkages and faults have been made good, they issue the Certificate of Making Good.	Clause 40–45. The supervisor notifies the contractor for defects and issues the Defects Certificate.
Dispute resolution	Mediation – Clause 8.1 (and ADR), Adjudication (clause 8.2), Arbitration (clauses 8.3 to 8.8) and litigation (Article 6)	Mediation – Clause 9.1 (and ADR), Adjudication (clause 9.2), Arbitration (clauses 9.3 to 9.8) Litigation (Article 9)	Option W1 – Adjudication followed by litigation or arbitration Option W2 – used in the UK when the Housing Grants, Construction and Regeneration Act 1996 applies – Adjudication followed by litigation or arbitration

Considerations for choosing a procurement method

- Risk
- Speed
- Quality
- Time
- Size
- Responsibility of design (e.g. will the contractor have responsibility for design)
- Responsibility of coordinating the work on-site
- The employer's knowledge of a contract sum before the contract
- Duration of the contract and programme
- Consequences to the programme
- Certainty of final cost
- Funding and price of the project
- Ability to change design
- The complexity and size of the project
- The expertise of the procuring party
- The commercial drivers behind the project
- The nature and scope of the work
- The measure of control by the employer
- The likelihood of change of the employer's requirements
- Changes during construction
- Skill and experience of the design team, employer and consultants

Traditional procurement

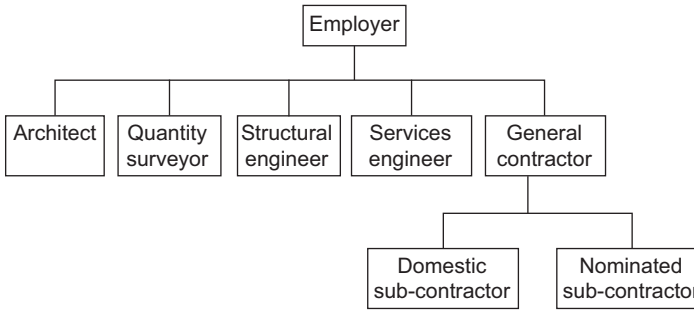

Figure 7.1 Contractual relationships in traditional procurement

Contracts

Traditional (lump sum)

JCT Standard Building Contract 2011 (the 'with Quantities' and 'without Quantities' versions)
JCT Intermediate Building Contract 2011
JCT Minor Works Building Contract 2011
NEC3 ECC Option A
ICC Minor Works Version 2011
GC/Works/1 Building & Civil Engineering Major Works with Quantities (1998)
GC/Works/1 Building & Civil Engineering Major Works without Quantities (1998)
GC/Works/2 Building & Civil Engineering Minor Works (1998)
GC/Works/3 Mechanical & Electrical Engineering Works (1998)
GC/Works/4 Building, Civil Engineering, Mechanical & Electrical Engineering Small Works (1998)
CIOB's Contract for Use with Complex Projects (2013)

Traditional ('remeasurement' or 'measure and value')

JCT Standard Building Contract 2011 ('with Approximate Quantities' version)
JCT Measured Term Contract 2011
NEC3 ECC Option B
FIDIC Red Book
FIDIC Pink Book
ICC Measurement Version 2011
ICC Minor Works Version 2011
ICC Ground Investigation Version 2011

Traditional procurement (see Figure 7.1) is characterised by a separation in the functions of design and construction between the design team and the contractor. In general, the architect designs the building, prepares production information, obtains prices by tender or negotiation and administers the building contract. The employer usually develops a business case for the project, provides a brief and budget and appoints a team of consultants to prepare a design and tender documents. The employer appoints the building contractor to construct the works to the design, by the contract completion date, and for the agreed price. The contractor, in general, has no responsibility for design and instead undertakes responsibility for workmanship and materials including work by subcontractors and suppliers. The employer can select some of the subcontractors to be engaged by the contractor, which are referred to as domestic or nominated subcontractors. Traditional procurement can also involve a two-stage tender and can be used in a wide range of situations, including a lump-sum contract, a measurement contract and a cost-plus contract.

Suitable

- Where the architect retains design control.

- For most types of project including complex projects.
- Where price certainty is required.
- Where a high degree of design control and product specification is required.
- Where robust variation control is required.
- Where there is a direct employer relationship with consultants.

Not suitable

- For fast-track projects where efficiency is required.
- Where the employer wishes to maintain a spirit of mutual trust as this procurement method can lead to disputes and for cost and time overruns if problems occur.
- Where the employer does not want a high risk of claims if the information and instructions from the architect are delayed.

Key features

- There can be a level of certainty about cost and design.
- Responsibility and risk reside with the employer.
- The employer's consultants are responsible for administrative matters relating to valuations and payments.
- The employer has control over design, specified quality and standards through appointed consultants.
- The contractor, in general, has no responsibility for design.
- Consultants administer the contract on behalf of the employer and advise on aspects associated with design, progress and stage payments which must be paid by the employer.
- The main issues that can be associated with traditional procurement can be an adversarial working relationship between employer and contractor and cost overrun, particularly in case of competitive fixed-price lump-sum contracts.

Design and build procurement

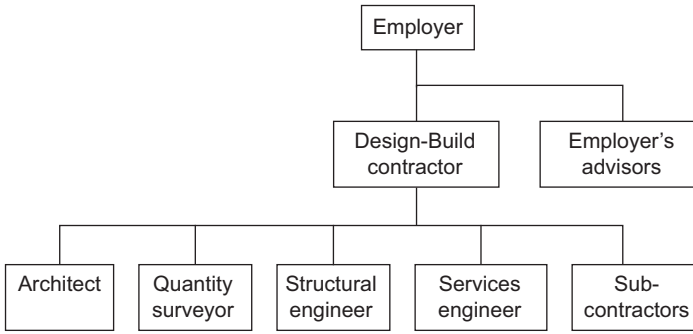

Figure 7.2 Contractual relationships in design and build procurement

Contracts

JCT Design and Build Contract 2011
JCT Major Project Construction Contract 2011
NEC3 ECC Options A–E
ICC Design and Construct Version 2011
GC/Works/1 Single Stage Design and Build (1998)
GC/Works/1 Two Stage Design and Build (1999)
IChemE Red Book 2013
IChemE Green Book 2013
IChemE Burgundy Book 2013
FIDIC Yellow Book
CIOB's Contract for use with Complex Projects (2013); MF/1 (Revision 6) (2014 edition)

Design and build (see Figure 7.2) is the most common procurement route for larger projects, accounting for 39 per cent of the value of projects undertaken in 2010.[3] Design and build

[3] RICS and Davis Langdon, *Contracts in Use, a Survey of Building Contracts in Use during 2010*, RICS, London, 2012.

procurement is generally used for projects which require certainties of cost and a relatively short delivery time. The employer usually employs a single contractor as the sole point of responsibility for the design, management and delivery of a project. The contractor prepares and completes the design by subcontracting or novating the architect and design team to carry out elements of design. The contractor then constructs the works to meet the requirements of the employer. There is usually no independent contract administrator, although there is often a named employer's agent. Design and build are often fixed-price and lump-sum contracts.

Suitable

- Where the employer requires cost certainty and fast delivery of a project.
- Where the employer wants a single fixed price which covers design and construction.
- Where the employer wants a single point of contact between the employer and contractor.
- Where the contractor takes responsibility for both the design and construction of the project.

Not suitable

- For an uncertain or developing employer brief.
- Where the employer wishes to have a high degree of design control.
- For complex buildings.
- Where maximum quality is desired.
- Where the employer wishes to make changes after the contract has been signed as the process requires agreement between the employer's requirements and the contractor's proposals.
- Where the employer wants to appoint all of the trade and specialist contractors directly.

Key features

- There is a shorter overall delivery time and better cost certainty than traditional procurement.

- The contractor has responsibility for completing on time.
- The employer can control design included as part of his requirements, but, once the contract has been signed, he or she has no direct control over the development of the contractor's detail design. The contractor assumes responsibility for design after the contract has been signed.
- Costs can be reasonably certain because the price of the contract is known at the outset. The contractor will be obliged, subject to the conditions, to complete the project for the contract sum, unless there are employer changes.
- The employer can request design or specification changes during construction; however, the contractor is obliged to advise on the consequences of additional time and disruption.
- Matters relating to valuation and payments are normally carried out by the contractor.

There are a number of variations of design and build procurement.

Design and build
The contractor takes responsibility for the complete design and construction process from initial briefing to completion of the project.

Design and construct
Design and construct includes design and build procurement; however, it is used in a wider term to include other types of construction, for example engineering works.

Package deal/turnkey contract
The contractor design and builds a project for a fixed price and has responsibility for the entire works of a project including, for example supplying furniture. The name refers to the idea that when the employer takes possession all that is to complete is to turn the key.

Novated design and build
The contractor prepares and completes the design and working details by supervising subcontractors. The contractor then

novates subcontractors to carry out design elements and constructs the works to meet the requirements of the employer.

Management procurement

Management procurement is a fast track procurement method which is suited to large, complex projects where early completion is desirable. There are a number of variants of management procurement in which construction management and management contracting are the most common. The main differences between management procurement and construction management are the early start on site and the cost reimbursable contracts.

Construction management

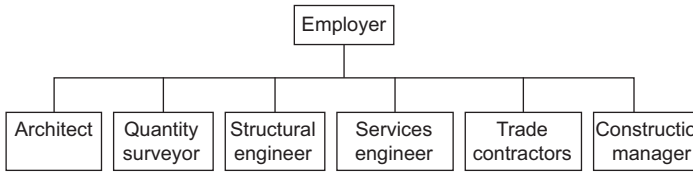

Figure 7.3 Contractual relationships in construction management

JCT Construction Management Appointment 2011
NEC3 ECC Option F
GC/Works/1 Construction Management Trade Contract (1999)

In construction management (see Figure 7.3), design and management are separate responsibilities and there are no direct contractual links between the construction manager and trade contractors. The construction manager adopts a consultant role and works directly with the employer to oversee the contract and to act on the employer's behalf. The construction manager does not directly carry out any construction

work, which is usually carried out by trade contractors. The employer contracts directly with the trade contractors who are contractually responsible to him. Construction management is often used for specialist engineering and house-building projects and house builders because it can deliver better value and outcomes. The construction manager administers the trade contracts, but does not enter into contract directly with the trade contractors. In this way, the construction manager is liable to the employer for the proper performance of its construction management services, but the construction manager is not responsible, per se, for the design or construction of the project by the professional consultants and trade contractors.

Suitable

- For large-scale, complex, relatively fast-track projects requiring an early start on-site and early completion.
- Where the employer may require changes to the employer's requirements during construction.
- Where much of the detail design may be of a complex or innovative nature requiring components or systems designed by specialists.
- Where the employer takes an active role in the management of the process.

Not suitable

- Where the employer is inexperienced and there is uncertainty of programme.
- Where there is no specialised expertise and experience available.

Key features

- The construction manager is appointed as a consultant at an early stage along with, and having a similar status to, the members of the design team.
- The employer contracts directly with trade contractors, and the construction manager has no contractual responsibility for their performance.

Management contracting

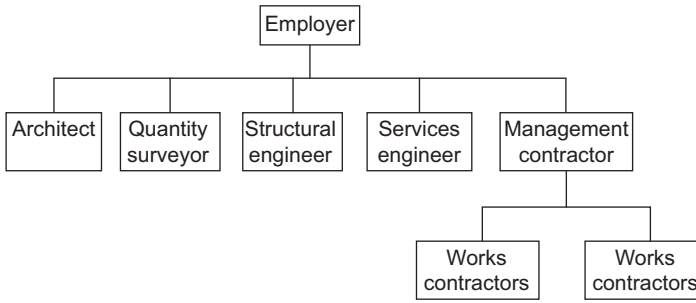

Figure 7.4 Contractual relationships in management contracting

JCT Management Building Contract 2011
NEC3 ECC Option F

A management contractor (see Figure 7.4) is appointed at the early stages of a project as an equal member of the design team under the direction of the contract administrator. The management contractor employs and manages trade contractors directly who carry out the construction works. The management contractor is responsible for the administration and operation of the contractors but does not directly undertake any of the construction work, which is broken down into packages. Trade contractors are appointed by the management contractor and are directly and contractually accountable to him.

Suitable

- For large-scale, complex, relatively fast-track projects requiring an early start on-site and early completion.
- Where the works are designed by or on behalf of the employer and where it is not possible to prepare full design information before the works commence.
- Where the employer may require changes to the employer's requirements during construction.

- Where much of the detail design may be of a complex or innovative nature requiring components or systems designed by specialists.
- Where the employer wants the maximum competition for the price of the building works.
- Where the employers takes an active role of the management of the process.

Not suitable

- Where the employer is inexperienced and there is uncertainty of programme.
- Where there is no specialised expertise and experience available.

Key features

- The design team is appointed by the employer. The contractor is appointed usually by negotiation or tender and interview on a professional basis in a similar manner to the members of the design team.
- The construction work is broken down into packages and carried out by contractors. These are appointed by the management contractor and are directly and contractually accountable to him or her.
- The subcontracting is the distinguishing feature that distinguishes management contracting from construction management. As in management, contracting every item of the construction works is subcontracted to the works contractors.
- Management contract is not a fixed price lump-sum contract. The amount to be paid to the management contractor is the prime cost of all work done under the management contract plus the management contractor's fee.

Partnering procurement

PPC2000 (2013 edition)
TPC2005
NEC3 ECC with secondary Option X12
JCT – Constructing Excellence Contract 2011

JCT Non-Binding Partnering Charter; and
ICC Partnering Addendum

Partnering is not a procurement route in itself. It is instead a model that can be applied to different procurement routes. It was one of the recommendations in the Latham Report[4] as a means to enable employers and contractors to work together with a system of reducing costs and limiting conflicts. It is flexible in its nature and is more about the way a project is managed than an individual model procurement arrangement. Partnering can apply to all types and sizes of projects and is based on mutual objectives, problem solving and continuous measurable improvements. There are different types of partnering arrangements including project partnering, for example the PPC2000, where specialists only sign a single contract, and strategic partnering, for example the JCT Framework Agreement.

Suitable

- For a variety of projects.
- Where the employer is looking for a contract which attempts to combines efficiency and performance and working towards mutual objectives.

Not suitable

- For small projects.
- Where the employer is not looking for a simple, easy to use contract as contract administration and project management can prove demanding.

Key features

- The partnering team members work together and individually in the spirit of trust, fairness and mutual cooperation in a multiparty team approach.
- It is based on a system of incentives and rewards.
- It is based on continuous improvement of quality and production targets.

[4] Latham (1994).

- There is not one model partnering arrangement; it is a flexible approach and needs to be tailored to suit specific circumstances.
- There are mechanisms for avoidance of conflict and dispute resolution.
- There is good opportunity for innovation and for fast delivery of projects.

Traditional procurement: standard lump-sum contracts

RIBA professional services contracts

There are two types of RIBA Building Contracts which were published in 2014: the RIBA Domestic Building Contract and the RIBA Concise Building Contract. Both contracts are flexible contracts for use in domestic and minor works projects.

RIBA Domestic Building Contract
The RIBA Domestic Building Contract is a simple contract between an employer and a contractor. It is suitable for residential projects and types of non-commercial work, such as work done to an employer's own home including renovations, extensions, maintenance and new buildings. This contract contains clauses that other consumer construction contracts do not cover such as instructing change, contractor design, a clear method of dealing with defective work and liquidated damages.

RIBA Concise Building Contract
The RIBA Concise Building Contract is a comprehensive contract between an employer and a contractor. It is suitable for all types of simple commercial building work. It is not suitable for non-commercial and domestic projects.

Traditional contract: JCT Standard Building Contract 2011

The Standard Building Contract is a traditional form of contract published in three versions: With Quantities, Without

Quantities and With Approximate Quantities. Each version requires the appointment of an architect and quantity surveyor to administer the contract and allows for the contractor to design parts of the works (the Contractor's Designed Portion) and for the works to be carried out in sections. This differs from design and build where the contractor has design responsibility for all of the works. All Standard Building Contract versions allow for the use of provisional sums where it is impossible to specify or describe the work accurately in advance.

The Standard Building Contract is primarily used on medium-sized to large projects where most of the project has already been designed and detailed by or on behalf of the employer prior to the employment of the contractor. It can be used by both private and local authority employers.

Standard Building Contract with Quantities (SBC/Q)

This is a lump-sum contract and should be used where the design team has provided at the time of tender a full set of drawings and bills of quantities accompanied either by a specification or schedule of work. Provisions of the Contractor's Design Portion do not have to be used. If the contractor's design portion is not required, the Standard Building Contract with Quantities without Contractor's Design, 2005 Revision 2, 2009 (SBC/Q/XD) can be used.

Standard Building Contract without Quantities (SBC/XQ)

This is also a lump-sum contract and should be used when a bill of quantities is not to be part of the contract documentation, primarily due to a lack of detailed information or lack of time. A schedule of rates is required to be submitted as a basis for valuing variations and a set of drawings and specifications. If the Contractor's Design Portion is not required, the Standard Building Contract without Quantities without Contractor's Design, 2005 Revision 2, 2009 (SBC/XQ/XD) can be used.

Standard Building Contract with Approximate Quantities (SBC/AQ)

This is a remeasurement contract where only approximate quantities are given for all of the work to be carried out. It is similar to the Standard Building Contract with Quantities; however, it is for use on projects where it is necessary to make an early start, where contract documents cannot be prepared before the tender stage and the employer may not have a firm contract cost figure at the outset. It is also used where it may be difficult or impossible to measure the majority of the work accurately in advance, for example in a contract for refurbishment or repair following a fire or other damage. As the contract progresses, the work is completely remeasured and the remeasurement priced on the basis of the rates set out in the bills of approximate quantities. If the Contractor's Design Portion is not required, the Standard Building Contract with Approximate Quantities without contractor's design, 2005 Revision 2, 2009 (SBC/AQ/XD) can be used.

Suitable

- For a variety of projects of different sizes including major refurbishment projects.
- Where design work has been done by or on behalf of the employer.
- Where the contractor is to design a part or parts of the works.
- Where the work is being carried out in sections.

Not suitable

- Complex engineering projects.
- For small house extensions (where Minor Works is better suited).
- Where the employer does not wish to take on much risk.
- Where the employer wishes to use a contract which is undemanding and easy to understand.

Key features

- This contract provides more detailed provisions and more extensive control procedures than the Intermediate Building Contract and the Minor Works Building Contract.

- An architect or contract administrator and quantity surveyor must be appointed.
- The Standard Building Contract is published with associated subcontracts and domestic subcontracts including the Standard Building Sub-Contract (SBCSub/A and SBCSub/C) and the Standard Building Sub-Contract with subcontractor's design (SBCSub/D/A and SBCSub/D/C).

Traditional contract: The GC Works range of contracts

GC/Works/1 Construction Management Trade Contract (1999)
GC/Works/1 Single Stage Design and Build (1998)
GC/Works/1 Two Stage Design and Build (1999)
GC/Works/1 Building & Civil Engineering Major Works with Quantities (1998)
GC/Works/1 Building & Civil Engineering Major Works without Quantities (1998)
GC/Works/2 Building & Civil Engineering Minor Works (1998)
GC/Works/3 Mechanical & Electrical Engineering Works (1998)
GC/Works/4 Building, Civil Engineering, Mechanical & Electrical Engineering Small Works (1998)

The GC Works are a family of contracts published by the Stationery Office for the Property Advisors for the Civil Estate (PACE) and intended for building and civil engineering works. The contracts are used for government and public sector projects and more recently by the private sector. There is a version for use with quantities and without quantities. The GC/Works/1 is intended for large-scale works, the GC/Works/2 is for medium-sized projects and GC/Works/4 for small projects.

Suitable

- The GC Works range of forms have been drafted to suit most projects including for building and civil engineering works and for mechanical and electrical engineering works.

- For most building projects including government and public-sector projects.

Not suitable

- Where the employer wishes to use a easy to understand and simple contract as GC Works contain a number of provisions not found in JCT or many other standard forms.

Particulars

The contract is available in the following versions:

- GC/Works/1: With Quantities (1998)
- GC/Works/1: Without Quantities (1998)
- GC/Works/1: Single Stage Design and Build (1998)
- GC/Works/1: Two Stage Design and Build (1999)
- GC/Works/1: With Quantities Construction Management Trade Contract (1999)
- GC/Works/1: Without Quantities Construction Management Trade Contract (1999)
- GC/Works/2: For building and civil engineering minor works (1998)
- GC/Works/3: For mechanical and electrical engineering works (1998)
- GC/Works/4: For building, civil engineering, mechanical and electrical small works (1998)
- GC/Works/5: For the appointment of consultants (1999)
- GC/Works/5: Framework agreement for consultancy services (1999)
- GC/Works/6: For a daywork term contract (1999)
- GC/Works/7: For measured term contracts (1999)
- GC/Works/8: For a specialist term contract for equipment maintenance (1999)
- GC/Works/9: For operation, repair and maintenance of plant, equipment and installations (1999)
- GC/Works/10: For facilities management (2000)

Traditional procurement: shorter lump-sum contracts

Traditional contract: JCT Intermediate Building Contract (ICD11)

The JCT Intermediate Building Contract is for traditional building projects of a small to medium size, where the works are not complex and usually less than a year in length, although it may be suitable for longer contracts. The Intermediate Building Contract is published in two versions, the Intermediate Building Contract (IC) and the Intermediate Building Contract with Contractor's Design portion (ICD). It can be used as a lump sum or measurement contract with the possibility of interim payments, and it is used with drawings, together with a bill of quantities, specifications or work schedules. It can be used by local authorities and private employers.

Suitable

- Where the building works are of simple content involving recognised trades.
- Where it is necessary to use detailed contract provisions and the employer is to provide the contractor with drawings and bills of quantities, a specification or work schedules to define adequately the quantity and the quality of the work.
- Where an architect and quantity surveyor are to administer the conditions.
- Where the works are to be carried out in sections.

Not suitable

- For large complex projects.
- As a design and build contract.

Key features

- This contract provides more detailed provisions and more extensive control procedures than the Minor Works Building

Contract but is less detailed and shorter than the Standard Building Contract.
- This contract is flexible in its use and can be used with or without bills of quantities.
- All subcontractors are domestic, whether chosen by the contractor or named by the employer.
- The contractor has to price for every item in the contract and accepts responsibility for the work of all specialist firms.
- The Intermediate Building Contract is published with associated subcontracts including the Intermediate Sub-Contract (ICSub/A and ICSub/C), Intermediate Sub-Contract with sub-contractor's design (ICSub/D/A and ICSub/D/C) and Intermediate Named Sub-Contract Tender & Agreement (ICSub/NAM) and Intermediate Named Sub-Contract Conditions (ICSub/NAM/C).

Traditional contract: JCT Minor Works Building Contract (MW11)

The Minor Works Building Contract is the most widely used JCT Standard Building Contract[5] and is to be used for small-scale building projects. The MW11 contract is commonly used for domestic construction projects, including new-build houses. It is a traditional lump-sum contract and designed for use where minor building works are to be carried out for an agreed lump sum, and where an architect or contract administrator has been appointed on behalf of the employer. There is no provision for bills of quantities and as a result a quantity surveyor (who can be named) has no specific role under the conditions. There are two versions of the Minor Works Building Contract, the Minor Works Building Contract (MW11) and the Minor Works Building Contract with Contractor's Design (MWD11). In the latter contract, the contractor takes

[5] Royal Institution of Chartered Surveyors, 2007, *A Survey of Building Contracts in Use during 2007*, Royal Institution of Chartered Surveyors, London, p. 15.

responsibility for ensuring that the standards set out in the contract documents are achieved which includes responsibility for subcontracted work.

Suitable

- For small to medium-sized building projects and where the contract is to be administered by an architect.
- For private and local authority employers.
- Where the work involved is simple in character.
- Where the employer is to provide drawings and/or a specification and/or work schedules to define adequately the quantity and quality of the work.

Not suitable

- Where the works generally exceed £150,000.[6]
- If the design element is significant and there is large structural works involved.
- For maintenance work.
- For complex projects.
- Where a range of consultants and sub-contractors are involved.
- Where bills of quantities are required.
- Where provisions are required to govern work carried out by named specialists.
- Where detailed control procedures are needed.

Key features

- This contract provides less detailed provisions than the Standard Building Contract (SBC) and the Intermediate Building Contract (IC).
- The contractor can undertake the design of part or parts of a project.
- It is short in comparison with other JCT contracts.
- It is designed for use where minor building works are to be carried out for an agreed lump sum.

[6] Chappell (2006b).

Traditional contract: JCT Repair and Maintenance Contract (commercial) RM 2011

JCT Repair and Maintenance Contract (Commercial) is published as a single document for projects of repair and/or maintenance work. It allows for three different bases for pricing: as a lump-sum contract, as a remeasurement contract or as a mixture of the two with defined work being priced as a lump sum and additional work measured using an agreed schedule of rates. The form is intended for use by local authorities or private employers.

Suitable

- For short, one-off, small projects of repair and/or maintenance work.
- Where no independent contract administrator is to be appointed.
- For experienced employers.

Not suitable

- Where the works comprise regular maintenance.
- For use as a term contract (the Measured Term Contract would be more appropriate).
- For use by home owners.
- Where a contractor administrator is required.

Key features

- The contract is relatively short.
- All the details regarding the work to be carried out and the information required under the contract particulars must be sent to the contractor at time of tender.

Traditional contract: the ACA Form of Building Agreement (2003 revision)

The ACA Form of Building Agreement is a lump-sum contract that has both fixed and fluctuating price versions. It is a single document that is suitable for projects of all sizes and can be

used with or without bills of quantities and where no quantity surveyor is appointed. It can also be used for private employers or local authorities and with contract administration by an architect or by a supervising officer.

Suitable

- For use on a variety of projects including fast-track projects.

Not suitable

- For employers who wish to use a simple easy to understand contract because some of the terminology used is peculiar to the ACA form and might cause confusion.

Key features

- In general, work is required to be designed and documented at tender stage (there is, however, an alternative provision for further detailing by either the architect or the contractor).
- The contractor can accept responsibility for design and the provision of drawings, or it can be used as a traditional contract.
- Each contract can be tailored to suit the project because there is a choice of optional clauses.
- The contract attempts to eliminate areas of uncertainty.

For further information, see the Association of Consultant Architects (2003).

Traditional procurement: measurement contracts

Traditional contract: JCT Measured Term Contract (MTC 2011)

A Measured Term Contract is for use where an employer has a regular flow of maintenance for small projects, including improvements to be carried out by a contractor. It is used by local authorities and private employers.

Suitable

- Where the intended contract period is one to three years in length.
- For large employer organisations such as local authorities who employ building contractors on small jobs.
- Where the work is measured and valued on the basis of an agreed schedule of rates.

Key features

- The contract is based on a priced schedule of rates and series of orders which include a written description and drawings where relevant.
- The contract provides for the appointment of a contract administrator who is responsible for placing the orders and exercises the normal JCT contract management role on behalf of the employer.

Traditional procurement: consumer contracts

Traditional contract: JCT Building Contract for a home owner/occupier who has appointed a consultant to oversee the work (HO/C)

This contract is for use by a residential occupier and is designed for use with the Consultancy Agreement for a Home Owner/occupier appointing a Consultant in relation to Building Work (HO/CA). A separate version is published and issued by the Scottish Building Contract Committee Limited (SBCC) for use in Scotland.

Suitable

- For small domestic building work such as alterations and extensions.
- Where the proposed works are to be carried out for an agreed lump sum.
- Where detailed procedures are not required.
- Where no consultant acts on behalf of the home owner/occupier to administer the contract.

Not suitable

- For complicated or large projects.
- If the employer wants the consultant to oversee the work and deal directly with the builder (use instead the agreement – JCT Consultancy Agreement for a Home Owner/occupier appointing a Consultant in relation to Building Work [HO/CA]).

Key features

- Retention, practical completion, variations or defects liability period are not formally described within the contract but exist.
- Tick boxes are used to fill in certain details.
- Disputes can be referred to an independent adjudicator. The adjudicator's decision is not final, and the parties can take matters to court at a later date.
- If a consultant is not to be appointed the JCT Building Contract for a Home Owner/occupier who has not appointed a Consultant to Oversee the Work (HO/B) should be used.

Traditional contract: JCT Consultancy Agreement for a home owner/occupier appointing a consultant in relation to building work (HO/CA)

This agreement is for use between the home owner/occupier and a consultant such as an architect or surveyor. It is a simple and straightforward contract, which at only 11 pages long, is considerably shorter than the 45-page Minor Works contract.

Suitable

- For small domestic building work such as extensions and alterations.

Not suitable

- For complicated or large projects.
- If the employer does not want the consultant to deal directly with the builder (use instead the contract – Building Contract

for a Home Owner/occupier who has not appointed a Consultant to oversee the Work).

Key features

- Retention, practical completion, variations or *defects liability period* are not formally described within the contract. For example, retention is described as 'the remaining 5% of the total price' under Part E, Payment (2).
- Tick boxes are used to fill in certain details.
- Disputes can be referred to an independent adjudicator. The adjudicator's decision is not final and the parties can take matters to court at a later date.

Traditional procurement: cost-plus contract

Traditional contract: Prime Cost Building Contract (PCC) 2011

This is a specialised, cost-reimbursable contract for alteration work and for projects that require early work on-site such as for urgent repair work, for example after fire damage. It can be used as a lump-sum or remeasurement contract and designed for private- or public-sector projects.

Suitable

- For projects requiring an early start on-site, where the works are designed by or on behalf of the employer but where it is not possible to prepare full design information before the works commence.
- Where detailed contract provisions are necessary and the employer is to provide a specification (and possibly drawings) describing and showing the items of work.
- Where an architect or contract administrator and quantity surveyor are to administer the conditions.
- Where the employer wants the earliest possible start.

Not suitable

- For employers seeking a low-risk contract.

Key features

- There is a high responsibility placed on the contractor and the risk can be high for the employer.
- The contractor will be paid the prime cost or actual cost of labour, plant and materials as certified by the architect or contract administrator.

Design and build procurement

Design and build contract: JCT Design and Build Contract (DB11)

The Design and Build Contract is for larger works where an employer has defined his requirements and where the contractor is to carry out the whole of the works and to complete the design for them in accordance with those requirements. It is for private and local authority sectors and allows for the works to be carried out in sections. It can be used as a lump-sum contract, payable in stages or based on the contractor's valuation. There is no need for bills of quantities. The level of design proposals should be stipulated in the contract and tender documents.

Suitable

- For most types of projects, in particular for larger works.
- For use where the contractor is to accept responsibility for design and to complete the design.
- Where the employer employs an agent (who may be a consultant or employee) to administer the conditions.
- Where the employer is looking for a high degree of cost certainty.

Not suitable

- For an uncertain or developing brief.
- For complex buildings.

- Where the employer is seeking design control and wants to make changes.
- Where the employer is looking for maximum control of aesthetic quality.

Key features

- There can be a shorter overall delivery time and better cost certainty than traditional procurement.
- The contractor has design responsibility for all of the works.
- There is a single fixed price which covers design and construction.
- The employer can control design included as part of his or her requirements, but, once the contract has been let, the employer has no direct control over the development of the contractor's detail design. The contractor assumes responsibility for design at this point and usually appoints his or her own consultants.
- Costs can be reasonably certain as the price of the contract is known at the outset. The contractor will be obliged, subject to the conditions, to complete the project for the contract sum, unless there are employer changes.
- The employer can request design or specification changes during construction; however, the contractor is obliged to advise on the consequences of additional time and disruption.
- Matters relating to valuation and payments are normally carried out by the contractor.
- There is normally no contract administrator.

For further information, see S. Lupton, 2011, *Guide to DB05*, RIBA Publishing, London.

Design and Build Contract: JCT Major Project Construction Contract (MPF11)

This contract is intended for use on large commercial projects (although there is no limit to the size of project) and where the contractor and employer are experienced at undertaking such projects and have in-house contractual procedures. There is

no appointed project manager or architect and all administrative decisions are made by the employer or a representative employed by the employer.

Suitable

- For large projects where the employer regularly procures large-scale construction work and where the employer is experienced and able to take greater risk than would arise under other JCT contracts.
- Where the parties are willing to have a high degree of involvement as parties have to submit their own detailed procedures.

Not suitable

- For small projects.
- For projects with a fast delivery time (management contracting is more suitable).

Key features

- This contract has a different style, format and content than other JCT contracts.
- It allows for a flexible amount of design input by the contractor.
- This contract is a short lump-sum contract, where the contractor is required to complete the project for the entered sum.
- The contractor carries responsibility for the contractor for the performance of named specialists and novated consultants.
- There is no contract administrator as instructions are issued by the employer.

For further information, see Lupton (2003) and Jones (2004).

Management procurement

Management contract: JCT Construction Management Trade Contract (CM/TC) 2011

This contract is between a trade contractor and an employer alongside the Construction Management Appointment (CM/A). The construction manager acts as agent for the employer in

issuing instructions, making decisions and preparing certifications. There are no direct contractual links between the construction manager and the trade contractors.

Suitable

- For large-scale projects requiring fast delivery and an early start on-site.
- Where the employer is to enter into direct separate trade contracts.
- Where the client is prepared to let the construction manager to administer the conditions on his or her behalf.
- Where much of the detail design may be of a sophisticated or innovative nature requiring systems designed by specialists.
- Where the works are to be carried out in sections.

Not suitable

- Where the employer is looking for certainty of cost.

Management contract: JCT Management Building Contract (MC) 2011

The JCT Management Building Contract is for large projects that require an early start on-site and where the design is prepared by a consultant team on behalf of the employer. The management contractor does not carry out any construction work but instead employs and manage subcontractors directly to carry out the construction works.

Suitable

- For large-scale projects requiring fast delivery and an early start on-site.
- Where the works are designed by or on behalf of the employer.
- Where much of the detail design may be of a sophisticated or innovative nature requiring systems designed by specialists.
- Where a management contractor is to administer the conditions.
- For private and local authority employers.

Not suitable

- Where the employer is looking for certainty of cost.

Partnering procurement

Partnering contract: the ACA Standard Form of Contract for Term Partnering TPC2005 (amended 2008)

TPC2005 is published by the Association of Consultant Architects and is a Standard Term Partnering Contract which can be used for a wide variety of projects including housing, prisons and schools. TPC2005 provides a set of contractual provisions and processes and uses ideas from PPC2000 Standard Form of Contract for Project Partnering to offer integrated teamwork.

Suitable

- For a wide variety of projects.
- Where the employer is looking for a contract which attempts to combine efficiency and performance and working towards mutual objectives.

Not suitable

- For smaller projects.
- Where the employer is looking for a simple, easy to use contract as contract administration and project management can prove demanding in this contract.

For further information, see www.ppc2000.co.uk.

Partnering contract: the Standard Form of Contract for Project Partnering, PPC 2000 (amended 2013)

Published by the Association of Consultant Architects, the PPC 2000 is a complete procurement and delivery partnering contract for use on projects of different sizes. The contract requires

the employer, contractor and all consultants to enter into a single partnering contract for mutual objectives in the spirit of trust, fairness and mutual cooperation. The contract can be used by both the private and public sector. In October 2007 an international version was published for jurisdictions outside the United Kingdom. There is also a separate subcontract for specialist subcontractors who are not partners (SPC 2000).

Suitable

- For a wide variety of works and services where a multiparty contract is required including hotels, housing, prisons and schools.
- Where the employer is looking for a contract to share risks and mutual objectives.

Not suitable

- For smaller projects.
- Where the employer is not looking for a simple, easy to use contract as contract administration and project management can prove demanding.

Key features

- The contract comprises 28 clauses and five appendices.
- There is good opportunity for innovation and for fast delivery of projects.
- There are mechanisms for avoidance of conflict and speedy dispute resolution.

For further information, see www.ppc2000.co.uk.

Partnering contract: JCT Framework Agreement (FA) 2007

The Framework Agreement is a flexible procurement arrangement primarily for use by public sector and private sector employers who anticipate procuring a large volume of varied construction work or services over a period of up to four years. The contract attempts to encourage collaboration between all key participants.

The Framework Agreement is intended to be used alongside and as a supplement to other JCT contracts and alongside other standard engineering contracts and subcontracts.

Suitable

- For the procurement of a sequence of construction and engineering projects over a period.
- For use when a number of similar sets of works or services (referred to as tasks) may be required by the same provider.
- For use alongside most standard forms of construction and engineering contracts as well as subcontracts.
- Where compliance with public procurement rules is required.

Not suitable

- As a 'stand-alone' procurement contract.
- For small one-off projects.

Key features

- Framework Agreements contain mechanisms for the instruction (or the calling-off) of individual tasks, which are then subject to the pre-agreed terms of a construction or engineering contract.

New Engineering and Construction Contract (NEC) third edition 2005

The NEC is a family of standard contracts published by the ICE, which embraces the concept of partnership and encourages architects, employers, contractors and project managers to work together collaboratively within a legal framework. The NEC can be used flexibly and contains a suite of documents to suit different procurement arrangements and contains the following:

- 9 core clauses;
- 6 main option clauses;
- 18 secondary clauses;
- 2 dispute resolution clauses.

It is used on a variety of projects and procurement initiatives and is often used by government departments such as the Highways Agency and by local authorities. The contract is administered by a project manager, who is required to act impartially when issuing certificates. Depending on the document chosen the NEC can be used as a lump-sum, a remeasurement or a cost-plus contract.

What NEC contract should be chosen?

There are a number of factors to take into account when deciding what type of contract to use from within the NEC family: These factors include the following:

How can the risk can most effectively be managed?
Who has the necessary design expertise?
Timescale to complete the works;
Performance of the complete works;
Certainty of final cost is more important than lowest final cost;
Contract coordination for the project objectives;
The employer selection of specialist contractors or suppliers to carry out parts of the works.

Types of NEC contract

The main options offer different basic allocations of risk between the employer and the contractor. These options are:

Option A – Priced contract with activity schedule;
Option B – Priced contract with bills of quantities;
Option C – Target contract with activity schedule;
Option D – Target contract with bills of quantities ;
Option E – Cost reimbursable contract; and
Option F – Management contract.

Options A and B are priced contracts in which the risks of being able to carry out the works at agreed prices are largely borne by the contractor.

Options C and D are target contracts in which the financial risks are shared by the employer and the contractor in an agreed proportion.

Options E and F are two types of cost reimbursable contracts in which the financial risk is largely borne by the employer.

Option A – priced contract with activity schedule
This is a lump-sum contract, with an activity schedule. Activity schedules comprise lists of all the work the contractor proposes to do in order to fully carry out his or her obligations under the contract (similar to a contract sum analysis). Each activity listed within the activity schedule is priced on a lump-sum basis. When each activity is completed the contractor can apply for payment in respect of that activity (stage payments).

Option B – priced contract with bill of quantities
This is a remeasurement contract. At tender stage the contractor prices a Bill of Quantities for the items that compose the works. The actual works carried out are then remeasured against that bill.

Options C and D – target contracts (with activity schedule or bill of quantities)
These are target cost contracts. Option C uses an activity schedule, and Option D uses a bill of quantities. At tender stage the contractor submits a target price; then at the end of the contract the contractor is paid (or pays) his or her share of the difference between the target cost and the actual cost.

Option E – cost reimbursable contract
This option is only intended to be used where value of works is unknown at the beginning of the contract.

Option F – management contract
This option is a cost reimbursable contract option where the contractor subcontracts most or all of the work and is paid a fee for managing the contract. There are the a series of secondary options which have W, X and Y prefixes and deal with legislative updates and issues such as partnering, retention, liquidated damages and sectional completion.

Suitable

- For a wide variety of projects and procurement initiatives.
- For a range of options of responsibility for design, depending on the chosen method. For example the contractor can have full, some or no design responsibility.
- Where the work is being carried out in sections.
- Where the employer is seeking a contract that is flexible and clear and attempts to provide a single point responsibility and awareness of risk.
- Where the employer is seeking a contract which is based on mutual objectives with an emphasis on best practice management.

Not suitable

- For small domestic projects.
- Where the contract is not well managed.

Key features

- The NEC3 can be used in a wide variety of projects and types of work.
- The NEC3 is shorter than other contracts and is written in the present tense. It is not written in a legal context, uses bullet points, contains short sentences and contains no cross-references between clauses.
- As a result, it is a clear and simple document using language and structure which are straightforward and easily understood.
- The project manager's role under the NEC3 is more extensive than with other contracts.
- The NEC contracts are structured differently from other standard contracts as they are in a in a modular format, with different contract options being selected to suit the needs of the particular project. Each contract contains a set of core clauses that always apply. These are then supplemented by a series of main options.
- There is no reference to a contractor's design portion. The scope of design responsibility must be construed from the contract documents, specifically the Works information.

Private Finance 2 (PF2)

The Private Finance 2 is a procurement method and operational framework in which private sector companies finance, construct and maintain building and infrastructure projects on behalf of the public sector in return for annual payments by public authorities, usually for a period of 25 or 30 years. The capital asset is then transferred to the public sector after the defined period.

Private finance projects have increased over the past decade and played a significant role in the development of many sectors, including transport, energy, health and infrastructure. The public sector transfers the risk to a private-sector consortium with architects, contractors and facilities managers.

Suitable

- For a large number of projects in many different sectors, including hospital and transport projects, fire and police stations and prisons, as well as waste and infrastructure projects.
- Where value for money is required as there may be greater efficiencies in both the building and running costs compared to other procurement routes.
- Where projects are required to be delivered with speed to budget.

Not suitable

- For individual or small one-off projects.
- For projects where high quality or innovation is required.

Key features

- There are three main PFI procurement models: joint ventures, financially free-standing projects and classic PFI.
- There are normally no standard forms of contract as contracts tend to be bespoke and fit the requirements of each scheme.
- In general, the private-sector operator is responsible for the risks involved in the design, building, financing and operation of the project.

- PFI is also known as design, build, finance and operate (DBFO) and build, own, operate and transfer (BOOT).

For further information, see www.hmtreasury.gov.uk.

NHS proCure 21+

Procure 21+ is a partnering framework agreement for use in National Health Service (NHS) projects. This agreement replaced ProCure 21 in October 2010 to reflect changes in policy, economic environment and procurement practice. Procure 21+ encourages a commitment to partnering, collaborative working and long-term relationships and uses the NEC3 contract to procure its services.

Suitable

- For any NHS organisation or any non-NHS organisation that collaborates with an NHS organisation.
- For major works schemes and some minor works schemes.
- For refurbishments, infrastructure upgrades and feasibility studies for service planning or reconfiguration.
- Where shared risk with mutual objectives is required.
- Where health projects require fast delivery with cost certainty.

Not suitable

- For use on non-health projects.
- For use on smaller schemes.

Key features

- It has been designed to streamline and simplify the procurement process.
- This contract attempts to improve performance, maximise value and mutual objectives.
- There is commitment to partnering, collaborative working and long-term relationships.

For further information, see www.procure21plus.nhs.uk.

FIDIC

FIDIC is an abbreviation of 'Fédération Internationale des Ingénieurs – Conseils' (International Federation of Consulting Engineers), an international federation of associations of consulting engineers. FIDIC contracts are the most widely used forms of international contracts and are sometimes used in the UK on large infrastructure projects and windfarms. If being used as a construction contract in the UK, FIDIC contracts require an amendment in order to comply with UK legislative requirements (e.g. the CDM Regulations 2007 and the amended Housing Grants, Construction and Regeneration Act 1996). The FIDIC 'Rainbow Suite' of New Contracts was published in 1999.

The Red Book: Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer

These conditions are suitable for all projects where main responsibility for design lies with the employer (or the engineer). The work done is measured, and payment is made according to a Bill of Quantities, although there is an option for payment on a lump-sum basis.

The Yellow Book: Conditions of Contract for Plant and Design-Build

These conditions are suitable for all types of projects where the main design responsibility lies with the contractor. Payment is made on a lump-sum basis, usually against a schedule of payments.

The Silver Book: Conditions of Contract for EPC/ Turnkey Projects

This book is intended for EPC (Engineering, Procurement and Construction) arrangements. The contractor is responsible for all the processes and design and assumes time and cost risks that are greater than it would otherwise assume under a Yellow Book.

The Green Book: Conditions of Short Form of Contract

These conditions are suitable for use on projects with a relatively small value, short construction time or involving simple or repetitive work.

Additional FIDIC contracts are the following:

- The Blue Book: Contract for Dredging and Reclamation Works
- The Pink Book: Conditions of Contract for
- Construction for Building and Engineering Works
- Designed by the Employer (for bank-financed projects only)
- The White Book: Client/Consultant Model Services Agreement
- The Gold Book: FIDIC Design, Build and Operate Projects.

8
Contract administration

This chapter makes reference to the JCT Standard Building Contract 2011 (SBC). For a summary of the Standard Building Contract refer to Chapter 7, Types of Contract.

Contents of the Standard Building Contract 2011

Introduction
Articles of Agreement
Recitals
Articles
Contract Particulars
Attestation
Conditions

Section 1 – Definitions and interpretation

Definitions (Clause 1·1)
Interpretation (Clauses 1·2 to 1·11)

Section 2 – Carrying out the works

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 (Contractor's Design Submission Procedure)
Errors, Discrepancies and Divergences (Clauses 2·13 to 2·18)
CDP Design Work (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

Access and Representatives (Clauses 3·1 to 3·6)
Sub-Contracting (Clauses 3·7 to 3·9)
Architect/Contract Administrator's instructions (Clause 3·10 to 3·22 and Schedule 4)
CDM Regulations (Clauses 3·23 and 3·24 and Supplemental Provision 2)

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

Contract Sum and Adjustments (Clauses 4·1 to 4·5)
Certificates and Payments (Clauses 4·6 to 4·15)
Gross Valuation (Clauses 4·16 and 4·17)
Retention (Clauses 4·18 to 4·20)
Fluctuations (Clauses 4·21 and 4·22 and Schedule 7)
Loss and Expense (Clauses 4·23 to 4·26)

Section 5 – Variations

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)

Injury and property damage – indemnity and insurance (Clauses 6·1 to 6·6)
Works insurance (Clauses 6·7 to 6·11 and Schedule 3)

CDP Professional Indemnity insurance (Clauses 6·12 and 6·13)
Joint Fire Code (Clauses 6·14 to 6·17)

Section 7 – Assignment, third party rights and collateral warranties (and Schedule 5 – Third party rights)

Section 8 – Termination

General (Clauses 8·1 to 8·3)
Termination by the Employer (Clauses 8·4 to 8·8)
Termination by the Contractor (Clauses 8·9 and 8·10)
Termination by either Party (Clause 8·11)
Consequences of Termination under Clauses 8·9 to 8·11, etc. (Clause 8·12)

Section 9 – Settlement of disputes

General (and Supplemental Provision 6)

Mediation (Clause 9·1) and ADR
Adjudication (Clause 9·2)
Arbitration (Clauses 9·3 to 9·8)
Litigation (Article 9)

Administering the contract

SBC Article 3 and Clauses 2.8 to 2.12
How a project is administered is important to ensure a project is delivered successfully and for the avoidance of claims. An architect is often appointed to act as a contract administrator on the employer's behalf and undertakes a number of administrative functions including issuing certificates, ordering variations of the works, agreeing interim payments and monitoring progress of the work. Details of the architect who is to act as the contract administrator is to be inserted under SBC Article 3.

An architect must exercise skill and care issuing certificates and must ensure that the issuing of interim valuations are reasonable and justified and reflect the work carried out.[1] The contract administrator must also be impartial and unbiased when certifying payments.[2] Under most standard forms of building contracts including the SBC the only person authorised to issue instructions to the contractor will be the architect or the contract administrator.[3]

The following are points of note on administering the contract:

- The contract administrator must be familiar with the terms of the contract.
- Time limits of the contract must be known so the administrator can issue certificates.
- The contract administrator must identify defective workmanship throughout the project.
- Architects should do no more than periodic inspection (not supervision).
- Practical completion remains at the discretion of the contract administrator and must be determined sensibly and robustly if the contract administrator is to resist pressure from the client or other parties to certify.
- An architect as a contract administrator has to exercise reasonable skill and care in the performance of his or her obligations.
- The conduct of an architect acting as a contract administrator will be measured against what would be expected of a reasonable and competent architect in the position of the contract administrator.[4]
- An architect as a contract administrator has to undertake the function which he or she is required to perform under

[1] *Sutcliffe v Chippendale & Edmondson (A Firm)* (1971) 18 BLR 149; and *Reinwood Ltd v L Brown & Sons Ltd* [2007] BLR 10.
[2] *Sutcliffe v Thackrah* [1974] AC 727.
[3] Except the JCT Design and Build Contract where the employer can issue an instruction.
[4] *West Faulkner Associates v London Borough of Newham* (1994) 71 BLR 1 at 15–16 per Simon Brown L.J.

the contract. This means that a contract administrator must issue certificates given by the contract.

The importance of record keeping

It is important to have a detailed comprehensive set of records maintained from the beginning of a project up through to completion. This is to have evidence of what happened during the course of a contract for the avoidance of claims. The parties to a contract should ensure they understand what the contracts states on keeping records. It is important that good records of all site visits are made. This provides evidence at a later date, if required, that the architect provided a reasonable inspection regime. See the case of *Walter Lilly & Company Ltd v Mackay & Anor*[5] for a recent case of why good written notes/records should be made from the beginning of the project. Clause 5.13 of the RIBA 2010 Standard Conditions for the Appointment of an Architect states that the Architect shall maintain records of time spent on services performed on a time basis for the purpose of verifying charges under Clause 5.6 and shall in addition maintain records of any expenses and disbursements to be reimbursed at net cost. The architect shall make such records available to the client on reasonable request.

Latent defect

> The concept of a latent defect is not a difficult one. It means a concealed flaw. What is a flaw? It is the actual defect in the workmanship or design, not the danger presented by the defect to what extent must it be hidden? In my judgement, it must be a defect that would not be discovered following the nature of inspection that the

[5] EWHC 1773 (TCC) (11 July 2012).

> defendant might reasonably anticipate the article would be subjected to.[6]

A latent defect is a concealed flaw[7] which could not reasonably have been discovered on reasonable inspection of a building by a reasonably careful person skilled in construction[8] or on behalf of the subsequent owner or occupier but which manifests over time. 'Latent' means existing but not visible.[9]

If a latent defect arises through the fault of an architect and/or a contractor he or she may find him- or herself liable for losses caused by latent defects. An architect may also be liable to subsequent owners of a building by latent defects. Architects should have professional indemnity insurance to a certain limit for claims against them for losses as a result of design defects.[10]

In *Pearson Education v The Charter Partnership Limited,*[11] a warehouse roof leaked during a storm damaging more than two million stored books. The roof was designed for a rainwater intensity of 75 mm per hour whereas experts agreed the design capacity ought to have been for not less than 150 millimetres. Between 1990 and 2002 the warehouse was owned, insured, leased and subletted by various owners. The occupiers, who subsequently assigned their lease to the people making the claim, did not learn of the defect. The judge found that a purely visual inspection of the building would not reveal the under-capacity of the drainage system and that the claimants knew nothing of the previous flood, or its cause, when they acquired the building. He rejected the architects' contention that if one person discovers the defect it ceases to be latent

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[6] *Baxall Securities Ltd v Sheard Walshaw Partnership* [2002] BLR 100 at 108 [46] (CA).
[7] *Baxhall Securities Ltd v Sheard Walshaw Partnership* [2002] PNLR 564.
[8] *Victoria University of Manchester v Hugh Wilson and Lewis Womersley* (1984) 2 Con LR 43 at 78 per Judge John Newey QC.
[9] An example of a latent defect is a house constructed on soil where it is liable to land slippage and it is expected that there will be serious movement in the foundations within 10 years of construction (*Batty v Metropolitan Property Realisations Ltd*).
[10] Other remedies for latent defects are collateral warranties, building warranty schemes, guarantees and latent defects insurance.
[11] [2007] EWCA Civ 130.

to subsequent parties. The judge concluded that 'the latent quality of the defect survives for everyone unless and until the defect becomes obvious to all'. In this case the architects were found liable because although someone had previously discovered the defect, the claimants had not.

Patent defect

A patent defect is a defect which should have been discovered following reasonable examination of the works by a skilled person.[12] A patent defect can include those matters which are observable. If defects are patent, the architect is unlikely to be held liable to a future owner or occupier if they were to purchase or take occupation of a property.

Contract documents

SBC Clause 1.1, 2.8

The contract documents are defined in SBC Clause 1.1 as the contract drawings, the contract bills, the agreement and these conditions, together with (where applicable) the employer's requirements, the contractor's proposals and the CDP analysis. The contract documents must remain in the custody of the employer and shall be available at all reasonable times for inspection by the contractor (SBC Clause 2.8). The contractor must keep the contract documents on the site and must ensure the contract documents are available to the architect at all reasonable times (SBC Clause 2.8).

Drawings

SBC Third Recital and Clause 2.8

The drawings must be consistent with one another and with other contract documents. The contract drawings must remain

[12] *Clay v AJ Crump and Sons Ltd* [1964] 1 QB 533 at 567, per Upjohn LJ.

in the custody of the employer and must be available at all reasonable times for inspection by the contractor (SBC Clause 2.8.1). The contractor must keep drawings on the site and ensure they available to the architect at all reasonable times (SBC Clause 2.8). The contractor must be provided with one certified copy and two further copies after the execution of the contract (SBC Clause 2.8.2). The drawings must not be used for any purpose other than the works, and the details of the rates or prices are not to be divulged except for the purposes of the contract (SBC Clause 2.8.4).

Bills of Quantities

Bills of Quantities are documents containing individual prices and other data of materials, parts and labour to enable a contractor to price the work. Bills of quantities are normally prepared by a quantity surveyor based on detailed drawings and a specification prepared by an architect or a contract administrator. The contractor must keep on-site at all reasonable times one copy of the unpriced bills of quantities (SBC Clause 2.8.3). The contractor must be provided with two copies of the unpriced bills of quantities after the execution of the contract (SBC Clause 2.8.3).

Architect's Instruction

SBC Clause 3.10–3.14

An Architect's Instruction empowers the contractor to carry out the duties and obligations of a contract. An architect should be cautious when issuing Architect's Instructions to the contractor, because they can have a number of consequences including varying the design, quantity of the work or the value of the building contract. The contractor must comply with Architect's Instructions, and if the contractor fails to do so can provide the employer the right under SBC Clause 3.11 to have the work carried out by others and in certain circumstances under SBC Clause 8.4.1.3 this can result in the employer having the right to terminate the contractor's employment.

All instructions should be in writing and oral instructions should be avoided as they have no effect under Clause SBC Clause 3.12.1 unless the contractor confirms an oral instruction in writing to the architect within seven days. The architect then has seven days to dissent and if the architect does not dissent the Architect's Instruction takes effect from the date of the architect's confirmation. If neither the contractor nor the architect confirms an Architect's Instruction in the manner and time stated but the contractor complies with it, the architect may at any time prior to the issue of the Final Certificate confirm the instruction retrospectively.

Contract particulars in which an architect can issue architect's instructions

- Discrepancies (SBC Clause 2.15)
- Issue of further drawings (SBC Clauses 2.11, 2.12)
- Levels and setting out (SBC Clauses 2.10)
- Defects arising in Rectification Period (SBC Clauses 2.38)
- Expenditure of provisional sums (SBC Clause 3.16)
- Discovery of antiquities (SBC Clause 3.23)
- Instructions for integration of CDP work (SBC Clause 2.2.2)
- Errors in setting out not to be amended (SBC Clause 2.10)
- Defects to be rectified during Rectification Period (SBC Clause 2.38)
- Confirmation of Clerk of Works Directions (SBC Clause 3.4)
- Variations (SBC Clause 3.14)
- Postponement of work (SBC Clause 3.15)
- Testing and opening up (SBC Clause 3.17)
- Work not in accordance with the contract (SBC Clause 3.18)
- Work not carried out in a proper manner (SBC Clause 3.19)
- Exclusion of persons (SBC Clause 3.21)
- Insurance matters, where applicable (SBC Clause 6.5)

Checklist when issuing Architect's Instructions

- Check the details of the name of project, contractor, date of instruction and serial number are entered on the form.
- Check all instructions are numbered consecutively for each contract.

- Check that the instruction is under the terms of the contract.
- State the Clause number for each instruction.
- Check that the instruction is signed by the authorised person.
- Check that the instructions are precisely worded and their meaning unambiguous.
- Check the original instruction is sent to the contractor and a duplicate copy is sent to the employer with a further copy to consultants including the quantity surveyor. A file copy should be retained.

Extension of Time

SBC Clauses 2.26–2.28

An Extension of Time is a provision of a contract in which an architect or contractor administrator can amend the date for completion of the works or a section of the works if the contractor is delayed as a result of an action of the employer or employer's agents or certain specified events. An Extension of Time has the effect of releasing the contractor from the obligation to pay liquidated damages and protects an employer's right to deduct or withhold liquated damages.

An architect or contract administrator is required to act fairly, lawfully, rationally and logically when considering an extension of time; see *Royal Brompton Hospital NHS Trust v Hammond & Others*.[13] If the cause of delay has been identified as a relevant event the architect must reasonably make in writing whether the relevant event qualifies as an Extension of Time. The following are relevant events in SBC:

- Variations issued by the architect;
- Instructions issued by the architect;
- Discrepancies or divergence between documents such as the contract drawings and the contract bills;

[13] (No. 7) (2000) 76 Con LR 148.

- Suspension of works by the contractor;
- Loss or damage by any of the specified perils;
- Deferment of giving possession of the site;
- Opening up works for inspection, unless the works or materials subsequently turn out to be faulty;
- Impediment by the employer, architect, quantity surveyor or any other person employed by the employer;
- Exceptionally adverse weather conditions;
- Civil commotion and threats of terrorism;
- Force majeure.[14]

Force majeure

SBC Clause 2.29.13 and Clause 8.11.1

Force majeure is a French term meaning 'superior force'. It is a clause in a contract which entitles a party to terminate or suspend the contract when an extraordinary event or circumstance occurs beyond the control of the parties, such as a war, or an event described as an 'act of God' which no one could have reasonably foreseen. An *act of God* can include flooding, earthquakes and volcanic eruption. Force majeure has the effect of preventing or delaying the performance of the contract and can result in an extension of time being granted. Contracting parties at the outset of a project should define the list of what constitutes a Force majeure before a contract is concluded as the term can include a number of separate events.

Specified perils

SBC Clause 6.8

Specified perils are listed in SBC Clause 6.8 and include lighting, explosion, storm, flood, escape of water from any water

[14] Joint Contracts Tribunal Limited, 2009, *The Standard Building Contract with Approximate Quantities*, 2009 Revision 2 SBC/AQ, Joint Contracts Tribunal Limited, London, p51 and p52.

tank, apparatus or pipe, earthquake, aircraft, riot and civil commotion.

Inspecting site

SBC Clauses 3.17 and 3.18

The architect's duty to inspect is dependent on the circumstances of each project[15] and should be defined by the terms of the contract and architect's appointment. An architect should inspect site with reasonable skill and care in conformity with the normal standards by what a reasonably competent architect would do in the circumstances.[16]

The frequency and duration of inspections is normally stated in the terms of the relevant contract and should be tailored to the nature of the works going on at site from time to time.[17] The Standard Building Contract, however, includes no express provision relating to inspection or monitoring of work by an architect. Under SBC Clause 3.17 an architect may issue instructions requiring the contractor to open up for inspection any work covered up, or to arrange for or carry out any test of any materials or goods or of any executed work. The cost of such opening up or testing (including the cost of making good) shall be added to the contract sum unless provided for in the contract bills or unless the inspection or test shows that the materials, goods or work are not in accordance with the contract. Under SBC Clause 3.18 if defects have been discovered, the contract administrator can demand further tests provided these tests are within the JCT Code of Practice in Schedule 4 of the SBC.

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[15] *Kensington Chelsea and Westminster Area Health Authority v Wettern Composites and Others* (1984) 1 Con LR 114.

[16] Dyson J in *New Islington and Hackney Housing Association Limited v. Pollard Thomas and Edward Limited* [2001] BLR 74.

[17] See *Corfield v Grant* (1992) 29 ConLR 58; and *McGlinn v. Waltham Contractors Ltd* EWHC149(TCC) HHJ and paragraph 8–240 of Jackson and Powell.

Architect's inspection duties

During an inspection, an architect must be satisfied that the works are being carried out in accordance with the contract and with statutory requirements. The inspection regime must be tailored to the project and appropriate to the work being carried out on-site during the course of a project. Records should be kept of site visits, and in particular of defective work.

The development of case law of inspection duties of architects has a long history starting with *Jameson v Simon*[18] in 1899 and more recently in a decision of *Ian McGlinn v Waltham Contractors,*[19] in 2007.[20] In this case his Honour Judge Coulson provided a number of principles in McGlinn of an architect's duties of inspection:

1. The frequency and duration of inspections are to be tailored to the nature of the works going on from time to time:

It is not enough for the inspecting professional religiously to carry out an inspection of the work either before or after the fortnightly or monthly site meetings, and not otherwise. The

[18] *Jameson v Simon* (1899) 1 F (Ct of Sess) 1211.

[19] *Ian McGlinn and Waltham Contractors and Huw Thomas Associates and DJ Hartigan and Associates Limited and Wilson Large Partners* [2007] EWHC 149 (TCC).

[20] The facts in this case are as follows:

- Construction of a large house in Jersey – completed in 2001.
- Empty for three years while defects were investigated.
- The client expected a building of high quality.
- The project was remote from the architect's office (Jersey and Winchester).
- There was an absence of any written record of what Mr McGlinn wanted at the outset and, in particular, what standard of finish he required.
- No specification, employer's requirements or clear design brief.
- Although there was no written appointment the court decided the architect owed a duty to inspect the work.

dates of such meetings may well have been arranged some time in advance, without any reference to the particular elements of work being progressed on site at the time. Moreover, if inspections are confined to the fortnightly or monthly site meetings, the contractor will know that, at all other times, his work will effectively remain safe from inspection.[21]

2. Instruct the contractor not to cover up the relevant elements of the work

Depending on the importance of the particular element or stage of the works, the inspecting professional can instruct the contractor not to cover up the relevant elements of the work until they have been inspected . . . if the inspecting officer is carrying out his inspections which are tailored to the nature of the works proceeding on site at any particular time, he will have timed his inspections in such a manner as to avoid affecting the progress of the works.[22]

3. The architect's reasonable expectations

The architect's inspection of a project will depend on a number of factors, including what the architect's reasonable expectations were as to what might be being carried out on site at the time and its importance to the works as a whole. If defective work is covered up between inspections, this may not be relied on by an architect as a valid defence, depending on the importance of the element and what was being carried out. This means the architect may need to require the contractor to expose work where there is suspicion it may be defective.

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[21] *Ian McGlinn and Waltham Contractors and Huw Thomas Associates and DJ Hartigan and Associates Limited and Wilson Large Partners* [2007] EWHC 149 (TCC).
[22] *Ian McGlinn and Waltham Contractors and Huw Thomas Associates and DJ Hartigan and Associates Limited and Wilson Large Partners* [2007] EWHC 149 (TCC).

4. Inspect part of the works early on

If an element of work is important because it is to be repeated throughout the whole or part of the works, an architect must ensure they have inspected part of the works early on, in order to form a view of the contractor's competence to carry out that part of the works.

5. Reasonable examination of the works does not mean the architect has to go into every detail

Citing the case of *East Ham Corporation v Bernard Sunley*,[23] His Honour Judge Coulson considered it was inevitable that some defects would escape the architect's notice. Therefore, reasonable examination of the works does not mean the architect has to go into every detail.

6. The architect does not guarantee that an inspection will reveal defects or prevent defective work being incorporated into the project.[24]

Summary of key cases on inspection

- A complex set of details will require more frequent inspection; see *George Fischer Holdings Ltd v Multi Design Consultants Ltd and Davis Langdon & Everest.*[25]
- The standard of care for supervision does not differ from that generally expected of professionals, the standard is one of reasonable supervision; see *Jameson v Simon*.[26]
- The architect cannot rely on the contractor to advise him or her of when such inspections should be carried out; see *Brown and Brown v Gilbert-Scott and Payne*.[27]

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[23] *East Ham Corporation v. Bernard Sunley & Sons Ltd.* [1966] AC 407.
[24] Corfield v Grant [1992] 29ConLR58.
[25] (1998) 61 Con LR 85.
[26] (1899) 1 F (Ct of Sess) 1211.
[27] (1992) 35 Con LR 120.

- The architect is under a continuing duty to check that his or her design will work in practice and to correct any errors; see *Brickfield Properties Ltd v Newton*.[28]
- An architect can instruct the contractor not to cover up the relevant elements of the work until they have been inspected, depending on the importance of the particular element or stage of the works; see *Florida Hotels Pty Ltd v Mayo*.[29]
- Reasonable examination of the works does not require the inspector to go into every matter in detail; see *East Ham Corporation v Bernard Sunley*.[30]
- The architect does not guarantee that his or her inspection will reveal or prevent all defective work; see *Corfield v Grant*[31] and *Consarc Design Ltd v Hutch Investments Ltd*.[32]
- In *Ian McGlinn v Waltham Contractors*[33] (at 218) a number of principles were examined by which architects duties of inspection should be judged; see the earlier summary.

Inspecting site checklist

Before visiting site

- Prepare list of matters to be checked.
- Ensure all contract production information is up to date and reflects items to be checked.

On-site

- Ensure there is a logical and thorough record of the condition before investigation, what was done and what was found.

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[28] [1971] 1 WLR 862.
[29] *Florida Hotels Pty Ltd v Mayo* [1965] 113 C.L.R. 588; and paragraph 8–241 of Jackson and Powell.
[30] [1966] AC 406; and paragraph 8–239 of Jackson and Powell.
[31] [1992] 29ConLR58.
[32] [2002] PNLR 712.
[33] EWHC149(TCC) HHJ.

- Ensure the building control officer and other officials have been notified as appropriate.
- Ensure the contractor's site management team or person in charge is on-site.
- Ensure the welfare facilities are set up, are of a high standard and are being used.
- Check that the site is tidy and materials are logically and accessibly stored.
- Ensure the site security, safety provisions and temporary protection are as specified.
- Check all hoardings and other temporary structures are fixed or anchored securely enough to deter intruders and to resist high winds.
- Ensure an assessment is made of the condition of structural frames.
- Check an assessment is made of the ceiling and floor voids.
- Check that the quality and design complies with the contract provisions.
- Record with sketches as well as photographs.
- Take samples if necessary. Some may need to be analysed by a laboratory.
- Decide whether the investigations need to be extended further.

In the office

- Ensure inspection notes and inspection records have been carefully written and filed.[34]
- Carefully date, record and file photographs, notes and sketches.

Periodic inspection or supervision?

In general, an architect's duties are of inspection and contract administration, not supervision. Supervision is a different term in which the architect gives directions as to how the work

[34] *Department of National Heritage v. Steensen Varming Mulcahy & Others* (1998) CILL 1422.

should be carried out, which is unlike inspection. An architect does not, in general, supervise the works. Supervision would require an almost constant presence on site and the power to direct the operations of the main contractor. RIBA standard forms refer to periodic inspection which the case of *Consarc Design Limited v Hutch Investments Limited*[35] confirmed is a less onerous duty than 'supervision'.

For further information on Inspection, see the following:

Jamieson, N., 2009, *Good Practice Guide: Inspecting Works*, RIBA Publishing, London.

RIBA, Architect's Job Book, 2008, 8th edition, RIBA Publishing, London.

Stewart, R., Powell, J., and Jackson, R., 2005, *Jackson & Powell on Professional Liability*, Sweet and Maxwell, London.

Defects

SBC Clause 3.18

In general terms, 'defects' are materials and goods which are not in accordance with the contract documents. A contract administrator owes a duty of care to the employer to discover defects and bad workmanship.[36] An architect may be liable if he could have reasonably been expected to discover a defect on an inspection. In *Clay v A.J. Crump & Sons*,[37] an architect and demolition contractors agreed to leave a wall standing. This wall subsequently collapsed and killed two workmen and injured an employee of the main contractors. It was held that the architect and the contractor were liable for agreeing with the demolition contractors to leave a wall standing because they could reasonably have been expected the defective wall to have been discovered by an inspection before it caused

[35] [2002] PNLR 310.
[36] *Imperial College of Science & Technology v Norman & Dawbarn* (1987) 8 Con LR 107.
[37] [1964] 1 QB 533.

damage. A reasonable opportunity to discover the defect arose when the contractors' director inspected the defective wall but negligently failed to notice the defect. However, in *Oldschool v Gleeson (Construction) Ltd*,[38] it was held there is no duty of the architect to the contractor to discover defective work.

What are defects?

- Defects are, generally, work, materials and goods which are not in conformity with the contract documents.
- Defects are not in accordance to British Standards and building regulations, among others.
- Defects give rise to damage (such as defective flashings allowing water ingress).
- Defects require opening up (such as water ingress within a basement, from an unknown cause).
- Defects not giving rise to other damage (such as use of a non-specified but otherwise adequate product).
- Defects which affect performance or are causing damage include the following:
  - Water ingress;
  - Air infiltration;
  - Poor environmental performance;
  - Condensation;
  - Movement;
  - Accelerated weathering;
  - Defects that involve issues of quality;
  - Workmanship or specification.

Common defects in buildings

Water penetration

- Basements
- Roofs
- Cladding and glazing

[38](1976) 4 BLR 103.

From above: roofs

- Thermal movement
- Incorrectly installed flashings
- Ponding
- Poor workmanship
- Lack of/incorrectly installed weep holes, cavity trays and movement joints

External walls

- Incorrect design/specification to floor build-up
- Incorrect detailing/workmanship
- Incorrect waterproofing

From below: basement waterproofing

- Incorrect design/specification to floor build-up
- Incorrect detailing/workmanship
- Incorrect waterproofing

Key clauses for defects in the Standard Building Contract (SBC)

SBC Clause 2.38
If any defects, shrinkages or other faults appear within the Rectification Period due to the failure of a contractor to comply with the materials, goods or workmanship, an architect is obliged to issue a schedule of defects to the contractor to make good relevant defects, not later than 14 days after the expiry of the Rectification Period.

SBC Clause 2.39
An architect should issue a Certificate of Making Good, if in the opinion of the architect all defects, shrinkages or faults have been made good.

SBC Clause 3.11
An architect has the power to issue a notice to the contractor for non-compliance with an instruction, giving seven days to

comply with an instruction. If the contractor does not comply with the notice, another contractor can be employed to carry out the work. The original contractor is liable for all additional costs incurred by the employer in connection which must be deducted in the calculation of the final sum.

SBC Clause 3.17
An architect can instruct the contractor to open up the works for inspection for work that has been covered up or to carry out tests on materials or goods. The cost of opening up is to be included in the final sum unless the inspection proves that the materials, goods or work are not in accordance with the contract.

SBC Clause 3.18.1
An architect may have defective work removed from site if any work, material or goods are not in accordance with the contract.

SBC Clause 8.4.3
If a contractor refuses or neglects to comply with a notice or Architect's Instruction to remove defective work, an architect can issue a default notice to the contractor to terminate his or her work.

Defects liability period

The defects liability period is the time following completion of the works during which the contractor or subcontractor is responsible for making good defects. Retention is usually held until the end of the defects liability period as security for the contractor or subcontractor to fulfil those obligations.

Letter of intent

A letter of intent is a document which sets out details of an agreement between two or more parties (e.g. an employer and

a contractor) to enter into a contract to start on-site before a contract is finalised. A letter of intent is often used to prevent delay at the start of a project, where an employer requires work to be commenced by the contractor before a formal contract has been agreed and signed. This can prove beneficial when there is a long lead in time for ordering materials or to avoid lengthy delays in obtaining approvals and permissions. However, judgement and caution must be used when drafting or accepting a letter of intent. A letter of intent can therefore create uncertainty and may be of no legal effect. There may also be uncertainty about the parties' rights and obligations. However it may depend on the intention of the parties,[39] as was stated by Judge Fay in *Turriff Construction Limited v Regalia Knitting Mills Limited*:[40]

> A letter is no more than the expression in writing of a party's present intention to enter into a contract at a future date. Save in exceptional circumstances it can have no binding effect.[41]

Liquidated damages

SBC Clause 2.30

Key cases

Alfred McAlpine Capital Projects Limited v Tilebox Limited [2005] EWHC 281 (TCC)

Bramhall & Ogden v Sheffield City Council (1983) 29 BLR 73

Liquidated damages are a reasonable pre-estimate of the losses the employer is likely to incur if work is completed on

[39] *British Steel Corporation v Cleveland Bridge and Engineering Co Ltd.* [1981] 24 BLR 94 at 119 per Robert Goff J. See also *Hall & Tawse South Ltd v Ivory Gate Ltd* [1997] 62 Con LR 117.

[40] [1971] 9 BLR 20.

[41] Judge Fay in *Turriff Construction Limited v Regalia Knitting Mills Limited* [1971] 9 BLR 20.

time. An agreed sum of money is specified in a contract of the amount to be paid by the contractor for the contractor's failure to achieve practical completion by the completion date. If a contractor fails to achieve practical completion by the relevant completion date (SBC Clause 2.31) liquidated damages are recoverable at the rate stated in the contract particulars provided that the sum fixed was a genuine pre-estimate of the loss likely to be suffered by the employer in the event of a predetermined occurrence. The architect or the contract administrator is then required to issue a non-completion certificate, and the employer must give the contractor written notice to withhold or deduct liquidated damages (SBC Clause 2.32.1). Once a Certificate of Practical Completion has been issued, the contractor can no longer be charged liquidated damages under SBC Clause 2.32.

Quantum meruit

The expression 'quantum meruit' is a Latin phrase for 'as much as is deserved' and means 'reasonable value of services'. Quantum meruit is a claim for reasonable payment where one party may be prevented by the other from completing performance. For example, if work commenced on a project and the contract was not signed, a contractor who seeks payment for the reasonable value of work done for the employer may be able to claim on a quantum meruit basis if the contract in the interim period does not apply. There are a number of situations where a quantum meruit approach may be applicable:

- Where there is an express agreement to pay a 'reasonable' price or a 'reasonable sum';
- Where work is done at the request of one party but without an express contract;
- Where work has been done under a contract without any express agreement as to price;
- Where work is done under a contract that both parties believed to be valid at the time, but which is in fact void.

Possession of the site

SBC Clauses 2.4–2.6

Under SBC Clause 2.4 the employer must give the contractor possession of the site on the date set out in the contract particulars. Failure to give possession to the contractor may be a breach of contract, unless the employer has exercised the right of deferring possession of site.[42] Under SBC Clause 2.6.1, the employer may, with the contractor's consent, use or occupy the site for storage or otherwise, without taking possession of it before the date of issue of the Practical Completion Certificate or relevant Section Completion Certificate subject to notification and confirmation from the works' insurers.

Deferring possession of site

SBC Clause 2.5

Under SBC Clause 2.5, if the parties agree and this is stated in the contract particulars, the employer can defer possession of the site (or part of it) to the contractor, by up to six weeks.

Rectification period

SBC Clause 2.38

The Rectification Period was formerly known as the 'Defects Liability Period' under previous standard JCT forms of contract. Under the SBC the purpose of the Rectification Period is to give the contractor the right to rectify any defects or snags that may appear. The Rectification Period commences once Practical Completion of the works has been achieved and the Certificate of Practical Completion has been issued for a period

[42] *Freeman & Son v Hensler* (1900) 64 JP 260.

as stated in the Contract Particulars. If no other period is stated under SBC Clause 2.38, the period is six months. The architect has 14 days after the expiry of the Rectification Period to provide the contractor with a schedule of defects or snags (SBC Clause 2.38.1). After the contractor has made good the defects, the architect can issue a Certificate of Making Good under SBC Clause 2.39.

Collateral warranties

A collateral warranty is a contractual statement which provides direct contractual rights between parties which are outside of the primary contract and where in the absence of such a warranty there may not be a right to recover for loss. Under English law a person who is not party to a contract cannot sue for breach of that contract. A collateral warranty usually supplements a main contract and can have the effect of protecting third parties who do not have a direct contractual link from recovering losses for work carried out.

In *Parkwood Leisure Limited v Laing O'Rourke Wales & West Limited*[43] (2013) the judge considered whether a collateral warranty is a construction contract for the purposes of Part II of the Housing Grants, Construction and Regeneration Act 1996. The court confirmed that, depending on their precise wording and the circumstances, collateral warranties could be regarded as being construction contracts under the act, in which case the beneficiary would be rendered eligible for statutory adjudication.

There are a number of standard forms of collateral warranty available such as those produced by the British Property Federation, the Construction Industry Council and the Joint Contracts Tribunal.

[43] EWHC 2665 2013.

The Joint Contracts Tribunal forms of collateral warranty

- CWa/F Contractor Collateral Warranty for a Funder
- CWa/P&T Contractor Collateral Warranty for a Purchaser or Tenant
- SCWa/E Sub-Contractor Collateral Warranty for Employer
- SCWa/F Sub-Contractor Collateral Warranty for a Funder
- SCWa/P&T Sub-Contractor Collateral Warranty for a Purchaser or Tenant
- CMWa/F Construction Manager Collateral Warranty for a Funder
- CMWa/P&T Construction Manager Collateral Warranty for a Purchaser or Tenant
- TCWa/F Trade Contractor Collateral Warranty for a Funder
- TCWa/P&T Trade Contractor Collateral Warranty for a Purchaser or Tenant
- MCWa/F Management Contractor Collateral Warranty for a Funder
- MCWa/P&T Management Contractor Collateral Warranty for a Purchaser or Tenant
- WCWa/F Works Contractor Collateral Warranty for a Funder
- WCWa/P&T Works Contractor Collateral Warranty for a Purchaser or Tenant

Construction Industry Council forms of collateral warranty

- CIC/ConsWa/F for use where a warranty is to be given by a consultant to a funder
- CIC/ConsWa/P&T to be given to a purchaser/tenant of the whole or part of a commercial or industrial development
- CIC/ConsWa/D&BE Collateral warranty: consultant–employer (including guidance notes)

British Property Federation forms of collateral warranty

- CoWa/F Form of Agreement for Collateral Warranty
- CoWa/P&T for use where a warranty is to be given to a purchaser or a tenant of a proposed development

Professional Consultant's Certificate

A Professional Consultants Certificate is issued by the Council of Mortgage Lenders and is for use by architects or professional consultants when designing and/or monitoring the construction or conversion of residential buildings. The certificate is used where there is the absence of traditional architect's certificates and when an architect or professional acting as contract administrator is asked to certify that a project is constructed in accordance with the Building Regulations and generally in accordance with the contract. The purpose of the Professional Consultants Certificate is to confirm to the lender (or its conveyancer) that a professional consultant has done the following:

- Has visited the property to check its progress of construction, its conformity with drawings approved under building regulations and its conformity with drawings/instructions issued under the building contract;
- Will remain liable to the first purchasers and their lender and subsequent purchasers and lenders for the period of 6 years from the date of the certificate;
- Has appropriate experience in the design and/or monitoring of the construction and conversion of residential buildings; and
- Will keep a certain level of professional indemnity insurance in force to cover his liabilities under the certificate.[44]

These certificates do not have (and are not intended to have) the equivalent standing as National House Building Council (NHBC) cover or a Zurich guarantee.

The case of *Hunt & Others v Optima (Cambridge) Ltd & Others*[45] (2013) highlights that architects should be careful when certifying works as they can be liable for negligence

[44] www.cml.org.uk/.
[45] EWHC 681 (TCC) 2013

if they certify works that later turn out to be defective.[46] The case also highlights what might happen if a project is certified in circumstances where latent defects subsequently develop.

Third-party rights

SBC Clause 1.6

Prior to the Contracts (Rights of Third Parties) Act 1999 a contract between two people agreeing to give money to a third party could not be enforced by a third person.[47] This was referred to as 'privity of contract' in which only the parties to a contract could have rights under its provisions. After the Contracts (Rights of Third Parties) Act 1999 was enacted third parties were entitled to claim under a contract, and the act provided a right to enforce a term of the contract against a

[46] The facts are that between 2001 and 2004, Optima (Cambridge) Limited were the developers of a new four-storey block of 26 flats. Thirteen of the flats were retained by Optima for letting purposes, and the remainder was sold largely to long leaseholders who included the claimant purchasers. The work was carried out by various contractors, including Strutt & Parker, who were retained by Optima to carry out periodic inspections of the flats as construction progressed in order that they could produce architects' certificates.

The certificates were prepared for the benefit of potential purchasers and confirmed the development had been constructed to a satisfactory standard and in accordance with the approved drawings and Building Regulations. The developer engaged the professional to sign off certificates to the purchaser's lender. The architect was held liable for negligence in wrongly issuing certificates certifying that works on each property had been carried out to a satisfactory standard in compliance with the drawings and building regulations, despite the fact the predetermined regime of inspections would not have allowed him to inspect all aspects of the works, and neither was he paid to do so. On the basis the certificates were not issued in favour of the individual residents, there was no direct contract between them and the professional. However, the judge held that the certificates amounted to what were in effect contractual warranties and that there was consideration because the purchasers understood a certificate would be issued when they bought the properties, so the certificate was part of the purchase price and the purchasers were entitled to rely on them.

[47] *Tweddle v Atkinson* (1861) 1 B & S 393.

third party. SBC Clause 1.6 contains an exclusion Clause to remove the effect of the act, other than such rights of any purchasers, tenants and funders as take effect pursuant to Clauses 7A and/or 7B.

Two-stage tendering

Two stage tendering is a tendering procedure which involves an employer obtaining tenders from contractors based on an initial scope of work and which is more fully defined at a later stage. It provides for an early appointment of a contractor and is best suited to complex or large schemes as the cost of tendering is greater than a single-stage tendering process. Two-stage tendering can be used with any standard contract.

Novation

Novation is a tripartite agreement consisting of an original employer, an incoming contractor and an architect (or other consultants) in which the architect's appointment is transferred from the original employer to the contractor. In doing so, the contractor effectively agrees to step into the shoes of the employer and act as the new employer and accept entire responsibility for the design including any design carried out by the architect prior to the contractor's appointment. Employers often favour novation especially in design and build projects as it can offer distinct advantages: there can be control over design before novation takes place, the contractor can have single-point responsibility, and there is continuity by retaining the same consultant.

Following novation, the employer's interest in the project remains unchanged, and as a result, sometimes, particularly in the case of an inexperienced client, there may be an expectation that an architect will continue performing services for them such as advising on technical matters, reporting and monitoring on progress of the works, and sometimes more.

Architects should ensure that their obligations are clearly stated in their novation agreement. Following novation, the legal obligation of an architect is to the contractor and not the client. The original employer loses the benefit of the services of its architect and the architect may even be required to act against the original client's interests. An architect must be aware that in novation it no longer owes a continuing duty to the client.

Practical completion

SBC Clause 2.30

Practical Completion is the point when the possession of a completed building takes place and the building can be occupied for use. When the works have achieved practical completion and the contractor has fulfilled his obligations and health and safety matters, an architect or contract administrator can issue a Practical Completion Certificate under SBC Clause 2.30. Architects should be careful when granting Practical Completion as Practical Completion triggers a number of aspects of the contract, including the date beyond which certain damages cannot be claimed, the release of retention and the transfer of insurance obligations.

There is no precise definition of practical completion. The SBC and other standard forms of contract do not define what constitutes practical completion,[48] and the term is ambiguous with conflicting case law. In *Jarvis (J) and Sons Ltd v Westminster CC*,[49] practical completion was defined as completion except

[48] Except for the JCT MP form under Clause 1, which states that practical completion takes place when the project is complete for all practical purposes.

[49] (1970) 7 BLR 64 at 75 per Viscount Dilhorne. In the same case Salmon LJ in the Court of Appeal took a different approach and defined practical completion as 'completion for practical purposes, that is to say for the purpose of allowing the employers to take possession of the works and use them as intended'.

for minor items when there are no apparent (visible) defects. *Keating on Construction Contracts* provides four factors for practical completion:

(a) The works can be practically complete notwithstanding that there are latent defects.
(b) A Practical Completion Certificate may not be issued if there are patent defects. The Defects Liability Period (Rectification Period) is provided in order to enable defects not apparent at the date of practical completion to be remedied (*Jarvis & Sons v Westminster Corporation* (1970) 1 WLR 637 and *HW Neville (Sunblest) v William Press)* (1981) 20 BLR 78.
(c) Practical completion means the completion of all the construction that has to be done; *Jarvis & Sons v Westminster Corporation* (1970) 1 WLR 637.
(d) However, the contract administrator is given a discretion to certify practical completion where there are very minor items of work left incomplete, on 'de minimus' principles *HW Neville (Sunblest) v William Press*) (1981) 20 BLR 78.[50]

The following are three important issues of Practical Completion:

- Practical Completion means completion of all the construction work that has to be done.
- Practical Completion can be certified where there are very minor, 'de minimis' items of work left incomplete.
- Practical Completion is a state of affairs in which the works have been completed free from patent defects, other than minor items.

The Certification of Practical Completion, in general, marks the date:

- When the employer can take possession of the site (SBC Clause 2.4);

[50] Ramsey and Furst (2006), p. 59.

- The user takes beneficial occupation;
- The responsibility for insuring the works and damage passes from contractor to owner;
- The Rectification Period begins (SBC Clause 2.38);
- Regular interim payments end (SBC Clause 4.9);
- The period for final review for extensions of time begins (SBC Clause.2.28.5);
- The contractor's liability for liquidated damages ends (SBC Clause 2.32).

After Practical Completion

SBC Clause 2.28.5

Under SBC Clause 2.28.5 after the date of practical completion the architect may review Extensions of Time within 12 weeks. The review may extend or bring forward the completion date, or confirm the date previously fixed and must be notified to the contractor together with that required by Clause 2.28.3. Under SBC Clause 4.5, the contractor should send all necessary information to the architect or the quantity surveyor not later than six months after practical completion of the works. Under SBC Clause 4.5.2.1 the architect or the quantity surveyor, if asked to do so, should make a final assessment of the amount of loss and expense no later than three months after receiving this information.

Termination

SBC Section 8

The SBC provides provisions for termination of the contractor's employment. Each party may terminate the contractor's employment for insolvency or a specified default including corruption or the works have been suspended for reasons beyond the control of the parties for a continuous period (stated in the contract or, in default, two months). The contractor's employment may at any time be reinstated if and on such terms as

the parties agree. Under SBC Clause 8.2.1, the grounds for termination cannot be given unreasonably.

Termination by the employer

SBC Clause 8.4

Under SBC Clause 8.4.1, if the contractor defaults on the following the employer may have the grounds for termination:

- Failure to proceed regularly and diligently with the works (SBC Clause 8.4.2);
- Refusing or neglecting to comply with written instructions (SBC Clause 8.4.3);
- Suspending the carrying out of work without reasonable cause (SBC Clause 8.4.1);
- Failing to comply with SBC Clauses 3.7 or 7.1;
- Non-compliance with CDM regulations under Clause 3.23.[51]

Under SBC Clause 8.4.1.2 if the contractor continues a specified default for the period of 14 days from receipt of a notice for termination, the employer may on or within 21 days of the expiry of that 14-day period issue a further notice to the contractor to terminate the contractor's employment. Under SBC Clause 8.2.3 and 1.7.4 a termination notices must be in writing and to be delivered by hand or sent by prepaid post.

Termination by the contractor

SBC Clauses 8.9 and 8.10

Under SBC Clause 8.9 a contractor may have grounds for termination if the employer does the following:

- Obstructs the issue of instructions or certificates (SBC Clause 8.9.1.2);

[51] Clause 8.4.1, JCT *Standard Building Contract*, 2005 Revision 2, 2009, With Approximate Quantities (AQ), pp. 70–71.

- Fails to pay certificates when due (SBC Clause 8.9.1.1);
- Fails to comply with SBC Clause 7.1;
- Fails to comply with the CDM regulations under SBC Clause 3.23.[52]

If the event or default continues for 14 days from the receipt of notice under SBC Clause 8.9.1 or 8.9.2, the contractor may on or within 21 days of the expiry of that 14-day period terminate the contractor's employment by a further notice to the employer.

Termination by either party

Either party may give notice to the other party that he or she may terminate the contractor's employment for the following specified events:

- Force Majeure;
- The architect or contract administrator's instructions are issued under SBC Clause 2.15, 3.14 or 3.15 as a result of the negligence or default of a local authority or statutory undertaker;
- Loss or damage to the works occasioned by any specified perils;
- Civil commotion or the use or threat of terrorism and/or the activities of the relevant authorities in dealing with such event or threat;
- The exercise of any statutory power by the government, which directly affects the works.[53]

This is subject to SBC Clause 8.11.2 that the event was not as a result of the contractor's negligence. Under SBC Clause 8.11 the employment of the contractor will be terminated seven

[52] Clause 8.9 *Standard Building Contract*, 2005 Revision 2, 2009, With Approximate Quantities (AQ).
[53] Clause 8.11 *Standard Building Contract*, 2005 Revision 2, 2009, With Approximate Quantities (AQ).

days after receipt of the notice, unless the suspension is terminated within that period. If the contractor's employment is terminated the contractor must remove from site equipment, temporary buildings, plant or tools subject to the provisions of SBC Clause 8.12.5.

The RIBA contract administration certificates

For the Standard Building Contract there are the following forms:

Interim Certificate
Statement of Retention
Statement of Reimbursement
Notice of Partial Possession by the Employer
Notification of Extension of Time
Non-Completion Certificate
Practical Completion Certificate
Section Completion Certificate
Certificate of Making Good
Final Certificate

Interim Certificate

2011 Edition
SBC Clause 4.9.2 and 4.13

An Interim Certificate is the periodic certification of the contract sum. The timing of the issue of Interim Certificates has changed since the Standard Building Contract 2005. An architect must certify the amount of the interim payment to be made by the employer to the contractor. The period of issuing the Interim Certificates in the Standard Building Contract is the period entered in the Contract Particulars. One-half of retention is released when the Interim Certificate is issued on or immediately following Practical Completion. Each Interim

Certificate must be issued within 5 days of the due date (Clause 4.10.1), and the final date for payment made is within 14 days from the due date (Clause 4.12.1).

Certificates are to be issued to the employer. If the employer intends to make any deduction from the certified amount, he or she must issue a notice to the contractor. If no notice is issued, the certified amount must be paid in full (SBC Clauses 4.13.3 to 4.13.5). Interest is payable on late payments (SBC Clause 4.13.6). Under SBC Clause 4.8.3 the employer may give written notice to the contractor stating any amount or amounts proposed to be withheld and the grounds for the withholding not later than five days before the final date of payment. When an Interim Certificate is issued, the Statement of Retention should also be issued, and a statement should be attached showing what the amount relates to and how it was calculated.

Statement of Retention

2011 Edition
SBC Clause 4.18.2
The Statement of Retention is a certificate attached to each Interim Certificate to show the gross valuation of work done by the contractor and to identify the calculation amounts of retention. This certificate should be issued to the employer and the contractor.

Statement of Reimbursement

2011 Edition
SBC Clause 4.8
The Statement of Reimbursement is intended for use where the Employer has made an advance payment to the contractor. This certificate should be issued to the employer and the contractor.

Notice of Partial Possession by the employer

2011 Edition
SBC Clause 2.33–2.37

The issue of a Notice of Partial Possession signifies that, the employer may take possession of a part or parts of the works ahead of practical completion of the whole of the works. Possession is subject to the contractor's consent, which must not be unreasonably withheld or delayed, and care should be taken not to interfere with the responsibilities of the contractor for completion. The architect should advise the employer of the implications of partial possession and identify the relevant part of the works taken over by the employer.

Notification of Extension of Time

2011 Edition
SBC Clause 2.28

The Notification of Extension of Time sets out in detail the procedures to be followed for an Extension of Time. There are three situations in which this Notification may be issued:

1. Notice of delay

   If the Contractor gives notice of delay under Clause 2.27, and the architect/contract administrator (A/CA) is of the opinion that the cause of delay is a relevant event which is likely to delay completion of the works or a section, the A/CA must give an extension of time by fixing a later completion date.

2. Omission of work

   If instructions have been issued for any relevant omissions, then the A/CA may fix an earlier date than any previously revised date.

3. Review

Within 12 weeks after the date of practical completion, the A/CA must decide whether to confirm the completion date or fix a new date (later or under some circumstances earlier).

Non-Completion Certificate

2011 Edition
SBC Clause 2.31

A Non-Completion Certificate is a factual statement stating that the contractor has failed to complete the works by the completion date. The certificate is issued if, in the opinion of the architect, the contractor has failed to complete the works or a section of the works by the contract date for completion or any extension of that date. The architect has to exercise caution when issuing this certificate as it has a number of consequences, once issued, including the deduction of liquidated damages under SBC Clause 2.32 by the employer and the right to deduct damages by a main contractor against a nominated subcontractor. This certificate will be cancelled by the fixing of a new completion date, and if relevant, a new certificate must be issued. Before a certificate of non-completion is issued it is necessary for the architect to have given fair and reasonable consideration to extensions of time in respect of any notices of delay given by the contractor. The latest date for the issue of this certificate is the date of issue of the final certificate.

Practical Completion Certificate

2011 Edition
SBC Clause 2.30

The Practical Completion Certificate signifies that the project works have reached practical completion. An architect should

issue this certificate when the works have achieved practical completion and the contractor has fulfilled his or her obligations under the contract. It does not exclude the existence of latent defects. The separate form, the Section Completion Certificate, is provided for certifying the practical completion of sections. The architect has to exercise caution when issuing this certificate. It triggers a series of events, including the following:

- It marks the date when the employer retakes possession of the site (subject to SBC Clauses 2.6 and 2.33).
- It marks the date when the Rectification Period begins (as stated in the Contract Particulars).
- It fixes the commencement of the period for the final adjustment of the contract sum (SBC Clause 4.5).
- It gives rise to the right of release of the first half of the retention percentage (SBC Clause 4.20.3).
- It marks the end of the contractor's liability for liquidated damages under (SBC Clause 2.32).

Section Completion Certificate

2011 Edition
SBC Clause 2.30
The Section Completion Certificate is for use where the contract provides for the work to be carried out in phases and, in the opinion of the architect, practical completion of a section has been achieved. When the last of the sections is certified, the architect must issue, on the same date, a Practical Completion Certificate for the works as a whole. After practical completion of a section has been certified, retention is reduced by half for that section.

Certificate of Making Good

2011 Edition
SBC Clause 2.39
The Certificate of Making Good is issued to the contractor at

the end of the Rectification Period, when in the opinion of the architect the contractor has completed the obligation to make good defects, shrinkages or other faults. The issue of the Certificate of Making Good triggers the final Interim Certificate and final release of retention (SBC Clause 4.20.3) issued on or immediately following practical completion. The certificate refers both to defects which were made good during the Rectification Period and to those which were scheduled within 14 days of the end of the Rectification Period. Caution should be exercised over the date of issue of this certificate as it may be relevant in the context of the issue of the Final Certificate (see Clause SBC 4.15).

Final Certificate

2011 Edition
SBC Clause 4.15 (also refer to 1.9)
The Final Certificate is of considerable importance because it brings the authority of the architect to an end under the terms of the building contract. The Final Certificate is conclusive as a statement of fact and case law. The architect should not issue the Final Certificate unless he is satisfied that the contract has been fully complied with. The architect must consider the whole of the contractor's performance under the contract and his or her right to payment notwithstanding the inclusion or otherwise of sums in interim certificates.

The effect of the Final Certificate

The Final Certificate is conclusive for the following matters:

- That the architect is reasonably satisfied that the quality of materials, goods or the standards of workmanship reflect the contract drawings or the contract bills (SBC Clause 1.9.1);

- That all extensions of time are due under SBC Clause 2.28 (SBC Clause 1.9.3);
- That all adjustments of the final contract sum under the terms of the contract have been complied with (SBC Clause 1.9.1.2);
- The contractor is prevented for reimbursement of direct loss and/or expense (SBC Clause 1.9.4);
- Proper adjustment has been made to the contract sum (SBC Clause 1.10.1.2).

However, the Final Certificate is not conclusive evidence that the contractor has met the terms of the contract in respect of materials, goods or workmanship generally (SBC Clause 1.10).

Periods for the Final Certificate

Under Clause 4.15.1 of the JCT SBC, the final certificate must be issued within two months (or within two months of the issue of the last certificate of making good, or the expiry of the last rectification period, whichever is the latest).

The Final Certificate must state the contract sum as adjusted under Clause 4.3, which sets out all the deductions and additions to the contract sum (Clause 4.15.2). The final date for payment of the Final Certificate is 28 days from the date of issue and is subject to equivalent notices provisions as described earlier in relation to Interim Certificates (Clause 4.15).

Both parties have the right to challenge the issue of the Final Certificate by commencing proceedings within 28 days. Whilst the timing of a Final Certificate is not mandatory, there are certain steps under a JCT contract which the architect must have taken, which will be regarded as condition precedent to the issue of a valid final certificate; see *Cantrell v Wright & Fuller Ltd.*[54]

[54] (2003) TCC 30 July 2003.

Issuing of certificates by Final Certificate

Before issuing the Final Certificate the following certificates should have been issued:

Interim certificates at monthly intervals (Clause 4.9.1)
Certificate of making good (Clause 2.39)
Certificates at two monthly intervals during the rectification period (Clause 4.9.1)
Interim Certificate following practical completion, including release of half of the retention (Clause 4.20.3)
Practical completion certificate (Clause 2.30)

Further information

RIBA Publishing, 2011, *RIBA Contract Administration Forms, SBC11 Project Pack,* RIBA Publishing, London (Standard Building Contract).
Lupton, S., 2011, *Guide to SBC11*, RIBA Publishing, London.
The Joint Contracts Tribunal, 2011, *Deciding on the Appropriate JCT Contract*, the Joint Contracts Tribunal, London.

9
Dispute resolution

Key legislation

Civil Procedure Rules (75th Update – 1 October 2014)
Local Democracy, Economic Development and Construction Act 2009
Civil Procedure Rules 1999
Part 1 of the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998
Arbitration Act 1996
Construction Act 1996
House Grants, Construction and Regeneration Act 1996

Construction disputes

Disputes in construction can arise because of mistakes in detailing and specification, misunderstandings about obligations, not identifying specific documentation or erroneous contract interpretation. Construction disputes can also be as a result of payment, contract interpretation, Extensions of Time Award, quality, progress and quality or lack of information.

Construction disputes commonly occur between the following:

- Contractor and subcontractors;
- Contractor and employer;
- Employer and consultants;
- Employer and third parties.

The remedies to a dispute are damages, an injunction, quantum meruit and specific performance. The RIBA 2010 Standard

Conditions for the Appointment of an Architect clause 9.1 states that the client and the architect may attempt to settle any dispute or difference arising under the agreement by negotiation or mediation, if suitable, or either party may refer the matter to adjudication, arbitration or legal proceedings as specified in the contract. Standard 10 of the ARB Code of Conduct states an architect is expected to deal with disputes or complaints appropriately.

Dispute boards

A dispute board consists of usually one or three members experienced in the type of project being carried out, although it can be more. The board is appointed shortly after commencement of the contract and monitors the key documents and project progress, carrying out a number of site visits per year. During these visits the dispute board discusses the project with the parties, helping to identify anything that might develop into a dispute and encouraging the parties to resolve such issues. The dispute board is available at any time to give informal opinions to assist the parties, or ultimately to give an interim binding decision if the parties are unable to resolve the dispute for themselves.

Dispute boards perform the following functions:

- Monitoring a project;
- Reviewing documents and visit the site;
- To help avoid disputes;
- Maintaining communications between the parties;
- Suggesting ways of working out problems at an early stage;
- Providing a high level forum for discussion of issues;
- Members are impartial;
- Board members must also be available, not only for regular site visits, which are easy to plan for, but also for meetings and hearings with the parties to help to resolve problems

and to give informal opinions or decisions about disputes that have arisen between the site visits;
- Dispute board decision must be capable of enforcement

Adversarial dispute resolution

Litigation

Legislation
Civil Procedure Rules 1999

Litigation is a process for resolving disputes through the courts and is a 'traditional' model of dispute resolution. Civil litigation, generally, is governed by the Civil Procedure Rules 1999 which implemented recommendations of the Woolf report *Access to Justice*[1] to improve access to justice by making legal proceedings more accessible, efficient and easier to understand for non-lawyers. Most construction litigation takes place in the Technology and Construction Court (see Chapter 1).

Arbitration

Legislation
Arbitration Act 1996

Arbitration is a consensual and private system of dispute resolution and is one of the preferred methods for resolving construction disputes.

Arbitration is a process whereby parties agree to refer an existing or future dispute to the determination of one or more independent persons. The decision of the arbitrator is expressed in

[1] Woolf (1996), available from: www.dca.gov.uk (accessed 20 July 2010).

an award, which, subject to certain requirements, will be final and binding on the parties and enforceable in law. Arbitration is mandatory under some contracts and the process of arbitration will usually remain confidential so long as there is no need to enforce the award in open court.

Key features

- Arbitration is a private and confidential process and the parties are bound by the decision reached by the arbitrator.
- Arbitration usually arises from an arbitration clause in a contract between the parties. The clause will provide that where a dispute arises between the parties in relation to the contract, that dispute should be resolved by arbitration rather than litigation in the courts.
- Arbitration is widely used in commercial, consumer and international disputes.
- The process and procedures to be followed derive from the terms of the contract and/or Arbitration Act 1996 or some other set of rules such as the London Court of International Arbitration.
- Arbitration is also widely internationally enforceable in other jurisdictions.
- Parties can choose the expertise and background of their arbitrator.

Advantages of arbitration

- It is private and confidential.
- The arbitrator's award is final and binding.
- It can result in savings in time and expense because of the consensual nature of arbitration.
- The parties are free to agree on the location, timing, representation and the individual arbitrator.
- Arbitration has the benefit of flexibility and convenience and can be quicker, simpler and less formal than litigation.
- The arbitrators seeking to resolve the dispute are chosen by the parties and are usually experts in the field.

Disadvantages of arbitration

- It can be more expensive than court proceedings, and the tribunal is less likely to see itself as being bound by legal precedents, which may give rise to less certainty of outcome.
- The process is longer than adjudication. Although that allows a more thorough look at the issues, parties should allow, for example, three months to appoint a panel of three arbitrators.
- Enforcement of the award still has to be done by making an application to the court.
- It lacks an effective means to deal with disputes involving more than two parties.
- There are limited rights of appeal.

For further information, see Lupton (1997).

Adjudication

Legislation

Local Democracy, Economic Development and Construction Act 2009
The Scheme for Construction Contracts (England & Wales) Regulations 1998
Housing Grants, Construction and Regeneration Act 1996
House Grants, Construction and Regeneration Act 1996

Adjudication is the most widely used form of dispute resolution and is a statutory procedure under Section 108 of the Housing Grants Construction and Regeneration Act 1996 amended by the Local Democracy, Economic Development and Construction Act 2009. Adjudication involves an independent third party considering the claims of both sides and making a decision. The adjudicator is usually an expert in the subject matter in dispute, and it is a private process. Adjudicators are not bound by the rules of procedure in litigation or arbitration. Adjudication decisions are usually binding on both parties by prior agreement.

When an adjudicator is appointed they will reach a decision generally based upon the documents provided by each party. A decision has to be made within 28 days by the adjudicator; however, in reality decisions can take three to four months. An adjudicator has 28 days from the date the dispute is referred to give his decision as to how that dispute should be resolved. The adjudicator's decision is binding on the parties unless it is overturned by the court.

Key features

- It was brought in by Housing, Grants, Construction and Regeneration Act 1996 following the Latham report in 1996.
- Adjudication is available for all construction contracts in writing if entered into before 1 October 2011 and for contracts whether oral or in writing thereafter.
- Any party to a contract has a right to have a dispute decided by an adjudicator.
- Adjudication is a statutory right, and as a consequence if one party wishes to use this method of dispute resolution the other has no alternative but to use this method.
- Adjudication is an automatic right under any UK construction contract, and that process is generally considered to be fast and cost-effective.
- The decision is binding on the parties until the dispute is finally decided by a process of litigation or arbitration, or the parties agree to accept the adjudicator's decision.
- The adjudicator is not liable to the parties for any of his or her actions in the adjudication.
- The appointment arrangements should aim for referral to an adjudicator within seven days of the notice.
- The adjudicator must reach a decision within 28 days of referral, 42 days with the consent of the referring party or a longer period as is agreed between the parties.
- The decision of the adjudicator is binding unless the dispute is finally determined by arbitration, court proceedings or by agreement of the parties.

- It can be launched by a party in dispute at any time before the work has commenced, including during the work carried out and after the work has been completed.

Advantages of adjudication

- It is a relatively quick process.
- It can be quicker and more cost effective than litigation or arbitration.
- It is a private and confidential process.

Disadvantages of adjudication

- The fast-track nature of adjudication means that it may be unsuitable for complex disputes involving multiple parties.
- Unless the contractual procedure provides otherwise, the adjudicator will have no power to award costs to the winning party (other than payment of the adjudicator's own fees).
- Adjudication is only interim and provisional in nature.
- UK statutory adjudication has evolved to become very legalistic and costly, and many adjudications are not carried out quickly or while the contract is in progress.

Non-adversarial dispute resolution

Mediation

Mediation is a voluntary and consensual non-binding process of negotiation in which an independent mediator assists the parties to achieve a legally binding settlement between parties. This is usually conducted in private and the objective is to reach a written settlement. Once a settlement has been achieved it will enforce the parties to a contract to attempt to bring the dispute to an end and stop any further proceedings. All the proceedings in mediation are private and confidential. Mediation is commonly included for in standard

forms of contract.[2] Conciliation is a process similar to mediation but can be distinguished to mediation in that an independent third party can put forward a solution or terms of settlement.

Key feature

- Mediation can be undertaken at any time, including during the course of another dispute resolution process.
- It is governed by the normal rules of contract law once a settlement is reached.
- Mediation typically lasts for one day.

Advantages

- Mediation can provide a relatively quick, cheap and confidential means of resolving disputes.
- It can avoid the procedural constraints of litigation.
- It is a non-adversarial process, unlike adjudication, arbitration, or litigation, and as a result the process can build good relationships between the parties and is less confrontational than arbitration or adjudication.
- The hearings are usually efficient instead of long frequently delayed court proceedings.
- The process is private and confidential.
- It provides an opportunity for immediate settlement of the dispute.

Disadvantages

- Alternative processes may be better to resolve the dispute.
- If the agreement is unsuccessful, some costs will have been wasted.

[2] For example, the Standard Building Contract refers to mediation in Clause 9.1.

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Liability and practice

It has been said for a project to be regarded as successful it should be completed within budget, completed on time and display superior quality of design materials and workmanship.[1] However, projects do not go always go according to plan and are not always completed on time and within budget. As part of an architect's duty of care and in the event that a project does not go to plan, an architect should be aware of his or her liability.

There is an traditional approach to liability in the construction industry, where a solicitor or barrister advise parties to turn risks and design errors into contractual liabilities. To determine that an architect is liable for a design error it must be shown that there has been a breach of duty by an architect that has caused damage. To establish that there has been a breach of duty it must be shown that the architect was negligent and had failed to act with the necessary level of skill and care.

An architect can become liable for a design error by the following:

- The law of tort (see Chapter 5);
- The law of contract (see Chapter 6);
- Or under statute (such as a criminal liability, e.g. manslaughter).

An architect has an implied contractual duty to exercise reasonable skill and care. An architect also has an implied duty of care to the client (as an agent, fiduciary duty) independently of his contractual duties to build and duty of care owed to a third party.

[1] 2010 26 Const. L.J., Issue 5 p. 350.

Limiting liability

There are a number of ways to limit liability, including the following:

- To identify and comply with the terms of the architect's appointment;
- To identify and comply with the terms of the contract;
- To ensure that the professional indemnity insurance is sufficient for the type and scale of project and risk undertaken;
- To comply with the obligations of the ARB Code of Conduct;
- To limit the amount of damages by means of a financial cap;
- To negotiate appointment terms to include limitations on liability and to agree shorter limitation periods;
- To check the RIBA of Work and the RIBA Architect's Job Book;
- To ensure the form of procurement used is understood and explained to all parties;
- To identify and define the role and scope of services;
- To check if there are any collateral warranties, if there is assignment and if the Contracts (Rights of Third Parties) Act 1999 applies.

Hudson's Building and Engineering Contracts, List of Duties for Designers

(a) To advise and consult with the employer as to any limitation which may exist as to the use of the land to be built on, either by planning legislation, restrictive covenants, or the rights of adjoining owners or the public over the land, or by statutes and by-laws affecting the works to be executed
(b) To examine the site, sub soil and surroundings
(c) To consult with and advise the employer as to the design, extent and cost of the proposed work
(d) To prepare preliminary sketch plans and an outline or approximate specification, having regard to all the conditions known to exist and to submit them to the employer for approval, with an estimate of probable cost, if requested

(e) To elaborate and, if necessary, modify or amend sketch plans and then, if so instructed, to prepare drawings and a more detailed specification of the work to be carried out as a first step in the preparation of contract documents
(f) To consult with and advise the employer as to the form of contract to be used (including whether or not to use bills of quantities) and as to the necessary or otherwise of employing a quantity surveyor to prepare bills and carry out the usual valuation services during the currency of the contract
(g) To bring the contract documents to their final state before inviting tenders, with or without the assistance of quantity surveyors and structural engineers, including the obtaining of detailed quotations from and arrangement of delivery dates with any nominated sub-contractors or suppliers whose work may have to be ready or available at an early stage of the main contractor work[2]

Main causes for construction claims

- Inaccurate design information
- Inadequate design information
- Inadequate site investigations
- Slow client response
- Poor communication
- Unrealistic time targets
- Inadequate contract administration
- Uncontrollable external events
- Incomplete tender information
- Unclear risk allocation[3]

[2] Hudson's Building and Engineering Contracts, List of Duties for Designers, 12th edition at page 225 as cited in Lupton, S., *Cornes and Lupton Design Liability in the Construction Industry*, Wiley Blackwell, 2013, p. 134.
[3] Main causes for construction claims as perceived by contractors, clients and consultants; see Kumarswamy (1997).

Common reasons why architects are sued

- Standard of care
- Practicality of design
- Reconsideration of design (continuing duty to consider design)
- Untried methods
- Fitness for purpose
- Duty to warn
- Scope of duty
- Specialist client
- Liability for design by others
- Duty of care to other parties[4]

Common problems in buildings

- Water vapour within buildings, for example condensation
- Inadequate specification of materials
- A lack of understanding of inspection duties
- Keeping water out of buildings, for example in basements and roofs and cladding systems
- A lack of understanding of detailing, for example fire protection

Avoiding common problems in buildings

- Understand the function of a vapour barrier and what it does technically and ensure it been designed and specified adequately.
- Understand the function of a Damp Proof Course (DPC) and Damp Proof Membrane (DPM) and how it works. Check the current Building Regulations and British Standards for the DPC and DPM, and check it they are correctly detailed.

[4] Frame (2006), p. 56.

- Fully understand what the product is, how it works and how it is detailed. Ensure what is being constructed is accordance to the manufacturer's recommendations.
- Check if there are any British Board Agreement (BBA) certificates or Agrément Certificates for the products being used and what implications they have on what is being carried out.
- Ensure the waterproofing strategy has been carefully identified and there is careful coordination of overlapping the waterproofing.
- Follow the manufacturer's recommendations.
- Ensure that you are exercising all reasonable skill and care carrying out the services of an architect.
- Ensure the design services of the project are set out in accordance with the architect's appointment.
- Ensure technical construction principles are understood and detailed correctly using current Building Regulations and British Standards. The following are some examples.

Weep holes

- The Building Regulations, Approved Document C
- British Standards BS 8215:1991 Code of practice for design for installation of damp-proof courses in masonry construction
- NHBC Standards Clause 6.1 – D6 (b)
- Weep holes in rendered walls – NHBC Technical Newsletter April 2005 (Issue 32)

Cavity trays

- Building Regulations Part L and M
- British Standards BS 8215:1991 Code of practice for design for installation of damp-proof courses in masonry construction
- British Standards BS EN 12588:2006 Lead and lead alloys – rolled lead sheet for building purposes

Condensation

- The Building Regulations 2000, approved documents C, F and J

- British Standards BS 5250:2011 Code of Practice for the control of condensation in buildings
- British Standards BS 5925: 1991 Code of Practice for ventilation principles and designing for natural ventilation
- British Standards BS EN ISO 13788:2001 Hygrothermal performance of building components and building elements. Internal surface temperature to avoid critical surface humidity and interstitial condensation. Calculation methods
- CIBSE Guide, C1 and 2, Properties of humid air, water and steam, 1975
- CIBSE Guide, A10, Moisture transfer and condensation, 1986
- BRE Information Paper IP 13/94, Passive stack ventilation systems: Design and installation, July 1994
- BRE Report BR 262 Thermal insulation: avoiding risks, 2002
- NHBC 2011 Standard clause 7.2-D11 and S11
- The Lead Sheet Association provides good building practice guidance

Basements

- Ensure the three types of British Standard BS8102:2009 are understood and the design complies with this British Standard. The following are the different types:
    - Type A: Barrier Protection, where a membrane is located on either the outer or inner faces of the basement (or sandwiched between an inner and outer layer);
    - Type B: Structurally Integral Protection: Where chemicals are added to concrete to render it water resistant;
    - Type C: Drained protection: Where the basement is constructed using two layers with a drained cavity between the two.

The architect's appointment

An architect's appointment sets out the services and appointment of an architect. It does this by reference to the RIBA Work

Stages, the terms and conditions of appointment, the scope of the services and the timescale, sequencing in which the work will be carried out and the fee and the standard of care that must be achieved when performing those services. The architect's appointment should set out the exact services of what the architect is contracted to do.

The RIBA Professional Code of Conduct and the ARB Architects Code requires an architect to have agreed a written appointment, setting out both the terms and conditions of appointment and their services. The RIBA Standard Form of Agreement, the RIBA Standard Agreement 2010 for an Architect (2012 revision) contains an obligation at clause 2.1 to exercise reasonable skill and care and diligence in accordance with the normal standards of the architect's profession in performing the services and discharging all the obligations within that clause. An architect may be sued by the client for breach of the architect's appointment.

An architect's appointment should identify/define the following:

- Identify the parties to the appointment;
- Identify the form of procurement;
- Identify the services in which an architect is engaged;
- Identify the architect's duties;
- Define the services of the architect;
- Identify the design duties undertaken by the contractor;
- Define the fees and provisions for payment;
- Allocate and define the limitation of responsibilities and liabilities;
- Define the scope of work;
- Define the amount of retention;
- Define the number of site visits;
- Certify the value of the works;
- Confirm the fee, method of calculation and payment with the RIBA Work Stages;
- Define the provisions for the termination of the Agreement;
- Set out the method of dispute resolution.

Standard of care of an architect

As a professional, an architect undertakes to exercise reasonable skill, care and diligence in accordance with the normal standards of an architect. The conduct of an architect is to be measured to the standard of a responsible body of architects. Architects will then be judged by the standard of the ordinary skilled man exercising and professing to have that special skill,[5] not falling short of a responsible body of architects, or a recognised practice within the profession.[6] Judge Windeyer J in *Voli v Inglewood Shire Council* said,

> He [an architect] is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual among architects practicing their profession.[7]

The scope and extent of an architect's liability depends on the facts of each case and on the express or implied terms of the relevant contract. The duty of care can also extend to the owner, occupier, visitor or passer-by of a building. The duty of care to a third party may also arise concurrently as a cause of action in tort, whereby an architect can be sued for breach of duty in negligence for failing to exercising proper skill and care. For a cause of action in tort for breach of duty against an architect, the claimant must show that the architect owed a duty of care, that there was a breach of that duty and that the damage is recoverable.

Reasonable skill and care

An architect is under an implied duty to carry out their work to exercise reasonable skill and care expected of an ordinarily

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[5] *McNair J. In Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 586–7.

[6] *Nye Saunders & Partners v Alan E. Bristow* (1987) 37 B.L.R. 92.

[7] *Voli v Inglewood Shire Council* (1962–63) 110 CLR 74, per Windeyer J.

skilled architect. The RIBA Standard Agreement 2010 for an Architect (2012 revision) at Clause 2.1 requires an architect to exercise reasonable skill and care and is expressed as an obligation to exercise reasonable skill and care and diligence in accordance with the normal standards of the architect's profession. A term to the effect that the architect will carry out their services with reasonable skill and care is also implied where the architect is supplying services in the course of their business by Part 2, section 13 of the Supply of Goods and Services Act 1982. The *ARB Architects Code: Standards of Conduct and Practice 2010 Version* states an architect is expected to carry out his or her work promptly and with skill and care and in accordance with the terms of their engagement. This is also expressed under the provisions of many contracts. An architect acting as a contract administrator must use reasonable skill and care.

Limitation

Under the Limitation Act 1980, claims for negligence in tort in respect of physical damage to property must be commenced six years from the date when the claimant suffers damage (Section 2) or if later, three years from the date when the claimant first knows about the damage and certain material facts about it (Section 14A). Under the Limitation Act 1980 claims for negligence in tort in respect of personal injury or death must be commenced within three years from the date on which the cause of action accrued, or if later, the date of knowledge of the person injured (Section 11(4)). This is subject to Section 14B of the Limitation Act 1980 in which an action for damages for negligence shall not be brought after the expiration of 15 years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission which is alleged to constitute negligence and to which the damage in respect of which damages are claimed is alleged to be attributable.

Under Section 5 of the Limitation Act 1980 the period of limitation for the commencement of actions against a defendant for breach of contract is six years from the date when the action accrued under a simple contract. Where the contract has been entered into as a deed the limitation period is 12 years from date of any breach (Section 8).

An architect's duty to the client

An architect will owe a duty to their client under the terms and conditions of the relevant appointment and contract. Standard forms of building contract and standard forms of appointment usually define the scope of an architect. An architect normally owes a contractual duty to his or her client and a parallel duty in tort.[8] In *Tesco Stores Limited v The Norman Hitchcox Partnership Limited*[9] the court said that an architect 'has a continuing duty towards his client both in contract and tort to see that his design is appropriate up to the time of completion of a building where he not only designs the building but also administers the construction contract'.

An architect should seek to perform as exactly as possible his duties under the contract. Under the ARB Architects Code: Standards of Conduct and Practice an architect must be honest and act with integrity, carry out work faithfully and conscientiously and be trustworthy and look after clients' money properly.[10] Under the RIBA Code of Conduct, members shall act with honesty and integrity at all times (Principle 1) and shall act competently, conscientiously and responsibly (Principle 2).[11]

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[8] *Henderson v. Merrett Syndicates* [1995] 2 AC 145 at 194.
[9] [1997] 56 Con LR 42.
[10] The Architects' Registration Board (2010).
[11] RIBA Code of Professional Conduct and Standard of Professional Performance, 2005, RIBA, London.

Duty to third parties

An architect will owe to third parties a duty to take care that his design does not cause injury or damage to their property.[12] An architect must also take reasonable care to avoid acts which can reasonably be foreseen would be likely to injure (or kill) a third party. For any loss to be recoverable from an architect, it must have been foreseeable and have been caused by the architect's professional negligence. An architect may also owe contractual obligations to third parties as a result of the provision of collateral warranties. If a third party is acting unreasonably or defaulting in their responsibility it is the duty of the architect to warn the client.[13] Directors and companies may also be liable under the Manslaughter and Corporate Homicide Act 2007 for gross negligence for a person's death.

Depending on terms of the contract and the relevant facts, an architect may not be responsible for changes made by third parties as was the case in *Hodgson Developments Limited v GTA Civils.*[14] In this case, an architect was employed by a developer to design a new housing development near Aylesbury. The planners imposed a condition that one house should be set back farther from the road as it occupied a dominant position on the site and would be visually intrusive and out of keeping with its surroundings. After achieving planning permission the setting out of the house (with the condition) was moved by the engineers 1.4 metres southwards and 1.8 metres eastwards to improve access. The engineers did not notify anyone of the change and the house was subsequently constructed at the revised position. Planning officers declared that the change of position of the house was in breach of planning control, and issued an enforcement notice requiring the demolition of the

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[12] See *Clay v A.J. Crump & Sons Ltd.* [1964] 1 QB 533; *Eckersley v Binnie and Partners* (1988) 18 Con. L.R. 1, *Targett v Torfaen B.C.* [1992] 3 All E.R. 27; and *Voli v Inglewood Shire Council* [1963] 110 CLR 74.

[13] *Investors in Industry v South Befordshire DC* [1986] 1 All ER 787.

[14] [2006] EWHC 1913 (TCC).

house. After an unsuccessful appeal, the house was demolished and rebuilt in the position required by the planning consent. The developers claimed for losses of £115,000. The judge held that the architects were not in breach of duty as they were under no contractual duty to examine the engineer's drawings in detail and were entitled to expect that the engineers would merge their drawings without changing them. The judge held the engineers were liable for the losses of the developer.

The architect's duty of care to a subsequent owner or occupier

An architect's duty of care to a subsequent occupier for a defect in a building will depend on the design and/or supervisory obligations of the architect in question. The architect will not owe a duty of care in respect of defects for which he or she never had any design or supervisory responsibility in the first place.[15] An architect may in certain circumstances, owe a duty of care in tort and be liable to a subsequent occupier of the building, in respect of latent defects arising in relation to the building which the architect has designed and/or the construction of which he or she has supervised. This can arise where there is no reasonable possibility of inspection of the duty of the negligent builder as stated by Lord Keith in *Murphy v Brentwood District Council*[16] and as applied to the position of architects by HH Judge Bowsher QC in *Baxall Securities Ltd v Sheard Walshaw Partnership*.[17] In the latter case a roof leaked, causing damage to the property of the claimants. The flooding occurred because of the inability of the drainage system to cope with heavy falls of rain on those days. There being no contract between the claimants and the defendants, this action was brought in tort. It was held that the architect owed

[15] Windeyer J in the Australian High Court in *Voli v Inglewood Shire Council* [1963] ALR 657 at 662.
[16] [1991] AC 398 at 460–465.
[17] (2001) TCC 36 at paras 107 and 111.

a duty of care to the claimants in respect of latent defects in the building occupied by them in respect of which there was no reasonable possibility of inspection.

Professional indemnity insurance

Professional indemnity insurance protects architects in contract or tort against financial claims for breach of professional duty and as a result of an arbitration award, a court order or a settlement. Guidance Note 5 of the Architects' Code of Professional Conduct states that architects should not undertake professional work without adequate and appropriate professional indemnity insurance cover. Clause 7.4 of the RIBA 2010 Standard Conditions for the Appointment of an Architect requires an architect to maintain insurance in the amount in the Appendix as agreed between the client and the architect. The Contract Particulars to a contract should accurately reflect the insurance requirements and the period when cover should be maintained.

Key features

- The principle of utmost good faith applies and every material fact should be disclosed to the insurer.
- If an architect fails to disclose a material fact, an insurer may be entitled to treat the insurance contract as void so that he is not bound to indemnify under the contract.
- Architects must carefully check the terms and policy to see what is covered and what is not covered.
- An architect must be careful to select an appropriate level of cover, which reflects the value of relevant projects.
- An architect must comply with a warranty; if a warranty is not complied with, an insurer may be discharged from all liability for the breach of the warranty.
- Architects must carefully check exclusions as they can have significant consequences.
- An architect must comply with a conditions precedent; otherwise, they may have no liability under the policy.

- There is no one standard architects' professional indemnity policy.
- An architect should ensure that insurance policies continue to cover them against claims in retirement, and sole practitioners should obtain 'run-off' cover to protect them through retirement. Such cover not only should for at least six years from the date of an architect's last involvement in a case but also should take any account any extended claims for latent damage.
- Architects should ensure that all claims or circumstances likely to give rise to a claim have been notified to insurers before the end of each policy year.

Specification

A specification is a document which sets out the technical requirements of the services to be provided and the work to be performed. A specification may indicate the materials to use, the standard of workmanship, components to be used, specific performance requirements or the work methods which are required to adopt.

Specifications can also convey the quality of work that an architect or client is intending for a project. The case of *Ian McGlinn v Waltham Contractors*[18] provides valuable lessons for architects not considering producing a specification. A specification was not produced for the design of a large house in Jersey. This had consequences for the architect later on because the client wanted a high-quality house to resemble the quality of a boat. The judge stated that the architects were obliged to provide a specification in respect of the works and failed to do this. The architects therefore failed to spell out to the contractors the very high standard required by the client. The absence of a specification emphasised the importance of the architect's periodic inspections. They were the only way in practice in

[18] EWHC149 (TCC) HHJ.

which the architect intended to get across to contractors the standard required.

Lead consultant/designer

A lead consultant can provide leadership, monitoring and coordination and ensure that the delivery of a project is to budget and to a specified standard. As the lead consultant, an architect needs to consider what their contractual obligations are and what they are in relation to the other consultants of the design team. The lead consultant may be contractually responsible for the performance and payment of the other designers and sub-consultants, regardless of whether they have been paid by the client. Often, under the contract, it is expected that the lead consultant would normally be appointed by the client as the CDM coordinator. It may also be the duty of the architect to advise on the appropriate contract, assuming that the procurement method has not been decided before the architect is appointed as lead consultant. As a result of any future disputes, it is important that the lead consultant confirms his or her position with his or her own professional indemnity insurers before being appointed.

An architect has to exercise reasonable skill and care in the performance of their duties when acting as a lead consultant and do what is reasonable to ensure that work by other consultants is done on time and is fit for purpose. Judge Coulson gave a definition of a lead consultant in *Fitzroy Robinson Limited v Mentmore Towers Limited* [2009], where he said,

> The architect is usually the lead consultant . . . they have to coordinate the work of other consultants. They cannot be expected to turn their mind to every technical consideration arising out of the specialist work of other consultants; if they could, there would be no need to engage those other consultants in the first place BUT, by the same token, architects such as Fitzroy Robinson Limited must do what they reasonably can to see that the work being done

by the other consultants is done on time and in the right form and to the extent they can sensibly comment on the technical detail of the work, to check that such content is generally suitable for its purpose.

The RIBA Job Book 2013 gives the following description of the typical duties of the lead designer:

- Directing the design process;
- Consulting the client about significant design issues;
- Informing the client of duties under the CDM Regulations;
- Investigating the feasibility of the requirements, and reporting;
- Advising the client about any limitations on the use of land or buildings;
- Preparing outline proposals, a scheme design, detail design drawings, etc.;
- Advising on the need for statutory and other consents, and preparing sufficient information for applications to be made;
- Preparing sufficient Technical Design to allow consultants and specialists to develop their proposals, coordinating these and integrating them into the overall scheme;
- Bringing contract documentation to a final state for inviting tenders.

If the architect is also project lead and contract administrator, the following might be added:

- Advising on the need for and appointment of other consultants;
- Coordinating the work of other consultants;
- Advising on methods of procurement, and on tendering and the appointment of the main contractor;
- Administering the terms of the Building Contract and inspecting the performance of the contractor as necessary;
- Issuing further reasonably necessary information, issuing empowered;
- Instructions, and acting as certifier as the Building Contract requires, including;
- Issue of the final certificate;

- Arranging for the preparation of record information and manuals.[19]

RIBA Plan of Work 2013

The latest RIBA Plan of Work was launched in May 2013. The Plan of Work organises the architect's services into a number of key stages which can otherwise be difficult to define.

The 2013 Plan of Work features a number of changes from the previous version. Work Stages A to L have been replaced with eight new numbered stages. There are changes to existing stage activities and the addition of new stages in particular with regard to services involving BIM and sustainable design. The previous Stage D has been extended partly into the previous Stage E (now the new Stage 3: "Developed Design") and has been slightly expanded. Stage 6 now covers the defects liability period from the point of issue of the Practical Completion certificate up to the issue of the final certificate as well as post-handover activities.

The Plan of Work 2013 has been updated to allow for different procurement routes and this is helpful as the previous version dealt only with traditional and design and build contracts. It should be remembered that the Plan of Work is a summary of the much more detailed Architect's Job Book, which has also been updated. Although most architects' fee agreements will not incorporate the details in the Job Book it is worth noting that in the event of a dispute about the provision of architects services the Job Book will be used as a benchmark for good practice.

RIBA Plan of Work stages

Stage 0 Strategic Definition is a stage in which a project is strategically appraised and defined before a detailed brief

[19] Architect's Job Book (2013), p. 42.

is created. Certain activities in Stage 0 are derived from the former (RIBA Outline Plan of Work 2007) Stage A – Appraisal.

Stage 1 Preparation and Brief merges the residual tasks from the former Stage A – Appraisal with the Stage B – Design Brief tasks that relate to carrying out preparation activities and briefing in tandem.

Stage 2 Concept Design is similar to the former Stage C – Concept.

Stage 3 Developed Design is similar to the former Stage D – Design Development – and part of Stage E – Technical Design. The difference is that in the RIBA Plan of Work 2013 the Developed Design will be coordinated and aligned with the cost information by the end of Stage 3. This may not increase the amount of design work required, but extra time will be needed to review information and implement any changes that arise from comments made before all the outputs are coordinated prior to the Information Exchange at the end of Stage 3.

Stage 4 Technical Design comprises the technical work of the design team members. At the end of Stage 4, the design work of these designers will be completed, although they may have to respond to design queries that arise from work undertaken on site during Stage 5. This stage also includes and recognises the importance of design work undertaken by specialist subcontractors and/or suppliers employed by the contractor (Performance Specified Work in JCT contracts) and the need to define this work early in the process in the Design Responsibility Matrix.

Stage 5 Construction is similar to the former Stage K – Construction to Practical Completion – but also includes Stage J – Mobilisation.

Stage 6 Handover and Close Out is similar to the former Stage L – Post Practical Completion – services.

Stage 7 In Use is a new stage which includes Post-occupancy Evaluation and review of Project Performance as well as

new duties that can be undertaken during the In Use period of a building.

Soft Landings

Soft Landings is a project process which enables project teams to deliver buildings to achieve energy and environmental performance and for architects and contractors to assist clients beyond practical completion. The Soft Landings Framework describes in detail the five stages of the Soft Landings process which shall be incorporated into a project and includes the following:

- Stage 1 – Inception and briefing
- Stage 2 – Design development and review
- Stage 3 – Pre-handover
- Stage 4 – Initial aftercare
- Stage 5 – Extended aftercare

Further Information

- www.bsria.co.uk/services/design/soft-landings/
- www.usablebuildings.co.uk/Pages/UBPublications/UBPubsSoftLandings

Building Information Modelling (BIM)

Key BIM standards

- PAS 1192–2:2013 Specification for information management for the capital/delivery phase of construction projects using building information modelling
- PAS 1192–3 Specification for information management for the operational phase of assets using building information modelling (BIM)
- BS 1192–4:2014 Collaborative production of information Part 4: Fulfilling employers information exchange requirements using COBie – Code of practice.

- BS 7000–4:2013 Design Management Systems: Guide to managing design in construction
- BS 1192:2007 Collaborative production of architectural, engineering and construction information. Code of practice

BIM is a digital representation of a building project which provides design and construction teams to share and exchange information around shared, computer based models. The benefits of BIM include:

- The ability to improve coordination of projects;
- A more efficient team working;
- Integration of architectural design with structure and mechanical and electrical services;
- Easier methods of producing production information such as door schedules;
- Early cost certainty;
- Reduced delivery costs;
- Reduced operational costs.

When using BIM it is important to have an understanding of BIM standards insurance issues, intellectual property rights and how the implementation of BIM will affect contractual processes. An architect's appointment should clearly establish the limit and scope of the architect's responsibility with regard to BIM.

The legal consequences of BIM are still evolving. The following are some watch points for the use of BIM:

- Any contractor's design portion should be clearly defined.
- The architect's design role should be clearly defined.
- It should be defined which consultants can modify the architect's model.
- The BIM manager should be identified and the role of the BIM manager should be defined.
- Issues of who owns the model or information, confidentiality and rights of the model should be defined.

- Who owns the copyright in the design should be defined.
- The contractual status of the model should be defined.
- The duty of design coordination should be defined.
- The best way to audit design changes should be defined and who has worked on the model should be tracked.
- Specialist information attached to the model's elements or components should be identified and defined.
- The responsibility of consultants should be defined.

The BIM Execution Plan

The BIM Execution Plan should document the overall Project BIM objectives. These should be discussed and agreed between all the stakeholders of a project. The BIM Execution Plan should be clearly defined as to responsibilities and risk.

BIM Protocol

The BIM Protocol is a supplementary legal agreement that is incorporated by an amendment into professional services appointments and construction contracts. The aim of the protocol is to achieve a level of certainty and flexibility. The protocol creates additional obligations and rights for a contracted party and an employer. The key principles of the application of the Construction Industry Council (CIC) BIM Protocol are as follows:

- All parties that are responsible for the production of BIM on behalf of the employer are included.
- The employer should have the protocol incorporated into his or her contract/appointment.
- The protocol should detail all the BIM that is going to be produced by all parties contracted to the employer.
- The appendices have to be completed with project specific information for all projects. This should be available from pre-appointment documentation such as the employer's Information Requirements.
- Changes to the protocol and its appendices should be treated as variations to the contract.

Types of practice

Key legislation

Companies Act 2006
Limited Liability Partnerships Act 2000
Contracts (Rights of Third Parties) Act 1999
Misrepresentation Act 1967
Partnership Act 1890

Sole practitioner

A sole practitioner is directly responsible for all matters within the practice of an architectural office. A sole practitioner is entitled to all the profits from the business and has full responsibility for all business debts and any damages awarded against him or her for breach of tort or contract. A sole practitioner can be made bankrupt and is liable to all of his or her personal and business assets.

Advantages

- Autonomy at work.
- There are a small number of formalities to setting up and operating as a sole trader. This can help to keep costs down and increase profits.
- The sole proprietor can make immediate decisions because he/she does not have to consult with other parties.
- The business belongs to one individual; thus, all profits belong to that person.

Disadvantages

- High risk.
- Difficult to keep up with changes in practice.
- If the business fails, all debts would have to be met by the proprietor's personal assets.
- As a small business, sources of finance may be more difficult to obtain compared to larger businesses.

Partnership

Legislation

Partnership Act 1890

A partnership is defined in the Partnership Act 1890 as 'the relationship which subsists between two or more persons carrying on business in common with a view to profit'.[20] A partnership is not defined as a corporate body but a collection of individuals. Each partner is jointly and severally liable for all the obligations and debts of the practice and as a consequence actions taken by one partner will result in all the partners being jointly and severally liable to a claim. Under the Partnership Act 1890 there is no legal requirement for a written partnership agreement; however, it is usual for a formal agreement or 'deed of partnership' to be drawn up, setting out rights and responsibilities.

Key features

- Partners share risk, responsibility, profits and losses together.
- Each partner carries unlimited liability for partnership debts.
- A retiring partner will still be liable for debts or obligations incurred before his or her retirement (Section 17(2) Partnership Act 1890).
- If a partner dies, his or her estate will be liable for such debts or obligations.
- Genuine accounts must be submitted (Section 28 Partnership Act 1890).
- Private profits that partners receive must be accountable (Section 29(1) Partnership Act 1890).
- Criminal actions of certain partners will not make all partners liable unless they contributed to them or have knowledge of them.
- All the partners may be liable if certain partners breach their professional code of conduct.
- Under the Partnerships (Unrestricted Size) (No.4) Regulations 1992 the size of partnerships for architects is unrestricted if

[20] Section 1, Partnership Act 1890.

not less than three-quarters of the partnership are registered architects under the Architects Act 1997.
- A new partner on entry into a partnership does not normally become liable for the obligations, debts or wrongs incurred or committed before they enter the partnership (section 17(1)).
- All invoices, letterheads, orders and receipts must contain business names and partners' names.

Advantages

- There are few formalities to setting up and trading as a partnership.
- The financial resources of more than one person are likely to be better than in a sole proprietorship.
- Responsibility can be shared.
- There are good opportunities of expansion due to the availability of collective resources from all the partners.
- There are good opportunities for pooling of equipment, accommodation and so on.
- Employees share profits by bonuses.

Disadvantages

- Partnerships have unlimited liability.
- One troublesome partner could make it difficult for the other partners, because the action of one of the partners makes the others liable.
- Partnerships can be formed by intent and from behaviour between parties even when no formal deed of partnership exists. Therefore, individuals sharing profits and facilities may not be aware that they are operating as a formal partnership which can have legal consequences.

Limited Liability Company (LLC)

Legislation

Companies Act 2006

A Limited Liability Company is a separate legal entity and can only be formed under the rules laid down by the Companies

Act 2006. The company is run by a board of directors who will carry no personal liability for the actions of the company ('the veil of incorporation'), and a company will not be liable for the actions of a shareholder. However, all employees of a company owe a duty of care to the company itself.

Key features

- A limited company must register with the Registrar of Companies and comes into existence when it has been registered.
- Accounts must be filed with the Registrar of Companies, and they may be inspected by the public.
- A company is administered by a board of directors, who are all paid a salary.
- Architects can be sued in tort as individual directors of the practice.
- There is no limit to the number of directors although if there are less than two for a period of over six months that member can incur personal liability.
- Companies must have a company secretary and at least one director.
- Private limited companies must put 'Ltd' or limited after the name. Public limited companies must put Public Limited Company or 'PLC' after the name.

Advantages of a Limited Liability Company

- Protection of personal assets.
- Tax advantages.
- Flexibility.
- No restriction in the number of members.

Disadvantages of a Limited Liability Company

- The company finances are in the public domain because annual accounts have to be filed at Companies House, although abbreviated accounts can be filed in certain circumstances.
- There can be an administrative burden.

Limited Liability Partnership (LLP)

Legislation

Limited Liability Partnerships Act 2000
Limited Liability Partnerships Regulations 2001

A Limited Liability Partnership is a corporate body which is responsible for its liabilities and assets and is a separate legal entity distinct from members (or owners). It combines aspects of a partnership and a limited liability company. Company members are liable if they are fraudulent or negligent in their dealings. Members are jointly and severally liable in the normal course of business; however, members are not personally liable for the partnership.

Key features

- There must be 'two or more persons associated for carrying on a lawful business with a view to profit'.
- A Limited Liability Partnership is liable for all its debts to the extent of its assets.
- A Limited Liability Partnership can be incorporated in England, Wales and Scotland, but it does not exist in Northern Ireland.
- There is no limit on the maximum number of members.
- A Limited Liability Partnership is not suitable for anyone who is disqualified to act as a company director.
- A Limited Liability Partnership is taxed similarly to a partnership and not to a limited company.
- Accounting records must be maintained and submitted to Companies House. An LLP must file annual accounts with Companies House, where they will appear on a public register in the same way as for limited companies.

Advantages of a Limited Liability Partnership

- The Limited Liability Partnership is liable for its debts and other obligations, but its members are not liable for the debts of the partnership.

- There are no restrictions on the number of members an LLP may have.
- Registration with Companies House protects the company name by law and prevents anyone else trading with the same name.
- The death or resignation of a director does not affect the structure of the company, and it can continue to trade as before.

Disadvantages of a Limited Liability Partnership

- There can be an administrative burden.
- There can be a complex and costly start-up procedure.
- Accounts must be prepared in accordance with accounting standards which must be audited.
- If the turnover of the company is more than £350,000, company accounts need to be submitted every year. This can be costly as accountants and auditors are required.

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Glossary

Adjudication
A form of dispute resolution and is a statutory procedure under Section 108 of the Housing Grants Construction and Regeneration Act 1996 amended by the Local Democracy, Economic Development and Construction Act 2009

Agency
A term describing the relationship between two parties

Alternative Dispute Resolution
A general term that refers to all dispute resolution processes which do not form part of the formal litigation procedure and where a third party is involved to provide assistance with a view to the settlement of the case

Appeal
The process in which an applicant can challenge a planning decision

Arbitration
A consensual and private system of dispute resolution and is one of the preferred methods for resolving construction disputes

Architect's Instruction
An instruction issued by an architect, which empowers the contractor to carry out the duties and obligations of a contract

Articles
Definitions used at the front of the contract

Article 4 Direction
An order under the Town & Country Planning (General Permitted Development) Order 1995 made by the Secretary of State or the local planning authority, requiring a planning application to be made where normally permitted development rights would apply

Beneficial owner
A person entitled for his or her own benefit and who is not as a trustee

Bills of quantities
Bills of quantities are comprehensive documents, containing individual prices and other data for valuing variations in the contract. Bills of quantities are normally prepared by the quantity surveyor based on detailed drawings and a specification prepared by the contract administrator

Breach of Conditions Notice
A type of notice used in enforcement of planning control where a planning condition of planning permission has been breached

Breach of Contract
Breach of contract occurs when a contractual obligation has failed to be performed under a contract

Building Preservation Order
A notice under the Planning (Listed Buildings and Conservation Areas) Act 1990 to protect buildings of special architectural or historic interest from demolition or alterations

Chattel real
A leasehold interest

Claimant
A person making a claim, previously known as the plaintiff

Clerk of Works
On-site representative of the client, who ensures that what is built meets the level of workmanship specified by the design team

Collateral Warranties
A contract which provides contractual rights between parties such as between employers, funders and professional consultants, contractors and subcontractors

Conditions
Stipulations attached to a planning permission that limit or direct the manner in which a development is carried out

Consideration
A one-way promise of exchange of value in return for what is promised by another party

Conservation Area
Areas of special architectural or historic interest

Contingency
An amount of money kept aside for unforeseen costs

Contract administrator
The person who ensures the activities and roles are carried out in accordance with the contract

Contractors Design Portion
Where the contractor is to design discrete parts of the works

Curtilage
Land surrounding and ancillary to a building which is necessary for its function and enjoyment

Deed
A legal document which sets out the terms of an agreement, which is signed by both parties

Defects
Materials and goods which are not in accordance with the contract documents

Defects Liability Period
A period as defined in a building contract, during which the contractor must put right any failures that have come to light

Defendant
The person who has been made a claim against

Design and Access Statement
A short report accompanying and supporting a planning application to illustrate the process that has led to the development proposal, which explains and justifies the proposal

Determination
A legal means of ending the contract early due to dispute

Development
The 'carrying out of building, mining, engineering or other operations in, on, under or over land, and the making of any material change in the use of buildings or other land' (Section 55 of the Town and Country Planning Act 1990)

Development Control
The process whereby a local planning authority decides whether a planning application meets the requirements of planning policy, particularly as set out in development plans

Domestic Sub-contractor
A person or company, other than a nominated subcontractor, to whom the main contractor sublets a portion of the work

Dominant Tenement
Land to which the benefit of a right is attached

Easement
A right over land for the benefit of other land, such as a right of way

Economic Loss
Financial loss which results from property damage or personal injury suffered by a third party

Enforcement
Procedures by a local planning authority that can ensure that the terms and conditions of a planning decision are carried out, or that development carried out without planning permission is brought under control

Enforcement Notice
A notice which local planning authorities can issue where development has taken place without planning permission or in breach of a planning condition

Environmental Impact Assessment (EIA)
A process for identifying the environmental impact of certain types of proposed development which attempts to ensure that the environmental, economic or social effects of a proposed development are fully considered

Equity
A term in law which applies to a specific set of legal principles which were developed by the Chancery Courts

Estoppel
A legal principle which arises when a promise, assurance or representation of some future conduct made by one person is relied on by another to that person's detriment

Expert Witness
An individual employed to give evidence on a subject in which they are qualified or have expertise

Extension of Time
A provision of a contract in which an architect or contractor administrator can amend the date for completion of the works or a section of the works if the contractor is delayed as a result of an action of the employer or employer's agents or certain specified events

Force Majeure
A clause in a contract which entitles a party to terminate or suspend the contract when an extraordinary event or circumstance occurs beyond the control of the parties, such as a war or an event described as an 'act of God', which no one could have reasonably foreseen

Full Application
The most common type of planning application which contains all the information required by a local planning authority

Frustration
Termination of a contract as a result of an intervening event

Latent Defect
A concealed flaw which could not reasonably have been discovered on reasonable inspection of the building by a reasonably careful person skilled in construction or on behalf of the subsequent owner or occupier but which manifests over a period

Lawful Development Certificate
A procedure by which existing or proposed uses and other forms of development can be certified as lawful for planning purposes

Lease
A lease is a contract under which an owner of a property grants another person an interest in land for an agreed period in return for a rent or sum

Letter of Intent
A document which sets out details of an agreement between two or more parties to enter into a contract before an agreement is finalised

Local Plan
A statutory development plan prepared by a local planning authority setting out detailed policies for environmental protection and development

Local Planning Authority
The local authority or council that is empowered by law to exercise planning functions

Liquidated Damages
An agreed sum of money specified in a contract of the amount to be paid by the contractor for the contractor's failure, usually, to achieve practical completion by the completion date

Listed Buildings
A building of 'special architectural or historic interest', which is included on the statutory List of Buildings of Special Architectural or Historic Interest

Licence
A permission, for example to enter on land

Litigation
Legal proceedings or court action either in civil or criminal proceedings

Local Development Framework
The name for the collection or folder of documents prepared by a local planning authority which form the planning strategy for the area

Incorporeal Hereditaments
An intangible right which is attached to property and which is inheritable

Information Release Schedule
An optional provision in certain standard building contracts which states what information the architect or contract administrator will release and the time of release

Mediation
A voluntary and consensual non-binding process of negotiation in which an independent mediator assists the parties to achieve a legally binding settlement between the parties

Misrepresentation
A false statement of fact made by one party to another, which induces the other party to enter the contract

Negligence
A failure to take reasonable care to avoid causing injury or loss to another person

Novation
A term used in contract law describing the act of replacing a party to an agreement with a new party

Overriding Interest
An interest in registered land which binds an owner without being entered on the register

Outline Application
A general application for planning permission to establish that a development is acceptable in principle, subject to subsequent approval of detailed matters, and which does not include full details of the proposal

Permitted Development
Developments which are automatically granted planning permission by the General Permitted Development Order 1995. These rights, however, can be removed by a legal agreement or condition attached to the original planning permission

Permitted Development Rights
Rights to carry out certain limited forms of development without the need to make an application for planning permission, as granted under the terms of the Town and Country Planning (General Permitted Development) Order 1995

Plaintiff
The person who brings or files a case with a court

Professional Indemnity Insurance (PI Insurance)
Protection against financial claims for breach of professional duty

Profit a prendre
The right to take something from another's land

Planning Obligations
Legal agreements, usually between a planning authority and a developer ensuring that certain extra works related to a development are undertaken, usually under Section 106 of the Town and Country Planning Act 1990

Practical Completion
Stage when the works have achieved practical completion and the contractor has fulfilled his or her obligations and health and safety matters

Precedent
The decision of a case which establishes principles of law, acting as an authority for future cases of a similar nature

Ratio decidendi
The legal principle on which a decision is based

Reserved matters
A planning permission, usually outline, may specifically reserve for later consideration some matters not relating to the principles of the proposed development. Matters reserved at outline stage can include access, appearance, layout, scale and landscaping

Restrictive covenant
A covenant restricting the use of land

Rectification Period
Period that gives the contractor the right to rectify any defects or snags that may appear. The Rectification Period was formerly known as the *Defects Liability Period*

Retention
A percentage of interim payments included within most standard forms of contract to be withheld by the client as an incentive to complete the works

Scheduled Ancient Monument
Scheduled ancient monuments are nationally important sites given legal protection by being placed on a schedule of ancient monuments of 'national importance' and are compiled and reviewed by English Heritage

Section 106 Agreement
A legal agreement, usually between a planning authority and a developer, ensuring that certain extra works related to a development are undertaken

Servient Tenement
Land burdened by a right such as an easement

Stop Notice
A notice served in respect of land subject to enforcement proceedings prohibiting the carrying out or continuing of specified operations which are alleged to constitute a breach of planning control

Sui Generis
Uses of land or buildings which do not fall into any of the use classes identified by the Use Classes Order

Stare Decisis
Judges bound by a system of case law in that they must have regard to earlier decisions made by superior courts on the same principles

Variations
Changes to the project of what a contractor was obliged to deliver as part of the contracted documents

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