A variety of factors make a construction contract different from most other types of contracts. These include the length of the project, its complexity, its size and the fact that the price agreed and the amount of work done may change as it proceeds. As a result, the allocation of these risks is a very important part of the contract since these factors always result in additional costs being incurred. This inevitably raises the question of who should pay.

**Complex nature**

The structure may be a new building on virgin ground. It may involve the demolition of an existing building and its full reconstruction. It could involve partial demolition and rebuilding, or the refurbishment and extension of an existing building or structure. This may be mostly below ground (in which case it is engineering) or above ground (in which case it is building). Building, however, includes foundations and other underground works. A building contract can consist of activities and services carried out both above and below ground level.

The term ‘construction contract’ or ‘construction law’ is used throughout this book. The term includes contracts for building works and as well as engineering contracts. *Chitty on Contracts* introduced for the first time in 1999 a chapter on the subject in its 28th edition (see ch. 37). Architects traditionally design and administer building contracts. The Architects Registration Board (ARB, see www.arb.org.uk) now regulates their academic and practical training. Consulting civil engineers design civil engineering works and administer their construction. A large engineering contract will usually make provision for administration and supervision by site-based resident engineers. Modern contracts also provide for the appointment of project managers to coordinate and administer the contract.

**What is a construction contract?**

In *Modern Engineering (Bristol) Ltd v. Gilbert-Ash Northern* [1974] AC 689, Lord Diplock at 717B described a building contract as:

‘an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work done. Decisions have to be made from time to time about such essential matters as the making of variation orders, the expenditure of provisional and prime cost sums and extension of time for the carrying out of the work under the contract.’

It is important to realise that Lord Diplock was referring to a contract made using a standard form of building contract. Such contracts usually make provision for interim payments at regular intervals as the work proceeds, whereas a contract that is described as entire is a product of the common law. It may
make provision for stage payments, but in essence, it requires the contractor to complete all its work before any entitlement to payment arises. A modern example of such an entire contract is *Discain Project Services Ltd v. Opecprime Developments Ltd* [2001] EWHC Technology 450. The carrying out and completion of this contract (whether made using a standard form contract or entire) differs from other manufacturing processes. HHJ Newey OR in *Emson Eastern v. EME Developments* (1991) 55 BLR 114 described the differences at p. 125, within the context of practical completion of the work:

‘I think the most important background fact which I should keep in mind is that building construction is not like the manufacture of goods in a factory. The size of the project, site conditions, the use of many materials and the employment of various kinds of operatives make it virtually impossible to achieve the same degree of perfection that a manufacturer can. It must be a rare new building in which every screw and every brush of paint is absolutely correct.’

There is no special body of rules that applies to such contracts, whether they are described as building, engineering or construction contracts. Lord Reid said in *Modern Engineering* that where the parties enter into detailed building contracts there were ‘no overriding rules or principles covering their contractual relationships beyond those which generally apply’. This principle was supported by Lord Lloyd of Berwick in *Beaufort Developments (NI) Ltd v. Gilbert-Ash (NI) Ltd* [1998] UKHL [1988] 1 AC 191 where he stated that:

‘Standard forms of building contracts have often been criticised by the courts for being unnecessary obscure and verbose. But in fairness one should add that it is sometimes the courts themselves who have added to the difficulty by treating building contracts as if they were subject to special rules of their own.’

The fact that the ordinary rules of the law of contract apply is subject to an important qualification. Legislation passed following the recommendations of the Latham Report (*Constructing the Team*, 1994) has treated construction contracts as a special category requiring statutory intervention. The introduction of Housing Grants Construction and Regeneration Act 1996, part II (hereafter HGCRA 96) has also altered fundamentally the allocation of risks in construction contracts. All parties before entering into contracts have to consider how they will deal with the legislation. It also provides a much wider definition of what, for the purposes of the legislation, is a construction contract.

Section 104(1) of the HGCRA 96 states that a ‘construction contract’ includes:

- the carrying out of construction operations
- arranging for the carrying out of construction operations by others, whether under a subcontract to him or otherwise
- providing his own labour, or the labour of others, for carrying out construction operations.

Section 104(2) extends the definition of a construction contract to any agree-
ment to carry out architectural, design or surveying work, or the provision of
advice on building, engineering, interior or exterior decoration, or the laying
out of landscape. Note that a contract of employment is specifically excluded
from the statutory definition. This definition is much wider than that given by
Lord Diplock above. It includes the carrying out of design activities and the
giving of advice, so widening the range of activities covered by the legislation.
Construction operations are further defined by Section 105 as including:

- all normal building and civil engineering works, including operations such
  as scaffolding, site clearance and painting and decorating as well as
  contracts for repair and maintenance
- consultants agreements on construction operations
- labour-only contracts
- contracts of any value.

Certain contracts are excluded from the operation of the Act: see Section
105(2). The reason for this is that they did not suffer from the same ills iden-
tified by the Latham Report. The petrochemical and process industries are
excluded, and so are contracts concerning the supply and fixing of plant
(including supporting steelwork). These activities are not classified as
‘construction operations’. The off-site manufacture of components to be
incorporated into the construction work is also excluded, and so are contracts
with residential occupiers (see Section 106). There is however, a substantial
body of case law resulting from contracts with residential occupiers. These
involve either the use of standard forms of contracts or other contracts that
make specific provision for adjudication. This is discussed further in Chapter
16. In a number of cases the meaning of construction operations has been
considered. Homer Burgess Ltd v. Chirex (Annan) [2000] BLR 124 held that
pipework was part of a pharmaceutical plant and not a construction operation.
By contrast, in Palmer Ltd v. ABB Power Construction (1999) BLR 426 the
subcontractor work was held to come into the definition. This was so despite
the main contract work being outside the definition. Staveley Industries Plc
v. Odebrecht Oil & Gas Services (2001) 98 (10) LSG 46 held that structures on
the sea bed below low water mark are not part of the United Kingdom for the
application of the Act.

Under the Act there was a special requirement that the contract has to be in
writing. ‘Writing’ was widely defined by Section 107, so word of mouth agree-
ments referring to a written document or an exchange of letters are sufficient to
bring a contract into the section. Whether the agreement is in writing has been
an issue in many references to adjudication. In Grovedeck Ltd v. Capital
Demolition Ltd [2000] BLR 181 an oral agreement was entered into. The parties
went to adjudication under the Scheme for Construction Contracts despite the
protests of one side that the Act did not apply. HHJ Bowsher QC refused
to enforce the adjudicator’s award, finding that there was no written contract.
The Court of Appeal in RJT Consulting Engineers Ltd v. DM Engineering
(Northern Ireland) Ltd (2002) EWCA Civ 270 had to consider the meaning of
Section 107. All three judges interpreted the section as requiring the express
terms of the agreement to be in writing, not the agreement itself. (See Chapter
16, where the issue of writing is discussed further in relation to
As a result of this decision many contracts were considered to be excluded from the legislation. After consultation with industry, new legislation has been passed but not implemented yet: The Local Democracy, Economic Development and Construction Act 2009 (LDEDC 09). Part 8 deals with Construction Contracts. Clause 139 (1) repeals Section 107. This means that all contracts whether made orally or in writing are now subject to the Act. However, Section 139(2) requires the adjudication agreement to be in writing. When implemented, these changes will only affect contracts entered into after that date, so for some time two sets of rules will apply. Note also that private finance initiative contracts and finance agreements are excluded from the legislation on grounds of policy.

**Risk allocation**

Like all contracts, construction contracts are about the prior allocation of risk. Windward (1992) draws attention to the construction industry’s need to make a profit on the employment of capital:

> ‘If risk is an essential ingredient of the system which generates your profit, it is inevitable that there must be a structure for resolving disputes. It brings the relationship of the disputants back into balance so that life can resume its normal course.’

Windward’s reference was primarily to arbitration, the main method of dispute resolution prior to the introduction of adjudication. It is of course a matter of debate whether the introduction of statutory adjudication by the HGCRA 96 achieves that balance between disputing parties. It was conceived by the Latham Report as essentially a ‘quick fix’ in that it was intended to resolve disputes as they arose rather than at the end of the project, this being the usual practice before its introduction. Standard forms of contract try to allocate risk equitably between the parties. In essence, the payment provisions of the HGCRA 96 can also be described as an attempt to introduce a measure of equity into the contractual relationship between contractor and subcontractor. Risks are varied in construction contracts, and include many factors that can affect the progress of the work.

1. The unforeseen:
   a. unexpected ground conditions
   b. unpredicted weather conditions
   c. a shortage of material
   d. a shortage of skilled labour
   e. accidents, whether by fire, flood or carelessness
   f. innovative design that does not work or proves impossible to construct.

2. The length of the contract. Projects vary in the time needed for completion, from days to years. During that time the risk allocation agreed at the time of contracting can change substantially. This is especially so with regard to the availability of materials and its costs. A contractor may have ‘bought’ the job because work was scarce at the time and the price of components low.

3. The number of participants, and parties in the project and the corresponding length of contractual chain cause their own problems. The risk of insolvency increases the longer the chain.
The particular relationship (often referred to as a triangular relationship of costs, time and quality) in which conflict is inherent. Contracting parties have different perceptions of how these factors of their relationship interact.

The interaction between liability for defective workmanship and for faults in design. The Latham Report in item 3.10 identified the lack of coordination between design and construction as a common source of dispute. Much of the innovation in procurement systems of recent years stems from creating ways of minimising the effect of this clash.

Why use a standard form of contract?

There has been a proliferation of standard forms in the construction industry in recent years, and there are many books available on specific forms of contract. It is not intended to compare those forms here or discuss their similarities or differences. There are, however, many advantages to be gained by using a standard form of contract.

Advantages

Some advantages are:

1. The standard form is usually negotiated between the different bodies that make up the industry. As a result the risks are spread equitably.
2. Using a standard form avoids the cost and time of individually negotiated contracts.
3. Tender comparisons are made easier since the risk allocation is same for each tenderer. Parties are assumed to understand that risk allocation and their prices can be accurately compared.

Disadvantages

Some disadvantages are:

1. The forms are cumbersome, complex and often difficult to understand.
2. Because the resulting contract is often a compromise, they are resistant to change. Much-needed changes take a long time to bring into effect.

Participants

A construction contract is best described as a complex web of competing interests. A particular problem in construction contracts is that there is little interest in building long-term relationships. With the growth of partnering it is possible to argue that much has changed. It is argued that contracts such as the New Engineering Contract (NEC), now renamed the NEC Engineering and Construction contract, provide flexibility and simplicity. Its success also depends on the parties building long-term relationships. In such a case the contract may well serve only as document to record the intentions of parties. Supply chain management is another much-heralded innovation. When tested in a recession or an economic downturn, these innovations may well provide proof that the construction industry has indeed changed.

The traditional contract is of great importance in understanding the problems
and complexities of construction contracts. Only by analysing the relationship between the employer and the contractor is it possible to understand the problems that other forms of procurement try to resolve. At the heart of the traditional contract lies the conflict between design on the one hand and workmanship on the other. That conflict is complicated further by the need to allocate rights to third parties. In addition, as the modern contractor neither designs nor builds but manages the process, many subcontractors will be involved in the constructing of the work.

**The traditional contract**

In such a contract the employer contracts with an architect or engineer to carry out the design. The architect or engineer, acting as the agent of the employer, supervises the construction of that design. The contractor enters into a contract with the employer to build that design. There is no guarantee given by the employer to the contractor that the design can be built. In carrying out the work, the contractor employs both subcontractors and suppliers of services, goods and equipment. These may in turn be classified as domestic or nominated. Out of the relationship between these parties arises the issue of privity of contract: the basic rule that only parties to a contract can enforce the contract. In summary:

(a) in the absence of a warranty there is no contractual relationship between the employer and subcontractors and suppliers
(b) third parties have no contractual rights.

The use and spread of collateral warranties has resolved some of the problems caused by the doctrine in providing for the forming of contractual relations with third parties. The passing of the Contracts (Rights of Third Parties) Act 1999 provides an opportunity to simplify this area, but at the moment this piece of legislation has not been widely adopted by the construction industry. Instead, the standard form of building contract, Private with Quantities 1998 edition issued by the Joint Contracts Tribunal (hereinafter called JCT 98) and the Institution of Civil Engineers Condition of Contract, Measurement Version, seventh edition (called ICE 7th) specifically excluded the application of the Act from these forms. However, the Standard Building Contract With Quantities 2005 edition (SBC/Q 2005), called JCT 05, makes provision for parties to use the Act as an alternative to using collateral warranties.

**The tendering process**

Whatever the method of procurement adopted, the tendering process in the United Kingdom is based on competitive bidding. To ensure transparency in this process the National Joint Consultative Committee (NJCC), an organisation consisting of the major professional bodies involved with construction, has produced codes of procedure (although disbanded in 1996, its documents are still in use).

**Open tenders**

The first step in this type of tendering is an advertisement in the technical press calling for expressions of interest. Parties can obtain the documents needed from the
body placing the advertisement or its agents. The advertisement usually contains a brief description of the location, the type of work being proposed, the scale of the project and the scope of the proposed work. Interested contractors are invited to apply for the details. The main disadvantage of this type of tendering is that it is indiscriminate in its approach, costly and likely to attract inexperienced tenderers. Local authorities have in the past tended to favour this method of procurement. Its use has been affected by European Directive 71/305/EEC 9 (as amended by directive 89/440/EEC), implemented in the United Kingdom by the Public Works Contracts Regulations 1991 (SI 1991/2680). These were followed by a number of regulations aimed at opening the European construction market. For more details see Emden (Bartlett, 2001, p. 2009). In public procurement this is the main form of selection. The financial thresholds change every two years. Because it applies to all public and local government projects, health authorities, police, education authorities and so on, it is therefore applicable to a wide range of projects. This is discussed further in Chapter 3.

**Single-stage selective tendering**

The NJCC code considers that this procedure is suitable for both private and public sector works. This procedure restricts the number of tenderers by preselection from either an approved list or on an ad hoc basis. A limited number (up to six) are selected on the basis of general skill and experience, financial standing, integrity, proven competence with regard to statutory health and safety requirements, and their approach to quality assurance systems. Thereafter price alone is the criteria, the lowest tender being selected.

**Two-stage selective tendering**

The NJCC regards this as a suitable method where the early involvement of the main contractor is required before the scheme is fully designed. It enables the design team to make use of the contractor’s expertise. The contractor also becomes involved in the planning of the project at an early stage. The first stage consists of the selection of the contractor on the basis of a competitively priced tender but with minimal information provided. The submission is on a basis of the layout and design of the works, clear pricing documents relating to the preliminary design and specification, and the conditions of contract. In the second stage the employer’s professional team collaborates with the selected contractor in the design and development of production drawings for the whole project. A bill of quantities (or it may simply be priced on drawings and a specification) is prepared and priced on the basis of the first-stage tender. If an acceptable sum is produced the contract documents are then prepared. This method is considered to be useful for building works of a large or complex nature, where the brief is unlikely to change. It is recommended for projects where the design and construction phases may overlap and the contractor’s design expertise can be utilised.

**Selective tenders**

Normally called design and build contracts, these are also called turnkey contracts, which is a wider description of what the employer may expect (i.e. the employer puts the key into the door of the new factory and starts it up). The
The contractor’s price is to carry out and complete the works in accordance with the conditions of contract. The tender includes the whole of contractor’s proposal including price and design. The NJCC Code of Procedure for selective tendering for design and build describes its code as a procurement method that combines the design and construction responsibilities.

Other modes of selection

Negotiation

Contracts are seldom entered into on this basis alone. Parties may negotiate an extension to a contract, additional work outside the scope of the contract may be agreed, or additional work may be carried out elsewhere for the same employer.

Joint venture

A joint venture is where two or more companies pool resources for a project beyond the resources of the single companies. It may be used on one project or the agreement may be for a specified period. The co-venturers accept joint and several liability for the project.

Other means of procurement

Various types of ‘procurement systems’ have evolved in recent years to deal with the difficulties perceived within the traditional contract.

(a) Management contracting. Here the employer engages the management contractor to partake in the project at an early stage. Normally an experienced builder, the contractor is employed not to undertake the work but to manage the process. All the work is subcontracted to works contractors who carry it out.

(b) Construction management. This differs from management contracting in that the employer enters into a direct contract with each specialist. The employer engages the construction manager to act as a ‘consultant’ to coordinate these contractors.

(c) Project management. The project manager is employed to coordinate all the work needed from design to procurement and construction on behalf of the client.

(d) Partnering. The rise of partnering in UK construction can be seen as a response to the widely held view that the industry was inherently flawed. After the boom times of the 1980s and subsequent recession of the early 1990s it contracted sharply. A culture of conflict persisted in the industry, with employers and contractors operating in a highly adversarial manner, with contractors taking on greater risks in a fiercely competitive market. In many cases, in order to secure contracts and survive, contractors had to tender at cost (or even under), and recover margins through building claims into the contracting process and withholding payments to subcontractors. The essence of any partnering agreement now involves a duty of good faith, mutual cooperation and trust between all parties involved in the construction process. This is discussed further in Chapter 2.

(e) The Private Finance Initiative (PFI). The aim of the system known as PFI is to involve the private sector in the provision of public services. In essence the PFI
contract is a concession granted by the public sector to the private sector. The private sector company provides the vehicle by which the project company secures the finance to provide services for running the asset provided. This may be a hospital, the provision of information technology projects and services, or the running of the London Underground. The purpose of private and public partnerships is to share the risk of the project, and PFI is at the moment the dominant method. For further information reference should be made to www.pfi/ogc.gov.uk and www.doh.gov.uk/pfi. For a contractor's perspective see Martin Lenihan at www.scl.org.uk. Note that the contract for carrying out the work is a design and build contract.

The incorporation of documents

The usual approach in books on contract law is to deal with this topic after discussing formation and before dealing with the terms of the contract. The approach taken here is to deal with it as part of the discussion of standard forms and the tendering process itself. It was commented earlier that parties use standard form contracts because they bring certain commercial benefits. The question of whether those documents are incorporated into the contract may prove crucial. Parties often make reference in contractual documents to the contract being ‘subject to conditions available on request’. Such a reference, when brought to the notice of the other party, is sufficient to incorporate the current edition of those conditions of contract. This rule was decided in *Smith v. South Wales Switchgear Ltd* [1978] 1 All ER 18.

Smith overhauled South Wales Switchgear Ltd’s electrical equipment for some years. The company wrote to Smith asking him to carry out the overhaul of equipment. A purchase note requesting work which read ‘subject to ... our general Conditions of contract 2400, obtainable on request’, was sent to Smith. He carried out the instructions as requested but did not request a copy. An unrequested copy of the 1969 conditions was sent to him. There were two other versions of the condition including the March 1970 revision. Held: The reference in the purchase order incorporated the March 1970 revision. There were three reasons for the decision:

1. It was clear how Smith could have ascertained the terms.
2. It was common knowledge that conditions of contract change over time.
3. If he had asked for the conditions he would have received a copy of the current one.

Sometimes the terms on which the work is to be let are referred to in correspondence passing between the parties. Terms of a standard form of contract may be incorporated into the contract by such a reference. A contract was made by exchange of letters in *Killby and Gayford v. Selincourt* [1973] 3 BLR 104. On 11 February 1972 the architect wrote to the contractor seeking a price for alteration work. The letter concluded, ‘subject to a satisfactory price between us, the general conditions and terms will be subject to the normal RIBA [Royal Institute of British Architects] contract’. The contractor provided a written estimate on 6 March 1972. The architect replied on behalf of the client accepting the estimate and also stated ‘please accept this letter as formal instructions to start work’. No standard RIBA (now the JCT) contract
was ever signed. It was held that the exchange of letters incorporated the current RIBA form of contract.

The parties may make a contract using a standard form of contract in circumstances where the use of the form is inappropriate. For example a main contractor may sublet work proposing the use of a standard form of contract not intended for such contracts, or a fixed fee contract may use one which allow for variations. Where the parties do so, a court may try to make sense of the vague references to it. In *Modern Buildings (Wales) Ltd v. Limmer and Trinidad Co Ltd* (1975) 14 BLR 101, the subcontract order read: ‘to supply adequate labour, plant and machinery to carry out ... [sub-contract] work ... In accordance with the appropriate form for nominated sub-contractors (RIBA 1965) edition ... All as per your quotation.’ No RIBA subcontract form existed and neither was there a RIBA 1965 edition. Held: the current green form was incorporated into the contract. The words in brackets would be disregarded to make the contract work. Buckley LJ observed that:

‘Here it is not disputed that the written contract between the parties consisting of the quotation and the order contains all the essential terms in the contract and in my judgement, the ‘green’ form of contract must be treated as forming part of the written contract, subject to any modifications that may be necessary to make the ‘green’ form accord in all respects with the express terms agreed between the parties.’

Note here that the main contract was let under the JCT 63 standard form of building contract. Expert witnesses agreed that that the reference to the ‘green’ form would be understood in the trade as being a reference to the (former) Green Form of nominated subcontract.

In *Brightside Kilpatrick Engineering Services v. Mitchell Construction* [1973] Ltd (1975) 1 BLR 624, the printed references to the green form had been deleted. The Court of Appeal had to construe references to the main contract condition contained in the sub-contract order. Buckley LJ said at 65:

‘The contention for the defendants has been that the statement in the document of 24 March 1972 that “the conditions applicable to the sub-contract with you shall be those embodied in the RIBA as above” is a clear reference to the main contract and the effect of that is to import into the contractual relationship between the contractor and the sub-contractor all the terms of the head contract ... substituting for references to the building owner references to the contractor, and substituting for references to contractor references to the sub-contractor.’

In agreeing with this approach the court held that the main contract provisions had to be modified to reflect the contractor–subcontractor relationship. Note that the FASS ‘green’ form was the one approved by the Federation of Associations of Specialist and Sub-Contractors (FASS).

**The construction of contracts**

Among the issues that often arise in construction contracts is the meaning of words used by the parties in their written contracts. The process by which courts arrive at this meaning is called construing the contract. The resulting
meaning as determined by the court is called the construction of the contract. Lord Diplock in *Pioneer Shipping v. BTP Toxide, The Nema* [1982] AC 724 at 726 said that the object in construing any commercial contract is to ascertain: ‘What each [party] would have led the other to reasonably assume were the acts he was promising to do or refrain from doing by the words in which the promise were expressed.’

**Expressed intention**

In construing a contract the court applies the rule of law that while it seeks to give effect to the intentions of the parties it must give effect to the actual words used. It must decide what the parties actually meant by using those words. Intention does not, however, equate to ‘motive, purpose, desire or state of mind’. Those are subjective states. The common law adopts an objective standard of construction by excluding general evidence of the actual intention of the parties. The meaning of the phrase ‘expressed intention’ was considered by Lord Hoffman in a number of cases. In *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749, he reiterated the well-known principle that the law was not concerned with the subjective intention of the speaker. He went on to comment that contained in the expression ‘the meaning of the words’ was an ambiguity that could not be ignored. This ambiguity was itself twofold. One concerned the meaning of the actual words themselves, whether contained in dictionaries or in the effect of their syntactical arrangement in grammar. The second was what the person who used them understood them to mean with regard to the factual background in which they were used. He went on to say:

‘It is the background which enables us, not only to choose the intending meaning when the word has more than one dictionary meaning but also to understand a speaker’s meaning, often without ambiguity, when he has used the wrong words.’

Bowdrey and Cottam conclude that Lord Hoffman’s analyses of what he describes as all the ‘old intellectual baggage’ of legal interpretation has been discarded. This is a view shared by McKendrick (2000, p. 194). In *Investors Compensation Scheme Ltd v. West Bromwich BS* [1998] 1 WLR 896, Lord Hoffman provided a summary of the principles involved:

1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person, having all the background knowledge, which would reasonably be available to the parties in a situation in which they were at the time of the contract.

2. The background was famously referred to by Lord Wilberforce as the ‘matrix of fact’ but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything that would have affected the way in which the language of the document would have been understood by a reasonable person.

3. The law excludes from the admissible background the previous negotiations of the parties and their subjective intent. They are admissible only in an action...
for rectification. The law makes this distinction for reasons of practical policy, and in this respect only, legal interpretation differs from the way utterances are generally interpreted in ordinary life. The boundaries of the exception are in some respects unclear, but this is not the occasion to explore them.

The meaning which a document (or any other utterance) would convey to a reasonable man or woman is not the same thing as the meaning of the words. The meaning of words is a matter of dictionaries and grammars; the meaning of documents is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable person to choose between the possible meaning of the words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax; see Mannai Investment.

The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people make linguistic mistakes, particularly in formal documents. On the other hand if one nevertheless concludes from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention to which they plainly could not have had. Lord Diplock made this point vigorously when he said in Antaios Compania Naviera SA v. Salem Rederierna AB [1985] AC 191 at 201: ‘if detailed semantic and syntactical analyses of words in commercial contracts is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense’.

In Transfield Shipping Inc v. Mercator Shipping Inc [2008] UKHL 48 at 28 Lord Hoffmann said: ‘the court is engaged in construing the agreement to reflect the liabilities which the parties may reasonably be expected to have assumed and paid for. It cannot decline this task on the ground that the parties could have spared it the trouble by using clearer language.’ In Chartbrook Ltd v. Persimmon Homes Limited and ors and anor [2009] UKHL 38, it was required to do just that. The parties were in dispute over the eventual price payable. The builder agreed to obtain planning permission to develop the site. Under a licence granted by the developer, it constructed mixed commercial and residential properties to be sold on long leases. It then directed the developer to grant long leases to these tenants. Out of the proceeds the builder agreed to pay the developer an agreed price for the land. The issue was what that price was in their complex financial arrangement.

At 14 Lord Hoffmann observed that there was no dispute about the principles to be applied. Where a contract (or any other instrument or utterance) has to be construed, they were summarised by the House of Lords in Investors Compensation Scheme Ltd. The question was what would a reasonable person ‘having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The House emphasised that ‘we do not easily accept that people have made linguistic mistakes, particularly in formal documents’. (Similar statements will be found in Bank of Credit and Commerce International SA v. Ali [2002] 1 AC 251, 269, Kirin-Angen Inc v. Hoechst Marion Roussel Ltd [2005] RPC 169, 186 and Jumbo King Ltd v. Faithful Properties Ltd (1999) 2 HKCFAR 279, 296.) He emphasised that
it was the context and background that drove a court to the conclusion that ‘something must have gone wrong with the language’. In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had.

For the application of these principles in a construction setting, see the judgment of HHJ Seymour QC in *Tesco Stores Ltd v. Costain Construction Ltd and ors* [2003] EWHC 1487 (TCC) at para 161.

**Extrinsic evidence**

The general principle for written contracts is that extrinsic evidence, outside of the document itself, is not admissible by a court. No extrinsic evidence may normally be adduced to contradict, vary, add or subtract from the written terms. There are a number of exceptions.

**Blanks**

Where a complete blank is left in a material part of a contract, evidence is not admissible to fill those blanks: see *Kemp v. Rose* [1858] 32 LT, (OS) 51, where the date of completion was omitted from the contract. To insert it would have resulted in the imposition of an onerous liquidated and ascertained damages clause. The court refused to admit evidence that each party had been told of the date. See also *Temloc Ltd v. Errill Properties* [1987] 39 BLR 30 where ‘Nil £’ was held to equal a blank.

**Preliminary negotiations**

Where the parties have reduced their negotiations to a final written contract, preliminary negotiations such as letters cannot be referred to for the purpose of explaining the parties’ intentions. In *Davis Contractors Ltd v. Fareham Urban District Council* [1956] AC 696 [1956] 2 All ER 145, a covering letter was sent subject to certain terms. After negotiations, a formal contract was signed which defined the contract documents but without including the letter. It was held that the term contained in the letter was not part of the contract.

**Deletions from the printed documents**

A question that often arises is whether it is permissible to look at deletions from printed documents. If it is permissible, for what purpose can it be used? *Keating* (2001, p. 81) says there are two schools. One school, an old weighty authority, states that it is not permissible to look at deletions at all. The rule was followed in a number of recent cases: see for example *Wates Construction v. Franthom Property* [1991] 53 BLR 23. The other school says that where the parties use a printed form and delete part of it, the deleted part can be looked at to decide what they have agreed to leave in. This was the approach adopted in *Motram Consultants Ltd v. Bernard Sunley & Sons* [1975] 2 Lloyd’s Rep 197, where the House of Lords referred to the deletion from an existing contract of a clause giving the employer the right to set off monies owed to the contractor. It decided that the parties had directed their minds to the question of set-off and decided that it should not be allowed. The second school was preferred. Where there is an ambiguity it is possible to look at deletions in order to throw light on the subject.
Where intrinsic evidence is permissible

Two occasions can be identified:

1 Where foreign or technical words can be proven. If there is no dispute about technical words, the court can inform itself by reliable means. Counsel can provide an explanation, dictionaries can be consulted or an assessor appointed.

2 Custom or usage. Evidence is permissible to show that the words were used according to a special custom or usage known to the trade or locality applicable to the contract. Everyone must know about it. In Symonds v. Lloyd (1895) 6 CB 691 it was accepted by the court that ‘reduced brickwork’ meant brickwork nine inches thick.

Rules of construction

This is only applied where there is some ambiguity or inconsistency. Where the meaning of words is plain, the court gives effect to them.

Ordinary meaning

The court decides as a matter of fact whether the case is within the ordinary meaning or not. The grammatical and ordinary sense of a word is to be adhered to. In doing so it also adopts the reasonable meaning. Where terms are ambiguous and two meanings are possible, the court adopts the reasonable meaning.

Written words prevail

Where there are printed contracts with clauses inserted or filled which are then inconsistent with the printed words, the written words prevail over the printed. Written words reflect the selection made by the parties.

Ejusdem generis rule

The phrase means ‘of the same type’. This means that where words of a particular class of words are followed by general words, the general words are treated as referring to matters in the same class. Thus in a clause dealing with non-delivery, where the port was unsafe ‘in consequence of war, disturbance, or other causes’, ice was held not be within the class. Another example is the presence of a clause that entitled the contractor to an extension of time if the works were ‘delayed by reason of any alteration or condition ... or in the case of a combination of workmen, or strikes, or by default of sub-contractors ... or any other cause beyond the contractor’s control’. The clauses were held to be limited to those ejusdem generis within the clause described. It did not therefore, include the employer’s default in failing to give the contractor possession of the site.

Contra proferentem

This simply means that where the words are ambiguous they are construed against the profferer, the person who drafted the document. As it is the person’s own document, he or she must know what he or she meant by the words used.
The nature of construction contracts

Where the representative bodies or committees have drafted a standard form of contract such as the JCT 98, JCT 05 or the ICE 7th, the rule has no application.

Summary

1. All contracts for work and materials are subject to the provisions of the HGCRA 96.
2. It introduces a statutory definition of a construction contractor. This is wider than the common law definition and includes design.
3. Contracts are about the allocation of risks, which are varied in such contracts.
4. The length of the chain in construction contracts increases the nature of the risks.
5. Standard forms of contract attempt to allocate risk fairly between the parties.
6. Modern innovations in procurement methods try to resolve the basic conflict between design and workmanship, which is at the heart of the traditional contract.
7. Competitive tendering and the various procurement systems allocate risk in different ways.
8. Standard forms may be incorporated into the contract by an exchange of letters. Whether they are can also depend on how easily the documents could have been obtained by the party arguing that they were not part of the contract.
9. Courts will attempt to use vague references to such contracts in order to make a contract work.
10. The meaning of expressed words used is subject to the rules of construction. The result of the process is called construing the contract.