Contractual Correspondence for Architects and Project Managers

Fourth Edition

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Blackwell
Publishing

Editorial offices:
Blackwell Publishing Ltd, 9600 Garsington Road, Oxford OX4 2DQ, UK
Tel: +44 (0)1865 776868
Blackwell Publishing Inc., 350 Main Street, Malden, MA 02148-5020, USA
Tel: +1 781 388 8250
Blackwell Publishing Asia Pty Ltd, 550 Swanston Street, Carlton, Victoria 3053, Australia
Tel: +61 (0)3 8359 1011

First edition published 1983 by The Architectural Press Ltd
Second edition published 1989 by Legal Studies & Services Ltd
Third edition published 1996 by Blackwell Science Ltd
Fourth edition published 2006 by Blackwell Publishing Ltd

ISBN-10: 1-4051-3514-X
ISBN-13: 978-1-4051-3514-6

Library of Congress Cataloging-in-Publication Data
Chappell, David.
Contractual correspondence for architects and project managers / David Chappell. – 4th ed.
p. cm.
Includes index.
ISBN-13: 978-1-4051-3514-6 (hardback : alk. paper)
ISBN-10: 1-4051-3514-X (hardback : alk. paper) 1. Architectural contracts–Great Britain–Forms.
2. Architects–Legal status, laws, etc.–Great Britain–Forms. I. Title.

KD1641.A65C45 2006
344.41'0176172–dc22 2005024848

A catalogue record for this title is available from the British Library

Set in 10/13 pt Palatino
by SNP Best-set Typesetter Ltd., Hong Kong
Printed and bound in Great Britain
by TJ International, Padstow, Cornwall

The publisher's policy is to use permanent paper from mills that operate a sustainable forestry policy, and which has been manufactured from pulp processed using acid-free and elementary chlorine-free practices. Furthermore, the publisher ensures that the text paper and cover board used have met acceptable environmental accreditation standards.

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www.thatconstructionsite.com

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Preface to the Fourth Edition

This was the first book I wrote. The first edition, with all its limitations, was extremely well received, particularly by architects, for whom it was written. It clearly filled a need for a handy book to help solve a few common problems. The somewhat enlarged second and third editions enjoyed continuing success and I sincerely hope that this new version will continue to act as a lifebelt in tricky situations. Many architects have been kind enough to tell me that it has been helpful.

The revisions have again been extensive. There has been much case law in the nine years since the third edition and, although this is not a legal textbook and contains no references to decided cases, they have been taken into account together with the Housing Grants, Construction and Regeneration Act 1996 and other legislation in framing the advice and model letters. In addition, the Joint Contracts Tribunal has issued a completely revised set of standard contracts. The advice and letters have been amended accordingly.

There is always criticism of the idea of model letters and the use of rather formal language in those letters. I remain firmly unrepentant on both issues. I have never advocated the use of model letters without the input of some brain activity. Circumstances and people demand differing approaches. Having said that, there is no doubt that model letters, sensibly used, are a tremendous aid to a busy practitioner. As for the language: wherever possible I have used the wording of the contract. This makes clear to the recipient that the letter is written pursuant to the appropriate clause. In general I have tried to be clear, concise and precise. It is for the user to make whatever amendments may seem fit in the circumstances. Informality in contractual correspondence is rarely, if ever, warranted, but in any case my informality is not yours and it would be out of place in a book like this.

There are many good contractual handbooks available to assist architects to carry out their duties properly. Contractual handbooks and procedural manuals, however, are intended to ensure that jobs proceed smoothly or, at any rate, within the prescribed limits of normal procedures. When things go wrong, the architect must turn to the legal textbooks, which require time and knowledge to study. It need hardly be said that the standard legal textbooks are not written by practitioners of architecture.

Between the two extremes, a smooth contract or a catastrophe, there is a gap which this book attempts to fill. It is based on the fact that architects, contractors, consultants and clients will forget things, do them at the wrong time or

simply make mistakes. In addition, numerous problems arise which the architect cannot foresee. Problems tend to follow a pattern. I have personally encountered or observed most of the situations set out on the pages which follow. The intention is to help architects extricate themselves from difficulties in the most practical way.

This is not a legal textbook. The opinions expressed are my own and I make no claim to infallibility. Adjudication, court and arbitration proceedings are fraught with uncertainty. Try not to be a test case. If in doubt you should always take sound advice.

The following points should be borne in mind when using this book:

- For ease of reference, the book follows the RIBA Plan of Work. Items are located where one would normally expect to find them
- JCT Standard Building Contract 'With Quantities 2005 edition (SBC)' is assumed to have been used. All items are applicable to the Without Quantities edition. The chief difference, noted in the text, is that schedules of work or a specification is used instead of bills of quantities
- Notes and alternatives have been given, where necessary, to show how the items are applicable when the JCT 2005 editions of the Intermediate Building Contract (IC), Intermediate Building Contract with Contractor's Design (ICD), Minor Works Building Contract (MW) or Minor Works Building Contract with Contractor's Design (MWD) are used. Where there are differences, additional notes are added under the headings IC, ICD, MW or MWD as appropriate. Thus if the comments under SBC, IC and ICD are the same, but MW and MWD required different comments, only the main text and a reference to MW and MWD would be given
- The 2004 updates of The Standard Form of Agreement for the Appointment of an Architect 1999 (SFA/99) and the Conditions of Engagement 1999 (CE/99) are assumed to have been used and the appropriate scales and terms of engagement agreed with the client
- It is assumed that the contractor is a corporate body and is referred to as 'it' in the text
- Numbers in brackets in headings and text refer to the numbers of the relevant letters
- Every letter should have a heading, clearly stating the job title. Only letter **1** has been shown in this way to avoid needless repetition

No attempt has been made to cover the perfectly routine matters adequately covered by other manuals. See the author's *Standard Letters in Architectural Practice* for more routine matters. The presentation is a series of problems. It is hoped that the inclusion of a large number of standard letters will be helpful, not only for use as model letters to deal with specific difficulties, but in indicating the kind of letter suitable for similar, although not identical, situations. Each letter should be adjusted in tone to suit the recipient. The Appendices contain sections on writing letters and making decisions.

I wish to thank all the people with whom I have ever worked, all the contractors, sub-contractors, suppliers, quantity surveyors, engineers, the people who have read earlier editions of this book and all the thousands of architects who have telephoned me with problems for helping to crystallise the main problems this book should address. Most of all, I thank my wife, Margaret, who bears with me writing books like this.

David Chappell
David Chappell Consultancy Limited
Wakefield
August 2005

Also new to the fourth edition of *Contractual Correspondence for Architects and Project Managers* is a free CD-ROM, inclusive of all the letters found in the text. All letters are compatible for use with Microsoft® Word and Wordperfect® on IBM-PC and Macintosh® machines. Additionally, every letter can be linked to directly from the table of contents list.

A Appraisal

A1 Client's bona fides: in doubt (1)

New clients often make appearances quite suddenly and you may know little or nothing about them. The request for your services may come in the form of a letter, telephone call or personal approach. Beware of the client who has an aversion to writing letters and who will only deal with you by telephone or in person. That kind of client hates to leave a trail of any sort.

Bearing in mind that many problems between architect and client owe their origins to an initial misunderstanding, you must go through the normal procedure of appointment including a very clear agreement on its precise terms and the fees payable (if you are dealing with a private client, see A2). The fact that your client is well known, and even respected, in his or her own profession is no guarantee that you will be paid your fees.

If you are at all uncertain about your client's ability to pay your fees, there are two things you can do immediately after receiving the initial approach:

- Take out references
- Ask the client for a payment on account

Both procedures require careful consideration before putting them into operation. References can usually be obtained through your own bank on a confidential basis but your prospective client may well discover that you have been making enquiries and take offence. There are also firms who specialise in providing this kind of information. Much depends upon the type of client. Nowadays, the taking up of references is commonplace before any sort of credit is extended. You alone will be in a position to gauge your client's probable reaction.

The alternative, which is much favoured by the legal profession, is sometimes a good way to test the serious intentions of a previously unknown client. If you hear nothing further, your suspicions were probably well founded. If your client proceeds with the meeting, you must be sure to have a clear agreement of the sum payable on account written into your terms of appointment. The precise sum will depend upon your assessment of:

- The size of the job
- The client

1
Letter from architect to client, if bona fides in doubt

Dear

Proposed office block at Back Road, Metrotown

Thank you for your letter [*amend as appropriate if the approach was by telephone or in person*] of [*insert date*] instructing me to carry out architectural services in connection with the above project.

I should be pleased to visit you/see you at this office [*delete as appropriate*] to discuss your detailed requirements and my terms of appointment. I ask for a payment on account of [*insert percentage*] of the estimated total fees[1] at the time of signing the agreement.

A copy of the RIBA Standard Form of Agreement for the Appointment of an Architect[2] is enclosed. When you have had the opportunity to peruse it, perhaps you will telephone me to arrange a convenient date and time for our meeting.

Yours faithfully

[[1] *You may prefer to insert an actual sum of money – it can avoid disputes.*
[2] *Insert whether SFA/99, CE/99 or SW/99 and 2004 update.*]

Finally, you must be sure to get your payment before starting work or writing the letter will be a waste of time.

A2 If your client is a private individual (a consumer) (2)

If your client is acting in a personal capacity when engaging you, in other words, if your client is a consumer, rather than a firm, partnership or company, you should be aware that your contract is subject to the Unfair Terms in Consumer Contracts Regulations 1999. Under the Regulations, a term which is not individually negotiated with your client will be regarded as unfair if it causes significant imbalance in the parties' rights to the consumer's detriment. An unfair term will not be binding on your client.

The difficulty is that a term which has been drafted in advance, for example in SW/99, will always be considered as not being individually negotiated. Therefore, it is essential that you sit down with your client and carefully explain every single term in your appointment document. You must confirm in writing to your client that you have carried out this exercise and that the client has agreed the terms or amendments to them. Particular terms could be singled out for attention; for example, adjudication, any terms restricting the client's right to set-off against payments, and any terms which purport to restrict your liability. However, the safest way is to individually agree every term. If you can get the client to confirm that all terms are negotiated, so much the better, but in practice many client are averse to writing letters.

Very often, the client may be a person of intelligence with a responsible job. Your client may be experienced in business or even a solicitor or a barrister. It makes no difference to the principle. Such a person is regarded in law as a consumer. It seems to be ignoring the facts to take that view; an experienced and sophisticated businessman or woman is, in reality, quite capable of reading a contract and deciding whether legal advice is required. However, if the matter came before the courts, there would be no point in putting forward that argument.

A3 Fee recovery (3), (4), (5), (6), (Fig. 1)

A difficult problem, which should be considered at the beginning of every project, is how to collect fees. Theoretically, you will submit invoices for amounts and at intervals previously agreed (hopefully under an RIBA standard form) and your client will pay. It seldom happens quite like that. Fees more often have to be coaxed or threatened from your client depending on circumstances. It is assumed that you have entered into a proper fee agreement before starting work. If not, you are not so much asking for trouble as laying a red carpet and begging it to come through your door.

The manner and timing of payments should be part of your agreement. Your client may well appreciate being able to make regular payments because it

2
Letter from architect to client, confirming that terms have been negotiated

Dear

[*insert appropriate heading*]

I refer to our meeting yesterday and confirm that I took the opportunity to go through the RIBA Appointment document SFA/99/ CE/99/ SW/99 [*delete as applicable*], 2004 update, with you in detail and that I explained each clause and its significance to you. You were satisfied that you understood the whole of the document.

[*Add either:*]

I further confirm that you did not require any amendments to the terms.

[*Or:*]

I further confirm that we agreed that certain terms should be amended.

[*Then:*]

A copy of the final version of the Appointment is enclosed for you to check, sign and date where indicated and return to me.

Yours faithfully

enables the programming of the client's financial commitment more accurately. Once you have agreed upon a system of regular payments, send accounts regularly and insist on payment. It makes sense to send out all your accounts on a monthly basis. One advantage of a regular fee commitment is that you will have early warning if your client misses a payment. Remember that if your client does not pay you, that is a breach of contract. A sign that your client may be in financial difficulties is sudden questioning of your fee accounts without good reason. Learn to recognise the signs and act accordingly.

You should set up your own system of collecting fees. As a guide, you could use the following procedure, but be ready to vary it depending upon your personal knowledge of your client:

- Send out fee accounts as soon as you can and keep a chart of all fees billed and outstanding with notes of reminders **(Fig. 1)**
- Send a first reminder letter one month after the date of the fee account **(3)**
- Send a second reminder seven days later **(4)**
- After a further seven days, telephone or visit your client if the amount warrants it. At this time state that you must have your fee within seven days
- Seven days later send a letter threatening legal action **(5)**
- Seven days later take legal or other action

If you have reason to believe that you will not be paid, you should curtail the reminders and threaten legal or other action at an early date. Clearly, if you do take action through the courts, by arbitration or adjudication to obtain payment, it is extremely unlikely that your client will commission you again. Splendid; if you have any sense, you will not accept such a commission even if offered. Always remember that your survival is at stake so act promptly.

If your client tells you, after the first reminder, that there is a temporary financial embarrassment, but is confident of paying you within, say, a month or six weeks or in instalments, you will have to use your judgment whether to accept the offer. If you do, get it in writing. If there is a failure to pay as promised, take immediate action. On no account agree to postpone your fees in this way twice with the same client and do not consider giving extra time to pay if you are not told of the difficulties until you threaten action.

This is merely a guide. How you react in any given set of circumstances is for you to decide. Remember that many individuals and firms make a habit of paying at the last possible moment. It makes good economic sense to them and they can be very plausible in formulating excuses.

In most cases you will recover fees after you have sent one or two reminders and certainly before you put your threat of legal action into effect. There will always be some instances, however, where legal action is your only hope. Every architect should have a detailed knowledge of the Housing Grants, Construction and Regeneration Act 1996, which applies to architectural services and requires every contract to have calculable dates when payment is due and the final date for payment. It does not apply to residential contracts, but the RIBA

Client	Fees billed	Date	First reminder (4 weeks)	Date	Second reminder (7 days)	Date	Threaten legal action (7 days)	Date	Take action (7 days)	Date
A Ltd	25,000	30.05.05	Yes	27.06.05	Yes	04.07.05	Yes	11.07.05	Adjudication, arbitration or litigation as appropriate	18.07.05
B LLP	10,700	30.05.05	Yes	27.06.05	**PAID**	29.06.05				
Ms C	3,000	30.05.05	Yes	27.06.05	**PAID**	01.07.05				
D Ltd	4,500	30.05.05	**PAID**	20.06.05						
Mr E	7,200	30.05.05	**PAID**	24.06.05						
Mrs F	300	30.05.05	**PAID**	02.06.05						
G Ltd	9,000	30.05.05	Yes	27.06.05	→		Yes	04.07.05	**PAID**	06.07.05
H Ltd	6,400	30.05.05	Yes	27.06.05	Yes	04.07.05	**PAID**	06.07.05		
J Partners	2,800	30.05.05	Yes	27.06.05	Yes	04.07.05	**PAID**	08.07.05		
K Ltd	12,000	06.06.05	**PAID**	14.06.05						
Miss L	2,500	06.06.05	Yes	27.06.05	**PAID**	29.06.05				

Fig. 1 Fee recovery chart.

3
Letter from architect to client – first reminder

Dear

[*insert appropriate heading*]

I refer to my fee account dated [*insert date*] in the sum of £ [*insert amount*] which is still outstanding.

You will appreciate that I rely upon clients to settle accounts promptly so that current economic fee rates can be maintained. No doubt the matter has escaped your attention, but I should be pleased if you would let me have your cheque by return of post.

Yours faithfully

4
Letter from architect to client – second reminder

Dear

[*insert appropriate heading*]

I refer to my fee account dated [*insert date*] in the sum of [*insert amount*] and my letter of [*insert date*]. I regret to note that I have not yet received payment.

Would you please give this matter your immediate attention?

Yours faithfully

5
Letter from architect to client – threatening legal action

Dear

[*insert appropriate heading*]

I refer to my fee account dated [*insert date*] in the sum of [*insert amount*] which has not yet been paid despite reminders dated [*insert dates*].

In view of the relationship which exists between us, I have not pursued this matter with the vigour it deserves. Although I have no wish to cause difficulties for you, I must have regard to my own financial position. I regret, therefore, that if I do not receive your cheque for the full amount outstanding by first post on [*insert date seven days following date of letter*], I shall have no alternative but to take whatever steps are necessary to recover the debt including interest and all my costs. I do hope that it will not become necessary.

Yours faithfully

appointment complies with the Act in any event. The provisions in the Act and complying contracts can make fee recovery relatively easy. In addition, architects would be wise to have some knowledge of the Late Payment of Commercial Debts (Interest) Act 1999 which, in the absence of any contractual term giving a substantial remedy, currently permits interest to be charged at 8% above Bank of England Base Rate as existing at the end of June and December each year. In addition a modest lump sum can be recovered in compensation.

If the sum outstanding is substantial, it is a good idea to speak to your legal advisor before you threaten legal action. You may be advised to incorporate a rehearsal of the facts in your letter together with dates of all letters of reminder in order to form a sound base for proceedings whatever the forum. It is often a good idea for your advisor to draft the initial letter for you to send.

Your client may offer to pay a lesser sum than you demand 'in full settlement' of your fee; otherwise, you may be told that you will get nothing. Do not hesitate to accept provided that:

- Your client has accepted that you are owed the full amount *and*
- There is no consideration attached to the payment of the lesser sum

Having received the lesser sum, you can if you so wish take action to recover the remainder. Your letter of acceptance should follow the lines of Letter **(6)**. If, however, you agree to accept a lesser sum 'in full settlement' of fees which the client is disputing, your acceptance is binding because you are both compromising the dispute and consideration is present. The handling of the matter requires great care and a consultation with your legal advisor is indicated.

Of course, it is always better to accept a lesser sum or payment of very small sums stretching to infinity than to waste time and money chasing an insolvent client.

A4 If two separate individuals or companies wish to commission you jointly (7)

This situation arises more frequently than may be thought. Where private persons are concerned, it may involve conversion work required to a building such as a barn or disused church to turn it into two dwellings. Two companies may have the chance to buy a building which is too large for each, but perfect in size to share after refurbishment.

In each case, both parties will have a keen interest in the outcome and both will want to be in a position to give you instructions. Although it is perfectly understandable to take that position, proceeding on that basis is a recipe for disaster. The old adage that no person can serve two masters is perfectly sound. Ideally, the parties should have an agreement prepared for them which states which one will act as client, speaking for both, and subsequently as employer under the building contract. Your agreement should be with that party alone.