

JCT 2005

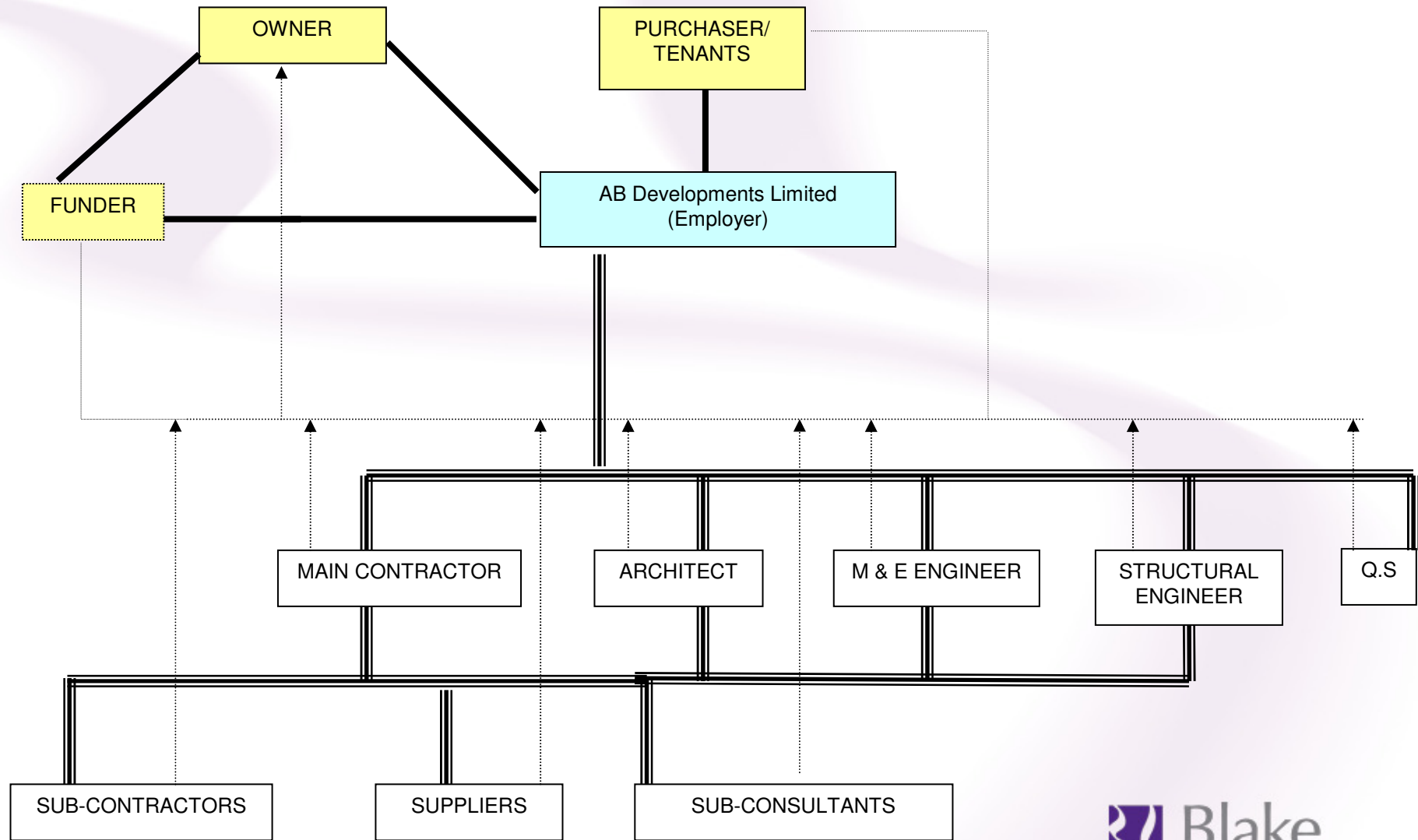
‘A rough guide’

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The 2005 suite (and some helpful abbreviations)

The main family

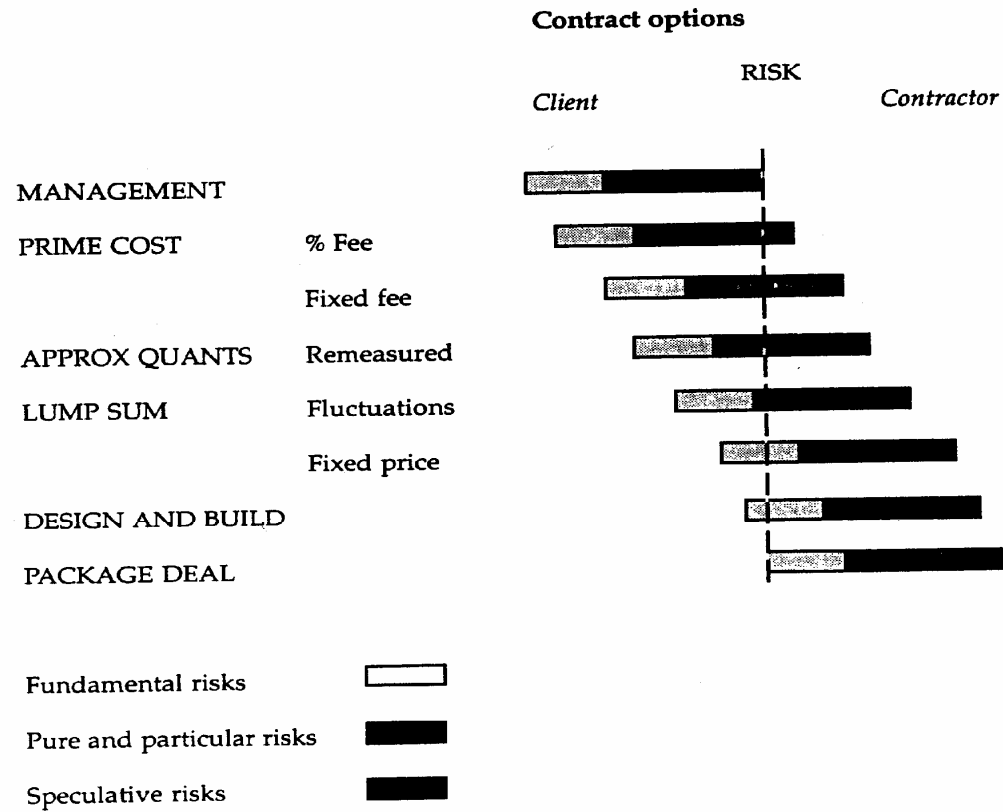
- Standard building contract (SBC)
- Design and build (DB)
- Intermediate (IC) (ICD)
- Minor works (MW) (MWD)
- Major project (MP)

The 2005 suite

Some cousins and Other relations

- Collateral warranties
- Framework agreement
- Adjudication agreement
- Construction management
- Measured term
- Management contracts
- Prime cost

Procurement options



Structure/layout Overview

- Consistency of structure across the suite
- Arranged in chronological sections
- 'Modular' feel to contracts
- Use of various default provisions
- Omission of unnecessary provisions (for example statutory procedures; VAT, CIS, CDM)

Structure/layout

Basic structure

- Articles of agreement
 - recitals
 - articles
 - contract particulars; new – replaced appendix in older versions – split into parts one and two (part two deals with third party rights)
 - attestation – ie signatures
- Conditions
 - arranged in nine chronological sections
- Schedules

Structure/layout

Default provisions

- Examples
 - clause 4.8 advance payment bond; default position that bond will be required
 - clause 6.16 risk for change to Joint Fire Code; now with the contractor
- Dispute resolution; litigation not arbitration
- Rectification (DLP): six months
- Retention: 3%

Structure/layout

Some examples of simplification

- Adjustment of completion date (SBC clause 2.26; DB clause 2.23)
 - no longer a requirement for extensions of time
 - procedure similar to JCT 98 but simplified wording
 - number of relevant events reduced from 19 to 13 (SBC 2.29; DB 2.26)
- In construction contracts time = money (or does it!)

Structure/layout

Relevant events

2.29 The following are the relevant events referred to in clauses 2.27 and 2.28:

- .1 variations and any other matters or instructions which under these conditions are to be treated as, or as requiring, a variation
- .2 instructions of the architect/contract administrator
 - .1 under any of clauses 2.15, 3.15, 3.16 (excluding an instruction for expenditure of a provisional sum for defined work), 3.23 or 5.3.2 or
 - .2 for the opening up for inspection or testing of any work, materials or goods under clause 3.17 or 3.18.4 (including making good), unless the inspection or test shows that the work, materials or goods are not in accordance with this contract
- .3 deferment of the giving of possession of the site or any section under clause 2.5
- .4 the execution of work for which an approximate quantity is not a reasonably accurate forecast of the quantity of work required
- .5 suspension by the contractor under clause 4.14 of the performance of his obligations under this contract

- .6 any impediment, prevention or default, whether by act or omission, by the employer, the architect/contract administrator, the quantity surveyor or any of the employer's persons, except to the extent caused or contributed to by any default, whether by act or omission, of the contractor or of any of the contractor's persons
- .7 the carrying out by a statutory undertaker of work in pursuance of its statutory obligations in relation to the works, or the failure to carry out such work
- .8 exceptionally adverse weather conditions
- .9 loss or damage occasioned by any of the specified perils
- .10 civil commotion or the use or threat of terrorism and/or the activities of the relevant authorities in dealing with such event or threat
- .11 strike, lock-out or local combination of workmen affecting any of the trades employed upon the works or any of the trades engaged in the preparation, manufacture or transportation of any of the goods or materials required for the works or any persons engaged in the preparation of the design for the contractor's designed portion
- .12 the exercise after the base date by the United Kingdom Government of any statutory power which directly affects the execution of the works
- .13 force majeure

Structure/layout

Loss and expense

- Divorced from adjustment to completion date (breaking old clause 25/26 link); so time does not always = money
- Dealt with in section four, which relates to 'payment'
- Procedure similar but simpler wording
- Contained in clauses 4.23 - 4.26 (SBC; 4.19 - 4.22 in DB)

Structure/layout

Termination – section eight

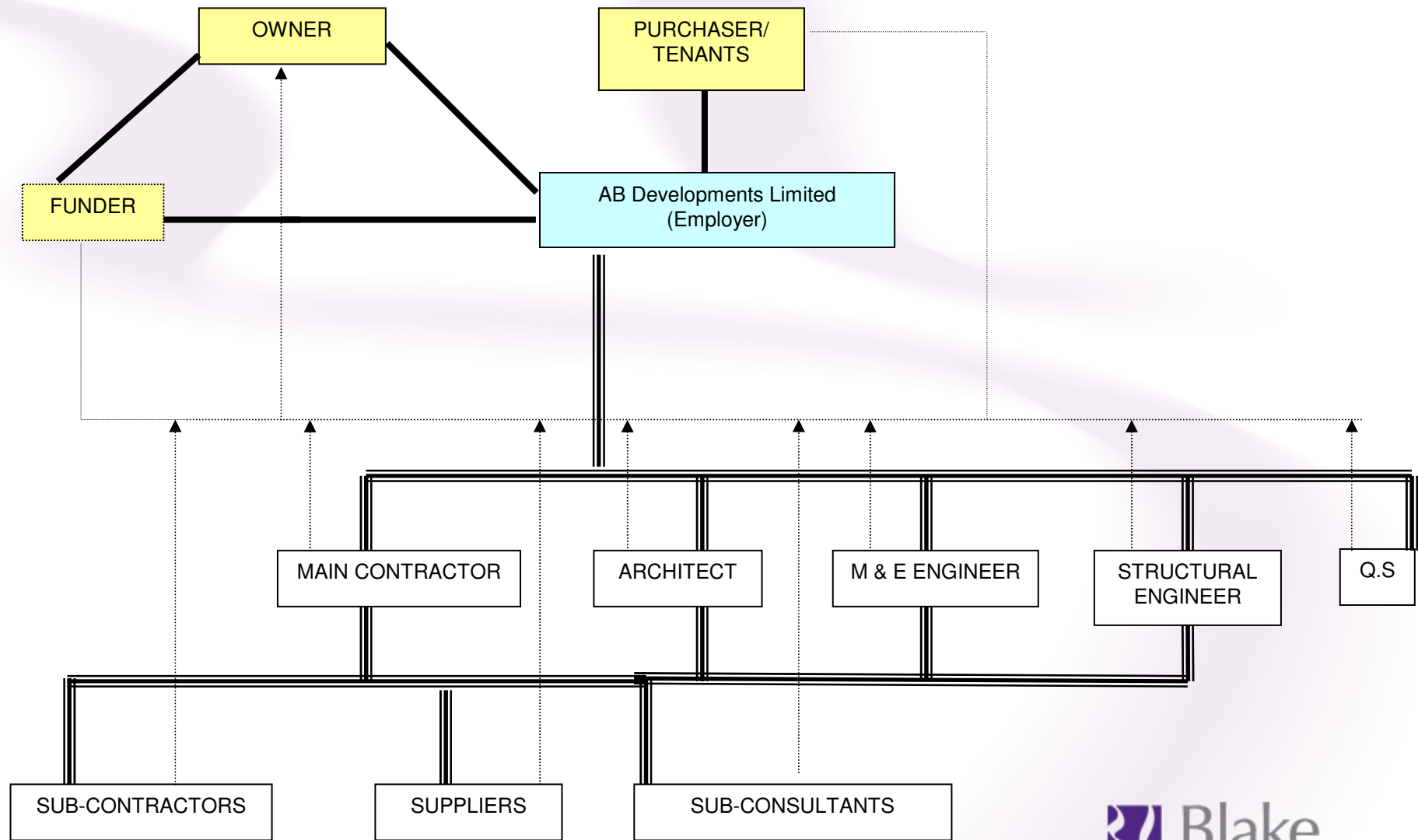
- Not determination
- Procedure hugely simplified
- Enables contract to remain live for settlement of outstanding matters following termination

Structure/layout Termination (cont.)

- General provision in clauses 8.1 – 8.3
- Termination by employer 8.4 – 8.8 (8.5 contains employer's right to terminate upon contractor becoming insolvent; impact upon obligation to pay - *Melville Dundas v Wimpey* (2007))
- Termination by contractor 8.9 – 8.10
- Termination by either party 8.11
- Consequences of termination 8.12

Design issues

- All forms provide for contractor design; note the different variants of each standard form
- Modular use of standard form; use of contractors design portion without a separate supplement
- Novation of consultants



Design issues

Design submission procedure

- New and **very significant!**
- Procedure set out at schedule one
- Gives opportunity to employer/architect to review contractor's proposed design

Design issues

Design submission procedure

- Contractor delivers two sets of design documents to architect/CA
- Employer/architect/CA will mark drawings either:
 - ‘A’ – proceed in accordance with document
 - ‘B’ – proceed subject to comments and resubmit
 - ‘C’ – do not proceed, address comments and resubmit

Design issues

Design submission procedure

- Deemed 'A' if no response within 14 days
- Contractor must challenge within seven days
- Absence of challenge will not give rise to variation
- No payment made unless work done in accordance with 'A' or 'B' status document
- Does not diminish contractor's design responsibility

Design issues

PI insurance

- (Insurance generally dealt with in section six)
- Now included as option
- Details to be set out in contract particulars:
 - nature of cover
 - limit of cover (including for pollution/contamination)
- Period for which insurance maintained; default is six years

Design issues

Copyright and licences

- Employer's licence to use and reproduce design documents
- But not for extension or separate development
- Subject to contractor being paid

Payment issues – section five

Some general points

- Requirement in HGCRAs for ‘adequate payment mechanism’
- Process similar to old JCT but simplified
 - no nominated sub-contractors
 - no VAT agreement
 - no lengthy CIS provisions
- Fluctuations provisions still included
- One major change for design and build (see below)

Payment issues

Interim payments

- Certificates (under SBC)
- Retention still provided for but default reduced from 5% to 3%
- For design works documents must be marked 'A' or 'B'

Payment issues

Interim payments in design and build

- The major change
- Contractor's application triggers payment
- Employer may respond with payment or withholding notice
- If no payment/withholding notice contractor to be paid amount **due** under contract
- No automatic entitlement to application sum

Payment issues

Valuation of variations – section five

- Contractor's price statement provisions dropped [alternative A in old clause 13]
- Schedule two gives mechanism by which payment for variations can be pre-agreed
- If valued no change to substance of previous rules

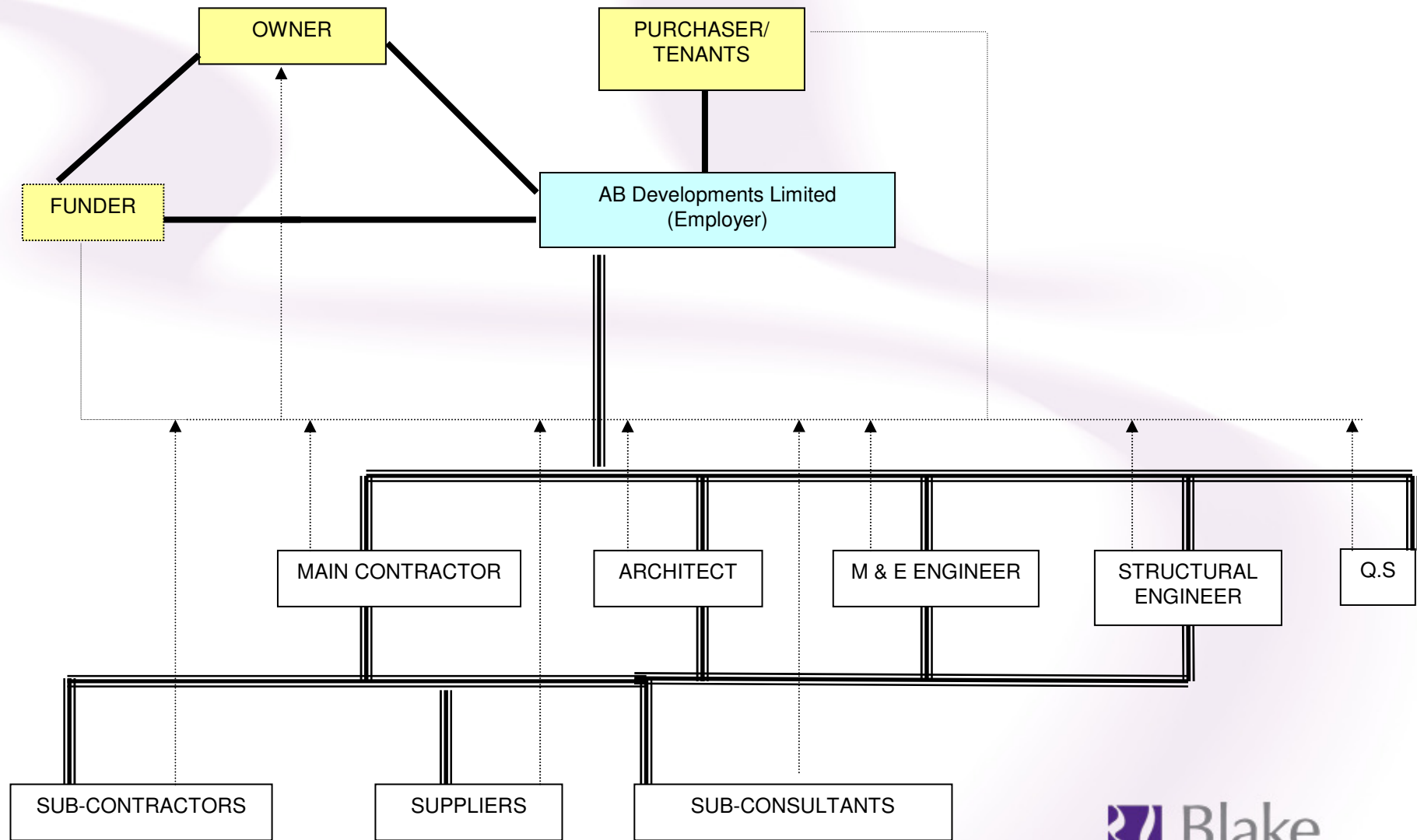
Payment issues

Final account

- Generally no change!
- Final certificate (4.15) has largely same effect as before (1.10)

Third party rights and warranties – section seven

- No requirement for collateral warranties in JCT 98
- Contracts (Rights of Third Parties) Act routinely excluded
- Why important?



Third party rights and warranties

So what's new?

- SBC and DB both provide for option to procure warranties for third parties and for setting out third party rights
- Position slightly different for MW, IC and MP
- Rights/warranties will be provided upon issue of notice by employer
- Form of warranty still needs to be annexed (unless JCT form used)
- Third party rights set out in schedule five
- Default provisions in contract particulars

Summary

- Main forms (SBC, DB, IC) streamlined, simplified and consistent
- New concepts eg contract particulars, design submission procedure
- Otherwise procedures not greatly different from previous forms
- Integration of collateral warranties, third party rights and PI insurance
- Reduced scope for amendment!

Dispute resolution – section nine

- Mediation
- Adjudication – HGCRRA requirement
- Arbitration
- Litigation

Proposed Construction Act amendments (1)

Payment

- Prohibition of “pay when certified” (section 110)
- Introduction of “payee notice” (section 110A/B)
- Overhaul of withholding notices – requirement to pay “notified sum” (section 111)

Proposed Construction Act amendments (2)

Adjudication

- Removal of section 107 (requirement for contract to be in writing) but ...
- New requirement for adjudication provisions to be in writing (section 108)
- Stipulations about costs and fees - including outlawing of “Tolent” clauses (sections 108A/B/C)

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