Lecture precedents.

NOMINATED SUB CONTRACTORS

— THE DUTY OF RENOMINATE

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1. The Duty to Renominate

1.1 The Nature of the Problem

The nature of the problem which arise in this regard is succinctly stated in **Hudson** at pages 332 to 333 as follows:

"A further problem which arises in relation to nominated sub-contractors occurs when through death, liquidation, bankruptcy or repudiation, the sub-contractor is no longer able or willing to continue and complete his work. In this situation it is frequently contended by main contractors that the employer is bound to nominate a further sub-contractor in substitution for the original one, which by virtue of the provisions as to payment for sub-contractors work in the main contract will usually mean that the new sub-contractor's price (which in practice may often be higher than the original sub-contractor's) will be substituted for the appropriate P.C. or provisional sum in the main contract. The opposing contention of the employer will be that the main contractor is in breach of contract by failing to complete with the nominated sub-contractor, and that it is his duty of mitigate the loss by arranging for the work to be completed by any means. On this view the contractor is entitled to be paid the amount of the original sub-contractor's price for the completed work, whatever the actual cost to the contractor of completing it. It must, however, also follow from this view that the employer loses the right of control over the identity of the persons completing the work".

The answer to this problem must be found in the exact working of the provisions in the head contract which empower the principal to nominate and which provide for the appropriate adjustment of the contract price in the settlement of accounts with the head contractor.

This problem of re-nomination of sub-contractors has been dealt with in a number of court decisions which are discussed below.

1.2 Bickerton

The general situation was considered in the case of *North West Metropolitan Regional Hospital Board —v— T A Bickerton & Sons Ltd.* (1970) I WLR 607. In this case, the Hospital Board had contracted with T A Bickerton & Sons Ltd. to construct certain buildings at its hospital. The heating for the hospital was to be installed by nominated sub-contractors and a P C sum was allowed for the cost of the work to be performed by that nominated sub-contractor.

Shortly afterwards the head contractor entered into the sub-contract with the nominated sub-contractor, namely Speediwarm. Shortly after this date, Speediwarm went into liquidation. The liquidator refused to continue with the project.

At this stage, and without prejudice to their respective rights, the principal and the head contractor arranged that the head contractor should do the work.

However, the work done by the head contractor (Bickerton) cost substantially more than Speediwarm's quote. The Hospital Board contended that the head contractor was only entitled to be paid Speediwarm's price. The head contractor, not unnaturally, contended that when Speediwarm failed to perform the contract, the Hospital Board ought to have nominated another sub-contractor and paid the price of that other sub-contractor, and that, as the Hospital Board had not done so, it must pay Bickerton on the basis of a quantum meruit.

The question therefore posed for the House of Lords was whether the principal was under a duty to renominate if, for any reason, the nominated sub-contractor dropped out.

The House of Lords held that, on a true construction of the contract, the sums payable in respect of prime cost work were to be expended in favour of a nominated sub-contractor and no-one else; that there was nothing in the contract to indicate that the head contractor could ever have in any event either *the right or the duty* to do any of the prime cost work himself and that, that would be contrary to the whole purpose of the scheme for nominated sub-contractors. If the original nominated sub-contractor dropped out, it was the *duty of the principal to make a new nomination* and, accordingly, the head contractor was entitled to recover for the work which he had performed on a quantum meruit.

It should not, however, be thought that *Bickerton's case* lays down any general rule that, in all cases where a nominated sub-contractor drops out, there is a duty on the principal to re-nominate a new sub-contractor to take the place of the defaulting nominated sub-contractor.

It is clear from the judgments of the Law Lords in *Bickerton's case* that the decision in that case rested upon the particular terms of the contract there in question. As Lord Reid remarked at page 613 in relation to the contract there in question:—

> "Although I have come to a clear conclusion that there was in this case a duty to renominate, the provisions of the RIBA form of contract are so confused and obscure that no conclusion can be reached without a long and complicated chain of reasoning. The RIBA form of conditions sponsored by the institute is in very common use. It has been amended from time to time. For a long time it has been well known that the question at issue in the present case has given rise to doubt and controversy. It could have been laid at rest by a small amendment of these conditions. But the institute have chosen not to do that, and they have thereby caused the long and expensive litigation in the present case".

It appears that the main basis for the decision in *Bickerton's case* was that, according to the terms of the head contract, the head contractor was prohibited from doing the particular work which was the subject of the nominated sub-contract in question. As Lord Reid stated at page 612:—

> "I would agree that if the principal contractor had any duty under the main contract to do prime cost work himself, it would follow that the employer would not be bound to make a second nomination."

And again, at page 613:—

Note: The author is a solicitor of the Supreme Court of Queensland and a partner in the legal firm of Morris Fletcher and Cross, Brisbane.
The subject article was part of a paper given by the author at a Conference "Avoiding and resolving disputes in Construction Contracts" held in Sydney on 1-2 April 1985.

"Once it is accepted that the principal contractor has no right or duty to do the work himself when the nominated sub-contractor drops out any more than he had before the sub-contractor was nominated then equally it must be the duty of the employer to make a new nomination when a nominated sub-contractor does drop out. For otherswise the contract work cannot be completed."

The basis upon which Lord Reid concluded that the head contractor sub-contractor was Clause 27 of the RIBA contract. That clause required the sums payable in respect of prime costs work "shall" be expended in favour of nominated sub-contractors and no-one else. Indeed, it was conceded in that case by the principal that the principal could not require the head contractor to do the work of the nominated sub-contractor. Accordingly, it was seen that, where a nominated sub-contractor dropped out, a "deadlock" situation arose; the head contractor was bound to ensure that the prime cost work was completed, but the head contractor was unable to do that work itself under the contract, and it would not be done by a nominated sub-contractor because the first has dropped out and there was no provision for a second to be appointed. It was on this basis that Lord Reid construed the contract as he did, in order to give it a positive meaning and to enable a completion of the works.

1.3 Percy Bilton

Bickerton's case was subsequently considered by the House of Lords in *Percy Bilton Ltd. —v— Greater London Council* [1982] 2 All ER 623.

In that case, the Council (as principal) had contracted with Bilton (as head contractor) for Bilton to erect a large number of houses. The Council nominated Lowdells as the sub-contractor for the mechanical services sub-contract.

During the course of construction of the project, Lowdells dropped out. Bilton had requested the Council eventually to re-nominate another nominated sub-contractor.

It was common ground between the parties that two types of delay had been caused by the dropping out of the original nominated sub-contractor, namely;—

(i) The period of delay arising directly from the withdrawal of the original nominated sub-contractor: and

(ii) The period of delay arising from the failure of the Council to nominate a replacement within a reasonable time.

The Council acknowledged that it was liable for the second period of delay. However, the Council (as principal) argued that Bilton (as head contractor) was liable for the first period of delay, and sought liquidated damages for that period.

Bilton (as head contractor) argued that the Council (as principal) was liable for the first period of delay.

The House of Lords unanimously rejected Bilton's argument. As Lord Fraser (with whose judgment the other Law Lords agreed) stated at page 627:—

"The appellant (Bilton) contends that the loss directly caused by the withdrawal of the nominated sub-contractor must fall on the respondent, on the ground that it has a responsibilty not only to nominate the original sub-contractor and any necessary replacement, but to maintain a sub-contractor in the field so long as work of the kind allotted to him needs to be done. This is said to flow from the decision of your Lordships' House in *Bickerton's case*. What was actually decided in that case was that, where the original nominated sub-contractor had gone into liquidation and dropped out, the main contractor had neither the right nor the duty to do any of the sub-contractor's work himself, and that it was the duty of the employer to make a new nomination. Consequently (so it was argued for the appellant), if the nominated sub-contractor withdraws at a time when his withdrawal must inevitably cause delay, the main contractor is disabled from, performing his obligations for want of the sub-contractor whom only the employer can provide, and the main contractor is thus, "impeded" from working...In these circumstances, it was said that the contractual time limit ceases to apply, the time for completion becomes at large and the employer cannot rely on the provisions for liquidated damages in Clause 22.

If that argument is correct, its effect would be to turn the employer's duty of nominating a sub-contractor, and if necessary a replacement, into a duty to ensure that the main contractor is not impeded by want of a nominated sub-contractor. That would be virtually a warranty that a nominated sub-contractor would carry on work continuously, or at least that he would be available to do so. But I see nothing in Clause 22 or Clause 23, or elsewhere in the conditions of contract, to impose such a high duty on the employer. Such a warranty would, in my opinion, place an unreasonable burden on the employer, particularly as he has no direct contractual relationship with a nominated sub-contractor, and no control over him. When the nominated sub-contractor withdrew, the duty of the employer, acting throught its architect, was in my opinion limited to giving instructions for nomination of a replacement within a reasonable time after receiving a specific application in writing from the main contractor under Clause 23(f)."

Accordingly, the House of Lords refused to extend *Bickerton's case* so as to turn the principal's duty to re-nominate into a duty to ensure that the head contractor is not impeded for want of a sub-contractor.

Thus, when the duty to re-nominate arises, and the head contract sets no time limit for the re-nomination, the principal must re-nominate within a reasonable time.

Of course, it must be remembered that the *Percy Bilton case* and *Bickerton's case* both concerned the RIBA form of contract.

1.4 Townsville Hospital Board

The application of *Bickerton's* case in Australia was considered by Douglas J. of the Queensland Supreme Court in Ex *parte Townsville Hospital Board* [1982] Qd R 592.

The decision concerns the duty of a principal to re-nominate a nominated sub-contractor where the existing nominated sub-contract has been determined by the head contractor for alleged repudiation by the nominated sub-contractor. The conditions of contract in this case were the National Public Works Conference Edition 2 (NPWC 2) standard conditions of which there are still a significant number in use in Australia today. Broadly speaking, Clause 10 of those standard conditions required the principal to nominate sub-contractors to be sub-contractors and required the head contractor to enter into contracts with such nominated sub-contractors containing provisions similar to the head contract provisions.

Douglas J., adopting the principles in *Bickerton's case*, and in particular the principles set out in a speech of Lord Reid, held that the principal was required to re-nominate.

The more recent National Public Works Conference standard form contract (NPWC 3), has amended its provisions in relation to nominated sub-contractors, by providing that in the event of default caused by bankruptcy or liquidation of a nominated sub-contractor, the principal may re-nominate in which event the cost of the work for further nomination is to be taken into account in determining the final contract sums. This provision does not, however, deal with the question of what occurs if the proprietor does not re-nominate.

Those amendments are unlikely to have altered the decision in the *Townsville Hospital case*, as that case did not involve bankruptcy, or liquidation of the nominated sub-contractor.

The standing of the *Townsville Hospital Board case*, in light of the decision of the High Court in the *Jennings case*, is discussed below.

1.5 Jennings

In *The Corporation of the City of Adelaide —v— Jennings Industries Limited* (14 February 1985, as yet unreported) the High Court of Australia considered the duty of the principal to re-nominate under a contract the provisions of which were in all relevant respects identical to the E5b form of building contract which is in wide use for private sector building works in Australia.

Clauses 15(f) and (g) of the contract provided generally as follows:—

(i) In the event of the default of a nominated sub-contractor the head contractor is to advise the architect who is thereupon obliged to issue instructions to the head contractor and all costs incurred by the head contractor in complying with the instruction are to be added to the contract price.

(ii) A mechanism is provided whereby the principal is given a right to recover additional costs thereby incurred from the nominated sub-contractor in the name of the head contractor.

(iii) The right of the head contractor to require directions under item (i) above is limited, in certain cases, to the situation of "the bankruptcy or liquidation of the nominated sub-contractor".

The *Jennings* case was one of those situations where the head contractor's rights under Item (i) above was limited to the event of "the bankruptcy or liquidation of the nominated sub-contractor".

The nominated sub-contractor defaulted in the execution of remedial work. The architect (on behalf of the principal) gave a direction to the head contractor for the head contractor to execute that remedial work. Neither the head contractor nor the nominated sub-contractor executed the remedial work. The architect (on behalf of the principal) appointed others to do the remedial work, and the principal then claimed from the head contractor the cost of having others execute the remedial work. The nominated sub-contractor was placed in liquidation at some time during the execution of the remedial work by those others.

In that fact situation, the principal sued the head contractor for the costs of having others execute the remedial work.

The head contractor rejected the principal's claim, on three basic grounds. Only one is relevant for present purposes, namely, that (relying on *Bickerton's Case*), a term should be implied to the effect that if the nominated sub-contractor fails to perform its obligations under the sub-contract, as was evident in this case, then the architect is under an obligation to nominate another sub-contractor to complete the work.

At first instance Matheson J., of the South Australian Supreme Court, (35 SASR 1) held that the principal had no duty to re-nominate a sub-contractor and that the terms of the contract effectively obliged the head contractor to complete all the work including the nominated sub-contract work.

On appeal the Full Court of the Supreme Court of South Australia overruled the primary judge (35 S.A.S.R. 1).

Two judges, Mitchell A.C.J. and White J., held that the principal had a duty to re-nominate and in reaching this conclusion followed *Bickerton's Case*. These judges expressed the view that the contract did not oblige the head contractor to complete the nominated sub-contract work and that in the event of the default of the nominated sub-contract prior to liquidation the contract did not deal with the impass thereby created. Thus in the circumstances it was their view that *Bickerton's Case* applied and a term should be implied into the contract requiring renomination by the principal.

The actual remedial work in respect of which the nominated sub-contractor had defaulted had been executed by the principal who was seeking to recover the cost from the builder. Legoe J. (the other member of the Full Court) did not go as far as to hold that there was a duty on principal to renominate. He regarded it as sufficient to hold that the contract did not require the head contractor to complete the prime cost works of a defaulting sub-contractor whether that occurred before liquidation or not and that in the circumstances the principal's claim for recovery of the cost of completion of the remedial work failed in view of the principal's inability to establish any breach of contract on behalf of the head contractor.

The principal appealed to the High Court. The High Court unanimously allowed the principal's appeal, and restored the judgement of Matheson J.

Wilson J. (with whom Murphy, Deane and Dawson JJ agreed) held (in relation to the head contractor's argument on *Bickerton's Case)* that *Bickerton's Case* was not applicable, on the following grounds:-

(a) *Bickerton's Case* is inapplicable to a contract which places upon the head contractor the authority or the responsibility to arrange for the making good of defects in the sub-contract works. In the contract in question here, clauses 13(c) and 18(c) placed such obligations upon the head contractor; and

(b) *Bickerton's case* is inapplicable to a contract which deals specifically with the rights of the parties in a case where the nominated sub-contractor is in default. In the contract in question, clauses 15 (f) and (g) deal specifically with this issue.

Brennan J. did not find it necessary to comment specifically upon the applicability of *Bickerton's Case*. However, it is implicit in his judgment that *Bickerton's case* has no application where the contract in question gives the builder the right, or places upon the builder an obligation, to do the work of a nominated sub-contractor if the nominated sub-contractor "drops out".

Brennan J. did however deal with one basis upon which *Bickerton's Case* and provisions similar to Clause 18 of E5b, have been heavily criticised. It has been said by some commentators that where no loss is suffered by the head contractor as a consequence of the default of a sub-contractor due to that loss being made up by the principal, the defaulting sub-contractor escapes liability for default, there being no way for the principal to recover its losses from the sub-contractor. This criticism is said

to justify resting full liability for nominated sub-contractors in the head contractor at all times. Brennan J. expressed the firm view that in the event of a principal compensating a head contractor for the default of a nominated sub-contractor under Clause 18 of E5b, the principal would be successfully subrogated to the head contract for the purpose of recovering the additional costs of construction occasioned by the default. (A useful discussion of the measure of damages recoverable by the head contractor from the defaulting nominated sub-contractor is contained in the judgement of Brennan J.)

1.6 The Position After Jennings

It is relevant to consider the effect of the *Jennings case* upon the *Townsville Hospital Board case*.

The basis of the decision in the *Townsville Hospital Board case* was as follows:—

(a) The Clause that specifically dealt with re-nomination (Clause 10.8) was inapplicable, as the nominated sub-contractor was not in liquidation.

(b) The second and third paragraphs of Clause 10.3 (which provided that the nomination of a sub-contractor did not relieve the head contractor of his liabilities under the head contract) did not mean that the head contractor was bound to complete without a further nomination and

(c) Nothing in the head contract *required* the head contractor to do the work of the nominated sub-contractor.

Items (b) and (c) above are arguably inconsistent with the *Jennings Case*.

In relation to item (b), in the *Townsville Hospital Board Case*, Douglas J. referred to the following two paragraphs of Clause 10.3 of NPWC 2:—

> "The nomination or selection by the Principal shall not relieve the Contractor of any of his liabilities or obligations under the Contract.
>
> Notwithstanding any such nomination or selection the Contractor shall be liable to the Principal for the acts, defaults and neglects of any Nominated Sub-Contractor or any employee or agent of the Nominated Sub-Contractor as fully as if they were the acts, defaults or neglects of the Contractor or the employees or agents of the Contractor."

Those two paragraphs are retained in Clause 10.3 of NPWC 3. At pages 594-595 Douglas J. made the following comments on those two paragraphs:—

> "I take the second and third paragraphs as seeking to preserve the rights of the principal and the contractor against each other and of each other as against the sub-contractor. With respect it has nothing to do with the nomination of a second sub-contractor."

However, in the *Jennings Case* the equivalent RAIA clause to Clause 13 (c) of E5b was relied on as one of the reasons for distinguishing *Bickerton's Case*. Clause 13 (c) of E5b provides as follows:

> "The Builder shall not be relieved of responsibility under this Contract for such parts of the Works as are sub-let to sub-contractors or suppliers pursuant to this clause or to nominate sub-contractors or nominated suppliers pursuant to Clause 15 and 16 of these Conditions."

In relation to item (c), in the *Townsville Hospital Board* case Douglas J. stated at page 595:—

> "Nowhere in the general conditions of contract, in my opinion, is there any provision which requires the contractor himself to provide any prime cost item, or do anything which involves a prime cost sum, except the matter ancillary to prime cost areas which are referred to in detail. It is of interest to note that Clause 11.4 provides for the principal to do or have done work to which provisional sums apply."

Nothing in the contract under consideration in the *Jennings case* expressly required the head contractor to complete prime cost items. However, the clause in the *Jennings case* which dealt with prime cost items (clause 18(c) of E5b) was more onerous on the head contractor than the clause under consideration in the *Townsville Hospital Board case*.

Because of differences between the contract under consideration in the *Jennings case* on the one hand and the contract under consideration in the *Townsville Hospital Board case* on the other hand, it is not possible to be definitive as to whether the *Townsville Hospital Board case* would have been differently decided in light of the High Court's decision in the *Jennings case*.

In support of a conclusion that the *Townsville Hospital Board case* is inconsistent with the *Jennings case* it could however be said that:

(a) Douglas J. in the *Townsville Hospital Board case* gave a much lesser importance to the second and third paragraphs of Clause 10.3 of NPWC 2 than the High Court in the *Jennings case* gave to clause 13 (c) of E5b.

(b) Douglas J. in the *Townsville Hospital Board case* appeared to require that there be a clause *requiring* the head contractor to attend to prime cost items, whereas the High Court in the *Jennings case* appeared to be content merely to look at the respective contractual obligations as a whole, to determine whether or not ultimate overall responsibility for the contract works (including works assigned to nominate sub-contractors) rests with the head contractor.

To the contrary it is the fact that:

(a) There is no indication that the contract under consideration in the *Townsville Hospital Board case* contained any equivalent of Clause 1 of the Articles of Agreement, which the High Court held to be of great importance in vesting ultimate overall responsibility for the contract works with the head contractor in the *Jennings case*.

(b) There was no equivalent clause in the contract under consideration in the *Townsville Hospital Board case* to Clause 18(c) of E5b. Clause 18(c) of E5b contemplates the circumstances where it may be the head contractor who executes work for which a prime cost sum is included in the head contract sum. To the contrary, Clause 11.4 of NPWC 2 (and NPWC 3) provides for the *principal* to do or have done such prime cost work.

It is difficult to discern an anti-Bickerton approach by the High Court in the *Jennings Case*. Thus it could well be that the *Townsville Hospital Board case* will stand despite the *Jennings case*. The differences in the form of contract certainly are significant and may indeed be decisive. It is well to recall the following comments by Douglas J. in the *Townsville Hospital Board case* at page 595:—

"Much reference was made from both sides of the bar table to the case of *North West Metropolitan Regional Hospital Board —v— T.A. Bickerton & Son Ltd.* (1970) 1 W.L.R. 607. That case and this case depend on the wording of the contracts being construed, and in that sense it only can be regarded as generally helpful."

The final chapter has yet to be written.

2. POSITION UNDER THE STANDARD FORMS OF CONTRACT

2.1 E5b

The contract considered in the *Jennings case* was for all intents and purposes identical to the E5b standard form of contract.

Generally, E5b places the risk of default by a nominated sub-contractor upon the head contractor. In the situations set out in Clauses 15 (g) (i) and 15 (g) (ii), the rights of the head contractor under Clause 15 (f) are totally removed, except in the case of bankruptcy or liquidation of the nominated sub-contractor. In other situations, the head contractor is (on the authority of the *Jennings case*) obliged to complete the sub-contract works, albeit that the head contractor *might* be able to claim some of the extra expense involved from the principle (as an alternative to the probably worthless rights which the head contractor has against the defaulting nominated sub-contractor). The question of the head contractor's possible rights to claim the extra expense from the principal is considered in the judgement of Brennan J. in the *Jennings Case.*

Clause 15 is the relevant provision.

Clause 15 (a) sets out the matters which the head contractor may require the nominated sub-contractor to include in the sub-contract. In addition, clause 15 (a) provides that the head contractor may lodge a "reasonable objection" to any sub-contractor nominated by the principal.

Clauses 15 (b), (c) and (d) deal with payment by the head contractor to the nominated sub-contractor. Basically, the situation is that the head contractor is only under an obligation to pay the nominated sub-contractor after the head contractor has received the payment from the principal in respect of the portion of the sub-contract works to which each progress payment relates.

Clauses 15 (f) and (g) deal with default of the nominated sub-contractor.

Clause 15 (f) provides that in the event of the default of a nominated sub-contractor, the head contractor is to advise the Architect who is thereupon obliged to issue instructions to the head contractor, and all costs incurred by the head contractor, in compliance with those instructions are to be added to the contract price. A mechanism is then provided whereby the principal (using the head contractor's name) is given a right to recover additional costs thereby incurred, from the nominated sub-contractor.

As a consequence of the *Jennings Case* the head contractor's rights are limited to this provision, qualified as it may be as discussed below.

Clause 15(g) limits the head contractor's rights under Clause 15 (f) in certain cases. Clause 15 (g) in no way limits the head contractor's rights under clause 15 (f) where the default of the nominated sub-contractor arises out of the liquidation or bankruptcy of the nominated sub-contractor. However, in cases of default by the nominated sub-contractor arising out of other reasons, clause 15 (g) totally removes the head contractor's rights under clause 15 (g) where either of the following circumstances exist:—

(i) Where the Architect has before calling for tenders for the nominated sub-contract submitted for the approval of the head contractor both the list of proposed tenderers and the terms and conditions under which it is proposed that tenders be called, and has also before nominating a sub-contractor submitted to the head contractor copies of all tenders received and agreed in consultation with the head contractor the selection of the nominated sub-contractor — clause 15 (g)(i): or

(ii) Where the Architect at the time of issue to the head contractor of tender documents for the head contract notified the head contractor in writing of the name and address of the proposed nominated sub-contractor, the specified terms and conditions of the sub-contract and the amounts of all tenders received in respect of the sub-contractor, and supplied to the head contractor copies of all relevant documents submitted by the proposed nominated sub-contractor with his tender—clause 15 (g) (ii).

In addition to removing the head contractor's rights under clause 15 (f) in the above situation, clause 15 (g) also (in the above situations) severely limits the head contractor's right to extensions of time under clause 24 (g) (xii) for delays caused by the default of a nominated sub-contractor.

2.2 MBW 1

The provisions of MBW 1 dealing with the position of the parties in the case of liquidation or bankruptcy of a nominated sub-contractor appear to apportion responsibility between the principal and the head contractor fairly evenly. However, MBW 1 makes no provision at all for the situation of defaults of a nominated sub-contractor caused other than through liquidation or bankruptcy. Clause 4.02 and the opening line of Clause 4.10 show an intention that the head contractor is to be liable for the defaults of the nominated sub-contractor in cases other than the liquidation or bankruptcy of the nominated sub-contractor, and appear to provide no express basis for the head contractor to claim from the principal the additional costs associated in the head contractor completing the works of the defaulting nominated sub-contractor. In particular, MBW 1 contains no equivalent of Clause 18 (c) of E5b—compare Clause 18 (c) of E5b with Clauses 4.03 and 10.27.01 of MBW 1.

Clauses 4.02, 4.03, 4.04, 4.05, 4.06, 4.07, 4.09, 4.10 and 10.27.01 are the relevant provisions.

Clause 4.03 confirms that the nominated sub-contract is to be dealt with on a "prime cost" basis.

Clauses 4.04 provides that the head contractor has a right to raise reasonable objections to a proposed nominated sub-contractor, and that the nominated sub-contractor must be willing to enter into a sub-contract on terms and conditions set out in Clause 4.07.

Clause 4.09 deals with payment by the head contractor to the nominated sub-contractor. The clause provides two alternative Clauses 4.09.02 for the parties to choose between. The first provides that the head contractor is only under an obligation to pay the nominated sub-

contractor after the head contractor has received payment from the principal in respect of the proportion of the sub-contract works to which each progress claim relates. The second alternative provides for the parties to draft and insert their own payment provisions as special conditions 15 to the head contract.

Clause 4.10 deals with the bankruptcy or liquidation of a nominated sub-contractor. In such circumstances, the head contractor is to notify the Architect, who is obliged either to re-nominate or to instruct the head contractor to omit the sub-contract works or to execute the sub-contract works himself. Clauses 4.10.02-4.10.05 deal with the adjustment of the contract price in such circumstances, Clause 4.10.06 provides a mechanism whereby the principal (in the head contractor's name) is given a right to recover additional cost thereby incurred, from the nominated sub-contractor.

It should be noted that MBW 1 makes no provision at all for the situation of defaults of a nominated subcontractor caused other than through liquidation or bankruptcy. It is clear from the opening line of clause 4.10 that the contract intends that, apart from liquidation or bankruptcy of the nominated sub-contract, the head contractor is to be liable for the consequences of default by the nominated sub—contractor.

It is arguable that *Bickerton's case* may apply to MBW 1. While it may be possible to read Clause 35.1 and the definition of "the works" to produce a clause similar to Article 1 (c) of the Articles of Agreement considered in the *Jennings case*, there is no equivalent in MBW 1 of Clause 18 (c) of E5b. Thus, even though there may be an obligation on the head contractor to complete the whole of the head contract works, there is no provision which deals with how payment for the nominated sub-contractor works which the head contractor executes is to be calculated.

2.3 AS 2124 — 1981

The provision in AS 2124-1981 concerning the position of the parties upon default of a nominated sub-contractor appear to be even handed. While the head contractor, work remaining uncompleted at the date of default, is treated as a "provisional sum", and the door is left open for a re-nomination by the principal.

Clauses 10 and 46 are the relevant provisions.

Clause 10.2 allows the head-contractor to raise a "reasonable objection" to any proposed nominated sub-contractor.

Clauses 10.2 and 10.4 also provide that the nominated sub-contractor must enter into a sub-contract with the head contract; but unlike E5b and MBW 1, do no set out the matters which the head contractor may insist be included into that sub-contract.

Clause 10.5 deals with default by a nominated sub-contractor. In the first instance, the head contractor must give notice to the superintendent of such default. The head contractor must then terminate the sub-contract, and the work remaining uncompleted on that sub-contract, is to be treated as a "Provisional Sum", and Clause 10 and 11 apply accordingly.

There is no express obligation on the principal to re-nominate. The final paragraph of clause 10.5 places on the head contractor the responsibility to remedy (at his own cost) any defective work of the nominated sub-contractor. However, clause 10.5 is clear in its statement that the sub-contract works remaining uncompleted at the date of default by a nominated sub-contractor are to be treated as provisional sum item under clause 11. Furthermore, the reference to clause 10.1, 10.2, 10.3 and 10.4 applying in such a case opens the door for a re-nomination by the principal.

Clause 46 deals with payment by the head contractor of the nominated sub-contractor. Under clause 46.1, there is no obligation on the head contractor to pay the nominated sub-contractor unless and until the head contractor has received a payment from the principal in respect of the portion of the sub-contract works to which each respective progress claim relates. Clause 46.2, 46.3 and 46.4 deal with direct payment by the principal to the nominated sub-contractor.

Bickerton's case probably does not apply to AS 2124 - 1981. Clause 10.5 gives the head contractor authority to execute the uncompleted work of the nominated sub-contractor, and to charge the principal for that work as a "Provisional Sum" under Clause 11. Clause 3 of the standard formal instrument of agreement, when read with the definition of "the works" in Clause 2 of the general conditions, places an obligation upon the head contractor to complete the whole of the head contract works. However, there is a possibility that there is no obligation on the head contractor to execute the uncompleted portion of the sub-contract works in the absence of a direction from the superintendent to that effect under Clause 11.1.

2.4 NPWC 3

The initial point to be noted is that the contract considered in the *Townsville Hospital Board case* was the predecessor of NPWC 3, namely NPWC 2.

In light of the decision in the *Townsville Hospital Board case*, it appears that the provisions in NPWC 3 place the responsibility for defaults of a nominated sub-contractor largely upon the principal.

Clause 10 is the relevant provision.

Clause 10.1 (a) allows the head contractor to raise a "reasonable objection" to any proposed nominated sub-contractor.

Clause 10.3 provides that the head contractor must enter into a sub-contractor with the nominated sub-contractor, such sub-contractor to bind the nominated sub-contractor to observe, perform and comply with all the provisions of the head contract that relate to the sub-contract works. However, apart from that general statement, clause 10.3 provides no further guidance as to the contents of the sub-contract.

Clauses 10.1 (b), 10.4, 10.5, 10.6 and 10.7 deal with payment of the nominated sub-contractor. Clause 10.4 provides that there is no obligation on the head contractor to pay the nominated sub-contractor unless and until the head contractor has received a payment from the principal in respect of the portion of the sub-contract works to which each respective progress claim relates. Clause 10.5 provides that the head contractor is not entitled to any further progress claims form the principal unless the contractor has paid the nominated sub-contractor all sums due to the nominated sub-contractor under clause 10.4. Clauses 10.6 and 10.7 deal with direct payments by the principal to the nominated sub-contractor.

Clause 10.8 deals with the bankruptcy or liquidation of the nominated sub-contractor. If the nominated sub-contract is terminated as a result of such bankruptcy or liquidation of the nominated sub-contractor, clause 10.8 provides that the principal may re-nominate. If the principal

does re-nominate, then

> "if the cost of the work is necessarily increased or decreased because of the further nomination or selection, the amount of such increase or decrease shall be taken into account in determining the final contract sum."

It should be noted that NPWC 3 makes no provision at all for the situation of default of a nominated sub-contractor caused other than through bankruptcy or liquidation. Accordingly, on the authority of the *Townsville Hospital Board case*,the principles of *Bickerton's case* appear to apply to cases of default by the nominated sub-contractor other then those dealt with in clause 10.8 (namely bankruptcy or liquidation). However, it must be remembered that the *Townsville Hospital Board case* may have to be reconsidered in light of the *Jennings case* (see the discussion in Section 4.3.6 above).

2.5 FIDIC

The provisions of FIDIC make no attempt whatsoever to apportion liability, for the defaults of a nominated sub-contractor, between the principal and the head contractor. Clause 4, referred to below, is the only clause to make even an oblique reference to this issue.

Clause 59 is the relevant provision.

Clause 59 (2) allows the head contractor to raise "reasonable objection" to any proposed nominated sub-contractor.

Clauses 59(2) and 59 (3) provide that the head contractor must enter into a sub-contract with such nominated sub-contractor, and those clauses then set out the matters which the head contractor may force the nominated sub-contractor to include in the sub-contract.

Clause 59 (5) is the only provision dealing with payment of nominated sub-contractor. It provides that, before issuing any progress claim certificate, the Engineer may require the head contractor to provide evidence that all amounts due to the nominated sub-contractor have been paid. That clause also gives the principal the right to pay the nominated sub-contractor direct.

This standard form of contract makes no provision at all for the default of the nominated sub—contractor, apart from clause 4, which merely provides that the head contractor is liable for all acts of his sub—contractors.

The principles of *Bickerton's case* may well apply to the FIDIC standard form of contract. There is no equivalent of Clause 1 (c) of the Articles of Agreement considered in the *Jennings case*, nor any equivalent of Clause 18 (c) of E5b (which provides for re-imbursement of the head contractor for such of the nominated sub-contract works as are executed by the head contractor). Clause 58 (ii) (a) might at first glance be thought to be similar to clause 18 (c) of E5b, but reference should also be had to Clauses 58 (ii) (b) and 59 (iv) in this regard.