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NOMINATED SUB-CONTRACTORS—APPLICATION OF THE *BICKERTON* PRINCIPLE IN AUSTRALIA

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In *North West Metropolitan Regional Hospital Board* v. *T. A. Bickerton & Son Ltd.* [1970] 1 W.L.R. 607 (*Bickerton's* case) the House of Lords held in relation to the English RIBA form of contract that the proprietor was required to nominate a new nominated sub-contractor as a consequence of the default through insolvency of the original nominated sub-contractor. The position has now been considered in Australia in relation to two standard forms of construction contract in common use.

The Jennings case

In *The Corporation of the City of Adelaide* v. *A. V. Jennings Industries (Australia) Limited* (14 February 1985, as yet unreported) the High Court of Australia considered the duty of the proprietor to renominate under a contract the provisions of which were in all relevant respects indentical to the E5b form of building contract published jointly by the Royal Australian Institute of Architects and the Master Builders Federation of Australia, 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 subcontractor the builder is to advise the architect who is thereupon obliged to issue instructions to the builder and all costs incurred by the builder in complying with the instructions are to be added to the contract price.

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

(iii) The right of the builder 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 builder'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 builder for the builder to execute that remedial work. Neither the builder 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

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principal then claimed from the builder the costs 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 builder for the costs of having others execute the remedial work.

The builder rejected the proprietor'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. (35 S.A.S.R. 1) held that the proprietor had no duty to renominate a sub-contractor and that the terms of the contract effectively obliged the builder 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 (*ibid.*).

Two judges, Mitchell A.C.J. and White J., held that the proprietor had a duty to renominate and in reaching this conclusion followed *Bickerton's* case. These judges expressed the view that the contract did not oblige the builder to complete the nominated sub-contract work and that, in the event of the default of the nominated sub-contractor prior to liquidation, the contract did not deal with the impasse 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 proprietor.

The actual remedial work in respect of which the nominated sub-contractor had defaulted had been executed by the proprietor 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 the proprietor to renominate. He regarded it as sufficient to hold that the contract did not require the builder to complete the prime cost works of a default sub-contractor whether that occurred before liquidation or not and that in the circumstances the proprietor's claim for recovery of the cost of completion of the remedial work failed in view of the proprietor's inability to establish any breach of contract on behalf of the builder.

The proprietor appealed to the High Court of Australia from the decision of the Full Court of the Supreme Court of South Australia.

The High Court unanimously allowed the proprietor's appeal, and restored the judgment of Matheson J.

Wilson J. (with whom Murphy, Deane and Dawson JJ. agreed) held (in relation to the builder'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 builder the authority or the responsibility to arrange for the making good of defects in the sub-contract works. In the contract in question

Douglas J. adopting the principles in *Bickerton's* case and in particular the principles set out in the speech of Lord Reid held that the proprietor was required to renominate.

The more recent National Public Works Conference standard form contract (NPWC3) 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 proprietor *may* renominate in which event the cost of the work for further nomination is to be taken into account in determining final contract sums. This provision does not however deal with the question of what occurs if the proprietor *does not* renominate.

In the light of the High Court decision in the *Jennings* case there seems little prospect of *Bickerton's* case being successfully called in aid by builders to overcome no renomination in the event of default other than that specified.